CHANGE THE RULES: REFORM OF THE ECONOMIC TORTS IN AUSTRALIA

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I INTRODUCTION

The status of the economic torts in Australian law has not featured in recent academic writing, and has not been the subject of much judicial consideration. This article intends to bridge this gap. It was prompted by a controversy involving a sporting star. Rugby Australia terminated the contract of star player Israel Folau due to his social media activity. One issue that has been raised is whether sponsors may be liable to the player for one of the economic torts, such as inducing breach of contract and/or interference with trade or business.[1] While the former tort has been well accepted in Australian tort law, there remains real uncertainty about the latter.

More broadly, some of the literature in this area has raised a broader question of the relation among the so-called economic torts.[2] They have grown in a somewhat haphazard way, and there is substantial overlap between them.[3] Thus, the current dispute might provide the catalyst to ask two questions. Firstly, whether Australian law does and should recognise a tort of interference with trade or business of some kind. It will be necessary to articulate and defend a precise description of this tort, if it is to be accepted in Australian law. Secondly, if such

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1 Janet Albrechtsen, 'Sponsors a New Law Front for Israel Folau', *The Australian* (Australia, 1 July 2019).

2 Hazel Carty, 'The Modern Functions of the Economic Torts: Reviewing the English, Canadian, Australian and New Zealand Positions' (2015) 74(2) *Cambridge Law Journal* 261 ('The Modern Functions of the Economic Torts').

3 Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis, 5th ed, 2013) 597.

a tort is accepted into Australian law, whether it should trigger consideration of broader reform of the economic torts in Australia. It might do this because if the economic torts were in fact reconceptualised, it might be on the basis that the tort of interference with trade or business becomes the central organising principle, around which the other existing torts would coalesce and merge.

Of course, these kinds of strategic re-alignments have occurred in the past in tort law. Obvious examples are the recognition of a generalised duty of care,[4] subsumption of the principle of *Rylands v Fletcher* ('*Rylands*')[5] into the law of negligence,[6] and reconceptualisation of the law of public nuisance (highway cases) into the law of negligence.[7] It has been observed elsewhere that the 'generalizing tendency of the twentieth century common law lawyer has passed the economic torts by'.[8] It is acknowledged the law has long had ambivalence about and wariness towards recovery for purely economic loss. This is primarily due to 'floodgates' concerns.[9]

It has required something more than reasonable foreseeability in order to justify liability on such grounds.[10] However, it has developed principles to guide and constrain liability in this area elsewhere in tort

4 *Donoghue v Stevenson* [1932] AC 562.
5 (1868) LR 3 HL 330.
6 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.
7 *Northern Territory v Mengel* (1995) 185 CLR 307.
8 John Dyson Heydon, 'The Future of the Economic Torts' (1975) 12 *University of Western Australia Law Review* 1, 14; Simon Deakin, 'Economic Relations' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (LawBook, 10th ed, 2011) 769. Robert French noted that leading torts textbook writers Clerk and Lindsell had referred to the economic torts as 'ramshackle' and 'lacking their Atkin' (presumably a reference to the rationalisation of the tort of negligence in the landmark judgment of Lord Atkin in *Donoghue v Stevenson* (n 4): Robert French, 'Torts in Commercial Law: Promiscuous Entanglement or Blessed Union?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 17.
9 Tony Weir, *Economic Torts* (Clarendon Press, 1997) 9.
10 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 192 (Gleeson CJ), 200 (Gaudron J), 209 (McHugh J), 241 (Gummow J), 267–9 (Kirby J), 299 (Hayne J), 324 (Callinan J).

law.[11] This article will suggest it is also possible to do so in the context of a new tort of interference with trade or business.[12] The House of Lords undertook some re-alignment in 2007,[13] though it is not necessarily suggested Australian law reach the same conclusion, as discussed below.

In the current context, the courts are wary about imposing liability in this space for the policy reason that they do not wish to punish legitimate commercial activity, which is generally a societal good in terms of creating employment, goods and services, and taxation revenue for society. On occasion, courts have recognised the right of a person or organisation to engage in business or trade.[14] The line between legitimate commercial activity which the law should respect, and action taken by some in business that damages or hurts competitors or other businesses, can be a fine one.[15]

It is necessary to explain in some detail the development of the law in 'this area'. The area is that of the so-called economic torts, taken to include the torts of inducing breach of contract, (possibly) that of interference with trade or business, conspiracy, and intimidation. Of

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[11] For instance, requiring the defendant assume a responsibility to the plaintiff, and the plaintiff relied on the defendant's expertise, thereby suffering loss: *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465; or the defendant is aware the plaintiff as an individual or organisation, and not merely as a member of an unascertained class, will suffer economic loss if they do not exercise due care: *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529.

[12] The suggested law reform and the subject of this article was not considered in the Ipp Review, because it was focussed on personal injury caused by negligence: *Review of the Law of Negligence* (Final Report, September 2002).

[13] *OBG Ltd v Allan* [2008] 1 AC 1.

[14] *Allen v Flood* [1898] 1 AC 1, 173 (Lord Davey); *Mogul Steamship Co Ltd v McGregor, Gow and Co* (1889) LR 23 QBD 598, 614 (Bowen LJ). 'All the great cases in the area of the economic torts … have been based on the principle that the right to pursue a trade, business or livelihood free of certain forms of interference, deemed to be illegitimate, deserves the protection of the law': Simon Deakin and John Randall, 'Rethinking the Economic Torts' (2009) 72 *Modern Law Review* 519, 534.

[15] *JSC BTA Bank v Khrapunov* [2018] UKSC 19, [6] (Lords Sumption and Lloyd-Jones for the Court).

these four torts, a complication arises because it has commonly been suggested the first is merely an illustration of the second, broader tort.[16] All four torts must be discussed in this article, because the suggestion will be that one generalised economic tort, encapsulating all of the existing economic torts, could and should be recognised. In order to do that, it is necessary to understand the state of the existing law.

Finally, by way of introduction, it should be remembered that many of the cases discussed below were decided at a time when business was less regulated by statute than today. In these earlier times, statutes did not regulate anti-competitive practices.[17] Those injured by such practices would naturally resort to the common law for relief when their business interests were being damaged by behaviour of their competitors. Further, industrial activity was less regulated in the times when these cases were decided than is the position today. Today, strikes are generally unlawful except in particular circumstances.[18] Finally, anti-discrimination laws today recognise the right of a person to be a member, or not be a member, of a union. It is generally unlawful to discriminate against someone because they are, or are not, members of a union.[19] These cases must be understood in their historical context. That said, it is possible the tort action that they recognise can be applied to different kinds of behaviour in the present and future than the circumstances that originally animated them, and it might be that they can be reconceptualised into one tort.

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16 'He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that whether he procures an actionable wrong or breach of contract': *Lumley v Gye* (1853) 2 El & Bl 234; 118 ER 749, 756 (Erle J).

17 There was no equivalent, for example, to the Australian *Competition and Consumer Act 2010* (Cth).

18 This is regulated in Australia by Part 3-3 of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') for most employees.

19 *Fair Work Act* (n 18) ss 772(1)(b)–(d); *Equal Opportunity Act 2010* (Vic) s 6(f); *Anti-Discrimination Act 1991* (Qld) s 7(k); *Anti-Discrimination Act 1998* (Tas) s 16(l); *Anti-Discrimination Act 1991* (ACT) s 7(1)(j); *Anti-Discrimination Act 1992* (NT) s 19(1)(k).

In Part II of this article, I explain developments in the United Kingdom. I have done this as succinctly as possible, but it is considered necessary to discuss in some depth the stages of evolution of the law in that jurisdiction, seeing what can be learned, before offering a critique of it. In Part III, I consider how these principles have been applied in Australian courts. Australian law is at a lesser stage of development, with fewer cases, but with some large questions remaining unanswered. In Part IV, I suggest specific reforms to Australian law, in light of the United Kingdom experience.

This article aims to build from the impressive scholarship in this field to date. Specifically, it seeks to build on the work of Deakin and Randall in suggesting a rationalisation of the economic torts, though it seeks to bring them together more fully than Deakin and Randall suggested.[20] It is more ambitious than the thoughtful work of Carty, who believed that development of one of the economic torts might in time influence others.[21] It embraces her noting of the need for strong control mechanisms in this area of the law, to keep it manageable, and specifically notions of intention and unlawfulness. In this respect it differs from the view of Heydon, who advocated liability based on the former (only).[22] Those first two works were also understandably very concerned with the *OBG Ltd v Allan* ('*OBG*') decision, appearing quite soon after it. This article seeks to take a longer lens, considering in depth the development of this area of the law since its inception, and including a consideration of the Australian position upon which the authors just mentioned were (understandably) not concerned. It will also build on the work of others such as Weir and Stewart who have suggested specific recognition of a tort of causing loss by unlawful means.[23] It will go further by seeking a rationalisation of the full range of economic torts.

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[20] Deakin and Randall (n 14).

[21] Carty, 'The Modern Functions of the Economic Torts' (n 2); Hazel Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2nd ed, 2010).

[22] Dyson Heydon, 'Justification in Intentional Economic Loss' (1970) 20 *University of Toronto Law Journal* 139, 177.

[23] Weir (n 9); Andrew J Stewart, 'Civil Liability for Industrial Action: Updating the Economic Torts' (1984) 9(3) *Adelaide Law Review* 359. See also David Goodwin, 'Inhibiting Economic Coercion by Groups: An Examination of the

II DEVELOPMENTS IN THE UNITED KINGDOM

A *Tort of Inducing Breach of Contract*

The tort that we would today recognise as that of inducing breach of contract has a long history in the law. It originated in the action the head of a household would have for loss of others living with them (for instance a family member, or an employee) through the actions of another.[24] The law recognised the household head had an action against the wrongdoer. This doctrine had roots in the Roman law doctrine of *actio iniuriarum*. It was originally confined to cases where violence had been used against the household member. Then came the *Ordinance of Labourers* in 1349, requiring those under 60 to work, and providing a remedy for employers in cases where employees left employment. It also punished those who took on employees who had abandoned their previous workplaces. In this case, proof of violence against the employee was not necessary. It was enough that the defendant had taken on the employee, knowing they were employed elsewhere. Originally these actions were enforced as trespass, the employee seen as the property of the original employer,[25] but by the late 18th century they were recognised as actions on the case. The requirement of violence had been abandoned, but the doctrine was confined to cases of employer and employee (ie, a contract *of service*).

The leading case where this tort was recognised was *Lumley v Gye* ('*Lumley*').[26] The facts involved a contract between the plaintiff and a singer for her to perform at the plaintiff's venue. This was a contract *for services*, not a contract of service. It was alleged the defendant induced the singer to abandon this contract and perform at his venue instead. The question was whether the plaintiff had a cause of action

Economic Torts and Anti-Secondary Boycott Laws in Australia' (PhD Thesis, RMIT, 2017).

[24] Francis Bowes Sayre, 'Inducing Breach of Contract' (1923) 36 *Harvard Law Review* 663, 664–7; G A Owen, 'Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?' (1976) 3 *Monash University Law Review* 41.

[25] *Anonymous* (1409) Y B 11, Henry IV, f 23, P1 46; *Bird v Randall* (1762) 3 Burr 1345; 97 ER 866, 867.

[26] *Lumley v Gye* (n 16).

against the defendant for so doing. Obviously, the action against the defendant could not be for breach of contract, since they were not party to it. A majority of the Queen's Bench recognised a cause of action based on procuring breach of an employment contract. Of the three justices in the majority, two expressly confined their comments to cases of breach of contract,[27] but one, Erle J, expressed the relevant principle in broader terms, that a person who maliciously damaged another by violation of their (legal) right was liable.[28] Violation of their right in this case involved breach of contract, but could involve violation of other rights.[29] All members of the majority described the defendant's actions in such a case as 'malicious',[30] a concept that would trouble subsequent courts in determining the proper contours of the tort. *Lumley* extended the previous law by recognising a right of recovery in a case involving a contract *for services*, rather than a contract *of service*.

Over the course of a century, the courts were called upon to explain and refine these concepts further. Inevitably, courts were pressed to expand the doctrine in order to fit more scenarios within its relatively narrow limits.

