

WILL AUSTRALIA COURTS MOVE TO A CARIBBEAN BEAT? THE QUESTION OF A STATE'S STANDING TO SUE IN THE TORT OF MISFEASANCE IN PUBLIC OFFICE

ANNA HOLMES*

It is unclear whether an Australian body politic could ever gain standing to sue in the tort of misfeasance in public office. Throughout the common law world, the question of a state's standing to sue in the tort has only arisen for judicial determination in the State of Belize. The Caribbean Court of Justice ultimately held that the State of Belize could properly plead the tort as against its own public officials. In this article, it is suggested that Australian courts will likely come to the same conclusion if ever an Australian state were to rely upon the tort of misfeasance in public office.

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* Research Associate at the Supreme Court of Western Australia, Court of Appeal. The original version of this article was submitted in fulfilment of the requirements for the degree of Bachelor of Laws with Honours at the University of Western Australia.

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I INTRODUCTION

The tort of misfeasance in public office has been said to be 'the kind of tort that makes one glad to be a lawyer', for it has 'mystery, intricate argument, arcane lore and a whole new lease of life since it reappeared from obscurity in the 1980s'.¹ Despite a history stretching back to the 17th century² and a renewed academic interest in the tort, its bounds are still undefined and its rationale remains uncertain.³ Professor Aronson, a leading academic in the field, recently catalogued an array of unresolved questions concerning this tort law 'oddity'.⁴ This paper will attempt to address just one of those questions; namely, whether an Australian Attorney-General could ever sue in the tort on behalf of the state.⁵ The central thesis of this article is that this question should be answered affirmatively, as there is no persuasive reason why standing to sue in the tort should be restricted to private individuals.

The conventional wisdom has long been that the tort of misfeasance in public office exists to provide a means for aggrieved individual members of the

¹ Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 221 (footnote omitted). Prue Vines notes that the tort was declared non-existent in *Davis v Bromley Corporation* [1908] 1 KB 170, but in *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172 the Privy Council said the tort was 'well-established'.

² *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 29 (Hirst LJ). Some trace the tort's history back further to the 1300s: see R C Evans, 'Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office' (1982) 31 *International and Comparative Law Quarterly* 640, 640. The first key case in the tort's history is generally accepted to be *Ashby v White* (1703) 92 ER 126; 2 Ld Raym 938.

³ Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427, 429; *Tampion v Anderson* [1973] VR 715, 720 (reasons of the court); *Northern Territory v Mengel* (1995) 185 CLR 307, 345; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 137 (Auld LJ); *Bonney v Ngunytju Tjitji Pirni Aboriginal Corporation* [2009] WASC 209, [38] (Beech J); *Lock v Australian Securities and Investments Commission* (2016) 111 ACSR 318, 346 at [121] (Gleeson J).

⁴ Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427, 428, 444.

⁵ I use the term 'state' as a synonym for the ten conventional Australian bodies politic, i.e. the Commonwealth, the six Australian states, the Northern Territory, the Australian Capital Territory and Norfolk Island.

public to sue public officials for damages to compensate them for harm inflicted in bad faith. That is, the cause of action exists to aid 'private persons and other entities who are asymmetrically powerless against public officials and officialdom'.⁶ Such a description of the typical plaintiff can in no way be applied to the state itself. However, this traditional understanding of the tort was challenged in 2011 when the Caribbean Court of Justice delivered judgment in the case of *Marin & Coye v Attorney General of Belize (Marin)*.⁷ The majority in *Marin* determined that the cause of action was not only available to private individuals, but also to the Attorney-General of Belize acting on behalf of the State of Belize. Therefore, the state could rely upon the tort to sue two public officials who had allegedly knowingly abused the powers of their office to sell 56 parcels of state land to a private company owned by the second defendant at almost a million dollars below market value.

Marin raises the question of whether an Australian Attorney-General might also successfully plead the tort. There is scarce academic commentary addressing this point.⁸ Aside from *Marin* and the related antecedent proceedings in Belize's courts (collectively, the *Marin* proceedings),⁹ there is no case precedent in the common law world that engages with the issue of an Attorney-General's standing to sue in the tort of misfeasance in public office as the state's representative.¹⁰

The question of a state's standing to sue in the tort of misfeasance in public office is an important topic of inquiry. From a state's point of view, a positive answer would give Australian bodies politic another tool to fight corruption

⁶ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1, [67] (Conteh CJ) (emphasis removed).

⁷ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ). Belize, like Australia, is a member of the Commonwealth and a common law jurisdiction. Belize abolished the right to appeal to the Privy Council, effective 1 June 2010. The final court of appeal is now the Caribbean Court of Justice.

⁸ This question and the case of *Marin* is discussed in John Hatchard, 'Combating Corruption: Some Reflections on the Use of the Offence and the Tort of Misconduct/Misfeasance in a Public Office' (2012) 24 *Denning Law Journal* 65, 81–87. Hatchard focuses upon comparing the tort with the crime of misconduct in public office. The issue of state standing, as raised in *Marin*, is noted as 'an interesting and potentially significant development' but is not resolved in Colin Nicholls QC et al, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd ed, 2011) 175. The issue is not touched upon in Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016).

⁹ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1; *Attorney General of Belize v Marin & Coye* [2010] Civil Appeal 25 of 2009, Court of Appeal of Belize, unreported.

¹⁰ Although the *Marin* proceedings were the first cases in which the issue of state standing was discussed in any depth, *Marin* was not the first case to allow a body politic to sue, as discussed in Part Two. See *Southern Developers Ltd v The Attorney General for Antigua and Barbuda* [2008] ECarSC 47; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.

within the public sector. A state might welcome this method of obtaining damages if it has been defrauded by a public official. State actions in the tort might also demonstrate a government's commitment to upholding the rule of law by making public officers personally accountable for their actions. At a doctrinal level, asking whether a state has standing to plead the tort of misfeasance in public office is a useful question because it allows for the tort to be analysed from a fresh angle. By adopting this frame of reference, it is hoped that some of the tort's elusive parameters might reveal themselves in a new light.

The principal focus of this article is not law reform.¹¹ Rather, this article is concerned with uncovering what the law presently is. Each of the four Parts within this article are written with this goal in mind.

Part One outlines the necessary preliminaries that must be understood before one can properly discuss the arguments for and against granting a state standing to sue in the tort of misfeasance in public office. It addresses standing rules within tort law and the appropriateness of an Attorney-General representing the state in a tort action. It also provides an overview of the tort's elements and remedies.

Part Two sets out the key argument made in the *Marin* proceedings against allowing the State of Belize to sue in the tort, and then puts forward and expands upon the majority's counter-arguments.

Part Three is concerned with two issues relating to legal duties and relationships. The first issue is whether, in order to successfully gain standing, a state plaintiff must establish that the defendant public officer breached a duty owed to the state. The second issue is whether, assuming that a state could gain standing, a state's claim would nonetheless be thwarted by principles of vicarious liability.

Finally, Part Four briefly demonstrates why consequentialist arguments against granting a state title to sue in the tort are, on balance, unpersuasive. Part Four also includes a comparison with the common law offence of misconduct in public office.

¹¹ A useful discussion of wide-ranging potential reforms concerning the tort of misfeasance in public office, as well as the law of torts more generally, is contained in Peter Hogg, Patrick Monahan and Wade Knight, *Liability of the Crown* (Carswell, 4th ed, 2011) 206–219.

It is concluded that there is no reason, either theoretical or practical, why a state should not gain standing to sue in the tort of misfeasance in public office.

II PART ONE: THE NECESSARY PRELIMINARIES

Before delving into the substance of the central thesis of this article, it is necessary to situate oneself with an introductory overview of standing requirements and the nature of the tort. Accordingly, Part One considers what it means to have standing, the appropriateness of an Attorney-General being a state's representatives in litigation, the tort's elements and the available remedies.

A *Standing Requirements in Tort Law*

To have standing is to have a legal entitlement to invoke a court's jurisdiction to hear a case.¹² The High Court has explained standing as a metaphor 'to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies'.¹³ The concept of standing should be distinguished from that of justiciability, which can also restrict access to the courts but concerns 'the overall fitness of a matter for adjudication'.¹⁴

Establishing standing is an important step in bringing a public law claim. However, the question of standing is generally unproblematic in the private law of torts, as the customary view is that there are no separate threshold tests to be proven in addition to the elements of the pleaded tort.¹⁵ If a tort's elements are

¹² LexisNexis, *Encyclopaedic Australian Legal Dictionary*, (accessed through LexisNexis online at 10 July 2016) 'Standing'. See also Leslie Stein, 'The Theoretical Bases of Locus Standi' in Leslie Stein (ed) *Locus Standi* (Law Book, 1979) 3, 3.

¹³ *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, 174, citing *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 624-632 [88]-[107].

¹⁴ Peter Johnston, 'Governmental Standing Under the Constitution', in Leslie Stein (ed) *Locus Standi* (Law Book, 1979) 173, 175-6. See also Australian Law Reform Commission, *Beyond the Doorkeeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [2.7]-[2.9]. Prue Vines writes the tort of misfeasance in public office is justiciable because the tort's malice requirement makes it appropriate for the judiciary to interfere with the impugned government action: Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 231.

¹⁵ *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 264 [43] (Gaudron, Gummow and Kirby JJ); *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 626-627 [92] (Gummow

established on the balance of probabilities, and the defendant is unable to raise a good defence, the court will be able to grant a legal remedy. It is the doctrinal limitations placed upon the bounds of each element of the tort which protect a defendant from unbounded liability.¹⁶

In the absence of a separate standing test, the question of who may sue in the tort of misfeasance in public office is to be answered by reference to the legal doctrines surrounding the tort's substantive operation, as well as its history, context and rationales. Accordingly, whilst it is beyond the scope of this article to give a detailed overview of the tort, it will be necessary to explore the tort's elements, remedies and relationships with other bodies of law in order to determine whether the state may have standing plead the tort.

B *An Attorney-General's Standing to Sue*

It should be noted at the outset that if the state is able to sue in misfeasance in public office, it will obtain standing through its Attorney-General. The state, or, as it is sometimes referred to, the Crown,¹⁷ is the executive branch of government. The executive is 'the cabinet, the ministry and the public service in each polity'.¹⁸ As an intangible body politic and juristic person,¹⁹ the state can only act through public officers, who are its agents. The Attorney-General, as a constitutionally appointed Minister of State²⁰ and the 'First Law Officer of the Crown', is the public officer who holds the power to formally instigate proceedings in the state's name.²¹

J); James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 30, citing Peter Cane, *Administrative Law* (Clarendon Press, 5th ed, 2011) 281–282.

¹⁶ Erika Chamberlain, 'The Need for a 'Standing' Rule in Misfeasance in a Public Office (2007) 7 *Oxford University Commonwealth Law Journal* 215, 216 citing Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1.

¹⁷ Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 151, footnote 42, which reads: 'Kirby J has argued that the use of "the Crown" to describe the Australian polities is historically and constitutionally incorrect. The fullest treatment of this argument is in *ACCC v Baxter Health Care Pty Ltd* (2007) 232 CLR 1; 237 ALR 512; [2007] HCA 38 at [87]–[136].'

¹⁸ Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013), 154, citing *Sue v Hill* (1999) 199 CLR 462 [87] (Gleeson CJ, Gummow and Hayne JJ).

¹⁹ *Commonwealth of Australia v Bogle* (1953) 89 CLR 229, 259 (Fullagar J).

²⁰ See, e.g. *Commonwealth of Australia Constitution Act 1901* (Cth) s 64.

²¹ *Judiciary Act 1903* (Cth) ss 61–63; *Crown Proceedings Act 1988* (NSW) s 4, 9; *Crown Proceedings Act 1980* (Qld) ss 8–9; *Crown Proceedings Act 1958* (Vic) 24–35; *Crown Proceedings Act 1993* (NT)

An Attorney-General is also a designated guardian of public rights who can represent the public in public interest litigation.²² However, arguably, it is not in the capacity as the public's guardian that an Attorney-General would sue in misfeasance in public office if a state suffers harm.²³ Although the public interest is a touchstone concept in the tort of misfeasance in public office, the tort is concerned with private rights and remedies.²⁴ The tort requires proof of special damage suffered by an identifiable plaintiff.²⁵ If a state suffers harm then the state, in its corporate capacity and in its own right, is affected. A democratic state may represent the citizenry and hold assets on trust for its people, but this does not mean that a harm inflicted upon the state is a harm for which members of the public can seek legal redress.²⁶ For reasons explained in Part Four, if a public officer has intentionally breached his or her duties to the public, the relevant state may vindicate the public interest by charging the wrongdoer with the common law criminal offence of misconduct in public office. Consequently, if any of the ten²⁷ bodies politic in Australia decide to sue in misfeasance in public office, the Attorney-General should bring the action in the state's own name.²⁸

s 5, 16–17; *Crown Proceedings Act 1992* (SA) s 5, 9, 16(3); *Crown Proceedings Act 1993* (Tas) s 5, 16; *Court Procedures Act 2004* (ACT) ss 21, 26–27; *Crown Suits Act 1947* (WA) ss 5, 7.

²² *Gouriet v Union of Post Office Workers* [1978] AC 435, 477 (Wilberforce LJ); *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493, 526 (Gibbs CJ), 537 (Stephen J). For a discussion of the public interest role of the Attorney-General see Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) 85 [155] ff.

²³ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [22] (de la Bastide PCCJ and Saunders JCCJ), [50] (Bernard JCCJ), [86] (Wit JCCJ). Cf. *Attorney General of Belize v Marin & Coye* [2010] Civil Appeal 25 of 2009, Court of Appeal of Belize, unreported [21]–[23] (Mottley P, Sosa and Morrison JJ agreeing).

²⁴ Compare with the tort of public nuisance.

²⁵ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 231 (Hobhouse LJ).

²⁶ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [86] (Wit JCCJ).

²⁷ The Commonwealth, the six states, the Northern Territory, Australian Capital Territory and Norfolk Island. For commentary on the legal structure of these entities, see Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 151.

²⁸ This conclusion makes it unnecessary to consider whether allowing the state to sue in its own right would raise the prospect of states suing as *parens patriae* in other torts, as *parens patriae* is an incident of an Attorney-General's role as guardian of the public interest: see *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [110] (Wit JCCJ) cf [121], [152] (Anderson CJJC). This is not to say that an Attorney-General could never bring a representative proceeding on behalf of a group of persons particularly affected by the malicious acts of a public official. However, the question of when this tort might be called upon in a representative action is beyond the scope of this article.

