return to AMPLA 2002 Table of Contents

# Liability of Public Bodies and Officers to Pay Damages

**John Griffiths SC***

SUMMARY

*Australia's mining and petroleum industries are subject to extensive government regulation ranging from local government requirements to detailed State and federal legislative controls and regulations. Those regulatory regimes necessarily involve the conferral of significant powers and discretions on public bodies and public officers. The exercise or non-exercise of those powers has the potential to cause substantial damage or losses to affected companies.*

*This paper outlines the potential to recover damages or compensation caused by the administration of such regulatory controls and powers. As will be seen, a right to compensation does not arise merely because it can be established that a public body or administrator has acted unlawfully in an administrative law sense. More is required and, in particular, it will be necessary to bring a claim for compensation under one of the traditional causes of action, whether in contract, tort or applicable legislation, such as the Trade Practices Act 1974 (Cth) or State fair trading legislation.*

*The paper discusses recent Australian cases which highlight the difficulties of recovering damages against a public body under the torts of misfeasance in public office and negligence. The potential to recover damages against public bodies for misleading or deceptive conduct is also discussed, including the hurdles presented by the need to establish that such conduct was in trade or commerce and arose in the context of the public body carrying on a business.*

* Barrister, Sydney.

## INTRODUCTION

It is ironic that in an era of so-called deregulation and widespread privatisation of publicly owned assets, the nature and extent of government regulation grows relentlessly. It is revealing that in the calendar year 1996, the Commonwealth Parliament passed a total of 84 Acts of Parliament, occupying some three volumes of legislation and slightly less than 3,000 pages in all, while in 1999, a total of 201 Acts were passed, occupying eight volumes of materials and taking up almost 9,000 pages. In 2001, 170 Acts were passed, also occupying eight volumes in total. A similar pattern is evident at the levels of both State and local government, and the position is even more dramatic if regard is had to the volumes of subordinate legislation being made every year at all levels of government.

Government regulation affects virtually every aspect of both corporate and individual endeavour. From a mining/petroleum commercial prospective, such regulation includes the following legislative controls on corporate activities:

- trade practices and fair trading legislation at a Commonwealth and State level which deals with anti-competitive activities and consumer protection. (The Commonwealth *Trade Practices Act* also now contains extensive provisions dealing with access to declared essential services);
- legislation regulating corporations and their officers, administered by the Australian Securities and Investments Commission;
- taxation and other revenue measures;
- environmental protection and controls;
- native title at both Commonwealth and State levels;
- the conduct and licensing of all aspects of mining activities, from initial exploration to export and distribution of the final product; and
- supply of, and access to, essential services, including electricity, gas and water.

Such extensive government regulation necessarily involves the conferral and exercise of wide powers and discretions on numerous federal and State government bodies and public officers. The exercise of those public powers and functions has the potential to, and does, impact significantly on affected companies and persons.

In general those powers are exercised lawfully, but that is not always the case. Necessarily, therefore, the question arises as to legal

rights to compensation for the wrongful exercise or failure to exercise public powers or duties.

This paper deals with the liability of public bodies or officers to pay damages to those who suffer loss arising from the exercise of public functions, with particular reference to administrative functions relating to the mining and petroleum industries. It is not proposed to deal with rights to seek judicial or administrative review of such decisions,[1] but rather to focus on rights to compensation where public bodies of officers abuse their powers or commit legal wrongs in performing their public functions.

## NO ADMINISTRATIVE LAW TORT

Under Australian law, public bodies and public officers enjoy no special dispensation from the ordinary law of tort or contract or other causes of actions available in private law against ordinary citizens or companies, except to the extent that particular statutes grant such dispensation (and, as will be seen below, many statutes do purport to provide immunity to public bodies and officers from liability for their decisions and actions). Accordingly, subject to public authorities acting within their statutory powers, they are liable like any other person or corporation under the law of contract or the law of tort, including for trespass, false imprisonment, nuisance, negligence and so on. Likewise, there is potential for liability to arise on the part of public authorities under federal and State trade practices/fair trading legislation (noting, however, the provisions in such legislation which limit liability to conduct which takes place in trade or commerce and in the context of a public authority "carrying on a business" operate to circumscribe liability of public authorities under that legislation, as is developed further below).[2]

It is a fundamental tenet of Australian administrative law that a public authority or officer is not liable to pay compensation or damages *merely* because that authority or officer has acted unlawfully in an administrative law sense, even though persons may have suffered loss as a result of such unlawfulness. Liability will only arise if the affected person is able to bring their case within one of the established causes of action recognised under Australian law

[1] That topic was addressed at last year's conference in Chris Furnell's paper entitled "Regulating the Regulator" [2001] AMPLA Yearbook 227. Nor is it intended to deal with any constitutional law rights to compensation, such as that provided for in s 51(xxxi) of the Commonwealth Constitution which guarantees just terms for the compulsory acquisition of property.

[2] The High Court held in *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 that the State (as opposed to an instrumentality or individual) was not "a person" for the purposes of ancillary liability under s 75B(1) of the *Trade Practices Act* 1974.

generally. Having said that, however, there are two causes of action in tort which have particular operation in the public law context. Those torts are misfeasance in public office and breach of statutory duty which I will now outline.

