Misfeasance in Public Office: Raw Statistics from the Australian Front Line

Kit Barker[*] and Katelyn Lamont[†]

Abstract

This article responds to recent suggestions that the number of claims for the tort of misfeasance in public office is increasing. It provides a full review of litigation statistics in Australia since the cause of action was revived in the 1950s, detailing the various types of claim litigated and the most common reasons why they tend to fail. It also seeks an explanation as to why it is that litigants are increasingly pressing their claims in the face of very poor chances of success. Although these reasons are complex, we suggest that the surge in litigation can be understood as part of a broader pattern in which private enforcement techniques are increasingly being used in recent years as a reaction to the failure of public systems. If this is so, then the phenomenon seems likely to continue until such time as the current balance of public and private interests in cases involving harmful maladministration is fully reconsidered.

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The report of my death has been grossly exaggerated.[1]

I Introduction

The tort of misfeasance in public office attaches liability to public officers where they purposely use their public powers to harm private citizens, or, more commonly, perhaps, where they consciously overstep the boundaries of those powers knowing that doing so is likely to cause harm.[2] It has long been noted that the tort is both peculiar, in so far as it is one of our few 'public law' torts;[3] and that it is very difficult to prove in practice. Whilst it provides a historic mechanism via which citizens harmed by abuses of public power can obtain compensation and perhaps also play a personal role in holding State actors to account,[4] it has yielded very few victories for plaintiffs since its revival in the second half of the 20th century. In fact, despite having been summoned ingeniously by courts from a shallow precedential grave precisely in order to respond to the expanded powers of the administrative state,[5] its success-rate has to date been pretty abysmal. In 2008, the Law Commission of England and Wales was so sceptical of the tort's practical utility that it proposed to abolish the cause of action altogether in favour of a more radical set of measures designed to increase state liability for maladministration in both public and private law.[6] That more radical regime never came to light in England and Wales;[7] nor has

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1 This much-loved quotation of Mark Twain (appearing in Albert Bigelow Paine, *Mark Twain: A Biography; the Personal and Literary Life of Samuel Langhorne Clemens* (Harper & Brothers, 1912)) is not quite accurate, although it nicely captures his wit. Twain's verbatim response to the newspaper report of his death, itself published in the *New York Journal* (2 June 1897) was that it was 'an exaggeration'. We reproduce the embellished version here for its poetic flourish.

2 For a more detailed account of the tort's elements, see Part IV below.

3 Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1, 2. On the tort's 'public law' character, see also *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J) citing Robert Sadler, 'Liability for Misfeasance in a Public Office' (1992) 14(2) *Sydney Law Review* 137, 138; Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook Co, 2011) 221, 231, 240; Donal Nolan, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker, Simone Degeling, Karen Fairweather and Ross Grantham (eds), *Private Law and Power* (Hart Publishing, 2017) 177. The distinction between public and private law can be cast in many ways, but, on our view, misfeasance is a public law wrong because it enforces primary rights and duties existing between the State (acting through its public officers) and the citizen, not rights and duties between private citizens.

4 On the competing forms of accountability at stake, see Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337; Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020).

5 On one view, the tort dates back to at least 1364: RC Evans, 'Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office' (1982) 31(4) *International and Comparative Law Quarterly* 640, 640. However, others suggest that the 20th century 'recognition' of the tort was based on very shallow foundations: CS Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9(1) *Sydney Law Review* 93, 99–103.

6 Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com CP No 187, 2008) esp 74–5 [4.88]–[4.92], 78 [4.105]. Compensation was proposed in both spheres where the statutory regime was intended to benefit a plaintiff and the defendant was at 'serious fault': 75 [4.95].

7 The Law Commission's final report was hampered by objection and lack of access to relevant information about the costs of litigation against government. It ultimately recommended only that governments properly record and publish this information: Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, 2010) 69 [6.14], [6.17].

there been any movement toward anything akin to it in Australia. In fact, Australian legislatures have, if anything, set the law in precisely the opposite direction, closely curtailing the State's civil liability for excess and error in the use of public power, and carving out new statutory liberties and immunities.[8]

The extraordinary feature of the tort that forms the focus of this article is the increased regularity with which it is currently being litigated, despite its minimal chances of success. The rise in litigious energy has been noted by a number of commentators,[9] but to date no systematic analysis has been conducted across a broad timeframe, which has made it impossible to assess the true extent of the phenomenon, or its full implications. On the face of things, the upswing appears paradoxical. Why would claims surge in this way when they apparently offer so little promise? Are litigants simply uninformed of the risks? Are they stubbornly vexatious in their interactions with the State, or driven by factors more emotive than rational? Are they, as some have suggested, reacting intelligently to recent restrictions on other causes of action in respect of state maladministration, tactically tacking claims for misfeasance on to their pleadings in an attempt to make liability stick, gain procedural advantage, or unlock access to awards of exemplary damages?[10] Or is the growth in litigation we are witnessing symptomatic of more deep-seated, tectonic shifts in law enforcement patterns? Does it, perhaps, signal a transition to a legal world in which private parties seek out — and are increasingly accorded — a more active role in enforcing public laws and public standards when public systems fail?

Here, we take a closer look at the statistics surrounding the misfeasance action since it was first seriously put to work in Australia in the late 1950s. We investigate the true extent of the current litigation 'boom' and speculate further on why it might be that litigants are increasingly pressing their claims in the face of very poor odds. One possibility, we shall suggest, is that the current trend may indeed signal a reversion to private enforcement initiatives in respect of harmful public wrongs. We say 'reversion,' because of course private proceedings were for a very long period of history the only real means via which rights, either private or public, were enforced, for lack of state policing and enforcement processes.[11] On this

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8 Although there is no consistent pattern, most Australian jurisdictions have, since 2002, introduced significant statutory restrictions on the civil liability of public authorities, some of which go beyond those previously existing at common law. See generally Mark Aronson, 'Government Liability in Negligence' (2008) 32(1) *Melbourne University Law Review* 44; Justine Bell-James and Kit Barker, 'Public Liability for Negligence in the Post-Ipp Era: Sceptical Reflections on the 'Policy Defence'' (2016) 40(1) *Melbourne University Law Review* 1.

9 The most recent Australian study reported 79 cases between 2002 and 2010: Vines (n 3) 222–3. The 'growing frequency' of claims since 2003 has also been reported in Canada and England: Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 3.

10 Vines (n 3) 222. See similarly in Canada, Erika Chamberlain, 'What is the Role of Misfeasance in Public Office in Modern Canadian Tort Law?' (2009) 88(3) *Canadian Bar Review* 575, 577–8 (misfeasance claims may offer better prospects of discovery, are less likely to be struck out and can offer some advantages in a small number of cases in which negligence claims might fail).

11 On the late development of public prosecution, for example, see Yue Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) *International Criminal Justice Review* 190. On the use of private tort actions to challenge public action prior to the advent of judicial review, see Ellen Rock and Greg Weeks, 'Monetary Remedies for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales (UNSW) Law Journal* 1159, 1167–8.

understanding, the current escalation of litigation is a product of two, catalytic forces — the increasing pervasiveness of state regulatory powers in modern Australian society and the absence of other, satisfactory, public means of redress for harm caused by their excess.[12] Increased recourse to the tort should therefore, we argue, be understood against the backdrop of a broader framework in which new emphasis is being accorded in recent years to private initiative in the enforcement of public laws when public systems fail.[13]

Part II sets out the parameters of our study, its methodology and limits. Part III presents an overview of the main results. In Part IV, we reflect further upon the more difficult question of what these results may mean. Part V tapers our conclusions to a point.

II Methodology

Our study set out to identify all recorded misfeasance cases pleaded in Australia over a 70-year period from the end of 1950 to the end of the year 2020, using a combination of the LexisNexisAdvance and AustLII databases as our primary resource. We recorded the incidence of cases across the period, the stage of litigation that each case reached, its final result (where available) and its subject matter. This enabled us to determine and compare litigation and success rates across the period and across different types of case. Where (as was overwhelmingly the case) claims failed, we recorded the reasons. We also recorded the type of damage alleged to have been suffered in consequence of the relevant abuse of power, any concurrent claims brought in the same proceeding, and whether or not the plaintiff was legally represented. All results were then entered into our own spreadsheet database. In analysing the data and suggesting inferences that might be drawn from it, we have not had recourse to formal statistical tools, so we cannot claim any definitive statistical proof that the thesis advanced in Part IV about possible causes of the rise in litigation is correct. Without access to further data that lies beyond the limited scope of the study, it is impossible to be sure of all the hidden variables. We therefore present our final thesis with caution — as a credible suggestion, not a final proof.

A *Limitations*

The number of cases returned by our search parameters was small — just 204 in total.[14] Some of them (about 11%) did not result in any final judgment and were either discontinued, or settled. These cases are included in our tallies of case types litigated but otherwise excluded from our result sets. We have also not attempted more generally to investigate the shadowy life of informal dispute resolution

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[12] As early as *Tampion v Anderson*, Smith, Pape and Crockett JJ cited with approval the view that the tort 'has … been revived by reason of concern regarding the inadequacy of the remedies usually resorted to by the citizen injuriously affected by administrative action': *Tampion v Anderson* [1973] VR 715, 720 ('*Tampion*'). Other remedial options have not improved much since then.

[13] See below Section IVB.

[14] The term 'misfeasance' was entered in the catchwords/case summary field in LexisNexis Advance and in the general search field of the Cases and Legislation Databases in AustLII. Results were then filtered and refined manually to eliminate duplication and irrelevance.

processes surrounding misfeasance claims, or the reach of other systems (internal complaints and review processes, administrative appeals, ombudsmen, discretionary compensation schemes, ex gratia payments and the like)[15] into which plaintiffs' grievances may have been channelled. This gives the study a formal orientation that will be unappealing to many realists and it necessarily means that the data used are selective.[16] In focusing exclusively on recorded litigation outcomes, it certainly does not tell the whole modern story of public misfeasance. While we hope that the information it presents will be useful to litigators, we therefore recognise that it is really only a starting point for much-needed, further qualitative investigation of the modern phenomenon of litigation surrounding public maladministration.

There was also a risk that the online databases we accessed might not provide a complete set of cases,[17] and/or that the proportion of cases uploaded to them might have increased over time.[18] The latter risk in particular had the potential to result in time-bias and the skewing of some results: if early cases were uploaded to the databases less consistently than later ones, this could result in the study exaggerating the extent to which misfeasance litigation had increased across the period as a whole. To mitigate this risk, we cross-checked the results of our primary data set against a secondary one comprising only officially reported cases, on the hypothesis that reported cases are more likely to have been uploaded consistently, notwithstanding the year in which they were decided. The results from the two data sets point reassuringly to the same underlying trends. We are therefore reasonably confident that the results of our primary analysis are robust and the trends to which it points are real.

B *Method: Coding and Result Sets*

Cases returned by our search were coded in accordance with a number of different criteria, which we set out below. Our source for most of this information is the text of finalised court judgments.[19]

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15 For a useful overview of the discretionary schemes operating in Australia, see Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) ch 10.

16 On selectivity and its impact on the inferences that can be drawn from litigation, see Daniel Klerman and Yoon-Ho Alex Lee, 'Inferences from Litigated Cases' (2014) 43(2) *Journal of Legal Studies* 209.

17 A more robust investigation of the relationship between case reporting and database uploads is warranted, but is beyond the resources of our current study. If cases have been missed, they are likely to be unreported, unsuccessful cases, struck out an early stage of proceedings. The existence of any such cases would mean that our overall litigation numbers were a bit low and the stated rate of success a little high.

18 Our limited investigations suggest that efficiency has increased as electronic databases have developed.

19 Court judgments are not written for the purposes of recording all possible information, so some data may be missing on account of matters being resolved prior to trial, or judges choosing not to record or decide matters they consider less important. Nevertheless, we expect that this effect is limited, since our focus is on matters important to most cases.

