

## 16. Authorising what would otherwise be a Tort

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### The right to sue in tort

16.1 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.<sup>1</sup>

16.2 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.

16.3 This chapter discusses: the source and rationale of tort law; how the right to sue in tort is protected from statutory encroachment; and when laws that authorise what would otherwise be a tort may be justified.<sup>2</sup> The ALRC calls for submissions on two questions.

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1 Tony Honore, 'The Morality of Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 75.

2 Immunities granted to government entities are considered in Ch 15.

**Question 16–1** What general principles or criteria should be applied to help determine whether a law that authorises what would otherwise be a tort is justified?

**Question 16–2** Which Commonwealth laws unjustifiably authorise what would otherwise be a tort, and why are these laws unjustified?

### Common law

16.4 Torts are generally created by the common law,<sup>3</sup> although there are statutory wrongs which are analogous to torts.<sup>4</sup> In addition, many statutes extend<sup>5</sup> or limit<sup>6</sup> tort remedies, while statutory duties and powers may form the basis of duties or liability in tort, either in the common law tort of breach of statutory duty<sup>7</sup> or the common law tort of negligence.<sup>8</sup> Common law torts mostly have a long history, some dating as far back as the 13th century.<sup>9</sup>

16.5 Although a tort may also amount to a crime, claims in torts are civil claims brought by the individual concerned, who seeks 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).

16.6 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

3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) Bk III; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed) vol II, ch VIII.

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

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

6 Eg, *Civil Liability Act 2002* (NSW). See also, how workers compensation legislation limits common law claims, and how state and territory *Uniform Defamation Acts 2005* regulate defamation claims.

7 Caroline Sappideen and Prue Vines, 'The Tort of Breach of Statutory Duty', *Fleming's Law of Torts* (Thomson Reuters (Professional) Australia, 10th ed, 2011).

8 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 583; Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 149–150; 215–222.

9 SFC Milsom, *Historical Foundations of the Common Law* (Lexis Nexis Butterworths, 2nd ed, 1981) 283; Pollock and Maitland, above n 3; J. Baker, *An Introduction to English Legal History* (Butterworths, 1971) 82–85. 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, provide limitation periods, cap or exclude awards of damages, and provide for survival of actions. The *Uniform Defamation Acts 2005* in all states and territories modifies the common law action of defamation.

professional services. The common law tort of defamation has long protected personal reputation from untruthful attacks.<sup>10</sup>

16.7 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.<sup>11</sup>

### Australian Constitution

16.8 The *Australian Constitution* does not create rights in tort nor does it expressly authorise any conduct that would otherwise constitute a tort.

16.9 However, the implied constitutional freedom of political communication, recognised in a series of decisions of the High Court of Australia, has been held to preclude the unqualified application of the common law of defamation:

The common law of libel and slander could not be developed inconsistently with the *Constitution*, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the *Constitution*.<sup>12</sup>

16.10 However, the implied constitutional freedom, recognised by the High Court as a restriction on the ability of people to sue for defamation, is not absolute. In *Lange v ABC* (1997), the High Court formulated the constitutional defence as one of 'qualified privilege' to speak freely on government and political matters, drawing in concepts of reasonableness and subject to an absence of malice on the part of the speaker.<sup>13</sup>

### Principle of legality

16.11 The principle of legality provides some protection from statutes that authorise what would otherwise be a tort.<sup>14</sup> Courts are reluctant to hold that a statute authorises the commission of what would otherwise be a tort, unless the statute does so clearly and unambiguously.

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10 A person's reputation is regarded as integral to his or her dignity, standing in the community and, in many cases, ability to earn income. According to William Blackstone, 'The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right': Blackstone, above n 3, Bks 1–2. See also, Pollock and Maitland, above n 3, 536–538; Sappideen and Vines, above n 8, Ch 25. The recognised defences to defamation at common law and in statutes provide important but not complete protection of freedom of speech.

11 For example, to prevent a trespass or a nuisance: Sappideen and Vines, above n 8, 58; 522–523. The courts are however especially cautious of granting injunctions in defamation cases, because of the risk of undue restriction on freedom of speech: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

12 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566. The *Constitution* also impliedly restricts the curtailment of the protected freedom by the exercise of legislative or executive power: *Ibid* 560, 566.

