INHIBITING ECONOMIC COERCION BY GROUPS: AN EXAMINATION OF THE ECONOMIC TORTS AND ANTI-SECONDARY BOYCOTT LAWS IN AUSTRALIA

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

David John Goodwin

LLB (Qld), Grad Dip Comm Law (Monash), M Bus (Logistics) (RMIT)

Graduate School of Business and Law
College of Business
RMIT University

September 2017
CANDIDATE’S STATEMENT

I certify that except where due acknowledgement has been made, the work is that of the author alone; the work has not been submitted previously, in whole or in part, to qualify for any other academic award; the content of the thesis is the result of work which has been carried out since the official commencement date of the approved research program; any editorial work, paid or unpaid, carried out by a third party is acknowledged; and, ethics procedures and guidelines have been followed. I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

(Signed)

David John Goodwin

15 September 2017
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ACKNOWLEDGEMENTS

I would like to thank RMIT University for the high levels of assistance and encouragement provided to me by members of the Graduate School of Business and Law.

I am extremely grateful for the supervision I have received from Professor John Glover, who generously guided me in the formulation of my thesis, reviewed my drafts rigorously and regularly gave insightful suggestions as to how it might be evolved and strengthened. Professor Anthony Forsyth, as my Associate Supervisor, also gave much-appreciated guidance and offered the benefit of his experience. Dr Paul Gibson has also been a great support, and stepped in as an assisting supervisor during periods when my principal supervisors were on research leave.

I am also grateful to Associate Professor Roderick Bagshaw of Oxford University and Magdalen College for generously reading a draft of Chapters Five and Six and offering constructive suggestions as to how those chapters might be developed.

Chapter Eight of this thesis was published as ‘Lawyers, Gunns and Money: An Australian perspective on environmental campaigns and the economic torts’ (2016) 23 Torts Law Journal 230. Chapter Nine was published as ‘Exempting environmental protection boycotts from competition laws: Should purpose or public benefit be the test?’ (2015) 23 AJCCL 260. My thanks go to the Editors of those journals and the peer reviewers they assigned for a range of helpful edits.

I would like to thank Poppy Jacobs for reading this thesis and acting as its overarching Editor, and for making a range of suggestions as to formatting and referencing.

Several members of the Graduate School of Business and Law have provided consistent support. I would like to thank Professor Mark Farrell, Head of the Graduate School of Law throughout the period I worked on this thesis, Professor Mark Leenders and Associate Professor Kathy Douglas for their unflinching guidance and friendship. I also want to acknowledge Professor Don Feaver, who encouraged me at the outset of my PhD journey.

Finally, I thank my wife Carolyn Goodwin, and my children Tom and Hamish, for their incredible tolerance throughout this venture and my parents Kay and Ken Goodwin for setting me on my path. My greatest fortune in life has been to belong to a loving family which values academic endeavours and hard work.

David Goodwin
Melbourne
September 2017
THESIS ABSTRACT

This thesis explores legal boundaries restricting economic coercion, by persons in groups and by groups acting in concert. When groups take collective action targeted at another party there is potential for considerable damage to be inflicted. What forms of coercion should the law allow, what justifications are advanced for conduct and by what means should the ambit of prohibitions be confined? The issues are studied within the context of the private political contest between activist groups such as environmental NGOs, and for-profit corporations. The boundaries of permissible conduct have historically been defined by the rules of common law economic torts - causing loss by unlawful means, conspiracy, intimidation and inducing breach of contract – and in more recent times by statutory interventions by Parliaments, including limitations on boycott conduct under competition laws. Through doctrinal research and analysis of judicial opinions, the current settings of the laws in these areas, as they apply in Australia, are examined. The study takes account of normative and policy considerations, including the advances that have occurred in the practice and effectiveness of modern-day activism. It addresses the challenge of setting defensible legal compromises in situations where there are conflicts between competing rights and priorities. The study outlines modifications and adaptations of existing rules that may be considered by lawmakers in order to improve the coherence of long-established legal doctrines, while enhancing societal welfare.
CHAPTER ONE

THE SUBJECT AND OBJECTIVES OF THIS THESIS

I. INTRODUCTION

This thesis examines the legal rules which inhibit economic coercion by persons in groups and by groups acting in concert, principally the economic torts. It deals with important remedies available to parties who are targeted by collective economic coercion which causes them loss or damage.

Economic coercion is perceived to have pernicious economic effects. Arguments for prohibitions on collective economic coercion arise from both economic and rights theories. The case for legal interventions to halt coercion and resulting economic dislocations derives from a utilitarian perspective, which seeks contractual freedom whenever loss of utility to third parties exceeds gains to parties to a transaction, but justifies antitrust laws in a carved out set of cases in which systematic losses to society at large give cause for some restraint on freedom of contract. The libertarian rationale assumes that the state has a legitimate role to play in preserving property rights, upholds the private autonomy of individuals and hesitates to give effect to “(physical) duress, deceit or misrepresentation.”

The thesis is concerned with the following central Research Question: when groups, or individual members of groups, acting in concert, band together to inflict injury upon third parties by economic coercion, what are – and what should be – the boundaries of permissible conduct?

There is a particular focus on the family of intentional economic torts that restrict interference with a plaintiff’s economic interests – the torts of inducing breach of contract, conspiracy (in both its lawful means and unlawful means forms), intimidation and causing loss by unlawful means. These torts are in focus in Chapters Two to Eight. The thesis also (in Chapter Nine) addresses legislative interventions developed as extensions of the applicable common law principles, in the form of competition laws which seek to regulate secondary boycott conduct.

The economic torts are a distinctive set of causes of action, developed by the common law, which are designed to protect individual and corporate rights. They exist to “protect both businesses and individuals against abuses of economic power (with combination being regarded as at least potentially involving an abuse) and the use of illicit means” and “to protect market actors from certain forms of interference which the law regards as

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2 Measured by failure to produce goods to the point where social marginal revenue equals social marginal cost.


Chapter One: The Subject and Objectives of this Thesis

illegitimate.” Not all intentionally caused economic loss is actionable but “several kinds” are.

As Elias and Ewing have highlighted, the significant case law on the permissible boundaries of collective conduct has been concerned with fundamental legal questions: “is it unlawful deliberately to harm the interests of another without justification? To put it another way, is there liability for abuse of economic power even where no independently unlawful act is committed?” To these may be added: to what extent, and under what conditions, should it be legitimate for parties acting in concert to cause economic harm to a ‘target’?

Some examples drawn from the case law, and spanning the past eighty years, illustrate the wide range of scenarios in which the torts can arise and to determine the principles which should shape those boundaries. A decision reported in 1936, *De Jetley Marks v Greenwood*, involved an alleged unlawful means conspiracy to cause a breach of contract, where company directors were said to have conspired together “to secure the dismissal by the company of one of their number.” In *Crofter Hand Woven Tweed Co Ltd v Veitch*, a case decided in 1942, an embargo was organised by officials of a trade union against producers of Harris tweed whose spinning mills were located on an island, with dockers instructed not to handle yarn from the mainland consigned to the island. *Resolute Forest Products v 2471256 Canada Inc* dealt with actions taken by environmental activists to target the plaintiff company’s stakeholders, to damage its reputation and dissuade customers from dealing with the company. The 2015 case of *Boral Resources (Vic) Pty Ltd v CFMEU* concerned actions taken by an Australian trade union to impose bans upon the products of a building materials supplier at construction sites.

To address the central research question the thesis must examine **four main subsidiary questions.** First, when groups take collective action targeting another party, what forms of coercion are proscribed under Australian law? Secondly, how has the law fashioned control mechanisms to confine the ambit of prohibitions? Thirdly, how does – and should – the law deal with the use of unlawful means and illegality in the context of collective economic coercion? Fourthly, should justification defences be widened, and how might this be achieved?

Context has affected the development of the economic torts to a significant degree. Their evolution has been spurred along by the advent of a series of social movements, most

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5 Ibid at 535. Rationales for prohibitions are addressed in great depth in Chapter Five, Part II of this thesis.


8 [1936] 1 All ER [KBD] 863 at 863.

9 *Crofter Hand Woven Tweed Co Ltd v Veitch* [1942] AC 435.

10 *Resolute Resources Resolute Forest Products v 2471256 Canada Inc* 2014 ONSC 3996.

11 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 429.
importantly, the growth of trade unionism. Increasingly, the economic torts are being applied in the context of corporate interaction.

A particular modern-day context has been selected for this study to provide a setting to test the propositions examined in this thesis: economic coercion in the course of campaigns mounted by environmental activist groups. Environmental activism has been under-explored as a context for the application of the torts but this is likely to be a domain in which established legal principles pertaining to collective conduct will be re-shaped over the next decade or so. Environmental campaigns are certain to present new cases in which the application of ‘control mechanisms’ can be tested.

Maxwell characterised the ways in which environmental groups seek changes in corporate and government behaviour as a form of “private politics.” He noted that “direct engagement between NGOs and industry” can take the form of actions which impose considerable costs on ‘targets’, including negative information campaigns and boycotts. It is increasingly common for activist campaigns to be confrontational in nature, involving threats and actions calculated to cause damage to those targeted. These kinds of group conduct are placed in focus in Chapters Eight and Nine of this thesis. The contests in which activist NGOs are engaged can be confidently predicted to be a domain in which established legal principles pertaining to collective conduct will be tested and re-shaped over the decades ahead.

Through doctrinal research and analysis of judicial opinions, the current settings of the law in Australia are examined. In this thesis, there is a particular focus on the topics of unlawful means and justification defences. The thesis outlines modifications and adaptations of existing rules that may be considered in order to improve the coherence of some long-established legal doctrines, with a view to public interest considerations. Carefully arranged and balanced, legal settings have the potential to encourage and reinforce desirable social effects and practices, limit negative social effects and enhance the ‘public good’. Interdisciplinary research, including the views of policy economists on the effects of campaigning environmental groups, is also taken into account.

This introductory chapter briefly explores a range of aspects of the legal problems associated with collective action causing economic injury. There are unresolved ambiguities under Australian law; fine judgements must be made as to which levers to use as control mechanisms to contain liability; clarity needs to be established around the consequences of illegal conduct, and the meaning of ‘unlawful means’; there are differences of view as to whether the mere fact of a combination of persons should be a basis for liability; such conduct gives rise to contests of rights and duties; and justification defences have not been clearly delineated. There is also discussion of the potential for the invocation of fundamental rights arguments and legislative encroachment to disrupt established rules and principles.

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12 The contributions of various social movements are described in Chapters Three, Eight and Nine of this thesis.


14 Maxwell, n 13 at 137-38.

15 Friedman, n 1, 149-68.
Chapter One: The Subject and Objectives of this Thesis

The chapter will then begin to discuss how further iteration of the common law, in particular the strengthening of justification defences and attention to public benefit and public interest considerations, can potentially offer solutions to perceived deficiencies in the existing common law position. It will then expand upon the methodologies employed in the research, and provide an overview of how this thesis is organised.
Chapter One: The Subject and Objectives of this Thesis

II. THE NATURE OF THE PROBLEM

Collective action has been defined as action taken together by a group of people whose goal is to enhance their status and achieve a common objective. The potential benefits of collective action are widely acknowledged. It allows minorities to make their voices heard, and can serve as a counterbalance to established power structures. But when groups take collective action, they have the capacity to cause significant economic injury to those they target.

In Quinn v Leathem, Lord Brampton railed against “the perpetuation of organized and ruinous oppression” and said:

> It is at all times a painful thing for any individual to be the object of the hatred, spite and ill-will of anyone who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs regardless of law, and actuated by malevolence, to injure him and all who stand by him.

Courts have been motivated to intervene by a “belief that the coercive pressure of a group far outweighed that of an individual acting alone.” However, as Lee noted, nowadays “the idea that a peculiar power or force of coercion resides in numbers is widely regarded as sophistry.”

Fleming saw the nature of the defendant’s conduct as a key variable in tort problems:

> Deliberate injury to others is almost invariably devoid of social utility and, excepting situations where on supervening grounds of policy a special privilege is recognised [as in cases of self-defence or necessity] a defendant who intentionally invades another’s interests of personality or reputation, or meddles with another’s things and, in many situations with the pecuniary interests of another, is held responsible for the harm he thereby causes.

An appropriate set of rules are needed to articulate principles that set boundaries for permissible conduct. The common law’s response to this problem has been the progressive iteration of the intentional economic torts. The torts normally come into focus in connection with interference with economic interests by groups acting collectively. There is a

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18 Quinn v Leathem [1901] AC 495 at 531, per Lord Brampton. Critics may see Lord Brampton’s concern as old-fashioned and a view of its time, but it is argued in this thesis that the concern is an enduring one.

19 Elias and Ewing, n 7 at 324, referring to Quinn v Leathem [1901] AC 495, per Lord Lindley at 537-38.


22 It should be noted, however, that acts transgressing the general economic torts (other than conspiracy) are capable of being performed by a single party acting alone.
Chapter One: The Subject and Objectives of this Thesis

legitimate playing field of permissible collective conduct, but this intersects with the domain of the economic torts at the margins. The question of where the boundaries of this arena should be set is contestable, and viewpoints differ.\(^{23}\)

However, there are continuing uncertainties about the manner in which key principles enshrined in these torts will be applied in Australia, and a need to clarify a number of contentious issues which are central to the architecture of the economic torts.

A The Contest of Rights

The application of economic coercion by groups can lead courts, and lawmakers involved in setting policy limits, to deliberate on conflicts of putative rights – between the interests asserted by those taking collective action and the private or civil rights of individuals and corporations. The areas of law which regulate collective economic coercion seek to resolve a conflict between rights of reputation and personal freedom (to be free from attacks on assets, property and businesses and to have redress for infringement of those rights) and rights of the public (such as for freedom of communication and association).\(^{24}\) It is the role of legal systems to determine demarcations when interests conflict.

As Deakin and Randall observed, “all the great cases in the area of the economic torts...have been based on the principle that the right to pursue a trade, business or livelihood free of certain forms of interference, deemed to be illegitimate, deserves the protection of the law.”\(^{25}\)

The law of torts has traditionally protected economic, trading and property interests against intentional intrusion, reflecting an idea deeply entrenched in judicial thought that “the law should not legitimize the infliction on another of gratuitous harm.”\(^{26}\) As Collins noted, two parties involved in a private law dispute will enjoy rights, but they will also be duty-bearers and “unlike the orientation in public law that typically treats fundamental rights as trumping arguments in order to control abuse of state power, the role of rights in private law is much more likely to be one of questioning the existing delicate balance struck by private law between rights, interests and public policy.”\(^{27}\)

According to Wright, the purpose of the law of torts is to adjust losses and “afford compensation for injuries sustained by one person as the result of the conduct of another.”\(^{28}\)

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\(^{23}\) See Searle J, n 17. Alternatively, see Olson M, The Logic of Collective Action (Harvard University Press, Cambridge, 1965) for a controversial theory of political science and economics which argued concentrated minor interests will be overrepresented and diffuse minority interests will be trumped due to a free-rider problem that is stronger when a group becomes larger.

\(^{24}\) See, for example, Tajjour v New South Wales; Hawthorne v New South Wales; Foster v New South Wales [2014] HCA 35 (8 October 2014).

\(^{25}\) Deakin and Randall, n 4 at 534.


\(^{28}\) Wright C, ‘Introduction to the Law of Torts’ (1942) 8 Cam. L.J. 238.
In *J. Bollinger v Costa Brava Co*, Danckwerts J said “… the law may be thought to have failed, if it can offer no remedy to the deliberate act of one person which causes damage to the property of another.”  

The right to use property is not protected from all interferences, “but rather only those which are unreasonable” and there are differing views as to the reasonableness or otherwise of various interferences. Canada’s Supreme Court has noted that “tort law has traditionally accorded less protection to purely economic interests than to physical integrity and property rights.”

In inquiring into the nature of rights protected by torts such as inducing breach of contract, it is important to keep in mind a principle articulated by Deakin and Randall – that while some forms of interference with others may be legitimate, others are “illegitimate.” This thesis addresses the need for the law to set well-reasoned legal compromises in situations where there are conflicts between competing rights and priorities. Of course, the evaluation of whether a given compromise is well-reasoned can be subjective, especially in a field which is politically contentious.

B Uncertainties under Australian Law

The thesis addresses the problem that the Australian common law regarding the economic torts is at a surprisingly early stage of development. The precise status of some key causes of action is still to be settled by the High Court, anomalies exist and a number of contentious issues central to the application of the torts remain unresolved.

For example, in *Sanders v Snell*, the High Court left open the question of whether or not the tort of causing loss by unlawful means is part of the law of Australia, describing it as “embryonic or emerging.”

In particular, there is a need to clarify for Australia the “competing agendas” revealed by the analyses undertaken by the House of Lords in *OBG v Allan* and *Revenue and Customs Commissioner v Total Network*, two somewhat contradictory cases reported within a single

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29 *J. Bollinger v Costa Brava Co* [1960] Ch 262 at 283, per Danckwerts J. This thinking is reflected in the tort of interference with contractual relations.


33 See the summary of anomalies at the conclusion of Chapter Two of this thesis.

34 *Sanders v Snell* (1998) 196 CLR 329 at 341.


37 [2008] 1 AC 1174.
volume of the Appeals Cases in 2008. Those competing agendas relate, in particular, to the meaning of the notion of ‘unlawful means’. Neyers has identified critical choices the High Court of Australia will face in due course when it considers the key innominate tort of causing loss by unlawful means, in the wake of these decisions.\(^{38}\) The position has been further complicated by the decision in *A.I. Enterprises Ltd v Bram Enterprises Ltd* in which the Supreme Court of Canada sought to fashion, for Canada, a ‘best rationale’ for the unlawful means tort. There is potential for this case to be highly persuasive as a precedent for Australian courts.\(^{39}\)

In Australia, the status of the unlawful means tort has been clouded by a succession of decisions in which lower courts have elected to neither confirm nor deny its existence. The view of the Queensland Court of Appeal in *Deepcliffe Pty Ltd v Council of the City of Gold Coast*\(^{40}\) was that it was not for first instance or even intermediate courts “to hold that such a tort does exist in Australian law.”\(^{41}\) In *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd*,\(^{42}\) it was said that the question of what the law is on this subject must await the authoritative determination of the High Court.

The economic torts have also been adapted in distinctive ways by Australian courts. For example, Edmundson traced the way in which tortious conspiracy has developed to operate quite distinctly from the position in England.\(^{43}\)

There has been widespread lack of understanding of the economic torts within the Australian legal profession and a seeming reluctance to plead them, given their intricacies and complexities and the evidentiary challenges that can arise when they are litigated. They have been under-studied by Australian legal academics: few university tort law courses have them as a focus in their curricula and many Australian torts textbooks leave the topic out altogether.

### C Control Mechanisms for the Economic Torts

Concern about the need for control mechanisms to inhibit the scope of the general economic torts and prevent them from being unmanageably broad has played a key role in shaping their development. In recent judicial and academic analysis of the intentional economic torts in England and Canada, the width of the definitions applied to the notion of unlawful means has

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38 Neyers, n 30.

39 [2014] SCC 12; [2014] 1 R.C.S. 177. This case is discussed at some length in Chapters Three (Part C) and Five (Part C) of this thesis.


41 Ibid at [74]. This case is referenced in Neyers, n 30 at p 119.

42 [2010] ACTSC 20 at [140].

been seen as one of two alternative control mechanisms that may be levered to inhibit the overall scope of the innominate unlawful means tort (with the other being intentionality).  

The first approach deploys a narrow definition of unlawful means as the control mechanism. A second approach places emphasis on the requirement of intentionality or ‘targeting’ accompanied by malice as a threshold for activation of the torts, and connects this with the availability of justification defences. The merits and disadvantages of these alternative approaches have been most clearly described by Carty and Deakin, whose viewpoints are detailed in Chapter Four of this thesis, in Parts V and VIII respectively.

In *OBG v Allan*, referring to the differences between viewpoints on the economic torts held by judges in that case, Lord Walker said “the most important difference is in the identification of the control mechanism needed in order to stop the notion of unlawful means getting out of hand.” Baroness Hale said it was “consistent with legal policy to limit rather than to encourage the expansion of liability in this area.”

The concern to impose limitations on the unlawful means conspiracy tort was noted by Heffey in 1975:

[U]nless limitations…are introduced conspiracy by unlawful means would become too potent a weapon in the hands of plaintiffs who are merely incidental victims of combined action involving merely incidental or trivial illegalities.

A desire to place boundaries around the scope of the tort had been expressed by the High Court of Australia in *Sanders v Snell*, concerning the tort of causing loss by unlawful means. There, the Court noted “difficulties that arise if wrongful acts are not confined” in some way and that it might be necessary for certain categories of unlawful act to be “excluded from the understanding of what is an unlawful act for the purposes of this tort.”

Carty referred to “the fear of disproportionate and limitless liability” and analysed the concern of courts and some commentators to apply control mechanisms to inhibit the potentially broad ambit of the torts:

…there are variations in approach as to the best control mechanisms for limiting liability…[and] there is a debate whether intention or unlawful means should be the focus for limiting these torts, or indeed whether both need to be restrictively defined to avoid an over-broad liability…Finally, there are some commentators who believe that these torts do not need to be limited by the interests they protect.

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44 See Deakin and Randall, n 4; Neyers, n 30; Cromwell J in *A.I. Enterprises*, n 39; Carty n 35.

45 *OBG v Allan* [2008] 1 AC 1 at [266] per Lord Walker.

46 Ibid at [306] per Baroness Hale.


49 Carty, n 35 at 1.

50 Ibid at 169.
Proposals for the imposition of control mechanisms as a matter of policy give rise to the need to consider whether the economic torts are best conceived of in terms of distributive justice theory or corrective justice theory, or some other basis. This question is addressed in Chapter Five of this thesis.

As indicated above, it can be anticipated that an opportunity may arise in the near future for the High Court to conduct a first principles review and to determine the control mechanisms it considers should be established to set the boundaries of liability for Australia.

D Illegality and Unlawful Means

The common law has developed differing conceptions of the meaning, and the consequences, of the use of unlawful means for different economic torts. As noted by Creighton, legality or its absence can have a quite dynamic effect on liabilities under the torts:

...‘unlawful means’ is of the essence of the common law torts of ‘unlawful means’ conspiracy, intimidation and the ‘indirect’ form of interference with contractual relations…and in the case of ‘direct’ interference with contractual relations, will vitiate the defence of justification.51

There has been a significant judicial debate about precisely what the implications of illegal conduct should be. A series of deliberations arise: how should unlawfulness operate as a constituent element of various torts? Which categories of wrongful act should attract the application of the torts? Where illegal conduct occurs, what should be the liability implications? These questions are considered in Chapters Three and Seven of this thesis.

For the innominate tort of causing loss by unlawful means the case law has developed two alternative conceptions of unlawful means. There is a ‘narrower view’ under which “criminal offences and breaches of statute would not be per se actionable.”52 There is also an alternative view that ‘widens the net’ of the conduct qualifying as prima facie tortious, based around “an objective element of unlawfulness as the boundary of liability”53 which “embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.”54 The case law articulating these two viewpoints is explored in Chapter Three.

There is a need to clarify the position in Australia on the scope of this tort and in particular which categories of conduct should be regarded as constituting unlawful means. The High Court of Australia recently signalled its interest in having an opportunity to consider the issue. In Construction, Forestry, Mining & Energy Union v Boral Resources,55 in concurring with the refusal of leave to appeal on the question of whether the tort of intimidation forms part of the common law of Australia (regarding that matter as settled) Nettle J said “if the


53 OBG v Allan [2008] 1 AC 1 at [147] per Lord Nicholls.

54 Ibid at [162] per Lord Nicholls.

question was whether there was an unlawful means tort part of the Australian common law that would be all very interesting.\textsuperscript{56}

Another key question that arises is whether the conduct of a defendant who has engaged in illegal activity, or utilised unlawful means, can ever give rise to a justification defence. The employment of unlawful means has conventionally been considered fatal to the pleading of a justification defence.\textsuperscript{57}

It is also necessary to ask, as a matter of policy: does exclusion of criminal offences and breaches of statute from the ambit of the tort undermine the aspiration, which is inherent in the torts, to inhibit clearly excessive and unacceptable intentional conduct?

E \hspace{1em} \textbf{Combination and Relative Power}

A spur to the development of the economic torts in the late nineteenth century – seen in the landmark House of Lords cases of \textit{Allen v Flood} \textsuperscript{58} and \textit{Quinn v Leathem}\textsuperscript{59} – was their application in the context of trade unionism. The consequences of collective economic coercion that causes harm to another party, and the conditions under which that is acceptable or should be prohibited, have long been preoccupations of labour law. Indeed, most of the relevant case law emanates from labour law. Carty noted that the torts were shaped by “judicial hostility to the growth of the trade unions” and later “in the twentieth century by concern over the power wielded by trade unions.”\textsuperscript{60}

Elias and Ewing saw potential for large ‘individual’ corporate entities to act in oppressive ways and it followed that their view was, especially when seen through the lens of labour relations, that the law should be designed to protect the interests of the figurative ‘little guy’.\textsuperscript{61} However, in examining instances of economic coercion that can arise in twenty-first century contexts, past assumptions about the relative strength of opposed parties may need to be revisited. Questions can arise as to the appropriateness of certain legal rules when there is disequilibrium in power and influence between those applying economic coercion and the party targeted. Therefore, rather than basing exemptions for conduct on broad categorisations of the nature of a defendant interest group (e.g., that they are a trade union, or an environmental NGO), or on analysis of their purpose,\textsuperscript{62} it may be that in the course of setting boundaries for permissible conduct, the focus should be placed on the nature of the conduct.

\begin{thebibliography}{1}
\bibitem{56} Ibid at page 9 of transcript, per Nettle J.
\bibitem{57} For a full discussion of this aspect see Chapter Seven, especially Part VI
\bibitem{58}[1898] AC 1.
\bibitem{59}[1901] AC 495.
\bibitem{60}Carty, n 35 at p 10, referencing Denning LJ in \textit{Lee v Showmen’s Guild} [1952] 2 QB 329.
\bibitem{62}As to which, see Chapter Nine, Part VII.
\end{thebibliography}
Chapter One: The Subject and Objectives of this Thesis

itself. Account might then be taken of factors such as the relative power (including political influence) of groups applying coercion and those targeted.\(^{63}\)

F Limited Recourse to Justification Defences

The notion of justification has been central to the economic torts from their inception but limited attention has been paid to delineating the justification defences. In part, this is attributable to the tendency courts have displayed to deploy definitions of unlawful means and/or intention, malice or purpose\(^{64}\) in preference to justification as the control mechanisms for the economic torts.\(^{65}\) Another potential explanation may be that, when statutes were introduced to confer almost total immunity from economic tort liability on collectives involved in industrial action, this “in effect fulfilled the function of the defence of justification in the labour context…and made unnecessary further judicial consideration or development of the common law doctrine.”\(^{66}\) Whatever the reason, the state of development of the justification defences remains surprisingly immature.