## MISFEASANCE IN PUBLIC OFFICE

The tort of misfeasance in public office has been developed at common law to impose liability in damages on public authorities or officers who engage in malicious, deliberate or injurious wrongdoing. Prior to the High Court's decision in *Northern Territory v Mengel*,[3] there had been suggestions in some Australian cases (such as Smith J's judgment in *Farrington v Thomson*[4]) that damages were recoverable under the tort of misfeasance in public office where damages were caused by a public officer acting in "breach of his official duty, even though it is not shown either that he realised this or that he acted maliciously". *Mengel* has established that the legal tort is not as generous as cases like *Farrington* suggested, but having clarified that particular issue, the High Court declined to be more definitive about certain elements of the tort, especially the necessary mental element.

The facts of *Mengel* exemplify the sort of economic harm which individuals can suffer as a consequence of well intentioned but over zealous and unauthorised administrative actions. The Mengel family owned cattle stations in the Northern Territory which they had purchased with hefty bank loans. They intended to pay back a large portion of their bank loans from the sale of their cattle. Northern Territory Government stock inspectors believed that the Mengel's cattle were afflicted with brucellosis and imposed restrictions on the movement of the Mengel's cattle, which had the consequence of preventing them from selling their cattle as they had planned. The inspectors believed that they had the power to impose such movement restrictions when, in law, they did not. The inspectors were aware that the Mengels had to sell some of their cattle in order to make their loan repayments. The Mengels sued the inspectors and the Northern Territory for damages in order to recover the losses, resulting from the restrictions. They succeeded both at first instance and on appeal, but ultimately failed in the High Court.

The High Court made clear in *Mengel* that, notwithstanding that the precise limits of the tort were still to be precisely defined, the tort is not established simply by proving that a public officer has done an act which he or she knows is beyond power and which results in damage.

[3] (1995) 185 CLR 307.
[4] [1959] VR 286.

The High Court held that both policy and principle demanded that liability of public officers for that tort should be more closely confined:

> "So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability. And principles such that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individual for the intentional inflection of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm … or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach."[5]

The High Court was unimpressed with the argument that the tort of misfeasance in public office should be reformulated to cover the case of a public officer who *ought* to have known of his or her lack of power. The court suggested that the tort of negligence was adequate to cover that situation. Regrettably, however, the High Court's decision in *Mengel* left unclear the precise state of mind required of a public officer in order for the tort of misfeasance in public office to apply.

*Mengel* is significant in another separate respect. The High Court also overruled its earlier decision in *Beaudesert Shire Council v Smith*.[6] In that earlier decision, the High Court had held that an action for damages upon the case was available to a person who suffers damage or loss as the inevitable consequence of the unlawful, intentional and positive acts of another. That tort had potential to provide a means to obtain compensation in circumstances where loss was suffered as the inevitable consequence of the unlawful, intentional or positive acts of a public officer. In *Mengel*, however, the High Court held that the *Beaudesert* tort was too wide and, in any event, presented unacceptable difficulties in terms of what constitutes either "unlawful act" or "inevitable consequence". More particularly, however, the High Court held in *Mengel* that the *Beaudesert* principle was unacceptable in providing for liability notwithstanding that the defendant was under no duty of care to avoid harm to the plaintiff (an essential element of the tort of negligence) and that liability did not depend upon an intention to harm. For all these reasons *Beaudesert* was overruled, with the consequence that persons suffering damages as a consequence of the actions or inactions of a public officer or body were left to consider their rights to recover compensation under

[5] Ibid at 347.
[6] (1966) 120 CLR 145.

other causes of action in private law, including negligence, trespass, breach of statutory duty and contract.

The High Court had occasion to revisit the issue of the scope of the tort of misfeasance in public office in *Sanders v Snell*.[7] That case involved claims for damages in tort by the former executive officer of the Norfolk Island Tourist Office for the termination of his employment contract. His claim for damages was based on the tort of misfeasance in public office and the emerging tort of wrongful interference with trade or business by unlawful means, as well as relying on the tort of inducement of breach of contract. His employment had effectively been terminated by the Minister for Tourism of Norfolk Island who had issued a direction to the statutory corporation responsible for tourism to terminate the plaintiff's employment. The plaintiff argued that the Minister's direction was in breach of the administrative law requirements of procedural fairness because he was not given an opportunity to be heard prior to the direction being given to the statutory corporation. The High Court agreed with the Full Court of the Federal Court that the plaintiff had been denied procedural fairness but the High Court disagreed that the plaintiff had established the necessary elements of the tort of misfeasance of public office. The High Court emphasised that the precise limits of the tort were still undefined but that it was insufficient merely to establish that the Minister had acted unlawfully by denying the plaintiff procedural fairness. Rather, "something more is required".[8] The Full Court of the Federal Court was satisfied that that additional element was provided by their finding of the Minister's absence of an honest attempt to perform the functions of his office, but the High Court found that, in the circumstances of the case, the Full Court was not entitled to make findings about the honesty of the Minister's conduct and the matter was remitted for a new trial.

Again, it is a matter of some regret that the High Court did not take the opportunity to provide stronger guidance as to the elements of the tort of misfeasance in public office but it is apparent from the court's decisions in both *Mengel* and *Sanders v Snell* that the court considers that it is premature authoritatively to define the limits of that tort. Even so, there are strong indications that the court views those limits narrowly rather than broadly, as is apparent from the following passage in *Sanders v Snell*:[9]

> "Questions of holding public officials liable for acts done apparently in furtherance of their duty raises very different considerations from those that may arise in relation to economic

[7] (1996) 196 CLR 329.
[8] Ibid at 349.
[9] Ibid at 344.