13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

14 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

16.12 For example, in *Coco v The Queen* (1994),<sup>15</sup> the High Court considered whether s 43(2)(c) of the *Invasion of Privacy Act 1971* (Qld), which conferred authority on a judge to authorize the installation and maintenance of a listening device, extended to authorising entry onto private premises to install the device. They held it did not authorise what would otherwise be a trespass onto the accused's land to install the device. The majority said:

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.

Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon* (1991): 'Inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights'.<sup>16</sup>

### **International law and bills of rights**

16.13 While international covenants typically do not refer to the right of an individual not to be subject to tortious conduct in such terms, many of their articles set out fundamental freedoms and rights which might be infringed by a person committing a tort.

16.14 Torture, for example, would constitute the torts of assault and/or battery and breach art 7 of the *International Covenant on Civil and Political Rights*. Imprisoning a person without lawful authority would constitute the tort of false imprisonment and breach art 9 of the ICCPR. Defaming a person would constitute the tort of defamation and breach art 17. While there is as yet no settled tort of invasion of privacy in Australian common law, the equitable action of breach of confidence protects correspondence from interferences in breach of art 17.<sup>17</sup>

16.15 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.<sup>18</sup> However, where a statute is ambiguous, courts will

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

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

17 See, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) Ch 13.

18 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

generally favour a construction that accords with Australia's international obligations.<sup>19</sup>

## Justifications for encroachments

16.16 Authorising what would otherwise be a tort has been justified for a number of reasons. Because torts may be committed in many different social contexts, the justifications for statutes authorising or granting immunity or a defence to what would otherwise be tortious conduct will vary and depend closely on the particular context. Justifications commonly include:

- law enforcement and prevention of crime;
- national security;
- public health;
- protecting vulnerable people from hurting themselves; and
- the encouragement of desirable practices by imposing conditions for the immunity.

16.17 Statutes give various powers to Commonwealth law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. These include powers to arrest or detain persons, to seize or retain property, and to carry out intrusive investigations—conduct that might otherwise amount to a tort. These powers are commonly justified on the grounds that they are necessary to prevent crime and terrorism and to otherwise protect national security. They may also be necessary to properly enforce laws, including customs, quarantine and immigration laws.

16.18 Statutes providing immunity from tort liability are generally based, not on the justification for particular intentional acts or omissions out of social necessity, but on the need to give general protection to socially worthwhile agencies, activities or services from liability for negligence or strict liability. This applies particularly to various forms of immunity given to government agencies discussed in Ch 17.<sup>20</sup>

16.19 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. It may be seen to have several justifications, differing over time as community attitudes to workplace disputes have changed. The immunity in Australia originally had the object of encouraging parties to bring their disputes within the new industrial relations and dispute resolution framework of 1993. It also regulates conduct by setting out conditions for the protection. The overall object is that disputes proceed

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19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

20 Eg, *Archives Act 1983* (Cth) s 57. This provision provides that no action will lie for defamation, breach of confidence or infringement of copyright arising from providing access to an archived record, where access is given in good faith in the ordinary course of administration of the *Archives Act*.

in an orderly, safe and fair way, without duress; that parties are properly and efficiently represented; and that undue risks to those caught up in the dispute are minimised.<sup>21</sup>

16.20 A statute may restrict a person's right to sue another in tort in several ways, for example, by:

- authorising certain conduct that *would* otherwise be a tort;
- providing a defence of statutory authority to conduct or activities that *may*, particularly if reasonable care is not taken, constitute a tort;<sup>22</sup> and
- giving a person an exemption or immunity from civil liability in tort.<sup>23</sup>

16.21 Many laws that authorise what would otherwise be a tort are no doubt justified. The ALRC does not consider it useful to attempt to list or analyse the justification for *every* statutory provision where authority is given to Commonwealth agencies or officers to arrest or detain a person, to seize or detain property, or to enter property, because such conduct would otherwise amount to a tort. The ALRC therefore invites submissions identifying those Commonwealth laws that authorise torts without good justification, and explaining why these laws are not justified.

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

22 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, 666 [16]; *Benning v Wong* (1969) 122 CLR 249, 324–337 (Owen J); Barker et al, above n 8, [4.1.6.3]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASC 79 [121]–[123].

23 Immunities provided by statutes to government bodies are discussed in Ch 15.