Chapter Seven of this thesis addresses this gap by reviewing relevant case law precedents, examining the role justification defences play within the architecture of the economic torts and exploring potential for their future expansion.

G Private Law and Fundamental Rights

The availability of robust private law solutions plays a disciplining role in the overall accountability framework for groups acting collectively – if they overstep permissible boundaries of conduct, they can be brought to account by aggrieved parties commencing litigation.

Blackstone’s original *Commentaries on the Laws of England*\(^{67}\) conceived a division of wrongs into public and private wrongs. Public wrongs were based on “a breach and violation of public rights and duties, which affect the whole community.” Private wrongs were seen to involve “an infringement or privation of the private or civil rights belonging to individuals, considered as individuals” with tortfeasors required to pay fair compensation for past and future economic loss suffered by a plaintiff as a result of an injury.\(^{68}\)

Burrows defined “the divide between private and public law” as follows:

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\(^{63}\) See Chapters Eight and Nine of this thesis.

\(^{64}\) See Chapter Three of this thesis.

\(^{65}\) The concern of courts to apply one or more control mechanisms to inhibit the potentially very broad ambit of the torts is discussed by Carty, n 35 at p 169.


…by private law, I mean that part of the law concerned with the legal relationship between individuals – the legal rights that one (legal) person has against another – rather than that part of the law (public law) concerned with the state’s legal constitution and the relationship between the individual and the state.\footnote{Burrows A, ‘Challenges for Private Law in the Twenty-First Century’ in Barker et al, n 27 at p 29.}

However, there is an emerging trend in legal discourse which seeks to apply principles of public law to private law contexts, including that of the economic torts, by a process of the invocation of fundamental rights. As Collins has acknowledged, “this insertion of fundamental rights into litigation over ordinary contractual, tortious and property disputes is perceived to present worrying challenges to basic structures of the legal order and to the nature of private law,” at least amongst some private lawyers,\footnote{Collins, n 27 at p 216.} with a threat that “human rights law will colonise the whole of private law and force a fundamental and disruptive reorganisation of its existing rules and principles.”\footnote{Ibid at p 217.} An example of this trend in action, in \textit{A.I. Enterprises}, is discussed in Chapter Five, Part III C.

\section*{H The Encroachment of Legislation}

Stevens argued that “by far the greatest challenge to the substance of private law as we now know it in the common law world is posed by legislative reform.”\footnote{Stevens R, \textit{Torts and Rights} (Oxford University Press, Oxford, 2007) at p 1. These comments were echoed by Burrows, n 69 at [1] in virtually identical language.} In his view the process of legislative creep “is a ‘one-way ratchet’ which, although it may occasionally slip backward in the face of particularly vocal public protest, over the course of time remorselessly tightens its grip…complete statutory strangulation of the common law is inevitable in the longer term and we should start to prepare ourselves for it, safeguarding ourselves through greater alertness to its particular risks and staying off the worst of its excesses.”\footnote{Barker in ‘Private Law as a Complex System: Agendas for the Twenty-First Century’ in Barker et al, n 27 at 15, citing Stevens, ‘Private Law and Statute’ paper delivered at ‘Private Law in the Twenty-First Century’ conference, Brisbane, December 14-15.}

Burrows saw that “the extent to which private law should be developed by the courts or whether, on the contrary, reform is best left to legislation” is an issue “of especial importance to the future vitality of private law.”\footnote{Burrows, n 69 at p 30.} He noted with concern that the march of legislation and the possibility of statute becoming the presumed source of private law may “lead judges to disclaim responsibility for making decisions that may need to be made, on the basis that it is better to leave matters to the initiative of elected parliaments”\footnote{Barker, n 73 at p 7, citing Burrows, n 72.} and that “it is normally an unacceptable denial of justice to refuse to develop private law on the ground that reform is best left to the legislature.”\footnote{Burrows, n 69 at p 32.} The certainty created by legislation is temporal. Legal principle, not politics, can offer certainty and the common law’s critical role in shaping principled
settings, and therefore establishing the bedrock of the legal protections Australians enjoy, ought not be lightly disregarded.

Parliaments can become involved in defining the circumstances under which collective actions are regarded as unacceptable, modifying common law rules. As Heydon noted, “Parliament, if it thinks the public interest requires it, can create any special exemptions of references needed for particular groups, as happens in England to a large extent with trade unions.”77 In the context of collective industrial action in the labour market, exemptions have been defined in some detail by statute.78 The initial legislation in this area was the Trade Disputes Act 1906 (UK). Its successor statute, the Labour Relations (Consolidation) Act 1992 (UK) Part V has, for decades now, defined acceptable collective industrial action in the United Kingdom labour market context.79

Australian legislatures have taken similar paths. Forms of the legislative exemptions pioneered in the United Kingdom have been adopted and employed in Australia,80 although “different considerations arguably apply in Australia where the political climate has not historically favoured the British example of legislating broad-scale immunities for strike action.”81 Balkin and Davis said that:

...judicial development of the economic torts in [Australia and New Zealand] has been somewhat different from that in England. In that country, legislation first passed in 1906 has granted to trade unions and their members a measure of immunity from actions in tort for activities undertaken in contemplation or furtherance of a trade dispute. The fact of this legislation has, without doubt, directed the attention of the courts in England along different paths from those which are appropriate in Australia and New Zealand.82

The introduction or extension of legislative exemptions from the common law rules to limit the scope of application of the remedies to certain interest-holders is now being advocated for areas outside labour law. For instance, Chapter Eight of this thesis analyses proposals that have been made in Australia for the passage of ‘anti-SLAPP’ legislation to create exemptions for environmental groups from ‘strategic litigation against public participation.’ Nevertheless, it can be too readily assumed that legislation is the answer to any problem in the law. Stevens foresaw a risk of “complete statutory strangulation of the common law” and cautioned that there is “a real risk of damage being done to private law by a blundering legislature that does not understand the value of the judge made laws we currently have.”83 As Stevens ventured:

77 Heydon, n 6 at 132.
78 Carty, n 35 at p 11-14.
79 These statutes are referenced by Deakin and Randall, n 4 at 523-24.
83 Stevens, n 72 at p 24.
We should care deeply about the common law not because of its source, but because of the basic rights it seeks to protect. That does not mean it is illegitimate for a legislature to replace either all or part of it, but there are dangers involved in doing so that need to be guarded against.  

III. ADDRESSING THE PROBLEM – THE ARGUMENT

The economic torts are politically contentious, a legacy of their intermittent deployment against trade unions. On occasions in Australia, calls have been made for their abolition, or for them to be severely restricted in their application to particular contexts, by statute. As was seen in Part II C above, the need for control mechanisms to restrict the boundaries of the general economic torts has been strongly asserted. The torts have been regarded as a means of “suppressing public debate and participation.”

This thesis, however, argues that the principles developed by the common law by the medium of the economic torts, and under competition laws prohibiting secondary boycotts, have enduring relevance and can offer coherent solutions to the legal problems discussed in this study. They set boundaries for permissible conduct, defend legitimate economic interests and afford protection against capricious and unrestrained economic coercion by groups.

It is important that the capacity of groups to utilise unlawful means to injure others is restricted in some way. In particular, it is desirable to impede the causing of deliberate injury to others, which has been described as the “gist” of these torts.

The torts therefore have a vital ongoing role. Nonetheless, the principles underlying the torts require adaptation to take account of societal trends and new contexts. There is considerable scope for this to occur in a more consistent and coherent manner. It is argued in this thesis that, with very limited exceptions, the development of these principles should be guided by the precepts of corrective justice theory. Their development should occur with a view to the nature of the rights at stake in a given contest. The scope for intermediate theories to be developed should also be acknowledged.

84 Ibid at p 11.

85 Balkin and Davis, n 82 at p 579 [20.1].

86 See for example Ogle G, ‘Anti-SLAPP Law Reform in Australia’ (2010) RECIEL 19(1) 35. Note however that Neyers took a different view, observing that “a survey of the case-law and academic literature surrounding the tort [of ‘unlawful interference with economic relations’] reveals few calls by judges or academics to abolish the cause of action” and that, rather than advocating its abolition, recent judgements have “sought to reinvigorate it by better defining its constituent elements”: Neyers J, ‘Rights-based justifications for the tort of unlawful interference with economic relations’ (2008) 28 Legal Studies 215 at 217.


88 Stevens, n 72 at p 39.

89 These arguments are elaborated in Chapters Five and Six of this thesis.
Chapter One: The Subject and Objectives of this Thesis

The economic torts are complemented by statutory prohibitions on secondary boycotts and boycotts affecting international trade, which are an important dimension of the legal rules which inhibit economic coercion by groups.  

IV. METHODOLOGIES EMPLOYED

The primary methodology deployed in this thesis is doctrinal research. Doctrine involves “a synthesis of rules, principles, norms, interpretive guidelines and values.”91 Doctrinal legal research is concerned with the philosophy of law, the nature of law and legal authority and the theories behind a particular area of substantive law. It also concerns legal decision-making processes and theories of legal interpretation and legal reasoning.92 In general, the objective of a doctrinal approach is to build an in-depth analysis of the legal reasoning and theories underpinning an area of law. A reason legal rules are often described as doctrinal is because “they are meant to be rules which apply consistently and which evolve organically and slowly.”93

Extensive analysis of judicial opinions is undertaken in this thesis, focusing on the study of law ‘as is’. Descriptive analysis sets out the facts, the holdings and the courts’ analyses of particular cases relevant to the research questions studied. This involves careful study of the facts of the cases and the reasons behind courts’ decisions, and assessment of how judges have identified and applied legal principles in particular ways in reaching their decisions. The contrasting views held by a range of commentators on the validity of various decisions, and the differing views expressed by different courts on particular issues, are studied.94 This builds a base for the arguments made in the course of the thesis as to how best to resolve conflicts of views.

This thesis also employs non-doctrinal research: the method which can be used to consider the impact of legal phenomena on a range of social institutions, businesses and citizens, recognising that the study of legal literature may provide insights or criticisms about the practice of law and law's effects upon different individuals or social groups.95 Non-doctrinal research is concerned with understanding the legal doctrines and practices being studied in their social context. This can include critiquing and commenting on legal doctrine and practices from the perspective of a range of sciences, like economics, politics and sociology.

90 These prohibitions, found in ss 45D, 45DA and 45DB of Australia’s Competition and Consumer Act 2010 (Cth), are discussed in Chapter Nine of this thesis.


94 See in particular Chapters Four, Six and Seven of this thesis.

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The thesis takes into account the insights of interdisciplinary researchers from the domain of economics. When examining the activities and effects of environmental activist groups, and their contributions to improved societal welfare, there is reference to the views of policy economists. This provides valuable insights into the law in context, including how the laws studied operate in the real world.

The main data sources used in this thesis are set out in the Bibliography.

V. ORGANISATION OF THE THESIS

This introductory chapter has introduced the reader to the topic and the research. It has also presented contextual background to help explain the drivers that have led to the development of the central research question. It has described the principal methodologies and research paradigms relied upon in this study.

Chapter Two will define and outline the current state of Australian law applicable to each of the torts, including their distinctive elements and how they differ from one another. Anomalies which continue to affect the torts will be summarised.

Chapter Three will trace the historical development of the general economic torts and summarise the outcomes of a trilogy of important recent cases: OBG, Total Network and A.I. Enterprises. It will then analyse alternative conceptions of the notion of ‘unlawful means’ that have been developed by the case law and review recent judicial debates about what the implications of illegal conduct should be in the application of the torts.

Chapter Four will provide an overview of a range of academic perspectives on the torts, reviewing the various attempts that have been made to categorise and classify them. The main conceptual maps that have been suggested for the torts will be described.

Chapter Five will consider which of two alternative conceptions of the purpose and function of tort law – corrective justice theory or distributive justice theory – provides the clearest explanation for economic tort liability. As corrective justice and distributive justice theories are not the only plausible and alternative explanations, Chapter Five will also review the potential for the development of intermediate theories.

Chapter Six will explore the application of notions of rights and interests to the general economic torts, and the potential for a stronger emphasis on public interest considerations. It will also examine case law which gives guidance on the approach courts should take to the weighing of competing rights and interests.

Chapter Seven will review the role justification defences play within the architecture of the economic torts and consider the potential that exists for their future expansion, based on a review of relevant case law precedents.

96 This occurs in Chapters Eight and Nine of this thesis.
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Chapter Eight will assess and test potential frameworks for the future development of the economic torts by focusing on an important twenty-first century context for economic coercion by groups acting in concert – environmental activism. It will review the Victorian Gunns cases97 and the Canadian Resolute Forest Products case98 which illustrate the application of the torts in this context. It will also undertake a critical evaluation of proposals that have been made in Australia for the passage of ‘anti-SLAPP’ legislation intended to prevent ‘strategic litigation against public participation’. Chapter Eight will include an examination of the potential for statutory interventions in favour of particular interest groups to create new exemptions from the common law restrictions on economic coercion.

Chapter Nine will analyse the statutory provision, s 45DD(3) of Australia’s Competition and Consumer Act 2010 (Cth), which exempts conduct from the general prohibitions in that Act on secondary boycotts and boycotts affecting international trade if “the dominant purpose for which the conduct is engaged in is substantially related to environmental protection.”99 It asks the question: should Australian competition law allow groups to arrange boycotts of some other person or entity because that person or entity does business with a third person to whom the boycotters object on environmental or consumer grounds? This will serve as a case study illustrating the effect of a legislative intervention developed as a counterpoint to the applicable common law principles.

Chapter Ten will then summarise the key research findings of this study and describe the potential value of this research for practitioners and policy-makers. The likely consequences of the key findings, if adopted by policy-makers, will be discussed. Some areas for future research will also be suggested.

97 Gunns Ltd v Marr [2005] VSC 251 (18 July 2005); Gunns Ltd v Marr (No 2) [2006] VSC 329 (28 August 2006); Gunns Ltd v Marr (No 3) [2006] VSC 386 (20 October 2006); Gunns Ltd v Marr (No 4) [2007] VSC 91 (3 April 2007); Gunns Ltd v Marr [2008] VSC 464 (7 November 2008); Gunns Ltd v Marr (No 5) [2009] VSC 284 (20 July 2009).

98 2014 ONSC 3996.

99 Section 45DD(3)(a) of Australia’s Competition and Consumer Act 2010 (Cth).
CHAPTER TWO

THE COMPOSITION OF THE GENERAL ECONOMIC TORTS

I. INTRODUCTION

The expression ‘the economic torts’ is not a precise term but a generic one used in legal parlance to refer to a series of causes of action developed by the common law over more than 150 years. A wide range of distinct torts fall within this general description. At least seven key causes of action can be identified, from an Australian perspective, within the family of the economic torts: inducing breach of contract; conspiracy; intimidation; causing economic loss by unlawful means; injurious falsehood; passing off; and deceit. (Other tortious actions can also be considered when corporations or individuals suffer loss as a result of economic coercion by groups, including recourse under defamation and trespass laws. These torts are however outside the scope of this thesis).

Injurious falsehood, passing off and deceit have been significantly affected by the evolution of Australia’s *Competition and Consumer Act* and can be argued to have been overtaken by legislation. It should be noted that, as Erbacher highlighted, there has been something of a resurgence in recourse to injurious falsehood since the reforms to Australia’s national defamation laws which came into effect in 2006 that prohibited “large” for-profit corporations (i.e. those with 10 or more employees) from suing in defamation.4

This thesis is principally concerned with a subset of the torts listed above – inducing breach of contract, conspiracy (in both its “lawful means” and “unlawful means” forms); intimidation; and causing loss by unlawful means. There are two sub-groups of the economic torts. It has been argued that, in one sub-group (of the torts with which this thesis is concerned) the main complaint of the plaintiff is that “the defendant has deliberately caused him loss.”5 In the other sub-group (injurious falsehood, passing-off and improper use of trade secrets) the main complaint of the plaintiff is that the defendant has made a gain which properly belonged to the plaintiff.

The five individual torts under study have in common, broadly, that they are concerned with inhibiting interference with a plaintiff’s economic interests.6 Carty reasoned that the most appropriate collective label for them is the “general economic torts,” albeit that they are often

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3 Ibid at p 582 [20.6].


6 Balkin and Davis, n 2 at p 579 [20.1].
Chapter Two: The Composition of the General Economic Torts

referred to as the “industrial” torts “due to the fact that they commonly arise in the course of industrial action.” In this thesis, Carty’s classification is adopted. Her classification, which shapes the structure of her book *An Analysis of the Economic Torts*:

... separate[s] the economic torts into two categories: the general torts and the misrepresentation torts, the latter comprising deceit, malicious falsehood, and passing off. This categorization is argued to mirror the fact that in the general economic torts the defendant seeks to attack the claimant. 8

Each cause of action falling within the ‘family’ of the economic torts has its own distinctive features. The constituent elements of the torts vary in sometimes subtle, important ways. Carty noted that “each tort has a separate basis and rationale.” 9

Illegality is a required element in many instances, albeit that interpretations of the meaning of unlawful means vary from tort to tort. Lee observed that “in each case the tort is founded on the combination of a particular course of conduct with the requisite unlawfulness.” She also highlighted that “although the element of illegality is necessary for founding liability, it is not, by itself, the sole rationale of any of the torts.” 10

This chapter examines the composition and elements of each of the general economic torts, as they are likely to currently apply in Australia. This requires discussion of the starting-point positions developed under English law. Each of the causes of action is considered in turn, with the component elements of the various torts identified. The central concerns of each individual tort, and the principal elements or ‘ingredients’ of each of them, as currently understood to be the law in Australia, are briefly described. The aim of this discussion is to establish understanding of the commonalities between the torts, and also how they differ from one another.

The concluding Part VII of this Chapter describes some open questions of interpretation, not yet finally settled by the High Court of Australia. Key anomalies that still exist within the framework of liability, which have been argued to impede the coherence of these torts as a set of remedies, are summarised.


8 Ibid at p 3.

9 Carty, n 7 at p 18. The rationale for each of the torts is analysed in Chapter Six, Part IV below.

Chapter Two: The Composition of the General Economic Torts

II. INDUCING BREACH OF CONTRACT

The tort of inducing breach of contract has been described as the most important of the general economic torts in terms of practical relevance.\(^\text{11}\) One reason for its importance has been the use of this tort “to cover cases in which the defendant used unlawful means to cause damage by interfering with the performance of a contract without any voluntary or even compelling participation on the part of the contracting party.”\(^\text{12}\)

As Carty explained, inducing breach of contract has been “surrounded by uncertainty and complexity”\(^\text{13}\) and had an “uncertain ambit,” partly because of an overcomplicated judicial approach to the tort and partly due to the pursuit of a “unified theory” for the economic torts which has led to “misconception surrounding the extent of the tort, compared to the area covered by the wider unlawful means tort.”\(^\text{14}\) Attempts have also been made to fashion additional variants of the tort – for example, in OBG, the claimants “sought to use the economic tort of ‘interference with contractual relations,’ the existence of which was accepted by the Court of Appeal.”\(^\text{15}\) (That claim was, however, rejected by the House of Lords.)

The requirements of this tort, famously first delineated in Lumley v Gye, were elucidated by the House of Lords in OBG v Allan. Recent decisions of the Federal Court of Australia\(^\text{16}\) have distilled the Lumley v Gye\(^\text{17}\) tort into five elements: there must be a contract between the plaintiff and a third party; the defendant must know such a contract exists; the defendant must know that if the third party does (or fails to do) a particular act, that conduct of the third party would be a breach of the contract; the defendant must intend to induce or procure the third party to breach the contract by doing or failing to do the particular act; and the breach must cause loss or damage to the plaintiff.\(^\text{18}\) These elements were summarised in Traffic Calming Australia v CTS Creative Traffic Solutions which concerned a falling out between former business partners. The case discussed “differences of emphasis or in degree” about these elements and noted “there appears to be no judgement of the High Court of Australia which unites the difference.”\(^\text{19}\)

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\(^{12}\) OBG v Allan [2008] 1 AC 1 at [28], per Lord Hoffmann, referenced by Carty, n 7 at p 32. This case is referred to hereafter as “OBG”.

\(^{13}\) Carty, n 7 at p 31.

\(^{14}\) Ibid at p 32.

\(^{15}\) Ibid at p 34. See also the discussion in Chapter 3, Part III A, which follows.

\(^{16}\) Daebo Shipping Company Ltd v The Ship Go Star (2012) 207 FCR 220 [88] (Keane CJ and Rares and Besanko JJ); Donaldson v Natural Springs Australia Limited [2015] FCA 498 (Beach J).

\(^{17}\) (1853) 118 E.R. 749.

\(^{18}\) In Allstate Life Insurance v ANZ Banking Group Ltd (1995) 58 FCR 26 it was said that “the gravamen of the tort is intention” and that “the requirement of knowledge of the contract … is an aspect of intention.”

Proof of malice, or spite or ill-will, is not a necessary element of this tort. However, Carty emphasised that “liability under the tort requires both that the defendant know of the existence of the claimant’s contract and that he have an intention to cause a breach of that contract.” Thus, elements of knowledge and intention are “connected, forming a ‘twofold’ requirement: without knowledge there can be no intention.”

Two other key points should be noted. It is necessary for a claimant to show that a target contract’s performance has been hampered in some substantial way. The scope of the tort is limited to inducing breach of an existing contract; it is not a tort (if no conspiracy is involved) to simply induce a party not to enter into a contract, although there is some support for an alternative view that interference with pre-contractual negotiations that results in a contract not being entered into is actionable.

Over time, two distinct forms of the tort have been identified. The first is direct interference. Typically, this is where persuasion, or another form of procurement, is directed at one of the parties to a contract. For example, this would arise in a labour law context when a defendant persuades a person to breach their contract with the plaintiff, or physically prevents that person from being able to perform their contract.

The second form, indirect interference, arises where a defendant commits or threatens to commit some act which is unlawful in itself and which has the effect of interfering with a contract to which the plaintiff is a party. In OBG, the House of Lords saw that indirect contractual interference should properly be seen as falling within the ‘genus’ of causing loss by unlawful means (not as a subset of inducing breach of contract), although it is not yet entirely clear if this logic will be picked up by Australian courts.

Lord Hoffmann in OBG said that in Lumley v Gye the court based its decision on “the general principle that a person who procures another to commit a wrong incurs liability as an accessory” and that “the real question” to be asked in relation to inducing breach of contract is “did the defendant’s acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessorial liability?” Carty suggested that continuing confusion may result from these comments.

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21 Carty, n 7 at p 38.

22 Torquay Hotel Co Ltd v Cousins [1969] 2 Ch 106; Merkur Island Shipping Corp v Laughton [1983] 2 AC 570.

23 Balkin and Davis, n 2 at 592 [21.5]. Allen v Flood; Sorrell v Smith; McKernan v Fraser (1931) 46 CLR 343 at 358-9 per Dixon J, at 369-70 per Evatt J.


25 See Stewart et al, n 11 at p 954 [26.80].

26 Ibid at pp 958-59 [26.87].

27 OBG, n 12 at [3] and [36] per Lord Hoffmann. See Carty, n 7 at p 51.
III. CONSPIRACY BY LAWFUL MEANS

There are two ‘traditional’ forms of conspiracy: ‘conspiracy by lawful means’ and ‘conspiracy by unlawful means.’ The conspiracy torts are activated when a ‘combination’ acts ‘in concert.’

A notable feature of lawful means conspiracy is that “a plaintiff may have an action against each of two or more parties where their actions, if performed by one party alone, would not give rise to a remedy.”

Goodman observed that unlawful means conspiracy “requires an act which would be ‘unlawful’ even if that act were done by one person acting alone, whereas in unlawful means conspiracy] all acts done to achieve the purpose of the parties to the combination would be ‘lawful’ if done by one person alone.” By contrast, the other general economic torts are capable of being performed by a single party acting alone.

The elements of conspiracy which need to be present are discussed at length in *Quinn v Leathem*. Three elements are common to both forms of conspiracy. These are summarised by Balkin and Davis as a) an agreement between two or more persons; b) which was carried into execution (or acted upon); and c) which caused damage.

*Conspiracy by lawful means* occurs when two or more persons (the potential defendants) act in concert to deliberately inflict economic loss on a plaintiff. The tort is committed where there is a combination between two or more parties, the combination is acted on, harm is caused to the plaintiff and the conspirators have a “predominant purpose of injuring the plaintiff.”

This tort may potentially apply if conduct amounts to “a combination or conspiracy aimed at harming the plaintiff in his trade or business” (the classic *Quinn v Leathem* test) and if it is also found to have been motivated by malice.

The tort enables a plaintiff to bring a suit “if two (or more) people combine with the predominant purpose of causing economic loss to the plaintiff, even if this loss is accomplished using otherwise lawful means which do not violate any public or private law prohibition (other than that posited by the law of conspiracy itself.)” Deakin and Randall

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29 Edmundson, n 1 at 191.


31 [1901] AC 495. See also *Sorell v Smith* [1925] AC 700 (723 per Lord Dunedin; 748-9 per Lord Buckmaster).

32 Balkin and Davis, n 2 at p 615 onward.


34 See *McKernan v Fraser*, n 23 at 362. This was the case in which the lawful means conspiracy tort was recognised by the High Court of Australia. See also *Williams v Hursey* (1959) 103 CLR 30.

35 Neyers, n 33 at p 132, discussing *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] All ER 142.
framed the proscribed interference as “combination coupled with ‘predominant purpose to injure’.”

The courts are vigilant to address situations where the predominant purpose of the conspiracy has been a malicious desire to harm the plaintiff. Key to the decision in *Quinn v Leatham* – a case which involved a trade union taking action against a butcher who had employed non-union labourers by compelling his largest customer to discontinue business with him – was the jury’s finding (which the House of Lords declined to meddle with) that the defendants had been motivated by malice against the plaintiff, in the sense of having no just cause or excuse for their actions. However, the Lords did not limit liability to cases where the officials were motivated by malice, spite or ill-will.

The requirement a plaintiff must demonstrate that bringing about the particular harm in focus was the ‘predominant’ motive of a defendant constitutes a “heightened standard” (higher than for unlawful means conspiracy), beyond just having to show intent to harm a plaintiff. Lee observed that “lawful means conspiracy requires proof of ‘improper motive’ – which in practice is often equated with a *predominant* intention to injure.” Edmundson argued that the element of intention within the tort of lawful means conspiracy has been framed so as to require a plaintiff “to show that intention to harm dominates the defendants’ motives.”

In *McKernan v Fraser* Dixon J (as he then was) said lawful means conspiracy required an intention to injure to be “the sole, the true, or the dominating, or the main purpose.” Evatt J said that if the agreement to cause injury to the plaintiff is made “solely with the object or motive of causing such damage” and “for no reason at all beyond the mere infliction of injury” or if the agreement is “stamped with wantonness” then the intention to injure will be presumed and conduct will exhibit “the necessary malicious character.” If, for example, the common purpose or object is “to do harm because the plaintiff is hated for some personal reason and his harm is desired as an end,” liability is clear. In the same case, Dixon J (as he then was) said lawful means conspiracy required an intention to injure to be “the sole, the true, or the dominating, or the main purpose.”

