

16. Immunity from Civil Liability

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Summary

16.1 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. They may operate to allow some interference—usually by government agencies—with a person’s liberty, freedom of movement, bodily security, property, and other rights, and deny civil redress. Although sometimes necessary, laws that give immunity from civil liability and authorise what would otherwise be a tort can limit individual rights and require careful justification.¹

16.2 Laws that give executive immunities a wide application and laws that authorise what would otherwise be a tort are closely related.² Notably, an executive immunity may essentially authorise the executive or part of the executive to commit what would

1 The Terms of Reference refer to laws that authorise the commission of a tort, but it is more appropriate to refer to laws that authorise what would *otherwise* be a tort. The fact that conduct is authorised by statute or other lawful authority will usually prevent the conduct amounting to a tort at all.

2 Both are listed in the Terms of Reference. Executive immunities from statute and from criminal prosecution are outside the scope of this chapter, for reasons set out below.

otherwise be a tort.³ Statutes that authorise tortious conduct or provide for immunities from civil liability may sometimes apply to non-government actors, for example to those engaging in industrial action, but it is more common for them to apply only to the executive.

16.3 This topic is closely related to some of the other rights, freedoms and privileges considered in this Inquiry. Laws that give executive immunities a wide application and that authorise torts are problematic largely because they limit other individual rights. An immunity from the tort of trespass to land affects a person's property rights.⁴ A statute that authorises arrest and detention affects a person's liberty and freedom of movement.⁵

16.4 Some laws that provide for executive immunities from civil liability or that authorise what would otherwise be a tort are no doubt justified. For example, the police need powers of arrest and detention to enforce the law. This is also recognised by the common law.

16.5 This chapter identifies many Commonwealth statutes that give some immunity not only to the federal police, but to other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. The immunities protect these agencies from liability that might otherwise arise from the exercise of their statutory powers, including powers to arrest or detain people, to seize or retain property, and to carry out intrusive investigations. Such powers and associated immunities are commonly justified on the grounds that they are necessary to prevent crime, protect national security and otherwise enforce the law.

16.6 Although often necessary, executive immunities warrant particular and thorough justification. They limit people's legal rights and have the potential to undermine the rule of law. Greater intrusions into people's rights warrant stronger justification.

16.7 Where government immunities from civil liability are necessary, consideration should be given to their appropriate scope—to the limitations and conditions attaching to the immunities. For example, an immunity provision might make clear that it does not protect a government agency from oversight by the Ombudsman, if this is intended. An immunity provision might also explicitly exclude conduct not done in good faith.

16.8 Many of the issues discussed in this chapter were reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. That report included a number of recommendations, including for legislation abolishing the Commonwealth's procedural immunities from being sued⁶ and for amendments to the *Judiciary Act 1903* (Cth) to state expressly that the Commonwealth is subject to the same substantive

3 'In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action': *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, [34] (McHugh J).

4 See Chs 18–20.

5 See Ch 7.

6 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 23–1.

obligations at common law and in equity as apply to people of full age and capacity, except as specifically provided by a Commonwealth Act.⁷

16.9 The 2001 report also called for further reviews, including a review of:

- the law relating to claims for compensation for loss arising from wrongful federal administrative action;⁸ and
- the circumstances in which a statutory exception (to the principle that the Commonwealth should be subject to the same substantive obligations at common law and in equity as others) is considered necessary or desirable.⁹

A common law principle

16.10 Historically, the executive had the benefit of the broad common law immunity of ‘the Crown’.¹⁰ This extended not only to the sovereign, but to the executive government. In *Commonwealth v Mewett*, which includes a discussion of the history and rationale of Crown immunity, Dawson J said:

The immunities which the Crown enjoys from suit in contract and tort rest, however imperfectly and in different ways, upon the propositions that the sovereign cannot be sued in its own courts and that the sovereign can do no wrong.¹¹

16.11 However, it is a fundamental tenet of the rule of law that no one is above the law. This principle applies not only to ordinary citizens, but to the government, its officers and instrumentalities: their conduct should be ruled by the law. AV Dicey wrote that the rule of law encompasses

equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the ‘rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.¹²

16.12 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.

7 Ibid rec 25–3.

8 Ibid rec 25–2.

9 Ibid rec 25–3.

10 The term ‘the Crown’ refers to ‘the government and its myriad components’: Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (LBC Information Services, 1982) 2. In contrast to the government, separate public authorities did not come within crown immunity: Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) 215. Whether or not a government instrumentality is to be regarded as ‘the Crown’ may be significant on a purely procedural level of deciding whom to sue: Aronson and Whitmore, 30.

11 *Commonwealth v Mewett* (1997) 191 CLR 471, 497. Others have suggested that, at least in theory, the Crown (and thus the executive) has always been regarded in law as able to commit a tort, but there have been procedural rules that prevent civil action: see, eg, *Commonwealth v Mewett* (1997) 191 CLR 471; *Bell v Western Australia* (2004) 28 WAR 555, 563–4. However, for the purposes of this chapter, it does not matter greatly whether the historical position of the executive government is characterised as a substantive principle of immunity or a procedural one.