1 *Stage of Proceeding*

First, each case was categorised according to the most advanced stage to which it progressed in the court system, namely:

1. Strike-Out ('SO') proceeding;[20]
2. Trial; or
3. Appeal.

2 *Positive or Negative Result*

Every case with a recorded final result was then classified as 'successful' or 'unsuccessful' overall; note being taken of the stage of proceeding at which the result was ultimately reached.[21] The latter, more fine-grained analysis allowed the creation of a secondary, more detailed results-set in which cases were coded as having been:

Unsuccessful

1. Struck out;[22]
2. Unsuccessful at trial with no appeal;
3. Unsuccessful at trial and unsuccessful after appeal; or
4. Successful at trial but unsuccessful after appeal.

Successful

5. Successful at trial with no appeal;
6. Successful at trial and successful after appeal; or
7. Unsuccessful at trial but successful after appeal.

This more granular set of analytics provides a rough proxy for the amount of time, complication and expense likely to have been involved in a plaintiff litigating the claim through to its final result. Unsuccessful claims struck out at an early stage generally involve less time and expense than either successful or unsuccessful claims determined at trial or (most expensively and protractedly of all) on appeal.

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[20] This category includes cases in which the defendant applied to have the claim dismissed, or where a plaintiff applied unsuccessfully to amend pleadings to include a misfeasance claim and the matter never proceeded to trial.

[21] Where a case was appealed several times, only the ultimate result after *all* appeals was recorded.

[22] 'Struck out' was defined broadly to include cases in which:
(i) pleadings were struck out; or
(ii) an initial decision not to strike out was reversed on appeal; or
(iii) there was an appeal from an initial strike-out decision resulting in another decision to strike, summary dismissal of the claim, or summary judgment against the plaintiff; or
(iv) the claim was struck out with leave to re-plead, but it was never re-pleaded and never went to trial; or
(v) a court determined, on the hearing of a preliminary question, that the case could not continue; or
(vi) proceedings were stayed, or the claim withdrawn on the basis that a stay would otherwise be granted.

3 *Reasons for Failure*

Wherever a claim failed, the reason or reasons for the failure were recorded within one of the following categories:

1. Pleadings — the plaintiff's pleading was defective in form, or disclosed no known cause of action.
2. Public officer not proven — the plaintiff failed to prove that the defendant was a public officer.
3. Excess of power not proven — the plaintiff failed to prove that the defendant was acting in excess of the powers of his or her office, or otherwise in breach of the public duties attached to it.
4. Mental elements not proven — the plaintiff failed to prove one or more of the required mental elements of the tort.
5. Damage not proven — the plaintiff failed to prove that he or she had been caused any damage.
6. Other — the plaintiff failed for reasons not falling within any of the other categories.

The required, substantive elements of the tort, which so often proved a stumbling block for plaintiffs, are discussed further in Part IV below. Where multiple reasons were cited for a claim failing, all of them were recorded without our attempting to determine which was ultimately conclusive. Our analysis therefore simply identifies the most commonly cited reasons for failure across all unsuccessful cases.

4 *Case Type (Subject Matter)*

Cases were further coded by reference to their subject matter:

1. Planning and property development — cases concerning actions or decisions of government officers or ministers in respect of planning, building and development matters.
2. Employment — cases in which an employee (or independent contractor) alleged illegality on the part of a public employer in relation to the termination of an employment contract, or the award of a contract for services under a public tendering process.
3. Immigration — cases involving immigration detention, or other harm suffered in consequence of alleged illegalities on the part of an officer resulting in the denial or termination of citizenship or visa applications.
4. Investigation — cases involving alleged abuse of powers on the part of regulatory agencies, the police or other persons acting under statutory authority in the conduct of prejudicial public investigations, prosecutions, or trials.
5. Licensing — cases, outside the planning and property development category, alleging public impropriety in the withholding, suspension or cancellation of a licence, or in enforcement action associated with the

absence of a licence in respect of otherwise prohibited activity. A particularly high-profile example is the recent case in which the Federal Agriculture Minister was held liable for misfeasance in issuing an illegal ban on the export of livestock to Indonesia.[23]

6. Policing — cases not falling within the investigations category involving alleged abuses of power by members of the police force, predominantly in the context of arrest and detention.
7. Taxation — cases involving the alleged mishandling of a citizen's tax affairs.
8. Welfare — cases involving the denial of citizens' claims to public welfare entitlements such as Centrelink benefits, or disability payments.
9. Other — cases falling outside the above categories, for example claims against judicial officers, prison officers, or livestock inspectors.

These categories are porous and prone to overlap in some instances. To keep matters as simple as possible, we were nonetheless strict in assigning each case to only one category — the one that, in our view, best represented the case's essential characteristics.

5 *Damage Pleaded*

Note was also taken of the type of harm alleged to have been suffered by the plaintiff in each case, damage being assigned to one of the following categories:

1. Pure economic loss (not consequential on personal injury or property damage).
2. Personal injury (other than mental injury).
3. Mental injury (psychiatric damage going beyond pure distress).
4. Property damage.
5. Loss of liberty.
6. Reputational harm.
7. Distress.
8. Other.
9. Unclear.

One of the reasons for recording information of this type was to enable us to investigate the accuracy of an interesting suggestion, to which we return in Part IV; namely, that recent increases in misfeasance litigation may be attributable to post-2002 restrictions in Australia on damages for personal injury in negligence cases.[24] Where a claim alleged more than one type of damage, all pleaded heads were recorded.

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[23] *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 ('*Brett*').

[24] Vines (n 3) 222, esp n 9. The suggestion is framed in cautious terms, emphasis also being placed by the author on the specific restrictions on public body liability for negligence referred to above in n 8.

6 *Representation*

Given the large number of cases that are struck out before ever reaching trial, we also considered it important to note whether or not the plaintiff was legally represented, or acting in person, so that we could examine the relationship, if any, between rates of representation and success. Cases were accordingly coded in one of the following ways:

1. Plaintiff self-represented
2. Plaintiff legally represented;[25] or
3. Information unavailable.

7 *Concurrent Claims Pleaded*

Misfeasance claims are almost always combined with other causes of action in the same proceedings. We therefore noted any and all concurrent claims together with their outcomes (where available).[26] Such claims fell into the following, main categories:

1. Administrative law (applications for judicial review and claims for associated administrative law remedies).
2. Claims based on the (now defunct) '*Beaudesert* principle' (tortious liability for the inevitable, harmful consequences of positive, intentional and unlawful acts).[27]
3. Negligence at common law.
4. Breach of statutory duty.
5. Breach of contract.
6. Malicious prosecution.
7. Trespass to the person (assault or battery).
8. Trespass to goods.
9. Trespass to land.
10. False imprisonment.
11. Defamation.
12. Inducement of breach of contract.
13. Conspiracy.
14. Injurious falsehood.
15. Other.

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[25] Cases were coded in this way if the plaintiff was represented at any stage of the proceeding.

[26] Note that we have not examined here non-concurrent claims arising out of the same subject matter, such as where an administrative law claim is brought prior to the tort claim (see, eg, *Ruddock v Taylor* (2005) 222 CLR 612). Such non-concurrent claims are not readily identified using our search methods, and are beyond the scope of this project.

[27] *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156 ('*Beaudesert*') (an action on the case). The action was rejected by the High Court in *Northern Territory v Mengel* (1995) 185 CLR 307 ('*Mengel*').

III Results

Consistently with accounts to date,[28] our results confirm that the number of cases in which the tort of misfeasance has been pleaded in Australia since 1950 is extremely small in comparison both to other tort claims, and administrative law claims for judicial review.[29] We found a total of 204 cases. Of the 179 instances in which a final outcome was recorded, only nine (5%) were ultimately successful.[30] Of these nine, six succeeded at trial and were never appealed by the defendant, but a further three prevailed only after an appeal.[31] These low litigation and success rates are consistent with patterns reported in other common law jurisdictions.[32] In eight of the nine successful cases, the plaintiff also succeeded in establishing at least one, alternative private or public law claim (usually more).[33] It may also be significant that in only one successful case to date has the plaintiff been self-represented.[34] Indeed, although the number of claims brought by both represented and unrepresented litigants has increased dramatically, the success rate of represented plaintiffs is some four times that of unrepresented plaintiffs — a matter to which we return further below.

A *Trends in Litigation and Success Rates*

Although the number of recorded claims is small in absolute terms, with no more than 11 cases in any single year,[35] there has been a rapid escalation in litigation rates across the period from a very low initial baseline. Some 96% of all cases have occurred between 1991 and 2020. The number has increased at a fairly consistent rate across this thirty-year period, with 21% of cases occurring in the ten-year period between 1991 and 2000; 37% between 2001 and 2010; and 39% between 2011 and the end of 2020. Another way of representing this increase is to observe that the total

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28 See above nn 3–5.

29 A search of the LexisNexisAdvance database conducted on 4th Dec 2020 disclosed more than 350 pleaded negligence cases and over 1300 claims for judicial review in 2019 alone.

30 *Brett Cattle* (n 23); *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311 ('*Nyoni*'); *Cunningham v Traynor* [2016] WADC 168 ('*Cunningham*'); *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ('*Trevorrow*'); *Cornwall v Rowan* (2004) 90 SASR 269 ('*Cornwall*'); *Gallo v Schubert* [2004] VCC 36 ('*Gallo*'); *De Reus v Gray* (2003) 9 VR 432 ('*De Reus*') (misfeasance was established at first instance in respect of one defendant, De Reus, and the jury's determinations on liability were not challenged on appeal — the successful appeal related to the jury's global assessment of damages for negligence and trespass to the person); *Tomkinson v Weir* (1999) 24 SR (WA) 183 ('*Tomkinson*'); *Farrington v Thomson* [1959] VR 286 ('*Farrington*'). In one recent case, *Ea v Diaconu*, the New South Wales Court of Appeal reversed a first instance decision to dismiss the claim, on the basis that the uncertain point of law it raised should not have been dealt with summarily: *Ea v Diaconu* (2020) 102 NSWLR 351 ('*Ea*'). The case was set down for directions in February 2021. As at 31 August 2021, it was still proceeding in the absence of settlement.

31 *Trevorrow* (n 30); *Cornwall* (n 30) (both appeals by the State against liability at first instance); *Nyoni* (n 30) (plaintiff failed at trial, successful on appeal).

32 See Chamberlain, *Misfeasance in a Public Office* (n 9).

33 Successful concurrent claims included trespass to the person, land, or goods, false imprisonment, malicious prosecution, defamation and negligence.

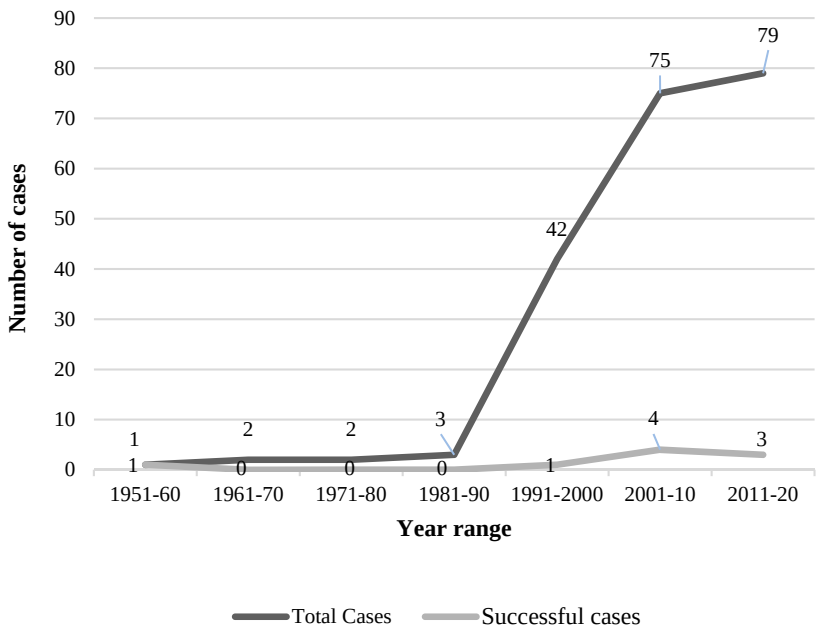
34 *Nyoni* (n 30). In *Cornwall* (n 30) the plaintiff (Rowan) was self-represented at trial until 7 October 2001 (*Rowan v Cornwall (No 5)* (2002) 82 SASR 152, 158), but represented thereafter.