So in *Bowen v Hall* ('*Bowen*'),[31] the High Court expanded on the elements, referring to a need to show the defendant had knowledge of the contract between the plaintiff and the employee, that the defendant acted to secure an advantage for themselves at the expense of the

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27 Ibid 752 (Crompton J), 756–9 (Wightman J).

28 He did not cite the decision in *Keeble v Hickeringill* (1809) 11 East 574; 103 ER 1127, 1128 where Holt CJ had expressed the broad principle that 'he that hinders another in his trade or livelihood is liable to an action for so hindering him', but that statement is consistent with the broader view upon which Erle J based liability in *Lumley v Gye*. Sayre says, 'many thought of *Lumley v Gye* simply as the reincarnation of the doctrine of *Keeble v Hickeringill'*: Sayre (n 24) 672.

29 *Lumley v Gye* (n 16) 756 (Erle J).

30 Ibid 752 (Crompton J), 756 (Erle J), 756 (Wightman J); *Cattle v Stockton Waterworks* (1875) LR 10 QB 453, 458: 'all three of the judges who gave judgment for the plaintiff relied on malicious intention' (Blackburn J for the Court, referring to *Lumley v Gye*).

31 (1881) 6 QBD 333.

plaintiff, and that the act was done for a wrong motive/maliciously,[32] which was not a stated requirement in *Lumley*. It also expanded the doctrine, or at least adopted the broader view of it, expressed by one judge in *Lumley*. Brett LJ accepted that broader view of Erle J in *Lumley* that the action was not limited to cases of inducing a breach of contract, but was rather a broader principle against wrongful acts which may or do cause injury to another.[33] The reach of the doctrine was expanded again when it was applied to general supply contracts.[34]

The Privy Council later resiled from suggestions in *Bowen* that the gist of the *Lumley* action was malicious conduct.[35] That was important on the facts because the defendants claimed they acted for the benefit of both the plaintiff and their members. The Council determined the union had induced breach of contract in calling its members to strike on particular days. The fact they did it in order to drive up commodity prices, which would benefit both the plaintiff and the workers, was irrelevant. The Council determined intent, not maliciousness, was the gist of the *Lumley v Gye* action.[36] Lord Lindley suggested dropping the word 'malicious' altogether because it did not add anything to the requirement of knowledge of the relevant contract.[37]

The courts have interpreted the requirement of knowledge liberally. For example, in *J T Stratford and Son Ltd v Lindley* ('*J T Stratford and Son Ltd')* the case involved action for inducing breach of contract when a union directed members not to tow particular barges, meaning

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[32] Ibid 337 (Brett LJ, Lord Selborne agreeing). However, subsequently Brett LJ suggests the requirement of maliciousness would be satisfied if the action was taken with the purpose of injuring the plaintiff, or of benefitting the defendant at the expense of the plaintiff, thus merging the second and third requirements: at 338. Coleridge CJ, dissenting, rejected the view the existence or otherwise of 'malice' should be the determinant of legal liability: at 343.

[33] Ibid 337. This is also suggested by Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535.

[34] *Temperton v Russell* [1893] 1 QB 715.

[35] *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239.

[36] See also *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40, 91 (Lord Atkin).

[37] *South Wales Miners' Federation v Glamorgan Coal Co Ltd* (n 35) 255. To like effect see *Larkin v Long* [1915] AC 814, 843 (Lord Parmoor).

that hirers of the plaintiff's barges could not return them in accordance with the time stipulation in their hire contract. The House of Lords rejected the defence of the union that they were not aware of the specific terms on which the barges were hired. The Court was prepared to infer the union would have had some knowledge at least of the nature of the hire contracts.[38] It was not necessary that the defendant be shown to know all of the specific details.[39]

The tort was expanded again with suggestions or decisions that the principle of *Lumley v Gye* should be extended to include cases where no breach of contract had occurred, for example, where performance of contracts was merely hindered,[40] or where a clause of the contract would have the effect that the plaintiff would not be held liable for a failure to perform contractual obligations.[41] It was also suggested the tort could apply to indirect, as well as direct, procurements of a breach of contract.[42] This was at a time when the courts appeared to be indecisive about whether the tort of inducing breach of contract was a standalone tort (*separate torts theory*), or part of a broader tort to be discussed presently (*unified tort theory*).

This issue was resolved by the House of Lords in *OBG Ltd v Allan*.[43] There the court accepted the separate torts theory; the *Lumley*

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38 *J T Stratford and Son Ltd v Lindley* [1965] AC 269, 324 (Lord Reid, Viscount Radcliffe agreeing).

39 Ibid 332 (Lord Pearce). See also *Falconer v Alsef* [1986] IRLR 331; *SOS Kinderdorf International v Bittaye* [1996] 1 WLR 987, 993 (Lord Keith).

40 *Temperton v Russell* (n 34) 728 (Lord Esher); *DC Thomson and Co Ltd v Deakin* [1952] Ch 646, 678 (Raymond Evershed MR), 694 (Jenkins LJ) (Court of Appeal); *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138 (Lord Denning) (Court of Appeal).

41 *Torquay Hotel Co Ltd v Cousins* (n 40).

42 *D C Thompson and Co Ltd v Deakin* (n 40) 677–8 (Evershed MR, Morris LJ agreeing), 696 (Jenkins LJ, Morris LJ agreeing). Lord Denning disagreed in *Torquay Hotel Co Ltd v Cousins* (n 40) 138, stating that for the principle of *Lumley v Gye* to apply, interference had to be direct.

43 *OBG Ltd v Allan* (n 13) 31 (Lord Hoffmann), 59–62 (Lord Nicholls). Lord Nicholls added there was no hybrid tort of interfering with contractual relations: at 62. Lord Walker expressed agreement on these matters with both Lords Hoffmann and Nicholls on these points: at 74; as did Baroness Hale: at 85; and Lord Brown: at 91.

action for inducing breach of contract was logically distinct from, and separate to, action for causing loss by unlawful means. A *Lumley v Gye* action was not a sub-category of this suggested broader category of liability. The Court noted substantial differences between the tort of inducing breach of contract, and the tort of causing loss by unlawful means, discussed below.[44]

Lord Hoffmann in *OBG* confirmed that it was necessary, to successfully sue on the basis of *Lumley v Gye*, that the plaintiff prove the defendant *intended* to cause breach of contract, though it was not necessary the plaintiff show the defendant intended to cause them damage.[45] It was irrelevant that the intent behind causing the breach was another end. In relation to intention, it was not sufficient the result was merely foreseeable. Knowledge by the defendant that they would cause the breach was required. It was not enough that a reasonable person would be aware of the likelihood of this. But a defendant could not escape liability by wilfully turning a blind eye to the consequences of their actions.[46] This requirement sits somewhat uncomfortably with earlier statements by the House of Lords that individuals are taken to have intended the reasonable consequences of their actions.[47] On the one hand it is said it is not sufficient to attract liability that damage to the plaintiff was reasonably foreseeable; later the court accepted that intention (a required element) could be deduced from reasonable foreseeability.

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[44] Lord Hoffmann pointed out four differences: (a) liability under the *Lumley v Gye* tort of inducing breach of contract is secondary or accessory, depending on a breach of contract by another; in contrast, an action for the tort of causing loss by unlawful means is primary, in that it is not necessary to prove that another has committed a wrong; (b) the 'wrong' required for the tort of causing loss by unlawful means is a wrong independent of the *Lumley v Gye* rule, while under *Lumley v Gye*, the relevant wrong is breach of contract by another; thirdly the tort of causing loss by unlawful means is not dependent on a contract, so it can encompass a broader range of behaviour than the *Lumley* tort; and fourthly, while in *Lumley*, proof of intention to cause breach of contract is required, it is not necessary to prove this intention for the tort of causing loss by unlawful means: *OBG Ltd v Allan* (n 13) 20. To like effect Lord Nicholls: at 59.

[45] Ibid 20.

[46] Ibid 29–30. To like effect Lord Hoffmann: at 62–3.

[47] *South Wales Miners' Federation v Glamorgan Coal Co Ltd* (n 35) 244 (Lord Halsbury).

In summary, this tort has expanded significantly in scope since its original inception. A previous limit to acts of violence was removed. Its confinement to contracts of employment was removed, when it was first extended to contracts for services, and then any contract. Then its supposed requirement of malice was jettisoned. Subsequently it was suggested that it could apply to cases where there was no breach of contract at all.[48] Today, the control mechanism is the question of the defendant's intent to cause the breach of contract, which has been quite stringently applied, together with proof they actually did cause the breach of contract. The relation between this tort and the one presently to be discussed was contentious for more than a century, but the House of Lords eventually decided on the separate torts theory.

B *Tort of Interference with Trade or Business or of Causing Loss by Unlawful Means*

In a different line of cases, early decisions had suggested unlawful behaviour by a defendant that damaged a plaintiff could be actionable, although no breach of contract was involved. One instance is *Garret v Taylor* ('*Garret*').[49] There the defendant threatened customers and employees of the plaintiff, demanding they no longer do business with them. The Court found this was an actionable wrong. This may have been an early instance of the tort of intimidation, though it was not described as such in the case. The word 'hinder' was used to describe the circumstances to which the nascent action might apply. Holt CJ in *Keeble v Hickeringill* ('*Keeble*') stated 'he that *hinders* another in his trade or livelihood is liable to an action for so hindering him'.[50] There was no qualification regarding whether the defendant's actions were lawful or wrongful.[51] There was no requirement that a third party be involved.

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48 'The most remarkable feature in the growth of this tort action is the surprising rapidity with which courts have adopted it, broadened it, and pared away restricting limitations': Sayre (n 24) 674.

49 (1620) Cro Jac 567; 79 ER 485.

50 (1707) 11 East 574; 103 ER 1127, 1128.

51 In *Keeble* the plaintiff was successful, although there was no finding that what the defendant did was legally wrong (the plaintiff had set 'decoys' onto his property, intending to attract fowl that he could capture to consume. In response, the defendant fired shots from a gun, intending to and having the effect of scaring

A further example is *Tarleton v M'Gawley* ('*Tarleton*'),[52] involving the defendant firing cannons at would-be customers of the plaintiff, seeking to 'hinder and deter trade'. The Court held this was an actionable wrong. Again, modern eyes might recognise the tort of intimidation, though that tort was not recognised as such at this time. The kind of behaviour that might attract this tort was imprecise — it was not known whether the defendant had to be acting unlawfully, and how this would be defined.

The law had to consider the interaction between this nascent tort of unlawful interference in the plaintiff's business and the older tort, of which *Lumley v Gye* was a modern example, of inducing breach of contract. How were they related, if at all? Was there overlap between them? Was one really a sub-category of the other, rather than a standalone tort? How did they relate to the tort of conspiracy? The tort of intimidation was not recognised at this time, but its subsequent development would pose further questions.

Courts suggested overlap between the nascent tort and that of inducing breach of contract.[53] This appears in the judgment of Erle J in *Lumley v Gye*, and subsequently in *Bowen v Hall* where it was again suggested the *Lumley v Gye* action could include damage to another in a business context in circumstances other than inducing a breach of contract. In other words, the *Lumley v Gye* line might effectively subsume the nascent tort of unlawful interference with business interests established in cases such as *Garret*, *Keeble* and *Tarleton*; or

off the fowl, affecting the plaintiff's catch. The Court found for the plaintiff). This has been criticised: 'This decision [*Beaudesert Shire Council v Smith*, a High Court decision which purported to adopt the *Keeble* reasoning] has been widely discussed and criticised. The major criticism has been that, the way the High Court framed its proposition, the decision meant that whether or not a defendant intended to injure the plaintiff, the plaintiff would recover and that this was akin to creating a strict liability principle of actionability for too wide a range of injuries': H J Glasbeek '*Lumley v Gye:* The Aftermath: An Inducement to Judicial Reform?' (1975) 1 *Monash University Law Review* 187, 212.

[52] (1790) 1 Peake 270; 170 ER 153.

[53] In a further muddying of the waters, in the later House of Lords decision in *Rookes v Barnard* [1964] AC 1129, Lord Hodson would link *Garret v Taylor* and *Tarleton v M'Gawley* with the tort of intimidation: at 1198.

alternatively, that *Lumley v Gye* was a subset of a broader principle. Either way, the suggestion was that it was really one tort, not two.