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37 See, for example, *Huntley v Thornton* [1957] 1 All ER 234.

38 [1901] AC 495.

39 Neyers, n 33 at pp 131-32.


42 By contrast, as Edmundson, n 1 at 191 explained, for unlawful means conspiracy (in Australia) “intention to harm the plaintiff need only be one purpose of the conspirators, not necessarily the dominant purpose.”

43 *McKernan v Fraser*, n 23 at 363, per Dixon J.

44 Ibid at 399-400, per Evatt J. Discussed by Goodman, n 30 at 78.

45 Ibid at 363, per Dixon J.
Goodman noted that there is a distinction “between ‘intention’ and ‘motive’ or ‘ultimate purpose’…the immediate intention of parties to a combination may be to cause harm; the ultimate ‘motive’ or ‘purpose’ may be the furtherance of interests. Liability is therefore dependent upon the answer to the question: why did the defendants injure the plaintiff?”

Liability for lawful means conspiracy is limited by the additional need to establish that defendants were not acting in furtherance of their own economic interests. A proposition of law established by *Sorrell v Smith* is that, if parties to a combination can show their motive was one of legitimate self-interest, they will avoid liability.

Complexities can arise when it is necessary for a court to analyse the presence of mixed motives amongst conspirators. An intention to cause harm may co-exist with an ultimate intention to further legitimate personal interests. As Goodman noted, parties may not all share the same motive for joining together:

An inquiry into the ‘motive’ or ‘purpose’ of a combination may reveal that the combiners had more than one purpose, or put another way that there was not a sole common intention among the combiners. For example, the combiners may perceive protection of their interests to be their main purpose for combining and at the same time some or all of the parties to the combination may relish the thought of harming the plaintiff.

Salmond wrote that:

The same individual may be inspired by more than one motive, or different parties to the combination may be inspired by different motives. In the former case liability will depend upon ascertaining which is the predominant object or the true motive or the real purpose of the defendant.

Simon LC in the *Crofter* case said “if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose.” He went on to note that:

The combiners may feel that they are killing two birds with one stone, and, even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right.

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46  Goodman, n 30 at 78. Goodman noted that this was the proper question to ask.


48  This was shown in *McKernan v Fraser*, n 23 at 399-408, referenced by Neyers, n 33 at p 131.

49  Goodman, n 30 at 78.


51  *Crofter Hand Woven Harris Tweed Co Ltd and Others v Veitch* [1942] All ER 142 at 149.
In *McKernan v Fraser*, Evatt J “commented that if an alleged conspiracy had as its purpose the carrying out of some religious, social or political object, the law prefers to examine the motive or object in each case before pronouncing an opinion.”

Lawful means conspiracy can arise if there is unjustified combination leading to economic pressure or harm (even if no unlawful means is used). By contrast to unlawful means conspiracy, ‘simple’ conspiracy does not require independently unlawful means. It does not matter that the defendant has not done any act that is unlawful in itself – the unlawfulness of the conspiracy rests purely in the fact of acting in concert with the intention of inflicting harm, and without a legitimate interest.

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52 Goodman, n 30 at 69 referencing Evatt J in *McKernan v Fraser*, n 23 at 400.

53 Neyers, n 33 at p 132.
IV. CONSPIRACY BY UNLAWFUL MEANS

The tort of *conspiracy by unlawful means* involves defendants, acting in combination, deliberately inflicting loss on a plaintiff by doing an act which is in itself unlawful, or for a purpose which is inherently unlawful. In addition to the three common elements of conspiracy, there must have been an *intention* to harm the plaintiff, together with the critical ingredient of *unlawful means*, which converts a ‘simple’ conspiracy into an ‘unlawful means’ conspiracy.

As Lee recently highlighted, uncertainty currently surrounds the elements and rationale of unlawful means conspiracy and this has given rise to potential for broadening of the tort, and at the same time possibilities that may “emaciate” it.

The first, pressing difficulty is the failure of the courts to settle upon a clear test of the scope of unlawful means for the purpose of the tort of conspiracy by unlawful means, with differences between the standards adopted by courts in England and Australia.

Australia’s law on unlawful means conspiracy has consistently accepted that crimes and breaches of statutory provisions *can* count as unlawful means. According to what Neyers has termed “the Australian conspiracy analysis” the requisite unlawful means may be furnished by breach of contract and conduct which is unlawful as a crime or a tort or breach of statute. Neyers’ view was that, for this tort, breaches of statutes and crimes can become tortious (possibly even contrary to parliamentary intention) “when coupled with an intention to injure.”

There has been a clear Australian view that conspiracy may be alleged in instances where defendants have conspired to commit a tort against the plaintiff, whether this be assault and battery, intimidation, fraud or defamatory or tortious conversion. In *Williams v Hursey*, a

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54 See generally Edmundson, n 1.
55 Lee, n 41 at 3 and 4.
56 Neyers, n 33 at pp 130-31. Balkin and Davis, n 2 cite *Williams v Hursey* (1959) 103 CLR 30. See also *Coal Miners’ Industrial Union of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437.
57 Neyers, n 33 at p 131.
58 See *Rookes v Barnard* [1964] AC 1129; *Total Network* [2008] 1 AC 1174 at [44] and [116]. See also *Stanley v Layne Christensen Co* [2006] WASCA 56.
60 See generally Creighton and Stewart, n 4 at p 800.
61 Neyers, n 33 at p 131.
62 See Balkin and Davis, n 2 at 617 [21.51].
64 *Williams v Hursey* (1959) 103 CLR 30.
Chapter Two: The Composition of the General Economic Torts

majority of the High Court held defendants liable for conspiracy based on false imprisonment and assault. In Fatimi Pty Ltd v Bryant it was held that there is no requirement in Australia that the unlawful means must be tortious in themselves.65

The Australian cases have found a wide range of acts to be a basis for unlawful means, including agreement to commit a crime,66 criminally receiving or soliciting a secret commission,67 breaching enforceable undertakings given to the Australian Competition and Consumer Commission,68 various breaches of directors’ duties69 and infringements of copyright.70

Lee highlighted that “expansion of the tort to encompass non-actionable unlawful acts has been endorsed in other Commonwealth jurisdictions.”71 In Wagner v McGill the New Zealand Court of Appeal accepted that a breach of fiduciary duty may, in principle, constitute a form of unlawful means but noted that whether it does so may depend on whether it is a two-party or three-party conspiracy. There, the Court of Appeal declined to apply the tort of conspiracy, seeing the need to place limits on the encroachment of common law into the regulation of economic competition, for policy reasons. It did so by preferring “to retain the requirement that the conduct must be directed at the claimant.”72

The Australian position differs from the prevailing position in England where a narrow interpretation of unlawful means for the tort was adopted by the House of Lords in OBG. According to Edmundson’s diagnosis, in England this tort “is not yet at the stage where the precise scope of its elements can be set down with confidence,” for “no clear test has been stated of the scope of unlawful means” and currently there is insufficient case law to distil true “patterns in the law” and general rules.”73 Edmundson saw, however, that following Total Network “the tort is now free to evolve on a case-by-case basis.”74

65 Fatimi Pty Ltd v Bryant (2004) 59 NSWLR 678 at 684.
66 Williams v Hursey, n 56.
67 Coomera Resort Pty Ltd v Kolback Securities Ltd [2004] 1 Qd R 1 at 37.
68 Dresna Pty Ltd v Misu Nominees Pty Ltd [2004] FCAFC 169.
70 Universal Music Australia Pty Ltd v Sharman License Holdings Ltd (2005) 220 ALR 1.
71 Lee, n 33 at 6, referencing the Singapore cases of Beckett Pte Ltd v Deutsche Bank AG [2009] 3 SLR (R) 452 at [120] and EFT Holding, Inc v Marinteknik Shipbuilders (S) Pte Ltd [2014] 1 SLR 860 at [91].
73 Edmundson, n 1 at 189, 198 and 202.
74 Ibid at 198. Edmundson saw that the opportunity available for this tort was in contrast to the narrow interpretation of unlawful means adopted by the House of Lords in OBG.
The question of whether crimes can constitute unlawful means in the context of conspiracy, which had previously been unclear, was settled for the UK in Total Network. In that case it was held that “the crime of cheating the revenue” in respect of contentious VAT claims provided the basis for a finding of unlawful means conspiracy. A key theme in the Lords’ speeches was that crimes in general can provide sufficient unlawful means, although the bench stopped short of saying all crimes would always be sufficient. Lee observed that, although “the House of Lords was unequivocal that ‘unlawful means’ for purposes of a two-party conspiracy were not confined to actionable civil wrongs…their Lordships furnished scant guidelines as to how far beyond traditional crimes the tort would extend.” She further noted that “cases subsequent to Total have generally eschewed the suggestion that any form of illegality would suffice [but]…At the minimum, the breach has to be either a civil or a criminal wrong.”

The House of Lords declined to set down a general rule defining what would constitute unlawful means, seeing this as undesirable in view of the wide range of possibilities. They did, however, canvass limits such as the requirement that there should “be some link between the unlawful act and the harm caused” – for example “that the crime must be the instrument of infliction of the harm.”

The question of “whether the unlawful act must be independently actionable against one of the putative conspirators” was also addressed in Total Network. There, unlawful acts were very clearly directed at the plaintiff and very intimately linked with the harm caused. Lord Hope characterised the claim as of a type involving a loss caused by an unlawful act directed at the claimants themselves, not a third party, a different case from situations where harm is “parasitic on the unlawful means used by a defendant against another party” where he saw that greater caution was needed. His Lordship found sufficient unlawful means despite the fact that the unlawful means were not in themselves actionable, taking the view that sufficient unlawful means were present because the acts were directed, targeted or aimed at the claimant.

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75 It should also be noted that, prior to Total Network there may have been a misconception in the UK that unlawful means conspiracy required a dominant intention to harm, based on interpretations of a precedent in Powell v Boladz [1998] Lloyds Rep Med 116. This was put to rest by the House of Lords in Total Network (per Lord Hope at [45] and Lord Neuberger at [217]) and Powell v Boladz was overruled.

76 See the discussion in Edmundson, n 1 at 196-7.

77 Ibid at 196.


79 See Lord Walker in Revenue and Customs Commissioner v Total Network SL [2008] 1 AC 1174 at [96], discussed in Edmundson, n 1 at 196. This case is referred to hereafter as “Total Network”.

80 See Lord Walker at [95] to [96]; Lord Mance at [119]; discussed by Edmundson, n 1 at 196-98.

81 Edmundson, n 1 at 189 and 198.

82 Lord Hope at [43], referencing Carty, n 7 - commented on by Edmundson, n 1 at 197.

83 Per Lord Hope at [44].
Edmundson argued that efforts to “define exhaustively what amounts to sufficient unlawful means” are unwise and unlikely to lead to certain outcomes and that “the presence of sufficient unlawful means should depend upon the facts of a case and not whether the unlawful act was of a certain type.” 84 His view was that “categorical statements of what can and cannot be sufficient unlawful means are not helpful.” He contended that “instead of seeking to determine what is relevantly unlawful by this type of act … it should be acknowledged that all unlawful acts provide potential unlawful means.” 85

Apart from the unlawful means element, the other key ingredient of the tort of conspiracy by unlawful means is that the defendants, by their agreement, must have intended to cause harm to the plaintiff. An implication of defining unlawful means broadly, as has occurred in Australia, is that courts may then place pressure on findings of intention, as a way of keeping the tort in check. 86

The necessary intention to harm the plaintiff in particular must be more than simply the foreseeable consequence of harming someone (who turns out to be the plaintiff): “it is not sufficient merely to show that their conduct necessarily involved injury to the plaintiff, or that the plaintiff was reasonably contemplated as likely to suffer harm.” 87

In three UK decisions, Lonrho Ltd and Others v Shell Petroleum Co Ltd and Others, 88 Allied Arab Bank Ltd v Hajjar and Others (No 2) 89 and Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc and Anor 90 it was apparently confirmed that predominant purpose to injure the plaintiff’s interests was an essential ingredient of the tort of conspiracy irrespective of whether the damage was achieved by legal or illegal means. Goodman commented that “by requiring that defendants have as their predominant purpose an intention to injure the plaintiff … even where unlawful means have been used, the House of Lords has effectively curtailed the ambit of this tort.” 91

That approach was not, however, followed in Australia. It was held in Carlton and United Breweries Ltd v Tooth & Co Ltd 92 that once it was established that the defendant had committed an unlawful act, it was not necessary to establish that the predominant motive of the defendant was to injure the plaintiff. Further, in Fatimi Pty Ltd v Bryant the New South

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84 Edmundson, n 1 at 190 and 202.
85 Ibid at 203 and 206.
86 See the comments made by Heffey P, ‘The Survival of Civil Conspiracy: A Question of Magic or Logic’ (1975) 1 Mon L Rev 136 at 177 calling for limitations on the unlawful means conspiracy tort to prevent it becoming “too potent a weapon” - referenced in Part IIC of Chapter One of this thesis.
87 Balkin and Davis, n 2 at 619 [21.55].
89 [1988] 2 All ER 103.
91 Goodman, n 30 at 76.
92 Unreported Supreme Court of NSW decision: 13886 No 4146 of 1985, referenced by Goodman, n 30 at 76.
Chapter Two: The Composition of the General Economic Torts

Wales Court of Appeal found that, in Australia, conspiracy by unlawful means required that harm to the plaintiff must be intended by the defendant, but this need not be the predominant intention. Although it is “necessary to prove that one of the things the defendant was trying to achieve was damage to the plaintiff,” an “intention to harm the plaintiff need only be one purpose of the conspirators, not necessarily the dominant purpose.” The recent decision in *Boral Resources (Vic) Pty Ltd and others v Construction, Forestry, Mining and Energy Union* affirmed that a ‘sole or dominant purpose’ is not an element of conspiracy to injure by unlawful means in Australia, and for that tort “it is enough if one of the purposes of the conspiracy was to injure the plaintiff.” The requirement of intention under unlawful means conspiracy is therefore different to that for conspiracy by lawful means.

As Lee highlighted, it should also be noted that in *OBG*:

> Lord Hoffmann had explicated the concept of ‘intention’ to mean that the defendant must have intended the claimant’s breach or loss either as an end in itself or a means to an end [and] … Although *OBG* did not concern liability for conspiracy, the Court of Appeal applied this definition in *Meretz Investments NV v ACP Ltd* to unlawful means conspiracy. In the yet later *Total* case, which concerned unlawful means conspiracy, the House of Lords did not expressly disagree with *OBG*’s formulation of intention. However, the Law Lords also variously referred to the notions of ‘directed at’ and ‘targeted at’ causing commentators to speculate that they hint at a reversion to a more traditional and stringent test than that endorsed by *OBG*.

Conspiracy actions face real practical difficulties. In *Gunns Ltd v Marr (No 2)* Bongiorno J was concerned by the plaintiffs’ attempt “to characterise virtually all of the defendants’ activities as being in furtherance of one extensive conspiracy,” noting that “conspiracy trials tend to be of inordinate length.” His Honour referred to a general reluctance of the Victorian Supreme Court to entertain civil conspiracy trials, observing that in the criminal jurisdiction, “such trials are now a rarity and are strictly controlled by statute.”

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93 Edmundson, n 1 at 191, referring to *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678 at 681, per Campbell J.

94 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 429 at [111], per Derham AsJ, referencing *Fatimi*.

95 As discussed in Part III above, sole or predominant purpose is an element of the tort of conspiracy to injure by lawful means: *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 429 at [98].

96 Lee, n 41 at 4-5, citing *Meretz Investments NV v ACP Ltd* [2008] Ch 244 at [146].

97 *Gunns Ltd v Marr* (No 2) [2007] VSC 329 (28 August 2006) at [26].
V. INTIMIDATION

The tort of intimidation arises where a defendant has, “by a threat to commit an unlawful act, coerced another person into acting in a way in which the latter did not wish to act, the defendant having thereby intended and caused economic damage to the plaintiff.” There are two basic forms of the tort. Intimidation can arise both where a threat made by a defendant has been directed to coercing a third party and where a threat is directed to a plaintiff.

The tort can be committed when a defendant threatens the plaintiff with unlawful acts unless the plaintiff takes action detrimental to their own interests (“two party intimidation”). In the two-party form of the tort, “the defendant, A, will be liable by threatening to commit an unlawful act as against the plaintiff B, unless B refrains from pursuing a particular course of action, thereby causing (as A intended) economic loss to B.” In OBG, Lord Hoffmann noted that two party intimidation raised “altogether different issues” from third party intimidation.

The more usual circumstance is that threats made by a defendant are directed to coercing a third party. ‘Third party intimidation’ arises where one party (the defendant), intending to cause loss to the plaintiff, threatens a third party with violence or serious damage to property unless the third party does something which is harmful to the plaintiff. Balkin and Davis described the situation in which three parties are involved, as follows: “if A, intending to injure C, by threatening B that he will commit an unlawful act as against B, unless B refrains from exercising his legal right to deal with C, induces B to refrain from so doing, A commits a wrong actionable at the suit of C.

There are three distinct elements to this cause of action. First, the defendant has made a demand, coupled with a threat, to either the plaintiff or a third party. Second, the threat must have been to commit an unlawful act. Third, the party threatened must have complied with the demand, thereby causing loss to the plaintiff. It is also necessary to prove that the defendant intended to cause injury to the plaintiff. Intimidation is an instance of a tort which has as its “essence” the use of unlawful means, and according to Lord Denning the requisite illegality may include “violence, tort and breach of contract.”

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98 Balkin and Davis, n 2 at 608 [21.31].

99 Ibid.


101 Balkin and Davis, n 2 at 608 [21.31].

102 These elements were set out in Habib v Commonwealth (No 2) (2009) 254 ALR 250 at [19]. Note that it was established in J T Stratford & Son v Lindley [1965] AC 269 at 283 that if there is no submission to the threat, there can be no action.

103 Rookes v Barnard [1964] AC 1129. It should be noted that it is not necessary to prove malice: Ware & De Freville v MTA [1921] 3 KB 40 at 82.

104 Morgan v Fry [1968] 2 QB 710. Carty, n 2 at p 113 characterised unlawful means as the tort’s essence.
Prior to 1964, the tort had operated in cases involving physical violence and threats. For example, in Garret v Taylor the defendant had persuaded customers of the plaintiff (a quarryman) from continuing to buy quarry stone from the plaintiff by threatening them with “mayhem.”

The modern tort of intimidation stems from the 1964 case of Rookes v Barnard, in which a plaintiff had (lawfully) been dismissed by his employer (an airline) due to pressure placed on the employer by the defendant. The required unlawful actions were present: a number of employees had indicated they would “breach their contracts of employment (by going on strike) if the airlines did not terminate the employment of a fellow-worker who had resigned his union membership.” The House of Lords held that liability for intimidation could arise “even if it did not involve violence or threat to property” and extended to the threat of a breach of contract. Lord Reid held that “threatening a breach of contract may be a much more coercive weapon than threatening a tort” and that “there is no technical reason requiring a distinction between different kinds of threats.” Carty noted that the effect of this decision was to deny the defendants the extensive statutory immunities then contained in the Trade Disputes Act 1906 (UK).

The status of intimidation as part of the law of Australia was established in two key cases – Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia and Latham v Singleton. In Latham other employees walked off the job each time the plaintiff arrived for work and it was found:

... that the majority of the defendants acted in concert when they walked off the job on the appearance of the plaintiff at the depot and that their actions were meant to constitute a threat to the city council which would be forced to take action against the plaintiff if it was unable to maintain the garbage and sanitary services of the City of Broken Hill.

Recent instances of the application of the tort of intimidation in Australia include AS v Murray, Ballard v Multiplex and Jack Brabham Engines Limited v Beare.

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105 (1620) Cro Jac 567.
108 Rookes v Barnard [1964] AC 1129 at 1169, per Lord Reid.
111 [2013] NSWSC 733.
113 [2010] FCA 872.
Carty contended in her 2001 book that intimidation should be considered as part of the innominate unlawful means tort, and attract the same definitions of intention and unlawful means as apply in that tort.\textsuperscript{114} It has been argued that this is now the likely position in England (as far as the three-party version of the tort is concerned), based on dicta of Lord Hoffmann in \textit{OBG}.\textsuperscript{115} Carty summarised comments supportive of this viewpoint made by Stevens\textsuperscript{116} and by Neyers, who said “three-party intimidation does not raise any meaningful conceptual issues that are distinct from the issues raised by the unlawful interference tort.”\textsuperscript{117}

However, the position in Australia is that intimidation remains a distinct cause of action, which has not been subsumed within the innominate tort. In the recent case of \textit{Boral Resources (Vic) Pty Ltd v CFMEU}\textsuperscript{118} the Supreme Court of Victoria reaffirmed (on appeal) the availability of intimidation in Australia, finding that it was obliged to follow the authority of the New South Wales Court of Appeal in the \textit{Sid Ross} case. The Court rejected “the proposition that the tort of intimidation is a variant of the tort of interference with business by unlawful means and is not at this time a part of the common law of Australia.”\textsuperscript{119}

The conduct complained of in Boral Resources was that the defendant trade union enforced a policy that prevented businesses and individuals that managed or performed work in Victorian construction projects from receiving, using or working with concrete supplied by the plaintiff companies. Builders were threatened with organised disruption at their building sites if they sourced concrete from the plaintiffs, conduct which was unlawful as either a breach of workers’ contracts or of s 45D of the \textit{Australian Competition and Consumer Law}.\textsuperscript{120}

When, in 2015, an application was made to the High Court of Australia for leave to appeal the \textit{Boral} decision on the question of whether the tort of intimidation forms part of the common law of Australia, leave was refused on the basis the High Court regarded the matter as settled.\textsuperscript{121} It had been argued in this case that the continuing recognition of the tort of intimidation needed to be questioned in view of the statutory framework operating in Australia for the taking of lawful industrial action in the context of bargaining for a new ‘enterprise agreement.’\textsuperscript{122}

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\textsuperscript{114} Carty H, \textit{An Analysis of the Economic Torts} (Oxford University Press, Oxford, 2001). This was the first edition of Carty’s text on the economic torts.
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\textsuperscript{118} \textit{Boral Resources (Vic) Pty Ltd v CFMEU} [2014] VSC 429.
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\textsuperscript{119} Ibid at [67] and [79].
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\textsuperscript{120} Ibid at [46] and [81].
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\textsuperscript{121} CFMEU \textit{v} Boral Resources (Vic) Pty Ltd [2015] HCATrans 122 at page 9 of transcript, per Nettle J.
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\textsuperscript{122} As to which, see Stewart et al, n 11 at pp 971-1001.
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Chapter Two: The Composition of the General Economic Torts

Not all English commentators concur with the position described by Carty. Deakin and Randall suggested that “the tort of intimidation survives, and…must be distinct from the unlawful means tort expounded by the House in OBG,” largely on the basis that “application of the doctrine of precedent precludes any conclusion which is inconsistent with the ratio decidendi of Rookes.” They acknowledged, however, that “this is a result with which nobody concerned with doctrinal coherence in tort law can feel particularly happy” and that “if intimidation survives as a distinct tort in its own right…we have two very similar torts co-existing alongside one another, one of which requires independent actionability and the other of which does not.”

Finally, reference should be made to one of the key “modern controversies surrounding the tort of intimidation” relating to “the scope and implications of the two-party version of this tort,” that is “when might two-party as opposed to three-party liability arise in the tort?” Although the tort typically arises in a three-party scenario, as in the Boral case, it can also “arise in a two-party setting, ie where the defendant makes the unlawful threat directly to the claimant in order to injure him (by causing him to act to his detriment)” – for example, “a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant.”

An example occurred in the Canadian case of Mintuck v Valley River Band, where:

…the defendant Indian band had, by continued but sporadic acts of trespass on the plaintiff’s farm, nuisance and assault, and implied threats to continue these activities, demanded that the plaintiff abandon the farm, which he leased from the federal government…The court upheld his claim based on the damages, both past and prospective, suffered as a result of his submission to the defendant’s demands.

Carty speculated that after the divergent analyses in OBG and Total Network it may be that:

…we will see the development generally of two-party economic torts with a different rationale to three-party economic torts, and different definitions of unlawful means. Conversely, we may see the courts drawing back from some of the wider implications flowing from the decision in Total Network and restrict two-party liability to the tort of intimidation, limiting it at the same time to the tort of intimidation.

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123 Deakin and Randall, n 36 at 548.
124 Carty, n 7 at p 116.
125 (1977) 75 DLR (3d) 589 (Manitoba Court of Appeal).
126 Carty, n 7 at p 116.
VI. CAUSING LOSS BY UNLAWFUL MEANS

The fifth cause of action to discuss is the tort most commonly described, in modern-day parlance, as ‘causing loss by unlawful means.’ This was the terminology deployed by Lord Hoffmann in *OBG v Allan* and adopted by the majority in *Total Network*. As Carty has highlighted, the nomenclature for the cause of action is probably not, as yet, well-established. In *A.I. Enterprises v Bram Enterprises* Cromwell J observed that:

> The tort of unlawful interference with economic relations has also been referred to as ‘interference with a trade or business by unlawful means’, ‘intentional interference with economic relations’, ‘causing loss by unlawful means’ or simply as the ‘unlawful means’ tort.

The tort was formerly often referred to as “unlawful interference with trade.” Whereas Lord Nicholls of Birkenhead in *OBG* referenced it as “the tort of unlawful interference,” Lord Walker in *Total Network* used the shorthand “the intentional harm” tort. In a significant Australian case discussed in Chapter Eight, *Gunns Ltd v Marr (No. 2)* the cause of action was pleaded as “interference with trade and business” but by the time of *Gunns Limited & Ors v Marr & Ors (No. 4)* it was re-pleaded as “intentional injury to the plaintiffs in their trade and business.”

In view of ongoing judicial evaluation of the nature of the ingredients of the tort, discussed below, these differences about nomenclature amount to more than mere semantics.

From an Australian vantage point, there are four key sets of questions concerning this tort which require discussion. Firstly, does the tort exist at all in Australia? Here the Australian precedents must be contrasted with clearly established positions in New Zealand, in England in the wake of *OBG*, and now, in Canada. Second, the precise nature of each of the elements of this tort have not been determined in Australia. Third, what are (and should be) the limits of the tort? Fourth, is the tort anomalous and what are the implications of this? The first two of these questions are covered in this chapter; the third and fourth questions are addressed in Chapter Four below.

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127 *OBG*, n 12 at [63].

128 *Total Network*, n 79.


131 This was the language deployed by Lord Diplock in *Merkur Island Shipping Corp v Laughton* [1983] A.C. 570.

132 *OBG* [2008] 1 AC 1 at [141].

133 *Total Network* SL [2008] 1 AC 1174 at [67].