C *The Tort's Elements*

The tort of misfeasance in public office is derived from the action on the case.²⁹ Consequently, damage is the gist of the action and it is essential for a plaintiff to demonstrate that they have personally suffered compensable harm as a result of the defendant's acts or omissions.³⁰ It can only be committed by public officers³¹ who deliberately³² abuse public power or authority while acting³³ (or purporting to act)³⁴ in their official capacity;³⁵ hence the title of the tort. The tort is concerned with the wrongful exercise of executive power.³⁶ As such, it

²⁹ *Farrington v Thomson & Bridgland* [1959] VR 286, 293 (Smith J); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 231 (Lord Hobhouse).

³⁰ *Farrington v Thomson & Bridgland* [1959] VR 286, 293 (Smith J); *Tampion v Anderson* [1973] VR 715, 720 (reasons of the court); *Pemberton v Attorney-General (Tas)* [1978] Tas SR 1, 12 (Neasey J), 26 (Chambers J); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 231 (Hobhouse LJ); *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395. Cf. *Ashby v White* (1703) 92 ER 126; 2 Ld Raym 938; *Ashby v White* (1704) 1 Brown 62, where a case regarding deprivation of the right to vote did not require proof of special damage in order to be actionable. Causation of damage is relevant, but foreseeability of damage is not: *Northern Territory v Mengel* (1995) 185 CLR 307, 358 (Brennan J). See generally, Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity' in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998), 340, 348–349.

³¹ The tort is structured around the 'classifier's device' of public officials: Paul Finn, 'Law and History in Four Parts' (2005) *Australian and New Zealand Law and History Society E-Journal* 239, 247. No restrictive test applies to determining who is a public officer: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191 (Steyn LJ), citing *Jones v Swansea City Council* [1990] 1 WLR 1453. In fact, there is no authoritative test at all, and in most cases the answer will be obvious: *Leerdam v Noori* (2009) 255 ALR 553, 554 [3] (Spigelman CJ). Not all public employees are public officers: *Pemberton v Attorney-General (Tas)* [1978] Tas SR 1, 12 (Neasey J), citing *Tampion v Anderson* [1973] VR 715, 720 (reasons of the court). For an explanation of the distinction see Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity' in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998), 340, 346–348. Members of Parliament are public officers: *R v Boston* (1923) 33 CLR 386. At common law, a collective entity, such as council or government department, may be a 'public officer': *Jones v Swansea City Council* [1990] 1 WLR 1453; *Bourgoin SA v Ministry of Agriculture, Fisheries & Food* [1986] QB 716; *Dunlop v Woollahra Municipal Council (No 2)* (1981) 45 LGRA 411, and on appeal in *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172 (Diplock LJ). Note that in the State of Victoria direct liability of the Crown is excluded by the *Crown Proceedings Act 1958* (Vic) s 23, see in this regard *Grimwade v Victoria* (1997) 90 A Crim R 526.

³² *Northern Territory v Mengel* (1995) 185 CLR 307, 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ): 'it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power.'

³³ The tort also extends to deliberate failures to act: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 236–237 (Millett LJ); *Northern Territory v Mengel* (1995) 185 CLR 307, 356 (Brennan J).

³⁴ *Cornelius v London Borough of Hackney* [2002] EWCA Civ 1073 [17] (Waller LJ); *Northern Territory v Mengel* (1995) 185 CLR 307, 355–356 (Brennan J).

³⁵ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191 (Steyn LJ).

³⁶ Although the tort has also been held to apply to the exercise of a private law power by a public body: *Jones v Swansea City Council* [1990] WLR 1453, which indicates that it is the nature of the office that is most important, rather than the classification of the power being exercised; see also Simone Deakin,

confounds the divide between public law and private law, and it has been labelled the 'common law's only truly public tort'.³⁷ It is notoriously difficult to prove, largely because it requires evidence of conscious wrongdoing.³⁸ The tort cannot be committed negligently or inadvertently,³⁹ and 'the invalidity of an official's act does not in itself constitute a cause of action'.⁴⁰ The plaintiff must establish that the public officer had intended to harm the plaintiff. That intention may be in the form of 'targeted malice', where the public officer's primary intent was to harm the plaintiff.⁴¹ It can also be found to exist in an 'untargeted' form if the public officer is shown to have known that the plaintiff would likely be harmed by the act or omission, or if the public officer acted with reckless indifference as to the probability of harming the plaintiff.⁴² If the plaintiff is relying on the 'untargeted malice' formulation, it must also be shown

Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 7th ed, 2013), 339. Statutory corporations may be liable in the tort: *Gimson v Victorian Workcover Authority* [1995] 1 VR 209, 225–226 (McDonald J, who did not make a final determination on this point); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1. In Australia, it appears as though the tort can apply to judicial officers: *Cannon v Tahche* (2002) 5 VR 317, 333–336, [41]–[48]; *Northern Territory v Mengel* (1995) 185 CLR 307, 355–356 (Brennan J). In New Zealand, District Court judges come within the scope of the tort: *Rawlinson v Rice* [1998] 1 NZLR 454.

³⁷ Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 2, citing *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J) and Robert J Sadler, 'Liability for Misfeasance in a Public Office' (1992) 14 *Sydney Law Review* 137, 138–139.

³⁸ Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427, 427–428. Prue Vines writes that in Australia, between 2002 and 2010, there were about 80 misfeasance actions, of which five were successful: Prue Vines, 'Private Rights and Public Wrongs: The Tort of Misfeasance in Public Office' (2012) 111 *Precedent* 4, 4, 5. In Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2009) 801, it is written that 'the lack of success of [misfeasance] claims, with some notable exceptions, suggests that such pleadings may be in part the product of desperation'.

³⁹ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 228 (Hutton LJ), 235 (Millett LJ); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J), cited in *Lock v Australian Securities and Investments Commission* (2016) 111 ACSR 318, 346 [123] (Gleeson J).

⁴⁰ Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Law Book, 1982) 118: 'the invalidity of an official's act simply means that the public character of his position gives him no defence if his act be tortious.'

⁴¹ *Northern Territory v Mengel* (1995) 185 CLR 307, 345, 347 (plurality), 356–357 (Brennan J); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191 (Steyn LJ); see, for example, *Roncarelli v Duplessis* [1959] SCR 121, 139–142 (this case was not decided on the basis of the tort, but Rand J thought that liability could equally be established at common law).

⁴² *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (plurality), 357 (Brennan J); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191 (Steyn LJ); *Akenzua v Secretary of State for the Home Department* [2003] 1 WLR 741, 746 (Sedley LJ); *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 [22]–[23], [38] (Iacobucci J).

that the public officer knew that they were acting in excess of their power or were reckless as to the limits of their authority.⁴³

The intentional elements of misfeasance in public office make the tort an exception to ‘the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him [or her] liable.’⁴⁴ When the conduct involved is extremely culpable and compensation alone is an inadequate remedy, the Director of Public Prosecutions may decide to prosecute the public official for committing the closely related common law criminal offence of misconduct in public office.⁴⁵

D *The Available Remedies*

Assuming that the plaintiff is able to prove each of the elements on the balance of probabilities, and the defendant is unable to raise a good defence, the court will be able to order that the defendant be liable to pay the plaintiff damages. The ability to obtain a monetary remedy for the misfeasance of public officers is significant because no counterpart exists in the law of judicial review. Therefore, the tort of misfeasance in public office is sometimes referred to as an unorthodox means of obtaining pecuniary relief for improper administrative action.⁴⁶

⁴³ *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 [22]–[23] (Iacobucci J); See *B v Reading BC* [2009] 2 FLR 1273, where an inference of untargeted malice could not be made. This further step is not required when the plaintiff is relying on the ‘targeted malice’ formulation of the tort because the targeted intent to harm the plaintiff is ‘inconsistent with an honest attempt by a public officer to perform the functions of the office’ and is clearly beyond the power: *Northern Territory v Mengel* (1995) 185 CLR 307, 356–357 (Brennan J); *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 [23] (Iacobucci J); *Cornwall v Rowan* (2004) 90 SASR 269, 325 [215].

⁴⁴ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 190 (Steyn LJ), quoting Percy Winfield, John Jolowicz and William Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 15th ed, 1998) 55, an citing *Bradford Corporation v Pickles* [1895] AC 587; *Allen v Flood* [1898] AC 1.

⁴⁵ Law Commission of England and Wales, *Misconduct in Public Office: The Current Law*, Issue Paper No 1 (2016) [5.58]–[5.59]. For a good explanation of the crime of misconduct in public office, see David Lusty, ‘Revival of the Common Law Offence of Misconduct in Public Office’ (2014) 38 *Criminal Law Journal* 337. For an overview of the related statutory offences see Colin Nicholls QC et al, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd ed, 2011) 615 ff. The criminal offence is discussed further in Part Four.

⁴⁶ Jeremy McBride, ‘Damages as a Remedy for Unlawful Administrative Action’ (1979) 38(2) *Cambridge Law Journal* 323; RC Evans, Damages for Unlawful Administrative Action: The Remedy for Misfeasance in public office (1982) 31 *International and Comparative Law Quarterly* 640; Heather Williams QC, *Damages Claims Against Public Authorities: Intentional Torts* (2007) *Judicial Review* 145; Harry Wruck QC, The Continuing Evolution of the Tort of Misfeasance in Public Office (2008)

Most commonly, compensatory damages are awarded,⁴⁷ since the dominant purpose of civil actions is compensation.⁴⁸ However, because the tort of misfeasance in public office is an intentional tort, it is also open for courts to order exemplary damages to deter further wrongdoing and to indicate that the conduct involved is morally repugnant.⁴⁹ The High Court has observed that 'exemplary damages may serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power" and "oppressive, arbitrary or unconstitutional action by the servants of the government"'.⁵⁰ An award of exemplary damages 'also embraces the notion that such an award will assuage the victim's potential desire or need for revenge and thus avoid any temptation to engage in self-help likely to endanger the peace'.⁵¹ In the words of Richard Moules, '[a]wards of exemplary damages are likely to be relatively common in successful misfeasance cases, since by definition the defendant will have been found to have exercised its powers unlawfully and in bad faith'.⁵² However, in

41(1) *University of British Columbia Law Review* 69; Steven Gardiner, 'Finding a Remedy for the Wrong: The Potential for a Monetary Remedy in Judicial Review' (2013) available online at <<http://ssrn.com/abstract=2377139>>; Peter Hogg, Patrick Monahan and Wade Knight, *Liability of the Crown* (Carswell, 4th ed, 2011) 197 fn 218.

⁴⁷ See commentary in Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity' in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998), 340, 362, where it is noted that compensatory damages can be difficult to assess in cases involving cancellation and refusal of licences, e.g. *Roncarelli v Duplessis* [1959] SCR 121. Unlike the tort of negligence, the award of damages is not limited by the concept of foreseeability: *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 352-353, [100], [103] (Spigelman CJ).

⁴⁸ *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 409-410 (Bingham LJ), 410-411 (Hope LJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (A), [122] (Anderson JCC).

⁴⁹ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 123 (McTiernan J), 131-132 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J); *Sanders v Snell* (1997) 143 ALR 426 (the award of exemplary damages was not in issue in the High Court appeal: *Sanders v Snell* (1998) 196 CLR 329); *Kuddus v Chief Constable of Leicester Constabulary* [2002] 2 AC 122; *Cornwall v Rowan* (2004) 90 SASR 269, 443 [787]; *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395; *Fernando v Commonwealth of Australia (No 4)* (2010) 119 ALD 371. The punitive function of the tort can be traced back to *Ashby v White* (1703) 92 ER 126; (1703) 2 Ld Raym 938; Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 162-163.

⁵⁰ *New South Wales v Ibbett* (2006) 229 CLR 638, 649 [39] (plurality), quoting *Rookes v Barnard* [1964] AC 1129, 1223, 1226 (Devlin LJ).

⁵¹ *Whitbread v Rail Corporation New South Wales* [2011] NSWCA 130 [214] (Whealy JA), citing *Lamb v Cotogno* (1987) 164 CLR 1, 8-13; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138; Harold Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (LexisNexis Butterworths, 2006) 98-99 [7.2].

⁵² Richard Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009) 231 [5-087].

practice, exemplary damages are not always granted, perhaps partly because they can be easily disguised as aggravated damages.⁵³

It is possible for a court to make an award of aggravated damages when faced with misfeasance in public office. Aggravated damages are a form of general damages ‘given by way of compensation for injury to the plaintiff, though frequently intangible, resulting from the circumstances and manner of the defendant’s wrongdoing’.⁵⁴ They are appropriate when the defendant committed the tort in an arrogant or humiliating way, thus worsening the injury to the plaintiff.⁵⁵ The High Court has stated that that ‘[a]ggravated damages, in contrast to exemplary damages, are compensatory in nature being awarded for injury to the plaintiff’s feelings caused by insult, humiliation and the like.’⁵⁶ However, a state cannot sue for aggravated damages because a state is an incorporeal body that cannot suffer hurt feelings.⁵⁷ Therefore, this head of damages would be irrelevant if a state was to sue in the tort of misfeasance in public office.

III PART TWO: UNPICKING THE DISSENTING JUDGMENTS IN *MARIN*

A *An Overview of the Marin Proceedings*

It is useful to first turn to the *Marin* proceedings in order to determine if a state can be a proper plaintiff in an action for the tort of misfeasance in public office.⁵⁸ Before the original proceedings in that matter were brought in the

⁵³ Mark Aronson, ‘Misfeasance in Public Office: Some Unfinished Business’ (2016) 132 *Law Quarterly Review* 427, 442 fn 107: ‘Exemplary damages are available, but are rarely granted’. Another reason for the rarity of exemplary damages might be that exemplary damages are generally awarded when the wrongful conduct in question is so oppressive that it far exceeds meeting the basic elements of the tort. This additional arbitrary or outrageous behaviour is harder to establish when the elements of the tort are already centrally concerned with bad faith.

⁵⁴ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129–130 (Taylor J).

⁵⁵ Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 161.

⁵⁶ *Lamb v Cotogno* (1987) 164 CLR 1, 8; cited by the court in *Sanders v Snell* (1997) 143 ALR 426, 499 (the award of exemplary damages was not in issue in the High Court appeal: *Sanders v Snell* (1998) 196 CLR 329). See also Tina Cockburn, ‘Personal Liability of Government Officers in Tort and Equity’ in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998) 363–364.

⁵⁷ *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308.

⁵⁸ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1; *Attorney General of Belize v Marin & Coye* [2010] Civil Appeal 25 of 2009, Court of Appeal of Belize, unreported; *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ).