> torts committed by private persons. Misfeasance in public office is concerned with misuse of public power. Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them where their exercise would be for the public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of public power uncompensated. The tort of misfeasance in public office must seek to balance these competing considerations. The considerations that arise in the case of public officials do not arise in the dispute between private citizens about economic harm allegedly inflicted by one on the other. There the focus may be less on the intention of the alleged tort feasor than it is on the means employed because the intended pursuit of economic advantage (and resulting economic harm to rivals) is central to competition. Equating the tort of misfeasance with the tort of wrongful interference with economic interest or subsuming the tort of misfeasance in that latter tort would pay too little regard to the different considerations that we have mentioned."

Post *Mengel* and *Sanders v Snell*, further cases have tested the limits of the tort of misfeasance in public office. The House of Lords has held in *Three Rivers District Council v Governor of the Bank of England*[10] that the tort requires an element of bad faith and applies in circumstances where a public officer exercises powers specifically intending to injure the plaintiff or, otherwise, in circumstances where the public officer acts with knowledge of, or reckless indifference to, the unlawfulness of those actions and with the same state of mind in respect of the probability of causing injury to the plaintiff.

The scope of the tort has also recently been considered in various Australian decisions post *Mengel* and *Sanders v Snell*.[11] Perry J in *Edwards v Olsen*[12] attempted to summarise the essential elements of the tort of misfeasance in public office. His Honour identified the following four essential matters:

1. The defendant must be a public officer.
2. There must be an invalid exercise of power or purported exercise of power.
3. The defendant must be shown to have the requisite state of mind.

[10] [2000] 2 WLR 1220.

[11] See, for example, *Scott v Secretary of Department of Social Security* [2000] FCA 1241; *Goldie v Commonwealth* [2000] FCA 1873; *Spectrum Decorating Pty Ltd v South Australia* [2000] NSWSC 971; *Berry v* Ryan [2001] ACTSC 11; *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 and *Tache v Abboud* [2002] VSC 42.

[12] [2000] SASC 438.

4. The plaintiff must suffer damages as consequence of the acts or omissions of the public officer.

*Edwards v Olsen* involved a claim for millions of dollars arising from alleged maladministration of State Fisheries legislation and its impact upon commercial abalone divers.

Further guidance on the essential elements of the tort identified by Perry J is to be found in Smith J's recent decision in the Supreme Court of Victoria in *Tache v Abboud*.[13] The claim for damages for misfeasance in public office in that case arose against a background of the plaintiff having had a conviction of rape quashed on appeal and he subsequently brought civil proceedings seeking damages against two legal practitioners involved in his original prosecution, including a solicitor employed by the Director of Public Prosecutions. The claim for damages for misfeasance related to an allegation against the legal practitioners that they had failed to disclose information which was relevant to the defence to the prosecution. After referring to the four essential elements of the tort of misfeasance identified by Perry J, Smith J gave the following additional guidance :

1. A "public officer" is a person discharging a duty in the discharge of which the public is interested and that person is paid out of funds provided by the public.

2. The scope of the requirement that there be an invalid exercise of power remains unclear, but includes acts invalid for want of procedural fairness, exercise of power for an improper purpose, intentional infliction of injury to the plaintiff, exercise of a power with regard to irrelevant considerations and the manifestly unreasonable exercise of power.

3. As to the requisite state of mind, while this element also remains unclear, proof of any of the following matters would satisfy the requisite state of mind:
   - targeted malice on the part of a public officer involving action for an improper ulterior motive of intentionally inflicting injury on the plaintiff;
   - where the public officer had actual knowledge that he had no power to do the act complained of and also had actual knowledge that his action would probably injure the plaintiff; or
   - where the public officer lacks actual knowledge of the absence of power but proceeds "recklessly indifferent as to the existence of a power to engage in the conduct which caused the plaintiff's loss".

[13] [2002] VSC 42.

## TORT OF BREACH OF STATUTORY DUTY

It is well established that a cause of action for damages is available for breach of statutory duty in circumstances where a statute imposes an obligation for the protection or benefit of a particular class of persons and, upon its proper construction, the statute provides a ground of civil liability when there is a breach of statutory obligation which causes injury or damage of a kind against which the statute was designed to afford protection.[14] This tort often provides a basis for liability to pay damages for breach of occupational, health and safety legislation and both public and private sector bodies or individuals may be involved as defendants.

On its face, that tort appears to have considerable potential to provide an avenue for recovering compensation for damages which flow from a breach of statutory duty by a public body or officer. In practice, however, the tort is not commonly established. The primary difficulty is to establish that Parliament intended to confer a private right of action for breach of a statutory duty on the part of individuals who suffer damage or loss arising from a breach of statutory duty. The difficulty is illustrated by the decision of the House of Lords in *X (Minors) v Bedfordshire County Council*[15] where an action for damages for breach of statutory duty was brought against a local council for its failure to exercise its statutory duties to institute care proceedings in respect of children and young persons. The House of Lords noted that the relevant welfare legislation provided protection to children and young persons but that the legislation in question was to be treated as having been passed for the benefit of society in general, not those individuals in particular. Accordingly, the claim for damages failed.