This suggestion of a broader principle also occurred in *Mogul Steamship Co Ltd v McGregor, Gow & Co* ('*Mogul Steamship*'),[54] where the defendants engaged in sharp business practices to shut out the plaintiff. This included lowering rates to make the plaintiff's business unviable, and pressuring others not to provide services to the plaintiff. The plaintiff's legal claims were dismissed. The Court found the defendants had not engaged in unlawful or wrongful behaviour. They had not induced anyone to breach any contract. However, two members of the House of Lords suggested mere proof of malice in actions taken against a business competitor might ground a cause of action.[55] This was similar to a statement of Bowen LJ in that case in the Court of Appeal,[56] and subsequent decisions of that Court.[57]

Matters came to a head in *Allen v Flood* ('*Allen*').[58] The case involved employers who had engaged two particular workers on a casual basis. A union delegate objected to use of the workers, because they objected to workers with their trade background doing this particular work. The delegate told the employer if they did not cease to employ the workers, other workers would take strike action. As a result, the employer terminated the services of the two workers. It was accepted the workers could be dismissed at will; the employer did not breach any contractual provision by terminating them. Thus, a *Lumley v Gye* action could not lie, since the union had not induced breach of contract between employer and employee. Nevertheless, the dismissed workers sued the union alleging malicious behaviour, conspiracy,

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54 [1892] AC 25.

55 Ibid 52 (Lord Field), 59 (Lord Hannen).

56 'Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong': *Mogul Steamship Co Ltd v McGregor, Gow and Co* (n 14) 613 (Bowen LJ).

57 *Temperton v Russell* (n 34); *Flood v Allen* [1895] 2 QB 21, 37 (Lord Esher MR).

58 *Allen v Flood* (n 14).

intimidation and breach of contract. A majority of the Court rejected the claim.

The majority rejected suggestions made in *Mogul Steamship* in the Court of Appeal and House of Lords that a malicious act that damaged another in business could, without more, found a legal action. The majority view in *Allen* was that 'malice', however interpreted or defined, could not turn what was otherwise a lawful act into an unlawful one.[59] The majority viewed the question of conspiracy as a possible exception (see below).

Lord Watson said there were two circumstances where a defendant who procured the act of another could be made legally liable for the consequences: (a) they knowingly and for their own ends induce another to commit an *actionable wrong*; or (b) they induce another to unlawfully breach their contract with a third party (*Lumley v Gye* action).[60] Again, this recognises two torts, rather than one. Others in the majority agreed it was necessary that the defendant had engaged in a recognised legal wrong in order for a plaintiff claiming to have suffered damage from their actions to obtain compensation against them.[61] The mere fact that the defendant's actions had the effect of interfering with another's trade, business or employment was insufficient.[62] This was why they found in favour of the defendant. In contrast, the dissentients held the plaintiff should succeed because the defendant had 'maliciously and wrongfully, with intent to injure the plaintiffs', coerced the employer to dismiss the workers.[63] It was not

[59] Ibid 92 (Lord Watson), 124 (Lord Herschell), 151 (Lord Macnaghten), 167 (Lord Shand), 172 (Lord Davey); Weir (n 9) 21.

[60] *Allen v Flood* (n 14) 96.

[61] Ibid 124 (Lord Herschell), adding 'the motive of injuring one's neighbour or of benefitting oneself at his expense it as old as human nature': at 128, 180 (Lord James).

[62] Ibid 138 (Lord Herschell). Lord Herschell rejected the statements of Bowen LJ in *Mogul Steamship* as 'far too wide': at 139, 151 (Lord Macnaghten).

[63] Ibid 88 (Lord Halsbury LC). Lord Ashbourne found the defendants had 'maliciously' induced the company not to employ the workers and did it not for their own purposes, but in order to obstruct: at 111–12; and Lord Morris found that 'it is actionable to disturb a man in his business … when the motive is malicious and damage ensues': at 155.

clear whether the tort was confined to cases involving actions of third parties, though those were the facts in *Allen v Flood*.

Despite *Allen v Flood*, judges continued to suggest that *Lumley v Gye* was not a decision limited to cases of procuring a breach of contract by another, but was of broader application. In *Quinn v Leathem*,[64] primarily a conspiracy case, Lord Macnaghten discussed *Lumley*. He said the decision was correct because, and stood for the principle that, 'violation of legal right committed knowingly is a cause of action'.[65] Lord Lindley agreed it was correctly decided, noting the 'principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him'.[66] Similar comments appear in *Jasperson v Dominion Tobacco*.[67] These comments suggest a broader scope for liability than what was envisaged by the majority in *Allen v Flood* just a few years prior. They suggest *Lumley* should be seen as part of the broader principle of causing a business loss by unlawful means.

The impact of *Lumley* was subsequently broadened in another way, again effectively raising the question whether it was a sub-set of a larger and more general principle. In decisions primarily involving the *Lumley v Gye* line, judges relaxed the requirement of a breach of contract.[68] This occurred in *Torquay Hotel Co Ltd v Cousins* ('*Torquay Hotel*'),[69] where at time of judgment no breach of contract had occurred. A further complication was that a frustration clause in the contract might have applied if contract performance were prevented, leaving it open to differing interpretations as to whether in

64 *Quinn v Leathem* (n 33).
65 Ibid 510.
66 Ibid 535.
67 [1923] AC 709. 'What was laid down long ago in *Lumley v Gye* reaches all wrongful acts done intentionally to damage a particular individual, and actually damaging him': at 713 (Viscount Haldane).
68 *Emerald Constructions Co Ltd v Lowthian* [1966] 1 WLR 691; *Daily Newspapers v Gardner* [1968] 2 QB 762. Both involved interlocutory proceedings.
69 *Torquay Hotel Co Ltd v Cousins* (n 40).

such a case the defendant that prevented performance had induced 'breach'. Lord Denning MR accepted a broader tort, stating:

> I have always understood that if one person deliberately interferes with the trade or business or another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.[70]

Lord Denning's judgment followed obiter by members of the House of Lords in *J T Stratford and Son Ltd* questioning the need for a breach of contract to be established in order for a plaintiff to succeed against a defendant for interference with contractual arrangements.[71] Effectively, this reasoning subsumes *Lumley* into the broader tort of wrongful interference with contractual relations.[72] These developments in United Kingdom law were noted by Mason J in *Kitano v Commonwealth*.[73] By 1983 the House of Lords recognised a tort of 'actionable interference with contractual rights' in circumstances other than a breach of contract.[74] In 1997 in his Clarendon Series lectures, Tony Weir concluded 'the tort of inducing breach of contract has now been absorbed into the general tort of causing harm by unlawful means',[75] as he described the tort.

The opportunity arose for the House of Lords to re-consider the relation between this line of authority and *Lumley v Gye*. In *OBG v*

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70 Ibid 139. See Owen (n 24) 60–4.

71 *J T Stratford and Son Ltd v Lindley* (n 38) 324 (Lord Reid), 330 (Viscount Radcliffe).

72 *OBG Ltd v Allan* (n 13) 25 (Lord Hoffmann).

73 (1974) 129 CLR 151. Referring to United Kingdom decisions where 'a person who suffers economic loss as the result of an unlawful act intended to cause harm can recover damages against the wrongdoer': at 173–4.

74 *Merkur Island Corporation v Laughton* [1983] 2 AC 570. Fridman, noting that by the early 1980s, 'it had become accepted that, at common law, there was a cause of action for interference with the performance of a contract, even though no breach of that contract had been induced, procured or otherwise obtained by the defendant': G H L Fridman, 'Interference with Trade or Business' (Pt 1) (1993) *Tort Law Review* 19, 21.

75 Weir (n 9) 28.

Allan,[76] different views were expressed as to the requirements for the tort to be shown, reflecting differences in opinion regarding its ambit. It was rebadged from a tort of 'actionable interference with contractual rights' to causing loss by unlawful means, as Weir had called it, to distinguish it from *Lumley v Gye.*

Lord Hoffmann, with whom others agreed, confirmed two elements needed to be shown to successfully sue for the tort of causing loss by unlawful means: (a) wrongful interference with the actions of a third party in which the plaintiff has an economic interest; and (b) intention to thereby cause loss to the plaintiff.[77] The actions would have to be 'wrongful' in the sense the third party could take action regarding them (ie actionable), or could except for the fact they had not suffered loss. This requirement places the wrongful means tort in conflict with other economic torts such as conspiracy[78] and intimidation,[79] where this is not required.

Lord Nicholls agreed with requirement (b) regarding proof of intention to cause loss to the plaintiff, adding it was a strict test to satisfy. It was not sufficient that it was reasonably foreseeable that the plaintiff would suffer loss.[80] However, his conception of the first element was broader than that of the others. He said the first element comprised all acts a defendant was not permitted to commit, whether by the civil or criminal law.[81] He rejected as overly narrow Lord Hoffmann's suggestion that the tort was limited to cases where the

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76 *OBG Ltd v Allan* (n 13) 31.

77 Again, it did not matter that the unlawful interference was committed in order to achieve another end: *OBG Ltd v Allan* (n 13) 57. Lord Walker agreed with Lord Hoffmann's formulation: at 75; as did Baroness Hale: at 85; and Lord Brown: at 91. For an argument that *OBG* can be defended on a theory that the interests of the plaintiff and the third party are 'unified', so avoiding problems with privity, see Jason Neyers, 'Causing Loss by Unlawful Means: Should the High Court of Australia Follow *OBG Ltd v Allan*?" in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 117.

78 *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174.

79 *Rookes v Barnard* (n 53); Deakin and Randall (n 14) 544–8.

80 *OBG Ltd v Allan* (n 13) 57.

81 Ibid.

plaintiff has suffered indirect loss due to the effect of the defendant's conduct on a third party with some relation to the plaintiff.[82] The House of Lords determined the torts should be kept separate, rejecting the unified torts theory evident in cases such as *Quinn v Leathem*, *DC Thomson and Co Ltd v Deakin* and *Torquay Hotel*.

C Reflections on the United Kingdom Developments Regarding These Torts

Wisdom is more attainable with the benefit of hindsight. The courts have strained to expand the principle of *Lumley v Gye* well beyond its original bounds. The decision itself was a significant expansion of its historical roots. Then subsequently to the decision, it was found necessary to expand its principles still further, to include the non-employment context, and cases where no breach of contract actually occurred, such as hindering performance, or preventing contracts being finalised.[83] It is submitted that rather than stretch the already stretched tort of inducing breach of contract to something unrecognisable and significantly removed from its historical roots, it may have been better for the courts to have developed the tort of causing damage to another's business or commercial interests through unlawful means. This tort would have been broad enough to encompass *Lumley v Gye* and subsequent decisions, provided it was accepted that breach of contract, including being an accessory to such, should be properly considered 'unlawful'. This path was not taken.

The United Kingdom law recognised in the 17th and 18th century that intentional and unlawful interference with another's business interests was an actionable tort. In hindsight, these precedents should

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82 Ibid 56.

83 Weir called expansion of *Lumley v Gye*, for instance to include cases where no breach of contract actually occurred, wrong. He said the case of *Torquay Hotel*, where this extension was affirmed, 'had nothing to do with *Lumley v Gye*, and the suggestion that it did facilitate[d] the unjustifiable extension of liability to cases where the interference is not by means wrongful in themselves … [and] the defendant may be held liable to those he had no intention to harm, entailing a large increase in the number of possible plaintiffs … [this is] something we normally try to avoid': Weir (n 9) 37–8.

have been applied in a *Lumley v Gye* situation, though it was not legally incorrect for the court to expand the previous precedents in the employment context regarding interference with employment relations. The court should have seized the opportunity in *Lumley* to merge the two lines of authority. It should have merged them into a tort of unlawful intentional interference with commercial interests; in other words, the tort of unlawful intentional interference should have been applied to resolve *Lumley v Gye*. This is what Tony Weir suggested, post-facto.[84] Formulated this way, it would have been sufficiently broad. It would have avoided the need for subsequent courts to (controversially) try to expand *Lumley v Gye* beyond recognition.