Supreme Court of Belize, no court had ever questioned whether a state could sue for misfeasance in public office. Notably, the parties in *Marin* at first proceeded on the basis that there was nothing problematic with the Attorney-General filing the action. It was only the judge at first instance, Chief Justice Conteh, who, in a case management hearing, flagged the issue of standing and directed a separate trial of the issue as a preliminary matter.⁵⁹ What followed was a prolonged legal saga lasting almost two years. The two defendants won at first instance, but the Attorney-General prevailed before both the Court of Appeal of Belize, which gave a unanimous judgment, and the Caribbean Court of Justice, where two judges jointly dissented. In total there were two sets of reasons written in favour of the defendants⁶⁰ and four in favour of the Attorney-General of Belize.⁶¹

Acknowledging that 'the [s]tate may sue in some or even most torts',⁶² it is logical to ask why the dissenting judges in the *Marin* proceedings wished to restrict a state's standing to sue in the tort of misfeasance in public office. The essential points of their argument are as follows. First, throughout the long history of the tort of misfeasance in public office, the ordinary plaintiff has been an 'individual', in the sense of 'a private person or non-governmental entity'.⁶³ Second, there is no room to read into the term 'individual' a reference to the state because the tort's purpose is to aid those who are 'asymmetrically' powerless against the state.⁶⁴ Third, it would be unjust to let the state put itself in the shoes of individuals to gain the benefit of the tort when the state, by

⁵⁹ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1, [7]–[8] (Conteh CJ); *Attorney General of Belize v Marin & Coye* [2010] Civil Appeal 25 of 2009, Court of Appeal of Belize, unreported [32] (Mottley P); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [2] (de la Bastide PCCJ and Saunders JCCJ).

⁶⁰ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [1]–[44] (joint judgment of de la Bastide PCCJ and Saunders JCCJ).

⁶¹ *Attorney General of Belize v Marin & Coye* [2010] Civil Appeal 25 of 2009, Court of Appeal of Belize, unreported (Mottley P, Sosa and Morrison JJA agreeing); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) (Bernard, Wit and Anderson JCCJ) each wrote their own individual reason for judgment).

⁶² *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [22] (de la Bastide PCCJ and Saunders JCCJ), citing Belize's equivalent to Australia's various Crown Proceedings Acts: *Constitution of Belize 1981* s 42(5), [71] (Wit JCCJ).

⁶³ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [55] (Conteh CJ). *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [14]–[21] (de la Bastide PCCJ and Saunders JCCJ).

⁶⁴ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [67] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [25] (de la Bastide PCCJ and Saunders JCCJ).

virtue of its great power, has alternative means of legal redress against misbehaving public officials.⁶⁵

These three points in favour of restricting a state's standing to sue in the tort of misfeasance in public office are at first persuasive. Yet none of these arguments withstand scrutiny. The remainder of this Part is concerned with expanding upon the counter-arguments raised by the majority in *Marin*.

B *The Lack of Historical Precedent*

The dissenting judges' first key point was that there was no historical precedent to support granting a state standing to sue in the tort of misfeasance in public office. The dissenting judges cite an impressive body of case law⁶⁶ concerning the tort in which the word 'plaintiff' is used interchangeably with terms such as 'individual',⁶⁷ 'member of the public'⁶⁸ and 'citizen'.⁶⁹ These cases span from the tort's early beginnings to recent history, including the high profile House of Lords case of *Three Rivers District Council v Bank of England [No 3]* (*Three Rivers*);⁷⁰ a case which helped define the modern tort. The judicial pronouncements in the cases cited were said to be 'statements of general application' that precluded a state from becoming a plaintiff in an action for misfeasance in public office.⁷¹

It is true that the vast majority of cases concerning the tort of misfeasance in public office relate to plaintiffs who are private individuals. But this is not to

⁶⁵ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [24] (de la Bastide PCCJ and Saunders JCCJ).

⁶⁶ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [55] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [10], [14]–[21] (de la Bastide PCCJ and Saunders JCCJ).

⁶⁷ *Henley v The Mayor and Corporation of Lyme Regis* (1828) 5 Bing 91; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 [30] (Iacobucci J); *Farrington v Thomson & Bridgland* [1959] VR 286; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 192 (Lord Steyn).

⁶⁸ *Jones v Swansea City Council* [1990] 1 WLR 54, 85; *Garrett v The Attorney-General* [1997] 2 NZLR 332, 350; *Re Attorney General's Reference (No 3 of 2003)* [2005] QB 73, 88 [48] (reasons of the court) (private corporations were included in the term); *Tampion v Anderson* [1973] VR 715, 720 (reasons of the court); *Cannon v Tahche* (2002) 5 VR 317, 328 [28] (reasons of the court); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 227 (Lord Hutton), 236 (Lord Millett).

⁶⁹ *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 424 [75] (Lord Walker); *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 [30] (Iacobucci J); *Gershman v Manitoba Vegetable Producers' Marketing Board* (1976) 69 DLR (3rd) 114, 123.

⁷⁰ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.

⁷¹ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [21] (de la Bastide PCCJ and Saunders JCCJ).

say that before the *Marin* proceedings a body politic had never gained standing to sue in the tort. The dissenting judges in the *Marin* proceedings did note the earlier case of *Southern Developers Ltd v The Attorney General of Antigua & Barbuda*,⁷² in which the Attorney-General was allowed to bring an action in the tort. Yet their Honours dismissed it as an anomaly because in that case the question of standing did not arise for discussion.⁷³ Another irregular case that had to be reconciled by the dissenting judges was *Three Rivers*.⁷⁴ In that case, a district council, along with thousands of other depositors, sued the Bank of England for misfeasance in public office. Chief Justice Conteh, giving the first instance judgment in the *Marin* proceedings, rationalised this outcome in *Three Rivers* by noting that the district council was just like any other regular client of the bank and so its position was inseparable from that of a private individual.

Chief Justice Conteh conceded that *Three Rivers* demonstrates that, in an appropriate context, a public authority can invoke the tort.⁷⁵ Implicit in this admission appears to be the understanding that when the body politic uses its corporate personality to act just like a natural person or a private corporation, the rationale for treating a state actor differently to any other potential plaintiff falls away. This admission is particularly relevant in the Australian context now that states are increasingly becoming commercial players that often adopt a corporate structure in order to conduct their business.

In the light of Chief Justice Conteh's admission regarding *Three Rivers*, it seems curious that the dissenting judges in *Marin* did not question whether the State of Belize was acting in its private capacity. In *Marin*, the land allegedly wrongly sold below value was not Crown land held on behalf of the public; it was private land that could be bought and sold by the state, a corporation or a natural person. As noted by Justice Wit in *Marin*, even though the State of Belize is democratic, its land is its own; it is not the people's land.⁷⁶ On the facts,

⁷² *Southern Developers Ltd v The Attorney General of Antigua & Barbuda* (2008) HCVAP 2006/020A, unreported. Note that in later proceedings in the High Court of Justice, Remy J relied upon the majority decision in *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) in order to find that the Attorney-General could sue in the tort: *The Attorney General of Antigua & Barbuda v Southern Developers Ltd* (2013) ANUHCV 2005/0512, unreported [54].

⁷³ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [63]–[64] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [13] (de la Bastide PCCJ and Saunders JCCJ).

⁷⁴ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.

⁷⁵ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [58] (Conteh CJ).

⁷⁶ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [86] (Wit JCCJ).

the State of Belize was arguably a regular landholder just like any other, and so could have gained standing on that basis.

The tort of misfeasance in public office has a long history⁷⁷ and is still evolving. It has been declared dead⁷⁸ only to rise again over the past forty years as a newly formed tort bearing little resemblance to its prior self. This is not a tort whose rules of standing have been calcified by time so that they must be applied doctrinally unless and until the legislature decides upon a modification. As Lord Justices Hirst and Walker cautioned in *Three Rivers* after reviewing the tort's development:⁷⁹

These dicta by judges of high authority ... tend in our judgment to suggest that the law on misfeasance in public office is not set in stone, and that it is susceptible of judicial development in the time-honoured tradition of the common law, particularly as the tort has a potential application in such a wide variety of circumstances affecting an extensive range of authorities. It follows that in our judgment we should not be unduly prescriptive in defining the ingredients of the tort.

That there is scarce precedent supporting a state's right to sue in the tort of misfeasance in public office should not be considered fatal when the tort is still surrounded by so much uncertainty.⁸⁰ What is most important is that there is no express bar in the case law preventing Australian courts from finding that a state has standing to sue in the tort. Although judges in past cases often talk of the ordinary plaintiff being an individual, their language should be read in its factual context. A restrictive rule of standing should not be extrapolated from cases in which the question of a state's standing to sue was not being contemplated.

C The Tort's Rationales

The second key point raised by the dissenting judges in the *Marin* proceedings was that individuals are asymmetrically powerless against public officials, whereas a state is not, and so the tort's ultimate purpose is the protection of

⁷⁷ See RC Evans, Damages for Unlawful Administrative Action: The Remedy for Misfeasance in public office (1982) 31 *International and Comparative Law Quarterly* 640; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 29, 57–58 (Hirst LJ), 189–190 (Steyn LJ).

⁷⁸ *Davis v Bromley Corporation* [1908] 1 KB 170, 172–173 (Vaughan Williams LJ).

⁷⁹ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 34 (Hirst LJ, writing for himself and on behalf of Walker LJ).

⁸⁰ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [90]–[93] (Wit JCCJ).

private individuals.⁸¹ Yet if one unpacks the concept of power asymmetry, it can be seen that it is not the tort's primary rationale, and so the concept should not limit state standing. The better view, and the view adopted by the majority in *Marin*, is that the tort's fundamental guiding principle is the rule of law.⁸² Any plaintiff, whether they be a private individual or a body politic, should have standing to uphold the rule of law.

1 *Power Asymmetry*

It is correct to pay particular regard to the unique power of public officials in establishing the cause of action, as the abuse of this power by a public official is a key element of the tort of misfeasance in public office. Yet this does not mean that it is also correct to focus upon the great power of a state when asking whether that state should gain standing to sue in the tort. It is one thing to sue a wrongdoer for the abuse of their power. It is another thing entirely to say that a plaintiff's power is already too great and so it should not be able to be further strengthened by being given an opportunity to win in a tort action.

Inequality of power, per se, is not something that the common law is concerned with remedying. Although the excesses of liberal economic theory are tempered in Australia through various regulations, our society is a capitalist model. Our legal system operates upon the understanding that not all actors have equal power and that it is legitimate for each individual to use legal means to amass control and finances at others' expense.⁸³ Incidentally, it is this economic model that has given rise to large multinational companies that occasionally accrue power enough to rival that of the state.⁸⁴ An assumption that the state is all-powerful when compared to all corporations and individuals within its jurisdiction is debatable.⁸⁵ But in any event, it is necessary to look at

⁸¹ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [67] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [24]–[25] (de la Bastide PCCJ and Suanders JCCJ).

⁸² This view was adopted by the majority *Marin: Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [48] (Bernard JCCJ), [78]–[79] (Wit JCCJ).

⁸³ *Sanders v Snell* (1998) 196 CLR 329, 341–342 [31] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 306 [347] (Hayne J).

⁸⁴ Consider the historical example of the Dutch East India Company, as well as present-day corporations such as Walmart and Apple.

⁸⁵ See, for example, Thomas Biersteker, 'The Illusion of State Power: Transnational Corporations and the Neutralization of Host-Country Legislation' (1980) 17(3) *Journal of Peace Research* 207; Douglas Bennett and Kenneth Sharpe, *Transnational Corporations Versus the State: The Political Economy of*

the nature of a state's power to see whether its inequality with other actors warrants curtailing its standing to sue in the tort.

There is often an inverse relationship between a state's power and the power of an individual within that state to pursue their own self-interest. Thus there must be a limit to state power. Fittingly, the law does not treat public officials just like 'a free agent in a free market', as they are constrained to not act in their own interest.⁸⁶ Further, the entire field of administrative law is predominantly founded on the proposition that abuses of a government's executive power are particularly threatening to the liberal democratic ideals, and are thus in need of specialised means of supervision and redress. But whilst it can be accepted that the state must have its power checked, this fact has never justified restricting a state's standing to apply for judicial review⁸⁷ or to sue in other torts such as negligence. In the context of negligence (and, as discussed below, perhaps too in the context of the tort of misfeasance in public office),⁸⁸ power asymmetry is only relevant insofar as it helps establish a duty of care. It can be said in relation to state plaintiffs that '[s]ince a harmful, invalid decision is actionable if made negligently, it seems obvious that a harmful, invalid decision should also be actionable if made deliberately'.⁸⁹ It follows that remedying power asymmetry is not a core rationale of the tort of misfeasance in public office.

2 *The Rule of Law*

The correct focal point is the abuse of public power by a public official and the harm it causes, not the relative power of plaintiff and defendant. A legal system based on the rule of law should compensate *anyone* who suffers damage caused by a public officer abusing the powers of his or her office, with the term 'anyone' encompassing the state.⁹⁰

the Mexican Auto Industry (Princeton University Press, 1985); WK Carroll et al, *The Making of a Transnational Capitalist Class: Corporate Power in the Twenty-First Century* (Zed Books, 2010).

⁸⁶ Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 12.

⁸⁷ Refer to the discussion below under heading number II.E.

⁸⁸ Refer to discussion below under heading number III.A.

⁸⁹ Peter Hogg, Patrick Monahan and Wade Knight, *Liability of the Crown* (Carswell, 4th ed, 2011) 197.

⁹⁰ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [79] (Wit JCC).

The rule of law is a cornerstone of Australia's constitutional system of government. The tort of misfeasance in public office provides a means for promoting compliance with the rule of law, as no public officer should exercise his or her power arbitrarily. Public officers have a constitutional obligation to act in the public interest.⁹¹ Powers of public officials should be clearly defined and circumscribed, with each official's powers being closely tied to the purpose of their office. If a public official abuses the power invested in him or her, then the official should personally face the legal consequences and be made subject to the laws administered by an independent judiciary in ordinary law courts.⁹² The tort of misfeasance in public office advances this aspect of the rule of law because, arguably, its deterrent effect restrains the abuse of state power and thus helps preserve individual liberty and the 'polity of a free society'.⁹³

Professor Vines cites the tort of misfeasance in public office as being 'a perfect example of Dicey's equality principle that [the rule of law requires that] public officials should be liable in the same way that private individuals are'.⁹⁴ However, in its most perfect formulation as envisaged by Dicey, the equality principle requires the state to abide by the very same laws as bind private individuals. In theory, treating the state in the same way as subjects in litigation 'has the effect both of ensuring that the government cannot claim any special exemptions and the effect of not imposing any extra burdens on government'.⁹⁵ The tort of misfeasance in public office does place a peculiar burden on the

⁹¹ *Commissioner of Taxation v Day* (2008) 236 CLR 163, 180–181 [34] (Gummow, Hayne, Heydon and Kiefel JJ) citing *McManus v Scott-Charlton* (1996) 70 FCR 16, 24, referring to *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No 2]* (1987) 10 NSWLR 86, 191; Chief Justice Robert French, 'Public Office and Public Trust' (Speech delivered at the 7th Annual St Thomas More Forum Lecture, Canberra, 22 June 2011) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun11.pdf>> 7–8. See also David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38 *Criminal Law Journal* 337, 363.