As the Full Court of the Federal Court noted recently in *Scott v Secretary of Department of Society Security*,[16] cases where a private right of action has been held to arise are generally where the statutory duty has been very limited and specific, as opposed to general administrative functions involving exercise of administrative discretions. Thus, in *Scott*, which involved an action for damages for breach of statutory duty said to arise under the *Social Security Act* 1991 in circumstances where a public servant had failed to advise the plaintiff of social security benefits which were potentially available, the Full Court held that the *Social Security Act* did not manifest any intention to confer a private right of action for the breach of any of its provisions and, in so concluding, the

[14] See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424 per Brennan CJ, Dawson and Toohey JJ.
[15] [1995] 2 AC 633.
[16] [2000] FCA 1241 at [18].

Full Court placed particular emphasis on the existence in the social security legislation of specific mechanisms for obtaining administrative review of decisions made by the department.

Similar reasoning is likely to apply in many other legislative contexts to frustrate actions for damages for breach of a statutory duty. But, necessarily, the issue will ultimately depend upon the proper construction of the particular statute. The few reported instances where a plaintiff has succeeded in establishing such a parliamentary intention highlight the difficulties of succeeding in this tort.

## NEGLIGENCE

The High Court's decisions in *Mengel* and *Sanders v Snell* both indicate that negligence is the primary tort for recovery of damages against public authorities. Indeed, although the Mengels failed in their claims under the Beaudesert tort and misfeasance in public office, Deane J seemed to suggest that the Mengels should have an opportunity on the remittal of the case to raise negligence as a source of liability arising from an arguable breach of a duty of care by the inspectors in failing to appreciate that their actions were unauthorised at law. The general principle was expressed in the following terms by Brennan J in *Mengel*:[17]

> "Public officers, like all other subjects, are liable for conduct that amounts to a tort unless their conduct is authorised, justified or excused by statute. A statute is not construed as authorising, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment. In particular, a statute which confers a power is not construed as authorising negligence in the exercise of the power. Thus liability may be imposed on a public officer under the ordinary principles of negligence where, by reason of negligence in the officer's attempted exercise of a power, statutory immunity that would otherwise protect the officer is lost."

The availability of the tort of negligence to recover compensation for losses caused by the negligent exercise or non-exercise of public power was also emphasised in the majority judgments in *Mengel*[18] in the following terms:

> "Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, *there may be circumstances,*

[17] (1995) 185 CLR 307 at 358.
[18] Ibid at 352-353 (emphasis added).

> *perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power.* And if the circumstances give rise to a duty of care of that kind they will usually also give rise to duty on the part of the officer or employee concerned to ascertain the limits of his or her power."

The availability of negligence may appear as a promising way of recovering compensatory damages for losses caused by the actions or inactions of public authorities and officers but, in practice, two aspects of the tort of negligence operate to limit the availability of that tort in a public law context. Those two matters concern:

(a) the determination of whether a common law duty of care exists with respect to the exercise of statutory powers; and
(b) even if that hurdle can be overcome, difficulties of establishing the breach of a relevant duty of care.

Each of those matters will now be developed.

## (a) Need to Establish Duty of Care

To succeed in negligence, the plaintiff must establish that the defendant owed a duty of care to him or her. That requirement presents particular challenges in cases involving alleged negligence in the context of the exercise or non-exercise of statutory provisions.[19] In particular, several recent cases reveal, the courts are alert to the danger of the tort of negligence operating to subvert statutory regimes which reflect Parliament's judgment as to the correct balance between competing rights and obligations. As the High Court recently observed in *Sullivan v Moody*:[20]

> "Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care … sometimes [the problems] may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion to be arrived at as a matter of principle."

In *Sullivan v Moody*, two fathers, both accused of sexual assault on their children, sued State employed medical practitioners who had

[19] See the remarks of McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [79] ff and see also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and *Pyrennes Shire Council v Day* (1998) 192 CLR 330.
[20] (2001) 75 ALJR 1570 at [50].

examined their children and reported to the State Department of Community Welfare that the children had apparently been sexually abused. Further departmental investigations resulted in charges being laid against the fathers. The charges were ultimately dropped. The fathers sued the State and the medical practitioners in negligence, claiming that they had suffered shock, distress and psychiatric harm. The fathers alleged that the medical practitioners had acted negligently in their examination and diagnosis and the State was said to be vicariously liable for the negligent investigation and reporting of its employees.

In determining whether a duty of care was owed to the fathers in investigating and reporting a possible crime, the High Court emphasised the importance of reconciling the alleged duty of care with the relevant statutory scheme providing for the investigation and reporting of such crimes. In particular, the court emphasised that if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Furthermore, "when public authorities or their officers are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations".[21]

In the event, the court rejected the alleged duty of care owed to the fathers on the basis that such a duty would be inconsistent with the proper and effective discharge of the statutory functions and responsibilities of the State in respect of the protection of children. The court held:[22]

> "The statutory scheme that formed the background of the activities of the present respondents was, relatively, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. *It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm.*"

Where allegations of negligence are made in the context of the exercise of powers as part of a statutory scheme was given further emphasis in the recent decision of the Court of Appeal of New South

[21] Ibid at [60].
[22] Ibid at [62] (emphasis added).