Again, the House of Lords had an opportunity to rationalise these torts in *OBG*.[85] However, rather than merge them, it insisted they were separate torts. It did recognise the tort of unlawful, intentional interference with commercial interests. However, four of the five Lords limited such action to wrongful interference through the actions of a third party.[86] It is not clear in principle why the tort should be so confined. Certainly, some of the precedent, including *Allen v Flood*, suggested it. On the other hand, *Keeble v Hickergill*, recognised as a case of causing loss by unlawful means, did not involve damage through a third party. While other cases of that period, *Garret v Taylor* and *Tarleton v M'Gawley,* did, the cases do not expressly turn on that fact. Statements by Lords Lindley and Macnaghten in *Quinn v Leathem* do not express this limitation. When the High Court of Australia expressed the cause of action in *Brisbane Shipwrights' Provident Union v Heggie* ('*Brisbane Shipwrights*'),[87] (discussed

[84] 'I believe that the tort of inducing breach of contract has now been absorbed into the general tort of causing harm by unlawful means. To the extent it has recently developed distinctive rules, because such absorption has been ignored, this development should promptly be put into reverse': ibid 28.

[85] *OBG Ltd v Allan* (n 13).

[86] Ibid 47 (Lord Hoffmann), 75 (Lord Walker), 85 (Baroness Hale), 91 (Lord Brown). Some see this as the orthodox view of the tort: Roderick Bagshaw, 'Can the Economic Torts be Justified?' (1998) 18 *Oxford Journal of Legal Studies* 729, 730.

[87] (1906) 3 CLR 686, 700.

below) it did not require the defendant's behaviour involve a third party. This has been noted by commentators.[88]

Respectfully, the formulation of Lord Nicholls, requiring an unlawful act by the defendant but not limiting it to cases involving third parties,[89] is preferred. He suggested the two views of the unlawful interference tort were based on different perceptions of its rationale. One rationale, which he favoured, was that the tort curbs 'clearly excessive conduct. The law seeks to provide a remedy for intentional economic harm caused by unacceptable means …. [and] regards all unlawful means as unacceptable in this context'.[90] The other rationale for the tort was merely to provide a claimant with a remedy where intentional harm was inflicted indirectly not directly.[91] This rationale assumes where intentional harm is inflicted directly, the plaintiff will have another remedy available. However, this assumption is misplaced. Most judges accept the mere fact a defendant intentionally harmed the plaintiff does not, without more, ground legal action. Lord Nicholls rejected this second rationale for the tort as a 'radical departure from the purpose for which this tort has been developed … [bringing] about an unjustified and unfortunate curtailment of the scope of this tort'.[92] With respect, I agree. This view also enjoys academic support.[93]

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88 Deakin and Randall who, after referring to Lord Hoffmann's judgment restricting the tort to cases of wrongful interference with actions of a third party, continue: 'a more straightforward approach would have been to stress the need for the claimant to show that he had an economic interest not in the specific relation with the third party that was being interfered with, but more generally in a trade, business or employment which was the subject or target of the defendant's action. This would be to revert to the language used in the *Mogul*, *Allen* and *Quinn* cases': Deakin and Randall (n 14) 533–4.

89 *OBG Ltd v Allan* (n 13) 56.

90 Ibid 55.

91 Ibid 55–6.

92 Ibid 56.

93 '[T]here are situations in which the intentional harm tort should be applicable even where no third party is involved': Philip Sales and Daniel Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411, 420.

The House of Lords did not take the step suggested here of viewing the tort of inducing breach of contract as a sub-set of the wider tort of unlawful, intentional interference with another's commercial/business interests. It gave several reasons for its decision to maintain the separate torts, pointing out ways in which liability under *Lumley v Gye* differed from liability for causing a business loss through unlawful means. Given that this article respectfully disagrees with that position, it is necessary to consider these reasons.

The first reason was that liability under *Lumley v Gye* was accessorial in nature, depending upon another person committing the primary tort. In contrast, the tort of causing loss through unlawful means was not so limited, being an example of primary liability.[94] While this *may* be true,[95] there is no reason why the tort of causing loss through unlawful means could not include this kind of accessory liability. Nothing inherent in that tort requires only primary liability be contemplated. It can be accepted that in terms of 'unlawful' means, one example of unlawful means is procuring breach of contract. It is doubted whether it is helpful to distinguish primary and secondary liability;[96] to the extent that it relates to questions of remoteness and measure of damages, it might be useful; however, this does not (and should not) preclude it from being part of a broader tort.

The second reason was the Court's statement that 'unlawfulness' for the purposes of the unlawful means tort 'requires the use of means which are unlawful under some other rule'.[97] No authority is cited. Again, no reason of policy of which the author is aware would require this in respect of the unlawful means tort.

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94 *OBG Ltd v Allan* (n 13) 20 (Lord Hoffmann), 59 (Lord Nicholls).

95 Weir disagreed: 'I am far from supposing that the inducer's tort is in any way secondary … where the defendant has used the contractor as a means of harming the plaintiff; in such cases the defendant is a primary wrongdoer': Weir (n 9) 34–6.

96 'The best view is that the idea of accessorial or secondary liability is doctrinally confusing and conceptually unnecessary, and should be rejected': Deakin and Randall (n 14) 544.

97 *OBG Ltd v Allan* (n 13) 20 (Lord Hoffmann).

A third difference is that the unlawful means tort does not require the existence of a contract, while the *Lumley* tort does. This is true, but it is not a reason why the torts cannot be merged, particularly where the position with respect to the new tort will be less onerous than it was under *Lumley*. Others have pointed out the benefits of deciding cases based on substance, rather than technical rules,[98] a sentiment which arguably fed the exponential growth in the *Lumley* tort. Some have claimed contractual interests should be reified, justifying a particular tort around inducing breach, which should remain distinct from a general tort action.[99] Maintaining *Lumley v Gye* as a separate action effectively does this, because it does not require evidence of specific intent to harm the plaintiff.[100] With respect, my sense is that the law is moving towards recognising civil obligations that individuals owe to another based on broad principles, breaking down technical rules and boundaries between contract and tort, and not reifying interests protected by the former over the latter.[101] This is part of an argument that *Lumley v Gye* is an instance of the wider tort.[102]

Fourthly, the Court noted the plaintiff had to show the defendant intended to cause them loss, which was not required for the *Lumley v*

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98 *J T Stratford and Son Ltd v Lindley* (n 38) 330.

99 *OBG Ltd v Allan* (n 13) 27 (Lord Hoffmann), citing Philip Sales and Daniel Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411. See also Bagshaw (n 86) 735–6.

100 Deakin and Randall (n 14) 535.

101 Weir warns that 'the formalism of our approach is at odds with the merits of cases in two main respects: first, that some deplorable conduct escapes sanction because no law or contract was broken, and secondly that people sometimes have to pay because some infringement of law or contract occurred incidentally and as a matter of happenstance': Weir (n 9) 74.

102 '[A]t least in the context of trade or business, the *Lumley v Gye* tort could be folded into the wider tort of interference with trade or business, without sacrificing the unity of purpose of structural logic of the economic torts. Where the real interest protected by the torts resides in the business or livelihood of the claimant, there would be much to be said for the focus of the tort being on conduct aimed at causing harm to the business or livelihood as such … *Lumley v Gye* was not challenged in *OBG*, but there are hints of judicial unease with the idea that economic interests should be better protected simply because they are bound up with expectations that a particular legal duty – contractual or otherwise – will be performed': Deakin and Randall (n 14) 537; D Howarth, 'Against *Lumley v Gye*' (2005) 68 *Modern Law Review* 195.

Gye action.[103] However, it is not a large step, when knowledge of the existence of the contract is required in *Lumley* cases, for a defendant to know as a result that breach of the contract is extremely likely, at least, to cause the plaintiff loss. The difference between the two actions in this respect is not great.

Lord Hoffmann also criticised the distinction between direct and indirect interferences in the current case law, giving it as a further reason for abandoning the unified tort theory.[104] It is agreed the distinction is problematic,[105] but if we adopt a general tort of intentional, unlawful interference with business interests, that distinction becomes redundant. Extra-judicially, Lord Hoffmann explained *OBG* as an attempt to confine the economic torts 'as narrowly as possible' given their slim basis in social or economic policy, so they would become torts 'of little practical consequence'.[106] Carty contrasts these attempts by the House in *OBG* to clamp down on action for causing loss by unlawful means with liberal growth of the tort of conspiracy, in a way which could undermine the apparent agenda of the court. She suggests, in time, the liberal approach to conspiracy may 'crossover' to the tort of causing loss by unlawful means, removing shackles placed on it in *OBG*.[107] Deakin and Randall point out the apparently anomalous distinction between the requirements of the tort of unlawful means and the tort of intimidation, to be discussed presently. In the case of the former, the House of Lords found in *OBG* it was necessary to show the wrong complained of was actionable by a third party. However, for the tort of intimidation, the House found it was *not* necessary the acts complained of were actionable by another party wronged, because the actions were

[103] *OBG Ltd v Allan* (n 13) 20, 35 (Lord Hoffmann).
[104] Ibid 28–9 (Lord Hoffmann).
[105] Lord Nicholls also made this point: ibid 61.
[106] Leonard Hoffman, 'The Rise and Fall of the Economic Torts' in James Edelman, James Goudkamp and Simone Degeling (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 113, 116.
[107] '[T]he tort of conspiracy may be used to circumvent the *OBG* requirements of intermediary use and actionability in the unlawful means torts … it may well be … that the revitalisation process that started with the conspiracy tort will insinuate itself into the application of the unlawful means tort': Carty, 'The Modern Functions of the Economic Torts' (n 2) 280–1.

separate.[108] Similarly, in the year after *OBG* in *Revenue and Customs Commissioners v Total Network SL*, the House found third party actionability was not required with respect to the tort of conspiracy, to be discussed below. This creates an anomalous situation with the family of economic torts, where third party actionability is required for the tort of unlawful means, but not for conspiracy, intimidation, or inducing breach of contract. Deakin and Randall, discussing this, conclude 'this is a result with which nobody concerned with doctrinal coherence in tort law can feel particularly happy'.[109]

D *Conspiracy and Intimidation*

Classically the courts have considered an unlawful conspiracy to be the intention of two or more, and in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means.[110]

The leading case *Quinn v Leathem*[111] was decided just after *Allen v Flood*.[112] The plaintiff regularly employed non-union labour. Members of a union approached him, threatening that if he did not cease to employ such labour, they would take measures against him. They threatened to target one of his biggest customers, Munce. The plaintiff and the unionists could not reach agreement. Subsequently the union did target Munce, instructing members working with him to strike. As a result, Munce told the plaintiff he would not be ordering from the plaintiff for the foreseeable future, because he lacked the workers to process the product, until the plaintiff resolved his

[108] *Rookes v Barnard* (n 53) 1207 (Lord Devlin).

[109] Deakin and Randall (n 14) 548. '[I]f the requirement of independent actionability is irrelevant in the context of the unlawful means conspiracy tort, and is not required in cases of threats (intimidation) under *Rookes*, it is hard to see what purpose it serves in the tort of interference with trade or business by unlawful means': at 549–50. *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493, 502 (Laddie J).

[110] *Mulcahy v R* (1868) LR 3 HL 306, 317 (Willes J).

[111] *Quinn v Leathem* (n 33).

[112] *Allen v Flood* (n 14). Although the case was largely decided on principles of conspiracy, it may have been decided as an inducing breach of contract case, since the effect of what the unionists did was to break an existing agreement between the plaintiff and its customer.

industrial relations issues. A contract existed between the plaintiff and Munce.

This case was decided based on the tort of conspiracy. Members of the House of Lords noted the defendant unionists had acted in concert, not to advance their own interests as workers, but purely to injure the plaintiff. This was unlawful. They distinguished *Allen v Flood* on the basis that there, the defendants were acting to promote their own trade interests. Here, the defendants were not so acting. They damaged the plaintiff's legitimate trade and business interests, without lawful justification. Lord Lindley said a conspiracy to prevent others from working by pressuring them not to do so was unlawful.[113]

There can be a fine line between an unlawful actionable conspiracy, and legitimate protection of business interests. For example, the Court dismissed a complaint against a motor industry association.[114] The association compiled a list of fixed prices for their goods, telling members that they must sell their goods within this agreed range. The association's rules provided that if there were evidence that someone was selling goods outside this range, they could be placed on a 'black list'. If someone were so placed, association members would not do business with them. The plaintiff was so placed for listing a motor vehicle at a price beyond the range. Association members refused to deal with him, seriously damaging his business. The Court rejected allegations of unlawful conspiracy against the plaintiffs; the defendants were acting in good faith to protect legitimate business interests.[115] Recall the House of Lords in *Allen v Flood*, in determining that the motivation for given actions could not determine whether or not they were lawful, expressly suggested that the tort of conspiracy might be an exception to that rule.[116]

[113] *Quinn v Leathem* (n 33) 538.
[114] *Ware and de Freville Limited v Motor Trade Association* (n 36).
[115] Ibid 62 (Bankes LJ), 71 (Scrutton LJ), 80 (Atkin LJ).
[116] *Allen v Flood* (n 14) 124 (Lord Herschell), 153 (Lord Macnaghten); *Sorrell v Smith* [1925] AC 700, 724 (Lord Dunedin).