⁹² *Ashby v White* (1703) 92 ER 126, 137–138; 2 Ld Raym 938, 956–958 (Holt CJ); *Jones v Swansea City Council* [1990] 1 WLR 54, 85 (Nourse LJ).

⁹³ *Jones v Swansea City Council* [1990] 1 WLR 54, 85 (Nourse LJ). In relation to the deterrent effect, see *Ashby v White* (1703) 92 ER 126, 137; 2 Ld Raym 938, 956 (Holt CJ); *Kuddus v Chief Constable of Leicester Constabulary* [2002] 2 AC 122, 149 [79] (Hutton LJ). Prue Vines notes that the regulatory aspect of the tort is unusual, for the law of torts is usually focused primarily on compensation: Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 224–225.

⁹⁴ Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 227.

⁹⁵ Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 15 (quote taken from a discussion of the effect of the various Australian Crown Proceedings Acts).

executive because only public officials can be held liable. Uniquely, ordinary citizens are immune from suit. Therefore, the tort might better be understood as an exception to Dicey's equality principle.⁹⁶

That the tort of misfeasance in public office aligns imperfectly with the equality principle does not mean that it is a problematic tort in need of reform.⁹⁷ Nor does it detract from the conclusion that the rule of law is the tort's primary rationale. Rather, highlighting this unusual aspect of the tort helps to illustrate the well-accepted fact that it is not always possible to treat states and their public officials just like private individuals.⁹⁸ Indeed, a core justification for the tort's existence is that 'there is something especially wrong about malice or dishonesty when it comes from a public official'.⁹⁹ As Chief Justice Holt proclaimed in the early case of *Ashby v White*, '[i]f public officers will infringe mens rights, they ought to pay greater damages than other men to deter and hinder other officers from the like offences'.¹⁰⁰

In concluding that the purpose of the tort of misfeasance is to uphold the rule of law, it would be a mistake to reason that Australian courts would allow states to sue in the tort purely by reason of a public official's breach of the rule of law. The High Court made it clear in *Northern Territory v Mengel* (*Mengel*) that a breach of the rule of law is not in itself a source of legal liability.¹⁰¹ Regarding the tort of misfeasance in public office, it is the breach of the rule of law coupled with the fact of loss and the intentional elements of the tort that are essential in giving rise to the cause of action. The tort addresses certain abuses of public power, not simply moral blameworthiness.¹⁰²

⁹⁶ Geoff McLay, 'What Are We to Do with the Public Law of Torts' (2009) 7 *New Zealand Journal of Public and International Law* 373, 378; Mark Aronson, 'Some Australian Reflections on *Roncarelli v Duplessis*' (2010) 55 *McGill Law Journal* 615, 630–631; Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 42, 249.

⁹⁷ Law Commission of England and Wales, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 27 [3.23]: 'The fact that, in effect, private law works differently in relation to public bodies than in relation to others is not – of itself – problematic. Our consultation paper's underlying premise was that public bodies are special.'

⁹⁸ Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Law Book, 1982) 9, 12–13; Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 192–202.

⁹⁹ Mark Aronson, 'Some Australian Reflections on *Roncarelli v Duplessis*' (2010) 55 *McGill Law Journal* 615, 631.

¹⁰⁰ *Ashby v White* (1703) 92 ER 126, 137; 2 Ld Raym 938, 956 (Holt CJ) (sic).

¹⁰¹ *Northern Territory v Mengel* (1995) 185 CLR 307, 352–353 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

¹⁰² Mark Aronson, 'Some Australian Reflections on *Roncarelli v Duplessis*' (2010) 55 *McGill Law Journal* 615, 640.

D *The Availability of Alternate Means of Redress*

What then of the dissenting judges' third key point in the *Marin* proceedings that a state has no need for the tort because it can avail itself of other legal means of redress against its misbehaving public officials?¹⁰³ In *Marin*, Justice Anderson convincingly dismissed this argument for two reasons.¹⁰⁴ His Honour's first reason was that he had 'serious doubts that genuinely alternative actions avail the State in the circumstances'.¹⁰⁵ Multiple examples can be given in support. For example, the elements of other torts may be difficult to establish.¹⁰⁶ Regarding negligence, claims for pure economic loss are often restricted,¹⁰⁷ and in Australia, the Civil Liability Acts limit public officials' liability.¹⁰⁸ In equity, pursuing a claim for restitution may preclude an award of exemplary damages.¹⁰⁹ Further, disciplinary proceedings and criminal prosecutions have different aims to the civil action and do not necessarily result in compensation.¹¹⁰ It can be added that judicial review applications require evidence of an established ground of illegality, which might not be possible on the facts.¹¹¹

¹⁰³ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [77], [79] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [24], [27]–[36] (de la Bastide PCCJ and Suanders JCC).

¹⁰⁴ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [146]–[150] (Anderson JCC).

¹⁰⁵ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [147] (Anderson JCC).

¹⁰⁶ See, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 285–288 (Hobhouse LJ), 290 (Millett LJ). For a discussion of the tort's relationship with the tort of negligence see Richard Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009) 236–237; John Murphy (2012) 32(1) *Oxford Journal of Legal Studies* 51, 70–71; Duncan Fairgrieve, 'Damages Claims Against Public Bodies: The Role for Misfeasance in Public Office' [2007] 12 *Judicial Review* 169, 175–177.

¹⁰⁷ *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

¹⁰⁸ Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 222; Prue Vines, 'Private Rights and Public Wrongs: The Tort of Misfeasance in Public Office' (2012) 111 *Precedent* 4, 5.

¹⁰⁹ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [149] (Anderson JCC) cf. [101] (Wit JCC); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.

¹¹⁰ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [147] (Anderson JCC); See also the discussion in Part Four.

¹¹¹ John Murphy (2012) 32(1) *Oxford Journal of Legal Studies* 51, 69 – 70, see also 73 – 74. Refer also to the discussion below under heading number II.E.

Justice Anderson's second reason was that it was beside the point to ask whether the state could have recourse to other causes of action.¹¹² Such an inquiry has no bearing on the question of whether the state could sue in the tort of misfeasance in public office. As Justice Anderson phrased it:¹¹³

If the intrinsic essence of the tort is such that the Attorney General has no competence to sue, such a fact must logically be impervious to the question of whether he has other causes of action available to him. On the other hand the mere fact that other causes of action are available cannot rob the Attorney General of any competence he has to bring proceedings in tort.

This logic is applicable in Australia, where states (and private individuals) can, and often do, plead multiple causes of action in the alternative within the one statement of claim.

The scope of operation of the tort of misfeasance in public office *is* curtailed by the existence of other torts. For example, in *Mengel* the High Court took care not to let the tort encroach on the realm of negligence.¹¹⁴ The tort is confined to filling what would otherwise be a tiny gap in the common law. But restricting the tort's scope by reference to other causes of action is not the same as limiting standing to plead the tort. One is a question of content, whilst the other is the threshold question of whether the tort can be called upon. These two inquiries should not be conflated and confused.

E *A Comparison with the Public Law of Judicial Review*

Justice Anderson persuasive reasoning in *Marin* as to why it is irrelevant to consider whether there are alternative means of redress in the circumstances does not do away entirely with the need to compare the tort with other bodies of law when asking who may sue in the tort. It is relevant to ask what other means of legal redress are beyond the state's reach to see if helpful analogies might be drawn with the tort of misfeasance in public office. One such body of law is that of administrative law. Chief Justice Conteh exclaimed in an obiter remark that 'it would be very strange if not unthinkable for the Attorney

¹¹² *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [150] (Anderson JCCJ).

¹¹³ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [150] (Anderson JCCJ).

¹¹⁴ *Northern Territory v Mengel* (1995) 185 CLR 307, 348 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

General to bring, for example, a claim for judicial review!¹¹⁵ By analogy, his Honour reasoned that an Attorney-General could not avail the state of the tort of misfeasance in public office, for the tort shares administrative law's purpose of impugning wrongful official conduct and decision-making.¹¹⁶ However, Chief Justice Conteh's reasoning does not fit with the Australian experience of judicial review.

Professor Aronson recently commented in relation to *Marin* that 'just as judicial review litigation can occur between different public sector bodies, the possibility has now been raised that government itself can be a claimant for misfeasance damages against individual officers'.¹¹⁷ This statement is supported by a review of the case law. A cross-jurisdictional example of a public body applying for judicial review is *South Australia v Honourable Peter Slipper MP*,¹¹⁸ where South Australia argued that the Commonwealth Minister's decision to urgently acquire parcels of South Australian land to establish a radioactive waste disposal facility was invalid. Another relevant case is *Western Australia v Minister for Aboriginal & Torres Strait Islander Affairs (Cth)*, in which Justice Carr found that a state and its ministers could both be a 'person aggrieved' for the purpose of gaining standing under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).¹¹⁹ His Honour also commented that the same result could be expected at common law.¹²⁰ A recent example of a state seeking judicial review of one of its own officers is *New South Wales v Avery*.¹²¹ In that case, New South Wales sought judicial review of a decision of a District Court Judge. As regards a judicial review application by an Attorney-General, one can refer to *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs*,¹²² which involved a challenge to the validity of

¹¹⁵ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [57] (Conteh CJ).

¹¹⁶ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [57] (Conteh CJ).

¹¹⁷ Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427, 428 (no authorities are cited for this proposition).

¹¹⁸ *South Australia v Honourable Peter Slipper MP* (2003) 203 ALR 473. An appeal from this decision was allowed, but the appeal did not question the State's right to apply for judicial review: *South Australia v Honourable Peter Slipper MP* (2004) 136 FCR 259.

¹¹⁹ *Western Australia v Minister for Aboriginal & Torres Strait Islander Affairs (Cth)* (1995) 37 ALD 633, 686–688 (Carr J).

¹²⁰ *Western Australia v Minister for Aboriginal & Torres Strait Islander Affairs (Cth)* (1995) 37 ALD 633, 687 (Carr J).

¹²¹ *New South Wales v Avery* [2016] NSWCA 147 (application dismissed, but not on the ground of standing).

¹²² *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1986) 67 ALR 282 (the application, which was made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), failed, but not on the ground that the applicant did not have standing).

the Minister's decision to make certain land grants. These cases together demonstrate that, at least in the Australian context, Chief Justice Conteh's reference to the impossibility of an Attorney-General applying for judicial review in a state's name is a fallacy.

A state can be an applicant in an action for judicial review. Of course, a state must always first show that it meets the judicial review standing requirements. That is, a state must demonstrate that it has a 'sufficient interest' in the subject matter of the application.¹²³ This is a flexible, non-restrictive test.¹²⁴ A state can easily meet this threshold test if it can demonstrate that it has suffered special damage.¹²⁵ One might argue that if this is all that a state needs to show in order to gain standing to apply for judicial review of a public officer's decision, then this same test should be observed when bringing a tort action for misfeasance in public office. This argument is strengthened by the observation that the tort of misfeasance in public office is sometimes considered a common law remedy for grossly invalid administrative action.¹²⁶ If the tort is categorised as a common law judicial review remedy,¹²⁷ it follows that a state should be able to plead the tort in any instance where it could bring a common law judicial review application. Moreover, special damage is already

¹²³ *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493, 528 (Gibbs J), 548 (Mason J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36, 38 (Gibbs CJ), 51–52, 54 (Aickin J), 74–75 (Brennan J). A comparable test is applicable under the statutory judicial review regime. Note that there is no such standing test if a state's Attorney-General is suing in his or her capacity as the guardian of the public interest: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

¹²⁴ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ); *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 265 [46] (Gaudron, Gummow and Kirby JJ) 283 [100] (McHugh J).

¹²⁵ Steyn LJ said in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 193 that 'of course, any plaintiff must have a sufficient interest to found a legal standing to sue'.

¹²⁶ Jeremy McBride, 'Damages as a Remedy for Unlawful Administrative Action' (1979) 38(2) *Cambridge Law Journal* 323; RC Evans, 'Damages for Unlawful Administrative Action: The Remedy for Misfeasance in public office' (1982) 31 *International and Comparative Law Quarterly* 640; Heather Williams QC, *Damages Claims Against Public Authorities: Intentional Torts* (2007) *Judicial Review* 145; Harry Wruck QC, 'The Continuing Evolution of the Tort of Misfeasance in Public Office' (2008) 41(1) *University of British Columbia Law Review* 69; Steven Gardiner, 'Finding a Remedy for the Wrong: The Potential for a Monetary Remedy in Judicial Review' (2013) available online at <<http://ssrn.com/abstract=2377139>>; Peter Hogg, Patrick Monahan and Wade Knight, *Liability of the Crown* (Carswell, 4th ed, 2011) 197 fn 218.

¹²⁷ The usual judicial review remedies are the writs of certiorari, mandamus and prohibition, along with the equitable remedies of declarations and injunctions. There are also statutory equivalent remedies, such as those contained in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16.

an element of the tort of misfeasance in public office, so importing the standing test from judicial review would not create an additional obstacle to pleading the tort.

However, this argument for parity with the law of judicial review has its faults. Whilst the tort of misfeasance in public office can, on occasion, effectively be a judicial review remedy, the tort can exist on its own without there being a corresponding right to judicial review.¹²⁸ For example, the elements of the tort may be established without there being a reviewable decision or recognised ground of judicial review.¹²⁹ If, on the facts, a judicial review application could be made alongside an action in the tort, the plaintiff may nevertheless have no interest in judicial review because the relevant opportunity has been lost and all they now seek is damages.¹³⁰ Further, judicial review proceedings generally become time barred before tort actions.¹³¹ Conversely, even though there may be administrative invalidity sufficient to allow judicial review, the mental element required by the tort may be absent.¹³² Therefore, importing judicial review's 'sufficient interest' standing test is not the inevitable answer to the question of who may sue in the tort, as each body of law is self-standing. Although an unrestricted standing requirement for the tort might, in effect, closely resemble judicial review's 'special interest' standing test.