Wales in *State of New South Wales v Paige*.[23] That case involved an action for damages in both tort and contract by a former principal of a Sydney high school who sued the Department of Education after his employment was terminated for failure to comply with departmental procedures in the way he handled complaints of sexual abuse. The plaintiff succeeded in first instance in establishing that the department owed him a duty of care to conduct its disciplinary procedures so as to avoid psychiatric harm to him. The appeal succeeded on liability for negligence but failed on the cause of action in contract. The Chief Justice's judgment contains a useful analysis of the difficulties which can arise in reconciling administrative law principles with the application of principles in negligence. In particular, following the High Court's lead in *Sullivan v Moody*, Spigelman CJ emphasised the need to give close consideration to whether an alleged duty of care was inconsistent or incompatible with a statutory regime. Indeed, the Chief Justice went further to emphasise[24] that "issues of coherence may arise even if there is no direct inconsistency. It may be enough if the effected imposing civil liability is to distort 'the focus'" of the statutory decision-making process.

Hence, it was held that it was insufficient for the purposes of establishing a duty of care to demonstrate that there had been a denial of procedural fairness in the conduct of the department's disciplinary procedures affecting the plaintiff. In concluding that no duty of care was owed to the plaintiff, the Court of Appeal was especially influenced by the fact that any such duty would have an inhibiting affect on the expeditious and efficient discharge of disciplinary investigations. The Chief Justice said:[25]

> "the scheme for the laying of charges involves the formulation of an opinion that a breach may have occurred and enquiring whether it is denied prior to charge. It is desirable that this stage be conducted expeditiously. The introduction of a duty of care at this time is fraught with the possibility of delay … a concern with expeditions is plainly part of the statutory scheme.
>
> Subsequent to charge, some form of hearing must take place – whether on paper or oral … the kinds of matters that may constitute [a breach of discipline] cover a broad spectrum of conduct and levels of iniquity. There are many circumstances in which delay caused by the imposition of a duty of care with respect to the statements made during this phase, or with respect to the act of laying the charge itself, will render the process less efficient and effective.

[23] (2002) NSWCA 235.
[24] Ibid at [93].
[25] Ibid at [121]-[123].

> In my opinion, there is a significant level of inconsistency or incompatibility between that of duty of care prior to charging and the expeditious institution of the charging process."

The Chief Justice's judgment also contains a comprehensive discussion of the essential need for the law of negligence as it applies to public officials to be coherent with administrative law principles. The following passage[26] is significant:

> "Administrative law has been one of the most dynamic areas of the common law for over half a century. That dynamism has not yet run its course. The development of administrative law continues to raise difficult issues about the proper role of the courts. Although the process of balancing the conflicting interests has not stabilised, *the substantial expansion has not led to a significant role for monetary compensation*.
>
> Compensatory damages for administrative error are available only in very limited circumstances ….
>
> Proposals for the development of an administrative tort have been made from time to time, so far without success. The intrusion of the tort of negligence into the area of procedural irregularities in administrative decision-making could well overwhelm the traditional remedies of administrative law."

The Chief Justice proceeded to emphasise the particular features of judicial review of the legality of decision-making and to emphasise that the purpose of judicial review was not compensatory but, rather, to uphold the rule of law and to ensure effective decision-making processes. Judicial review rarely involves the court stepping into the shoes of the decision-maker and performing that decision-maker's statutory function. Rather, in circumstances where a judicial review error is established, the ordinary relief is for the affected administrative decision to be set aside and sent back to the decision-maker for a fresh decision according to law.

The Chief Justice emphasised the potential for conflict between the limited nature of judicial review of administrative action and extending the law of tort of negligence to permit recovery of damages for judicial review errors. In particular, his Honour said:[27]

> "An award of damages based on defective decision-making will often be explicable only on the basis that the decision ought to have been made in favour of the person who suffered damage. The effect of extending the law of tort to permit recovery of damages for errors subject to judicial review will therefore often be, in substance, to remove to the courts the determination of matters that a statute reposes in another. *In my opinion, the*

[26] Ibid at [171] (emphasis added).
[27] Ibid at [176] (emphasis added).

*courts should be very slow to extend the law of negligence to a new category that has such a consequence.*"

Accordingly, the Court of Appeal held that the trial judge had erred in accepting the plaintiff's claim that he was owed a duty of care in the conduct of disciplinary investigations, the laying of charges and the hearing of disciplinary proceedings. The court considered that legal deficiencies in the conduct of those processes were more appropriately remedied by judicial review relief than by extending the law of negligence to permit recovery of damages. The need for judicial restraint was said to relate directly to the importance of maintaining "coherence" in legal principles.

The Chief Justice's refusal to regard the traditional heads of judicial review of administrative action (for example, denial of procedural fairness, failure to have regard to relevant considerations, error of law) with the standard of care required under the law of negligence makes good sense for other reasons. In particular, if the heads of review are directly tied to the standard of care in negligence there is a real danger that the courts will be inclined to limit the ambit and operation of the traditional grounds of judicial review, thereby producing an undesirable result for the effectiveness of judicial review of public administrative action. As the Chief Justice stated, our judicial review system is directed to fundamentally different objectives and considerations than those which apply under the law of negligence.