Similarly in *Sorrell v Smith*,[117] an association of retail newsagent outlets determined there were sufficient outlets in a given area. They determined to act against any wholesale newsagent that dealt with new retail newsagents in the area, by refusing to purchase product from that wholesaler. The Court rejected a conspiracy claim, because the defendants were pursuing legitimate business interests in a reasonable manner, and had not set out to injure the plaintiff. Lord Dunedin stressed the importance of evidence of intent to injure the plaintiff in cases of alleged conspiracy,[118] though practical difficulties were acknowledged.[119]

Eventually, the United Kingdom courts would distinguish in this context acts that were lawful and those that were unlawful. In respect of lawful acts, conspiracy would be actionable as a tort only where the predominant or main purpose of the combination was to damage the plaintiff.[120] It was logically necessary to place the bar this high, because the law was effectively making it wrong to do something that would, if done individually, not be tortious. In contrast, where the action/s concerned were unlawful, it was only necessary to show that

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[117] *Sorrell v Smith* (n 116).

[118] Ibid 719. Similarly: at 712 (Viscount Cave LC, Lord Atkinson agreeing), 741–2 (Lord Sumner), 749 (Lord Buckmaster). It has been said that intention to injure does not need to be accompanied by maliciousness: *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 470–1 (Lord Wright). The action did not lie against a union that had ordered a strike, because the Court found that the union was seeking to act in what it thought were the best interests of its members, and did not intend to damage the plaintiff: *J T Stratford and Son Ltd v Lindley* (n 38) 323 (Lord Reid).

[119] Lord Sumner reflected on the difficulties in determining the defendant's intent: *Sorrell v Smith* (n 116) 742. Dissatisfaction is also evident in the judgment of Viscount Maugham in *Crofter Hand Woven Tweed Co Ltd v Veitch* (n 118): 'some [Lords] … have used phrases which seem to suggest that once it is found that the infliction of injury on the petitioners was not the real purpose or object of the embargo that is the end of the matter. I must say plainly that I disagree with this view': at 448–9; calling it a 'mistake to hold that combinations to do acts which necessarily result in injury to the business or interference with the means of subsistence of a third person are not actionable provided only that the true or predominant motive was not to injure the plaintiff and that no unlawful means are used': at 451.

[120] *Lonrho Ltd v Shell Petroleum (No 2)* [1982] AC 173, 188–9 (Lord Diplock for the House); *Lonrho plc v Fayed* [1992] 1 AC 448, 465–6 (Lord Bridge for the House).

the combination had at least one purpose of damaging the plaintiff. Setting of the bar at this lower level was justified because the defendant/s were engaged in 'unlawful' behaviour, however defined.[121]

Carty contrasts the broad modern application of the tort of conspiracy with the narrow constraints in which courts have typically placed the unlawful means tort. She says the broad interpretation of the conspiracy tort can effectively undermine these constraints, so that in time courts might then loosen the constraints they have placed on the unlawful means tort.[122]

In *Rookes v Barnard*[123] the House of Lords recognised the tort of intimidation. This tort was established when the defendant threatened to commit an unlawful act and intended to cause the plaintiff loss. The tort was made out on the facts, which involved union members threatening the plaintiff's employer that if they did not dismiss him, they would call a general strike which would seriously impact the employer's business. The Court determined this was a threat to commit an unlawful act, that of breach of an employment agreement, and the defendants intended to cause the plaintiff loss. Again, the relation between this tort and the tort of causing loss by unlawful means is unclear. The Court in *OBG* did not expressly subsume this tort into the tort of unlawful means. However some commentators claim that the Court treated the tort in *Rookes v Barnard* as being 'the same' as that of causing loss by unlawful means.[124]

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[121] To be considered 'unlawful' for the tort of conspiracy, it is not necessary that the defendant's actions would have made them liable in tort. For instance, it includes criminal behaviour not actionable in tort. This is because it is a form of primary, not secondary, liability: *Revenue and Customs Commissioners v Total Network* (n 78). However, this places it in conflict with the House of Lords' formulation of the intentionally causing loss by unlawful means tort, where the House insisted the claim had to be actionable by the third party in order for the tort to apply.

[122] Carty, 'The Modern Functions of the Economic Torts' (n 2) 280–1.

[123] *Rookes v Barnard* (n 53) 1178 (Lord Reid), 1182–3 (Lord Evershed), 1205 (Lord Devlin), 1200 (Lord Hodson), 1233 (Lord Pearce).

[124] Deakin and Randall (n 14) 547.

In sum, the United Kingdom law in relation to the economic torts is unsatisfactory because the principles applicable to the various torts are inconsistent and in conflict, without good reason. Originally, the principle of *Lumley v Gye* was stretched beyond recognition, in a strained effort to fit a broader range of cases within its narrow boundaries. Numerous courts have suggested it would be better to view *Lumley* as part of a broader principle. This connection was rejected by the House of Lords in *OBG*. There the House attempted a partial rationalisation of the law in this area, but its efforts were unsatisfactory. It did not provide strong reasoning for insisting that *Lumley* should remain separate from a broader tort, and it did not reconcile the *Lumley* tort and the tort of causing loss by unlawful means with the torts of intimidation and conspiracy. Its framing of the causing loss by unlawful means appears to have been motivated by a desire to drive it out of the law of torts, or at the very least marginalise it, for unexplained reasons. *Lumley* should have been seen as an example of the tort of causing loss by unlawful means.

III DEVELOPMENTS IN AUSTRALIAN LAW

A *High Court Decisions*

The High Court considered itself bound by decisions of the House of Lords, which decided most of the above cases, until 1963.[125] It is interesting to see how Australian courts have applied the legal principles stated above, and to what extent they have followed the (somewhat tortuous) path taken by United Kingdom law in this field. This discussion informs later law reform suggestions.

The first High Court decision was in 1906 in *Brisbane Shipwrights' Provident Union v Heggie*.[126] The timing was unfortunate, occurring just after the tumultuous turns of United Kingdom law in the era of *Allen v Flood* and *Quinn v Leathem*. The case concerned an employee

[125] *Parker v The Queen* (1963) 111 CLR 610.
[126] *Brisbane Shipwrights' Provident Union v Heggie* (n 87).

who refused to join the union. As a result, union officials told the employer that unless and until he was dismissed, union members would remain on strike. The employer dismissed the employee. The Court found in favour of the dismissed employee. After discussing the United Kingdom authorities, it identified three categories of case: (a) the alleged interference with trade or business did not violate a legal right, but was merely incidental to a lawful act (no action would lie); (b) the alleged interference with trade or business is the direct result of an unlawful act (an action would lie); and (c) the act is prima facie neutral, where its consequences depend on the motive of the defendant.[127] *Lumley v Gye* was not considered here because there was no evidence the employer breached the contract by terminating the employee.

The Court found the case belonged to category (b). The acts were contrary to s 543 of the *Criminal Code 1899* (Qld), prohibiting a person from conspiring with another to cause injury to a third person in their trade or profession. This is what the union had done. The court added if the case were considered to be one within category (c), the plaintiff still had a case, because the jury had found the defendants were motivated by a desire to injure the plaintiff, not trying to protect legitimate business interests. Obviously, category (b) identified by the High Court here is similar to the tort of unlawful interference with trade or business, for which this article will argue later.

The *Lumley* action was considered in the High Court decision *Short v City Bank of Sydney*.[128] There Isaacs J emphasised the importance of knowledge in determining whether the tort had been committed — the plaintiff had to show the defendant knew what they did would induce or procure another to breach a contract.[129] A defendant who believed in good faith that what they did would not cause a breach of contract by another would not have committed the tort. Nor would a defendant who was unaware of the contract. If the defendant reasonably believed whatever action they induced would not amount to breach of the

[127] Ibid 700 (Griffith CJ, for Barton and O'Connor JJ).
[128] (1912) 15 CLR 148.
[129] Ibid 160.

contract, they would not have committed the tort. Nor if they believed the contract was no longer on foot. Barton and O'Connor JJ simply accepted the reasoning of the lower court.[130]

In *James v Commonwealth*,[131] Dixon J considered both the suggested tort of interference with business interests, and the *Lumley v Gye* tort. He expressed a narrower view of the first, rejecting suggestions in cases like *Keeble v Hickeringill*, *Mogul Steamship* and *Temperton v Russell* that it could exist independently of proof the defendant had committed a wrongful act.[132] He recognised the tort of conspiracy as an exception to this position, as the United Kingdom court had in *Allen v Flood*.[133] Dixon J, presumably influenced by the United Kingdom decisions, expressed a broader view of *Lumley*. He found 'the principle to which *Lumley v Gye* is now referred is no doubt wide enough to include within its protection civil rights which exist independently of contract'.[134] He added that uncertainty continued to surround the requirements of that tort, but it was clear that the defendant had to be aware of the 'civil right' and act without lawful justification.[135] Dixon J indicated a possible defence to a *Lumley v Gye*

[130] Ibid 155–6. In the New South Wales Supreme Court, Street J articulated three elements to the tort: (a) the defendant in fact induced and procured the breach complained of; (b) the breach was procured with the deliberate intention of injuring the plaintiff, or where it should have been obvious that a reasonable consequence of the defendant's actions would be damage or injury to the plaintiff; and (c) what the defendant did actually did injure or damage the plaintiff. He stated that the word inducement suggested the idea of persuasion or contrivance. The plaintiff would need to show 'that the person whose actions are complained of did something in the nature of effectually persuading or prevailing upon the other party to the contract to violate his obligations': *Short v City Bank* (1912) 12 SR (NSW) 186, 202–3. To like effect *Independent Oil Industries v Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394, 414–15 (Jordan CJ, Long Innes CJ in Eq and Davidson J agreeing).

[131] (1939) 62 CLR 339.

[132] 'The mere fact that the Commonwealth … without committing or threatening any illegality, procured the shipowners and other carriers to refuse to carry the plaintiff's goods and thereby injured his trade would not suffice to give him a cause of action. It is necessary that some unlawful or wrongful means should have been used or threatened': ibid 366.

[133] Ibid.

[134] Ibid 370.

[135] Ibid.

action where the defendant had acted honestly and reasonably in pursuit of a legitimate interest.[136]

He quoted with approval an extract from a leading torts text written by Salmond, where the author stated that mere advice was not actionable; rather, an inducing cause or reason to breach the contract. The distinction was between inducing a contract in terms of creating a reason for breaking it, and to advise a breach of contract, meaning to point out reasons which already existed.[137]

The High Court recognised a new tort in *Beaudesert Shire Council v Smith* ('*Beaudesert*').[138] The plaintiff had rights to take water from a nearby river. His rights were compromised when the appellants took gravel from the river bed, altering the flow of the river in a manner detrimental to the plaintiff. The plaintiff sued the Council. The High Court found for the plaintiff. It expressly referred to the English authorities referred to above, namely *Garret v Taylor*, *Tarleton v M'Gawley*, and *Keeble v Hickeringill*. It did so in establishing a new principle that:

> Independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another is entitled to recover damages … it may be that a wider proposition could be justified, but the proposition we have stated covers this case.[139]

The decision was much criticised.[140] There were several puzzling aspects to it, including why the Court found the need to utilise the

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[136] Ibid 373.

[137] Ibid 371. Cf Heydon, 'The Future of the Economic Torts' (n 8) 1: 'it seems that "persuasion" includes "advice", for certain relationships such as that of union organiser and employer are such that advice can be very persuasive'.

[138] (1966) 120 CLR 145.

[139] Ibid 156 (Taylor, Menzies and Owen JJ).