F *Standing to Sue and Tort Law Theory*

Although the basic principles of tort law theory were not directly called upon by any judge in determining the *Marin* proceedings, the argument that a state can sue in the tort of misfeasance in public office is strengthened by having regard to the theoretical basis of tort law. Whilst there is no single, coherent theoretical explanation of tort law, it is widely acknowledged that a key function of tort law is to compensate wrongfully inflicted, legally recognised

¹²⁸ *Canada (Attorney General) v TeleZone Inc* [2010] 3 SCR 585, 600 [19] (Binnie J). For example, the pleadings in *Northern Territory v Mengel* (1995) 185 CLR 307.

¹²⁹ Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 202–203, citing, by way of example, *O'Dwyer v Ontario (Racing Commission)* [2008] OJ No 2219 (where no 'decision' was made).

¹³⁰ Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 207–208.

¹³¹ John Murphy (2012) 32(1) *Oxford Journal of Legal Studies* 51, 69.

¹³² Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 201, citing, by way of example, *Northway Outfitters Ltd v Saskatchewan* (2006) SKQB 409. See also, *Chapman v Luminis Pty Ltd* [2001] FCA 1106 (Von Doussa J) [269].

harm.¹³³ According to corrective justice theory, if a wrongdoer is morally to blame for the harm caused, then they have a duty to repair the wrong, even if that wrong is inflicted upon a wealthy state which can easily absorb losses.¹³⁴

When it comes to the tort of misfeasance in public office, harm must be proved. Usually the harm claimed is economic loss,¹³⁵ but this does not always have to be the case. For example, the relevant harm can be physical,¹³⁶ psychological,¹³⁷ or constitute harm to one's property.¹³⁸ There are some harms that a state cannot suffer. For example, a state cannot sue for defamation.¹³⁹ Nor can the state sue for battery, for the state is incorporeal.¹⁴⁰ But a state does have a consolidated revenue fund, which is entirely capable of being depleted by its public officials, as was the case in *Marin*. As a general proposition, the state can suffer, and sue to recover, pure economic loss. Whether a public officer is likely to be able to afford to personally compensate the state is another question, which must to be assessed on a case-by-case basis, having regard to the terms of any liability insurance.¹⁴¹

From a distributive justice viewpoint, preventing the state from suing in the tort to recoup financial losses means that the public purse may be depleted and the loss cannot be directly shifted to the wrongdoer. The state may be able

¹³³ Susan Kneebone, *Tort Liability of Public Authorities* (1998, LBC Information Services) 38–42; *Harrington v Stephens* (2006) 226 CLR 52, 130 [264] (Crennan J, Gleeson CJ, Gummow and Heydon JJ agreeing); *Waller v James* (2006) 226 CLR 136, 159 [81] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ).

¹³⁴ Jules Coleman, Scott Hershovitz and Gabriel Mendlow, 'Theories of the Common Law of Torts' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2015, Winter Edition) 3.1 'Corrective Justice' <<http://plato.stanford.edu/entries/tort-theories/>>.

¹³⁵ For example, *Northern Territory v Mengel* (1995) 185 CLR 307. Although note that not every economic loss is compensable, e.g. *Gibson v Fisher* [2009] NZHC 853 (refusal to grant the plaintiff legal aid was not compensable), cited in Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 147.

¹³⁶ *Brasyer v Maclean* (1874–1875) LR 6 PC 398; *Akenzua v Secretary of State for the Home Department* [2003] 1 WLR 741; *Karagozlu v Metropolitan Police Commissioner* [2007] 2 All ER 1055; *Fernando v Commonwealth of Australia* (2010) 188 FCR 188.

¹³⁷ *Garrett v Attorney General* [1997] 2 NZLR 332; *De Reus v Gray* (2003) 9 VR 432; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263; *South Australia v Lampard-Treverrow* (2010) 106 SASR 331.

¹³⁸ *Smith v East Elloe Rural District Council* [1956] 1 All ER 855.

¹³⁹ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680: allowing the state to sue in defamation would endanger democratic freedom of speech on political matters.

¹⁴⁰ Clearly the tort of battery is concerned with intentional interference with the (natural) person. See Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2009) 576–602.

¹⁴¹ Mark Aronson comments, as an aside, that one might doubt whether professional indemnity insurance would respond to misfeasance (presumably because of the intentional elements of the tort): Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 47.

to recover its losses through taxation, but it is questionable whether this measure could have the same deterrent and regulatory effect as the tort.¹⁴² The tort of misfeasance in public office is an intentional tort, and so its deterrent effect is likely to be greater than for unintentional torts such as negligence.

Admittedly, the tort of misfeasance in public office is not an ideal vessel for achieving the goal of deterrence, as liability insurance and the doctrine of vicarious liability both lessen the punitive sting of a damages award. Moreover, the tort is aimed at countering extreme conduct and is rarely encountered, and so the deterrent effect of the tort is perhaps negligible.¹⁴³ Nor is the tort a particularly efficient means of loss distribution, partly because of the time and costs involved in proving one's case in the courts. However, such arguments, whilst valid, are arguments that can be directed at the law of torts generally, and so do not constitute a specific reason why the state should be unable to sue in the tort of misfeasance in public office.

G *Summary*

If the purpose of the tort of misfeasance in public office is to uphold the rule of law and to compensate knowing abuses of public power, rather than remedying power inequality per se, then there is no theoretical reason why a state cannot sue. The lack of historical precedent does not compel a different conclusion and the existence of other legal options is strictly irrelevant. A state can take action against its public officials in both private law and public law, including judicial review, and it is up to Attorney-Generals (or their delegates) to make strategic decisions about the best cause of action. Suing public officials in the tort of misfeasance in public office is just another way in which a state can pursue public officials when it perceives that it has been wronged by them. Therefore, the three key arguments of the dissenting judges in the *Marin* proceedings are unpersuasive and the view of the majority in *Marin* should prevail in Australia.

¹⁴² As to the tort's regulatory function, see Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 224-225. The deterrent effect may be reduced by liability insurance, but premiums would still rise accordingly and there remains the stigma of a negative court verdict.

¹⁴³ Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity' in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998) 342-323, citing Susan Kneebone, 'Misfeasance in a Public Office After Mengel's Case: A 'Special' Tort No More?' (1996) 4 *Tort Law Review* 111, 136.

IV PART THREE: ISSUES RELATING TO LEGAL DUTIES AND RELATIONSHIPS

This Part involves a discussion of two issues, each of which relate to the nature of the relationship between a defendant public officer and a plaintiff state, and the duties that these parties owe each other.

The first issue is whether, in order to be liable in the tort of misfeasance in public office, the public officer must have breached a duty owed to the plaintiff. If this is an element of the tort, this duty requirement will operate as a standing test. The question then becomes whether the duties that the public officer owes the state are sufficient to base a claim in the tort.

The second issue concerns vicarious liability. The defendants in the *Marin* proceedings argued, by way of a defence, that even if a state could sue in the tort of misfeasance in public office, the state would ultimately be held vicariously liable for the defendant's wrongs.¹⁴⁴ If vicarious liability is established, then the state would, in effect, be suing itself. It is axiomatic that the Crown cannot sue itself in its own courts.¹⁴⁵ Would it then be a costly and fruitless exercise for a state to plead the tort as against one of its own public officers?

A Issue One: A Duty-Based Concept of Standing

1 Is There a Duty Requirement?

It is sometimes asserted that in order for a plaintiff to gain standing to sue in the tort of misfeasance in public office, the plaintiff must establish that the defendant's wrongful act or omission breached a common law or statutory duty owed to the individual plaintiff as a member of the public.¹⁴⁶ This requires

¹⁴⁴ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [18] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [88] (Wit JCCJ).

¹⁴⁵ *Commonwealth of Australia v Silverton Ltd* (1997) 130 ACTR 1, 8 (Higgins J): 'That the Crown cannot sue itself in its courts is axiomatic. That does not mean that an action by the Crown against a Crown servant or agent for a wrong done to the Crown is not justiciable'. See also *Ex Parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450, 460 (Williams J); *Lansen v Northern Territory* [2005] HCATrans 437 (Callinan J); Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 150, where it is noted that, similarly, a state cannot contract with itself (but a government can contract with, and sue, one of its statutory corporations).

¹⁴⁶ *Tampion v Anderson* [1973] VR 715, 720 (reasons of the court); *Cannon v Tahche* (2002) 5 VR 317, 328 [28] (reasons of the court); *Pemberton v Attorney-General (Tas)* [1978] Tas SR 1, 13–14 (Neasey J) 26–27 (Chambers J); *Dunlop v Woollahra Municipal Council [No 2]* (1978) 40 LGRA 218,

something more than showing that the public officer owed duties generally the public to exercise his or her power in the public's favour.¹⁴⁷ This duty requirement would operate as a standing provision, as a plaintiff would have to show that their loss resulted from a breach of a duty owed to them.¹⁴⁸ Presumably, this would prevent members of the public from filing tort actions whenever they perceive abuses of public power.¹⁴⁹

The High Court has not expressly endorsed this duty element.¹⁵⁰ In *Mengel*, Justice Brennan went so far as to flatly deny the existence of any such duty element in the tort of misfeasance in public office.¹⁵¹ His Honour stated that:¹⁵²

Foreseeability of damage to another by one's own conduct is the factor which warrants the imposition of a duty of care to the other when engaging in the conduct. But the tort of misfeasance in public office is not concerned with the imposition of duties of care. It is concerned with conduct which is properly to be characterised as an abuse of office and with the results of that conduct. Causation of damage is relevant; foreseeability of damage is not.

Justice Brennan thought that the correct question to ask was whether the public officer acted in 'the absence of an honest attempt to perform the functions of the office'.¹⁵³ Justice Deane agreed with Justice Brennan on this point.¹⁵⁴

235 (Yeldham J) (the correctness of this point was not considered on appeal in *Dunlop v Woollahra Municipal Council* [1982] AC 158. *Murcia v City of Nedlands* (1999) 22 WAR 1, 37-38 [142] (Anderson J); Simon Dench, 'The Tort of Misfeasance in Public Office' [1981] *Auckland University Law Review* 182, 201. For a contrary view, see *Neilson v City of Swan* (2006) 147 LGERA 136 [52], [66] (Buss JA, Wheeler and Pullin JJA agreeing); Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2' (2001) 9 *Torts Law Journal* 1, 2- 5. See also Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 55-59.

¹⁴⁷ Susan Kneebone 'Misfeasance in a Public Office After Mengel's Case: A Special Tort No More?' (1996) 4(2) *Tort Law Review* 111, 124.

¹⁴⁸ Susan Kneebone 'Misfeasance in a Public Office After Mengel's Case: A Special Tort No More?' (1996) 4(2) *Tort Law Review* 111, 124.

¹⁴⁹ Susan Kneebone 'Misfeasance in a Public Office After Mengel's Case: A Special Tort No More?' (1996) 4(2) *Tort Law Review* 111, 124; Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2' (2001) 9 *Torts Law Journal* 1, 2.

¹⁵⁰ *Neilson v City of Swan* (2006) 147 LGERA 136 [56], [58] (Buss JA, Wheeler and Pullin JJA agreeing), referring to *Sanders v Snell* (1998) 196 CLR 329 and *Northern Territory v Mengel* (1995) 185 CLR 307. The plurality in *Northern Territory v Mengel* (1995) 185 CLR 307 flagged the issue but declined to decide upon it.

¹⁵¹ *Northern Territory v Mengel* (1995) 185 CLR 307, 357-358 (Brennan J).

¹⁵² *Northern Territory v Mengel* (1995) 185 CLR 307, 358 (Brennan J).

¹⁵³ *Northern Territory v Mengel* (1995) 185 CLR 307, 357-358 (Brennan J).

¹⁵⁴ *Northern Territory v Mengel* (1995) 185 CLR 307, 376-373 (Deane J).

Lord Hobhouse in *Three Rivers* also refused to accept the duty requirement. He stated, in effect, that if a duty of care could be established then the plaintiffs could have instead relied upon the tort of negligence.¹⁵⁵ Moreover, a duty requirement is not needed because the need to prove loss and bad faith already keeps the tort within proper bounds.¹⁵⁶ Similarly, the New Zealand Court of Appeal has said that ‘requiring the existence of a duty of care ... would move the tort right into the area occupied by the torts of negligence and breach of statutory duty and leave little room for its separate operation.’¹⁵⁷

A case worthwhile noting in the Australian context is the Australian Capital Territory Supreme Court case of *Twining v Curtis*.¹⁵⁸ In that case, Justice Penfold considered whether an Australian Public Service employee could bring an action for misfeasance in public office against his superior, or whether the tort was only available to members of the public who were not government employees.¹⁵⁹ The case was an appeal from the decision of the Master to strike out the plaintiff’s statement of claim. One ground of appeal went to the Master’s finding that *Tampion v Anderson (Tampion)*,¹⁶⁰ *Pemberton v Attorney-General (Pemberton)*¹⁶¹ and *Mengel* together required that only a member of the public could be a plaintiff.¹⁶² Justice Penfold stated that the Master’s reading of the authorities ‘diverges from the words of those cases and from the interpretation of those cases found in later cases’.¹⁶³ Her Honour considered that *Tampion* and *Pemberton* did not expressly require that a plaintiff be ‘a member of the public’. Rather, those two cases required that the plaintiff be a member of the public to whom a public duty was owed.¹⁶⁴ She reasoned that *Mengel* did not support the finding in *Tampion* and *Pemberton* that such a duty is an element of the tort. Justice Penfold adopted Justice Buss’ reasoning in the Western Australian Court of Appeal case of

¹⁵⁵ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 229, 285 (Hobhouse LJ).

¹⁵⁶ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 229, 285 (Hobhouse LJ), see also 193 (Steyn LJ), cf. Hirst LJ at 30, who said: ‘If there is a need for a particular duty it might be the correlative of the [pleaded] antecedent right’.

¹⁵⁷ *Garrett v Attorney General* [1997] 2 NZLR 332, 346 (Blanchard J).

¹⁵⁸ *Twining v Curtis* (2009) 3 ACTLR 174.

¹⁵⁹ *Twining v Curtis* (2009) 3 ACTLR 174 [41]–[58] (Penfold J).

¹⁶⁰ *Tampion v Anderson* [1973] VR 715.

¹⁶¹ *Pemberton v Attorney-General (Tas)* [1978] Tas SR 1.

¹⁶² *Twining v Curtis* [2008] ACTSC 3 [22] (Harper M); *Twining v Curtis* (2009) 3 ACTLR 174 [42] (Penfold J).

¹⁶³ *Twining v Curtis* (2009) 3 ACTLR 174 [43] (Penfold J).

¹⁶⁴ *Twining v Curtis* (2009) 3 ACTLR 174 [45] (Penfold J).

