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Legal briefing

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MISFEASANCE

Introduction

Misfeasance in public office is a form of intentional tort. It is the only tort recognised by the common law that has an exclusively public law operation. It has been described as 'a very peculiar tort'.[1] Although the tort is over 300 years old, it can be properly described as an emerging and evolving tort. Despite being the subject of hundreds of decided cases, considerable uncertainty attends each and every element of the tort.

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Elements of the tort

The elements of the tort are:

- the defendant must be the holder of a public office
- the defendant must have purportedly exercised a power that was an incident of that office
- the defendant's exercise of power must have been invalid/unlawful
- the exercise of power must have been accompanied by one or other of the following forms of 'bad faith':
  - the defendant must have exercised the power knowing that he or she was acting in excess of power AND with the intention to cause harm to the plaintiff (sometimes referred to as targeted malice)
  - the defendant must have been recklessly indifferent to whether the act was beyond power AND recklessly indifferent to the likelihood of harm being caused to the plaintiff
  - the defendant must have acted with reckless indifference to whether the act was beyond power AND there must have been, objectively, a foreseeable risk of harm to the plaintiff. This third form of bad faith is very controversial.
- the exercise of power must have been productive of loss.

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First element: holding a public office

There is no authoritative test for determining what constitutes holding a public office for the purpose of the tort of misfeasance: *Leerdam v Noori* [2009] NSWCA 90 at [3]. It has been suggested that in almost all cases the answer will be obvious.[2]

Occupancy of a public office connotes some sort of official position. Difficulties of characterisation can arise. It has recently been held that pleading that an alleged tortfeasor was employed by the Commonwealth and had 'line management responsibility' for the plaintiff would not, even if proven, establish occupancy of a public office: *Skinner v Commonwealth of Australia* [2012] FCA 1194 at [39]. Further, although it is conventionally thought that a mere contractual engagement of a person by the Commonwealth is not enough,[3] the following observations

of the High Court in *Plaintiff M 61* (2010) 243 CLR 319 at [51] concerning the engagement of independent merits review officers to undertake reviews of government decision-making are somewhat salutary:

> It is appropriate to leave for another day, the question whether a party identified as 'an independent contractor' nevertheless may fall within the expression 'an officer of the Commonwealth' in section 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been 'contracted out'.

If a person is an 'officer of the Commonwealth' for constitutional law purposes, there is much to be said for regarding him or her as occupying a public office for the purpose of the tort of misfeasance. Whether that is so may depend upon a consideration of the purposes served by s 75(v) and the tort respectively.

The need for a 'public office' to be occupied has been described by a Full Court of the Federal Court as the reason why the Commonwealth itself cannot be directly liable for misfeasance (since the Commonwealth does not occupy a public office).[4]

Second element: exercising 'public power'

The 2 obvious sources of public power are statutory and executive. It should be noted that the application of the tort to exercises of non-statutory executive power will often raise particular constitutional issues: for example (i) if it is alleged that executive action was taken outside the spheres of responsibility vested in the Commonwealth; or (ii) where issues arise as to the reach or application of s 61 of the Constitution, including where the alleged illegality arises as a result of the asserted operation of State laws: see *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410. Sometimes these constitutional issues will be obvious, but on other occasions they may be somewhat subterranean. It is important that Commonwealth departments and agencies obtain legal advice on any constitutional issues in accordance with the Attorney-General's directions on tied work: see para 2.1 and Appendix A of the Legal Services Directions 2005 (LSDs).

If a person is an 'officer of the Commonwealth' for constitutional law purposes, there is much to be said for regarding him or her as occupying a public office for the purpose of the tort of misfeasance.

It should also be noted that courts have declined to characterise all functions or acts of public officials as involving the exertion of public power.[5] Indeed, in *Emanuele v Hedley* (1998) 179 FCR 290, the Full Federal Court held that a report submitted by a senior public servant to his supervisors concerning an allegedly improper conversation about a public tender process could not give rise to misfeasance. The Court stated (at [34]):

> The report of the Fabrizioni conversation clearly cannot found an action for misfeasance in public office. Whether the report was true or false, its compilation and delivery were not actions done in the exercise of powers attaching to a public office. They were simply the actions of an employee reporting an alleged event to superior officers.