## (b) Breach of Duty of Care

Justice Mason's judgment in *Wyong Shire Council v Shirt*[28] is often referred to as containing the classic statement of the assessment of breach of a duty of care, where his Honour observed :

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidentially assert what is the standard of

[28] (1979) 146 CLR 40 at 47-48.

> response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

Again, the Chief Justice's judgment in *Paige* contains an illuminating discussion of the particular difficulties of establishing breach of a duty of care in a statutory context. In *Paige* the trial judge had held that the department's failure to accord procedural fairness constituted a breach of the duty of care. That finding was criticised and overruled by the Court of Appeal which emphasised that procedural fairness was a principle, rather than a standard or rule and that it was singularly inappropriate to use the concepts of procedural fairness to identify a standard of care for the purposes of assessing whether or not there has been a breach of a duty of care for the purposes of negligence.

The dangers of importing administrative law concepts into the tort of negligence are highlighted in the following passage from Spigelman CJ's judgment:[29]

> "in my opinion his Honour erred in expressing his conclusions in public law concepts. Even if it be the case that there was a denial of natural justice of administrative law purposes, a matter which need not be determined, the focus in this case must be whether or not a more elaborate oral hearing process should have been chosen by a reasonable investigator mindful of the risk of mental trauma from an adverse finding. That is quite a different standard."

Thus far I have been dealing with the potential for damages to be recovered under the law of negligence for the actions or inactions of public authorities or officers. Additional problems arise where the complaint is that a public authority or its officer has acted negligently in giving advice. Cases such as *Shaddock v Parramatta City Council (No 1)*[30] highlight the potential for compensatory damages to be recovered for negligent advice by a government body. It was held there that the Parramatta City Council was under a duty to a purchaser of property to take reasonable care that the information provided by the council in certificate under relevant local government legislation. Subsequent cases, however, have emphasised the limits of that potential

[29] (2002) NSWCA 235 at [231].
[30] (1981) 150 CLR 225.

liability. For example, in *Scott v Secretary of Department of Social Security* above the Full Court of the Federal Court rejected the claim that the department was liable in negligence for failing to advise the plaintiff of specific benefits that might be available under social security legislation. *Shaddock* was distinguished on the basis that it dealt with the council's response to an enquiry in respect of a particular purchase, as opposed to a more broad ranging enquiry. Beaumont and French JJ observed:[31]

> "The position in Shaddock, where the Council was aware of a particular proposal and failed to mention it, may, we think be distinguished from the position of a Department administering social security legislation. It is one thing to expect a Department (reasonably) to communicate accurately the general range of benefits available; it is another to expect the Department to have sufficient knowledge of the personal circumstances of any particular applicant for social security, so as to be in a position to advise the applicant of specific benefits that might be available in his or her personal circumstances."

Interestingly, Finkelstein J adopted a more liberal approach to the issue whether a duty of care was owed both as to the manner in which a claim for a social security benefit is processed and in respect of the expeditious processing of such a claim, as is evident from the following passage:[32]

> "The respondent's functions are not inconsistent with the existence of a duty of care. The respondent is responsible for the general administration of the *Social Security Act*. You must consider each application for a claim and if an applicant satisfies the necessary criteria, he must ensure that the benefit is paid. Applicants who are entitled to benefits of the kind payable under the *Social Security Act* are generally in a vulnerable position. The duty to consider a claim for a benefit and the obligation to process the claim are not legislative in character. There is no reason in policy why a duty of care should not be owed. It is reasonably foreseeable that a person who is wrongly deprived of a benefit to which he or she is entitled, or who endues unreasonable delay in receipt of a benefit, may suffer physical harm."

Finkelstein J's comments would appear to be out of step with the approach taken in decisions such as *Sullivan v Moody* and *Paige*.

## MISLEADING OR DECEPTIVE CONDUCT

In view of the limitations applying to the law of negligence in a public law context, it is important to also consider the potential for liability of public bodies or officers under the Commonwealth *Trade*

[31] [2001] FCA 1241 at [23].
[32] Ibid at [32].

*Practices Act* or equivalent State legislation. Provisions in those Acts dealing with liability for misleading or deceptive conduct are of particular relevance if one is considering the potential to recover damages arising from the actions or statements of such persons. As will be seen below, however, while that legislation can operate to impose liability in circumstances where recovery would be unlikely in the law of tort, the legislation has its own particular limitations which will often operate in practice to frustrate its use to recover damages against public bodies and officers.

The Commonwealth *Trade Practices Act* and equivalent State legislation apply to the Crown in right of both the Commonwealth and the States. That is not to say, however, that such legislation applies across the board to all activities carried out by the Crown. The point can be illustrated by reference to the Commonwealth *Trade Practices Act*.