35 This number was reached in 2012, 2014, 2016 and 2020.

number of cases recorded in each of the last three decades has been, respectively 14, 25 and 26 times the rate in the prior ten-year period (1981–90). Litigation seems, therefore, to have really taken off in the late 1980s; and to have been on a steep upward trajectory ever since, with a significant slowing in the rate of increase in the last decade.

By stark contrast, success rates have remained both low and stagnant, with a maximum rate of about 5.3% in the first decade of the new millennium and an average over the last thirty years of only about 3.8%. Before that, there is only one recorded successful case, *Farrington v Thomson*,[36] which is often heralded as the beginning of the modern misfeasance story and which was decided very early on, in December 1958. The startling divergence between litigation and success rates across the whole period is illustrated graphically in Figure 1 below, where the steepness of the climb in case numbers contrasts dramatically with a virtual flatline in positive outcomes for plaintiffs.

Figure 1: Misfeasance litigation and success rates by 10-year period: 1951–2020



B *Unsuccessful Cases*

95% of all cases with a recorded result therefore failed. Of these, some 59% were struck out before ever reaching trial. A further 20% failed at trial and were never appealed. Some 14% failed at trial and then again on appeal. A small proportion —

[36] *Farrington* (n 30).

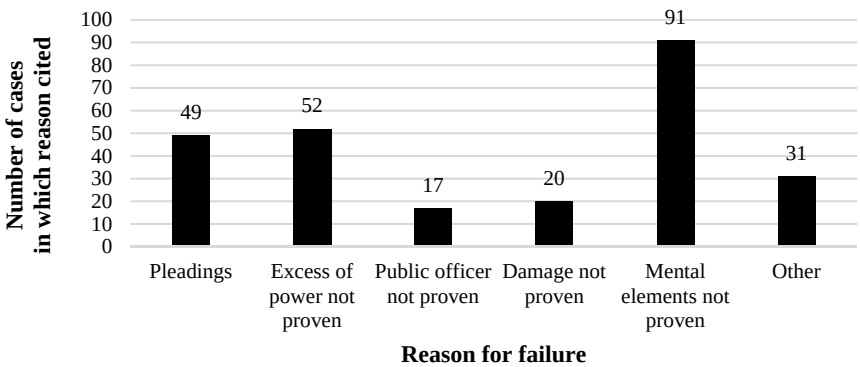
about 2% — succeeded initially, only to be reversed. As a proportion of unsuccessful cases, those that were struck out account for an arresting 62%.[37]

The death of most misfeasance claims is, therefore, as swift as it is (almost) assured, although there are undoubtedly some cases that are permitted to continue for a while, with plaintiffs (usually self-represented ones) being allowed by sympathetic judges to make repeated amendments to their pleadings before the proceedings are ultimately terminated.[38]

C *Reasons for Failure*

The reasons for failure in unsuccessful misfeasance in public office cases between the end of 1950 and the end of 2020 are summarised below in Figure 2.

Figure 2: Reasons for failure in unsuccessful cases



The most commonly cited reason for a claim failing was the fact that the plaintiff failed to prove (or properly to plead facts that might prove) the required mental elements of the tort. This defect was cited in 54% of all unsuccessful cases and it was the *only* reason given for the claim failing in about one fifth of them. As we discuss further in Part IV below, the threshold requirements of the tort in Australia remain high, with it probably being necessary to prove, at a minimum, that a public officer subjectively adverted both to the possibility that his or her actions were unlawful in the relevant sense and that they might cause the plaintiff harm. The seriousness of the required imputation (which is effectively that the officer knowingly caused damage by acting in 'deliberate' or 'conscious' excess of power)[39] also triggers the operation of stricter evidential requirements in meeting the civil standard of proof under the rule in *Briginshaw v Briginshaw* and its modern statutory

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37 This casts doubt on a suggestion made by Chamberlain that misfeasance claims are less likely than other claims to be disposed of summarily on account of the uncertainties surrounding the tort's parameters: Chamberlain, 'What is the Role of Misfeasance in Public Office in Modern Canadian Tort Law?' (n 10) 577.

38 See, eg, *Henderson v Commissioner of Taxation* (2006) 62 ATR 116 ('*Henderson*').

39 *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198, [96], [99] (Mortimer J) ('*Morrison (No 2)*').

equivalents.[40] The gravity of misfeasance as a wrong therefore ironically makes it harder to persuade a court that it ever actually occurred. Judges are slow to attribute bad faith to public officers doing a difficult job,[41] not least, perhaps, because they are themselves occasionally targeted by such claims.[42]

The second most commonly cited reason for failure (featuring in 31% of unsuccessful cases) was the plaintiff's failure to prove any unlawful excess of public power. The fact that claims are regularly defective in this regard may either reflect the fact that excesses of power are genuinely rare,[43] or the fact that the legality of many discretionary decisions is hard for plaintiffs (or even sometimes officials) to judge without benefitting from the determination of a court or administrative tribunal. Where the boundaries of legal discretion are ambiguous and subject to final confirmation only on judicial review, it is easy to see how a complainant might perceive those bounds to have been exceeded, when it is later determined by a judge that this is not, in fact, the case.

The third most common reason for a claim being rejected (29% of unsuccessful cases) related to some fatal defect in the plaintiff's pleadings. The high incidence of technical problems of this type may be connected, we suspect, to the significant proportion of unsuccessful cases (40%) in which plaintiffs are self-represented and therefore potentially lack access to legal advice. It may also, perhaps, be connected to the remaining uncertainties about the exact parameters of the tort to which we allude in Part IV below.

The vast majority of unsuccessful cases (84%) failed for either the first or second reason — lack of proof of the required mental elements, or lack of proven illegality — or for both reasons. There is, however, no single problem that blights all claims. In 12% of cases, plaintiffs failed to prove (or properly allege) that they had suffered any damage. Indeed, claims were often criticised by courts as being either too vague about damage, or as omitting to refer to it at all.[44] Sometimes the damage of which plaintiffs complained seems to have been more in the nature of harm to a common, public interest, than to any private interest of their own.[45] Sometimes the damages claimed were either nominal,[46] or a staggering, arbitrary sum bearing closer resemblance to a punitive award than any true calculation of injury personally suffered.[47] Although there has been some debate about the logic of the damage

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40 *Briginshaw v Briginshaw* (1938) 60 CLR 336. See, eg, *Hamilton v New South Wales* [2020] NSWSC 700 ('*Hamilton*'); *Mullett v Nixon* [2016] VSC 512 ('*Mullett*'); *New South Wales v Roberson* (2016) 338 ALR 166; *Commonwealth v Fernando* (2012) 200 FCR 1 ('*Fernando*').

41 Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 (July) *Law Quarterly Review* 427, 435 (an 'implicit belief in the benignity of government').

42 *Hammond v New South Wales* [2013] NSWSC 1930; *Fleet v Royal Society for the Prevention of Cruelty to Animals NSW* [2005] NSWSC 926; *Mentyn v Attorney-General* [2004] TASSC 5 ('*Mentyn*'). Judicial immunity usually puts an end to the suit.

43 For our doubts in this regard, see Part IV(A) below.

44 See, eg, *Grass v Slattery* (2018) 162 ALD 276 ('*Grass*') (no evidence of damage admitted).

45 *Bill v Northern Land Council* [2018] FCA 1823 (common interests of traditional landowners).

46 See, eg, *Lymberopoulos v Police* [2006] SASC 360.

47 *Roads and Maritime Services v Young* [2018] NSWSC 1867 ($80 million); *Nyoni v Shire of Kellerberrin* [2019] FCA 530 ($100 million); *Mentyn* (n 42) ($1 million); *Henderson v Bakharia* [2001] QSC 370 ($3 million).

requirement in light of the tort's public law character,[48] it is clearly part of Australian law and it is therefore pretty unlikely that plaintiffs (at least legally represented ones) are unaware of it. It may instead be that they look past the requirement, compensation for harm being just one motivation for their claim and the vindication of their public rights and the enforcement of an officer's public duties being a more pressing personal concern. This is certainly a credible explanation of one of the tort's earliest cases, *Ashby v White*, where the plaintiff's complaint related to the denial of his public voting rights and no personal damage was either alleged, or suffered.[49] It seems possible, therefore, that the 'public law' character of the tort is leading some plaintiffs mistakenly to assume that personal damage is inessential to their claim and need not be alleged, or particularised. Damage will also be especially hard to prove where the alleged illegality is of a purely procedural kind, since the officer may in such cases have made the same decision even without the irregularity.

In a further 10% of cases, plaintiffs failed to prove that the defendant was a public officer, or that he or she was exercising any relevant public power. This was a particular problem in employment cases, as we note further below. In the remaining 18% of cases, claims failed for 'other' reasons, which included:

- evidential defects;[50]
- the fact that a plaintiff was attempting to use the litigation collaterally to attack a prior criminal conviction;[51]
- failure to establish facts that might make the State vicariously liable;[52]
- an immunity protecting the officer in question;[53]
- lack of court jurisdiction;[54]
- the expiry of a limitation period;[55] or

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48 See, eg, Nolan (n 3) 199–200 (suggesting that the requirement is best understood as a standing rule for suit in respect of a public wrong and can therefore be more liberally constructed). Note that the damage requirement was at one time waived in cases involving the violation of constitutional rights in *Watkins v Secretary of State for the Home Department* [2005] QB 883, but that stance was reversed on appeal: [2006] 2 AC 395 (HL).

49 *Ashby v White* (1703) 92 ER 126. The plaintiff's preferred candidate was, in fact, elected.

50 See, eg, *New South Wales v Hunt* (2014) 86 NSWLR 226 ('*Hunt*').

51 *Re Western Australia; Ex parte Vella (No 2*) [2012] WASCA 272.

52 *Mbugua v Commonwealth* (2012) 78 SR (WA) 154; *Ogawa v Parker* [2008] FCA 388, [30] (Logan J) (obiter dicta); *Mickelberg v Western Australia* [2007] WASC 140 ('*Mickelberg*'); *Griffiths v Ballard* [2005] NSWSC 1350 ('*Griffiths*'); *Holloway v Tasmania* (2005) 15 Tas R 127 ('*Holloway*'); *Hart-Roach v Public Trustee* [1998] WASC 34. Although vicarious liability is sometimes doubted, it is now regularly conceded, or considered possible, given the right legal conditions: see, eg, *Morrison (No 2)* (n 39) [3] (conceded); *Mengel* (n 27) (conceded at initial trial: *Northern Territory v Mengel* (1992) 109 FLR 411, 420, see also at 347 — possible where de facto authority); *Frangieh v Deputy Commissioner of Taxation* (2018) 343 FLR 1, 31 [150] (White JA) (obiter dicta); *Grass* (n 44) 279 [1] (conceded); *Okwume v Commonwealth* [2016] FCA 1252, [209], [211] (Charlesworth J) (obiter dicta) ('*Okwume*'); *Porter v OAMPS Ltd* (2005) 215 ALR 327, 353, [108] (Goldberg J) (obiter dicta) ('*Porter*').

53 *Keenhilt Pty Ltd v Byron* [2008] QSC 70 (tax officer); *Griffiths* (n 52) (witness); *Wentworth v Wentworth* (2001) 52 NSWLR 602 (judicial officers); *Tampion* (n 12) (public inquiries). See also the cases cited above at n 42.