12 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1985) 202.

16.13 Historically, Australia has shown a ‘healthy concern for the rule of law’¹³ by limiting this type of immunity by statute—in South Australia as early as 1853.¹⁴ Dr Nick Seddon has written:

The distance of the tyranny of English ways of thinking together with the need, in a frontier society, for new systems and roles of government combined to make Australia the pioneer of Crown proceedings legislation. ... In addition, as has been pointed out by Gummow and Kirby JJ in *Commonwealth v Mewett*, the *Constitution* itself, with its recognition of the role of the High Court as the guardian of the *Constitution*, placed substantial limitations on the maxim that the sovereign could do no wrong.¹⁵

16.14 The Law Council of Australia (the Law Council) submitted that, in general, ‘the whole course of the development of Australian law ... points to removal of executive immunity’.¹⁶

16.15 The general immunity is now abrogated by statute in all Australian states and territories and in the Commonwealth. For the federal government, Crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth),¹⁷ and arguably under s 75(iii) of the *Australian Constitution*,¹⁸ suggesting Australia’s constitutional arrangements work against special immunities from suit for governments. Under ss 56 and 64 of the *Judiciary Act* the executive is, so far as possible, subject to the same legal liabilities as citizens.¹⁹

16.16 Nevertheless, this position could be clarified. In its 2001 report, *The Judicial Power of the Commonwealth*, the ALRC recommended that the *Judiciary Act* be ‘amended to state expressly that the Commonwealth is subject to the same substantive obligations at common law and in equity to persons of full age and capacity, except as specifically provided by a Commonwealth Act’.²⁰ In its submissions, the Law Council supported this and other related recommendations in the ALRC’s 2001 report.²¹

16.17 The Commonwealth of Australia therefore now has no general Crown immunity from liability in tort or other civil actions and is subject to the same procedural and substantive laws as those which govern claims by one individual against another.²² The Crown is also now subject to vicarious liability for the torts of its servants and agents, and may also have a non-delegable duty, to the same extent as an individual.²³

13 Nick Seddon, ‘The Crown’ (2000) 28 *Federal Law Review* 245, 257.

14 See *Claimants’ Relief Act 1853* (SA).

15 Seddon, above n 13, 257.

16 Law Council of Australia, *Submission 75*.

17 *Judiciary Act 1903* (Cth) ss 56, 64.

18 Cf *Commonwealth v Mewett* (1997) 191 CLR 471.

19 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 176.

20 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 25–3.

21 Law Council of Australia, *Submission 140*; Law Council of Australia, *Submission 75*.

22 *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 10, 7.

23 The Crown was not, at common law, vicariously liable for the torts of its servants or officers and also had no direct liability to its citizens: Sappideen and Vines, above n 10, 215. But the laws abrogating Crown immunity reverse that position. For example, the Commonwealth was held to have a non-delegable duty in negligence as a school authority to its pupils: *Commonwealth v Introvigne* (1982) 150 CLR 258.

16.18 A 2002 review of the law of negligence, chaired by the Hon David Ipp QC,²⁴ considered many aspects of public liability and made recommendations that have greatly reshaped the liability of public authorities in many Australian jurisdictions. One recommendation was for the enactment of a ‘policy defence’ to a claim in negligence:

[A] policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant’s position could have made it.²⁵

16.19 This ‘policy defence’ does not strictly create an immunity, but instead alters (and lowers) the applicable standard of care—which is another way of protecting someone from civil liability. Western Australia was the only jurisdiction to adopt a version of this recommendation.²⁶

Immunity from statute

16.20 Immunity from statute is a related but distinct type of executive immunity. Although this government immunity from statutory obligations is not the subject of this chapter,²⁷ there have been calls for reform to limit and clarify these immunities. There is a general presumption of statutory interpretation that statutes are not intended to bind the Crown,²⁸ in the absence of clear words or necessary implication.²⁹ In 1990, the High Court in *Bropho v Western Australia* held that this presumption only provides limited protection to the government, and gives way to an express or implied intention that legislation binds the executive.³⁰ However, the law with respect to immunities from statute remains unclear and uncertain. To remove such uncertainty, the ALRC in 2001 recommended that the *Judiciary Act* be amended to provide that the

24 Commonwealth of Australia, ‘Review of the Law of Negligence: Final Report’ (2002).

25 Ibid 185, rec 39.

26 *Civil Liability Act 2002* (WA) ss 5U, 5X.

27 The Terms of Reference suggest that laws that give executive immunities a wide application encroach on a traditional principle. But laws that provide for an immunity from statute would be consistent with a traditional Crown immunity, rather than an encroachment upon it. This is not to suggest that such immunities are therefore justified, but only that they are outside the scope of this chapter.

28 ‘Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect’: *R v Cook* (1790) 3 TR 519, 521 (Lord Kenyon). See also *Attorney-General v Donaldson* (1842) 10 M & W 117, 124 (Alderson B); *Ex Parte Post Master General*; *In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).