The Full Court later stated (at [37]):

> There may be a question whether, in discussing with Mr Emanuele the prospective sale of the Belconnen Mall, Mr Hedley was *acting* in a public office. He was a public officer in the sense that he was a senior officer of a Department of the Commonwealth Government, but his actual activity was no different to that daily undertaken by many people in the private sector: the stimulation of interest in a real estate transaction.[6]

It cannot be assumed that this reasoning will necessarily prevail. In *Commissioner of Taxation v Day* [2008] HCA 53 Gummow, Hayne, Haydon and Kiefel JJ stated, albeit in a different context (at [34]):

> The public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment, as Finn J observed in *McManus v Scott-Charlton* 70 FCR 16. Such legislation facilitates government carrying into effect its constitutional obligations to act in the public interest.

It is questionable, then, whether public officials can avoid liability for misfeasance on the basis that their acts/decisions do not involve the exertion of public power. The mere existence of equivalent action or conduct in the private sector may not be sufficient to avoid liability for misfeasance.[7]

Must the public officer owe the plaintiff a duty with respect to the exercise of power?

Some cases have suggested that there is a further element of the tort of misfeasance: namely, the public official must owe a duty to the plaintiff in relation to the exercise of the impugned power.[8] However, the suggestion that a public official must owe a duty not to commit the particular abuse complained of may insufficiently recognise that public officials always owe a duty not to abuse their powers because of the public law obligation to act in the public interest. In *Northern Territory v Mengel* (1995) 185 CLR 307 (*Mengel*) Brennan J (at 357) rejected the contention that duty constituted an added element of the tort. Deane J agreed with Brennan J in this regard (at 371). The plurality in *Mengel* left the question open (at 346), as did the Western Australian Court of Appeal in *Neilson v City of Swan* (2006) WASCA 94 at [49]–[67]. In *Leerdam v Noori* [2009] NSWCA 90 the New South Wales Court of Appeal acknowledged that it was reasonably arguable that there was no such duty requirement (at [115]). The existence of a duty requirement was rejected by the New Zealand Court of Appeal in *Garrett v Attorney-General* [1997] 2 NZLR 332 at [54]–[55] and by the House of Lords in *Three Rivers District Council v Governor and Company of Bank of England* (No 3) [2003] 2 AC 1 (*Three Rivers*).[9] Even assuming the existence of a duty requirement, if the plaintiff has standing to seek judicial review of the relevant exercise of power, it is difficult to see how such a requirement would not be satisfied.[10]

The mere existence of equivalent action or conduct in the private sector may not be sufficient to avoid liability for misfeasance.

Third element: the exercise of power must be invalid/unlawful

An exercise of power will be both unlawful and invalid where no power exists at all. However, some limits on statutory powers, or procedures governing the manner of their exercise, may be breached without resulting in invalidity: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. It is somewhat unclear whether the administrative law distinction between errors within jurisdiction and jurisdictional errors is an apposite distinction for the purposes of the tort of misfeasance. Whilst it is true that most cases speak of jurisdictional-type errors,[11] it is far from clear that true 'excess of power' resulting in invalidity is necessary. Given that the tort provides a remedy in respect of deliberate/reckless misuses of power, there is much to be said in favour of a lower test: namely, the act/decision of the public official was contrary to law and therefore liable to be set aside on judicial review. It is difficult to see why, as a matter of policy or principle, the deliberate wrongdoing must go to the existence of power rather than the manner of its exercise.

Fourth element: the so-called mental element

At the outset, it is important to recognise a fundamental distinction between reckless indifference on the one hand and gross negligence on the other hand. Reckless indifference involves an advertent disregard of risk, whereas gross negligence involves serious carelessness in failing to appreciate the existence of risk. That distinction must be kept in mind for the purposes of the tort of misfeasance. Being grossly negligent in failing to recognise the unlawfulness of a particular act/decision cannot, as a matter of law, establish misfeasance. However, various cases have suggested that there need be no mental element in relation to the risk of harm if, objectively assessed, the likelihood of that harm is reasonably foreseeable.