54 *Croker v Commissioner of Taxation* [2006] FCA 372 ('*Croker*') (claim related to State, not Commonwealth officers).

55 *New South Wales v Mulcahy* [2006] NSWCA 303 ('*Mulcahy*'); *Thompson v Macedon Ranges Shire Council* [2006] VSC 458; *Sita Queensland Pty Ltd v Queensland Transport* [1998] QSC 130 (limitation period for judicial review exceeded, no separate misfeasance claim ultimately lodged).

- the fact that making out the claim might require the plaintiff to rely on evidence of his or her own illegal actions.

The last of these problems is atypical, but colourfully illustrated by the facts of *Emanuele v Hedley*, where the plaintiff's claim against the police for entrapment would potentially have required him to disclose his own attempts to bribe one of the officers in question.[56]

D *Case Types*

Misfeasance cases are factually extremely diverse — indeed, 23% of the cases in our study fell outside any of the more specific 'nominate' categories identified above (see pp 321–2). This reflects the reality that allegations of abuse of power now span a very large number of discrete areas of governmental function, without being clustered in one particular sphere.

The largest nominate group by far (28% of cases) concerned official 'investigations'. Examples of alleged abuses in this context included:

- the unlawful restriction of a surgeon's registration following official complaints about his work;[57]
- illegal phone-taps or unlawful searches by the police during criminal investigations;[58]
- improprieties on the part of the Australian Securities and Investments Commission ('ASIC'),[59] the New South Wales Independent Commission Against Corruption ('ICAC'),[60] or Australian Competition and Consumer Commission ('ACCC')[61] investigators during their inquiries into corruption or corporate wrongdoing;
- the prejudicial use of fabricated or illegally-obtained evidence or the violation of other procedural justice norms by investigators and prosecutors;[62] malicious prosecutions by individual officers,[63] their prejudicial misbehaviour in court proceedings;[64] and

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56 *Emanuele v Hedley* (1998) 179 FCR 290 ('*Emanuele*').

57 *Morris v St Vincent's Health Australia Ltd* [2020] VSC 690.

58 *Flanagan v Commissioner of the Australian Federal Police* [1996] FCA 1210 (phone-tapping); *Pinfold v New South Wales* [2009] NSWSC 1240 (execution of search warrant).

59 *Porter* (n 52).

60 *Obeid v Lockley* (2018) 98 NSWLR 258 ('*Obeid*'); *Kazal v Independent Commission Against Corruption* [2019] NSWSC 556. See similarly *Allen v Corruption and Crime Commission of Western Australia* [2011] WASC 327.

61 *Pro Teeth Whitening (Aust) Pty Ltd v Commonwealth* [2015] QSC 175 ('*Pro Teeth Whitening*').

62 *Grimwade v Victoria* (1997) 90 A Crim R 526 (false/illegal evidence); *Emanuele* (n 56) (entrapment); *Woodroffe v National Crime Authority* [2000] FCA 1052 (invalid warrant); *Cannon v Tahche* (2002) 5 VR 317 ('*Cannon*') (withholding information at trial); *Holloway* (n 52) (procedural unfairness); *Duke v New South Wales* [2005] NSWSC 632 ('*Duke*') (planting of evidence); *Mulcahy* (n 55) (fabricated evidence); *Mickelberg* (n 52) (fabricated/false evidence); *Poynder v Kent* (2008) Aust Torts Reports ¶81–984 ('*Poynder*') (intimidation); *Noye v Robbins* [2010] WASCA 83 (scapegoating); *Hunt* (n 50) (fabrication of evidence). Only some allegations were ultimately made out.

63 *Martens v Stokes* [2013] 1 Qd R 136; *Calabro v Western Australia (No 3)* [2014] WASC 84; *Mullett* (n 40); *Flowers v New South Wales* [2019] NSWSC 1467 ('*Flowers*'); *XYZ v New South Wales (No 2)* [2019] NSWDC 32; *Hamilton* (n 40) (claim by spouse of alleged victim for related psychiatric harm).

64 *Ea* (n 30).

- (in one case) the failure of an official to report suspected child abuse.[65]

The harm alleged in such cases usually includes reputational damage on the part of the person being investigated, economic loss, loss of liberty (in cases involving physical detention), psychological damage and distress.

The next largest nominate categories — all of roughly equivalent size and constituting between 8% and 10% of the total number of reported cases — involved 'employment', 'immigration', 'planning and property development' and 'policing'. 'Policing' cases typically alleged abuses of police powers during arrest and detention, or their use for illegitimate collateral purposes such as intimidation, humiliation, or harassment. The most recent example involved (unsubstantiated) allegations that officers in New South Wales had used their powers to intimidate the brother-in-law of a fellow officer.[66] Other claims (this time, substantiated) involved an illegal strip search by Victorian police,[67] and the widely reported tasering and illegal detention of a law professor and his wife by officers in Western Australia.[68] The damage alleged in such instances typically includes physical and mental injury, as well as loss of liberty and associated economic loss; and actions are therefore often combined with claims for trespass to the person, goods or land, false arrest and false imprisonment. If one counts all of the cases in our study in which the police were named as defendants to a misfeasance action (across all of our categories), they collectively accounted for about a quarter of all cases. The number of cases targeting the police is therefore greater than our single, nominate 'policing' category itself suggests. A full breakdown of case types, together with their respective success rates, appears below in Figure 3. The extent to which litigation is increasing across the different classes is shown below in Figure 4.

Figure 3 yields some interesting findings concerning relative success rates across the different case types. For example, although licencing cases constitute only about 7% of claims overall, their success rate is about four times the average for a misfeasance claim. They account for three of the nine successful cases in Australia to date: *Farrington*,[69] *Nyoni v Shire of Kellerberrin*,[70] and *Brett Cattle Co Pty Ltd v Minister for Agriculture*.[71] The rate of success in policing cases is about the same and accounts for another four positive outcomes.[72] The remaining two successes fall into the miscellaneous 'other' category,[73] where the success rate is slightly below the overall average of 5%. By contrast, the investigations category has failed to yield a single successful case, despite constituting by far the largest nominate group.[74]

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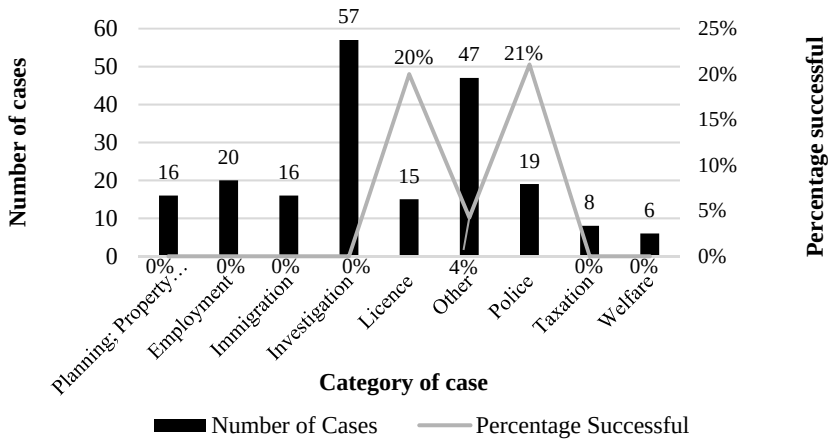
65 *TB v New South Wales* [2009] NSWSC 326.
66 *Doueihi v New South Wales* [2020] NSWSC 1065.
67 *De Reus* (n 30).
68 *Cunningham* (n 30).
69 *Farrington* (n 30).
70 *Nyoni* (n 30).
71 *Brett Cattle* (n 23).
72 *Cunningham* (n 30); *Gallo* (n 30); *De Reus* (n 30); *Tomkinson* (n 30).
73 *Cornwall* (n 30) (malicious misinformation in withdrawal of funding from plaintiff's women's shelter); *Trevorrow* (n 30) (unlawful removal of indigenous children from parents in breach of natural justice).
74 This broadly mimics the pattern in such cases in negligence: *Sullivan v Moody* (2001) 207 CLR 562 ('*Sullivan*'); *Stewart v Ronalds* (2009) 76 NSWLR 99; *N v Poole Borough Council* [2020] AC 780 (UKSC). See, however, *New South Wales v Spearpoint* [2009] NSWCA 233 (claim not struck out);

The planning and property development, employment, immigration, taxation and welfare classes are similarly moribund.

Figure 3: Case types with success rates



Our data do not disclose any particular reason for failure as being markedly more common in one type of case than another, with the possible exception of employment cases. Here, claims failed 38% of the time at least in part because the defendant was not (or was not properly alleged to be) a public officer, or because he or she was not exercising any public power when engaged in the acts complained of. This is about three times the rate of failure for this type of reason that applies to unsuccessful claims as a whole. The fact that claims fail so often for this reason in employment cases seems to point to a significant confusion among litigants about the tort's scope and rationale, which (at least on the current law) is confined to the misuse of powers that an official enjoys by virtue of his or her public functions, not the abuse of contractual or other powers that are equally available to private parties.[75] Litigants should therefore be clear that the mere fact that one is wronged by a public employer does not necessarily mean that the employer has engaged in misfeasance in public office. Claims for breach of contract, the tort of inducing a breach of contract, interference with contractual relations, conspiracy, or intimidation are more appropriate causes of action in respect of pure economic losses sustained in contractual and employment disputes and are, in fact, often also pleaded.

The different litigation rates across the nominate categories are similarly hard to explain without further qualitative investigation. Some intelligent speculation is nonetheless possible as to why claims involving investigations, policing and immigration are popular. Interactions between citizens and

McColley v Commonwealth [2014] ACTCA 21 (leave to appeal granted); *Fuller-Wilson v New South Wales* (2018) Aust Torts Reports ¶82–413 (claim not struck out).

75 *Skinner v Commonwealth* [2012] FCA 1194; *McGuirk v University of New South Wales* [2010] NSWSC 1471; *Leerdam v Noori* (2009) 255 ALR 553; *Cannon* (n 62). For signs of a possible change in this approach, see further below n 102 and accompanying text.

prosecuting authorities or the police are often personal, face-to-face and threatening to a plaintiff's liberty, dignity and reputation. They are therefore prone to generating a keen sense of grievance and the desire for personal vindication, even where an official's intervention is perfectly legal, responsible and well-motivated. State actions in the immigration context are also highly emotive and have become increasingly fraught, controversial and politicised in recent years.[76] The fracas came to a head recently in unsuccessful proceedings brought on behalf of some 1600 immigration detainees against Federal Ministers, alleging unlawful manipulation of their visa arrangements designed to facilitate their involuntary transfer to Nauru under Australia's offshore processing arrangements.[77] As Figure 4 (below) illustrates, immigration cases are a recent phenomenon, with 94% of all claims occurring since the year 2000 and litigation rates increasing sixfold in the period 2001–10 (and then again by another 50% in the last decade). Although absolute numbers of cases are still very small, this is about three times the average rate of increase across all categories in the same period.

Meaningful alternative remedies for plaintiffs in the immigration category are also particularly limited, which could provide an additional incentive for the turn to the tort. In contrast to European jurisdictions, human rights legislation coverage in Australia is patchy,[78] and weak in so far as it gives no private action for damages.[79] Administrative law remedies are often invoked, but suffer the same remedial disadvantage. We return to these observations in Part IV(B), where they feed into our more general thesis about drivers of the current misfeasance litigation boom.

As things stand, the statistics suggest that claims are increasing significantly across the board, the surge in litigation is greater in some nominate areas than in others, but, for the most part (and with the exception, noted above, of employment cases), claims tend to fail for similar reasons across all categories, with the tort's mental elements providing the most serious, repeated obstacle to success.