29 *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *Commonwealth v Rhind* (1966) 119 CLR 584. See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [5.171]–[5.172].

30 *Bropho v Western Australia* (1990) 171 CLR 1, 15, 18–19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 28 (Brennan J). Where this rebuttable presumption applies and legislation is interpreted as not binding government, it may be said to give the executive a form of ‘immunity’ from laws which apply to ordinary citizens. In modern times, with the increased outsourcing of governmental functions, the principle could provide protection to parties contracting with the Crown, but only where the application of statutory liability would impair the Crown’s legal interests, or prevent the divestment of proprietary, contractual or other legal rights and interests of the Crown: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Commonwealth is bound by every Commonwealth Act enacted after the amendment unless the relevant Act expressly states otherwise.³¹

What is a tort?

16.21 Executive immunity from civil liability most commonly arises in the context of potential tort liability. A tort is a legal wrong which one person or entity (the tortfeasor) commits against another person or entity and for which the usual remedy is an award of damages. Many torts protect fundamental liberties, such as personal liberty, and fundamental rights, such as property rights, and provide protection from interferences by other people or entities and by the Crown. In short, torts protect people from wrongful conduct by others and give claimants a right to sue for compensation or possibly an injunction to restrain the conduct. Like criminal laws, laws creating torts also have a normative or regulatory effect on conduct in society:

When the legislature or courts make conduct a tort they mean, by stamping it as wrongful, to forbid or discourage it or, at a minimum, to warn those who indulge in it of the liability they may incur.³²

16.22 A statute authorising conduct that would otherwise be a tort may therefore reduce the legal protection of people from interferences with their rights and freedoms.

16.23 Torts are generally created by the common law,³³ although there are statutory wrongs which are analogous to torts.³⁴ In addition, many statutes extend³⁵ or limit³⁶ tort remedies, while statutory duties and powers may provide a basis for duties or liability in tort, either in the common law tort of breach of statutory duty, or the common law tort of negligence.³⁷ Many common law torts have a long history, some dating as far back as the 13th century,³⁸ although others were created more recently.³⁹

31 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 26–1. In its submission to this Inquiry, the Law Council similarly recommended that the *Acts Interpretation Act 1901* (Cth) be amended ‘to provide that all Acts are to be taken to bind the Crown in all its capacities, unless expressly stated otherwise’: Law Council of Australia, *Submission 140*.

32 Tony Honoré, ‘The Morality of Tort Law’ in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 75.

33 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) bk III; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1899) vol II, ch VIII.

34 For example, the statutory liability for misleading or deceptive conduct in trade or commerce: see fair trading Acts and the *Australian Consumer Law* (Cth) s 18.

35 See, eg, *Compensation to Relatives Act 1987* (NSW). See also equivalent acts in other states and territories that extend tort liability to fatal accidents.

36 See, eg, *Civil Liability Act 2002* (NSW). See also how workers’ compensation legislation limits common law claims and how state and territory Uniform Defamation Acts regulate defamation claims.

37 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 583; Sappideen and Vines, above n 10, 149–50; 215–22.

38 SFC Milsom, *Historical Foundations of the Common Law* (Lexis Nexis Butterworths, 2nd ed, 1981) 283; Pollock and Maitland, above n 33; JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 82–5. Despite their common law origins, most tort actions are subject to some statutory variation of the common law principles by state and territory legislation. Numerous statutes limit actions or defences,

16.24 Although a tort may also amount to a crime, claims in tort are civil claims generally brought by people seeking compensation from the tortfeasor for injury or loss. Torts may be committed by individuals, corporate entities or public authorities, including government departments or agencies. Tort liability includes both personal liability and vicarious liability (for torts committed by employees or agents).

16.25 Torts include assault, battery, false imprisonment, trespass to land or goods, conversion of goods, private and public nuisance, intimidation, deceit, and the very expansive tort of negligence. Negligence occurs in many different social contexts, including on the roads, in the workplace, or through negligent medical care or professional services. The common law tort of defamation has long protected personal reputation from untruthful attacks.

16.26 While not all consequences of tortious conduct result in an award of damages, generally people have a right to legal redress if they can prove, on the balance of probabilities, that they have been the victim of a tort. In some cases, the affected person may seek an injunction from the courts to prevent the tort happening or continuing.⁴⁰

Protections from statutory encroachment

Australian Constitution

16.27 As noted above, s 75(iii) of the *Australian Constitution* may be taken to impliedly extinguish common law Crown immunity. It provides that in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, the High Court shall have original jurisdiction.

16.28 Further, Crown immunity is removed by s 64 of the *Judiciary Act*:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.⁴¹

16.29 However, this provision may be superseded or overridden by legislation providing for a specific immunity to a person or entity.

16.30 The *Constitution* does not create rights in tort, however, as discussed throughout this Report, it does to some extent protect many traditional rights from statutory encroachment.

provide limitation periods, cap or exclude awards of damages, and provide for survival of actions. The Uniform Defamation Acts in all states and territories modify the common law action of defamation.