Although it has not yet been authoritatively adopted in Australia in its modern incarnation, the tort of causing loss by unlawful means has received judicial support.\textsuperscript{137} In \textit{Hardie Finance Corporation Pty Ltd v Ahern} the Western Australian Supreme Court accepted “that the unlawful means tort forms part of the Australian common law on the basis that the decision in \textit{OBG v Allan} is well-reasoned, has been applied in Canada, and is not inconsistent with any decision of the High Court.”\textsuperscript{138}

By contrast, decisions of lower Australian courts have challenged the existence of the tort,\textsuperscript{139} leading the Victorian Court of Appeal to acknowledge in 2015 that “appellate courts in Australia have expressed reservations about accepting the broader tort in this country.”\textsuperscript{140} In \textit{Qantas Airways Ltd v Transport Workers Union of Australia} a single judge of the Federal Court, Moore J, said that the tort does not form part of the landscape of the Australian common law.\textsuperscript{141} McDougall J, a single judge of the New South Wales Supreme Court, applying \textit{Qantas} in \textit{Nyoni v Shire of Kellerberrin (No 2)} said “I expressly find the unlawful means tort does not form part of the landscape of the Australian common law.”\textsuperscript{142}

In \textit{Deepcliffe Pty Ltd v Council of the City of Gold Coast} McMurdoo P of the Queensland Court of Appeal expressed the view that the existence of the unlawful means tort had not been successfully established in Australia.\textsuperscript{143} In a separate judgment in that case Williams JA said that, in light of the reasoning of the High Court in \textit{Sanders v Snell}, it was not for first instance or even intermediate courts “to hold that such a tort does exist in Australian law.”\textsuperscript{144}

Neyers\textsuperscript{145} attributed the relative lack of recourse to this tort in Australia to \textit{Sanders v Snell}, in which the High Court left open the question of whether or not causing loss by unlawful means is part of the law of Australia, describing it as “embryonic or emerging.” While expressly declining to determine whether “a tort of interference with trade or business interests by an unlawful act should be recognised in Australia” the Court equally did not rule it out from being formally recognised in the future.\textsuperscript{146}


\textsuperscript{138} \textit{Hardie Finance Corporation Pty Ltd v Ahern} [2010] WASC 403, referenced in Neyers, n 33 at p 119.

\textsuperscript{139} See Barker K et al, \textit{The Law of Torts in Australia} (5th ed. 2012) at pp. 291 ff.

\textsuperscript{140} \textit{Boral Resources (Vic) Pty Ltd v CFMEU} [2014] VSC 429 at [47].

\textsuperscript{141} (2011) 280 ALR 503 at [422]-[430].

\textsuperscript{142} [2012] FCA 1477 at [45]-[46].

\textsuperscript{143} [2001] QCA 342.

\textsuperscript{144} \textit{Deepcliffe Pty Ltd v Council of the City of Gold Coast} [2001] QCA 342 at [74].

\textsuperscript{145} Neyers, n 33 at 119.

\textsuperscript{146} \textit{Sanders v Snell} (1998) 196 CLR 329 at 341.
Chapter Two: The Composition of the General Economic Torts

The status of the tort has also been clouded by other decisions in which lower courts have elected to neither confirm nor deny its existence. In Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd it was said that “what the law is in Australia on this subject must await the authoritative determination of the High Court.”

The High Court has recently signalled its interest in having an opportunity to consider the issue. In CFMEU v Boral Resources (Vic) Pty Ltd in 2014 the Victorian Court of Appeal resisted the appellant’s invitation to find that the tort was available under Australian law. When an application was then made to the High Court for leave to appeal on the question of whether the tort of intimidation forms part of the common law of Australia, leave was refused on the basis that matter was settled. However, Nettle J indicated the High Court’s interest in having an opportunity to consider the status of the broader tort, saying “if the question was whether there was an unlawful means tort part of the Australian common law that would be all very interesting.”

The confused position in Australia contrasts with certainty as to the tort’s availability in New Zealand and the recent clarifications that have been undertaken in the United Kingdom and Canada. It will be recalled that causing loss by unlawful means was “decisively affirmed” by the House of Lords in OBG, and by the Canadian Supreme Court in AL Enterprises.

Unsurprisingly, the uncertainty surrounding the precise dimensions of this cause of action in Australia appears to have affected the frequency with which it is litigated. Writing in 2011, Neyers observed the surprisingly limited impact of OBG on Australian jurisprudence (relative to other common law jurisdictions) since the case was decided in 2007. He noted that as of January 2011 OBG was making a significant impact in Canada, having been cited in fifteen first instance and appellate decisions, whereas by contrast in Australia at the same point “it was cited in only seven first instance decisions and one appellate decision.”

Although there had been a long-running debate as to whether the inducing breach of contract tort might be “subsumed in the tort of causing loss by unlawful means,” Lord Hoffmann decisively opined on this in the negative. Thus, following OBG, “it is now clear that the unlawful means tort is (unlike the Lumley v Gye tort) not a form of accessory liability but a primary and substantive tort” and that causing loss by unlawful means is not a general

147 Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd [2010] ACTSC 20.
148 CFMEU v Boral Resources (Vic) Pty Ltd [2015] HCATrans 122 at page 9 of transcript.
149 See Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 N.Z.L.R. 131 (C.A.) and Diver v Loktronic Industries Ltd [2012] NZCA 131 (NZLII) at [100].
150 Neyers, n 33 at p 119.
151 OBG, n 12 at [32] per Lord Hoffmann. The basis for Lord Hoffmann’s view is described in Part III of Chapter Three of this thesis.
principle or “genus” tort. One of the key elements of the decision in OBG was to affirm that inducing breach of contract and causing loss by unlawful means are separate actions.

Neyers characterised the “classic example” of the unlawful means tort in action as follows: “the defendant assaults third parties (such as customers of the plaintiff’s shop) with the intention of driving them away and harming the plaintiff.”

The general Australian consensus, in cases where the tort has been applied, is that it has two essential ingredients: a) a wrongful interference with the actions of a third party in which the plaintiff has an economic interest (ie. unlawful means); and b) an intention thereby to cause loss to the claimant. This aligns with the English case law precedents. These elements have application, in one way or another, (but in nuanced ways) across the majority of the economic torts: Carty noted that “most commentators agree that the economic torts require intentional harm and unlawful means” as key ingredients.

The case law has developed two alternative, conceptions of unlawful means for the innominate unlawful means tort: a ‘narrower view’ and a ‘wider view.’ There is a need to clarify for Australia the question of which categories of conduct should be regarded as constituting unlawful means for the purposes of the innominate tort. This issue will be discussed in Chapter Three below.

The second major ingredient of the unlawful means tort, intention, has also been the subject of judicial and academic debates. Carty described the “orthodox view” of the requirements of intention for the unlawful means tort that existed prior to OBG as being “the harm needed to be aimed, directed or targeted in the sense that ‘causing the [plaintiff] economic harm will be a specific object of the conduct in question’.” This orthodox view can be traced from Lord Watson’s dictum in Allen v Flood through to Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots.

However, in OBG the House of Lords sought to re-cast the definition of intention in the context of this tort, stating that it should be thought of in terms of means and ends. Carty said

152 Lee, n 10 at 331.

153 This is an important finding, because recognition of the separateness of the innominate unlawful means tort cause of action has the effect that it is unnecessary to prove that there has been interference with a contract to which the plaintiff is a party, or that a combination of persons are responsible for any injury to the plaintiff.

154 Neyers, n 33 at p 129; See also Stevens, n 116 at pp 276-77.

155 These elements for the tort are stated by Balkin and Davis, n 2 at 606 [21.27] (writing in 2009). The elements are also described by Lord Hoffmann in OBG, n 12 at [47].

156 Carty, n 7 at p 170. Carty spells out her interpretation of the ingredients of the unlawful means tort at pp 78-79.

157 Ibid at p 128; Carty, n 7 at pp 80-4.

158 Allen v Flood [1898] AC 1 at 96.

that in *OBG* “the orthodox definition of intention for this tort appeared to be rejected.”\(^{160}\) The majority in *OBG* decided that the unlawful means tort required active “proof of an intention to injure the plaintiff and that therefore proof that the harm was merely a reasonably foreseeable consequence of the defendant’s actions did not suffice to impose liability.”\(^{161}\)

Lord Hoffmann saw this adjusted approach as preferable to “the danger of giving a wide meaning to the concept of unlawful means and then attempting to restrict the ambit of the tort by giving a narrow meaning to the concept of intention.”\(^{162}\) He said:

[I]t is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one’s actions.\(^ {163}\)

This approach has been criticised. Carty said that a straightforward (and deliberately narrow) definition was replaced with one that has an uncertain scope.\(^ {164}\)

Neyers suggested that if at some future time the High Court is to clarify the position of the unlawful means tort in Australia it should more explicitly take ‘targeting’ into account in assessing transgression of the torts. He advocated a “return to using the orthodox ‘aimed, directed or targeted’ understanding of intention”\(^ {165}\) which acknowledges “the plaintiff’s right not to have others act with the predominant purpose of causing them injury.”\(^ {166}\)

Deakin and Randall also encouraged a reformulation - one which would focus “more on the nature of the interest at stake, and on the need for ‘targeting’ of the claimant” and advocated that “the general requirement for liability in tort for interfering with trade … should be restated in terms of the defendant ‘aiming at’ or ‘targeting’ his conduct at the [plaintiff].”\(^ {167}\) They saw ‘targeting’ as “where the defendant’s conduct directly interferes with the trade or business of the other (and is also illegitimate, as in the sense of involving unlawful means or combination.)”\(^ {168}\)

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\(^{160}\) Carty, n 7 at p 79.

\(^{161}\) Neyers, n 33 at p 118.

\(^{162}\) *OBG*, n 12 at [135], per Lord Hoffmann.

\(^{163}\) Ibid at [62], quoted by Neyers, n 33 at p 128.

\(^{164}\) See Carty, n 101 at 660.

\(^{165}\) Neyers, n 33 at p 128.

\(^{166}\) Ibid at pp 137-38.

\(^{167}\) Deakin and Randall, n 36 at 552. Deakin and Randall’s approach generally is described at Chapter Four, Part VIII of this thesis.

\(^{168}\) Ibid at 540-41. It should be noted that targeting can occur via means directed at a third party.
Chapter Two: The Composition of the General Economic Torts

VII. CONCLUSION: OPEN QUESTIONS SUMMARISED

The discussion above has highlighted the central issues which create difficulty in the practical application of the general economic torts. It can be seen that these torts continue to be affected by a large number of areas of uncertainty. Doctrinal incongruence and inconsistencies have meant that commentators continue to characterise aspects of the torts as anomalous or, in the words of Lord Nicholls in OBG, “passing strange.” As a result of the judicial and academic scrutiny they have been subjected to over the past decade, the torts may not be as “obscure” as before, but they are far from settled. Four of the most important areas of uncertainty are briefly summarised below.

The first point to note is that there have been misconceptions about the scope of the tort of inducing breach of contract and its relationship with the broader tort of causing loss by unlawful means. This can be partly explained by the efforts that were made to develop “a unifying ground of liability” for the torts. Whilst it is now established “that there is no unified theory linking the tort of inducing breach of contract with the tort of unlawful interference with trade, and that the two are quite separate wrongs” the precise boundaries of these two torts are still being clarified.

Second, some argue that the lawful means conspiracy tort is anomalous, and the validity of basing liability for lawful means conspiracy on “the mere fact … of a combination of persons” has been criticised. It would be helpful if there was re-confirmation by a superior court of the exact dimensions of this tort in Australia. It is well-established that this tort requires a ‘heightened standard’ of purpose – that bringing about the harm was the ‘predominant’ motive of a defendant – but additional clarification of the exact nature of this test would be welcome.

Third, there has been a failure to date to state a clear test of the scope of unlawful means for the purpose of the tort of conspiracy by unlawful means, with differences between the standards adopted by courts in England and Australia. The resulting uncertainty is compounded by the adoption of starkly different interpretations of the meaning of ‘unlawful means’ depending on whether the tort of unlawful means conspiracy or the tort of causing loss by unlawful means is in focus.

Fourth, there is a continuing need for Australia’s High Court to affirm the existence in Australia of the innominate tort of causing loss by unlawful means, to delineate precisely how it varies from the tort of intimidation and to clarify the tests applicable to its constituent elements. In particular, there is a need to resolve the divided views reflected in the majority

169 OBG, n 12 at [162], per Lord Nicholls.


171 The quest for a unifying ground of liability was traced by Balkin and Davis, n 2 at 580 [20.4] and 581 [20.6], and by Deakin and Randall, n 36.

172 Balkin and Davis, n 2 at 592.

173 Stevens, n 116 at pp 276-77, referenced by Neyers, n 33 at p 132.
and minority judgments in *OBG* and the subsequent *Total Network* case) about what should count as unlawful means under this tort.

It can be seen from the foregoing discussion that the analysis required to determine whether a particular form of coercion is proscribed, and whether viable causes of action exist, requires scrutiny of difficult-to-fathom concepts: interests, intention, purpose and unlawful means, as well as justification, which is analysed in Chapter Seven below. The tests applicable to these concepts under Australian law remain uncertain. It is difficult to anticipate the choices which may be made by the High Court of Australia when it eventually has the opportunity to deliberate upon and clarify the open questions for Australia.

Chapter Three which follows briefly summarises the common law’s evolution of the general economic torts and focuses in particular on the problem of clarifying the meaning of ‘unlawful means’.
CHAPTER THREE
THE EVOLUTION OF THE GENERAL ECONOMIC TORTS AND THE UNLAWFUL MEANS DEBATE

I. INTRODUCTION

The common law’s development of the economic torts has resembled the journey of an automobile running out of petrol. Intermittent shudders and vibrations are followed by extended periods where the vehicle glides under its own momentum. Periodically, new shakes and ructions leave the passengers startled and uncertain as to their destination. The last decade has been one of these turbulent phases. After a long period in which the general economic torts had been “quiescent,”¹ they came into focus at the highest levels of the English judicial system in two significant cases reported in 2008 within a single edition of the Appeal Cases. In OBG v Allan² and then in Revenue and Customs Commissioner v Total Network,³ the House of Lords sought to recalibrate the general economic torts. In A.I. Enterprises Ltd v Bram Enterprises Ltd⁴ the Supreme Court of Canada endeavoured to interpret the House of Lords decisions for Canada.

The decisions in these cases, the most important economic tort judgments of the past decade, demonstrate the operation of the torts in a commercial context. OBG concerned the actions of defendants who took control of the claimant company’s assets as receivers appointed under a floating charge which proved to be invalid. In Douglas and another v Hello!,⁵ the second of three conjoined cases heard on appeal in the OBG matter, an action for causing loss by unlawful means was brought by the actors Michael Douglas and Catherine Zeta-Jones against a magazine which had published surreptitiously-taking photographs of their celebrity wedding, despite knowledge that a rival magazine had paid US$1 million for the exclusive right to photographs of the wedding. In Mainstream Properties Ltd v Young⁶ a financier facilitated the actions of two employees of a property company who had, in breach of their contracts, diverted a development opportunity to a joint venture in which they were interested. Total Network involved a conspiracy to defraud the taxation revenue authorities, whilst A.I. Enterprises involved machinations amongst family members over the sale of a valuable investment property.

In the past, discussion of the economic torts usually occurred in the context of labour law, the primary battleground for their development in the twentieth century. Carty’s view was that the torts were shaped by “judicial hostility to the growth of the trade unions” and concern

² [2008] 1 AC 1. This case is referred to hereafter as “OGB”.
³ [2008] 1 AC 1174. This case is referred to hereafter as “Total Network”.
⁴ [2014] SCC 12; [2014] 1 R.C.S. 177. This case is referred to hereafter as “A.I. Enterprises”.
⁶ [2005] IRLR 964. This was the third of the conjoined cases heard on appeal with OBG.
over the power they can wield. She saw them as “muddled” by courts’ “inability to appreciate the legitimacy of collective pressure.” As a result of their intermittent deployment against trade unions, the general economic torts have been politically contentious.

However, the new focus on application of the torts in commercial (and other) contexts means that the principles which underpin them must be generalisable across the full range of contexts. This need has reinvigorated debates about the implications, under these torts, of the employment of unlawful means by a defendant. Which categories of wrongful act should attract the application of the torts?

At the same time, the Australian common law regarding the general economic torts is at a surprisingly early stage of development. As was seen in Chapter Two, there is continuing uncertainty as to the elements which constitute a number of them – a result of judicial inattention and the lack of opportunity, thus far, for the High Court of Australia to clarify the ‘competing agendas’ revealed in OBG and Total Network.

This chapter will explore the potential implications for Australian common law of the trilogy of important recent United Kingdom and Canadian decisions: OBG, Total Network and A.I. Enterprises. It is important to begin with a brief review of the historical development of the general economic torts, a task which inevitably involves review of the English precedent base. This will occur in Part II. Part III will summarise key principles enumerated in OBG, Total Network and A.I. Enterprises. Part IV will examine the alternative conceptions of the notion of ‘unlawful means’ that have been in focus in the recent cases, and consider whether a narrower or wider view of unlawful means should be preferred.

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8 Ibid at p 3.


10 The relatively new context of collective environmental activism is in focus in Chapter Eight of this thesis.
Chapter Three: The Evolution of the General Economic Torts and the Unlawful Means Debate

I. HISTORICAL DEVELOPMENT OF THE ECONOMIC TORTS

A The Early Cases

It has been said that the economic torts barely existed before Miss Johanna Wagner, a popular Covent Garden opera singer of the 1840s who was under contract to sing at Her Majesty’s Theatre in London, failed to honour that engagement. Mr Gye, a rival opera impresario to the proprietor of Her Majesty’s, Mr Lumley, induced her to break her contract. The subsequent litigation, in *Lumley v Gye* established the modern incarnation of the tort of inducing breach of contract, the progenitor from which the other economic torts have derived. The effect of the case was to settle a principle that, despite the frequently ruthless nature of competition between businesspeople in the mid nineteenth Century, there were “limits, boundaries to permissible competitive behaviour” and “Mr Gye had exceeded the bounds of decent behaviour in his chosen line of business.”

Over time, the ambit of the incipient new family of torts began to expand. Lord Hoffmann surmised that “the judges in *Lumley v Gye* must have thought that poaching someone who was contracted to provide her services to a rival was crossing a bright line which could be enforced without practical or conceptual difficulties.” However, because the common law trades in broad general principles, the judges’ original narrow purpose of laying down “a common rule about what amounts to unfair competition” became overwhelmed by wider applications of its principles.

The sentiment of *Lumley v Gye* was reinforced, and broadened, by key principles stated by the English Court of Appeal in *Mogul Steamship Co Ltd v McGregor, Gow & Co*. The case involved a trading cartel of shipowners, working in concert to establish a monopoly of an important trade in tea, and to secure high profits. The conduct of the cartel, outrageous by modern-day standards, included the offering of loss leaders and special rates to those refusing to deal with its competitors. Lord Bowen said:

No man, whether trader or not, can … justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.

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12 (1853) 118 ER (749) (QB).


14 Ibid at p 107.

15 Ibid at pp 106-7 comprehensively discusses the historical setting for *Lumley v Gye*.

16 (1889) 23 QBD 598.


18 *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889) 23 QBD 598 at 614, per Bowen LJ.
B The Inhibition of Trade Union Activities

The social development that spurred the take-off of the economic torts was the rise of the trade union movement. The strike, or the threat of a strike, which had become “the ultimate bargaining weapon of a nineteenth century trade union,” quickly became an object of judicial consternation. \(^{20}\)

In two important cases at the turn of the twentieth century the House of Lords explored the question of whether there should be liability for abuse of economic power and for putting pressure on an employer “even where no independently unlawful act is committed.” \(^{21}\) In *Allen v Flood* \(^{22}\) the House of Lords saw there was no such liability. This case involved a dispute between ironworkers and shipwrights, where the ironworkers union urged an employer to terminate the employment of shipwrights, failing which a strike would occur. The employer dismissed the shipwrights, and they brought an action against the key union official alleging malicious interference with their employment. The action failed on the basis nothing unlawful had been done – the shipwrights had been dismissed lawfully and not in breach of contract.

Carty characterised the majority in this case as taking an “abstentionist approach to liability for intentionally inflicted economic harm,” even “where intentional and unjustified economic harm was inflicted, liability would only follow where unlawful means were used.” \(^{23}\)

The subsequent case of *Quinn v Leathem* \(^{24}\) also involved actions by a trade union, but this time the House of Lords took a different view. A butcher (the plaintiff in the action) had employed non-union labourers, and was urged by the defendants to dismiss them in order to employ union workers. When the butcher refused, the union officials took action to effectively compel his largest customer to stop dealing with him, by threatening a strike of the customer’s union labour. The House of Lords in this case found a conspiracy to injure, as the defendants had been actuated by malice, having had “no just cause or excuse for their actions.” \(^{25}\) This was the genesis of “bad motive” conspiracy. The case established the principle that it is a tort deliberately to harm another without justification, and specifically that “a combination or conspiracy aimed at harming the plaintiff in his trade or business was actionable if it was motivated by malice against him.” \(^{26}\)

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\(^{19}\) Hoffmann, n 11 at p 108.

\(^{20}\) Ibid at p 109. Hoffman commented that in *Temperton v Russell* [1983] 1 QB 715 (CA) “one cannot read the description of the union’s activities by the Master of the Rolls without seeing disapproval dripping from every sentence.”

\(^{21}\) Elias and Ewing, n 17 at 322.

\(^{22}\) [1898] AC 1.

\(^{23}\) Carty, n 7 at p 17.

\(^{24}\) [1901] AC 495.

\(^{25}\) Elias and Ewing, n 17 at 323.

\(^{26}\) Deakin and Randall, n 1 at 522.
Chapter Three: The Evolution of the General Economic Torts and the Unlawful Means Debate

Carty has criticised *Quinn v Leatham* as “sowing the seeds of confusion” and sidelining a coherent framework articulated by Lord Watson in *Allen v Flood*.\(^{27}\) The orthodox view of these cases is that the element of conspiracy in *Quinn v Leatham* is the distinguishing feature between the two fact situations:

> In *Allen* a single trade union official was the defendant; in *Quinn v Leatham* a group of trade unionists were combining together. So motive and purpose became relevant where a combination of persons was acting together. The apparent justification for this was the belief that the coercive pressure of a group far outweighed that of an individual acting alone.\(^{28}\)

The establishment of liability for “abuse of the right to combine” was a major threat to the union movement. After political manoeuvrings, “Parliament came to the rescue” with passage of the *Trade Disputes Act (UK) 1906* which contained an immunity from the tort of simple conspiracy for defendants “acting in contemplation or furtherance of a trade dispute.”\(^ {29}\)

Elias and Ewing characterised *Mogul Steamship, Allen v Flood* and *Quinn v Leatham* as “the trilogy of cases where the ground rules of the economic torts were established.”\(^ {30}\) As will be seen in Part III of this chapter, over the past decade, fresh impetus for the development of the torts has been provided by a ‘new trilogy’ of cases.

C The Twentieth Century ‘Muddle’

The further evolution of the torts over the course of the twentieth century has been chronicled by a number of English academics.\(^ {31}\) In Carty’s view, from a doctrinal perspective, they got “into a muddle” during the middle years of the century.\(^ {32}\)

In a series of cases, starting with *Sorrell v Smith*\(^ {33}\) and culminating in *Crofter Hand Woven Tweed Co Ltd v Veitch*,\(^ {34}\) “the courts accepted that the pursuit of union objectives as the predominant motive would constitute a justification and remove any liability for conspiracy.”\(^ {35}\) The judges in *Crofter* required “disinterested malice” on the part of conspirators, and accepted the following precept:


\(^{28}\) Elias and Ewing, n 17 at 324.

\(^{29}\) Ibid at 325. See also Hoffmann, n 11 at pp 110-111. A form of this Act remain in place in the UK to the present day.

\(^{30}\) Ibid at 335. To this list must be added the “new trilogy” discussed in Part III of this chapter.

\(^{31}\) See Deakin and Randall, n 1; Carty, n 7; Elias and Ewing, n 17. See also Chapter Four of this thesis.

\(^{32}\) Carty, n 27 at 641.

\(^{33}\) [1925] AC 700 (HL).

\(^{34}\) [1942] AC 435.

\(^{35}\) Elias and Ewing, n 17 at 324.
… the pursuit of union objectives as the predominant motive would constitute a justification and remove any liability for conspiracy. However unethical, self-interest provides protection for trade unionists no less than for traders.36

_Crofter_ involved an embargo imposed against producers of Harris tweed, whose spinning mills were located on an island. The embargo was organised by officials of the Transport and General Workers Union, who had instructed dockers to refuse to handle yarn from the mainland consigned to the plaintiffs. The House of Lords held that “the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining, and since the means employed were neither criminal nor tortious in themselves, the combination was not unlawful.”37

Malice was interpreted as “the absence of economic justification; that is to say, the critical issue was whether the combination could be justified by the economic self-interest of the group.”38 For liability to arise, the court required “an intention to injure unaccompanied by any wish to advance their own interests.”39

Later, there came “an unexpected late revival of the economic torts” driven by an upsurge in the exercise of union power in the UK in the 1960s and 1970s which alienated the public, and judges.40 _Rookes v Barnard (No. 1),_41 in that it involved union officials urging an employer to terminate the employment of non-unionists, presented a set of facts quite similar to _Allen v Flood_ six decades earlier, except that “the workers involved in _Rookes_ were employed under contracts containing lengthy notice periods, so that the threatened strike action was unlawful.”42 _Rookes_ has been widely seen as a turning point which opened up new avenues of liability, including the tort of intimidation.43

36 Ibid.


38 Deakin and Randall, n 1 at 522.

39 Hoffmann, n 11 at p 111.

40 See Hoffmann, n 11 at pp 112-113. He noted that the union excesses of the 1960s and 1970s led to passage of revised industrial relations legislation in the UK in the 1980s by the Thatcher government, the essential framework of which persists to the current day. The scheme of this legislation is to accept that, at common law, virtually all forms of industrial action are unlawful, but the legislative provisions make virtually all forms of industrial action lawful (if preconditions such as secret ballots have been met).

41 [1964] AC 1129.

42 Deakin and Randall, n 1 at 522.

43 Ibid at 524. According to Lord Hoffmann (n 11 at p 112) in _Rookes_ “the antique cases about using violence to frighten away customers or suppliers were generalised into a tort of intimidation, using threats of unlawful action against a third party to cause damage to the target.”
III. THE NEW TRILOGY: KEY RECENT CASES

A. OBG v Allan

OBG has been described as “a magnificent attempt to take the economic torts bull by the horns.”44 In this case the House of Lords deliberated on three conjoined appeals, which the Lords decided to hear together because of their overlapping legal issues concerning the intentional harm tort.