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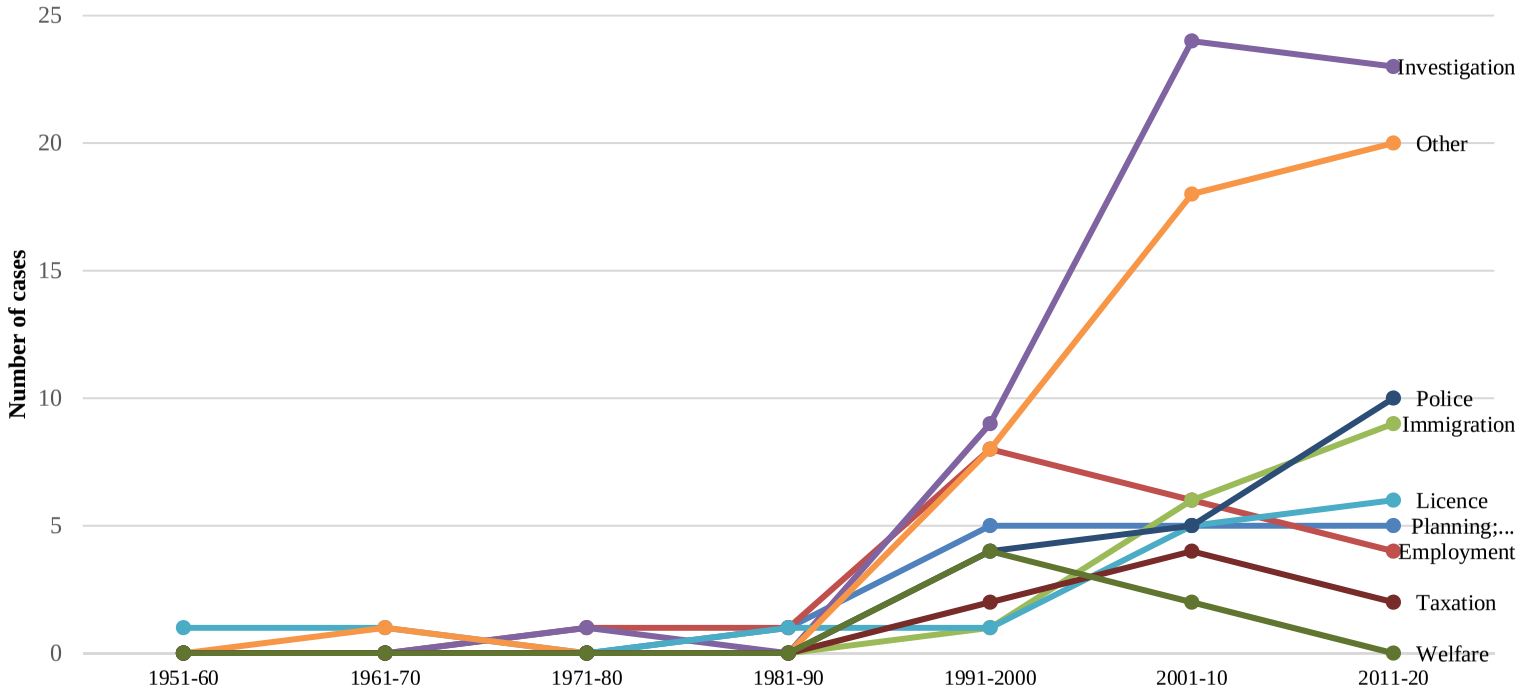
[76] The scandal of Australia's offshore detention and processing of asylum-seekers in secretive, primitive conditions is well known and has been through two iterations since 2000: see (on the first iteration) Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20(2) *International Journal of Refugee Law* 273; (on the second iteration) Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing, 2016).

[77] *Morrison (No 2)* (n 39).

[78] State legislation currently only exists in the ACT (*Human Rights Act 2004* (ACT)), Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic)) and Queensland (*Human Rights Act 2019* (Qld)) and at Federal Level (in a limited form that is non-binding on the executive) under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

[79] It is possible that there is a loophole in the *Human Rights Act 2004* (ACT) in cases of unlawful arrest, detention and conviction, but this seems unlikely: Boughey, Rock and Weeks (n 15) 214.

Figure 4: Litigation increases across different case types over time: 1951–2020



E *Concurrent Claims Pleaded*

The overwhelming majority of misfeasance claims (some 98%) are brought alongside other causes of action. Furthermore, in all but one case in which the plaintiffs succeeded in proving misfeasance,[80] they also succeeded in establishing another public or private law claim. Many of the concurrent claims pleaded have lower mental thresholds, but they are not free of their own complications. While it is true that one or more concurrent claims succeeded whenever a misfeasance claim did, it is certainly not the case that they necessarily (or even regularly) succeeded when the misfeasance claim failed. In fact, they were also overwhelmingly unsuccessful — failing in 73% of such cases. Of the 16 instances in which we were able to determine that a concurrent claim succeeded,[81] administrative law accounted for 11; and tort or contract claims sounding in damages accounted for only five.[82] This means that in only about 3% of cases in which the plaintiff's misfeasance claim failed, did he or she clearly obtain monetary compensation on some other legal ground in the same proceeding. Figure 5 below provides a summary of the most common concurrent claims, showing both the total number of cases in which they were pleaded, and that number as a percentage of the total number of misfeasance claims.

Administrative law claims for judicial review featured in 16% of cases and were the *only* other claim pleaded in about 6% of cases. This is symptomatic of the fact that in many harmful encounters between citizens and state power, the citizen's objective is not simply (or even perhaps primarily) to obtain compensation, but also to challenge the validity of an adverse decision in the hope that the decision-maker may then change it. All the other concurrent claims advanced potentially sounded in damages, although the *Beaudesert* principle did not succeed in any case we examined and was ruled out by the High Court in *Northern Territory v Mengel* in 1995.[83] It is now only ever pleaded by the unwary.[84]

Negligence was overwhelmingly the most common concurrent claim, featuring in 44% of cases. It offers the obvious attraction that an officer need not have adverted to the possibility of any overreach of public power to be liable, but a negligence claim is still subject to a variety of restrictions, both common law and statutory, that regularly blunt its efficacy as a compensation tool. This is especially so in cases in which maladministration has resulted in a pure economic loss, which was alleged in some 60% of cases.[85] Like the tort of misfeasance, negligence requires proof of damage, which means that in any case in which the misfeasance claim failed

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80 *Nyoni* (n 30) (note, however, that the plaintiff succeeded against another party for trespass to land).

81 In an additional 14 cases, leave to re-plead (or otherwise proceed with) one or more alternative claims was granted, but we were unable to determine whether those claims ever went on to trial.

82 *Okwume* (n 52) (false imprisonment); *Fernando* (n 40) (false imprisonment); *Zreika v New South Wales* [2011] NSWDC 67 ('*Zreika*') (false arrest and trespass to the person); *Brady v Official Trustee in Bankruptcy* [2002] FCA 363 (conversion); *Martin v Tasmania Development & Resources* (1999) 163 ALR 79 (breach of contract).

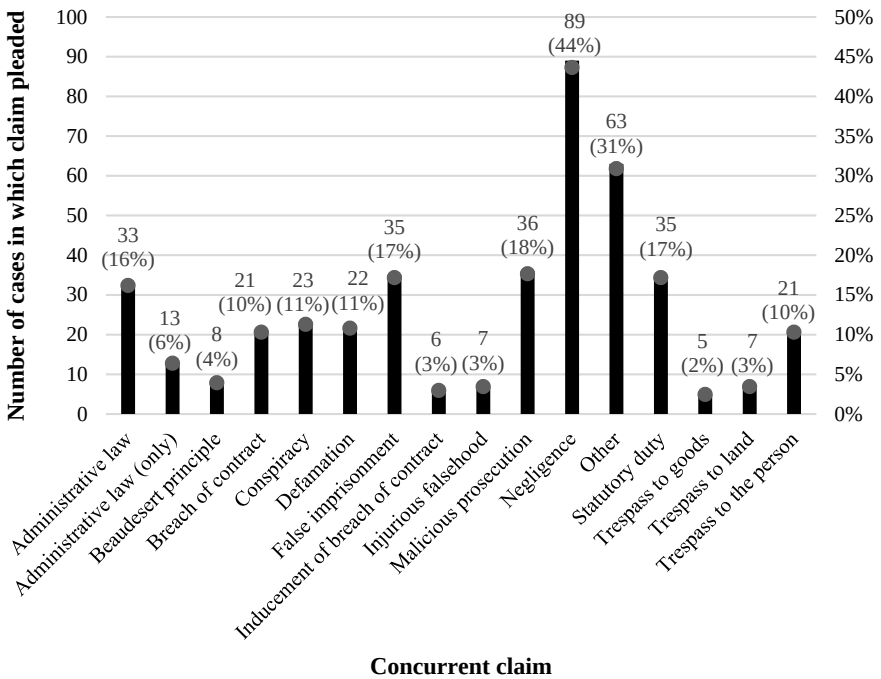
83 *Mengel* (n 27).

84 Plaintiffs still occasionally (fruitlessly) plead a cause of action that is close to the principle. See, eg, *Queensland Nickel Pty Ltd v Commonwealth* (2016) 339 ALR 83, 96 [49] (Dowsett J).

85 Pure economic loss accounted for 122 out of a total of 271 (45% of) heads of damage across all recorded cases.

for this reason, the negligence claim inevitably did so too. Duties of care are also restricted in investigations and policing contexts on public policy grounds where they are judged by a court to be inconsistent with the intended design of the statutory framework within which an officer is operating.[86] Problems also arise wherever legislation was intended to benefit the public as a whole, not a specific class of vulnerable individuals to which a plaintiff belongs.[87] All negligence claims are also now subject to the statutory restrictions referred to earlier in this article.[88]

Figure 5: Concurrent claims pleaded



The relatively large quotas of false imprisonment (17%), malicious prosecution (18%) and defamation claims (11%) are explained by the significant number of 'policing' and official 'investigations' cases. Claims for false imprisonment and trespass to the person are the ones that most regularly succeed in policing and investigations cases, neither action requiring proof of carelessness on the part of the official concerned, or actual damage. But the number of successes is still vanishingly small in absolute terms.[89] Claims for breach of statutory duty are

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86 *Sullivan* (n 74); *Halech v South Australia* (2006) 93 SASR 427.

87 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 564 [39] (Gleeson CJ) (ministerial power under s 189 of the *Fisheries Management Act 1994* (NSW) not a power to protect a specific class). Cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (power under *Stevedoring Industry Act 1956* (Cth) s 18 was a power to protect a specific class).

88 See above nn 8, 24 and accompanying text.

89 We found six cases in which false imprisonment was established: *Hamilton v New South Wales (No 13)* [2016] NSWSC 1311 ('*Hamilton (No 13)*'); *Okwume* (n 52); *Zreika* (n 82); *Goldie v*

quite common (17% of cases) and evenly distributed across the different types of case, but are even more difficult to get off the ground. Although one plaintiff in our study was granted leave to re-plead a claim of this type and take it to trial,[90] there was not a single instance within the study's parameters in which the action succeeded.

'Other' concurrent causes of action comprise a farrago. They include claims for the deliberate infliction of psychiatric harm under *Wilkinson v Downton*,[91] intimidation, breach of fiduciary duty, deceit, conversion, abuse of process, misleading and deceptive conduct, interference with contractual relations and unconscionable conduct. The overall pattern is one in which regular factual overlap occurs between the misfeasance tort and other public and private law causes of action. In some instances, this overlap could explain the discontinuance of a misfeasance claim, or a prudent initial decision never to try to plead it. In one case, a claim was struck out in part because it was thought simply to re-plead other causes offering the same remedial advantages, the court emphasising the importance of keeping the various torts 'distinct' in the name of 'coherence'.[92] The extent and regularity of overlap also illustrates (if any illustration is really needed) the far-reaching ambit of state regulatory power in the modern age, with official powers bearing upon virtually all aspects of modern life and potentially impinging on the entire range of interests (person, property, liberty, dignity, confidentiality, privacy, financial welfare and so on) that private law now protects.