39 B Creighton and Others, *Submission 24*. ‘In a series of decisions between 1880 and 1901 the English courts identified a range of tort liabilities, which cumulatively had the effect of fixing any worker who engaged in industrial action, or any union official who organised such action, with responsibility for any losses that the action inflicted upon another party (most obviously, the employer)’: *Ibid*.

40 For example, to prevent a trespass or a nuisance: *Sappideen and Vines*, above n 10, 58; 522–3.

41 See also *Judiciary Act 1903* (Cth) s 56; *Australian Constitution* s 78.

Principle of legality

16.31 The principle of legality provides some protection for the principle that executive immunities should be only as wide as necessary to achieve the legislative purpose, and should not unduly derogate from individual rights.⁴² When interpreting a statute, courts will presume that Parliament did not intend to grant the executive a wide immunity from liability or authorise what would otherwise be a tort, unless this intention was made unambiguously clear.⁴³ In the absence of clear language, courts will narrowly construe any legislative provision to this effect.

16.32 The application of the principle of legality to particular rights and freedoms is discussed throughout this report. A few cases that apply the principle in interpreting immunity and authorisation provisions are noted below.

16.33 The High Court case, *Board of Fire Commissioners v Ardouin*,⁴⁴ concerned a claim in negligence—an infant riding his bike in the street was injured when hit by a fire truck that was racing towards the scene of a fire. The Court considered a section of the *Fire Brigades Act 1909* (NSW) that gave immunity from liability to the Board of Fire Commissioners where damage was caused by a bona fide exercise of statutory authority under that Act. Kitto J expressed the principle of interpretation which arose:

Section 46 operates to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow.⁴⁵

16.34 In the same case, Dixon J pointed out that the immunity in that case was confined to aspects of the executive's operations that justified special protection from liability:

It was not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority.⁴⁶

16.35 Further High Court authority may be found in *Puntoriero v Water Administration Ministerial Corporation*.⁴⁷ Mr and Mrs Puntoriero had irrigated their potato crop using water supplied by a statutory corporation, and the water was contaminated. Could the corporation defend a claim of negligence by relying on a statutory provision that provided, in part, that 'an action does not lie against' the

42 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

43 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105, 116; *Coco v The Queen* (1994) 179 CLR 427; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

44 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

45 *Ibid.*

46 *Ibid* 110.

47 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

corporation ‘with respect to loss or damage suffered as a consequence of the exercise of a function’ of the corporation? The High Court held that it could not. Kirby J said:

It has been stated in a series of decisions in this Court that immunity provisions, such as the one in question here, will be construed jealously or strictly so as to confine the scope of the immunity conferred. [The reason for this] ... is to ascertain the true purpose of the provision upon an hypothesis, attributed by the courts to Parliament, that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language.⁴⁸

16.36 Courts are similarly reluctant to hold that a statute authorises the commission of what would otherwise be a tort. In *Puntoriero*, McHugh J said:

In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action. The reasons which require provisions of the latter kind to be read narrowly apply to provisions of the former kind. For that reason, provisions taking away a right of action for damages of the citizen are construed ‘strictly’, even jealously.⁴⁹

16.37 In *Coco v The Queen*,⁵⁰ the High Court considered whether a statute that conferred authority on a judge to authorise a police officer to install a listening device extended to authorising the police officer to enter onto private premises to install the device. The Court held that the statute did not authorise this trespass. The majority said that statutory authority to ‘engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language’.

Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law.⁵¹

International law

16.38 International covenants typically do not refer to the right of an individual not to be subject to tortious conduct in such terms, nor do they explicitly prohibit broad executive immunities. But they do set out fundamental rights which might be infringed by tortious conduct. Imprisoning a person without lawful authority, for example, would constitute the tort of false imprisonment and may breach art 9 of the *International Covenant on Civil and Political Rights*. Defaming a person would constitute the tort of defamation and breach art 17. Torture would constitute the torts of assault or battery and breach art 7. While there is no settled tort of invasion of privacy in Australian common law, the equitable action of breach of confidence protects correspondence from some interferences, and invasions of privacy may breach art 17.⁵²

48 Ibid [59].

49 Ibid [34] (McHugh J).

50 *Coco v The Queen* (1994) 179 CLR 427.

51 Ibid [8] (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).

52 See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) ch 13.

Justifications for encroachments

16.39 The executive performs unique functions, and may need special powers and privileges to discharge those functions, particularly when pursuing a broader public good. Exposure to some types of liability might make a government agency's task very difficult, or prohibitively costly, to perform.⁵³ It is therefore generally accepted that executive immunities from civil liability will at least sometimes be justified.