Neilson v City of Swan.¹⁶⁵ In that case Justice Buss thoroughly reviewed the case law and found that it was 'at least reasonably arguable' that there was no requirement to show that the public officer owed the plaintiff any particular common law or statutory duty.¹⁶⁶ Justice Penfold concluded that if there was no duty requirement, there was likewise no requirement that the plaintiff in an action for misfeasance in public office be a member of the public in order to come within the scope of the tort.¹⁶⁷ Clearly, an Attorney-General wishing to sue in the tort on behalf of their state could analogise with *Twining v Curtis* when arguing that their state should gain standing.

2 *Could a State Satisfy the Duty Requirement?*

In Professor Aronson's opinion, '[i]f there is a duty nowadays, it is not deliberately to abuse a public power, and expressed at that level, it is not very useful.'¹⁶⁸ Indeed, if this broad duty requirement exists then it is most unlikely to ever arise as a contested issue. This is because public officers always owe duties to the public to exercise his or her powers in the public interest.¹⁶⁹ Nevertheless, there is still a possibility that the High Court will yet find that it is necessary to show that the defendant owed, and breached, a duty to the plaintiff. Therefore, it is relevant to identify duties that public officers owe their state, as this could potentially form the basis of a state's standing to sue.

Public officials owe fiduciary duties to the public, as it is a central tenant of the doctrine of representative government 'that all powers of government are derived from, ultimately belong to, and may only be exercised for and on behalf of, the people'.¹⁷⁰ However, public officials also owe fiduciary duties to the

¹⁶⁵ *Neilson v City of Swan* (2006) 147 LGERA 136 (Wheeler and Pullin JJA agreeing), referred to in *Twining v Curtis* (2009) 3 ACTLR 174 [51]–[57] (Penfold J).

¹⁶⁶ *Neilson v City of Swan* (2006) 147 LGERA 136 [66].

¹⁶⁷ *Twining v Curtis* (2009) 3 ACTLR 174 [58].

¹⁶⁸ Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 25, see also 34.

¹⁶⁹ See Simon Dench, 'The Tort of Misfeasance in Public Office' [1981] *Auckland University Law Review* 182, 201, quoted in Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity' in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998) 361, see also 374–375 where the fiduciary duties of public officers are described; also quoted in Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2' (2001) 9 *Torts Law Journal* 1, 4, see also 5.

¹⁷⁰ David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38 *Criminal Law Journal* 337, 337, citing, in support, inter alia, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70–72 (Deane and Toohey JJ); *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 190 (Lord Steyn); *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, 180–

Crown and hold their powers on trust for the Crown.¹⁷¹ It is the primary duty of public officials to be loyal to their political superiors,¹⁷² and thus their state. This is essentially because when a state invests public officials with public power, that state becomes vulnerable to the abuse of that power.

Professor Chamberlain argues that it is the quality of vulnerability that marks the proper plaintiff to bring an action in the tort of misfeasance in public office.¹⁷³ It is worth noting, as a sidenote, that it is perhaps in this context that the language of ‘power asymmetry’ has most currency.¹⁷⁴ Professor Chamberlain writes that public fiduciary duties underlie the tort of misfeasance in public office.¹⁷⁵ She focuses on public officers’ duty to the public,¹⁷⁶ and does not mention their duty to their state, but both of these duties are well-recognised public fiduciary duties. If public fiduciary law lies at the heart of the tort of misfeasance in public office, one can conclude that a public official’s breach of a fiduciary duty owed to his or her state lies within the purview of the tort. Accordingly, an insistence upon the duty element of the tort would not detract from a state’s standing to sue in the tort of misfeasance in public office. Although perhaps it might be more problematic when it comes to cross-jurisdictional claims.

181 [34] (Gummow, Hayne, Heydon and Kiefel JJ). Note that these public fiduciary duties underlie standing rules in public law: Joshua Wilson SC and Michael McKitterick, ‘Locus Standi in Australia: A Review of the Principal Authorities and Where it is All Going’ (Paper presented at the Conference of the Civil Justice Research Group at the University of Melbourne, 2010) 6, citing *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 [78] (McHugh J).

¹⁷¹ Erika Chamberlain, ‘Fiduciary Aspects of Misfeasance in a Public Office’ (2014) 39(2) *Queens Law Journal* 733, 737–740. See, for example, *Reading v Attorney-General* [1951] AC 507; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

¹⁷² Paul Finn, ‘Integrity in Government’ (1992) 3 *Public Law Review* 243, 252, cited in Tina Cockburn, ‘Personal Liability of Government Officers in Tort and Equity’ in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (The Federation Press, 1998), 374.

¹⁷³ Erika Chamberlain, ‘Fiduciary Aspects of Misfeasance in a Public Office’ (2014) 39(2) *Queens Law Journal* 733, 767. See also Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 69–81.

¹⁷⁴ Even though a state is, on the whole, more powerful than any one of its public officers, in certain situations a state is made vulnerable at the hands of its public officers.

¹⁷⁵ Erika Chamberlain, ‘Fiduciary Aspects of Misfeasance in a Public Office’ (2014) 39(2) *Queens Law Journal* 733, 745.

¹⁷⁶ Indeed, the tort has long been rationalised as recognising breaches of duty owed to the public: e.g. *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 190 (Steyn LJ): ‘in a legal system based on the rule of law executive or administrative power “may be exercised only for the public good” and not for ulterior and improper purposes’, citing *Jones v Swansea City Council* [1990] 1 WLR 54, 85 (Nourse LJ).

B *Issue Two: Vicarious Liability*

1 *Vicarious Liability and the Tort of Misfeasance in Public Office*

Tortious liability can either be direct or vicarious. Direct liability is personal liability, whereby the person or entity at fault is made to pay the price of the wrong. In contrast, vicarious liability is a form of strict liability 'imposed on one person for the wrongful act of another on the basis of the legal relationship between them'.¹⁷⁷ A party made vicariously liable for a wrong committed by the primary tortfeasor is not necessarily at fault.¹⁷⁸ Vicarious liability can be imposed even if the tort was committed for purely selfish reasons,¹⁷⁹ as well as when the tortious acts in question were prohibited by the employer and constitute a criminal offence.¹⁸⁰

If a state is to sue a public official for misfeasance in public office, it must sue that public official in his or her personal capacity. Although public officials are part of the state, they are also private individuals who are capable of being sued in their own right. It is not possible for the state to sue the department to which the public official belongs because a government department is a limb of the state; the government department and the state are the same legal entity.¹⁸¹

While a state cannot sue one of its own arms, it should be noted that a private individual could directly sue a government department if the department is shown to have the subjective mental state that the tort requires.¹⁸²

¹⁷⁷ Peter Nygh and Peter Butt, *Australian Legal Dictionary*, (Butterworths, 1997) 1244, quoted in Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2007) 652. See also Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 3; Paula Giliker, 'Comparative Perspectives on Vicarious Liability: Defining the Scope of Employment' in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (2007, Hart Publishing) 419, 419.

¹⁷⁸ Stephen Todd, 'Vicarious Liability, Personal Liability and Exemplary Damages' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 410.

¹⁷⁹ *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716; *Ffrench v Sestili* (2007) 98 SASR 28; *New South Wales v Lepore* (2003) 212 CLR 511.

¹⁸⁰ *Bugge v Brown* (1919) 26 CLR 110; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

¹⁸¹ Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5th ed, 2013) 149–150. Seddon notes that statutory corporations are separate legal entities that a state can contract with and sue. This reasoning would not apply if a state was suing a public official in another jurisdiction.

¹⁸² *Bourgoin SA v Ministry of Agriculture, Fisheries & Food* [1986] QB 716; *Jones v Swansea City Council* [1990] 1 WLR 1453; *Hart-Roach v Public Trustee* (1998) WASC Lib No 980044 (11 February 1988); *Chagos Islanders v Attorney General* [2004] EWCA Civ 997 [27] (Sedley LJ, on behalf of the court); *South Australia v Lampard-Treverrow* (2010) 106 SASR 331 [265] (Doyle CJ, Duggan and White JJ). A statutory corporation can also be sued in the tort: *Gimson v Victorian Workcover Authority* [1995] 1 VR 209, 225–226 (McDonald J); *Dunlop v Woollahra Municipal Council* [1982] AC 158. Note that the State of Victoria is an exception, for there direct liability of the Crown is

However, it is not clear whether Australian courts will follow the English position that the state, as a whole, 'is not a potential tortfeasor' which can be held directly liable.¹⁸³ Australian Crown Proceedings Acts are, on the whole, not as stringent as their English counterpart,¹⁸⁴ and appear to allow the Crown to be held directly liable.¹⁸⁵ Although proving the necessary intention on the part of the state would be most difficult.

As a general rule, any one of the Australian bodies politic can be made vicariously liable for its employees. This is because legislation within each jurisdiction removes state immunity from suit and allows a state to be treated in litigation, as nearly as possible, in the same way as individuals.¹⁸⁶ Therefore, the employment relationship between the state and its employees can form the basis for vicarious liability. In the employment context, an employer will be

excluded by the *Crown Proceedings Act 1958* (Vic) s 23, see in this regard *Grimwade v Victoria* (1997) 90 A Crim R 526.

¹⁸³ *Chagos Islanders v Attorney General* [2004] EWCA Civ 997 [20]–[21], [26] (Sedley LJ, on behalf of the court), at [26]: 'the state is not a potential tortfeasor. The nature of misfeasance in public office is tailored to this fact: it is concerned with individuals who consciously abuse powers entrusted to them by the state and do so knowing that it may well harm someone', citing *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191 (Steyn LJ). See a summary of the English position in Richard Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009) 225.

¹⁸⁴ *Crown Proceedings Act 1947* (UK) s 2 allows the Crown to be made vicariously liable for the torts of its servants or agents, but not directly liable. See commentary in *Chagos Islanders v Attorney General* [2004] EWCA Civ 997 [20] (Sedley LJ, on behalf of the court): 'the 1947 Act does not work by making the state a potential tortfeasor: it works by making the Crown vicariously liable for the torts of its servants. It has only been with the enactment of the *Human Rights Act 1998* (UK) that the Crown, in the form of a 'public authority', has acquired a primary liability for violating certain rights. Where, of course, a limb of the state has corporate legal personality – a local authority, for example, or the Bank of England – no such problem arises; but this is not such a case.' Note that in the State of Victoria the direct liability of the Crown is excluded by the *Crown Proceedings Act 1958* (Vic) s 23, see in this regard *Grimwade v Victoria* (1997) 90 A Crim R 526.

¹⁸⁵ Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Law Book, 1982) 26–27. In *Emanuele v Hedley* (1998) 179 FCR 290, 300 [36] Wilcox, Miles and Nicholson JJ stated that 'it is a legal nonsense to suggest there can be conduct of the Commonwealth itself that constitutes a misfeasance in public office. The Commonwealth of Australia is a legal entity created by the *Commonwealth of Australia Constitution Act 1901* (Imp). It is a juristic person but, of course, is incapable of acting except through agents. It is incapable itself of committing misfeasance in public office; it does not hold public office.' However, Mark Aronson critiques this reasoning in Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 43–44. See also the discussion in Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 1' (2001) 9 *Torts Law Journal* 1, 13–14; *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481, 483–484.

¹⁸⁶ See, for example, *Judiciary Act 1903* (Cth) s 64. Note that this is in conformity with Dicey's equality principle, as the Crown can be made vicariously liable just like individuals: Peter Hogg, Patrick Monahan and Wade Knight, *Liability of the Crown* (Carswell, 4th ed, 2011) 218. See also Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Law Book, 1982) 22.

made vicariously liable for an employee's tort if the tort was committed within the scope of employment for that office.¹⁸⁷ However, traditionally, it has been thought that liability for misfeasance in public office will usually be personal and not vicarious because the tort is so centrally concerned with personal, intentional wrongdoing.¹⁸⁸ Generally speaking, in tort law there is a broad reluctance to make a party liable for another's deliberate wrongdoing of a personal character.¹⁸⁹ According to the traditional view, vicarious liability would only be imposed if the state gave its de facto authority, for example, by expressly or tacitly purporting to authorise the public officer's tortious acts or omissions.¹⁹⁰

Taking into account the traditional view, the question that then arises is whether an abuse of office sufficient to give rise to a cause of action in the tort of misfeasance in public office could ever give rise to vicarious liability, absent de facto authority.¹⁹¹ In answer to this question, Professor Vines writes that 'surely an abuse of an office could not be regarded as within the course of employment for that office'.¹⁹² She reasons that the requirement of the tort that the public official act in bad faith must take the relevant conduct outside the

¹⁸⁷ *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716; *Bugge v Brown* (1919) 26 CLR 110; *New South Wales v Lepore* (2003) 212 CLR 511, 535 [40] (Gleeson CJ); *Ffrench v Sestili* (2007) 98 SASR 28, 36 [29] (Debelles J).

¹⁸⁸ *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); *Rogers v Legal Services Commission of South Australia* (1995) 64 SASR 572, 587 (Lander J); See also Tom Howe QC and Andrew Berger, *Legal Briefing No 98: Misfeasance* (4 December 2012) Australian Government Solicitor <<http://www.ags.gov.au/publications/legal-briefing/br98.html>> 'Can the Commonwealth be vicariously liable for the misfeasance of its employees?'

¹⁸⁹ See, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

¹⁹⁰ *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); *South Australia v Lampard-Treverrow* (2010) 106 SASR 331, 390 [273] (reasons of the court); See also Tom Howe QC and Andrew Berger, *Legal Briefing No 98: Misfeasance* (4 December 2012) Australian Government Solicitor <<http://www.ags.gov.au/publications/legal-briefing/br98.html>> 'Can the Commonwealth be vicariously liable for the misfeasance of its employees?'. A state can only give de facto authority, and not actual authority, because a state cannot actually authorise someone to commit a tort.

¹⁹¹ See Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 227-231.

¹⁹² Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 228. Similar sentiment is expressed in Jim Davis, 'Misfeasance in Public Office, Exemplary Damages and Vicarious Liability' (Speech delivered at the Australian Institute of Administrative Law National Administrative Law Forum, Canberra, 7 August 2009) available at <<http://www.austlii.edu.au/au/journals/AIAdminLawF/2010/29.pdf>> 63-64. See also Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 171.

role that the public official is employed to fulfil.¹⁹³ However, she notes that this position is ‘not without some doubt’ since three members of the High Court in *New South Wales v Lepore (Lepore)* accepted that vicarious liability can be imposed on a state for intentional torts of its employees, such as the sexual abuse of students by a public school teacher.¹⁹⁴ As Professor Chamberlain has recently explained, with reference to *Lepore*:¹⁹⁵

If such criminal action, committed solely for the teacher’s personal benefit, can be the subject of vicarious liability, it is relatively easy to make the case that the state can be vicariously liable for a public officer who commits a (generally less egregious) unlawful act in the course of carrying out his or her official duties.