IV Reflection: What Does it All Mean?

There are many fascinating features of the data from our study that command further qualitative investigation — for example, the apparent disparity in success rates as between different, nominate types of case. It is impossible to address them all in this article and here we confine ourselves to some further reflection on the two questions that prompted our closer examination of the field: why is it that success is generally so rare and (most puzzlingly) why is that litigation is continuing to spike in spite of that fact?

A *Why is Success so Rare?*

The main, formal reason why claims fail before courts is as plain as day: the demanding mental elements of the tort. Commentators have often pointed accusingly at these, but our study highlights the true size of the obstacle they present in practice. They have mutated throughout the tort's history and are not yet set in stone. In the

Commonwealth (2002) 117 FCR 566; *Tomkinson* (n 30) and two others in which it was left open to the plaintiff to re-plead the claim (*Duke* (n 62)) or take it to trial (*Sadiqi v Commonwealth (No 3)* [2010] FCA 596). Trespass to the person was found in five cases: *De Reus* (n 30); *Zreika* (n 82); *Cunningham* (n 30); *Hamilton (No 13)* (n 89) and *Gallo* (n 30). Trespass to land was found in one case: *Farrington* (n 30) (and by a separate defendant in *Nyoni* (n 30)).

90 See *Rogers v Legal Services Commission of South Australia* (1995) 64 SASR 572.

91 *Wilkinson v Downton* [1897] 2 QB 57.

92 *Hamilton (No 13)* (n 89) [226] (Campbell J). See further Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41) 434–5.

beginning, there is good reason to believe that liability was at least sometimes strict,[93] as it still is in some cases in civilian systems.[94] In the revived 20th century form of the tort, this possibility disappeared. An intention to injure the plaintiff ('targeted malice') was considered sufficient to render an official liable,[95] but the idea that harmful public illegality or excess of power could, of itself, trigger liability was never seriously contemplated in modern conditions. This is no doubt because of the serious repercussions this might have for the finances of the burgeoning administrative State and the perceived potential that such liability might have for driving officials out of public service, or causing them to engage in defensive administrative practice.

Some liberalisation occurred with the recognition that a second version of the tort exists according to which it is sufficient to prove that an official's acts were unlawful and that he or she was recklessly indifferent to (actually adverted to, but deliberately ignored) both: (i) the possibility that the acts might be illegal in the relevant sense; and (ii) the fact that they might cause the plaintiff harm.[96] There has been some uncertainty in Australia about the second of these elements, with courts occasionally suggesting that it is sufficient for harm to be foreseeable, not actually adverted to, at least when the official knew his or her acts to be illegal.[97] However, the New South Wales Court of Appeal has recently taken the view that Australian authority is sufficiently unclear on the point to justify it adopting the more 'principled' position that the official must advert to the possibility of *both* excess of power *and* harm.[98] The logic of this additional stricture is highly questionable in our view (it is stricter even than in cases of deceit and surely unnecessary to avert

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93 Evans (n 5) 642, 647–9. See also David Mullan, '*Roncarelli v Duplessis* and Damages for Abuse of Power: For What Did it Stand in 1959 and for What Does it Stand in 2009' (2010) 55(3) *McGill Law Journal* 587 (advocating a return to strict liability combined with appropriate immunities and limitations on liability).

94 On the French approach, see Duncan Fairgrieve and François Lichere, 'The Liability of Public Authorities in France', in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia, 2016) 155.

95 *Mengel* (n 27) 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), 357 (Brenan J), 370 (Deane J). The term 'targeted malice' stems from *Bourgoin v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, 776.

96 *Mengel* (n 27) 357 (Brennan J) (reckless indifference), 370–1 (Deane J) (reckless indifference or deliberate blindness). The level of risk that needs to be adverted to in each regard is still not clearly determined: Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41) 435–6.

97 The suggestion stems from an obiter dicta passage in the plurality judgment in *Mengel* (n 27) 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), where their Honours were prepared to proceed on the basis that it is sufficient to prove that harm was foreseeable where the defendant knew the act was beyond power. Decisions following this approach include: *Sanders v Snell* (1998) 196 CLR 329, 345 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Sanders*'); *Trevorrow* (n 30) 388 [263]–[264] (Doyle CJ, Duggan and White JJ); *Moder v Commonwealth* (2012) 261 FLR 396, 414 [67] (Margaret Wilson AJA); *Deputy Commissioner of Taxation v Frangieh (No 3)* (2017) 321 FLR 1, 20–1 [101] (Harrison AsJ).

98 *Obeid* (n 60) 293–7 [153]–[172] (Bathurst CJ), following the UK approach: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 (HL), 196 (Lord Steyn), 222–3 (Lord Hutton), 197 (Lord Hope).

defensive practice),[99] but the weight of recent authority seems to favour it.[100] The result is that, in the absence of any clear indication by the High Court, the tort's mental elements may now be interpreted more restrictively than some Australian courts were previously hinting.[101] Other expansions in the tort's scope — for example, the recent suggestion that it may capture abuses of an official's public position (the influence or factual opportunity that it brings), as well as the abuse of particular statutory or prerogative powers attached to that position[102] — do little to mitigate the difficulties created by this primary obstacle, which continues to dominate the landscape like Mount Doom.[103]

There are other feasible explanations for the absence of litigant success. The most optimistic (or perhaps naïve) of these, to which we previously alluded, is that excesses of public power are very rare. However, one only has to look to the volume of successful claims for judicial review of administrative action to have serious doubts about this line of thinking.[104] It is far more likely, in our view, that official illegalities are unwitting, than that they occur only very infrequently. Some cases that might succeed in misfeasance may not feature in the records because litigators, aware of the tort's stringencies, choose to pursue other remedies. Residual uncertainties about the tort's exact scope and rationale may also have prompted claims that had little or no chance of success.[105] There is certainly some evidence for this, we suggested above, in employment cases.

Relatedly, the fact that such a high proportion of litigants lack legal representation could be important. This feature of misfeasance claims has hitherto attracted little attention. On our reckoning, some 36% of plaintiffs represent themselves,[106] and the rate at which litigation has increased over the last 20 years is

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99 Cf *Obeid* (n 60) 293–4 [157] (where it is suggested that actual advertence to the risk of harm is required to prevent over-deterrence). Over-deterrence cannot be an issue where officers actually know they are acting beyond power — this is precisely the sort of behaviour than needs to be discouraged, whether consequent harm is actually foreseen or only reasonably foreseeable.

100 Ibid 293–53 [153]–[172]; *Brett Cattle* (n 23) 406 [280] (Rares J); *Grass* (n 44) 313 [172] (Bromwich J); *Lock v Australian Securities and Investments Commission* (2016) 248 FCR 547, 580–1 [141] (Gleeson J); *Fernando* (n 40) 25 [115] (Gray, Rares and Tracey JJ); *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority* [2009] FCA 1487, [164] (McKerracher J); *Poynder* (n 62) 62, 520–1 [120]–[121] (Osborn AJA); *Rush v Commissioner of Police* (2006) 150 FCR 165, 197–8 [121] (Finn J); *Holloway* (n 52) 135 [9] (Evans J); *Cornwall* (n 30) 324–5 [212] (Bleby, Besanko and Sulan JJ); *Perrett v Williams* [2003] NSWSC 381, [522] (Wood CJ); *Cannon* (n 62) 333 [40]; *Sanders v Snell (No 2)* (2003) 130 FCR 149, 174 [95] (Black CJ, French and von Doussa JJ).

101 See above n 97.

102 *Pro Teeth Whitening* (n 61) [31]–[36]; *Nyoni* (n 30) (special leave denied: Transcript of Proceedings, *Shire of Kellerberrin v Nyoni* [2018] HCATrans 27); *Ea* (n 30) 361 [50]–[51], 363 [56]–[57] (Payne JA); 366 [75]–[76] (White JA); 382 [145] (Simpson AJA).

103 JRR Tolkien, *The Lord of the Rings* (George Allen & Unwin, 1983) 262.

104 Reliable empirical data on the frequency of excesses of power is hard to find, but one study of 714 Federal Court cases in the period 1984–94 found judicial review to have been granted in more than 40% of the study sample: Robin Creyke and John McMillan, 'Judicial Review Outcomes — An Empirical Study' (2004) 11(2) *Australian Journal of Administrative Law* 82, 82.

105 There is a fair amount of 'unfinished business' in describing the tort's precise parameters: Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41).

106 Public information on rates of self-representation in Australian courts is elusive, but the Australian Productivity Commission data suggests that rates vary dramatically as between different courts, tribunals and types of matter: Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, September 2014) Appendix F. The proportion of self-represented litigants in

higher among unrepresented than represented litigants. In a good number of cases, claims have been struck out as being vexatious, or (in extreme cases) the individuals concerned have been barred from initiating further proceedings without the leave of the court.[107] The significant smattering of vexatious complainants attests perhaps to the emotive nature of interactions between citizens and bureaucratic state agencies. It is nonetheless difficult to be sure of the precise impact of legal representation and broader litigant profile on success rates. On the one hand, it seems entirely logical that expert representation would be material to a claim's success and our statistics do show clearly higher success rates for represented than unrepresented litigants (about 5.5% as opposed to a mere 1.4%). But it is also possible that one of the reasons unsuccessful litigants so often lack legal representation is that their claims are devoid of substantive merit and they would therefore have failed even with the best legal advice. It is an exceptional lawyer indeed who can turn a pig's ear into a silk purse and it may be that legal representation features self-selectively in more viable cases. While our statistics suggest that litigants in person are pretty common in unsuccessful cases and very rare in successful ones, we cannot therefore be certain of the extent to which lack of representation in itself accounts for the high failure rate and no correlation can be formally proven by our statistics. It is also unclear to us whether the percentage of litigants that are deemed vexatious is significantly higher in misfeasance cases than any other category of civil claim, although in Canada specific concerns about vexatious litigation in misfeasance cases have recently resulted in the enactment of new requirements that litigants obtain court permission before their actions are allowed to proceed, which attests to this possibility.[108]

Australian federal courts fell between 2008 and 2011 to only 6% (at 997), and in civil matters in the Victoria Court of Appeal, the rate of self-representation between 2003 and 2011 rose from about 10% to a little over 20% (at 1003). In family law proceedings (especially divorce), self-representation is very common, greatly exceeding the rate in misfeasance litigation.

107 See, eg, *Chandrasekaran v Royal Australian and New Zealand College of Psychiatrists* [2019] FCA 1687; *Mathews v Cooper* [2017] QCA 322; *Attorney-General (SA) v Kowalski* [2014] SASC 1; *Chan v Sellwood* [2009] NSWSC 1335 (and see *Attorney General (NSW) v Chan* [2011] NSWSC 1315 — declaration as vexatious litigant); *Croker* (n 54) (and see *Attorney General (NSW) v Croker* [2010] NSWSC 942, *Soden v Croker (No 2)* (2016) 334 ALR 540 — declarations as vexatious litigant); *Henderson* (n 38); *Scott v Pedler* (2004) 80 ALD 283; *Mentyn* (n 42); *Richards v Victoria* [2003] VSC 368 (plaintiff diagnosed in 2002 with delusional disorder — unclear whether proceedings vexatious); *Blair v Howat* [2001] FCA 156.

108 A 2008 inquiry into vexatious litigants conducted in Victoria was unable to quantify their number, citing lack of empirical research: Law Reform Committee of Victoria, *Inquiry into Vexatious Litigants* (Parliamentary Paper No 162, December 2008) 29. In terms of the numbers of declared vexatious litigants in Australian jurisdictions who are barred from bringing claims without leave, however, the numbers, while small, are reported as increasing, with a noticeable increase in declarations since the year 2000: at 31–3. One study suggests that 45 such declarations were made Australia-wide between 1970 and 2008: Grant Lester and Simon Smith, 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 17 cited in Nikolas Kirby, 'When Rights Cause Injustice: A Critique of the *Vexatious Proceedings Act 2008* (NSW)' (2009) 31(1) *Sydney Law Review* 163, 163. For the new Canadian restrictions on misfeasance actions designed to combat vexatious litigation, see the *Crown Liability and Proceedings Act 2019*, SO 2019, c 7, sch 17, s 17. Our thanks to Jason Neyers for drawing our attention to this development.