Prior to 1996, the *Trade Practices Act* did not apply to the Crown in the right of any of the States nor to any State instrumentality. That situation changed in 1996 with the enactment of s 2B of that Act. Two important limitations on the ambit of that Act will operate in practice, however, to circumscribe the circumstances in which liability may be imposed on either a Commonwealth or State public body or officer. First, the Act applies only to conduct "in trade or commerce". Secondly, the Act applies only in so far as those governments or their instrumentalities carry on a business and there are specific provisions which declare that certain activities do not amount to carrying on a business, including imposing or collecting taxes or granting or revoking licences.[33]

The importance of the first limitation is illustrated by cases in which the Act has been used to challenge statements or representations made by public authorities or individuals on the grounds that they were misleading and deceptive. For example, in *Unilan Holdings Pty Ltd v Kerin*,[34] a claim was made under s 52 of the *Trade Practices Act* against the Minister for Primary Industry seeking damages for losses which were said to have been incurred in reliance upon statements made by the Minister in a speech regarding the government's policy on wool prices. The claim failed on the basis that the Minister's speech was not made "in trade or commerce". The speech had been given by the Minister to an international body governing the wool trade. The Minister promised in the speech that a recent drop in the reserve price of wool would not be repeated as a matter of government policy. Hill J found that the speech did not involve conduct in trade or commence and he said:[35]

> "The giving of a speech to a international wool conference by a Minister of State is not an aspect or element of activities or

[33] See s 2B.
[34] (1992) 35 FCR 272.
[35] Ibid at 277 (emphasis in original).

> transactions which, of their nature, bear a trading or commercial character. A fortiori, if the Minister attends that conference in his personal capacity. It does not form a part of the *central conceptions* of trade or commerce of … and is not made so merely because the speech concerns matters of trade or commerce. The giving of the speech is a matter that can be said to be *in relation to* trade or commerce, but not conduct which is actually *in* trade or commerce."

It might also be noted that the applicant in *Unilan* also sued the Minister in negligence and Hill J was not prepared to strike out the relevant paragraphs in the Statement of Claim alleging that cause of action even though he concluded that the s 52 claim was untenable and should be struck out.

Another example of the limits of s 52 in its application to public bodies is the decision in *Giraffe World Australia Pty Ltd v ACCC*.[36] In that case, the applicant courageously challenged an ACCC press release on several grounds, including that it was misleading and deceptive. As in *Unilan*, the Statement of Claim was struck out on the basis that it did not disclose that the ACCC had published the press release in trade or commerce.[37]

The limitation in the *Trade Practices Act* that a government instrumentality be "carrying on a business" for the Act to apply is also an important limitation. Thus, it has been held that s 52 is unavailable against the Commonwealth in regard to its conduct in carrying out a tender to run immigration detention centres because the running of detention centres by the Commonwealth Department of Immigration was found not to amount to the Commonwealth carrying on a business.[38] To similar effect, Emmett J held in *JS McMillan Pty Ltd v Commonwealth*[39] that the Commonwealth was not carrying on a business when it issued a tender for the outsourcing of the role of the Australian Government Publishing Service.[40]

Those cases are to be contrasted with *Hughes Aircraft Systems International v Air Services Australia*[41] where the applicant was successful in establishing a claim for damages under s 52 of the *Trade Practices Act* against Air Services Australia (a Commonwealth

[36] (1999) ATPR 41-669.

[37] That finding is to be contrasted with the refusal in *Meadow Gem Pty Ltd v AMP Executors and Trustee Co Ltd* (1994) ATPR 46-130 where the court refused to strike out a Statement of Claim alleging that statements made by a Minister and government officials concerning the solvency of a building society were misleading.

[38] See *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448.

[39] (1997) FCR 337.

[40] Contrast *Paramedical Services Pty Ltd v Ambulance Service of NSW* [1999] FCA 548 at [86]-[92] per Hely J.

[41] (1997) 76 FCR 151.

statutory corporation) in respect of misleading and deceptive conduct in the course of a tender for the provision of a new air traffic control system for Australia. The respondent in that case did not seek to avoid liability under the *Trade Practices Act* by denying that it was "carrying on a business". Its decision was presumably based on the fact that it provided air traffic control services to airlines on a "user pays" basis. And, in that sense, it was carrying on a business. The same reasoning could be applicable to the many other federal and State government instrumentalities and bodies which have been corporatised in recent years and provide services on a commercial basis.

## STATUTORY IMMUNITIES

Another important matter to be considered before commencing litigation with a view to recovering damages against a public body or officer is whether there are any relevant statutory immunities operating to protect such persons from particular liability. Many federal and State Acts contain specific provisions which are intended to exempt or limit liability of those responsible for public administration.

The concept of the exercise of public powers "in good faith" is frequently the pivotal element of statutory immunity provisions. Typical of such provisions are ss 397 and 398 of the *Water Management Act* 2000 (NSW), which deal respectively with the exclusion of personal and Crown liability, and are in the following terms:

"397(1) An act or omission of:
(a) the Minister or Director-General, or
(b) a prescribed authority, or a member of a prescribed authority, or
(c) a member of staff of the Department or of a prescribed authority, or
(d) a person acting under the direction of a person referred to in paragraph (a), (b) or (c),

does not subject the Minister, Director-General, member of staff or person so acting personally to any action, liability, claim or demand if the act or omission were done, or omitted to be done, in good faith for the purpose of executing this Act.

398(1) Neither the Crown nor other person is subject to any action, liability, claim or demand arising:
(a) from the unavailability of water, or
(b) from any failure in the quantity or quality of water,

as a consequence of anything done or omitted to be done in good faith by Minister, by a prescribed authority or by any person acting on behalf of the authority or a prescribed authority, in the exercise of any functions under this Act.

(2) Neither the Crown nor any other person is subject to action, liability, claim or demand arising as a consequence of:
(a) the use in good faith of any water management work, or
(b) the release in good faith of water from any water management work,
by the person, by a prescribed authority or by any person acting on behalf of the Minister or a prescribed authority, in the exercise of any functions under this Act."