It is somewhat unclear whether the administrative law distinction between errors within jurisdiction and jurisdictional errors is an apposite distinction for the purposes of the tort of misfeasance.

The notion that this aspect of the mental element of misfeasance can be satisfied if there is a foreseeable risk of harm to the plaintiff can be traced to the judgment of the English Court of Appeal in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (*Bourgoin*) at 777. In the case of *Mengel*, the plurality [at 347] proceeded on the basis that, even assuming correctness of the decision in *Bourgoin*, no misfeasance in public office was made out. However, in *South Australia v Trevorrow-Lampard* [2010] SASC 56 the Full Court of the South Australian Supreme Court suggested that in *Mengel* the plurality had endorsed the conclusion in *Bourgoin*. It is noteworthy that in *Mengel* both Brennan J (at 547) and Deane J (at 554) proceeded on the basis that the defendant must either know of, or be recklessly indifferent to, the likely harm caused to the plaintiff. In *Three Rivers*, the House of Lords declined to follow the decision in *Bourgoin*, holding instead that the defendant must know of, or be recklessly indifferent to, the likelihood of harm. A similar approach has been taken in New Zealand: *Garrett v Attorney-General* [1997] 2 NZLR 332 at 349. In Australia, the approach in *Bourgoin* has

not been specifically rejected at intermediate or High Court level, but most intermediate courts have formulated the mental element in terms inconsistent with *Bourgoin*: see *Sanders v Snell* (No 2) (2003) 130 FCR 149 at [96]; *Commonwealth v Fernando* (2012) 126 ALD 10 at [109]–[110]; *Cannon v Tahche* (2002) 5 VR 317 at [34]–[49]. This is also the approach that has found most favour at single judge level: see *Rush v Commissioner of Police* [2006] FCA 12 at [120]–[123]; *Skinner v Commonwealth of Australia* [2012] FCA 1194.

Can the Commonwealth be vicariously liable for the misfeasance of its employees?

The traditional view has been that, absent so-called 'de facto authority',[12] liability for misfeasance will be personal rather than vicarious.[13] However, in the case of *South Australia v Trevorrow-Lampard* (2010) 106 SASR 331 the Full Court of the South Australian Supreme Court suggested, by way of obiter, that the Crown in right of the State of South Australia could be vicariously liable for the conduct of a departmental secretary (at [275]). The Court reasoned as follows in support of this obiter conclusion:

> In the present case [the officers in question] each acted in apparent performance of their duties under or derived from the 1934 Act. They were doing the kind of thing (fostering a child) that was an appropriate exercise of the statutory powers. It is evident that they believed that the particular circumstances called for the action taken. They acted deliberately, but they acted for the benefit of the public and of the State, and not for any personal or private gain. If necessary, we conclude that this is a case in which the Crown in right of the State of South Australia is vicariously liable for the conduct of the tortfeasor ...

These observations were obiter because the Court found that the State, through its ministers and other emanations, had actual knowledge that public officers were unlawfully taking Aboriginal children from their parents and gave de facto authority to that conduct. However the Court's observations suggest that, if the act/decision in question can be characterised as a misguided and unauthorised method of performing an otherwise authorised act, vicarious liability will arise. Whilst this reasoning lends support to the Commonwealth or a State indemnifying a public official in respect of their liability for misfeasance, doubt exists as to its conformity with the principle that, absent de facto authority, liability will ordinarily be personal.

Commonwealth liability for ministerial misfeasance?

In some respects, ministers can be regarded as comprising the directing mind and will of the Commonwealth, albeit that they are not employees. That proposition might be regarded as lending support to the existence of direct liability on the part of the Commonwealth for the misfeasance of a minister.[14] The fact that a minister may be required to exercise an 'independent discretion' is not necessarily inconsistent with the existence of direct liability for misfeasant acts/decisions of a minister. In *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 the Full Court of the Federal Court noted (at 483–484) that it is 'not self-evident that in respect of acts and omissions of a Minister in the conduct of his portfolio the tortious liability is that of the Minister as a servant for which the Commonwealth is vicariously liable'.