B *Why is Private Litigation Increasing? A Reinvigoration of Private Enforcement?*

This brings us to the key question as to why, given very poor success rates, the tide of misfeasance litigation continues to swell. The rise we have identified (see Figure 1, above) certainly looks dramatic, even accounting for its low initial base. The likelihood is that there is no single explanation and it may be that slightly different factors — beyond the grasp of the limited statistical tools used in our study — are driving numbers in the different, nominate classes of case. We have mentioned some of the particular, socio-political factors that may explain the spike in immigration cases, for example, in Part III(D) above. The particularly sharp recent increase in cases being brought against the police might also be accounted for by broader contextual factors to which we cannot speak without drilling down in a much more detailed way into the empirical experience of litigants and policing policy and culture.

Beyond the specific categories however, what general considerations might explain the overall increase in litigation rates? One interesting possibility mooted by Vines is that the shift is an intelligent one, made by enterprising litigators, to avoid the strictures introduced during the civil liability reforms of 2002–04 upon other civil causes of action for governmental maladministration, in particular the law of negligence. She points both to the specific statutory restrictions on civil claims against public bodies; and (less definitively) to the more general limitations on recoverable damages in personal injury cases, which include prohibitions in some jurisdictions on exemplary damages awards.[109]

Our findings do not strongly support the suggestion that restrictions on personal injury claims have made much difference to the litigation surge. It is true that almost all cases featuring claims for physical or mental injury have occurred since 2002 and that such claims have risen dramatically in this period.[110] This is striking. A slightly higher than average proportion of these cases involve legally represented plaintiffs (70% as opposed to about 63%), which might indeed suggest that there is some additional legal intelligence now involved in the direction of claims of this type. But the overall volume of post-2002 cases alleging personal injury of some sort still only accounts for about 17% of the total number of cases in this more recent period (and only about 7% of all cases in Australia to date).[111] Personal injury claims are also unaffected by the statutory reforms in several jurisdictions when the injury was intended.[112] Moreover — and this is perhaps the

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[109] Vines (n 3) 221–2. For restrictions on exemplary awards, see *Civil Liability Act 2002* (NSW) s 21; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19; *Civil Liability Act 2003* (Qld) s 52(1).

[110] We found no cases of physical injury prior to 2002 and 15 since. We also found one clear case of alleged mental injury prior to that date (*Toomer v Commonwealth Bank of Australia* (Federal Court of Australia, Goldberg J, 26 February 1998)) and 14 cases since.

[111] Cases involving economic loss are overwhelmingly still the dominant group (some 60% of all cases). Cases involving deprivation of liberty (23%), and reputational harm (18%) are the next most common. Other types of loss feature in between 5 and 7% of cases.

[112] See, eg, *Civil Liability Act 2002* (NSW) ss 11A(1), 3B(1)(a); *Wrongs Act 1958* (Vic) s 28C(2)(a); *Civil Liability Act 2002* (WA) s 3A(1) item 1; *Civil Liability Act 2002* (Tas) s 3B(1). The New South Wales, Western Australia and Tasmania legislation also excludes special public liability restrictions in such cases.

clinching point — overall litigation rates seem, if anything, to have increased slightly faster between the end of the 1980s and the year 2000 than in the subsequent decade, as illustrated graphically in Figure 1, above. This does not mean that the reforms of 2002–03 restricting other causes of action and remedies have had no effect at all. They may have steered some legally-represented litigants toward misfeasance in some instances in some jurisdictions, but it seems unlikely that they are the main, or even a very significant driving force in respect of the phenomenon as a whole.

Another possibility raised by Chamberlain in the context of similar phenomena in Canada and the United Kingdom ('UK'), is that large volumes of litigation are simply to be expected in the early years of any new tort, while its parameters are tested.[113] In Australia, the High Court has addressed the tort's elements only twice: in *Mengel* in 1995,[114] and in *Sanders* in 1998.[115] Its precise contours are yet to be finalised.[116] This might indeed cause some confusion and encourage the addition of misfeasance to other claims in a pioneering spirit, but it seems unlikely that uncertainties about the wrong's exact parameters would themselves be the main cause of ever-larger numbers of claims — if they were, one would expect some stabilisation, or reduction of litigation as the weight of legal authority increased and some of the uncertainties were settled. There is little evidence of this in our study. The increased awareness among litigators of the tort's possibilities stemming from the gradual accretion of case law in the mid-1990s may have played some part in the acceleration, but that also seems unlikely to tell the full story, or to explain why so many cases are pursued in the face of what must now be known by most lawyers to be very poor odds. It is possible that the rise in claims is part of a larger narrative about 'compensation culture' and the targeting of the 'deep pockets' of the State by civil claimants, but the empirical evidence for such a culture in Australia is very thin[117] and the recent statutory reforms to which we have referred seem likely, in any event, to have killed it off as far as public authority liability is concerned. It might also be that readiness to litigate has been increased by greater rights-consciousness among citizens flowing from the deeper penetration into Australian society of civil and human rights discourse. The first human rights provisions (to be labelled such, anyway) were introduced in Australia in 2004.[118] But if this is another current affecting the direction of litigator attitudes, our study

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113 Chamberlain, *Misfeasance in a Public Office* (n 9) 9.

114 *Mengel* (n 27).

115 *Sanders* (n 97).

116 Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41) 428.

117 For an example of a judicial view that such a culture had developed in Australia, see JJ Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76(7) *Australian Law Journal* 432. In fact, this picture appears to have been subject to much media and insurance industry distortion and not to be supported by the evidence: Kylie Burns, 'Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective' (2007) 15(2) *Torts Law Journal* 195. Similar claims made by conservatives in the UK were also debunked: House of Commons Constitutional Affairs Committee, *Compensation Culture: Third Report of Session 2005–2006* (House of Commons Paper No 754–I, Session 2005–06) 13 [31]. It has astutely been pointed out that the term 'compensation culture' is too often used for rhetorical purposes without clearly defining what is meant: James Goudkamp, 'The Young Report: An Australian Perspective on the Latest Response to Britain's 'Compensation Culture'' (2012) 28 *Journal of Professional Negligence* 4, 16–17.

118 *Human Rights Act 2004* (ACT). Anti-discrimination statutes have of course been around for much longer.

found no explicit evidence of it, other than a few cases in which allusion to the human rights context has been made,[119] or where an interference with such rights has unsuccessfully been pleaded as a cause of action.[120]

We suggest that all of these explanations are likely to be partial at best and none really gets to the root of the issue. Our suggestion is that there are greater forces at work and that the rise in private litigation is most likely to be a product of the failure of public systems in recent decades to deal properly with the growing, modern problem of public maladministration. Unlike Vines' thesis (which leaves unexplained the high rates of increase before 2002), and Chamberlain's thesis (which ought to have seen a plateau in case numbers over time), this view is consistent with (albeit certainly not proven by), the continued, documented escalation of litigation since the late 1980s. It is a view that has also been voiced by some judges.[121] Conclusive proof of the thesis would require additional, qualitative work, as well as an exhaustive empirical review of all alternative mechanisms that exist for the resolution of private citizens' disputes with the State. We nevertheless present it as a credible possibility, perhaps as a catalyst for further work of this type.

In our view, then, the rise in litigious activity is likely to be the product of two, catalytic factors. On the one hand, statutory regulatory powers have continued to increase markedly since the 20th century, while the amount of public funding available to those who are charged with the tricky responsibility of executing discretionary administrative functions has remained stable, or shrunk in increasingly tight public finance conditions.[122] This is likely, we speculate, to have resulted in more error and greater harm being caused to the private interests of those who are impacted by public powers. On the other hand, despite numerous calls for more generous public or private solutions for those whose interests are detrimentally affected by public maladministration,[123] little has been done to provide for victims. Australian governments have, we observed above, reined in the State's civil liabilities and courts have (unsurprisingly, perhaps) remained reluctant to take the liberalising steps that governments will not.[124] Suggestions for viable public law solutions, such as providing compensation for the violation of human rights norms,[125] as a discretionary remedy in administrative law,[126] or through the creation

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119 *Morrison (No 2)* (n 39); *Scott v Secretary, Department of Social Security* (1999) 57 ALD 627; *Scott v Secretary, Department of Social Security* (2000) 65 ALD 79.

120 *Flowers* (n 63); *Barlow v Law Society of the ACT* [2015] ACTMC 8.

121 See above n 12.

122 On the rise of regulation, see below n 128. As to public funding, the Australian Bureau of Statistics reports relatively stable public sector surpluses until 2008/9, but substantial deficits thereafter until 2018–19; and a further plummeting since the onset of the recent coronavirus COVID-19 outbreak. The figures do not show how the funding has been distributed, of course, as between different departments. See Australian Bureau of Statistics, *Government Finance Statistics* (Catalogue Nos 5519.0.55.001 17 March 2004 to 5519.0.55.001 2 March 2021).

123 Calls started early in the UK: see, eg, JUSTICE-All Souls Committee, *Administrative Justice: Some Necessary Reforms* (Clarendon Press, 1988).

124 See Rock and Weeks (n 11). As the authors suggest at 1185, this means that further progress will almost certainly have to be legislative.

125 Jason Varuhas, *Damages and Human Rights* (Hart Publishing, 2016).

126 This has been a popular suggestion. See, eg, Peter Cane, 'Damages in Public Law (1999) 9(3) *Otago Law Review* 489, 505. It was at one time favoured by Carol Harlow, *Compensation and Government Torts* (Sweet and Maxwell, 1982) esp Part 3. See also Michael Fordham, 'Reparation for

of general (or sector-specific) statutory schemes that redistribute the risk of public failing to the public, rather than leaving it to fall on particular individuals,[127] have all fallen on fallow ground.

The result is that we have, as a society, unwittingly created all the conditions of a perfect storm — rising pressures of underfunded public agencies and increased instances of regulatory intrusion (and failure) have met uncompromising, vested governmental opposition to the idea that the State should be exposed to greater financial responsibility for the consequences of failure. The State has been ambivalent about witnessing discretionary statutory powers grow in the hands of its officers,[128] but has been unable or unwilling, for prudential reasons, to bear the cost of the consequences of administrative illegality for individual, private interests. Such paucity of funding as exists is best preserved, governments tend to think, for frontline public services, rather than for compensating the victims of excesses of public power, unless the latter are so visible as to command the immediate sympathy of voters. As public finances plummet further in the wake of the economic turmoil caused by the current COVID-19 pandemic, even less policy space is likely to be devoted to remedying the damage caused by administrative failing, particularly where the damage is purely economic in nature. Anyone expecting a change in government attitudes in the immediate future should therefore probably prepare themselves for a bitter disappointment.

In these circumstances, private litigation could be all that is left to the increasingly frustrated citizen. All other avenues of recourse may have been explored, but have failed. Although there are no comprehensive empirical studies that map this phenomenon, we came across some clear examples. In *Cunningham v Traynor* for instance, the plaintiffs were ultimately awarded large sums of damages for their abuse and malicious prosecution by the police, but their legal action appears to have been a measure of last resort.[129] Media reports suggest that they had sought several times to resolve matters informally; sought an apology to no avail; received no vindication through the police's own internal investigations process; and had

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Maladministration: Public Law's Final Frontier' (2003) 8(2) *Judicial Review* 104; Michael Fordham, 'Monetary Awards in Judicial Review' [2009] (January) *Public Law* 1; Law Commission Public Law Team, 'Monetary Remedies in Public Law' (Discussion Paper, 11 October 2004).