[140] Gerald Dworkin and Abraham Harari, 'The *Beaudesert* Decision – Raising the Ghost of the Action Upon the Case' (Pt 1) (1967) 40 *Australian Law Journal* 296; Gerald Dworkin and Abraham Harari, 'The *Beaudesert* Decision – Raising the Ghost of the Action upon the Case' (Pt 2) (1967) 40 *Australian Law Journal*

concept of 'inevitable consequence' since none of the English authorities cited by the Court had. It was not entirely clear why negligence could not have been utilised, although the fact the defendant's actions were 'intentional' might have been relevant, and that tort was more modest in scope than today. There was no evidence the council acted maliciously to deliberately harm the plaintiff.[141] The Council's actions were certainly *voluntary*, but this falls well short of a finding they intentionally damaged the plaintiff's interests, and it is difficult to frame an action around voluntariness. One might have thought something extra, like intention to harm the plaintiff, might have been necessary.[142] In terms of other torts, the plaintiff perhaps lacked a claim in nuisance since there was no damage to their property interests per se, as opposed to a right to draw water from a Crown-owned watercourse. A *Rylands* claim was also not possible, since there was no 'escape' from land owned by the council.

In any event, this tort had a relatively short life. It was killed off by the High Court in *Northern Territory v Mengel* ('*Mengel*').[143] This is an important development in the current context because, had the *Beaudesert* tort continued, it would overlap with the suggested tort of unlawful interference with business interests.[144] However, the possible new tort would be broader than the *Beaudesert* principle, because it would not require the loss the plaintiff suffered be an 'inevitable

347; Gerald Dworkin, 'Intentionally Causing Economic Loss – *Beaudesert Shire Council v Smith* Revisited' (1974) 1 *Monash University Law Review* 4.

141 R J Mitchell, 'Liability in Tort for Causing Economic Loss by the Use of Unlawful Means and its Application to Australian Industrial Disputes' (1976) 5(4) *Adelaide Law Review* 428, 452.

142 'It is clear that *Beaudesert*, in so far as it represents a generalised principle of economic tort liability, is wrong and that intention to harm the plaintiff must be established': Stewart (n 23) 369; Heydon, 'The Future of the Economic Torts' (n 8) 16–17.

143 *Northern Territory v Mengel* (n 7).

144 Indeed, there was apparently a suggestion that the *Beaudesert* principle and the tort of wrongful interference with trade and business were analogous, with the High Court in *Beaudesert* quoting the United Kingdom decision in *Mogul Steamship* in support of the principle it recognised in *Beaudesert*: *Beaudesert Shire Council v Smith* (n 138) 155–6 (Taylor, Menzies and Owen JJ); *Kitano v Commonwealth* (1974) 120 CLR 151, 174 (Mason J). However, the concept of 'inevitable consequence' which appears in the *Beaudesert* principle does not find support in the *Mogul Steamship* decision.

consequence' of the plaintiff's actions. This also means the fact the High Court overruled *Beaudesert* should not determine the court's decision about recognition of a possible new tort of unlawful interference with business interests, because it lacks the troubling features of *Beaudesert*.

The judgment in *Mengel* was made on other grounds,[145] but the Court made obiter comments on the tort of inducing breach of contract or, as the High Court re-phrased it in *Mengel*, 'intentional interference with contractual rights'. It observed in respect of the United Kingdom case law that a liberal approach had been taken to questions of proof of intention; it was not necessary the intent to injure another be predominant, it was sufficient that the defendant had constructive knowledge of the contract breached, and sufficient if the defendant had 'recklessly disregarded' means of ascertaining the terms of the contract.[146] It also noted an emerging tort in the United Kingdom of interference with trade or business interests by an unlawful act. It was not clear what 'unlawful' encompassed, but it was not necessary they be done to damage the plaintiff's interests.[147] The joint reasons expressed no view as to whether these developments should be accepted in Australian law.

Both torts of inducing a breach of contract and unlawful interference with trade or business were considered in *Sanders v Snell*.[148] There a government minister decided the contract of a particular office holder should be terminated, and directed his department to that effect, asking them to terminate it as soon as practical. The contract was terminable on conditions, but it was argued termination had not occurred on those conditions. The High Court narrowly viewed the tort of inducing breach of contract:

> The tort of inducing or procuring a breach of contract is not established by demonstrating only that the alleged tortfeasor hoped or wished that the

[145] It was primarily decided on the basis of the alleged tort of misfeasance in public office.
[146] *Northern Territory v Mengel* (n 7) 342 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[147] Ibid 343 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[148] (1998) 196 CLR 329.

> contract would or might be breached. To establish an inducing or procuring of breach, something more must be shown than that the alleged tortfeasor harboured an uncommunicated subjective desire that the contract would or might be breached.[149]

The Court declined to determine whether the tort of unlawful interference with trade or business interests existed in Australia.[150] However, the joint reasons accepted the possibility of it, by commenting on whether it required the actions complained of to be unlawful, and what was meant by 'unlawful'.[151] It did not refer to earlier decisions like *Brisbane Shipwrights* and *James* v *Commonwealth* which discussed the tort of unlawful interference with business interests. The issue was considered briefly in *Zhu v Treasurer of New South Wales*.[152] There the Court referred to a 'tort of contractual interference' and referred with apparent approval to the judgment of Dixon J in *James v Commonwealth*, discussed above, in which both torts were recognised, without elaboration.[153]

B *Most Recent Australian Lower Court Decisions*

1 *Tort of Inducing Breach of Contract*

Subsequent decisions have basically applied the above principles. It is not sufficient that breach of contract was a foreseeable consequence

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[149] Ibid 339 (Gleeson CJ, Gaudron, Kirby and Hayne JJ, Callinan J agreeing). Later the Full Federal Court confirmed the mere fact the defendant knows of the clause that is breached is not sufficient. It was necessary to show they knew or intended what they did would result in a breach of the other contract: *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 130 ALR 469, 486 (Lindgren J for the Full Court). Later courts have accepted that recklessness or wilful blindness to the other contract may be sufficient: *Tszyu v Fightvision Pty Ltd* [1999] NSWCA 323, [171] (Sheller, Stein and Giles JJA). United Kingdom case law had adopted a similar position: *Emerald Constructions Co Ltd v Lowthian* (n 68) 700–1 (Lord Denning), 703–4 (Lord Diplock) (Court of Appeal).

[150] *Sanders v Snell* (n 148) 341 (Gleeson CJ, Gaudron, Kirby and Hayne JJ, Callinan J agreeing).

[151] Ibid 344 (Gleeson CJ, Gaudron, Kirby and Hayne JJ, Callinan J agreeing).

[152] (2004) 218 CLR 530.

[153] Ibid 570 (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

of the defendant's activities.[154] It is not enough that the defendant's activity caused the breach, in the absence of the mental element of intention/knowledge.[155] However, evidence the defendant turned a 'blind eye' to the possibility their behaviour would or might induce a breach of contract may be sufficient, as may reckless indifference.[156]

The courts have applied the distinction of Dixon J in *James v Commonwealth*, based on Salmond, between inducement of breach of contract and advising a breach of contract.[157] On occasion, these requirements have been applied narrowly. In *Bodycorp Repairers Pty Ltd v AAMI & Martin* ('*Bodycorp*'),[158] the Victorian Court of Appeal was not satisfied they were met when the defendant openly questioned with the contracting party whether it was in their best interests to remain with their present contract. The Court accepted the evidence which suggested the defendant would have been happy for the contracting party to exit their existing contract. The defendant said the contracting party may in future obtain more work if they exited their existing arrangements. In dismissing the claim for inducing breach of contract, the Court applied the distinction in *James v Commonwealth* between inducing a breach of contract, meaning to create a reason for breaking it, as opposed to advising a breach of contract, which was to point out reasons which already existed. Dixon J said the former was actionable; the latter was generally not. With respect, the defendant's conduct in *Bodycorp* was more like an inducement to breach, rather than advising a breach. In the express language of Salmond, adopted by Dixon J, it 'created a reason for breaking it', in terms of a promise of more work in future. It was not to (merely) point out reasons which

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[154] *LED Technologies Pty Ltd v Roadvision Pty Ltd* [2012] FCAFC 3, [52] (Besanko J for the Full Federal Court); *Civic Video Pty Ltd v Paterson* [2016] WASCA 69, [52] (Newnes J for the Court of Appeal).

[155] *LED Technologies Pty Ltd v Roadvision Pty Ltd* (n 154) [53]. In *Australian Football League v Hard On Sports* [2012] VSC 475, the Court referred to a requirement of 'sufficient knowledge to ground an intention to interfere with contractual rights': at [68].

[156] *LED Technologies Pty Ltd v Roadvision Pty Ltd* (n 154) [54] (Besanko J for the Full Federal Court); *Civic Video Pty Ltd v Paterson* (n 154) [52] (Newnes J for the Court of Appeal).

[157] *Donaldson v Natural Springs Australia Limited* [2015] FCA 498, [208] (Beach J).

[158] [2015] VSCA 73.

already existed. It has been stated that 'procuring' means 'persuading with effect'.[159] One would have thought that telling a party to a contract they will/may get more work once they have exited the contract might be, and might be designed to be, highly persuasive.

Interestingly, some of these cases have made extensive reference to the House of Lords decision in *OBG* in framing the parameters of the tort of inducing breach of contract. As was noted above, it was there that the House recognised the tort of unlawful interference with business interests as separate from that of inducing breach of contract.

2 *Possible Wider Tort of Unlawful Interference with Business or Commercial Interests*

As indicated, the High Court has twice expressly left open[160] whether Australian law should follow *OBG* and recognise a tort of unlawful interference with business or commercial interests. Earlier decisions like *Brisbane Shipwrights* and *James v Commonwealth* had apparently recognised the tort. There is and has been substantial Australian academic support for it, providing a remedy where *Lumley v Gye* could not, because no breach of contract occurs,[161] and because of the narrow way in which that tort's requirements have been applied. Inevitably, lower courts have been asked to recognise the broader tort. A mixture of approaches has been evident.

Some lower courts have thought it better to avoid the issue, declining to decide until the High Court does so. This is not surprising, since the High Court has earlier expressed concern with a lower court reforming the common law, on the basis it was the High Court's responsibility to do so.[162] It is hard to disagree with this, but it presupposes willingness on the High Court's part to determine contentious points of law. On occasion, respectfully, the High Court

[159] *Winsmore v Greenbank* (1745) Willes 577; 125 ER 1330, 1332.

[160] *Northern Territory v Mengel* (n 7); *Sanders v Snell* (n 148).

[161] '[I]t makes perfect sense to recognise that the doing of an illegal act which indirectly hinders or prevents performance should be actionable even where no suggestion of breach arises': Stewart (n 23) 362.

[162] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

has appeared reluctant to do so. For example, since 1992 lower courts in Australia have determined good faith applies to Australian contracts.[163] The Supreme Court in Canada[164] and in the United Kingdom[165] has done so. Yet when the Australian High Court has been asked to determine the question, it has declined to do so.[166] Difficulties can arise when the High Court refuses to make a decision for the nation about a particular legal controversy, yet appears to view dimly occasions where lower courts make such calls.

A recent example of a court leaving open the question of the possible new tort is the Victorian Court of Appeal in *CFMEU v Boral Resources (Vic) Pty Ltd* ('*CFMEU*'):[167]

> As already noted, the question of the existence of the broader tort has been the subject of consideration by the High Court. To date, that Court has declined to decide whether the broader tort should be recognised as part of Australian law. The definitive decision which the appellant seeks – that the broader tort is not part of the common law of Australia – is a decision which could only be made by the High Court.[168]

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[163] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87, [154]–[156] (Gleeson JA, Meagher and McCallum JJ agreeing). Cf *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; Nuncio D'Angelo, 'The Ongoing Saga of an Implied Duty of Good Faith in Contracts' (2019) 93 *Australian Law Journal* 519, 524–5. The apparent inconsistency between the positions in New South Wales and Victoria might be thought to be ripe for definitive High Court determination of the common law position in Australia.

[164] *Bhasin v Hrynew* [2014] 3 SCR 494, [32] (Cromwell J for the Court); Anthony Gray, 'Development of Good Faith in Canada, Australia and Great Britain' (2015) 57(1) *Canadian Business Law Journal* 84.

[165] *Telefonica O2 UK Ltd v British Telecommunications plc* [2014] UKSC 42, [37] (Lord Sumption for the Court).

[166] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45.

[167] [2014] VSCA 348.