If the act/decision in question can be characterised as a misguided and unauthorised method of performing an otherwise authorised act, vicarious liability will arise.

The nature of liability, if any, on the part of the Commonwealth in respect of the misfeasant acts/decisions of a minister (that is, whether such liability is direct or vicarious) remains unresolved. Legal advice should be sought where any such issue arises in legal proceedings. In this regard, in *Fernando v Commonwealth* (2010) FCA 1475, the Court proceeded on the basis of what it understood to be a concession by the Commonwealth that, for the purposes of those particular proceedings, it was vicariously liable for any misfeasant act which might be found against a minister.[15]

Importance of early and vigorous assessment of misfeasance claims

Misfeasance claims are often articulated, through pleadings or otherwise, in terms that depend upon drawing inferences as to the public official's state of mind. In this regard, it must be remembered that whether or not a particular inference is open is a question of law, not a question of fact. Allegations of misfeasance should be analysed in light of this proposition. Very often, it may mean that it is appropriate to seek to strike out or summarily dismiss pleadings of

misfeasance. For instance, if the facts alleged in support of a pleading of deliberate or reckless wrongdoing are equally consistent with negligence, oversight or innocent error then, as a matter of law, the allegation of misfeasance is unsustainable. Courts have been very willing to analyse both pleadings and evidence at an early stage in proceedings to ensure that a misfeasance claim is properly based: see, for example, *Three Rivers* at [184]–[188]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 267 ALR 494 at [69]; and *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* [2011] FCA 1126 at [109]–[111].

So far as evidence is concerned, it is clear that an allegation of misfeasance is a serious allegation that attracts the operation of the principle in the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 – a court should be properly satisfied before finding an allegation of serious wrongdoing made out.

A close analysis of the evidence adduced in support of an allegation of misfeasance will also need to be undertaken before a decision is made as to whether the defendant should be called to give evidence. Such a decision will need to be made in light of the principle in *Jones v Dunkel* (1959) 101 CLR 298 that an inference, otherwise open, may be more readily drawn if a defendant does not give evidence of matters of which they can be expected to give relevant evidence.

The Commonwealth conceded for the purposes of those particular proceedings that it was vicariously liable for any misfeasant act which might be found against a minister. .

Damages

As with assault, battery and false imprisonment, misfeasance in public office is classified as an intentional tort. In the case of an intentional tort, a claimant may recover general damages both for the wrong itself and for any consequential loss that is not too remote. A consequential loss arising from an intentional tort will not be too remote if it was either intended by the defendant or was the natural or probable consequence of the tortious conduct. This is a more generous test for recoverable loss than reasonable foreseeability, which applies to actions in negligence and other unintentional torts: *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at [13], [73] and [114]; *TCN Channel Nine v Anning* (2002) 54 NSWLR 333 at [100] and [103]. In assessing general damages for these torts, courts can take into account events and circumstances that occur after the tort was committed, including indignity, ongoing hurt feelings (such as disgrace and humiliation), damage to reputation, physical or psychiatric injury and consequential economic loss. This may include damages for physical or psychological injury, loss of liberty, damage to reputation and/or financial loss (including loss of profits). Since the tort is founded on the bad faith of the defendant, it is one where the award of exemplary damages may be a real possibility.

Assisting Commonwealth officers, other than ministers

Appendix E of the LSDs governs the circumstances in which the Commonwealth provides assistance to its employees in legal proceedings. Appendix E applies to requests for assistance from various classes of employees specified in paragraph 1A, including officers employed by *Financial Management and Accountability Act 1997* (FMA Act) agencies and staff of ministers (see LSDs, para 3, regarding *Commonwealth Authorities and Companies Act 1997* (CAC Act) employees).