Professor Aronson casts significant doubt upon the proposition that vicarious liability is incompatible the tort of misfeasance in public office.¹⁹⁶ He writes that even in the absence of the state’s ratification or de facto authority, the state can still be held vicariously liable. If one applies the ‘close connection’ test then it can be said that ‘the sort of misconduct alleged in most misfeasance cases can only be committed “on the job”’.¹⁹⁷ Someone who is not a public officer does not hold public power, and so has no capacity to abuse the powers of public office.¹⁹⁸ If one instead asks whether the public officer’s acts were an unauthorised mode of performing authorised acts, then the answer may well be affirmative if the public officer’s conduct would have been lawful if only it was

¹⁹³ Prue Vines, ‘Misfeasance in Public Office: Old Tort, New Tricks?’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 228. Although in Christian Witting, *Street on Torts* (Oxford University Press, 14th ed, 2015) 618 it is observed that if one applies the ‘close connection’ test promulgated in *Lister v Heselley Hall Ltd* [2002] 1 AC 215, rather than asking whether the acts were beyond the authorised duties of the employee (as the court did in *Racz v Home Office* [1994] 2 WLR 23), then it may be somewhat easier to find vicarious liability for the tort of misfeasance in public office.

¹⁹⁴ Prue Vines, ‘Misfeasance in Public Office: Old Tort, New Tricks?’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 228, citing *New South Wales v Lepore* (2003) 212 CLR 511. In *Lepore*, Gleeson CJ, Kirby and Gaudron JJ were in favour of finding vicarious liability. However, Gummow, Hayne and Callinan JJ took a more conservative approach, and Gaudron J’s judgment did not directly deal with the application of the vicarious liability test. Thus the ratio of this case is somewhat unclear.

¹⁹⁵ Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 175.

¹⁹⁶ Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35 *Melbourne University Law Review* 1, 45.

¹⁹⁷ Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35 *Melbourne University Law Review* 1, 45 (emphasis removed).

¹⁹⁸ Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35 *Melbourne University Law Review* 1, 45: ‘As a private individual, I can neither cancel a trading bank’s licence (as in *Three Rivers*) nor impose regional restrictions on cattle droving (as in *Mengel*).’

carried out with bona fide intent.¹⁹⁹ However, the question of vicarious liability will always be a question of fact and degree.²⁰⁰

Professor Aronson does note that a 'formidable' argument against imposing vicarious liability upon a state for the tort of misfeasance in public office is the common law 'independent authority' exception to vicarious liability.²⁰¹ This exception operates when the employee's tortious act arise out of an exercise of his or her 'independent discretion' or 'original authority'.²⁰² The discretion can be conferred on the employee either at common law or by statute.²⁰³ The basic idea is that the power abused by the employee was not derived from his or her employer, but rather was his or her own power to exercise as he or she saw fit.²⁰⁴ It cannot be said that the employer was the original source of authority. This exception to vicarious liability poses a difficulty in the context of the tort of misfeasance in public office because public officers almost invariably possess discretionary powers. Therefore, it is likely that this exception to vicarious liability will frequently prevent a state being held liable for the misfeasance of its public officers, unless a statutory exception applies.²⁰⁵ Although not every instance of misfeasance in public office

¹⁹⁹ Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 45. Aronson compares this to sexual assault cases, where bona fide intent does not make an assault lawful.

²⁰⁰ *New South Wales v Lepore* (2003) 212 CLR 511, 619 [321] (Kirby J).

²⁰¹ Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 45-46. For a discussion of the unclear basis of this exception see Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 758-759, where it is recommended that this exception be abolished. See also the explanations and criticisms of the exception in Carolyn Sappideen and Prue Vines (eds), *Flemming's The Law of Torts* (Lawbook, 10th ed, 2011) 446-447 [19.80]; Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 75-78.

²⁰² Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 45-46; Susan Kneebone, 'The Independent Discretionary Function Principle and Public Officers' (1990) 16(2) *Monash University Law Review* 184, 184; *Enver v The King* (1906) 3 CLR 969; *Field v Nott* (1939) 62 CLR 660, 675 (Dixon J); *Little v Commonwealth* (1947) 75 CLR 94, 114 (Dixon J); *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; *Cubillo v Commonwealth* (2001) 112 FCR 455; *Mickelberg v Western Australia* [2007] WASC 140 [120]-[133] (Newnes J).

²⁰³ *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

²⁰⁴ Susan Kneebone, 'The Independent Discretionary Function Principle and Public Officers' (1990) 16(2) *Monash University Law Review* 184, 184, citing *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 642 (Gibbs CJ). See also *Field v Nott* (1939) 62 CLR 660, 675 (Dixon J).

²⁰⁵ This exception has been reversed by legislation in New South Wales: *Law Reform (Vicarious Liability) Act 1983* (NSW) s 7. See also *Australian Federal Police Act 1979* (Cth) s 64B; *Police Service Administration Act 1990* (Qld) s 10.5; *Police Act 1998* (SA) s 65; *Police Service Act 2003* (Tas) s 84; *Police Administration Act 1978* (NT) s 148C; *Victoria Police Act 2013* (Vic) s 74; *Police Act 1892* (WA) s 137. Note that in the majority of Police Acts the transfer of liability to the Crown only applies

will involve an abuse of discretionary power. Thus it is still possible for a state to be held vicariously liable for tortious acts not connected with an independent authority but committed in the scope of employment.²⁰⁶

If a court finds it appropriate to hold a state vicariously liable for its public officer, a secondary question may be whether the state should also be held vicariously liable for an award of exemplary damages. As noted in Part One, the purpose of exemplary damages is to punish the wrongdoer and to make an example of that person so that others are deterred from committing a similar wrong. Exemplary damages are not intended as compensation.²⁰⁷ In the context of misfeasance in public office, the wrongdoer is the public officer, not the state, for in Australia it appears that the ‘master’s tort’ theory of liability does not apply.²⁰⁸ Therefore, the intended punitive and deterrent effect of exemplary damages would be diminished if the state, and not the miscreant public officer, paid the exemplary damages.²⁰⁹ Largely for this reason, it has been observed that ‘[v]ery arguably, then, a liability to pay exemplary damages cannot be vicarious’.²¹⁰

However, the High Court in *New South Wales v Ibbett* (*Ibbett*) appears to have come to a contrary conclusion regarding exemplary damages.²¹¹ It was held that New South Wales could be made vicariously liable for exemplary

if the police officer was acting in good faith and without malice: Jim Davis, ‘Misfeasance in Public Office, Exemplary Damages and Vicarious Liability’ (Speech delivered at the Australian Institute of Administrative Law National Administrative Law Forum, Canberra, 7 August 2009) available at <<http://www.austlii.edu.au/au/journals/AIAdminLawF/2010/29.pdf>> 63.

²⁰⁶ Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths Australia, 5th ed, 2013) 772 [26.60].

²⁰⁷ Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 434.

²⁰⁸ Stephen Todd, ‘Vicarious Liability, Personal Liability and Exemplary Damages’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 438, citing *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37 [34]–[35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36, 56–57 (Fullagar J) cf. 64–65 (Kitto J); *New South Wales v Ibbett* (2006) 229 CLR 638, 641 [6], 650–655 [41]–[60], where Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ supported Fullagar J’s view in *Darlington Island*, but confusingly called it the master’s tort theory.

²⁰⁹ *Kuddus v Chief Constable of Leicester Constabulary* [2002] 2 AC 122, 162 [131], 163 [137] (Scott LJ).

²¹⁰ Stephen Todd, ‘Vicarious Liability, Personal Liability and Exemplary Damages’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 443.

²¹¹ *New South Wales v Ibbett* (2006) 229 CLR 638.

damages awarded against its police officers.²¹² The rationale seemed to be that making a state vicariously liable for exemplary damages would encourage the state to better train its employees.²¹³ However, this rationale would not apply if the state could show that it really was 'innocent' in the circumstances and had done as much as it reasonably could to educate its public officials.²¹⁴ Moreover, *Ibbett* concerned New South Wales' statutory regime of vicarious liability which does away with the 'independent discretion' exception and makes the state vicariously liable for torts of its public officers committed in the course of their employment.²¹⁵ Therefore, it is unclear whether *Ibbett* stands for a general rule that states can be held vicariously liable for exemplary damages. This ambiguity has not yet been resolved in Australia.

2 *Vicarious Liability as a Defence*

If the state can, on occasion, be held vicariously liable for the intentional tort of misfeasance in public office, how might the courts react when faced with the prospect of vicarious liability being raised by a defence to defeat the state's claim to compensation? In short, it is suggested that Australian courts would have little patience for this argument.

In facing this conundrum, a logical starting point is to look to the theory underpinning vicarious liability in order to see whether the doctrine of vicarious liability can ever be used defensively. Taking this first step is not straightforward, as it is widely accepted that 'the doctrine of vicarious liability had not grown from any very clear, logical or legal principle but from social convenience and rough justice'.²¹⁶ However, what does come through strongly in cases and in the literature is that the doctrine of vicarious liability only

²¹² *New South Wales v Ibbett* (2006) 229 CLR 638, 653 [54] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), citing with approval *Adams v Kennedy* (2000) 49 NSWLR 78 and *Peeters v Canada* (1993) 108 DLR (4th) 471.

²¹³ *New South Wales v Ibbett* (2006) 229 CLR 638, 645 [25], 653 [51] and [53] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

²¹⁴ Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2' (2001) 9 *Torts Law Journal* 1, 21–22, citing *Kuddus v Chief Constable of Leicester Constabulary* [2002] 2 AC 122, 161–162 (Scott LJ).

²¹⁵ *Law Reform (Vicarious Liability) Act 1983* (NSW).

²¹⁶ Stephen Todd, 'Vicarious Liability, Personal Liability and Exemplary Damages' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 412, citing *ICI Ltd v Shatwell* [1965] AC 656, 685 (Lord Pearce). See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37–38 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

operates to aid innocent plaintiffs harmed by the tort.²¹⁷ Vicarious liability is a tripartite concept that can only coherently be applied when there is a plaintiff, a defendant and a third party who is said to be vicariously liable.²¹⁸ The law of vicarious liability can be understood as reflecting a moral concern that the plaintiff should have a chance at receiving full compensation, even if the primary tortfeasor is impecunious.²¹⁹ It is a principle of fairness and justice that ‘the loss be shifted from the one who suffered it to the one whose activity unreasonably caused it’.²²⁰ Professor Glanville Williams wrote that:²²¹

One of the most important social goals served by vicarious liability is victim compensation. Vicarious liability improves the chances that the victim can recover the judgment from a solvent defendant.

Arguably, the main reason that vicarious liability has been extended to intentional torts is because of a desire to do right by innocent plaintiffs, even if doing so may seem harsh on the employer.²²² It then makes no sense for vicarious liability to be raised as a defence to defeat what would otherwise be a

²¹⁷ A plaintiff’s ‘innocence’ may be marred by the application of doctrines such as contributory negligence.

²¹⁸ This was the State of Belize’s argument in the *Marin* proceedings: *Attorney General of Belize v Marin & Coye* [2010] BZSC 1 [16] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [88] (Wit JCC). Patrick S Atiyah seemed to presume this would be the case when discussing the question of how to formulate pleadings for vicarious liability: Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 8–9. Nowhere in his book does Patrick S Atiyah consider that vicarious liability could constitute a defence.

²¹⁹ David Wingfield, ‘Perish Vicarious Liability?’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (2007, Hart Publishing) 393, 394–396. See also Paula Giliker, ‘Comparative Perspectives on Vicarious Liability: Defining the Scope of Employment’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (2007, Hart Publishing) 419, 426–427; John Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 409–410, quoted in Richard Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009) 208; Stephen Todd, ‘Vicarious Liability, Personal Liability and Exemplary Damages’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 412–413, 416, 439. More generally, it has been observed that tort actions are ‘the embodiment of public morality’: Allen Linden, ‘Tort Law as Ombudsman’ (1973) 51 *Canadian Bar Review* 155 and Allen Linden, ‘Reconsidering Tort Law as Ombudsman’ in Steel and Rodgers-Magnet (eds), *Issues in Tort Law* (Carswell, 1983) 477, cited in Carol Harlow, ‘A Punitive Role for Tort Law?’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Essays in Honour of Mark Aronson: Administrative Law in a Changing State*, 247, 271.

²²⁰ David Wingfield, ‘Perish Vicarious Liability?’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (2007, Hart Publishing) 393, 410.

²²¹ Stephen Todd, ‘Vicarious Liability, Personal Liability and Exemplary Damages’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 413, quoting Bruce Feldthusen, ‘Vicarious Liability for Sexual Torts’ in Nicholas Mullany and Allen Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (Law Book Co, 1998) 221, 224.

²²² Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 780.

good claim by the plaintiff for compensation. Vicarious liability is meant to aid plaintiffs, not bar plaintiffs' recovery of damages.

The concept of deterrence has also been raised as a justification for vicarious liability.²²³ Allowing vicarious liability to be pleaded as a defence would have the effect of deterring a state from bringing claims against its public officers in the tort of misfeasance in public office, but would do nothing to deter the actual wrongdoer. There may be some benefit in deterring a state from bringing an action in the tort, as it might further encourage the state to take preventative action.²²⁴ Yet a state can never entirely prevent misfeasance in public office, and arguably there are already many safeguards in place throughout Australia.²²⁵ Therefore, the benefit that could come from deterring the state from suing its public officers is likely to be negligible. In any case, when it is said that a rationale of vicarious liability is deterrence, surely the underlying policy is that the party held vicariously liable should be deterred from engaging its employees in activities that can likely cause harm to third parties, such as consumers of goods and services. If public officers cause their own state harm, then the state will no doubt learn from the loss and endeavour to avoid similar future wrongdoing. However, in the meantime, whilst aiming to avoid future losses, the state should be compensated for that loss without being hindered by the tortfeasor defensively calling upon principles of vicarious liability.

²²³ *New South Wales v Lepore* (2003) 212 CLR 511, 611 [302] (Kirby J), citing *Bazley v Curry* [1999] 2 SCR 534 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37–38 [33]–[35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Stephen Todd, 'Vicarious Liability, Personal Liability and Exemplary Damages' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 409, 412–413, citing *Bazley v Curry* [1999] 2 SCR 534, 552–553 [29], 554 [32]–556 [35] (McLachlin J).