The lead OBG case involved a “claim by a company in liquidation for damages in respect of losses sustained by the company through acts done by administrative receivers whose appointment was later held to be invalid”45, in which the appellants sought to widen the scope of the tort of conversion which meant that “the principles behind economic tort liability were raised.”46 In Douglas v Hello! Ltd47 (which was also reviewed as part of the OBG appeal) the focus was on the role of intention in the torts and issues about breach of confidence arising from publication of photographs taken surreptitiously at a celebrity wedding (the wedding of the actors Michael Douglas and Catherine Zeta Jones).48 Mainstream Properties Ltd v Young49 concerned wrongful interference with contractual relations and alleged breaches by directors of their obligations to their company. Although this case might have been treated as a claim for dishonest assistance in breach of fiduciary duty its consideration by the House of Lords enabled “the essentials of the Lumley tort” to be addressed.50

The facts and background in OBG have been concisely summarised by Hazel Carty:

The claimant company sought damages in respect of losses resulting from acts done by receivers who had been invalidly appointed over them. The claimants were aggrieved that the receivers’ handling of the ‘run off’ from of the claimants’ contracts led to less satisfactory outcomes than the claimants would otherwise have achieved through their liquidators. However, neither bad faith nor negligence was alleged in the defendants’ management of the claimants’ contract claims. Rather, the claimants objected per se to the receivers’ invalid assumption of control over their contracts.51

44 Carty, n 7 at p 23. Carty saw (at p 25) that “an agenda for the twenty-first century appeared to have been drawn up.”

45 Ibid at p 137.

46 Ibid at p 23.


48 See the comments made on this case by Carty, n 7 at pp 23 and 138.


50 Carty, n 7 at p 23, referencing Total Network [2008] 1 AC 1174 at [97], per Lord Walker.

51 Ibid at p 34.
Chapter Three: The Evolution of the General Economic Torts and the Unlawful Means Debate

The House of Lords rejected the claim in *OBG*. In a split decision, the majority “distinguished the conspiracy tort from the unlawful means tort and held that a more flexible definition of ‘unlawful means’ was needed in the conspiracy context.” More important than the findings around liability in the case itself were the ground-breaking statements in the judgements about the patterns of liability underpinning the general economic torts. Lord Brown perceived a need “to confine [the tort of causing loss by unlawful means] to manageable and readily comprehensible limits.” Lord Walker concurred, expressing the challenge as “the identification of the control mechanism needed in order to stop the notion of unlawful means getting out of hand.” (A similar desire to place boundaries around the scope of the tort had previously been expressed by the High Court of Australia in *Sanders v Snell*.54)

The majority judgments in *OBG* were primarily concerned with establishing (or re-affirming) the existence of the tort of unlawful means, tracing the history of its development and advancing the process of defining the nature of the elements of the tort. The judges comprising the majority did not concern themselves in any detail with specifying the rationale for the tort. Lord Hoffmann (representing the majority view which favoured a ‘narrower’ interpretation of the tort) dealt only lightly with rationale, by referring to *Quinn v Leathem* and the way “the rationale of the tort was described by Lord Lindley” in that case.55

A noteworthy feature of the claimants’ arguments in this case was that they sought to combine favourable ingredients of two torts – inducing breach of contract and the ‘unlawful means’ tort – in order to arrive at a new extended form of economic tort liability. They did this in order to overcome limiting features of the well-established torts: “they could not show that the receivers employed unlawful means, nor that they intended to cause *OBG* any loss, ruling out the unlawful means tort. Nor could they show any contract breach was involved, ruling out the *Lumley* tort.”56 As Carty highlighted, the method used by the claimants to plead this ‘hybrid’ tort was to rely on “a ‘broad reading’ of Lord Macnaghten’s dictum in *Quinn v Leathem* – that *Lumley* liability was based on a violation of a legal right through interference with contractual relations without sufficient justification.”57 Whilst these arguments were accepted by the Court of Appeal the majority of the House of Lords rejected them.

Neyers saw four main elements of the *OBG* decision in relation to the unlawful means tort:

52 This interpretation of the *OBG* decision was expressed by Cromwell J in *A.I. Enterprises* [2014] SCC 12; [2014] 1 R.C.S. 177 at [53], cross-referencing paragraphs [44], [76]-[77] and [94] of Lord Hoffmann’s speech in *OBG*.

53 *OBG*, n 2 at [266], per Lord Walker.

54 *Sanders v Snell* (1998) 196 CLR 329 at 341. This case was referenced in Chapter One, Part II (C) of this thesis.

55 *OBG* [2008] 1 AC 1 at [46], per Lord Hoffmann, referring to *Quinn v Leathem* [1901] AC 495, 534-535.

56 Carty, n 7 at pp 34-5.

57 Ibid at p 34.
First, that inducing breach of contract and causing loss by unlawful means were separate actions that cannot be reduced to one genus tort … second … the unlawful means tort required proof of an intention to injure the plaintiff and that therefore proof that the harm was merely a reasonably foreseeable consequence of the defendant’s actions did not suffice to impose liability. The third key element was that only means that are actionable by the intermediate third party (or would have been so actionable had the third party suffered loss) and which affected that party’s liberty to deal with the plaintiff, suffice as the “unlawful means” for the purposes of imposing liability. Thus, crimes and breaches of statute were excluded as unlawful means for the purpose of the tort … [Fourth] the unlawful means tort is a three-party tort involving a plaintiff, a defendant and an injured or threatened third party.58

Carty itemised a string of ways in which areas of uncertainty were clarified by OBG: it was found that “the unitary approach was fundamentally wrong”59 and “the first in-depth analysis of the unlawful means tort was achieved, the majority demanding actionable civil wrongs as the basis of this tort.”60 She noted that:

… their Lordships highlighted the danger of accepting the kind of hybrid liability that had been suggested. They killed off the tort of interference with contractual relations, as proposed. They rejected the ‘unified theory’. They established the only form of the Lumley tort is the classic form which focuses on ‘secondary’ liability for inducing a breach of contract.61

Carty said the effect of the case was that it “offered as a framework for the general economic torts … a two-tort paradigm, based on a three-party scenario, the defendant deliberately striking at his target through a third party.”62

A key issue the House of Lords grappled with in OBG was the nature of unlawfulness required to satisfy the first element of the unlawful means tort, of wrongful interference: “what should count as unlawful means?”63 Lord Hoffmann described this as “the most important question concerning this tort.”64 As was noted in Chapters One and Two of this thesis, the case law has developed two alternative conceptions of unlawful means: a ‘narrower view’ and a ‘wide view.’65 On the question of which of these conceptions is most appropriate their Lordships were divided, with the majority preferring the narrower view, according to which unlawful means is only constituted by an ‘actionable civil wrong’.

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59 Carty, n 7 at p 24.

60 Ibid at p 25.

61 Ibid at p 25.

62 Ibid at p 25.

63 OBG [2008] 1 AC 1 at [266], per Lord Hoffmann; and at [302], per Baroness Hale.

64 Ibid at [45], per Lord Hoffmann.

65 See Chapter One, Part II (D).
In a subsequent article Lord Hoffmann summarised the effect of OBG: “the tort of causing loss by unlawful means was severely restricted to loss caused by acts which were tortious against third parties and caused loss to the plaintiff by restricting the ability of the third party to deal with him, so pruning the tort back to the original cases of deliberate violence or fraud against customers or suppliers for the purpose of taking away a rival’s business.” He acknowledged that an important reason for this part of the decision of the majority was “a wish to confine the economic torts as narrowly as possible, on the grounds that they have little rational basis in social or economic policy and that such matters are best left to the legislature.”

The debate around the meaning of unlawful means is analysed in Part IV of this chapter.

**B Total Network**

The Total Network case involved an allegation that the defendant had conspired with others to deprive the Revenue and Customs Commissioners in the United Kingdom of revenue from value added tax (‘VAT’) via a series of thirteen ‘carousel frauds’ involving sales of mobile phones. The scheme capitalised on the fact that no VAT was payable on imports into the UK from a country in the European Union, or exports out of the UK to somewhere else in the European Union. The defendant was a Spanish company from whom phones had been bought, which was a party to the fraud. The defendant’s conduct constituted the common law offence of ‘cheating the Revenue’, but this was not actionable by the Commissioners as a civil suit.

The question in issue in the case was whether this crime constituted ‘unlawful means’ for the purposes of the tort of unlawful means conspiracy and whether the alleged unlawful means employed by the defendant must have been independently actionable by the party against whom it was inflicted. An argument made against a crime amounting to sufficient unlawful means was that the tort gave effect to a form of accessory liability (i.e. A is liable for a wrong committed by B to C, because A agreed with B that B would perpetrate that wrong upon C). This argument was unsuccessful.

The defendants also argued, citing the decision in OBG just a few months earlier, that for the sake of consistency ‘unlawful means’ must have the same meaning under both the unlawful means conspiracy tort and the innominate tort of causing loss by unlawful means. This argument was rejected, for two reasons. First, it was seen that it would be anomalous if a claimant could sue in ‘lawful means conspiracy’ where no-one had actually done anything wrong to cause loss, that the same claimant could be prevented from suing in unlawful means conspiracy simply because the means used were ‘merely criminal’. Second, it was felt that Lord Hoffmann’s views in OBG on the meaning of unlawful means might only apply in two-party cases, i.e. cases where a defendant intentionally caused a claimant harm directly (rather

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66 Hoffmann, n 20 at 114.

67 Ibid at 113.

than by interfering with a third person’s freedom to deal with the claimant). 69 This is an important distinction for the purposes of this thesis, because the thesis is primarily concerned with the conduct of groups acting in concert.

In Total Network it was unanimously held that, for unlawful means conspiracy, “a common law offence could count as ‘unlawful means’ even if it was not separately actionable by the claimant. In this connection, the stricter approach in OBG was distinguished as one that was intended to apply only to a three-party unlawful means tort.” 70 Lord Walker’s concluded that the law should be clarified “by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means … of intentionally inflicting harm.” 71 Carty’s brief summation was that “the Total Network panel asserted that other two-party economic torts – such as conspiracy – would not necessarily be encompassed by the analysis in OBG. Therefore, a different definition of unlawful means could be applied to the conspiracy tort compared to the unlawful means tort.” 72 She framed the decision in Total Network as follows: “crimes (though not all crimes) constituted unlawful means for the tort of unlawful means conspiracy, even though OBG established they would not for the unlawful means tort.” 73

The Total Network decision has been evaluated by a wide range of commentators. Deakin and Randall concluded that “the analysis in OBG raises as many questions as it answers” 74 and that the case “while clearing away some doctrinal confusions, has created new uncertainties.” 75

Lee saw that whilst the case “clarified that ‘unlawful means’ in the context of the conspiracy tort should be construed broadly to include crimes that are not also civilly actionable” this did not mean that any unlawful act will suffice and it is likely that in the future “greater reliance will have to be placed on the need to demonstrate a tight causal link between the unlawful act and the injury sustained to rein in the tort.” 76 Lee’s assessment, based on analysis of the judgements of Lords Hope, Mance and Neuberger, was that they saw the “gist” of the tort of unlawful means conspiracy as lying in:

… the intentional infliction of harm through a combination. That being the case there was no reason for insisting on a “single consistent approach as to what constitutes unlawfulness in relation to all the economic torts” and no reason why unlawful means conspiracy could not be established by a crime that was not also actionable as a tort. 77

69 McBride and Bagshaw, n 68 at p 710.

70 Lee, n 68 at 348.

71 Total Network [2008] 1 AC 1174 at [95] per Lord Walker.

72 Carty, n 7 at p 27.

73 Ibid.

74 Deakin and Randall, n 1 at 519.

75 Ibid at 552.

76 Lee, n 68 at 349.

77 Ibid at 348.
In McBride and Bagshaw’s view, the effect of *Total Network* is likely to be that courts will now develop over time a separate set of rules (distinct from the unlawful means tort) for the means required under the tort of unlawful means conspiracy.  

Carty’s evaluation of the case was entirely negative. While she assessed the analysis in *OBG* as a “search … for coherence and certainty,” partly accomplished, she despaired that “the *Total* decision has arguably undermined the prospect for clarity that *OBG* represented, and thrown the economic torts back into the mess they were before *OBG*. Carty commented that “the debate as to the existence and scope of two-party economic torts has been set alight by the House of Lords decision in *Total Network*, a debate which may lead to the emergence of two frameworks for economic tort liability and possibly the distortion of established areas of tort liability.”

### C A.I. Enterprises

In 2010, Carty wrote, following *OBG* and *Total Network*:

> What is required is that an agreed agenda for development be articulated. This would clarify the underlying rationale or rationales of the general economic torts and thereby establish the control mechanisms necessary to contain liability.

In the 2013 *A.I. Enterprises* case, a Full Court of the Supreme Court of Canada looked to rise to this challenge. The judgement of the Court, authored by Cromwell J, sought to “delve deeply into the rationale of the tort [of causing loss by unlawful means] and its place in the larger scheme of tort liability for causing economic harm” in order to set out the scope of liability for the tort for Canada.

*A.I. Enterprises* involved machinations amongst family members over the sale of a valuable investment property: the action was brought by Bram and Jamb, family companies which were majority shareholders of a corporation that owned an apartment building in New Brunswick, Canada. A minority interest-holder, A.I. Enterprises, whose sole director was A, exercised rights it held under a syndicate agreement and its arbitration processes in such a way as to delay a sale with the result that the property was eventually sold to A.I. Enterprises for $2.2 million, less than the $2.58 million that could have been obtained from a third party purchaser. The defendants also “impeded the sale by registering groundless encumbrances against the property and denying prospective buyers access to the property.”

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78 McBride and Bagshaw, n 6 at p 710.
79 Carty, n 27 at 642.
80 Carty, n 7 at p 3.
81 Carty, n 7 at p 168.
83 Ibid at 187 [7]. See also the comments made at 194 [26].
The trial judge found that the conduct of A.I. Enterprises and A amounted to interference by unlawful means and awarded damages against them reflecting the difference between the sale price paid by A.I. Enterprises and the price that a third party would have paid. A.I. Enterprises and A appealed. The Court of Appeal found their conduct did not meet the requirements of the unlawful means tort. It nevertheless imposed liability on them on the basis of a ‘principled exception’ to the unlawful means requirement. The idea that the unlawfulness requirement was subject to principled exceptions was a novel aspect of this decision.

When the Supreme Court heard the matter on a further appeal, it rejected the principled exception arguments but found that A.I. Enterprises and A were liable for the damages because of a breach by A of his fiduciary duties as a director of the family companies – a basis unrelated to the economic torts.

The Supreme Court took the opportunity to make a series of statements about the composition of the unlawful means tort, although – in view of the fact the matter was decided on the basis of a breach of fiduciary duty – these might be considered *obiter dicta.*

After reviewing the authorities Cromwell J observed that there was a need for a rationale for the unlawful means tort but there was “no consensus about what that rationale is or should be” and “no clear rationale as a matter of historical fact.” Lacking such a precedent, he set about defining a new ‘best rationale’ for the tort and concluded it “was ‘liability stretching’ - a rationale that favours a narrow approach to the unlawful means requirement.”

Cromwell J favoured a narrow view of unlawful means which required that acts “give rise to a civil action by a third party and interfered with the plaintiff’s economic activity.” The result of this approach was seen to be “extending civil liability without creating new actionable wrongs.” It would have the effect that “the potential scope of liability is limited by both the intention requirement and the more restrictive definition of the conduct which will support liability.”

The Supreme Court’s preferred approach focused on “extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct.” This would allow “those intentionally targeted by

85 A.I. Enterprises, n 4 at 178.

86 The Supreme Court found that A had taken groundless legal steps to obstruct the property sale in order to further his personal interests, knowingly assisted in a breach of fiduciary duty and knowingly received proceeds of the breach.


88 Ibid at 204 [49].

89 Ibid at 202 [45].

90 Ibid at 201 [43].

91 Ibid at 199 [37].

92 Ibid at 199 [37].
already actionable wrongs to sue for the resulting harm.”93 Liability would arise “where the wrongdoer’s acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff”94 The Court’s view was that “the gist of the tort” was “the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party.”95

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93 Ibid at 199 [37].

94 Ibid at 201 [43].

95 Ibid at 180.
IV. THE IMPLICATIONS OF ILLEGALITY

A The Difference of Views Surrounding Unlawful Means

As Chapter Two explained, the notion of ‘unlawful means’ is an integral element of inducing breach of contract, conspiracy by unlawful means, intimidation and ‘causing loss by unlawful means’. The width of the definitions applied to ‘unlawful means’ has been seen as one of two potential ‘control mechanisms’ able to be levered to inhibit the overall scope of the innominate unlawful means tort (with the other being intentionality). The precedents demonstrate significant variations in judicial approaches. As different definitions of unlawful means are applied across the various torts, problems of coherence and consistency arise.

Summarising the position as at 2009, Deakin and Randall observed that “the category of unlawful means stretches all the way from serious criminal conspiracies (as in Total Network) to threats to commit civil wrongs such as a breach of contract.” Heydon’s earlier assessment had been that illegal means under the innominate unlawful means tort “may be common law crimes like murder of a third party, or breaches of criminal statutes; torts, for example nuisance as against third parties, nuisance as against the plaintiff, trespass against the plaintiff, violence against third parties, defamation of the plaintiff, injurious falsehood … and breaches of contract.”

Specifically for the unlawful means tort (as shown by the outlines above of OBG, Total Network and A.I. Enterprises) the recent common law has developed two starkly different, but well-reasoned, conceptions of unlawful means: a ‘narrower view’ under which unlawful means is only constituted by an actionable civil wrong and “criminal offences and breaches of statute would not be per se actionable;” and an alternative ‘wide view’. The latter conception widens the net of the conduct qualifying as prima facie tortious, by embracing “all acts a defendant is not permitted to do, whether by the civil law or the criminal law.”

In the recent cases, the narrower view has been progressing towards orthodoxy. However, despite the strong judicial endorsements it has received, the narrower view is far from set in concrete, especially from an Australian vantage point. As Lee highlighted, “the debate as to

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96 See Deakin and Randall, n 1 and Neyers, n 58.
97 Deakin and Randall, n 1 at 551.
98 Heydon JD, ‘The Defence of Justification in Cases of Intentionally Caused Economic Loss’ (1970) 20 University of Toronto Law Journal 139 at 174. Heydon also (at 173) summarised conduct found not to constitute unlawful means: agreements in restraint of trade and “a system of fines and blacklists operated by members of a trade association to advance their trade interests” (Ware & De Freville Ltd v Motor Trades Association [1921] 3 K.B. 40) and “an invasion of privacy independently of trespass” (Byrne v Kinetograph Renters’ Society Ltd [1958] 1 W.L.R. 762) would not constitute unlawful means conspiracy.
99 Lord Hoffmann’s preference was based on the view “it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law” – OBG [2008] 1 AC 1 at [57]. See also [60].
101 OBG [2008] 1 AC 1 at [162] per Lord Nicholls.
the scope of ‘unlawful means’ remains very much alive in view of the lack of unanimity amongst the Law Lords in OBG.”

The situation is further complicated by the strength of judicial logic underpinning the contrary majority position in Total Network and contestable aspects of the analysis in A.I. Enterprises.

B The Narrower View

For the unlawful means tort, the majority in OBG adopted a narrow definition of unlawful means, under which “criminal offences and breaches of statute would not be per se actionable.”

Lord Hoffmann’s view was that acts against a third party should only count as unlawful means if they are actionable by the intermediate third party and affect that party’s liberty to deal with the plaintiff, with one qualification: “that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss.”

His Lordship added:

> It is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law … I do not think that the width of the concept of ‘unlawful means’ can be counteracted by insisting upon a highly specific intention, which ‘targets’ the plaintiff. That, as it seems to me, places too much of a strain on the concept of intention.

Under this view, crimes and breaches of statute would be excluded as unlawful means for the purpose of this tort. Lee concisely summarised the essence of Lord Hoffmann’s position as follows: “a person is liable for interference by unlawful means if he deliberately inflicts economic injury on another through the commission of civil wrongs against a third party intermediary.”

Lord Hoffmann’s position was supported by others in the majority in OBG.

The narrow view favoured by Lord Hoffmann was endorsed by a unanimous decision of seven judges of the Supreme Court of Canada in A.I. Enterprises. In that case, Cromwell J preferred a restrictive rationale for the tort:

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102 Lee, n 68 at 331. In Total Network [2008] 1 AC 1174 at [269], Lord Walker ventured that “neither [of the alternative views on unlawful means] is likely to be the last word on this difficult and important area of the law.”


104 OBG [2008] 1 AC 1 at [49], per Lord Hoffmann.

105 Ibid at [57] and [60], per Lord Hoffmann.

106 Neyers, n 58 at p 119.

107 Lee, n 84 at 560.

108 OBG [2008] 1 AC 1 per Lord Walker at [266]; also Lord Brown at [320].
… because it establishes a clear ‘control mechanism’ on liability in this area of the law, consistent with tort law’s reticence to intrude too far into the realm of competitive economic activity: OBG, at para. 266, per Lord Walker of Gestingthorpe. In the words of Baroness Hale of Richmond in OBG, it is “consistent with legal policy to limit rather than to encourage the expansion of liability in this area.”

The decision in A.I. Enterprises and the majority view in OBG both reflected a desire to limit or inhibit the scope of the unlawful means tort’s availability.

In A.I. Enterprises Cromwell J said that the focus should be “not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm” and that the tort should only be available if:

… under common law principles, those acts also give rise to a civil action by the third party and interfered with the plaintiff’s economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will therefore be no potential liability under the unlawful means tort.

The Supreme Court expounded four propositions in support of adopting a narrow scope for the unlawful means tort, reflecting “the modern role that the tort should play in the broader scheme of civil liability.” The first was the notion that the common law accords a relatively low level of protection to purely economic interests: “tort law has traditionally afforded less protection to purely economic interests than to physical integrity and property rights.”

A second proposition was the idea that “the common law generally prefers a limited role for the economic torts in the modern marketplace” - it was seen that the common law has traditionally been “reluctant to develop rules to enforce fair competition.” This is in line with the views of Carty, that “the role of fostering a healthy competitive order – whether that be by the regulation of monopolies, anti-competitive agreements, or policing trade descriptors – is essentially a matter for state regulation, in the interests of the public at large.”

Thirdly, there was a concern “not to undermine certainty in commercial law” and it was noted that “the common law … has generally promoted legal certainty for commercial affairs. That certainty is easily put in jeopardy by adopting vague legal standards based on...

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109 Ibid at [45], per Lord Hoffmann.


111 Ibid at 198 [36].

112 Ibid at 195, [29] and [30]. This aligned with Carty’s view that the unlawful means tort should not provide some form of “sweeping protection” from economic harm: Carty H, ‘The Economic Torts and English Law: An Uncertain Future’ (2006-2007) 95 Ky. L.J. 845.

113 Ibid at 201 [42].

114 Ibid at 201 [29]. See also [31].

115 Carty, n 7 at p 313.

“commercial morality” or by imposing liability for malicious conduct alone.” The Canadian Supreme Court harkened back to the view of Lord Morris in Mogul Steamship that “regulating commercial activity should not … depend on the idiosyncrasies of individual judges.”

Fourthly and finally Cromwell J listed the concern “that tort liability, if unduly expanded, may undermine fundamental rights.” He referenced “… the risk that expanded liability for the economic torts may be used to undermine legislative choices and perhaps even constitutionally protected rights of expression and association” and said that “a narrow and clear definition of the scope of liability reduces this risk.” A limited scope for the unlawful means tort was supported by:

… the risk inherent in the economic torts generally that they will undermine legislative schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of association and expression. At one time the common law was ready – and many would say overready – to intervene to prevent economic coercion in the context of industrial disputes. The common law’s approach in this area led to legislative intervention to grant greater freedom to labour unions by enacting immunities to specific economic torts, in legislation.

Cromwell J noted that the common law’s approach in the area of the economic torts led to “legislative intervention to grant greater freedom to labour unions by enacting immunities to specific torts” (legislation modelled on the UK Trade Disputes Act 1906 and successor Acts). This was seen to be one of the factors supporting the “wisdom of viewing the unlawful means tort as one of narrow scope.”

It will now be argued that the judicial viewpoints expressed around these considerations are contestable and that the wide view of unlawful means is the preferable conception.
The alternative ‘wider view’ was favoured by a minority of the judges in *OBG*. It was most clearly expressed by Lord Nicholls who said: “the concept of ‘unlawful means’ stretches far and wide. It covers common law torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on.”\(^{121}\)

In making these observations His Lordship relied upon key judicial statements in *Rookes v Barnard*.\(^{122}\) In that case Lord Reid articulated a distinction between “doing what you have a legal right to do and doing what you have no legal right to do”\(^{123}\) whilst Lord Devlin observed that it was “of course” accepted that a threat to commit a crime was an unlawful threat. Lord Devlin went on to note: “It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and unlawful as against the party threatened.”\(^{124}\) Lord Nicholls said:

> I accept the approach of Lord Reid and Lord Devlin and prefer the wide interpretation of ‘unlawful means’. In this context the expression ‘unlawful means’ embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.\(^{125}\)

Lord Nicholls began his judgment by considering the ingredients of the relevant economic torts.\(^{126}\) He noted that although “the common law of England has adhered to the view that ‘unlawful’ conduct is a prerequisite of liability under the tort of unlawful interference with trade”\(^{127}\) the content of this expression was not well established and there was “some controversy” about its scope.\(^{128}\)

His Lordship referred approvingly to the writings of the legal academic Tony Weir,\(^{129}\) whom he described as a “staunch supporter” of the approach of “having an objective element of unlawfulness as the boundary of liability.”\(^{130}\) The sympathies of the Canadian academic Jason Neyers – derived from a standpoint of ‘strict legalism’ - also tend to align with the wider view.\(^{131}\)

\(^{121}\) *OBG* [2008] 1 AC 1 at [150], per Lord Nicholls.

\(^{122}\) *Rookes v Barnard* [1964] AC 1129.

\(^{123}\) Ibid at 1168-169, per Lord Reid.

\(^{124}\) Ibid at 1206-207, per Lord Devlin.

\(^{125}\) *OBG* [2008] 1 AC 1 at [162], per Lord Nicholls.

\(^{126}\) Ibid at [140], per Lord Nicholls.

\(^{127}\) Ibid at [145], per Lord Nicholls.

\(^{128}\) Ibid at [149], per Lord Nicholls.

\(^{129}\) He referenced Weir T, ‘Economic Torts’ (1997) at p 3. Weir’s viewpoints are described at Part IV of Chapter Four of this thesis.

\(^{130}\) *OBG* [2008] 1 AC 1 at [147], per Lord Nicholls.

\(^{131}\) Neyers, n 58 at p 120.
In Lord Nicholls’ view “the true rationale” underlying the lawful interference tort was that:

… by this tort the law seeks to curb clearly excessive conduct. The law seeks to provide a remedy for intentional economic harm caused by unacceptable means. The law regards all unlawful means as unacceptable in this context.\(^\text{132}\)

The wider view was supported by the subsequent comments of Lord Walker of Gestingthorpe in *Total Network* (in which he departed somewhat from his own views expressed nine months earlier in the majority in *OBG*). Lord Walker said that “criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means … of intentionally inflicting harm.”\(^\text{133}\) His Lordship also said:

… all the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it).\(^\text{134}\)

It should be noted that the “Australian conspiracy analysis” applying to the tort of conspiracy by unlawful means, under which the requisite unlawfulness can be constituted by breach of contract, crimes and breaches of statute, also accords with a wider view of unlawful means.\(^\text{135}\)

Two principal objections to the wider view have been expressed in the literature. The first, which has been argued by Hazel Carty, a leading advocate of the “narrower view conception”\(^\text{136}\) is that it is important to apply control mechanisms to the general economic torts rather than broaden their scope of operation.