16.40 Perfect equality before the law between government and citizen is not possible, Gleeson CJ suggested in *Graham Barclay Oysters Pty Ltd v Ryan*. The formula that in proceedings against the government, rights should be *as nearly as possible* the same as in an ordinary case between subject and subject,

reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.⁵⁴

16.41 However, as Emeritus Professor Mark Aronson has written, discussing government liability in negligence, the 'trouble is that while most people have a sense that governments occasionally warrant different treatment, the commentators have difficulty agreeing on a set of principles to determine when that is the case'.⁵⁵ Moreover, at least in regard to negligence, the common law may provide only limited assistance if, as Aronson states, the 'common law on the liability of government authorities in negligence is remarkably confused'.⁵⁶ Where a statute provides an immunity to a claim in negligence, the statute may amount to a 'permission to be careless'.⁵⁷ Concerning government liability in negligence, Aronson concludes:

it is never a good reason to deny a duty of care simply because the defendant is the government, or because it is a statutory authority, or because it has statutory powers or statutory duties. Each of those reasons is both far too general and far too narrow. They are too general because not all government entities are the same, and nor are their functions. They are too narrow because they imply that the private sector has no

53 An example is the immunity given to the Commonwealth against liability for defamation where access is given to records required to be made available for public purposes: *Archives Act 1983* (Cth) s 57.

54 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [12]. Although Gleeson CJ was here discussing a NSW provision, the words are similar to those in the *Judiciary Act 1903* (Cth) s 64, quoted above.

55 Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 46.

56 *Ibid.* This problem is not limited to Australia. See, eg, Bruce Feldhusen, 'Public Immunity from Negligence: Uncertain, Unnecessary and Unjustified' (2013) 92 *Canadian Bar Review* 211. The UK Supreme Court considered the liability of police officers in negligence in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

57 Aronson writes that it is 'difficult to understand what possessed the Parliaments to grant government entities generic permissions to be careless, or careless to a degree not permissible to their private sector analogues': Aronson, above n 55, 82.

analogues equally deserving of special consideration. The search for categorical exemptions from government liability has proved elusive.⁵⁸

16.42 The same caution may be applied to government immunities more broadly, for example with respect to other torts.

16.43 Where immunities from civil liabilities affect people's rights—including their liberty, property and freedom of speech—such immunities are presumably only justified when strictly necessary. This may often be assessed by applying a structured proportionality analysis, of the sort widely used in international law, countries with bills of rights and human rights Acts, and by the Australian Parliamentary Joint Committee on Human Rights.⁵⁹

16.44 The executive performs unique functions, but it also carries unique responsibilities. Governments may seek to enact laws that authorise their own agencies and officials to act in a way that would normally create legal liability, and to exclude or limit that liability. This may also suggest the need for some caution in giving executive immunities.

16.45 It may be less difficult to justify immunities given to people who make complaints or provide evidence to government regulators, and immunities given to public officials who disclose illegal, corrupt or other such conduct.

Laws that give immunity from civil liability

16.46 A statute may restrict a person's right to sue in tort in several ways, for example: by authorising conduct that would otherwise be a tort; by providing a defence of statutory authority to conduct that may constitute a tort, particularly if reasonable care is not taken;⁶⁰ and by giving a person an exemption or immunity from civil liability in tort.

16.47 Many examples of such laws are discussed in other chapters of this report, in the context of the individual right the law interferes with. For example, laws that authorise or provide an immunity from:

- the tort of defamation are discussed in the freedom of speech chapter;⁶¹
- the torts of trespass to person and false imprisonment are discussed in the freedom of movement chapter;⁶² and
- the tort of trespass to property is discussed in the chapters about property rights.⁶³

58 Ibid 81.

59 Proportionality is discussed in Ch 2. Parliamentary committee scrutiny is discussed in Ch 3.

60 For example, a nuisance. See, eg, *Allen v Gulf Oil Refinery Ltd* [1980] AC 1001; *Bankstown City Council v Alamo Holdings Pty Ltd* (2005) 223 CLR 660, [16]; *Benning v Wong* (1969) 122 CLR 249, 324–337 (Owen J); Barker et al, above n 37, [4.1.6.3]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, [121]–[123].

61 Ch 4.

62 Ch 7.

63 Chs 18–20.

16.48 Some of these laws are also noted briefly below, although most are examples of more general statutory immunities from civil liability.

Authorising torts—police, customs and tax office powers

16.49 There are many examples of Commonwealth statutes that give authority to a Commonwealth officer or agency to do what would otherwise be a tort. For example, statutes give authority to federal police officers and customs officers to arrest or detain a person, to search a person, to enter and search property, or to seize or retain seized property. As long as the officer acts within the lawful authority given by the statute or common law, such conduct will not constitute a tort. Without such lawful authority, these types of conduct would amount to trespass to the person, trespass to land, or trespass or conversion of goods.

16.50 For example, powers to arrest without a warrant are found in the *Australian Federal Police Act 1979* (Cth) s 14A and the *Crimes Act 1914* (Cth) ss 3W, 3WA, 3X, 3Y and 3Z. Powers of arrest without a warrant are also provided at common law, and provided a justification in an action in tort.⁶⁴

16.51 The *Customs Act 1901* (Cth) s 210(1) authorises an officer of customs or the police to arrest a person, in some circumstances, without a warrant, if the officer believes on reasonable grounds that the person has committed certain offences. This provision authorises what would otherwise be a tort.