Section 398 of the *Water Management Act* replaces s 19 of the *Water Act* 1912 which relevantly provided as follows:

"Except to the extent that an Act conferring or imposing functions on the Ministerial Corporation otherwise provides, an action does not lie against the Ministerial Corporation with respect to loss or damage suffered as a consequence of the exercise of a function of the Ministerial Corporation, including the exercise of a power:
(a) to use works, or impound or control water; or
(b) to release water from any such works."

Section 19 was considered by the High Court in *Puntoriero v Water Administration Ministerial Corporation*.[42] The court held that s 19 did not give the Ministerial Corporation immunity from a claim for damages for negligence in circumstances where the corporation supplied contaminated water to a potato farmer for crop irrigation causing the crop to fail. The High Court held by a majority that because the supply of water was pursuant to a consensual dealing and was not forced upon the farmer, and because it was not an exercise of a function which of its nature involved any interference with persons or property, s 19 did not operate to confer an immunity from suit by farmer.

Section 398 of the *Water Management Act* has been carefully worded with a view to avoiding the consequences of the High Court's decision by including express reference to water management, as well as expressly providing for a defence to omission to act.

Other statutory immunity provisions employ the concept of good faith to provide protection to public bodies, even in circumstances where in fact powers have not been exercised for an authorised purpose. A good example of particular relevance to the mining and

[42] (2000) 199 CLR 575.

petroleum industries operating in Queensland is s 401 of the *Mineral Resources Act* 1989 (Qld), which is in the following terms:

> "401 No act, omission, thing or decision done or made by the Minister the chief executive, tribunal, mining registrar, field officer, other authorised officer or anyone else acting under the authority of any of those persons as provided by this Act –
>
> (a) for the purpose of giving effect of any provision of this Act; or
>
> (b) purporting to be for the purpose of giving effect to any provision of this Act and done or made in good faith and without negligence;
>
> shall render the Crown, the Minister, the chief executive, tribunal, mining registrar, field officer, other authorised officer or other person liable at the suit of any person."

It is to be noted that the defence of good faith is an alternative to the defence of exercising a power or function for the purpose of giving effect of any of the Act's provisions, but only applies in the absence of negligence. An interesting issue arises as to whether the defence in para (a) would be available even where negligence was present as long as the exercise or non-exercise of power was in fact for the purpose of giving effect to any provision of the Act.

Statutory immunities have the potential to limit liability not only for negligence but for other torts, including misfeasance in public office, as is demonstrated by the Court of Appeal's decision in *Chief Commissioner for Business Franchise Licenses (Tobacco) v Century Impact Pty Ltd*.[43] In that case the plaintiff sought to recover damages from the State Commissioner and one of his inspectors following their seizure of the plaintiff's tobacco stocks. It was argued that the seizure was invalid and that there had been misfeasance of office. Section 27 of the *Business Franchise Licences (Tobacco) Act* 1987 provided:

> "No matter or thing done by the Chief Commissioner or any other officer or person shall, if the matter or thing was done in good faith for the purpose of executing this Act, subject the Chief Commissioner or any such officer or person to any action, liability, claim or demand."

The Court of Appeal held that the statutory immunity applied in circumstances where the inspector believed that what he was doing was being properly done for purposes of executing the Act even though that belief may have been unreasonable. The court emphasised that there was no material to suggest that the officer was aware that he was acting unreasonably. The court considered that the inspector was

[43] (1996) 40 NSWLR 511.

protected from liability so long as what he did was done in good faith for the purpose of executing the Act at the time of seizing the tobacco and that what he did was intended to be in furtherance of his duty to the public at large and was not done maliciously or for any other reason other than carrying out his public duty.

That approach is to be contrasted with the decision of the Full Court of the Federal Court in *Mid Density Developments Pty Ltd v Rockdale Municipal Council*,[44] which concerned the immunity conferred by s 149(6) of the *Environment Planning and Assessment Act* 1979, which relevantly provided that a council "shall not incur any liability in respect of any advice provided in good faith" pursuant to a particular provision. The Full Court held that the requirement of "good faith" involved more than "honest ineptitude". For the immunity to apply, the court considered that there must be a real attempt by the council to answer a request for information at least by reference to information and material which was accessible to the council.

## CONCLUSION

As is apparent from the above analysis, Australian courts have declined to equate unlawful administrative action with a right to recover damages or compensation. Liability of public bodies or officers for damages caused by their administrative conduct depends upon the ability of an affected person or company to establish liability under general causes of action in tort or contract law. The path to recovery of damages is complicated by special considerations which reflect the public law context in which the issues arises. Recent cases highlight the courts' alertness to preserving the coherence of administrative law principles as opposed to legal principles governing liability to pay damages.

Within that framework there is potential to recover damages through legal action, but the difficulties are clear. In many cases it might pay to consider alternative avenues for compensatory relief, including utilising the services of the various offices of Ombudsman who operate at both a federal and State level and who have the power to recommend that compensation be paid for damage caused by some form of maladministration. Although any such recommendation is not binding as a matter of law, practice indicates that such recommendations tend to be acted upon. It should be noted, however, that an Ombudsman is unlikely to investigate a complaint if it is considered that the complainant has alternative rights, including by way of legal proceedings.

[44] (1993) 44 FCR 290.

**return to AMPLA 2002 Table of Contents**