[168] Ibid [31] (Maxwell P, Neave, Redlich, Beach and Kaye JJA). See also *Ballard v Multiplex* [2012] NSWSC 426, [85] (McDougall J); *Deepcliff Pty Ltd v Council of the City of Gold Coast* [2001] QCA 342, [72] (Wiliams JA); *Donaldson v Natural Springs Australia Limited* [2015] FCA 498, [222] (Beach J); *Ooranya Pty Ltd v ISPT Pty Ltd* [2018] WASC 256, [60] (Martin J).

In contrast, some lower court judgments support adoption of the tort of unlawful interference with business interests. In *Deepcliffe Pty Ltd v Council of the City of Gold Coast*,[169] President of the Queensland Court of Appeal McMurdo accepted its existence for the purposes of argument. The question was closely considered by Pritchard J in *Hardie Finance Corporation Pty Ltd v Ahern (No 3)*.[170] That judge accepted the unlawful means tort was part of Australian common law. Pritchard J considered arguments in favour of and against recognition. In favour was the fact some lower courts in Australia had recognised it, the arguments presented in *OBG* for recognition of the tort were persuasive, the High Court's statements in this area to date had not expressed concern with developments in the United Kingdom law and there was nothing inconsistent between statements in the Australian cases and the United Kingdom position, there was no concern recognition of the new tort would lead to indeterminate liability, the highest decisions in the United Kingdom courts remained highly persuasive in Australia, and Canadian courts had also adopted the House of Lords decision in *OBG*.[171]

Pritchard J noted reasons to be wary about recognising the tort included the High Court had previously declined to so decide when asked, to some extent it might be inconsistent with the High Court's general reluctance to permit recovery for economic loss in tort, economic activity had already been the subject of extensive statutory regulation, and the meaning of the elements of the tort determined in *OBG* needed further clarification. On balance Pritchard J adopted the tort. That decision was not referred to when the Victorian Court of Appeal subsequently declined in *CFMEU* to determine whether the tort was part of Australian law. Others suggest Australian law will accept the new tort.[172]

[169] *Deepcliff Pty Ltd v Council of the City of Gold Coast* (n 168).
[170] [2010] WASC 403.
[171] Ibid [711]–[719].
[172] Carty, 'The Modern Functions of the Economic Torts' (n 2) 272; *AI Enterprises Ltd v Bram Enterprises Ltd* [2014] 1 SCR 177, [54] (Cromwell J for the Court).

3 *Tort of Conspiracy and Tort of Intimidation*

The High Court recognised the tort of conspiracy in *McKernan v Fraser*.[173] There Dixon J applied the United Kingdom decision in *Sorrel v Smith*. His Honour found the tort existed, in relation to lawful acts, where two or more parties combined with the 'sole, true, dominating or main purpose' of harming the plaintiff.[174] It was not enough to do something which inevitably would harm the plaintiff. A sharp distinction was required between acts done for the benefit of the defendant or their business that incidentally harm the plaintiff (not conspiracy), and acts done with the dominant purpose of harming the plaintiff.[175] Evatt J agreed, adding that in relation to unlawful acts, the tort of conspiracy arises if there was evidence of intention to injure another.[176] A similar view was taken in *Williams v Hursey*,[177] with the Court focussing on whether the predominant motive of the defendant was to harm the plaintiff, or pursue legitimate business activity.

Subsequent lower court decisions have largely applied these rules. The Court expressed the two parts of the tort in *Ballard v Multiplex*.[178] McDougall J found in order for a conspiracy by lawful means to be actionable, evidence was required that the combination had the sole or predominant purpose to injure a third party. For conspiracy by unlawful means to be actionable, it had to be motivated by a purpose of harming a third party. The purpose would need to have been either agreed upon by all, or at least known to all who participated. The purpose of a conspiracy was not controlled by the immediate result. The mere fact a competitor was ruined as a result of what the members

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[173] (1931) 46 CLR 343.

[174] Ibid 362 (Dixon J, Rich and McTiernan JJ agreeing).

[175] Ibid 362 (Dixon J, Rich J agreeing at 354, McTiernan J agreeing at 412). Evatt J expressed a similar view: at 393. The dissents (Gavan Duffy CJ and Starke J) related to the application of the principles to the facts, not the principles themselves.

[176] Ibid 380.

[177] (1959) 103 CLR 30. In that case the conspiracy existed to commit unlawful acts: at 78 (Fullagar J, Dixon CJ and Kitto J agreeing), 105 (Taylor J), 124 (Menzies J).

[178] *Ballard v Multiplex* (n 168).

of the combination did did not prove they were engaged in an illicit conspiracy. It had to be shown the conspiracy had this purpose.[179]

Australian law has also recognised the tort of intimidation.[180] In *Sid Ross Agency v Actors and Announcers' Equity Association of Australia*, Mason JA (with whom the rest of the Court agreed) referred to links between the tort of intimidation and the possibly wider tort of unlawful actions damaging commercial interests.[181]

In summary, Australian law has accepted the tort of inducing breach of contract as per *Lumley v Gye*, but interpreted the requirements of this tort very strictly and narrowly. The High Court has acknowledged the possible existence of the tort of interference with trade or business, but has not decided whether it applies in Australian law or not, nor whether *Lumley v Gye* is just an example of it. It is not clear the extent to which *OBG* is accepted.[182] And Australian case law has not openly countenanced a possible rationalisation of these economic torts, together with the closely related torts of conspiracy and intimidation.

IV SUGGESTED LAW REFORM IN AUSTRALIA

The article will now suggest two reforms to Australian law. It will be argued that Australian law should recognise a new tort of unlawful, intentional interference with trade or business interests, and that

[179] Ibid [65]–[69]. Applied in *JR Consulting & Drafting Pty Ltd v Cummings* [2014] NSWSC 1252, [251]–[260], similarly *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd (No 2)* [2018] SASC 188, [374]–[376] (Doyle J). Doyle J also accepted it might be difficult to obtain direct evidence of an agreement to injure, so they may infer this from 'concurrences of time, character, direction and result' of apparently disparate acts: at [373].

[180] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 181, 225 (Crennan, Bell and Keane JJ); *Sid Ross Agency v Actors and Announcers' Equity Association of Australia* [1971] NSWLR 760; *CFMEU v Boral Resources (Vic) Pty Ltd* (n 167).

[181] *Sid Ross Agency v Actors and Announcers' Equity Association of Australia* (n 180) 766.

[182] Neyers (n 77) 119.

Australian law should reconceptualise the economic torts around this new tort. The argument is the existing torts of inducing breach of contract, the tort of conspiracy, and tort of intimidation, should be folded into a new tort of unlawful, intentional interference with the trade or business of another.

A *Not Radical*

The suggestion may sound radical; however, in fact it is not a seismic shift from where Australian law currently stands. At the risk of simplicity, the existing torts and their summary application are:

Existing Tort	Summary of Application
Inducing breach of contract	Defendant induces one party to a contract to breach it; they must have substantial knowledge of the contract or wilfully turn a blind eye to it; the plaintiff must suffer loss as a result; no intention to injure the plaintiff need be proven
Unlawful interference with trade or business	Unlawful act interfering with another's business (as per High Court decision in *Brisbane Shipwrights*, though subsequent High Court decisions leave open whether the tort is part of Australian law); not entirely clear whether intent to harm another's business or trade need be proven
Conspiracy Unlawful Means Conspiracy	Two or more parties enter into a combination with at least one purpose of damaging the plaintiff, and they do so; unlawfulness of actions and intent of defendants must be proven
Conspiracy Lawful Means Conspiracy	Only actionable where there is a combination with the sole or dominant purpose of damaging the plaintiff, and it does so; intent of defendants must be proven
Intimidation	Defendant threatens the plaintiff they will commit unlawful acts and intends to thereby cause the plaintiff loss; intent of defendants must be proven

There is substantial overlap, and some differences, across the economic torts. Both the second and fourth tort, and one type of the third tort, require the plaintiff prove the defendant is engaged in an unlawful act. The first tort also requires this, if 'unlawful act' is defined to include breach of contract. Regarding intention, the third and fourth torts require proof the defendant intended to harm the plaintiff. In respect of the second tort, Dixon J did not make this clear, but subsequent cases have generally confirmed it is a requirement to show the defendant intended to harm the plaintiff thereby. The first tort does not specifically require proof of the defendant's intent, but it is not a large leap from proof the defendant was aware what they were doing involved a breach of a contract to which the plaintiff was a party, to a conclusion that breach of it would harm the plaintiff. Breaches of contract will tend to harm the innocent party.

B *Academic Support for the Suggested Reforms*

There is substantial, high-level academic commentary supportive of recognition of the new tort, including the possibility it could effectively subsume the existing torts of inducing breach of contract, conspiracy and intimidation. Employment law specialist Professor Andrew Stewart supports recognition of such a tort and its subsumption of the others:

> As long as the innominate tort of unlawful interference is recognised in some form, as seems now clearly to be the case, then the doing of any act amounting to illegal means with the requisite intention will ground liability; thus there is no need to rely on the fact of combination … it has been apparent since *Rookes v Barnard* that there ought to exist a tort of unlawful interference with economic interests. If the threat of an illegal act to the damage of the plaintiff is a tort, then so must in all logic be its commission. There seems to be no good reason why actionable unlawful interference should be confined to the situations covered by the three relevant nominate torts, that is either (a) where threats are issued but not carried into effect (intimidation); (b) where the defendants combine to inflict loss (conspiracy); or (c) where it is the plaintiff's purely contractual relationships which are affected (indirect contractual interference).[183]

[183] Stewart (n 23) 367.

Dyson Heydon also favoured rationalisation of the economic torts, adopting a general tort of unlawful interference with the plaintiff's commercial interests. He said if this reform occurred:

> The change would make the law much more capable of handling bad behaviour and abuse of rights and of power; much more flexible; and much more based on factors of substance rather than technicality … [further] our law remedies intentional injuries to the plaintiff's body, to [their] nervous system, to [their] land and chattels; it is anomalous that a general theory of intentional tortious liability has developed for injuries to all these interests, but not for injuries to the plaintiff's financial interests. The generalizing tendency of the twentieth century common law has passed the economic torts by.[184]

The desire for rationalisation of principle, and consistency across the economic torts, has been noted by judges:

> There is much to commend the suggestion that the principles which apply to economic torts should be consistent with each other. After all, these are creations of the common law and it is difficult to see why, for example, an unlawful act which is sufficient to ground an action for unlawful interference with trade should not also be sufficient to ground an action for unlawful means conspiracy and conversely why an unlawful act, if any, which is insufficient to support one should not also be insufficient to support the other.[185]

C *'Unlawful'*

The tort should be grounded in behaviour that is unlawful.[186] The common law should not provide a remedy for hard-nosed, lawful commercial behaviour of a defendant to further their business interests, although its effect is to harm or injure the plaintiff, even if it

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[184] Heydon, 'The Future of the Economic Torts' (n 8) 14. To like effect David Partlett, 'From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry' (1992) 66 *Tulane Law Review* 771, 773: 'the economic torts require a Cardozo or Atkin to tell them where they belong'.

[185] *Michaels v Taylor Woodrow Developments Ltd* (n 109) 502 (Laddie J).

[186] Fridman concluding 'that factor [the unlawfulness of the defendant's acts or omissions] justifies the treatment of interference with another person's trade, business or economic interests as potentially … tortious': G H L Fridman, 'Interference with Trade or Business' (Pt 2) [1993] *Tort Law Review* 99, 119 (''Interference with Trade or Business' (Pt 2)')

ruins a competing business. The heart of this tort is the unlawful nature of the defendant's behaviour. The notion of 'unlawful' should be given its ordinary meaning. The courts have been reluctant to settle a satisfactory meaning of 'unlawful' in this context,[187] consistent with more general reluctance to outline the parameters of this nascent tort.[188] It would embrace criminal behaviour, and breaches of statutory obligations.[189] It would include breaches of contract and commission of a tort.[190] It does not mean what a defendant is 'not at liberty to commit',[191] because that phrase is vague and uncertain in meaning. The concept of 'unlawfulness' provides an important control mechanism in relation to this tort.[192]

It is conceded that others have argued that intentionally inflicted harm should be actionable per se in the absence of evidence of unlawfulness.[193] Dyson Heydon favoured this position:

> The courts should rationalize the position by basing the practical law on intentionally caused loss rather than on the theoretically more restrictive notion of causing such loss by unlawful means.[194]

Respectfully, the tort should require evidence that the defendant's actions were unlawful; mere intent to cause a defendant loss should be insufficient to attract liability. This is the position of the United Kingdom Supreme Court.[195] The requirement of unlawfulness is an

[187] 'Little effort has been made at judicial level to determine, or categorise, in even the most general terms, the meaning of the term 'unlawful' in this context': Mitchell (n 141) 442.