16.52 Statutes may also authorise an arresting officer to search a person to find hidden weapons or prevent the loss of evidence⁶⁵ and to use some limited level of force when arresting a person.⁶⁶ Without such authority—whether at common law or in statute—such physical interference might amount to the tort of trespass to the person.

16.53 The Australian Taxation Office has statutory access and information-gathering powers. For example, the access power in the *Taxation Administration Act 1953* (Cth) provides that a tax official, for the purposes of a taxation law, ‘may at all reasonable times enter and remain on any land, premises or place’ and ‘is entitled to full and free access at all reasonable times to any documents, goods or other property’.⁶⁷ This authorises what would otherwise be the tort of trespass to property.⁶⁸

Other public authorities

16.54 Section 246 of the *Australian Securities and Investments Commission Act 2001* (Cth) is typical of the immunity from civil suit (for example, for the torts of negligence or breach of statutory duty) that is given to various public authorities. It provides that the Minister, ASIC, a member of ASIC, and a number of other persons listed in the provision, are not

64 See, eg, *Holgate-Mohammed v Duke* (1984) AC 437.

65 See, eg, *Australian Federal Police Act 1979* (Cth) s 14D.

66 Eg, *Ibid* s 14B.

67 *Taxation Administration Act 1953* (Cth) sch 1, s 353–15.

68 This provision ‘makes lawful that which otherwise would be unlawful, eg entry upon premises, the examination of a document’: *Federal Commissioner of Taxation v Smorgon* (1979) 143 CLR 499, 535 [14] (Mason J).

liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred or expressed to be conferred by or under the corporations legislation, or a prescribed law of the Commonwealth, a State or a Territory.⁶⁹

16.55 Similar provisions may be found in the following Commonwealth Acts, among others:

- *Age Discrimination Act 2004* (Cth) s 58;
- *Australian Information Commissioner Act 2010* (Cth) s 35;
- *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 78;
- *Australian Sports Commission Act 1989* (Cth) s 57;
- *Imported Food Control Act 1992* (Cth) s 38;
- *Inspector-General of Intelligence and Security Act 1986* (Cth) s 33;
- *National Health Act 1953* (Cth) s 99ZR;
- *Navigation Act 2012* (Cth) s 324;
- *Ombudsman Act 1976* (Cth) s 33; and
- *Product Stewardship (Oil) Act 2000* (Cth) s 31.

16.56 Many of these provisions contain an explicit ‘good faith’ proviso, but others do not. For example, s 34(1) of the *Australian Postal Corporation Act 1989* (Cth) provides:

An action or proceeding does not lie against Australia Post or any other person in relation to any loss or damage suffered, or that may be suffered, by a person because of any act or omission (whether negligent or otherwise) by or on behalf of Australia Post in relation to the carriage of a letter or other article by means of the letter service.

16.57 In *Little v Commonwealth*,⁷⁰ the High Court considered an immunity provision that was silent on the notion of ‘good faith’. Dixon J held that the provision removed liability from the arresting police for all actions, except those not done in good faith.⁷¹

16.58 The above provision from the *Australian Postal Corporation Act* also highlights that executive immunities are sometimes extended to government business enterprises, such as Australia Post.⁷²

⁶⁹ *Australian Securities and Investments Commission Act 2001* (Cth) s 246(1).

⁷⁰ *Little v Commonwealth* (1947) 75 CLR 94.

⁷¹ More recently, the High Court has suggested that remedies would always be available where officials acted in bad faith or according to other corrupt motives: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁷² Other government business enterprises include: Defence Housing Australia; ASC Pty Limited (formally known as Australian Submarine Corporation); Australian Rail Track Corporation Limited, Moorebank Intermodal Company Limited; and NBN Co Limited: *Public Governance, Performance and Accountability Rule 2014* (Cth) r 5.

16.59 Some statutes expressly give an immunity not only from civil proceedings, but from criminal proceedings. For example, the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides:

Criminal or civil proceedings do not lie against [certain prescribed people] in relation to anything done, or omitted to be done, in good faith by the person in connection with the performance or purported performance of functions or duties, or the exercise or purported exercise of powers, conferred by this Act.⁷³

16.60 Other provisions giving an immunity from both civil and criminal proceedings include:

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 75P, 235;
- *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K;
- *Broadcasting Services Act 1992* (Cth) s 203 (in relation to defamation); and
- *Trade Marks Act 1995* (Cth) s 226B.

16.61 Some statutes set out limitations on the immunity more fully. For example, the immunity for those participating in a special intelligence operation, in s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth), does not extend to conduct that causes death or serious injury, constitutes torture, or causes significant loss of, or serious damage to, property. It also only applies to authorised conduct that is engaged in as part of a special intelligence operation under div 4, pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Nevertheless, the Law Council submitted that the immunity ‘may not contain adequate safeguards’ and compared the provision to those related to the Australian Federal Police’s controlled operations scheme in the *Crimes Act*.⁷⁴

16.62 Other immunity provisions apply not just to a particular government agency, but to the executive government more broadly. For example, s 2A(3) of the *Competition and Consumer Act 2010* (Cth) provides:

Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

⁷³ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 86.