²²⁴ *Bazley v Curry* [1999] 2 SCR 534, 555 [33] – [34] (McLachlin J).

²²⁵ At the federal level, see the Australian Public Service Code of Conduct; *Public Service Act 1999* (Cth) s 15 allows for breaches of the Code of Conduct to be met with disciplinary action. *Public Service Act 1999* (Cth) s 15(c) requires agency heads to implement procedures for determining if employees have breached the Code of Conduct. Many anti-corruption agencies have also been established, for example, the Australian Criminal Intelligence Commission and the Australian Commission for Law Enforcement Integrity. For further detail, see Australian Government, *Australian Public Service Commission: State of the Service Report 2014-15* (2015) available online at <http://www.apsc.gov.au/_data/assets/pdf_file/0010/72379/sosr-2014-15-web.pdf> 44–47.

C *Summary*

It is by no means clear that the tort of misfeasance in public office contains a duty requirement. Even if such an element is found to exist, then a state could easily demonstrate that its public officer owed it a fiduciary duty, and that the public officer's misfeasance breached that duty. If the foundation of the duty requirement is fiduciary law, the duty requirement should not be restricted to duties owed only to the public, but would include duties owed to the state.

In relation to the vicarious liability issue, it can be concluded that whilst principles of vicarious liability are likely to occasionally apply to the tort of misfeasance in public office despite the intentional nature of the tort, vicarious liability will not be allowed to operate to defeat a state's claim against its own public officer.

V PART FOUR: UNINTENDED CONSEQUENCES

Although it appears to be theoretically possible for a state to become a plaintiff in an action for misfeasance in public office, there may nevertheless be consequentialist reasons for preventing a state from suing in the tort. This Part address the argument that giving a state standing would lead to political vendettas and would also open a floodgate of claims that would chill the public service. Moreover, this Part includes a discussion of whether a state should abstain from pursuing the 'softer option' of civil liability when it has a monopoly over the power to instigate criminal prosecutions.

A *Political Vendettas*

In the *Marin* proceedings, the defendants argued that allowing a state to sue in the tort of misfeasance in public office would set a dangerous precedent because Attorney-Generals may begin suing in the tort as a way of exacting revenge on their political foes.²²⁶ This argument might be countered on two bases.

First, a court should not presume that an Attorney-General will abuse his or her powers.²²⁷ Justice Thomas has written extra-curially that 'constitutional

²²⁶ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [44] (de la Bastide PCCJ and Saunders JCCJ), [104] (Wit JCCJ), [151] (Anderson JCCJ).

²²⁷ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [105] – [109] (Wit JCCJ), [151] (Anderson JCCJ).

convention recognises that the Attorney-General represents the government as the “fountain of justice”.²²⁸ His Honour then asked, rhetorically:²²⁹

Has the party system so corrupted politics that all higher values and idealism have vanished? I hope not.

Attorney-Generals are bound to be model litigants,²³⁰ and so courts should be entitled to assume that Attorney-Generals will be astute enough not to launch unmeritorious claims.

Second, it must be admitted that it is entirely possible for an Attorney-General to abuse the tort to pursue a political vendetta or personal grudge.²³¹ However, this is true of any plaintiff who has standing to plead any cause of action. Australian Attorney-Generals ‘are not, and cannot be, independent of political imperatives.’²³² Yet if an Attorney-General were to misuse his or her power to make claims in the tort on the state’s behalf then, somewhat ironically, the Attorney-General may in turn attract a tortious action for misfeasance in public office or for malicious prosecution.²³³ Further, the courts are always on the lookout for claims that may constitute an abuse of process.²³⁴ If necessary,

²²⁸ James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 132, citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 311 (Diplock LJ).

²²⁹ James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 133.

²³⁰ At the federal level, see *Legal Services Directions 2005* (Cth) Appendix B r 1: ‘Consistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and Commonwealth agencies are to behave as model litigants in the conduct of litigation.’

²³¹ See generally (in the context of judicial review proceedings): *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 390 [7] (Gleeson CJ); *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262 – 263 [38] (Gaudron, Gummow and Kirby JJ): ‘At the present day, it may be “somewhat visionary” for citizens in this country to suppose that they may rely upon the grant of the Attorney-General’s fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible’, citing *Victoria v The Commonwealth & Hayden* (1975) 134 CLR 338, 383 (Gibbs J).

²³² James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 131, quoting Attorney-General Daryl Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252, 261.

²³³ Wit JCCJ hinted at this possible outcome in *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [109]. The elements of the tort of malicious prosecution were summarised by the High Court in *Beckett v New South Wales* (2013) 248 CLR 432, 438 [4] (French CJ, Hayne, Crennan, Kiefel and Bell JJ): ‘the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.’

²³⁴ Tom Howe QC and Andrew Berger, *Legal Briefing No 98: Misfeasance* (4 December 2012) Australian Government Solicitor <<http://www.ags.gov.au/publications/legal-briefing/br98.html>> ‘Importance of early and vigorous assessment of misfeasance claims’, where they write that ‘[c]ourts

courts have the power to strike out an Attorney-General's application and deliver summary judgement in the defendant's favour.

B *Opening the Floodgates and the Chilling Effect*

Allowing the state to sue is unlikely to lead to a flood of litigation that will stifle the public service. Indeed, no Australian body politic has yet even tried to use the tort to its advantage, which suggests any 'floodgates' argument would be unfounded.²³⁵ Even if the floodgates were to open, it is easy to overstate the chilling effect of the tort on public officials.²³⁶ Public officials are already instructed to be cautious of liability on all fronts, and public officials are generally more concerned about the more numerous cases of negligence and applications for judicial review. In any case, it is usually better that public officials face claims of misfeasance in public office rather than let loss go uncompensated.²³⁷

C *The Criminal Offence and the 'Softer Option' of Civil Liability*

The dissenting judges in *Marin* considered that the Attorney-General of Belize should not sue in the tort of misfeasance in public office when the State of Belize could instead pursue a criminal conviction.²³⁸ There were two main reasons given for this conclusion. First, they cited *R v Bembridge (Bembridge)*,²³⁹ an English case from 1783, as authority for the proposition that as between the state and a public officer, the common law treats misfeasance as

have been very willing to analyse both pleadings and evidence at an early stage in proceedings to ensure that a misfeasance claim is properly based', citing: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 291–292 [184]–[188] (Lord Millett); *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 267 ALR 494 [69] (Flick J); and *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* (2011) 203 FCR 293, 320–321 [109]–[111] (Kenny J).

²³⁵ A similar argument was made in *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [69] (Bernard JCCJ).

²³⁶ RC Evans, Damages for Unlawful Administrative Action: The Remedy for Misfeasance in public office (1982) 31 *International and Comparative Law Quarterly* 640, 660.

²³⁷ RC Evans, Damages for Unlawful Administrative Action: The Remedy for Misfeasance in public office (1982) 31 *International and Comparative Law Quarterly* 640, 660.

²³⁸ *Attorney General of Belize v Marin & Coye* [2010] BZSC 1, [77] (Conteh CJ); *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [31] (de la Bastide PCCJ and Saunders JCCJ). David Lusty agrees with the minority in *Marin* that the criminal offence should be preferred, but does not give detailed reasons for this view: David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38 *Criminal Law Journal* 337, 341–342.

²³⁹ *R v Bembridge* (1783) 3 Doug KB 327.

a crime and never as a tort.²⁴⁰ Second, they held that even if the state could sue, suing in the tort would have the unintended consequence of offering the public officer 'the softer option of civil liability'.²⁴¹ Each of these arguments will be addressed in turn.

There is no bright dividing line between the tort and the crime. It may well be that most instances of the tort misfeasance in public office can be brought within the scope of the criminal offence of misconduct in public office, and vice versa.²⁴² What does seem apparent is that the state is not restricted to pursuing criminal convictions despite the prima facie availability of the tortious action. *Bembridge* does not stand for the broad proposition that the state can never plead the tort. Rather, the principle in *Bembridge* is that when a public officer breaches his or her duty to the public, the state should pursue a criminal conviction to vindicate the public interest.

Bembridge is a foundational case establishing the criminal offence of misconduct in public office. It concerned fraudulent behaviour by a public service accountant. In that case, Lord Mansfield stated:²⁴³

Here there are two principles applicable: first, that a man [or woman] accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his [or her] office; this is true, by whomever and in whatever way the officer is appointed ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.

In an alternative reported version of this case, it is expressly stated that the term 'King' is used as a synonym for 'the public'.²⁴⁴

Justice Finn has observed that only Lord Mansfield's first principle is concerned with the common law criminal offence of misconduct in public

²⁴⁰ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [32] (de la Bastide PCCJ and Saunders JCCJ).

²⁴¹ *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [44] (de la Bastide PCCJ and Saunders JCCJ).

²⁴² It has been noted that '[a]ll the most serious crimes are simultaneously torts', for example, false imprisonment, assault and battery: Robert Stevens, 'Private Rights and Public Wrongs' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press, 2014) 111, 114, see also 123.

²⁴³ *R v Bembridge* (1783) 3 Doug KB 327, 332 (Mansfield LJ).

²⁴⁴ *R v Bembridge* (1783) 22 State Trials 1, 155–156 (Mansfield LJ), quoted in *Denlay v Commissioner of Taxation* (2010) 119 ALD 306, 335 – 336 [79] (Logan LJ).

office.²⁴⁵ The second principle relates to the narrow common law offence of cheating,²⁴⁶ and so is not directly relevant to the present discussion. In plain terms, the first principle is that a public officer should face criminal sanction for breaching the duty to exercise the powers of his or her office in the public interest. This first principle was formulated before the tort of misfeasance in public office had fully emerged, and so it cannot be understood as meaning that a criminal prosecution should always be preferred over a civil action. Moreover, as discussed above,²⁴⁷ in Australia, a breach of public duty does not seem to be an element of the tort of misfeasance in public office. It is only the criminal offence that is based upon a serious breach of public trust and confidence. Unlike the tort, the crime also does not require proof of material damage.²⁴⁸ Lord Mansfield's first principle is of restricted application, but it does usefully illustrate that when a public officer offends the public interest by breaching a duty owed to the public, then the state has the power to prosecute that officer for committing the crime of misconduct in public office. This public interest function of a prosecution is separate from the compensatory aims of tort law.²⁴⁹

The public interest function of the criminal offence is reiterated more clearly in *Attorney General's Reference (No 3 of 2003)*, where Lord Justice Pill observed on behalf of the court:²⁵⁰

there must be differences between the crime and the tort in that the crime is committed upon an affront to the Crown, that is in this context the public interest, whereas the tort requires a balancing of interests as between public officers and individual members of the public or organisations seeking private remedies having asserted a loss which must be proved.

This statement has recently been affirmed in Australian courts.²⁵¹ Following Lord Justice Pill's observation, it follows that a state can appropriately pursue a tortious action for misfeasance in public office if its primary aim is to obtain compensation for harms suffered in its corporate capacity.

²⁴⁵ Paul Finn, 'Official Misconduct' [1978] 2 *Criminal Law Journal* 307, 309.

²⁴⁶ Paul Finn, 'Official Misconduct' [1978] 2 *Criminal Law Journal* 307, 309.

²⁴⁷ Refer to the discussion under heading III.A, above.

²⁴⁸ See the elements of the offence set out in *R v Obeid (No 2)* [2015] NSWSC 1380 [22] (Beech-Jones J), citing *R v Quach* (2010) 201 A Crim R 522 [46] (Redlich JA, Ashley JA and Hansen AJA agreeing).

²⁴⁹ For a longer explanation of the private / public distinction between torts and crimes, see R A Duff, 'Torts, Crimes and Vindication: Whose Wrong Is It?' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press, 2014) 146, 161–163.

²⁵⁰ *Attorney General's Reference (No 3 of 2003)* [2005] QB 73, 88 [48] (Pill LJ).

²⁵¹ *R v Quach* (2010) 201 A Crim R 522 [24]–[28] (Redlich JA, Ashley JA and Hansen AJA agreeing); *R v Obeid (No 2)* [2015] NSWSC 1380 [94] (Beech-Jones J).

As for tortious proceedings being a 'softer option', this description is misleading as it reduces the discussion of the crime and the tort to an 'either or' dichotomy. The state can pursue both tortious and criminal proceedings, although generally 'it will be the more serious instances of wrongdoing that are prosecuted'.²⁵² Crimes are more serious than torts, hence the higher standard of proof required. Yet an award of exemplary damages in a tort action for misfeasance in public office performs the same function as the crime in marking out the defendant as having personally committed a culpable wrong.²⁵³ A benefit of the tort is that it only needs to be proven on the balance of probabilities and, unlike the criminal offence, the tort offers greater potential for compensation. There may be other strategic reasons why a state may choose to plead the tort, but such decisions are best left to states, not the courts. The civil action provides a state with another tool to counter wrongdoing. It does not deplete the existing strength of the anti-corruption legal structure.

D *Summary*

The consequentialist arguments against giving a state standing to sue in the tort of misfeasance in public office are weak. Political vendettas are unlikely and can be countered by court supervision. It is also most unlikely that the floodgates will open and that the threat of claims will have a chilling effect on the public service. The state does not have to pursue a criminal conviction instead of a civil action, and the civil action is not necessarily a lesser option. Rather, allowing the state to sue in the tort adds another layer to the law.²⁵⁴

VI CONCLUSION

There is no convincing reason why a state should not be able to avail itself of the tort of misfeasance in public office. Allowing a state to sue in the tort is not inconsistent with the tort's history or its overriding concern with upholding the rule of law. Moreover, granting a state standing does nothing to detract from individuals' ability to rely upon the tort if they are harmed by the malicious or

²⁵² Law Commission of England and Wales, *Misconduct in Public Office: The Current Law*, Issue Paper No 1 (2016) 112 [5.58].

²⁵³ Law Commission of England and Wales, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 35–37 [3.65]–[3.72].

²⁵⁴ As to the tort adding another layer to the law, see *Marin & Coye v Attorney General of Belize* [2011] 5 LRC 209; [2011] CCJ 9 (AJ) [107] (Wit JCCJ).

reckless acts of public officials. The tort of misfeasance in public office will never be the whole solution to the problem of corruption and other abuses of public office. But allowing the state to sue in this tort if and when it is deemed appropriate gives the state another tool to counter impropriety, both within its own ranks and in the public service of other jurisdictions. If ever Australian courts are faced with the question of whether an Attorney-General can sue in the tort on behalf of the state, Australian courts will most likely move to a Caribbean beat by reasoning along similar lines as the majority of the Caribbean Court of Appeal in *Marin*.