A second objection was acknowledged by Lord Nicholls in *OBG*: that the wider view “tortifies” criminal conduct.\(^\text{137}\) In *A.I. Enterprises* Cromwell J addressed this, seeing that his preferred approach “avoids ‘tortifying’ the criminal and regulatory law by imposing civil liability where there would not otherwise be any.”\(^\text{138}\)

\(^{132}\) *OBG* [2008] 1 AC 1 at [155], per Lord Nicholls.

\(^{133}\) *Total Network* [2008] 1 AC 1174 at [95], per Lord Walker.

\(^{134}\) Ibid at [93] per Lord Walker.

\(^{135}\) The Australian conspiracy analysis was discussed in Part IV of Chapter Two of this thesis.

\(^{136}\) Carty’s views are discussed and analysed in Part V of Chapter Four of this thesis.

\(^{137}\) *OBG* [2008] 1 AC 1 at [152], per Lord Nicholls.

D Arguments for the Wider View

There are six reasons why, for Australia, the wider view of unlawful means should be preferred over the narrower view.

The first is that the wider view is consistent with important first principles. The starting point for the creation of the unlawful means tort was that it was developed in order to inhibit “clearly excessive and unacceptable intentional conduct.” The exclusion of criminal offences and breaches of statute from the ambit of the tort undermines this aspiration.

In his treatise analysing tort law and economic interests Cane stated three key propositions regarding tort law’s discouragement of illegal conduct. The first was that “as a matter of public policy, courts are unwilling to give legal remedies to a party who founds his cause of action on his own illegal act. The judges do not wish to be seen as giving aid or encouragement to law breakers.” A second proposition was that if an “illegal act was a cause of, or was closely associated with … loss … it would be an ‘affront to the public conscience’ to afford relief.” Thirdly, a court will not “promote or countenance a nefarious object or bargain which it is bound to condemn.” The problem with the narrow view is that it is at odds with the common law’s traditional intolerance, as a matter of policy, of illegality.

The second reason for preferring the wider view of unlawful means resonates with a corrective justice view of tort law. The efforts of Cromwell J the Supreme Court of Canada in A.I. Enterprises to fashion a rationale for the narrower view by introducing a number of new labels and categories which seem to be entirely novel formulations, are unconvincing and suggest the application of policy-based reasoning. Lee saw potential for the torts to be reined in, if a wider view was adopted, by greater reliance on “the need to demonstrate a tight causal link between the unlawful act and the injury sustained.”

Third, the decision of the Canadian Supreme Court in A.I. Enterprises is premised on a downplaying of the importance of the protection of economic interests relative to other interests, which may be regarded as contentious. The view of Cromwell J was that “tort law has traditionally accorded less protection to purely economic interests than to physical integrity and property rights.” The debate about the relative importance of economic interests is discussed further in Chapter Six of this thesis.

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139 This is Lord Nicholls’ term, in OBG [2008] 1 AC 1 at [155].

140 Cane P, Tort Law and Economic Interests (Clarendon, Oxford, 1991) at p 238, citing the authority of Holman v Johnson (1775) 1 Cowp. 341, 343; [1775-1802] All ER 98, 99.

141 Ibid at p 238. See Thackwell v Barclays Bank PLC [1986] 1 All ER 676, 687.

142 Ibid at p 239. See Saunders v Edwards [1987] 1 WLR 1116, 1134 per Bingham J.

143 The corrective justice viewpoint is explored in depth in Chapter Five of this thesis (which includes a further critique of the decision in A.I. Enterprises).

144 Lee, n 68 at 349.

Fourth, the majority judgments in OBG and A.I. Enterprises give the impression that, in their grappling with the complexities of the law’s internal coherence, sight may have been lost of the “very simple” proposition expounded by Lord Walker in his exegesis on unlawful means (in the majority) in Total Network:

The man in the street, if asked what an unlawful act was, would probably answer ‘a crime.’ He might give as an example theft, obtaining money by false pretences, or assault occasioning actual bodily harm. He might or might not know that each of these was also a civil wrong (or tort) but it is unlikely that civil liability would be in the forefront of his mind … The reaction of a lawyer would be more informed but it would not, I suggest, be essentially different. In its ordinary legal meaning “unlawful” certainly covers crimes and torts (especially intentional torts). Beyond that its scope may sometimes extend to breach of contract, breach of fiduciary duty, and perhaps even matters which merely make a contract unenforceable. 146

These words are consistent with the injunction of Lord Nicholls, in the minority in OBG:

It would be very odd if … the law were to afford the plaintiff a remedy where the defendant committed or threatened to commit a tort or breach of contract against the third party but not if he committed or threatened to commit a crime against him. In seeking to distinguish between acceptable and unacceptable conduct it would be passing strange that a breach of contract should be proscribed but not a crime. 147

The fifth reason for preferring the wider view is the desirability of keeping the meaning of the ‘unlawful means’ as consistent as possible across the torts of unlawful means conspiracy and causing loss by unlawful means. Lord Walker of Gestingthorpe observed in Total Network that difficulties of analysis can result from the fact:

… it has been generally assumed, throughout the 20th-century cases, that ‘unlawful means’ should have the same meaning in the intentional harm tort and in the tort of conspiracy. A good deal of legal reasoning in the speeches and judgments (as to the ingredients of one or other of these torts) has been based on the assumption that the meaning must be the same in both. 148

It may seem a bridge too far, based on the current state of the authorities, to seek to reinstate exact consistency across these torts, but the higher courts in Australia should strive towards this desired end-point unless there is an overriding reason of principle not to do so. 149

Sixth and finally, adoption of the wider view of unlawful means would enable an enlivening of the justification defences available under the general economic torts. In Heydon’s words,

146 Total Network [2008] 1 AC 1174 at [90]-[91], per Lord Walker.
147 OBG [2008] 1 AC 1 at 55 [152], per Lord Nicholls.
148 Total Network [2008] 1 AC 1174 at [266], per Lord Walker.
149 The observation of Lord Mance in Total Network [2008] 1 AC 1174 at [123], that “the two torts are different in their nature, and the interests of justice may require their development on somewhat different bases” should be noted. Edmundson commented that “there are dangers in allowing analysis of the elements of one tort to permeate analysis of another without rigorously addressing the differences between those torts.” [Edmundson P, ‘Conspiracy by Unlawful Means: Keeping the Tort Untangled’ (2008) 16 Torts Law Journal 189 at 190.]
“the wider the net of illegality is thrown, the more the need for a defence of justification.”¹⁵⁰ Chapter Seven which follows later in this thesis will examine more flexible approaches which might allow courts to weigh the nature of illegality involved against the strength of potential justifying factors. It will explore the potential for future development of the intentional economic torts to be shaped by an expansion of justification defences.

V. CONCLUSION

As a result of OBG and Total Network, the general economic torts have attained new impetus in the twenty-first century, but doctrinal consistency remains elusive. This is exemplified by the debate around unlawful means. Some academics argue that unlawful means should mean the same throughout these torts, although not all agree on this.

Ideally, there would be a high degree of uniformity on the meaning of unlawful means across the torts. Widely different views on similar elements from one tort to the next lead to doctrinal confusion and this is one of the factors which, as a practical matter, discourages the pleading of the economic torts. Creating as much consistency as possible between the elements of the various torts – bringing them into line with one another – continues to be a commendable objective.

The adoption of the narrower view by the majority in OBG “has been criticised on account of its illogicality¹⁵¹ and inconsistency with authorities.”¹⁵² Rather than providing clarity, a close examination of A.I. Enterprises leads to yet more confusion as to the precise components of the unlawful means tort and the difficult question of what should count as unlawful means.¹⁵³ The ambiguities that have dogged the torts have been compounded by this trilogy of important recent cases.

The narrower view of unlawful means was expressly preferred by the majority of the House of Lords in OBG and by Cromwell J on behalf of the Full Court of the Canadian Supreme Court in A.I. Enterprises (albeit, arguably, in obiter dicta). Undoubtedly, the conclusions of these courts will be persuasive when Australia’s High Court eventually has an opportunity to determine the status of the innominate tort of causing loss by unlawful means for Australia.

Nevertheless, there is a strong case for a wide conception of unlawful means to be preferred for Australia, for two main reasons. The first is that a wide view would be capable of being applied across the innominate unlawful means tort and the tort of unlawful means conspiracy, in line with the “Australian conspiracy analysis.”¹⁵⁴ The depth and range of the Australian case law pertaining to unlawful means for the purposes of conspiracy may be a factor which


¹⁵¹ OBG [2008] 1 AC 1 at [155], per Lord Nicholls.

¹⁵² Deakin and Randall, n 1 at 544.

¹⁵³ Lee, n 84 at 560.

¹⁵⁴ This is Neyers’ term, n 58 at p 131. The Australian conspiracy analysis was canvassed at Part IV of Chapter Two of this thesis.
Chapter Three: The Evolution of the General Economic Torts and the Unlawful Means Debate

in due course inclines the High Court to prefer the ‘Nicholls view’ from OBG. Neyers has shown that it would be open to the High Court to adopt the wide view.\(^{155}\) It may legitimately be asked: for the sake of consistency and coherence, why should crimes and torts be disregarded as qualifying forms of wrongful interference for one tort when they are sufficient for another?\(^{156}\)

A second strong reason for preferring the wide view is that – in deeming torts but not crimes or statutory breaches ‘unlawful’ – the narrower view fails the ‘man in the street test’ framed by Lord Walker in Total Network.\(^{157}\) It is undesirable to deny the unlawful means tort remedy to a plaintiff who has been caused loss, and targeted, by collective action which constitutes a crime or a breach of statute, on the basis of a judicial desire to establish a ‘control mechanism’. This can be characterised as “a ‘judicial confiscation’ of what is due to the claimant in order to subsidise external policy objectives,”\(^{158}\) contrary to the precepts of corrective justice theory.

The conclusion of this chapter is that, in placing primary emphasis on unlawful means as the control mechanism for the unlawful means tort, and preferring the narrower view, the House of Lords in OBG and the Supreme Court of Canada pulled the wrong rein. However, because of the cogent arguments articulating the alternative wide view which can be drawn from the minority judgment of Lord Nicholls in OBG and the observations made by Lord Walker in Total Network, the unlawful means horse has not entirely bolted.

The preferable conception is a wide view of unlawful means placing emphasis on ‘targeting,’ accompanied by a clearer articulation of principles underpinning justification defences. Such an approach was conceived by Heydon in the 1970s, subsequently supported by Weir and Sales and Stilitz, and re-advocated by Deakin and Randall in 2009.\(^{159}\) A ‘justification-enabling’ conception of unlawful means would ‘widen the net’ of the conduct qualifying as prima facie tortious, and necessitate closer attention to the available defences. The implications of such a conception for justification defences under the torts will be explored in Chapter Seven of this thesis.

Next, however, it is important to review the key economic torts literature, examining the work of the most significant recent academic commentators in the field. This is undertaken in Chapter Four which follows.

\(^{155}\) Ibid.

\(^{156}\) Ibid.

\(^{157}\) Total Network [2008] 1 AC 1174 at [90]-[91], per Lord Walker.


\(^{159}\) See Chapter Four of this thesis which follows.
CHAPTER FOUR
THE SEARCH FOR AN IMPROVED CONCEPTUAL MAP

I. INTRODUCTION

A series of examinations of the general economic torts by academics have attempted to decipher their complexity and categorise and classify the torts in the light of the case law. As was evident from the cases referenced in the preceding chapters, there are a range of alternative conceptions of these torts.

The torts have been under-studied.1 Perhaps this is because, as Heydon observed, “there cannot be any account of the economic torts which is comprehensible without effort”.2 In OBG, Lord Hoffmann described the economic torts as “an extremely obscure branch of the law.”3 Neyers concluded torts such as “unlawful interference with economic relations” were “radically under-theorised” and said the economic torts generally “could benefit tremendously from more intense academic examination.” 4 The perceived absence of comprehensive recent academic scrutiny of the torts was addressed in the wake of OBG and Total Network: the two cases spurred a wave of scholarly papers analysing their implications. In recent times, the opinions of academic writers have significantly influenced the development of the torts. 5

This chapter seeks to discern the main fault lines of academic opinion and explore the effectiveness of various ‘roadmaps’ that have been proposed for the future development of the torts. It will firstly (in Part II) consider two significant debates that have preoccupied much of the past academic analysis of the general economic torts – the de facto role the torts play in regulating competition; and whether it is possible to identify a single coherent principle of liability ranging across the various torts. The chapter then reviews the work of the most significant recent academic commentators and in each case refers to major criticisms that have been, or can be, made of their positions.

First, the views of two outstanding early Anglo-Australian scholars of the torts will be summarised – Dyson Heydon, later a judge of the High Court of Australia from 2003 to 2013, who was (in the 1970s) the author of two editions of a ground-breaking text titled Economic Torts6 and several notable journal articles on the torts;7 and Tony Weir of Cambridge

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1 See Chapter 1, Part II B.
3 Lord Hoffmann in OBG v Allan [2008] 1 AC 1 at [65].
5 The judgment of Cromwell J in A.I. Enterprises v Bram Enterprises [2014] 1 R.C.S. 177 contains an extensive bibliography of academic literature on the torts, with several authors extensively referenced in the judgment – see, for instance, pages 182-84.
6 Heydon, n 2.
University and Trinity College, whose contribution was highlighted by his series of Clarendon Law Lectures delivered in Oxford in 1996 and a subsequent book, also titled *Economic Torts*.  

Next, the viewpoints of Hazel Carty, perhaps the most influential economic torts scholar of the past fifteen years, are summarised. Carty has proposed an optimal framework for the further development of the torts. The suggestions made in her book *An Analysis of the Economic Torts* and a related article have had a significant impact upon the recent evolution of the common law position.

The chapter then reviews the ideas of a number of influential scholars who have examined the torts from a rights perspective. The contribution of the corrective justice theorist Ernest Weinrib is considered together with that of Robert Stevens, who based his study of the economic torts on a ‘rights model’, reflecting a view that “the infringement of rights, not the infliction of loss, is the gist of the law of torts.” The recent contributions of the Canadian academic Jason Neyers, who in three significant articles, explored the potential for rights-based theories to provide justification for the economic torts, expressly reviewed the application of corrective justice theory to the torts and made incisive observations on gaps in Australian law, are also analysed.

Finally, the important contribution of Simon Deakin and John Randall is discussed. Their 2009 article ‘Rethinking the Economic Torts’ focused on discerning potential pathways for the future development of the torts and suggested a new conceptual map to guide their future.

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13 Neyers, n 4.


Chapter Four: The Search for an Improved Conceptual Map

II. THRESHOLD ISSUES

The general economic torts are concerned with competition, although there are differences in views about their precise role in regulating commercial activity. Lord Hoffmann in *OBG* saw the unlawful means tort as designed “to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour.”17 Carty said “the economic torts represent [the common law’s] chosen method to attack excessive (rather than simply aggressive) competition or economic endeavour, whether through diversion of custom or attacks on commercial links”18 but argued “the courts should accept a minor role in policing economic behaviour.”19 Cromwell J in *A.I. Enterprises* agreed, observing that the common law “is reluctant to develop rules to enforce fair competition” and noted that “the scope of the unlawful means tort should be understood in the context of the broad outlines of tort law’s approach to regulating economic and competitive activity.”20 A “wider competency for the common law in the regulation of economic activity”21 is envisaged by Deakin and Randall – “maintaining the integrity of the competitive process.”22

The debate about the appropriate role of the torts in regulating competitive conduct or rivalry gives rise to interesting questions about the appropriateness of applying those remedies to novel settings which fall outside conventional conceptions of competition. Cane noted that even “industrial action designed to improve wages and conditions is a form of competitive activity, in the sense that the aim of the action is to achieve a redistribution of wealth from the employer to the employees just as traders seek to divert wealth from their own competitors to themselves.”23

Questions have been asked about whether this ‘competition base’ paradigm should be applied to certain groups who are seen to be special cases worthy of distinct and differentiated treatment, like environmental NGOs and activist networks.24 Interestingly, competition arguments have been used to advantage by activist groups – in *Gunns Ltd v Marr*25 the Wilderness Society successfully resisted disclosure of documents relating to its campaigns, tactics, strategies and operations on the basis they might give the company it was targeting a collateral advantage in its conduct of adversarial dealings, a tacit acknowledgement of the competitive context of activism.26

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17 *OBG v Allan* [2008] 1 AC 1 at [56], per Lord Hoffmann. This case is hereinafter referred to as “*OBG*”.

18 Carty, n 9 at p 2.

19 Ibid at 172.

20 *A.I. Enterprises v Bram Enterprises* [2014] 1 R.C.S. at 195. This case is hereinafter referred to as “*A.I. Enterprises*”.

21 Carty, n 9 at p 172.

22 Deakin and Randall, n 16 at 522.


26 See the discussion of this case in Chapter Eight, Part III of this thesis.
Maxwell observed that there are a range of ways in which NGOs operate competitively, for example in relation to fundraising and in vying for goodwill in the public domain.\(^{27}\) Baron and Deirmeier referenced “competition among activist groups in the market for donors and volunteers” and saw that “the encounter between the activist and the target is viewed as competition. At the heart of that competition is an activist campaign, which is represented by a demand, a promised reward if the target meets the demand, and a threat of harm if the target rejects the demand.”\(^{28}\) Although it can be argued that activist conduct does not conform to the ordinary maxims of competitive rivalry – Maxwell has noted impediments the economics discipline has faced in predicting NGO patterns of activity due to comprehension dissonance resulting from their diversity and aggregate “lack of a widely recognized objective comparable to the profit-maximizing objective of firms”\(^{29}\) – activist groups can be regarded as in competition with the corporations they target.

The potential role of the general economic torts in regulating competition between for-profit corporations and environmental activist groups will be explored in Chapters Eight and Nine of this thesis.

For decades, academic and some judicial consideration of the economic torts was dominated by a debate about the possibility of developing a ‘unifying ground of liability’ for the economic torts.\(^{30}\) However, these efforts to find a single coherent principle of liability for the torts have been unsuccessful.

According to Lord Walker in \textit{OBG}, “the ‘unified theory’ of the economic torts, attractive as it is, must be rejected.”\(^{31}\) It has been said that \textit{OBG} “affirmed that there is no unified theory linking the tort of inducing breach of contract with the tort of unlawful interference with trade, and that the two are quite separate wrongs.”\(^{32}\)

In \textit{OBG} Lord Hoffmann firstly referenced the observation of Sales and Stilitz that \textit{Lumley v Gye} “was founded on a different principle of liability than the intentional harm tort.” He then explained that its extension to the imposition of secondary liability on a person who procures a contract-breaker to breach his contract, “it is quite distinct from the unlawful means principle, which is concerned only with intention and wrongfulness and is indifferent as to


\(^{29}\) Maxwell, n 27 at p 159.

\(^{30}\) The quest for a unifying ground of liability was traced in Balkin R and Davis J, \textit{Law of Torts} (LexisNexis Butterworths, Sydney, 4th Edition, 2009) at p 580 [20.4] and p 581 [20.6], and by Deakin and Randall, n 16.

\(^{31}\) \textit{OBG} [2008] 1 AC 1 at [264], per Lord Walker.

\(^{32}\) Balkin and Davis, n 30 at p 592.
the nature of the interest which is damaged.” Lord Hoffmann also envisaged “practical disadvantages” with a unified theory.

As Cromwell J noted in *A.I. Enterprises*, there is now a settled consensus among scholars “that there is no single unifying principle underlying the economic torts generally.” Various academics have concluded that claims the economic torts are part of a wider principle of prima facie liability for intentional harm, or that they are based on a theory of secondary or accessorrial liability, should be rejected. Lee observed: “the strict inductive reasoning employed by the majority of the Law Lords in *OBG* appears to have foreclosed the development of a broad organising principle. Their Lordships’ preference was to construct the law incrementally.”

The debate on the prospects for establishing greater uniformity between the various torts is especially significant in the context of this thesis when the topic of illegality is in focus (as it was in Chapter Three of this thesis).

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33 *OBG* [2008] 1 AC 1 at [32].

34 Ibid at [33].

35 *A.I. Enterprises v Bram Enterprises* [2014] 1 R.C.S. at 198, per Cromwell J.

36 See Carty, n 9 and Neyers, n 15.

III. HEYDON: AN EARLY AUSTRALIAN VIEWPOINT

In his book *Economic Torts*, the most prominent Australian writer in the field, Dyson Heydon, discussed three general formulations for the torts. The first formulation he identified was the “wider” tort he termed “intentionally causing loss by unlawful means”. He identified five drawbacks with this proposed formulation:

First, it fails to take account of the recent protection of the right to work. Secondly, it shares a fault of the individual existing torts which would merge with it, parasitic as they are on illegalities… It depends on what standards contracting parties have stipulated for each other… A third problem is that some thought would have to be given to ironing out the many inconsistencies among the illegalities... [Fourthly.] supposed advantages of certainty would be illusory, because of the likelihood of new common law illegalities being discovered and because of the uncertainty in operation of each of even the best drafted statutes. Furthermore, the wider the net of illegality is thrown, the more the need for a defence of justification.

A second potential formulation Heydon identified was “intentionally causing loss by improper means.” He referred to United States cases “where the defendant has used means which though improper are not actionable in themselves” (e.g. lies which do not amount to deceit or defamation). Heydon acknowledged, however, that this formulation would be “even vaguer than the proposed tort of intentionally causing loss by unlawful means.”

The third possible general form of liability advanced by Heydon was “if the defendant causes damage to the plaintiff intentionally and without justification he should be liable.” A basis for this formulation was seen to arise from *Mogul Steamship Co Ltd v McGregor, Gow and Co* and *Skinner & Co v Shaw* as well as logic which could be adopted from American jurisprudence, including its ‘prima facie tort’ theory. This placed central focus on the importance of justification.

Heydon considered arguments in favour of this potential formulation of the tort and also arguments against it. He listed the following “arguments in favour”:

38 Heydon also canvassed, briefly, a fourth potential general formulation – that of “causing loss by an intentional unlawful act” based on the principles in *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 – but, given the subsequent overturning of that case by the High Court in *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, these ideas are not considered to warrant discussion here.

39 Heydon, n 2, in the chapter titled ‘The Future of the Economic Torts’ commencing at p 123. It should be noted that the wording of this chapter is, with small additions, extracted from an article published the same year: Heydon, n 7 above.

40 Ibid at 124-25.

41 Ibid at 126.

42 Ibid at 126-27.

43 Ibid at 128.

44 (1889) 23 QBD 598 at 613.

45 [1893] 1 Ch 413 at 422.
First, without substantial change in the incidence of liability, the entire law would be put on a much sounder theoretical basis. Secondly, there is much evidence in English law that we are approaching … a possible wider tort. Thirdly, the change would make the law much more capable of handling bad behaviour and abuse of rights and of power; much more flexible; and much more based on factors of substance rather than technicality. Fourthly, our law remedies intentional injuries to the plaintiff’s body, to his nervous system, to his land and chattels; it is anomalous that a general theory of intentional tortious liability has developed for injuries to all these interests, but not for injuries to the plaintiff’s financial interests.

Heydon then detailed arguments commonly used against adoption of a general tort based around an absence of justification for intentionally causing damage: “obstacles of precedent” deriving from *Allen v Flood* and *Lumley v Gye*; the argument that “to base the law on intention, motive and justification would allow a wider scope for prejudice” (including against trade unionism, by “property-owning juries”); “that to work out the defence of justification would be a difficult and uncertain process”; that “there is little point in changing the whole doctrinal basis of the law if the incidence of liability is not going to be much changed”; “that there is a danger of burdening commercial mobility by requiring all who enter business to answer for their motives”; that any extension of liability “will not benefit the weak individual citizen, but only the powerful and well-advised company”; and, finally, that there are advantages to “limiting recovery for losses to those which occurred because of interference with contract” because this would prevent “an excess of litigation”. Heydon also acknowledged other difficulties involved in placing focus on malice, including that “it rarely occurs as the sole or predominant motive” and “it is usually combined with some illegality or interference with contract or conspiracy which makes it seem orthodox.”

In the conclusion of his book, Heydon acknowledged that “a common criticism of any generalised tort is that it would be so wide as to render unlawful most acts of ordinary business competition, unless a wide defence of justification is permitted” but came to the view that “the gains in rationality and predictability of development that follow from generalisation and a greater concentration on justification might outweigh any uncertainty: the latter problem might only be transitional.”

Heydon discussed the American case of *Tuttle v Buck* in which a wealthy banker was held liable for spitefully driving the plaintiff barber out of business by opening a rival barbershop, and undercutting him. He saw that it was possible to take two different views of this case –

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46 He referred to evidence including judicial statements of a wider tort in *Torquay Hotel Co v Cousins* [1969] 2 Ch 106 at 147 per Winn LJ and the reformulation of the direct/indirect distinction in inducing breach of contract in *Pete’s Towing Services v NIUW* [1970] NZLR 32.

47 Heydon, n 2 at pp 129-30

48 Ibid at p 130.

49 Ibid at p 131.

50 Ibid at p 132.

51 Ibid at p 129.

52 Ibid at p 138.

53 *Tuttle v Buck* 119 NW 946 (1909).
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one, that it was “based on abuse of the right to compete” or alternatively on “the broader notion of intentionally causing loss without justification.”

Carty has been strongly critical of viewpoints expressed by Heydon, arguing that he “presents perhaps the simplest overarching thesis. He supports prima facie liability based on intentional harm.” Carty observed that he “bemoans the fact that the English courts did not adopt” liability based on malicious motive, as per Tuttle v Buck. She interpreted Heydon’s stance as contending that “rejecting malice as the focus of liability…denied the economic torts theoretical consistency.” Carty went on to state that the aim of her book was to show otherwise and to “support Lord Hoffmann’s rejection of Heydon in OBG v Allan.” In the concluding chapter of her book she cautioned against “focusing on intention as the main control mechanism” and argued that this “could move the economic torts even closer to Heydon’s agenda, even though this was expressly rejected by Lord Hoffmann.”

The rejection of Heydon which Carty refers to appears to be Lord Hoffmann’s statement that:

Some writers regret the failure of English law to accept bad motive as a ground for liability, as it is in the United States and Germany: see for example Dyson Heydon, Economic Torts 2nd ed (1978) p 28. But I agree … that we are better off without it. It seems to have created a good deal of uncertainty in the countries which have adopted such a principle.