⁷⁴ *Crimes Act 1914* (Cth) pt 1AB. The Law Council also criticised the provision in relation to its effect on property rights: see Ch 19 and Law Council of Australia, *Submission 75*. The Law Council submitted that the immunity should be reviewed by the Independent National Security Legislation Monitor ‘with particular focus on whether immunity from civil liability is appropriate in light of the need for an effective remedy under international law’: Law Council of Australia, *Submission 140*. The NSW Bar Association has called the provision ‘quite extraordinary’ and said it ‘leaves considerable room for violence to be lawfully inflicted’: New South Wales Bar Association, *Submission 28 to the Independent National Security Legislation Monitor, Inquiry into Section 35P of the ASIO Act*, 2014. The Explanatory Memorandum for the relevant Bill states that the provision was ‘necessary and appropriate’; ‘does not deem lawful special intelligence conduct which would otherwise be unlawful’; and has a number of conditions and safeguards: Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

16.63 Sections 494AA and 494AB of the *Migration Act 1958* (Cth) also bar certain legal proceedings against the Commonwealth, including ‘proceedings relating to an unauthorised entry by an unauthorised maritime arrival’ and proceedings related to the exercise of powers to bring a ‘transitory person’ to Australia from a country or place outside Australia. The latter type of power is said to include restraining a person on a vessel and using such force as is necessary,⁷⁵ the exercise of which, without authority, may amount to a tort.

16.64 It is by no means certain or likely that a public authority would be held liable in tort for negligence in the performance of its powers, due to the difficulty of establishing either a duty of care in negligence arising out of the creation of a statutory power,⁷⁶ or a civil right of action for breach of statutory duty. However, there are cases where a public authority has been held liable for negligent misstatement⁷⁷ or negligent conduct in operational matters.⁷⁸

Giving evidence and making complaints

16.65 Some statutes provide an immunity to people who make complaints or give evidence to certain government agencies, particularly regulators. For example, s 37 of the *Ombudsman Act 1976* (Cth) provides that civil proceedings ‘do not lie against a person in respect of loss, damage or injury of any kind suffered by another person’ because they made a complaint or a statement or gave a document or information to the Ombudsman or a member of the Ombudsman’s staff, for the purposes of the Act.⁷⁹

16.66 Examples of similar provisions include:

- *Enhancing Online Safety for Children Act 2015* (Cth) s 89;
- *Freedom of Information Act 1982* (Cth) ss 55Z, 84; and
- *Interactive Gambling Act 2001* (Cth) s 23.

Public interest disclosures

16.67 The *Public Interest Disclosure Act 2013* (Cth) features a more detailed immunity scheme for public officials who make a ‘public interest disclosure’ in relation to certain types of conduct, such as illegal conduct, or conduct that perverts the course of justice, or constitutes maladministration, or is an abuse of public trust.⁸⁰

75 *Migration Act 1958* (Cth) s 198B.

76 See, eg, *Graham Barclays Oysters v Ryan* (2002) 211 CLR 540; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

77 *Shaddock & Associates v Parramatta City Council (No 1)* (1981) 150 CLR 225.

78 *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

79 The Commonwealth Ombudsman plays an important role in dealing with complaints about the misuse of government power—a role that may be all the more important where limits are placed on the availability of remedies in the courts.

80 For the immunity provisions, see in particular *Public Interest Disclosure Act 2013* (Cth) pt 2 div 1.

Consular and diplomatic immunities

16.68 It is less common for a statute to provide immunity to a non-government person or entity. An example is the immunity given to members of a foreign consular or diplomatic service by the *Consular Privileges and Immunities Act 1972* (Cth) and the *Diplomatic Privileges and Immunities Act 1967* (Cth).

Industrial action

16.69 Statutes protect industrial action that might otherwise amount to a tort. The limited immunity provided to ‘protected industrial action’ is unusual in that it applies to individuals or non-government groups such as employee or employer associations.

16.70 So far as the common law is concerned, Professors Breen Creighton and Andrew Stewart write, ‘virtually all industrial action would be unlawful as a tort, a breach of contract and, frequently, a crime’.⁸¹ Relevant torts might include trespass, private nuisance, conspiracy and intentional interference with a contract.

16.71 Creighton and Stewart note that, unlike the United Kingdom, Australia has ‘little history of legislative protection against common law liability for industrial action’.⁸² However, there is now some protection. An immunity provision for protected industrial action, subject to prescribed limitations, is in s 415 of the *Fair Work Act 2009* (Cth). It is not a ‘blanket’ immunity and it applies to those taking or organising industrial action in relation to a new single-enterprise agreement.⁸³ Section 415 provides:

- (1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:
 - (a) personal injury; or
 - (b) wilful or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

16.72 The immunity in Australia originally had the object of encouraging parties to bring their disputes within the industrial relations and dispute resolution framework of 1993. This new framework represented a ‘shift away from conciliation and arbitration in favour of formalised enterprise bargaining’,⁸⁴ an essential element of which is said to be ‘the capacity of the participants in the process to elect to take industrial action in

81 Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [22.08].