Significantly, Appendix E currently provides that expenditure should normally be approved to assist an employee who is a defendant in civil or criminal proceedings if the proceedings arise out of an incident that relates to their employment with the employing agency and *the employee acted reasonably and responsibly* (LSDs, para 5). However, para 6 of the LSDs contemplates that assistance will only be withheld where, if the Commonwealth itself were sued in the matter, it would be likely to seek an indemnity from the employee. The Commonwealth would be unlikely to seek indemnity or contribution from an employee unless the employee in question made no genuine attempt to act in the Commonwealth's interests and/or wilfully breached their duties. Approached in this way, an employee may be regarded as having acted 'responsibly and reasonably' within the meaning of Appendix E, notwithstanding the possibility of a high measure of wrongdoing on his or her part.

However, given the nature of the tort of misfeasance, there will be instances where a person alleged to have committed this tort will not have acted 'reasonably and responsibly'. In some instances, an agency may wish to defer some or all of the decision on legal assistance: see LSDs, para 7. Of course, the LSDs do not preclude a full indemnity being given to an official simply because there is an allegation that the official committed misfeasance in public office.

Assisting Commonwealth ministers

Legal assistance to ministers is governed by the *Parliamentary Entitlements Regulations 1997*. These Regulations provide that the Commonwealth can pay ministers' legal costs, including damages, penalties and settlement costs. Sub-regulation 10(1)(c) introduces a similar requirement to that contained in para 5 of the LSDs; namely, that the minister acted reasonably and responsibly in the matters giving rise to the proceedings. However, even if this condition is not satisfied, assistance can nevertheless be provided if the proceedings arose only because of the fact that the minister holds (or held) that office. Like para 7 of the LSDs, the Regulations provide that approval for payment of legal costs can be deferred until a decision is reached as to whether it is appropriate to provide legal assistance.

... the Commonwealth can pay ministers' legal costs, including damages, penalties and settlement costs.

Reducing the risk of misfeasance claims

Properly documented and sound decision-making that accords with all applicable legal requirements is the best antidote to misfeasance claims.

As the speed and volume of decision-making increases, there is a natural tendency for corners to be cut. For instance, in the case of *Commonwealth v Fernando* (2012) 126 ALD 10, an acting minister was asked to make a decision, within a very short timeframe, that had significant consequences for an individual. While the minister was ultimately held not to have committed the tort of misfeasance in public office, the following observations of the Full Court (in the opening passage of its Reasons for Judgment) are apposite:

> From time to time public officials deem it necessary to cut corners when confronted with deadlines. In doing so they sometimes circumvent statutory requirements and deny procedural fairness to those whose interests are affected by their decisions. This case provides another illustration of the need for public officials strictly to observe legal requirements especially when they are dealing with the liberty of individuals.

Cutting corners when exercising coercive powers (for example, by police or regulators) is particularly risky. So, too, are situations where:

- a decision or conduct directly affects personal liberty or the financial position or reputation of a person to a significant extent
- the conduct is not otherwise subject to alternative statutory remedies such as internal reconsideration or external merits review
- there are doubts about the limits of power
- the decision or conduct relates to controversial/politically sensitive topics or people
- a history of acrimony precedes the decision.

Cutting corners when exercising coercive powers (for example, by police or regulators) is particularly risky.

In such circumstances it is not suggested that public officials should shy away from making what they conscientiously consider to be the preferable decision – rather, the reasons for the decision should be apparent from documentary records such as written briefings or investigation reports (which, as business records, will usually be admissible as evidence of the truth of their contents). The existence of such records will:

- reduce the risk of misfeasance claims being made
- increase the likelihood of such claims being withdrawn or settled before hearing
- reduce the 'pressure' for public officials to give oral evidence and thereby submit themselves to cross-examination
- reduce the risk of adverse judicial outcomes for public officials and the Commonwealth.

Other matters that may reduce the risk of a claim for misfeasance are:

— giving the subject of the decision-making process ample opportunity to be heard on the proposed decision (this should also reduce the chance of the decision being set aside as a denial of natural justice)

— the use of 'clean-skin' decision-makers who have not previously been involved in dealings with the subject of the decision-making process or matters relating to it

— obtaining legal advice. Paying careful attention to administrative law requirements is particularly important because a lawful decision cannot constitute misfeasance (and will normally constitute powerful evidence against any allegation of malice).