Carty’s criticisms of Heydon seem overdone and it is possible to interpret his positions more sympathetically. In particular, she disregarded the nuanced account of ‘interests’ he undertook in his 1970 article The Defence of Justification in Cases of Intentionally Caused Economic Loss. Her comments conveyed the impression that in seeing importance in giving weight to malice as a factor, Heydon was arguing for it to be the “focus of liability.”

An alternative interpretation of Heydon’s views is that he envisaged a menu of options that might enable the three considerations of intentionality, unlawful means and justification to be ‘dialled up or down’ in relative importance. He did not argue for unlawful means to be expunged as a consideration, though he did urge that relative importance should be attached to intention and malice. His view emphasised the significance and implications of unlawfulness as a factor in the torts.

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54 Heydon, n 2 at p 128.
55 Carty, n 9 at p 169.
56 Ibid at p 7.
57 Ibid.
58 Ibid at p 302.
59 OBG v Allan [2008] 1 AC 1 at [14], per Lord Hoffmann.
60 Heydon, n 7 at 142-50 and 161-71. Heydon’s comments on interests are reviewed in Chapter Four of this thesis.
61 Carty, n 9 at p 7.
IV. WEIR: THE PROPER NATURE OF THE ECONOMIC TORTS

In his Clarendon Law Lecture series delivered in Oxford in 1996, Tony Weir addressed “the proper nature of the torts that redress deliberately inflicted economic harm.”62 Weir searched for ways to unify the economic torts. For example, he argued that the specific “tort of procuring breach of contract has now been absorbed into the general tort of causing harm by unlawful means,”63 a viewpoint that has subsequently been shown to be mistaken. However, Weir’s lively and insightful work built foundations for the work of many subsequent commentators.

Bagshaw discerned two overarching themes in Weir’s arguments: that there are “good reasons for insisting that liability in the economic torts should depend on the unlawfulness of the means used to inflict the harm…and that in all the economic torts that are dependent on unlawful means the requisite mental element is that the harm was deliberate.”64 The issues that surround these two themes are central to current-day debates about the economic torts.

On the first of Weir’s themes, concerning the scope of unlawful means, Bagshaw framed his argument thus: “in order to prevent a trivial illegality triggering the general economic tort it may be necessary to hold that breaches of minor provisions in contracts and of irrelevant laws do not constitute ‘unlawful means’.65 (Weir saw that “it would be possible to interpret the Lumley v Gye tort so that “not every induced breach contract is relevant, but only breaches of principal obligations or relevant laws.”66) With the passage of time and hindsight it is now apparent that Lord Hoffmann’s proposed solution in OBG to the potential problem of trivial breaches triggering liability, and Carty’s proposals for broadly drawn control mechanisms, range well beyond the solution Weir considered necessary to avoid this risk.

As far as “the requisite mental element for the general economic torts” was concerned, Weir advocated “a narrow mental element, ‘deliberate harm’, in order to reduce the extent to which the economic torts impinge on liberty.”67 Bagshaw saw that “Weir’s version of deliberate harm” (which is to say, his interpretation of the state of affairs in the case law as at 1996) comprised two elements: “the defendant must intend the harm, as opposed to merely expecting it or foreseeing it as a possibility, and the defendant must have been ‘aiming at’ the plaintiff” i.e., intending the harm for the plaintiff.68

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62 The “polished text” [this description was used by Bagshaw R, ‘Can the Economic Torts be Unified?’ Oxford Journal of Legal Studies, Vol 18, No 4 (Winter, 1998) 729] of these lectures was subsequently published by Weir, n 8.


64 Bagshaw, n 62 at 729.

65 Ibid at 733.

66 Weir, n 8 at p 75.

67 Bagshaw, n 62 at 737.

68 Ibid, referencing Weir, n 8 at p 13.
Carty described Weir as a subscriber to the “interventionist” judicial approach, viewing him as belonging to the category of commentators who preferred intention rather than unlawful means as the prime control mechanism for the general economic torts (and therefore wishing to see a broader view of unlawful means employed). She saw that he employed a “limited version of an overarching theory” of liability which:

…sees the main control over their scope as being provided by the strict intention required viz the orthodox definition of ‘targeted harm’. Mindful of Allen v Flood this policy also requires unlawful means, though defined in a wide way. So for Weir it is ‘tortious intentionally to damage another by means of an act which the actor was not at liberty to commit’. For this reason he also sees a prime role for the defence of justification.\(^69\)

Bagshaw expressed concern at a potential consequence of following Weir’s interpretation. He saw that if malice was broadly defined to “mean ‘intending to cause harm without a legitimate justification for doing so’” then “the tort [of causing loss by unlawful means] would amount to a considerable and unpredictable restriction on freedom … For instance, every protest group urging a consumer boycott might be compelled to justify its actions on pain of liability for the consequences.”\(^70\)

In OBG, Lord Nicholls (who was in the minority in that case) referred approvingly to Weir’s writings, describing him as a “staunch supporter” of the approach of “having an objective element of unlawfulness as the boundary of liability.”\(^71\)

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\(^69\) Carty, n 9 at p 169.

\(^70\) Bagshaw, n 62 at 731-32.

\(^71\) OBG v Allan [2008] 1 AC 1 at [147], per Lord Nicholls.
V. CARTY: PROMOTING THE ABSTENTIONIST APPROACH

In her work, spanning two editions of her book *An Analysis of the Economic Torts* and a number of influential articles, Hazel Carty addressed the need to find solutions to the anomalies that existed within the architecture of the economic torts at the turn of the last century. She saw that, by the year 2000, the torts were in a “hopeless muddle” with “lack of clarity in the definition of key ingredients of the torts,” in particular “no certainty in the definition of knowledge or unlawful means…[or] the cornerstone economic tort requirement of intentional harm.” Carty described the House of Lords’ focus on the torts in *OBG* as “a chance to finally sort out this mess (which had been bubbling away for 100 years)” which “promised a new dawn for understanding the economic torts.” She noted that the two conspiracy torts had been “left hanging” and “remained on the periphery of the economic torts in terms of importance.”

Carty provided a useful concise summary of ‘the academic debate’ regarding the economic torts. She identified four ‘camps’ amongst academic commentators as to the role the torts should play in policing economic behaviour and specifically how widely the ingredient of unlawful means should be defined.

The first cluster emphasised the importance of conceptions of intention: “Some … see intention as the prime control mechanism so that unlawful means can be defined broadly (beyond actionable civil wrongs to include crimes and perhaps even wider in the attenuated form of ‘doing what you have no legal right to do’).” She placed Weir, Sales and Stilitz and Deakin and Randall in this camp. Sales and Stilitz, she said, argued “that the common law focus on intention and unlawful means in the economic torts could be transferred to a wider principle of liability for intentionally causing harm.” Carty also noted that “though it would

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74 Carty, n 9 at p 18.

75 Ibid at p 23.

76 Ibid.

77 Ibid at p 25.

78 Ibid at p 22.

79 Ibid at p 169. It should be noted, however, that hers is the perspective of a key participant in the debate.

80 Ibid at p 171.

appear that there is agreement that these should be torts of intentional harm, the definition of intention remains fluid.”

A second camp was described as seeing “unlawful means as the prime control mechanism.” Here, reference was made to Bagshaw, who was quoted as suggesting:

…a further limit on ‘unlawful means’ so that only those which ‘are identical with or in some way approximates to behaviour that is unacceptable between competitors’ should give rise to liability in tort.

A “third group” (Carty placed herself and Eekelaar in this camp) was said to:

… see both intention and unlawful means as important limiting mechanisms. On this view both should be narrowly defined, with ‘unlawful means’ requiring actionable civil wrongs.

Carty also observed: “There are some commentators who believe that these torts do not need to be limited by the interest they protect: that they point the way forward to a generalized model for intentional tort liability.” Carty regarded Weir as propounding a “limited version of an overarching theory” which saw “the main control over their scope as being provided by the strict intention required viz the orthodox definition of ‘targeted harm’,” but also requiring unlawful means “though defined in a wide way.”

Carty was particularly concerned with the need she perceived for tight control mechanisms to inhibit the potentially broad ambit of the torts, noting that:

… there are variations in approach as to the best control mechanisms for limiting liability … [and] there is a debate whether intention or unlawful means should be the focus for limiting these torts, or indeed whether both need to be restrictively defined to avoid an over-broad liability.

Her preference was for “a narrow definition of intention and unlawful means, an almost non-existent justification defence and a side-lining of conspiracy liability as either unnecessary (unlawful means) or anomalous (lawful means).”

Carty saw the development of the economic torts in the United Kingdom as the result of choices made by judges in the late nineteenth and twentieth centuries in accord with “two

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82 Ibid at p 169, noting the comments of Neyers that Canadian courts appear to prefer a constructive test for intention under which the defendant should realise that damage is likely to result (Neyers, n 14).


84 Ibid at p 171.

85 Ibid at p 169.

86 Ibid.

87 Ibid.

88 Ibid at p 172. Carty saw that, by contrast, Deakin and Randall “support a broader view of unlawful means [and] also … justify conspiracy liability as a method of controlling the abuse of market power” a position she is at odds with.
antithetical policies”89 – “a policy of judicial abstentionism” and “judicial hostility to the growth of the trade unions.”90 In her analysis a policy of abstentionism meant that the courts took a policy decision that “motive of itself was not a permissible mechanism for imposing economic tort liability.”91 As a result “the general theme of the economic torts was that intentionally inflicted economic harm, even if inspired by malice, would not result in liability unless unlawful means were used [either by the defendant or through a third party] against the claimant.”92

Carty contrasted this approach with the alternative (which she termed “interventionist”) approach under which “intentional injury causing loss should be actionable unless public policy, in the guise of the defence of justification, indicated otherwise.”93 She saw that, whereas the Court of Appeal in Allen v Flood had appeared to favour an interventionist role, the majority of the House of Lords in that case rejected it.94

Her view was that the general economic torts have been “muddled” by “judicial hostility to trade unions or inability to appreciate the legitimacy of collective pressure”95 and attributed “the growth and uncertainty” of the torts “to the fact that they commonly arise in the course of industrial action.”96 She commented that, for example, to “undermine” a requirement for strict intention under the tort of inducing breach of contract97 was “hardly legitimate in view of the fact that it may deny trade unions the immunities from liability that Parliament intended they should have”98 and this affected the economic torts by:

…unsettling the application of these torts when they are pleaded in other contexts. So, the uncertainty generated by the application of these torts within the context of an industrial dispute is transferred to subsequent commercial or competition cases in which the torts are raised.99

89 Ibid at p 5.
90 Ibid at pp 5 and 10.
91 Ibid at p 6. She attributed the establishment of the policy to the House of Lords in Allen v Flood [1898] AC 1.
92 Ibid at p 7.
93 Ibid at p 6.
94 She noted also that, by contrast, “it was the interventionist view that gained favour across the Atlantic” (Carty, n 9 at p 6). Carty’s perception Heydon had empathy for the United States position and discomfort with the majority decision of the House of Lords in Allen v Flood seems to be at the heart of her criticisms of his position.
95 Carty, n 9 at p 3.
96 Ibid at p 3.
97 Carty suggested this occurred for example in Falconer v NUR [1986] IRLR 331 where Judge Henham in the Sheffield County Court rejected an argument made by defendants that they had intended to harm British Rail, not passengers using British Rail, as “both naïve and divorced from reality”.
98 Carty, n 9 at p 3.
99 Ibid at p 4.
Carty detailed her own “preferred agenda” for “the correct definition of ‘intention’ to be applied by the courts,” involving retention of a ‘target’ test – one which she regarded as “traditional,” “orthodox” and “standard”: “the defendant must target or aim at the claimant” and “a high degree of blameworthiness is called for.” Consistent with her views on the three-party nature of the economic torts, Carty saw that “the notion of ‘target’ requires that the defendant has to aim at the claimant by also aiming at the intermediary.” So there is a series of aimed harm, with the intermediary as piggy in the middle. In her conception, ‘targeted’ harm “envisages an intended ‘domino’ effect of harm flowing from the defendant, through the third party and finally meeting its target, the [plaintiff]” and “unless he targets the claimant through the intermediary there will be no liability.”

She noted the following statement of Lord Hoffmann on the definition of intention:

[I]t is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one’s actions.

Carty observed that this shift to a ‘means and ends’ definition of intention was “a departure from the orthodox view that existed prior to OBG v Allan.” As Neyers explained, the orthodox view had been that “intention for the purposes of the unlawful means tort required that ‘the harm needed to be aimed, directed or targeted in the sense that causing the [plaintiff] economic harm will be a specific object of the conduct in question’.” The ‘aimed, directed or targeted’ understanding of intention was seen by both Carty and Neyers to be “more consistent with Lord Lindley’s explication in Quinn v Leatham, where he said:

… if the interference is wrongful and is intended to damage a third person, and he is damaged in fact – in other words, if he is wrongly and intentionally struck at through others, and is thereby damnified – the whole aspect of the case is changed; the wrong done to others reaches him, his

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100 Ibid at p 302
101 Ibid at p 304
102 Ibid at p 302
103 Ibid.
104 This is because of the 3-party nature of the torts. Carty says (n 9 at p 303) that “unless he targets the claimant through the intermediary there will be no liability.”
105 Carty, n 9 at p 303
106 Ibid at pp 97-8
107 Ibid at p 303
109 Carty n 9 at pp 80-84; Neyers, n 15 at p 128.
110 Neyers, n 15 at p 128.
rights are infringed although indirectly, and damage done to him is not remote or unforeseen, but is the direct consequence of what has been done.  

Despite her general accord with the views of Lord Hoffmann in OBG, Carty saw that “there are dangers in replacing the traditional clear and restricted approach to intention with the OBG suggestions,” namely “the ends/means test and the glosses to the definition of ‘unlawful means’ proposed by Lord Hoffmann and Lord Nicholls.” She noted that “the orthodox test of targeted harm was rejected by Lord Hoffmann (and apparently also by Lord Nicholls) with relatively little discussion” and suggested:

… that the OBG definition of intention should be ignored, together with the OBG ‘glosses’. They are all unnecessary if the ‘target’ test is retained, a test that reflects the fact that the economic torts involve ‘principles of liability for the act of another’.

**Carty’s ‘Alternative Agendas’**

Carty identified three alternative agendas which could be the basis for future liability under the economic torts which she saw as viable following the OBG and Total Network cases. She urged that “an agreed agenda for development” needed to be articulated in order to “establish the control mechanisms necessary to contain liability for the deliberate infliction of ‘pure’ economic harm.”

The first proposed agenda she identified, which she called the extended civil party agenda, would see “the general economic torts limited to the direct infliction of economic harm and ‘unlawful means’ limited to actionable civil wrongs.” Carty stated that this had always been her preferred option.

Requiring an “actionable wrong” as a threshold for bringing a tortious action can lead to the imposition of liability on quite an arbitrary basis. In Mbasogo v Logo Ltd (No. 1) it was said to be “unattractive and also arbitrary that … [liability] … depends on the virtual happenstance of whether or not the unlawful means are actionable at the suit of the claimant.”

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111 *Quinn v Leathem* [1901] AC 495, per Lord Lindley (quoted by Neyers, n 15 at p 126).

112 *OBG v Allan* [2008] 1 AC 1 at [60] and [64], per Lord Hoffmann.

113 Ibid at [269] where Lord Nicholls referred to the ‘gloss’ of ‘instrumentality’.

114 Carty, n 9 at p 304.

115 Ibid.

116 Ibid at p 168.

117 Ibid at p 173.

118 Ibid at p 179.

119 *Mbasogo v Logo Ltd (No. 1)* [2005] EWHC 2034 at [72], per Davis J – referenced by Carty, n 9 at p 301.
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The second agenda Carty identified, which was said to draw on the analysis in *Total Network*, especially that of Lord Walker - and which she termed “the two-party extended civil liability agenda” - would apply the OBG policy only to the *indirect* infliction of economic harm; “the *direct* infliction of economic harm [would be] subject to an extended definition of unlawful means.”¹²⁰

Carty’s third possible agenda was said to be grounded in Lord Nicholls’ analysis in *OBG*. She viewed this as a “more dramatic version of the *Total Network* agenda,” involving “an extended civil liability agenda for both the direct and indirect infliction of economic harm.”¹²¹

Carty objected to “extending the scope of unlawful means” to merely “blameworthy conduct” or “focusing on intention as the main control mechanism” on the basis this “could move the economic torts ever closer to Heydon’s agenda” and submitted that “a narrow remit for these torts, based on existing civil liability is the best policy.”¹²²

In the final chapter of the 2nd edition of her book, Carty sought to distil an optimum framework for the general economic torts, taking account of OBG and Total Network.¹²³ The starting point was her construction of a suggested optimum framework in the first edition of her book,¹²⁴ which preceded those two cases. There, she saw three distinct categories based on different liability justifications. Category A involved the “secondary liability economic torts” where liability was “based on inducing a third party to commit an actionable wrong” - this included the tort of inducing breach of contract. Category B covered the “unlawful act economic torts” where the use by the defendant of “unlawful means to intentionally harm the claimant” justified the imposition of liability and where “the necessary nexus between the defendant and the claimant must be proved and that nexus is intended harm.”¹²⁵ In this category were the tort of causing loss by unlawful means and the tort of intimidation. In category C was lawful means conspiracy which was seen to “demand its own category” as it required “neither unlawful acts nor an attack on the economic interests of the claimant by participation in another’s wrong” but rather “concerted action in furtherance of an agreement, causing intended harm to the claimant” – in effect a tort of malice.¹²⁶

Carty viewed the unlawful means conspiracy as belonging in a further, distinctive category and in the 2010 edition of her book outlined three potential adjusted frameworks for the torts post-Total Network as a result of the House of Lords’ decision in that case to not “contain” the unlawful means conspiracy cause of action. One of these involved expanding her

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¹²⁰ Carty, n 9 at p 176.

¹²¹ Ibid at p 177.

¹²² Ibid at pp 301-2.

¹²³ Ibid at p 307. Carty’s objective was that the framework she advanced should be capable of encompassing both the general intentional torts and the separate category of “misrepresentation economic torts.”


¹²⁵ Carty, n 9 at pp 319-22.

¹²⁶ Ibid at pp 322-23.
Category B to reframe it as “indirect and direct unlawful means liability: nexus plus extended unlawful means.” The other options she advocated involved a brand new category expressed either as “unlawful means conspiracy liability: nexus plus extended unlawful means” or “direct unlawful means liability: nexus plus extended unlawful means.”

**A Critique of Carty**

Of modern writers, Carty appears to have had the most impact on the viewpoints of judges straining to find a coherent future structure for the general economic torts. Her work has strongly influenced the trajectory of the torts since the turn of the last century. Cromwell J, in *A.I. Enterprises*, cited the views of Carty on the “confusion, overlap and inconsistency” inherent in the torts and noted she had “wisely said,” with reference to the innominate unlawful means tort, that “the scope of this tort can only be established by clarifying its rationale so that there is a principled definition of unlawful means.” He went on to say “I agree in general terms with Hazel Carty that ‘a narrow remit … based on existing civil liability is the best policy’: *An Analysis of the Economic Torts* (2nd ed.), at p. 301.” Lord Hoffmann, in his decision in *OBG*, also indicated that he had placed some reliance on the views of Carty, stating:

> In arriving at these statements of general principle, I have derived great assistance from many who have written on the subject in addition to those whom I have specifically cited and in particular, if what I have said does anything to clarify what has been described as an extremely obscure branch of the law, much is owing to Hazel Carty’s book *An Analysis of the Economic Torts* (2001).

Carty saw great prospects for the law to develop in her preferred direction based on the majority decision in *OBG*, which aligned in key respects with her formulations. She was bitterly disappointed by contradictory aspects of the decision in *Total Network*, handed down just six months later, which she described as having “thrown the economic torts back into the mess in which they were before *OBG*” and opening up a “can of worms yet again.”

Carty’s analysis of the economic torts is admirably comprehensive and Lord Hoffmann’s endorsement of her work is well-deserved. However, there are four questionable aspects of her analysis. The first is that Carty gives the impression her enthusiasm for placing control mechanisms around the torts, and for a narrow view of unlawful means, is largely due to her views on the importance of granting freedom of action to trade unions. The context of labour relations has strongly influenced the shaping of her views and other contexts have been less focused upon.

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127 Ibid at p 326.

128 *A.I. Enterprises v Bram Enterprises* [2014] 1 R.C.S. at [28], per Cromwell J.

129 Ibid at [36] and [44], per Cromwell J.

130 *OBG* [2008] 1 AC 1 at [65], per Lord Hoffmann.

131 Carty, n 10 at 642.

132 Carty, n 9 at p 85.

133 Ibid at pp 10-11. Note Carty’s comments here on the role judicial hostility to trade unions played in the evolution of the torts.
Second, the proposals for future development of the torts she advanced are too complicated—in the end, a potpourri of complex amalgams. Her work is motivated by a continuing aspiration for theoretical consistency in line with broad organising principles. Whilst, as noted in Part II above, this continues to be a commendable objective, more pragmatic solutions seem to be required, in line with Heydon’s preference for “substance rather than technicality.” As Lee observed “the strict inductive reasoning employed by the majority Law Lords in OBG appears to have foreclosed the development of a broad organising principle. Rather, their Lordships’ preference was to construct the law incrementally.” There may be good reasons for allowing the individual torts to develop differentially.

Third, Carty favoured statutory solutions over iteration of the common law. In arguing the need for an “appropriate level of common law control over economic endeavour” she made the contestable claims that there is a “limited ability of the courts” to develop an “appropriate balance between policing competition and not unduly stifling it” and that “the common law can only work as a safety net; rigorous control of competition in the public interest must be the function of Parliament.” She also saw that “the role of fostering a healthy competitive order … is essentially a matter for state regulation, in the interests of the public at large” and that “the economic torts act as residual rules of the game, lacking the fine tuning or finesse of statutory law.” Thus, her “suggested optimum framework” ascribed “a limited role to the judiciary, with the state providing any more complex regulation deemed necessary.”

The fourth criticism which may be made of Carty is related to the first. In her enthusiasm to limit the torts, Carty placed lower emphasis than some other commentators on the importance of protecting economic rights and business interests. She lightly noted Weir’s comment that “economic torts have something to do with liberty” but she certainly did not base her approach on the analysis of rights.

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134 Ibid at p 328.
135 Heydon, n 2 at p 129.
136 Lee, n 37 at 331.
137 Against this, Cromwell J in A.I. Enterprises was concerned by “the danger of ad hoc decisions tailored to achieve a vision of commercial morality” - A.I. Enterprises [2014] 1 R.C.S. at 195 at [85].
138 Carty, n 9 at p 311.
139 Ibid at p 312.
140 Ibid at p 313.
141 Ibid at p 172.
142 Ibid at p 318.
143 A.I. Enterprises [2014] 1 R.C.S. at [34], per Cromwell J.
144 Carty, n 9 at p 328, citing Weir, n 2.
VI. WEINRIB AND STEVENS: RIGHTS-BASED THEORIES

By contrast to Carty, adherents to a school of thought based on the ‘rights model’ contend that analysis of the general economic torts should be ‘all about rights.’ Ernest Weinrib, whose work built important foundations for later rights theorists, wrote that:

…rights provide the space within which all right holders may pursue ends of their own. Such ends are consistent with the self-determining freedom of others only if the point of pursuing them is independent of the adverse effect on someone else. When all act to pursue ends of their own in this sense, they all rank equally as persons whose activities can coexist within the system of rights. Conversely, if the freedom to perform an act merely to frustrate the purposes of another were legitimate, rights would be transformed from markers of mutual freedom to instruments of subordination.”

Arguing from the perspective of corrective justice, he observed that the study of the law of torts often commences with the “simple and obvious idea” that “the point of a tort action is to undo the injustice that the defendant has done to the plaintiff.” Rights may be exigible against the rest of the world but tort actions are concerned with the effect of conduct by one party upon another. Hence, damages are usually assessed on the basis of putting the successful plaintiff in the position they would have been in had the action complained of never occurred (this can be contrasted with the position in contract law where damages are designed to place parties in the position they would have been in had unperformed obligations in a contract been performed). Corrective justice “restores the equilibrium, through an award of compensation, within the…relationship of the injured plaintiff and the defendant” where a “bipolar relationship” has been disturbed.

Unsurprisingly, Weinrib’s views have been criticised by those who favour “a more contextual approach to law” and incorporation into law of “the findings of the social sciences.” A particular criticism is that “corrective justice is too contested and indeterminate to be illuminating.”

Robert Stevens, in his 2007 book *Torts and Rights*, and elsewhere, has urged that understanding of the economic torts should be based on analysis of rights. According to Stevens:

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150 Weinrib, n 146 at 109, acknowledging the criticism made of his views by Hutchinson, n 149 at 251.

151 Stevens, n 12.

A wrong is a breach of a duty owed to someone else. A breach of a duty owed to someone else is an infringement of a right they have against the tortfeasor. Before a defendant can be characterized as a tortfeasor the anterior question of whether the claimant has a right against him must be answered. The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.

He concluded that “the infringement of rights, not the infliction of loss, is the gist of all torts,” highlighting that “for those torts which are not actionable per se the infliction of a loss is necessary before liability arises, but it is never alone sufficient.” He called this conception of law “the rights model” and contrasted his preferred approach with a “loss-based model.”

Neyers, critiquing Stevens, highlighted the argument made in Torts and Rights that an action under the unlawful means tort “may be justified on the basis that it prevents [the defendant] from deliberately using others as means to his own end” but sees a logical inconsistency in that “the justification that Stevens proposes for the exception seems to require that there should be no exception – no deviation from the requirement of privity.” He argued that Stevens’ proposed justification “logically leads to the conclusion not that there should be liability to the plaintiff (who has not been used, only harmed) but rather to the third party (who has been used).”

The views of Weinrib and Stevens, and reactions to those views, are further explored in Chapters Five and Six of this thesis.

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153 Neyers, n 15 at p 124. Elsewhere, Neyers described the difficulty the economic torts face – particularly the tort of inducing breach of contract - in satisfying the doctrine of privity of contract “which states that contracts create rights and obligations only between the parties to that particular contract” (n 14 at 164).

154 Ibid at p 307.

155 Neyers, n 4 at 231.
VII. NEYERS: EXPLORING RIGHTS-BASED JUSTIFICATIONS FOR THE TORTS

In three significant articles published in 2008, 2009 and 2011, Jason Neyers sought to identify a rights basis for the innominate tort of causing loss by unlawful means. His 2008 article described this as “the tort of unlawful interference with economic relations” whereas in 2011 he adopted the nomenclature “the unlawful means tort.” This reflected the change in prevailing terminology that arose from Total Network.

Writing in 2008, Neyers examined whether rights-based theories can explain the tort, seeking to identify “an independent right of the defendant” that when violated should entitle a defendant to sue in its own right. After considering and largely dismissing ‘right to trade’, ‘remoteness’ and ‘abuse of right’ as justifying the tort (due to problems of coherence and fit with case law), he found potential justification in a ‘public right’ theory: “the plaintiff is not suing for a violation of any of her private rights but rather to vindicate her enjoyment of public rights created by the criminal law (whether statutory or common law).” He explained this theory by reference to the dictum of Palles CB in Leathem v Craig, who saw that a civil action could be sustained if a criminal action is “accompanied by damage special and peculiar to the individual”.