[188] Fridman, ''Interference with Trade or Business' (Pt 2)' (n 186) 103.

[189] *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762; Fridman, ''Interference with Trade or Business' (Pt 2)' (n 186) 107–10.

[190] This is consistent with *Rookes v Barnard* (n 53).

[191] *Torquay Hotel Co Ltd v Cousins* (n 40) 139 (Lord Denning MR).

[192] '[I]n the economic sphere … some deliberate harm may unquestionably be caused … the common law should not, unless the law has itself outlawed the means used, impose liability': Weir (n 9) 77.

[193] Fridman, ''Interference with Trade or Business' (Pt 2)' (n 186) 119.

[194] Heydon, 'Justification in Intentional Economic Loss' (n 22) 177.

[195] 'A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others': *JSC BTA Bank v*

appropriate dividing line between hard-nosed business strategy and practice designed to further the defendant's interests but possibly damaging to a competitor, but which the law should permit in a free market economy,[196] and behaviour which should not be countenanced because, on balance, the courts have found the damage such behaviour is likely to cause outweighs the benefit.[197] It is conceded that this is a value judgment about which reasonable minds will differ. However, the distinction between lawful and unlawful actions is knowable and workable.

D *'Intentional'*

The tort should embrace a requirement of intent. This is another important control mechanism.[198] The plaintiff would need to establish the defendant, by their behaviour, intended to injure them. Formulated as such, the tort would likely fully encompass the current tort of inducing breach of contract, concerning unlawful behaviour in the

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Khrapunov [2018] UKSC 19, [10] (Lords Sumption and Lloyd-Jones for the Court).

196 The Supreme Court noted in *JSC BTA Bank v Khrapunov* (n 195) that 'the successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy': at [6] (Lords Sumption and Lloyd-Jones for the Court). See also *Perre v Apand Pty Ltd* (n 10) 299: 'the market economy treats rivalry between participants as an essential and defining feature; rivalry in which each participant seeks to maximise its profit and market share at the expense of all other participants in that market'.

197 I respectfully agree with Lord Nicholls in *OBG Ltd v Allan* (n 13) 53: 'the gist of this tort (of interference with trade or business by unlawful means) is intentionally damaging another's business by unlawful means. Intention is an essential ingredient. The tort is not one of strict liability for harm inflicted on another's business … but intent to harm is not enough. Intentional harm of another's business is not of itself tortious. Competition between business regularly involves each business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognizes the economic advantages of competition'.

198 '[T]he concept of intention … provides the core justification for, and the principal limit on, the intentional harm tort': Sales and Stilitz (n 93) 425.

form of an accessory to a contract breach, together with the mental element of intent. Foreseeability would not be sufficient.

It would fully encompass the current tort of intimidation, involving threats of unlawful behaviour together with intent.[199] It would fully encompass the unlawful means aspect of the tort of conspiracy, based as it is on notions of proof of unlawful behaviour, and intention to damage the plaintiff. If subsumed into a new tort of unlawful damage to commercial interests, the requirement of a combination would become redundant.[200] The proposed new tort would not readily encompass that known as lawful means conspiracy, because the gist of the proposed new tort would be *unlawful* behaviour. As a result, either that aspect of conspiracy should remain as a separate tort, or else it should no longer be regarded as a common law wrong. It should be acknowledged that behaviour that might at common law have been regarded as lawful means may be converted to unlawful means due to the anti-competitive practice provisions of the *Australian Competition and Consumer Act 2010* (Cth),[201] in any event. Conduct that is within

[199] As noted above Mason JA in *Sid Ross Agency v Actors and Announcers Equity Association of Australia* (n 180) acknowledged links between the tort of intimidation and the tort of unlawful interference with business relations, referring to whether the tort of intimidation was separate or not: at 766. This is similar to the observation of Lord Hodson in *Rookes v Barnard* where he referred to two historic decisions generally considered to be early examples of the tort of unlawful interference with commercial interests, suggesting they might now be considered examples of the tort of intimidation. 'Intimidation has often been taken as simply an example of a wider tort — intentionally causing loss by unlawful means': Heydon, 'The Future of the Economic Torts' (n 8) 6. Glasbeek called the actions 'analogous': Glasbeek (n 51) 225. 'The tort of intimidation should be regarded as one example of this … tort [intentionally causing loss by unlawful means]': Sales and Stilitz (n 93) 435.

[200] 'With respect to the other "industrial torts" [other than lawful means conspiracy] it is obvious that the continued rise of the tort of "unlawful interference" should lead to their increasing redundance': Mitchell (n 141) 449.

[201] Specifically s 45, which prohibits the making of an agreement with the purpose *or* likely effect of substantially lessening competition, giving effect to such a provision, and concerted practice with the purpose or effect of substantially lessening competition. Section 45DA prohibits secondary boycotts; in other words, it is unlawful for two organisations to engage in conduct which hinders or prevents a third person from supplying goods or services, or acquiring goods or services from a fourth party, for the purpose, *and* with the likely effect, of substantially reducing competition. Section 45D similarly operates where the

these prohibitions should be regarded as 'unlawful means' within the proposed new tort. Obviously, that legislation may also provide plaintiffs with a remedy in such cases. Though not essential for the argument, there is an interesting congruence between the anti-competitive provisions of the above legislation and the proposed tort here, in that intention to harm another is central to the wrongfulness of the behaviour proscribed by the legislation, and proposed in the common law tort.[202]

It would fully encompass the current *Lumley v Gye* tort of inducing a breach of contract. Once the definition of unlawful act is taken to include breach of a contract, including being an accessory to its breach by encouraging or coercing it, there is no real controversy with subsuming it into the broader tort. Both require unlawful acts and focus on the intent with which the defendant acted. But recognition of the new tort will make things easier. No longer will it be necessary to continue to stretch the *Lumley v Gye* tort ever broader, to try to make it fit circumstances where the court thinks that an actionable wrong has been committed, but the present technical parameters of the tort have prevented it, which has effectively been the history of *Lumley* as discussed above.[203] The suggestion that *Lumley v Gye* should be seen as part of the broader tort of unlawful interference with commercial

conduct is committed for the purpose, *and* is likely to have the effect, of substantially damaging the plaintiff. See also ss 45AF and 45AG with respect to making an agreement containing a cartel provision and giving effect to such a provision, respectively. Cartels might make an agreement in relation to price or in relation to preventing or restricting the production, capacity to produce, or supply of goods or services with the purpose and likely effect of substantially lessening competition, acquisition of such good or service, or an agreement concerning segmenting the market by customer or geographic location, or in relation to bidding practices for work.

[202] Further, the existence of the anti-competitive provisions in the *Competition and Consumer Act 2010* (Cth) does not obviate the need for reform of the common law principles, because the common law principles apply to a much broader range of conduct than that regulated by the legislation.

[203] For example, witness the attempts by some judges to stretch the principle in *Lumley v Gye*, known for the tort of inducing breach of contract, to cases where there is in fact no contract and/or no breach: *Temperton v Russell* (n 34); *Torquay Hotel Co Ltd v Cousins* (n 40) 138 (Lord Denning MR).

interests has been suggested by various justices and academics.[204] However, obviously this was not the direction taken in *OBG,* though Lord Hoffmann noted there was often overlap between the two torts in practice.[205]

E S*ubstance Not Form*

An advantage of the new approach is that it breaks down some of the technicalities of the existing case law. For example, some might argue in cases such as *Torquay Hotel* that an individual who hinders or makes it difficult to perform an existing contract, but does not induce its breach, should be subject to legal sanction. However, due to the parameters of the traditional *Lumley v Gye* action, a plaintiff so affected could not claim. Further, cases like *Temperton v Russell* provide an example where the defendant's behaviour was targeted to ensure a contract is never formed between the plaintiff and a third party. Again, under the traditional technicalities of *Lumley v Gye*, no action would be possible. Alternatively, the defendant's activity might be targeted towards deterring future contracting. Again, on a traditional *Lumley v Gye* approach, no action would be possible. Viscount Radcliffe expressed dissatisfaction with these technicalities:

> One sees again how easily a slight difference in the framing of the embargo order [by the defendant] might have avoided incitement to breach of contract, while still achieving a virtual cessation of the plaintiff's business. I cannot see it as a satisfactory state of the law that the dividing line between what is lawful and what is unlawful should run just along this contour. The essence of the matter is that the defendants … decided to use the power of their control … to put the plaintiffs out of business … when and upon what conditions they would be allowed to resume their business was left in the air. In my opinion the law should treat a resolution of this sort according to its substance, without the comparatively accidental issue whether breaches of contract are looked for and involved; and by its substance, it should be either licensed, controlled or forbidden.[206]

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[204] 'The tort of inducing breach of contract rests upon, and is but a specific application of, the broad general principle that to damage another intentionally without justification or privilege is a tort': Charles Carpenter, 'Interference with Contract Relations' (1928) 41 *Harvard Law Review* 728, 735.

[205] *OBG Ltd v Allan* (n 13) 24.

[206] *J T Stratford and Son Ltd v Lindley* (n 38) 330.

Some courts have attempted to adapt *Lumley v Gye* in a way that breaks these shackles, though the House of Lords eventually frowned upon such moves in *OBG*. These suggestions had taken the tort well away from its historical moorings. In some ways, developments of the law in this area have been reminiscent of piling more and more sand onto a sandcastle which has relatively narrow foundations. Sometimes, the better alternative is to start again, building a new sandcastle with broader foundations.

Some have argued that an advantage of a new generalised tort of unlawful damage to commercial interests is that some of these technicalities would be stripped away. The law would not be so focussed on whether there was an inducement to breach an existing contract; rather, there would be a wider net drawn over unscrupulous business behaviour. The idea would be to facilitate greater business activity, by stamping out certain sharp practice.[207] However, control mechanisms in the form of requirements of unlawfulness and intent would rein the tort in, making it manageable.

In terms of the specific changes that the reforms would make to existing Australian precedents, the result would be to:

(a) Clear up the uncertainty expressed in cases such as *Sanders v Snell*[208] as to whether Australian law recognises the tort of intentionally causing loss by unlawful means;

[207] '[I]nterference with commercial relationships will be actionable if licence to interfere with them would detract from the ability of free enterprise to flourish. The question of liability can, therefore, not be determined by drawing artificial distinctions between the interests violated on the basis that these interests are or are not enforceable as contracts. Free enterprise is promoted by giving as many people as possible as much opportunity as possible of entering into business relationships with one another. Thus an interference with such an opportunity might well give rise to a cause of action': Glasbeek (n 51) 214.

[208] *Sanders v Snell* (n 148).

(b) Remove the need for the fine distinctions made in the *Bodycorp* case to be made[209]; and

(c) Would likely remove the cause of action for lawful means conspiracy accepted by the court in *Ballard v Multiplex*.[210]

V CONCLUSION

This article has taken a contractual dispute as a catalyst for a broader discussion of the economic torts. This is an area that is in an uncertain state, and ripe for reform. It has been suggested that a court, preferably a higher court, hearing a case involving one or more of these torts take the opportunity to seriously consider reform. Firstly, it is argued that the court should recognise that the tort of intentional, unlawful interference with trade or business interests exists in Australian law. Secondly, it should reconceptualise the economic torts around this new organising principle. The existing torts of inducing breach of contract, conspiracy and intimidation should be subsumed into the new tort. This, together with the existing protection in Australian statute for the kind of anti-competitive behaviour which society should frown upon, would be an improvement to the law, breaking down technicalities in favour of broader principles capable of application to a broad range of cases, and providing a better balance between the various interests involved in such disputes. The concepts of unlawfulness and intent permeate the existing economic torts, and can be used as control mechanisms for the reconceptualised version.

[209] *Bodycorp Repairers Pty Ltd v AAMI & Martin* (n 158).
[210] *Ballard v Multiplex* (n 168).