... a lawful decision cannot constitute misfeasance

The need to report misfeasance claims as significant issues

Paragraph 3 of the LSDs requires FMA agencies to report to the Office of Legal Services Coordination (OLSC) on significant issues that arise in the provision of legal services, including handling of claims, litigation and involvement in dispute management. Failure to report a significant issue is a breach of the Directions and the Attorney-General may impose sanctions for non-compliance with the Directions: see para 14 of the LSDs.

The OLSC's Guidance Note No 7 makes it clear that, for the purposes of the LSDs, an issue will be considered 'significant' if the tort of misfeasance in public office is in issue.

Notes

1 Emeritus Professor Mark Aronson, 'Misfeasance in public office: a very peculiar tort' (2011) 35 *Melbourne University Law Review* 1.

2 *Society of Lloyds v Henderson* [2008] 1 WLR 2255 at [23]; *Leerdam v Noori* [2009] NSWCA 90 at [3]; T Cockburn and M Thomas, 'Personal liability of public officers in the tort of misfeasance in public office' (2001) *Torts Law Journal* 80, 245.

3 *Leerdam v Noori* [2009] NSWCA 90.

4 *Emanuele v Hedley* (1998) 179 FCR 290 at [36].

5 In *Cannon v Tahche* (2002) 5 BR 317 it was held that public prosecutors did not necessarily exert public power; in *Leerdam v Noori* [2009] NSWCA 90 it was held that a lawyer employed by a private law firm who was engaged by a government agency did not exercise public power.

6 In light of the decision of the English Court of Appeal in *Jones v Swansea City Council* [1990] 1 WLR 54, the Full Court in *Emanuele v Hedley* (1998) 179 FCR 290 considered it preferable to assume, without deciding, that Mr Hedley acted in a public office in conducting his discussions with Mr Emanuele.

7 See also *Three Rivers District Council v Governor and Company of Bank of England* (No 3) [2003] 2 AC 1 (*Three Rivers*).

8 See the decision of the Privy Council in *David v Abdul Cader* [1963] 1 WLR 834 at 839; *Tampion v Anderson* [1973] VR 715 at 720 (a decision of the Full Court of the Supreme Court of Victoria); *Cannon v Tahche* (2002) 5 VR 317 at [28] and [34] (a decision of the Court of Appeal of Victoria); *Pemberton v Attorney-General* [1978] Tas SR 1 at 13–14 and 26–27.

9 A similar approach was taken by the Supreme Court of Canada in *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 at [28]–[29].

10 See *Three Rivers* at 193.

11 See *Mengel* at 356; *Sanders v Snell* (1998) 196 CLR 329 at [38]; and *Three Rivers* at 230.

12 De facto authority will generally be present where the Commonwealth expressly or tacitly authorises the exercise of power in question. Awareness of what is occurring may be enough to create such 'de facto authority': *South Australia v Trevorrow-Lampard* at [273].

13 See *Northern Territory v Mengel* at 347; *Rogers v Legal Services Commission of South Australia* (1995) 64 SASR 572.

14 The extent to which the 'indoor management' of ordinary corporations is an appropriate analogy in the case of government bodies is unresolved: see *HMS Truculent: The Admiralty v The Divina (Owners)* [1951] 2 All ER 968; *Western Australia v Watson* [1990] WAR 248; *Babcock International v Babcock Australia* (2003) 56 NSWLR 51 at [94]–[101]. Resort to that analogy may be unnecessary in the case of ministers: see *Ryder v Foley* (1906) 4 CLR 422 at 432-3; *Radio Corporation v Commonwealth* (1938) 59 CLR 170 at 192.

15 See at [124]. In fact, the Commonwealth stopped short of conceding the existence of vicarious liability. The Commonwealth's position was that if liability was found against the minister, it would consent to judgment being entered against the Commonwealth. On appeal the Full Court overturned the trial judge's finding of misfeasance, so it was unnecessary for the Full Court to consider the question of the characterisation of the Commonwealth's concession: *Commonwealth v Fernando* [2012] FCAFC 18.

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