82 Ibid [23.01]. Rather, ‘both State and federal parliaments have adopted a quite extraordinary range of legislative provisions against industrial action, the operation of which is additional to that of the common law. The end result is that for all practical purposes it was impossible, at least before 1993, for any group of Australian workers lawfully to take industrial action to protect or promote their occupational interests’: Ibid [22.08].

83 B Creighton and Others, *Submission 24*.

84 Ibid.

order to exert pressure upon the other parties'.⁸⁵ This in turn called for legislative protection against common law liability.⁸⁶ The overall object of the scheme was that disputes proceed in an orderly, safe and fair way, without duress; that parties be properly and efficiently represented; and that risks to those caught up in the dispute be minimised.⁸⁷

16.73 The appropriate scope of the immunity is the subject of considerable debate. The statutory limitations on this immunity affect other rights, particularly freedom of association.⁸⁸

16.74 The justification of immunities for protected industrial action should be considered in the broader context of industrial relations law and in light of other important rights, including freedom of association.

Vicarious immunity

16.75 Executive liability is limited by the operation of the 'independent discretion rule', also known as the *Enever* principle,⁸⁹ which limits the vicarious liability of government for certain wrongs committed by government employees.

The basic idea behind this rule is that, if powers are conferred by law directly upon an employee, such a person is considered to be executing an independent discretion or original authority for the consequences of which the employer is not vicariously responsible. Of course, the corollary of this rule is that the individual officer may bear a personal liability.⁹⁰

16.76 This principle has been abrogated by statute in New South Wales⁹¹ and, to the extent that it applies to police officers, in other jurisdictions, including the Commonwealth.⁹²

16.77 The independent discretion rule has been widely criticised and in 2001, despite finding the rule had relatively little practical effect, the ALRC recommended it be abolished.⁹³

85 Ibid.

86 Ibid. See also Australian Council of Trade Unions, *Submission 44*.

87 See, for example, *Industrial Relations Reform Act 1993* (Cth) s 4.

88 See Ch 6.

89 *Enever v The King* (1906) 3 CLR 969.

90 *Cubillo v Commonwealth (No 2)* (2000) 174 ALR 97, [1089] (O'Loughlin J). The independent discretion rule therefore limits the basic principle in tort law that 'an employer is liable for the damage caused by the negligent acts or omissions of its servants when they are acting within the scope of their employment': Ibid [1088].

91 *Law Reform (Vicarious Liability) Act 1983* (NSW) s 8.

92 See, eg, *Australian Federal Police Act 1979* (Cth) s 64B(1). 'The Commonwealth is liable in respect of a tort committed by a member or a protective service officer in the performance or purported performance of his or her duties ... in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment'.

93 'The principle in *Enever v The King* (1906) 3 CLR 969, namely, that the Commonwealth is not vicariously liable for the tortious conduct of Commonwealth officers who act with independent discretion pursuant to statute, should be expressly abolished in relation to the Commonwealth': Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 25–1.

New cause of action for public law wrongs

16.78 Some have called for the creation of a new cause of action for so-called public law wrongs. Aronson explains that because ‘government’s tort liability is usually judged by private law principles, there is no generalised common law right of action for damages for loss caused by invalid administrative action’.⁹⁴ Discussing non-judicial review remedies in the UK, Maurice Sunkin concluded:

The absence of a right of damages for losses sustained as a consequence of public law wrongs is widely recognized as being one of the most serious of the remaining gaps in our remedial system. It is a gap that does not exist in more developed systems. This gap has been widely criticised over the years by judges, by legal commentators, and by the Law Commission. This is an issue that now cries out for reform.⁹⁵

16.79 This chapter is largely about statutes that limit executive liability to private law torts. It is another question whether a new cause of action might be needed to allow for the recovery of damages for certain wrongful government conduct for which there is no private law action. Although some have called for the introduction of such an action, others have been critical of the idea.⁹⁶

16.80 In 2001, the ALRC recommended that there be a review of the law relating to claims for compensation for loss arising from wrongful federal administrative action.⁹⁷

Conclusion

16.81 As noted above, many of the issues discussed in this chapter were reviewed more fully in the ALRC’s 2001 report, *The Judicial Power of the Commonwealth*. Although in this current Inquiry few stakeholders commented on the matters discussed in this chapter, the ALRC’s 2001 report contains a number of recommendations broadly aimed at, among other things, ensuring that executive immunities from civil liability are only available when justified. These recommendations may warrant further consideration.

94 Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35 *Melbourne University Law Review* 1, 2.

95 Maurice Sunkin, ‘Remedies Available in Judicial Review Proceedings’ in David Feldman (ed), *English Public Law* (Oxford University Press, 2nd ed, 2009) 820.

96 The UK Law Commission said the response to its proposed reforms in this area was ‘almost universally negative’ and the Government in particular was ‘firmly opposed’ to its proposals: The Law Commission, *Administrative Redress: Public Bodies and Citizen* (The Stationery Office, 2010).

97 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 25–2.