127 Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) (favouring statutory compensation and ex gratia payment schemes for 'abnormal loss' with 'botheration payments' in suitable instances). In Australia, there are now a number of poorly-advertised discretionary ex gratia compensation arrangements in place, including the Commonwealth Scheme for Compensation for Detriment Caused by Defective Administration: Boughey, Rock and Weeks (n 15) 298–302. Such schemes are a last resort and provide no right to compensation.

128 On the rise, causes and costs of regulation in Australia (with a focus on economic regulation), see Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (Report to the Prime Minister and the Treasurer, January 2006); Chris Berg, *The Growth of Australia's Regulatory State* (Institute of Public Affairs, 2008). Although conservative governments have sought to reduce bureaucracy, it gathers a momentum of its own. On the growth of public powers, see also Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, September 2012) 29–31 [2.18]–[2.25].

129 *Cunningham* (n 30).

been unable to persuade the Crime and Misconduct Commission to reopen the investigation and clear their names.[130]

Violations of public rights — the rights that all citizens have that public officers observe the limits of their powers — are hence occurring without full public recognition or consequence and without their effects being visibly addressed. Private litigation in such circumstances becomes a mechanism via which control over the enforcement of important public duties and standards can be taken back into the hands of affected citizens. Indeed, from this standpoint, the recent rise in misfeasance litigation is not something that should be understood in isolation, but ought rather to be connected to rises in rates of private litigation in public law more generally. For example, although we do not claim that there is any causal connection between the two phenomena, the acceleration of misfeasance claims seems to us to parallel the dramatic recent growth in the last 5–10 years of private prosecution in criminal cases in the UK.[131] There, the pressures on state funding of the public prosecution system and the consequent narrowing of the criteria according to which public prosecutors are prepared to take a claim forward are reported to have resulted in an explosion of individuals and private institutions embarking on their own prosecutions.[132] This is permitted and, indeed, sometimes supported[133] by the State in the public interest and is a classic example of recourse to private initiative in public matters by way of reaction to the failure of public mechanisms. Indeed, in those jurisdictions in which private prosecution remains a possibility, private prosecution is rationalised in precisely these terms, as a constitutional safeguard against state neglect.[134]

Not everyone supports the private enforcement of public law norms. It breaks away from the Blackstonian orthodoxy that public wrongs are wrongs to the community and should therefore be enforced publicly by the State, not left to the

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130 Rebecca Turner, 'Couple Tasered by Police in Freemantle Fight to Keep Damages', *ABC* (online, 15 May 2018) <https://www.abc.net.au/news/2018–05-15/couple-tasered-by-police-in-fremantle-fight-to-keep-damages/9762182>; David Weber, 'Corruption Watchdog Admonished over Case of Wrongfully Tasered Couple', *ABC* (online, 12 October 2017) <https://www.abc.net.au/news/2017-10-12/ccc-urged-to-reinvestigate-case-of-tasered-perth-couple/9044348>.

131 In 2014 in *R (Virgin Media Ltd) v Zinga*, Lord Thomas CJ signalled 'an increase in private prosecutions at a time of retrenchment of state activity': [2014] 1 WLR 2228, 2232 [10] ('*Virgin Media*'); see also at 2244 [55]. Concerns over the recent growth of Post Office prosecutions in particular spurred a 2020 report: House of Commons Justice Committee, *Private Prosecutions: Safeguards* (House of Commons Paper No HC 497, Session 2019–21). The Report refers at 13 [25] to evidence presented by the Private Prosecutors' Association of the increased incidence of private prosecutions as a means of filling the public gap. Another report describes the increase since 2015 as 'exponential' and attributes it to the dramatic cuts in the budget of 2010: AnotherDay, *The Rise of Private Prosecutions* (February 2020) foreword, 2 <https://www.another-day.com/resources/new-guide-the-rise-of-private-prosecution>.

132 The narrowing of the criteria was the focus of the proceeding in *R (Gujra) v Crown Prosecution Service* and there survived legal challenge: [2013] 1 AC 484 ('*Gujra*'). See also the sources cited at n 131; C Lewis, G Brooks, M Button, D Shepherd and A Wakefield, 'Evaluating the Case for Greater use of Private Prosecutions in England and Wales for Fraud Offences' (2014) 42(1) *International Journal of Law, Crime and Justice* 3.

133 *Virgin Media* (n 131) (support permissible provided products of the prosecution inure to public, not private benefit).

134 See, eg, *Jones v Whalley* [2007] 1 AC 63, 79 [43] (Lord Mance); *Gujra* (n 132) 496 [28] (Lord Wilson JSC); 504 [68] (Lord Neuberger PSC); 517–18 [115] (Lord Mance JSC).

vagaries of individual interest.[135] But the Blackstonian paradigm has never been a fully accurate depiction of our law enforcement processes either historically, or in the modern day. There are a good number of instances in which public law is once more (or still) enforceable at the suit of affected private citizens.[136] The tort of public nuisance provides one, clear example. Competition law provides another, where public norms designed to create fair public markets are enforceable both at the instance of the State and individual litigants.[137]

In the United States ('US'), private litigation has spearheaded a number of important advances in civil rights protections since the 1960s and, it is argued by at least one commentator, now constitutes an important constitutional mechanism, substituting for deficient public agency enforcement of public laws in an environment that is so deeply riven in its attitudes towards governmental regulation as to otherwise face political stalemate.[138] The phenomenon is on the rise in that jurisdiction. It has hence been reported that a staggering 97% of all enforcement actions initiated in respect of the breach of federal regulatory provisions in the US between 2000 and 2010 were filed by private parties, not by government agencies.[139] Until very recently, perhaps the best known and most controversial example of reinvigorated private enforcement was the US federal law that openly incentivises individuals to detect, report and prosecute frauds against the State in exchange for a share of the litigation proceeds — a modern equivalent of the ancient action *qui tam*.[140] But the prominence of this example has now been overtaken by the introduction of highly controversial legislation in Texas that effectively delegates the enforcement of laws restricting abortion rights to private citizens, paying the latter a bounty for every successful prosecution.[141]

In Australia, attitudes toward the private enforcement of public law norms remain much more guarded. This is not without good reason, because history is full of examples of private abuses of prosecutorial power and there is a good, basic, logical and deontic case for thinking that actions that protect the public interest ought in principle to be brought by representatives of that interest. Mindful of the risks, a recent UK Justice Committee Report has highlighted the need for additional safeguards to deal with the recent rush of private prosecutions.[142] Nonetheless, the

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135 William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book IV: of Public Wrongs* (Oxford University Press, 2016) 2–3 [4].

136 For a critical survey, see Kit Barker, 'Modelling Public and Private Enforcement: The Rationality of Hybridity' (2018) 37(1) *University of Queensland Law Journal* 9.

137 Ibid 12–13. Private enforcement has historically been dominant in the US and public enforcement in Europe. See further Donald Baker, 'Private and Public Enforcement: Complements, Substitutes and Conflicts' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing, 2012) 238.

138 Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the US* (Princeton University Press, 2010) esp chs 4–6.

139 Ibid 11.

140 *False Claims Act*, 31 USC §§ 3729–3733 (2009) esp § 3730(d).

141 The legislation, known as the 'Texas Heartbeat Law' or 'SB 8', came into effect on 1 September 2021 and controversially survived a recent interlocutory application before the US Supreme Court to restrain its application on the ground of unconstitutionality: *Whole Woman's Health v Jackson*, 594 US (2021).

142 House of Commons Justice Committee, *Private Prosecutions: Safeguards* (House of Commons Paper No HC 497, Session 2019–21).

basic point is that we are mistaken if we assume that public actions alone can, or should necessarily, cope with public wrongs in all instances. Cases of misfeasance may be one instance in which there is a credible danger that public enforcers (typically, the police) may be captured and culturally disinclined to pursue state officials (including their colleagues) for overstepping the boundaries of their public powers. The absence of proper public machinery providing compensation for the harmful consequences of excesses of state power also provides a good reason for allowing citizens to resort to their own enforcement initiative, when their private interests have been detrimentally impacted. Occasional abuses of this private enforcement system are, on this logic, an acceptable risk and can be reined in by proper court supervision and by weeding out querulous complainants though appropriate controls on vexatious litigation.

While we are not necessarily advocating the view that private enforcement is a better solution to the problems of misfeasance than proper public enforcement and redress, we must recognise that there may be special reasons for allowing it where public systems fail to deliver. It also seems likely that private litigation in respect of alleged misfeasance on the part of public officers will continue to rise, even in the face of such poor prospects, as long as current legal conditions prevail. The increase in such actions is a symptom of rising pressure within the legal system as whole, when other possible outlets via which public standards can be enforced and victims of maladministration can be compensated have effectively been stopped up or ignored for decades. Misfeasance litigation has, on this view, become a pressure release valve in the system and highlights the potential constitutional importance of private rights of action — even those offering little chance of success — when public systems designed to address the problem are perceptibly falling short of the mark.

V Conclusions

Public maladministration is an ongoing problem and, if the recent revival of the old criminal action for misconduct in public office in some Australian jurisdictions means anything, it may well be on the rise.[143] This study has set out some of the raw statistics surrounding modern misfeasance litigation in tort law in Australia, while calling for further, qualitative research to be done to help us understand them more fully. We cannot prove the exact cause or mix of causes underpinning the recent increase in litigation rates, but it seems unlikely to be explicable by any single factor. It is more likely the product of a variety of complex considerations, both legal and socio-political.

When seeking an understanding of the current uplift and determining what it may mean, it is also important, we have suggested, not to view the statistics in isolation. They form part of a broader historical picture in which there has been an irregular ebb and flow in the use of private enforcers in public law, for the

[143] The revival is reported not just in those Australian jurisdictions that retain the common law crime, but also in the UK and Hong Kong: David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38(6) *Criminal Law Journal* 337. The UK Law Commission reported that claims in that jurisdiction rose from 2 in 2005 to 135 in 2014: UK Law Commission 'Misconduct in Public Officer: Issues Paper 1, The Current Law' (Issues Paper, 20 January 2016) 5 [1.15].

advancement and protection of both public and private interests. The flow has generally been from private enforcement to public enforcement as the sophistication of public machinery has increased, but the pattern is by no means linear, or in just one direction. The recent increases in misfeasance cases must be understood against the backdrop of a more extensive set of developments in which private enforcement techniques are once more being put into operation in public law in an attempt to meet some of the inadequacies of public systems of accountability and redress. In this regard, the fact that private litigants are increasingly prepared to pursue state officers for excesses of public power against all the odds should serve as a salutary wake-up call to policymakers and legislators. Until more is done to reduce the incidence of public maladministration and to address and redress the personal fallout it causes, private tort actions for misfeasance seem likely to continue and, in all possibility, to increase further in number.

It may be, of course, that governments are perfectly awake, just not listening. They may well take the view that Australian taxpayers cannot afford to pay for the private consequences of public illegalities and that, in current economic circumstances, the very idea should be buried even before it sees the light of day. Our view is that ultimately society cannot afford *not* to address the fallout of excesses of public power *if* it remains committed to high levels of regulatory intrusion, however benevolent the administrative intention. Revised attention to the provision of meaningful statutory redress in some of the key areas of pressure that we have identified, such as policing, botched licensing decisions and perhaps even official investigations, would certainly help to ease some of the pressure and reduce the current litigation problem.[144] At some stage, however, there will need to be a more general reckoning that better reconciles the current imbalance of public and private interests across the various domains of public administration. Until such time, we will probably continue to see litigants expressing their hopes and frustrations by throwing themselves headlong against the battlements, mostly to no avail, but with the occasional, important success.

[144] For early suggestions favouring this more specific approach in the field of licensing and policing, see PP Craig, 'Compensation in Public Law' (1980) 96 (July) *Law Quarterly Review* 413, 451–5.