… in addition to his own private rights, it is clear that every member of the community has, in common with every other member, an individual right that a public right shall not be violated in such a way as to cause him special and peculiar damage; and although, for such an invasion of the public right as affects all persons alike, an indictment, as distinct from an action, is the only remedy, yet, if an individual, by reason of the publication of the public right, sustain an injury peculiar to himself, an action lies at his suit against the guilty parties … [This principle is] applicable to all acts of commission which are violations of public right, and which cause special and peculiar damage to an individual. Thus, it is wholly illogical to restrict the effect of the criminality or want of criminality of a particular act to the administration of the criminal law. It has a far wider scope. It necessarily affects civil rights.

Whilst not viewing the public right theory as a complete satisfactory justification for the innominate tort, due largely to the logical difficulty of “accepting that ‘unlawful means’ would be limited to crimes and would not include either torts or breaches of contract,” Neyers saw this theory could potentially be used to “explain the tort of unlawful interference with economic relations in a way that does not violate the privity principle.”

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161 Neyers, n 4 at 228.

162 Leathem v Craig [1899] 2 Ir R 667 (Div Ct) at 708. Note also Neyers’ (n 4 at 229) definition of special damage as “damage that is different in kind or scope from those suffered by the rest of the public.”

163 Ibid at 708.

164 Neyers, n 4 at 230.

165 Ibid at 231.
Neyers also advanced a separate “justified exception theory” under which “the law creates a composite person out of the third party and plaintiff to unify the right with its loss.” He saw that a claim for economic loss by unlawful means could be based on a right deriving from what he called “the composite justification whereby the plaintiff and the third party against whom the unlawful means are directed are treated as a unity with the result that the loss for which the compensation is sought is for the infringement of a right of the composite.”

Neyers further developed his arguments on justifying the tort as an exception to the privity principle in his 2011 article “Causing Loss by Unlawful Means: Should the High Court of Australia Follow OBG Ltd v Allan?” In this paper Neyers set himself the task of asking, from the perspective of ‘strict legalism’, “whether the High Court should adopt the reasoning of the House of Lords in OBG v Allan in relation to the unlawful means tort.” He observed, citing Victoria Park Racing and Recreation Grounds Co Ltd v Taylor that “it is a fundamental principle of the law that tortious liability requires both a right and an interference that is not too remote – one without the other will not do.”

Neyers developed an argument that “the unlawful means tort vindicates the plaintiff’s right to not have others act with the predominant purpose of causing them injury” and called this “the predominant purpose justification.” Neyers’ conclusion was that, if this view was adopted by the High Court, “OBG v Allan should not be followed in relation to its definition of unlawful means; rather, the courts should use the traditional definition of the concept advocated by Lord Nicholls and utilised in Australian cases of unlawful means conspiracy.”

He developed a depiction of liabilities based around the central notion that it is appropriate for the law to confer liability when a party imposes gratuitous harm on another. This is built on Weinrib’s “idea that the law should not legitimize the infliction on another of gratuitous harm,” which Neyers termed “the gratuitous harm principle.”

Neyers set out to demonstrate that “there exists a right to be free from gratuitous harm and that this right can consistently and coherently exist with the other rights recognised by law.” He achieved this persuasively. He argued that the High Court of Australia should

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166 This is how Mark Lunney described Neyers’ justified exception theory when he critiqued it in ‘Book Review – Torts in Commercial Law’ (2012) 20 Torts Law Journal 145 at 146.

167 Neyers, n 15. This article constitutes the most comprehensive recent analysis of the status of the innominate tort in Australia.

168 Ibid at 119-20.

169 [1937] HCA 45; (1937) 58 CLR 479 at 524 per McTiernan J.


171 Ibid at 138.

172 Ibid at 132.

173 Weinrib E, n 145 at 3.

174 Neyers, n 15 at 134.

175 Ibid at 132.
“accept the gratuitous harm understanding of the unlawful means tort”\textsuperscript{176} and his view was that, if it does, important changes to \textit{OBG v Allan} would be in order – in particular a return to the \textit{aimed, directed or targeted} understanding of intention.\textsuperscript{177} “This is because forcing the plaintiff to prove that she was the target of the defendant’s actions allows the courts to conclude that the defendant had \textit{a} purpose of causing harm which can then be grown…into a predominant purpose.”\textsuperscript{178}

Following his review of the principles and justifications underpinning the torts of causing loss by unlawful means and of conspiracy, Neyers arrived at a classification of the patterns of liability which apply to those torts. His view was that the key to answering questions such as “why are unlawful means essential?” and “why should lower thresholds of intention be tolerated?” is to “accept that the gratuitous harm principle may take a direct/simple form and an indirect/complex form.”\textsuperscript{179} Neyers summarised the patterns of liability in tabular form as follows:\textsuperscript{180}

<table>
<thead>
<tr>
<th>Claim</th>
<th>Direct/Simple</th>
<th>Indirect/Complex</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Causing Loss  | No liability since 
| Allen v Flood  | \textit{OBG v Allan} (Unlawful Means)                |
|                | (Lawful Means)                                      |                                                       |
| 
| Conspiracy     | \textit{Quinn v Leathem}; 
| McKernan v Fraser | \textit{Williams v Hursey}; 
|                 | Revenue and Customs Commissioners v Total Network SL |
|                | (Lawful Means)                                      | (Unlawful Means)                                      |

\textit{Figure 1: Neyers’ Summary of Patterns of Liability}

Neyers defined the direct/simple form as “where the defendant acts with the predominant purpose of injuring the plaintiff and causes economic loss without involving any intermediate parties or permitting any otherwise unlawful acts.”\textsuperscript{181} “Targeted misfeasance” is a term which has been used to describe this form of conduct.\textsuperscript{182}

The indirect/complex form was said to arise “where the defendant acts with the purpose of harming the plaintiff and also the purpose of furthering her own ends (but with means that are

\textsuperscript{176} Ibid at 128.

\textsuperscript{177} Ibid.

\textsuperscript{178} Ibid at 137.

\textsuperscript{179} Ibid at 134.

\textsuperscript{180} Ibid at 136. This table has been re-drawn from Neyers’ formulation to omit the category of “misfeasance in public office” which is not in focus in this study.

\textsuperscript{181} Ibid at 135.

\textsuperscript{182} Ibid at 134-35 cites examples of conduct which may constitute targeted misfeasance.
unlawful in the sense of breaching the criminal law, a statutory prohibition or the rights of third parties).”

Neyers saw anomaly, not in the acceptance of the unlawful means tort, or lawful means conspiracy, but in refusal to acknowledge the imposition of liability where a party has acted with the predominant purpose of injuring another, causing economic loss, even if they have not involved intermediate parties or permitted otherwise unlawful acts. This is at odds with Carty’s views.

Whereas Carty insisted that it is of fundamental importance that the economic torts have a three-party structure – to ensure “they do not ‘tortify’ breaches of statute or crimes that under the ordinary rules would not be actionable in a two-party situation” – and applauded the decision in OBG v Allan in this respect, Neyers took a different view. He noted that “under the Australian conspiracy analysis…torts have a two-party structure whereby breaches of statutes and crimes become tortious…when coupled with an intention to injure.” He took the view that if a “predominant purpose” justification for the innominate unlawful means tort were to be adopted, “the tort can apply in either two-party or three-party circumstances.”

Neyers addressed the issue that there “is a problem as to the nature of [the plaintiff’s] right which is infringed by the conduct of [the defendant]” and argued “that there exists a primary right of the plaintiff that is infringed when the defendant injures the third party.” His view was that “the unlawful means tort can be justified … on the basis that the defendant’s actions violate a (specially constituted) primary right of the plaintiff” and that justification on this basis “has consequences and delivers answers that are somewhat different than those offered by their Lordships in OBG v Allan concerning what constitutes intention and unlawful means for the purposes of this tort.”

Neyers suggested that “Sales and Stilitz were on the right track in focusing on (1) the defendant’s intention in relation to the third party and (2) Lord Lindley’s explanation of the principle at stake in Quinn v Leathem” where his Lordship stated “… if the interference is wrongful and is intended to damage a third person, and if he is damaged in fact – in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnedified – the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly.”

183 Ibid at 135.
184 Carty, n 10 at 667-69.
185 Neyers, n 15 at 130-31.
186 Ibid at 139.
187 Rookes v Barnard [1963] 1 QB 623 (CA) at 688.
188 Neyers, n 15 at 122.
189 Ibid at 123.
190 Quinn v Leathem [1901] AC 495 at 534-5, per Lord Lindley, referenced by Neyers, n 15 at 126.
Chapter Four: The Search for an Improved Conceptual Map

Drawing together these threads, Neyers advanced a view which he called the “composite justification”:

This view is that the defendant is liable to the plaintiff (and the third party) as a result of the defendant intentionally treating the plaintiff and the third party as a unity that could be, and were, harmed through her actions. Since it was the defendant who treated the two parties as a unit in the furtherance of her own ends, it does not lie in her mouth to claim, when the action comes before a court for redress, that the third party and the plaintiff must be treated as separate entities whose rights and entitlements should be considered independently. In essence the law will create a composite legal person for the purposes of adjudicating the defendant’s liability, where the plaintiff is ‘wrongfully and intentionally struck at through others’. 191

Neyers urged that, when the time comes for the High Court of Australia to deliberate upon the nature of the unlawful means tort for Australia, this composite justification should be considered for adoption. 192

Neyers reached an important conclusion, developed from a strict legalist perspective: that claims for economic loss caused by unlawful means can potentially be founded on breach of a ‘primary right’ of the plaintiff, the right to be free from the targeted infliction of gratuitous harm. 193 He developed this idea as an extension of the thread of common law, exemplified by lawful means conspiracy, which “recognises a claim-right, currently only actionable in defined circumstances, for an individual to be free from the targeted infliction of gratuitous harm.” 194 In his view, if the High Court were to accept a gratuitous harm understanding of the unlawful means tort, a return would need to be made to the “orthodox view” of intention that existed prior to OBG. 195

Carty had seen that the statement of Lord Hoffmann in OBG that “intention should be thought of in terms of means and ends” was an undesirable departure from the orthodox view. 196 Neyers was concerned that this was potentially “problematic since on the means and ends understanding it is possible that a foreseen outcome that is absolutely necessary to achieve a desired end will count as ‘means’ and therefore be ‘intended’.” 197 For Neyers and his advocacy of a composite justification the issue this created was that it is “not consistent with basing the tort on the defendant’s intention to treat the third party and the plaintiff as a unity” and so he suggested that “should the High Court adopt the composite justification … they should return to using the orthodox ‘aimed, directed or targeted’ understanding of intention.” 198

191 Neyers, n 15 at 126.

192 Ibid at 128.

193 Ibid at 134-35.

194 Ibid at 134.

195 Ibid at 137.

196 See Carty, n 9 at pp 302-3.

197 Neyers, n 15 at 128.

198 Ibid.
The orthodox view had been articulated by Carty as follows: “intention for the purposes of the unlawful means tort required that ‘the harm needed to be aimed, directed or targeted in the sense that ‘causing the [plaintiff] economic harm will be a specific object of the conduct in question’.”

199 Carty, n 9 at pp 80-84, citing Allen v Flood at 96, per Lord Watson.
VIII. DEAKIN AND RANDALL: A NEW CONCEPTUAL MAP FOR THE FUTURE

In their 2009 article “Rethinking the Economic Torts,” Deakin and Randall provided a robust framework for understanding the structure of economic tort liability. Following a review the status of the economic torts (as applied in the United Kingdom) up to and following the 1964 case of Rookes v Barnard they ventured that the torts (as they were understood to that time) could be mapped in terms of two critical dimensions: whether the action taken was individual or collective in nature, and whether or not an element of unlawfulness - interference with a pre-existing right or the use of unlawful means – was involved.

Deakin and Randall arrived at a diagrammatic depiction of the structure of liability in the form of a four-quadrant matrix, the key elements of which are reproduced below:

![Diagram of the Structure of Economic Tort Liability after Rookes v Barnard](image)

Figure 2: The Structure of Economic Tort Liability after Rookes v Barnard

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200 Deakin and Randall, n 16 at 523.
201 [1964] AC 1129.
202 Deakin and Randall, n 16 at 523.
203 This table is reproduced from Deakin and Randall, n 16 at 524.
Deakin and Randall saw that the structure of liability up to the 1960s was “awkward but not entirely illogical” and involved three distinctive types of liability depicted in their matrix.204 (There was no liability in the “innocuous” quadrant of the matrix, where individual action blended with lawful means, based on *Allen v Flood*.)

The first was the category of cases where individual action involved unlawful means, in which “the gist … was direct interference with the pre-existing legal rights of the plaintiff.” The core tort in this category was inducing breach of contract.205

The second type of liability involved situations in which defendants acting in combination intentionally interfered with a plaintiff’s trade, business or livelihood using unlawful means. In these circumstances it was necessary for a plaintiff to demonstrate that, in addition to being unlawful, conduct had been specifically aimed or targeted at the plaintiff’s interests. The requirement of ‘targeting’ meant that, no matter how unlawful the means used, incidental or unintended victims had no cause of action. An absence of malice was no defence. This category of torts was said to have derived from *Rookes v Barnard*.206

In the separate third category of lawful means conspiracy, liability could arise despite the fact that no unlawful means were employed and no pre-existing legal right had been interfered with. The essence of this tort, according to Deakin and Randall, was unjustified combination leading to economic pressure or harm, so that (in effect) malice was required.207

Deakin and Randall differed from Carty in seeing a lesser need to deploy a narrow definition of unlawful means as the control mechanism for the economic torts: their view was that “a requirement that harm should be aimed or targeted at the claimant would be preferable as a control device.”208

After analysing the House of Lords decision in *OBG* with respect to the tort of inducing breach of contract, Deakin and Randall observed that the House “limited this tort by imposing the additional, double requirement that the unlawful means should be independently actionable and should have the effect of interfering with the freedom of the claimant to deal with the third party concerned.” They noted how “the first of these requirements departs from *Rookes v Barnard*, with the unintended consequence of thereby decoupling the unlawful means tort from the otherwise similar civil wrong of intimidation.”209 Their conclusion was that “*OBG*, while clearing away some doctrinal confusions, has created new uncertainties.”210

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204 Deakin and Randall, n 16 at 522.
205 Other torts in this category derived from a breach of a statutory or fiduciary duty owed to the plaintiff.
206 The way in which the requirement of targeting was de- emphasised in importance in *OBG* (per Lord Hoffmann) – “ends, means and consequences” – is further explained in Part V (above) of this Chapter Four.
207 Deakin and Randall, n 16 at 523.
208 Ibid at 552.
209 Ibid.
210 Ibid.
Deakin and Randall explored an alternative path for analysing the economic torts. They proposed a revised conceptual map for the economic torts built around a “more defensible conception of these torts in terms of the economic interests which they protect, the kinds of interferences which trigger liability, and the nature of justifications which should be accepted as defences.”

Their proposed new conception of the economic torts was summarised in the table below:

<table>
<thead>
<tr>
<th>INTERESTS</th>
<th>INTERFERENCES</th>
<th>JUSTIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GENERAL PRINCIPLES OF ECONOMIC TORT LIABILITY</strong></td>
<td>Economic interest in trade, business or employment</td>
<td>Direct interference, with a presumption of ‘targeting’ in cases of direct competitors and of parties involved in direct distributional conflict</td>
</tr>
</tbody>
</table>

*Figure 3: Deakin and Randall’s Suggested Basis for Reformulating the Economic Torts*

Their suggested approach had three essential components. The first was that ‘interests’ should be placed at the heart of analysis of the economic torts. They argued there should be “closer attention to the interests which the torts protect (substantial interests in a trade, business or livelihood).”

Central to their proposal was the idea that it is correct to characterise the economic torts narrowly as part of a:

… broad class of civil wrongs in which the gist of the action lies not in damage caused by fault, as in the case of negligence, but in an interferencewith an interest which the law protects. It is only once that interest is found to be present in a particular case that the court should proceed to establish the nature of the liability which could arise, the degree to which fault and damage are necessary ingredients of the claim, and the extent of any defences.

The second component was a clearer focus on “the nature of the interferences which they proscribe (interventions which are direct and targeted).” This required consideration of the types of conduct which amount to illegitimate interference with protected interests.

Thirdly, Deakin and Randall saw a need for a more nuanced account of the justification defences which determine the outer limits of the torts. Chapter Seven of this thesis aims to provide such a nuanced account.

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211 Ibid at 519.
212 Ibid at 553.
213 Ibid.
214 Ibid at 533.
215 Ibid at 553.
Deakin and Randall provided a concise summary of the elements of the economic torts after *OBG* and *Total Network*, based on their analysis. This is summarised in the table below, reproduced from their 2009 article.\(^\text{216}\)

<table>
<thead>
<tr>
<th></th>
<th>INTERESTS</th>
<th>INTERFERENCES</th>
<th>JUSTIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INDUCING BREACH OF CONTRACT</strong></td>
<td>Actionable contractual expectation (<em>OBG</em>)</td>
<td>Knowing and intentional procurement of breach</td>
<td>Limited (e.g. rights under pre-existing contract: <em>Edwin Hill</em>)</td>
</tr>
<tr>
<td><strong>INTERFERENCE WITH TRADE, ETC BY UNLAWFUL MEANS</strong></td>
<td>Economic interest in the relation being interfered with (<em>OBG</em>)</td>
<td>Intentional harm via independent actionable unlawful means, limiting freedom to trade (<em>OBG</em>); or threat of unlawful conduct (‘intimidation’) (<em>Rookes</em>)</td>
<td>None</td>
</tr>
<tr>
<td><strong>LAWFUL MEANS CONSPIRACY</strong></td>
<td>Economic interest in a trade, etc (<em>Mogul, Allen, Quinn</em>)</td>
<td>Combination coupled with ‘predominant purpose to injure’ (<em>Total</em>, dicta of Lord Walker)</td>
<td>Collective economic self-interest (<em>Crofter</em>)</td>
</tr>
<tr>
<td><strong>UNLAWFUL MEANS CONSPIRACY</strong></td>
<td>Economic damage, not confined to trade interests (<em>Total</em>)</td>
<td>Combination coupled with intention to harm; need not be independently actionable (<em>Total</em>)</td>
<td>None</td>
</tr>
</tbody>
</table>

**Figure 4: Elements of the Economic Torts after OBG & Total Network: Deakin & Randall**

The Deakin and Randall proposal involves paying attention to the essential ingredients of the torts from the perspective of market regulation. They saw that a key advantage of the conceptual basis they proposed was that it was true to their historical role of regulating the competitive process: “the economic torts exist to govern market relations and in particular to police the competitive process.” It would also, they argued, “ensure greater consistency of approach across the different torts, and go a long way to restoring doctrinal coherence.”\(^\text{217}\)

The Deakin and Randall proposal has similarities to the analysis of Neyers in that both attach importance to the sanctioning of conduct which inflicts gratuitous harm and involves targeting.

\(^{216}\) Deakin and Randall, n 16 at 552.

\(^{217}\) Ibid at 553.
Chapter Four: The Search for an Improved Conceptual Map

IX. CONCLUSION

It is apparent from the foregoing analysis that, although some areas of uncertainty affecting the general economic torts have been clarified in recent cases, continuing complexity and doctrinal inconsistencies are inherent in this complex field of law. It is also clear that the ongoing lack of academic consensus has resulted in a confusing and jumbled set of potential pathways for their future development. For Australia, a clear roadmap needs to be settled by the High Court, based upon a revised conceptual map.

Heydon, writing at a quite early stage in the torts’ development, saw a wide range of possibilities for the ways they might develop. He was prepared to countenance a formulation aligned with American jurisprudence which would place strong emphasis on notions of intention, motive and justification. For this, he has been criticised, especially by Carty. His priority was to establish a framework for the torts which provided robust protection for economic interests, subject to a nuanced approach to justification.

Carty, on the other hand, was motivated to establish the tightest possible control mechanisms to limit the scope of the torts, preferring narrow definitions of intention and unlawful means and an “almost non-existent” justification defence. Carty acknowledged that “there are important differences between commentators as to the importance that the economic torts should play in protecting economic interests” and her comments indicated that she tended to afford less priority to the protection of business interests than some others. Her preference was to erect a series of hurdles to ensure the inhibition of the torts. She would approve of the kinds of “additional, double” requirements identified by Deakin and Randall.

The contribution of Neyers, building on ideas developed by Weinrib and Stevens, was in the articulation of the gratuitous harm principle, the suggestion of a rationale for basing the unlawful means tort on the defendant having the predominant purpose of injuring another and his description of a pattern of liability that has both a direct/simple form and an indirect/complex form. He also saw potential for the tort to apply in both two-party and three-party circumstances.

Deakin and Randall constructed, in this writer’s view, a robust framework for the future development of the general economic torts, centred on the economic interests which they protect, the kinds of interferences which trigger liability and the nature of the justifications which should be accepted as defences. Their proposals take account of the implications of illegality and unlawful means. Another important attribute of their approach is that it resonates with the ideas of Weinrib and Stevens, by inviting courts to backtrack and pay attention to first principles: what are the interests which the law is designed to protect; and how should priorities of interests be resolved in circumstances where they conflict?

A point of difference with the Deakin and Randall proposal (relative to other English commentators) was that they did not see the choices made by the English courts as

218 Carty, n 9 at p 172.
219 Deakin and Randall, n 16 at 552.
220 Neyers, n 15 at p 137.
irredeemable. Certainly for Australia, as Neyers highlighted, there is scope for the High Court to set the torts upon a revised path.

There is a need for more detailed evaluation of Deakin and Randall’s proposals. In *A.I. Enterprises*, Cromwell J, though purporting to conduct an extensive analysis of the rationale for the economic torts, briefly referenced these authors’ view that “the tort seeks to maintain the integrity of the competitive process by curbing conduct that deserves to be called *cheating*.” However, he did not otherwise engage with their arguments and their proposed roadmap. The difficulty with Deakin and Randall’s presentation of arguments is that it only offered a high-level sketch and did not flesh out each of the considerations upon which their conception is based.

In Chapters Six and Seven which follow, the notions of interests, interferences and justifications these authors have raised will be more fully explored, to test their suitability as a base for further development of the general economic torts.

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221 *A.I. Enterprises v Bram Enterprises* [2014] 1 R.C.S. at [40], per Cromwell J, referring to Deakin and Randall, n 16 at 520.
I. INTRODUCTION

It was seen in the literature review conducted in Chapter Four that there is a wide spectrum of views amongst commentators as to the optimal direction for the future development of the general economic torts.

Underpinning the academic debates, there are two main conceptions of the purpose and function of tort law: corrective justice theory and distributive justice theory. This chapter considers which of these alternative conceptions provides the clearest explanation for economic tort liability and explores the possibility and implications of one conception being preferred over the other to guide the development of the torts.

Simply stated, the question to be examined is whether it is appropriate to determine cases based on considerations of justice between the parties to a particular dispute, or factors which relate to broader community interests. A corrective justice approach “restores the equilibrium, through an award of compensation, within the … relationship of the injured plaintiff and the defendant”\(^1\) where, as Weinrib would term it, a “bipolar relationship”\(^2\) has been disturbed. By contrast, those who prefer distributive justice “treat private law as a tool of public policy and focus their attention on the policy implications of private law rules.”\(^3\)

The difference between distributive and corrective justice was described by Dworkin as that between arguments of policy and principle:

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole … Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.\(^4\)

Part II of this chapter outlines the corrective justice theory framework, and reviews the recent literature which has applied this framework to the general economic torts as well as the literature which criticises the framework. It also explains the implications of adopting an approach based on corrective justice theory.

Part III briefly describes distributive justice theory and considers the suitability of this theory as a framework for the future development of the general economic torts. It then analyses the

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Chapter Five: The Application of Policy to Shape the Economic Torts

Canadian case *A.I. Enterprises Ltd v Bram Enterprises Ltd*\(^5\) to illustrate the application of an approach based on distributive justice.

Part IV considers the potential emergence of mixed or intermediate theories that seek to blend the distributive and corrective justice conceptions, which might provide an alternative basis for courts to take account of broader policy considerations in further developing the torts.

\(^5\) [2014] 1 R.C.S. 177.
II. CORRECTIVE JUSTICE THEORY

A  The Corrective Justice Viewpoint

Corrective justice makes claims to be a predominant organising principle of the law of torts. As Erbacher described it, “corrective justice theory regards tort law as a rights-based instrument of corrective justice designed to rectify wrongs committed by one person against another in a relationship.” 6 This aligns with the view of Wright that the purpose of the law of torts is to adjust losses, affording “compensation for injuries sustained by one person as the result of the conduct of another.” 7 Weinrib wrote that:

… rights provide the space within which all right holders may pursue ends of their own. Such ends are consistent with the self-determining freedom of others only if the point of pursuing them is independent of the adverse effect on someone else. When all act to pursue ends of their own in this sense, they all rank equally as persons whose activities can coexist within the system of rights. 8

In his extensive and decades-long scholarship of tort theory, Weinrib developed an increasingly clear conception of corrective justice, which involved attention to “exhibiting the presence of correlativity in the doctrines of tort law, linking it to ideas of bilateral fairness and coherence, incorporating it into a methodology of inquiry about tort law as a normative practice, and connecting it to the classic philosophical expositions of natural law and natural right.” 9 Weinrib’s “juridical conception of corrective justice” aimed to reflect “the justifications internal to tort law, treating them as normative in their own terms rather than as the disguised surrogates for extrinsically justifiable social goals.” He viewed “the determination of liability as a distinctive domain of practical reason that subjects the interaction between the plaintiff and the defendant to a coherent ordering.” 10

Two complementary abstractions are synthesised within Weinrib’s juridical conception of corrective justice – correlativity and personality:

Correlativity articulates at the most general level the relationship between the interacting parties as doer and sufferer of the same injustice. Personality, i.e., the idea of purposiveness regardless of one’s particular purposes, similarly articulates at the most general level the conception of the interacting parties that is presupposed in a regime of rights and their correlative duties. 11

One of the distinguishing features of corrective justice is that its primary function is to “provide a conceptual framework for understanding and analysing private law, rather than to

10 Ibid.
11 Ibid at 107.
state prescriptively what the law should be.”\textsuperscript{12} Weinrib speculated that the renewed interest in corrective justice over recent decades may be due to its appeal to “theorists who viewed tort law as a repository of moral reasoning about responsibility for harm, rather than as a device for promoting economic goals” and because of “the clash between economic analysis and the moral approaches that reacted to it.”\textsuperscript{13} There is a moral foundation for corrective justice, which Weinrib explained as follows:

… a particular principle or decision will reflect corrective justice (and hence the law’s internal coherence) where it reflects the morality of correlativity: ‘tort law reflects the morality distinctive to the relationship of doing and suffering harm’. Thus, tort law has its own ‘special morality’; it does not express ‘morality at large’ but has a ‘special moral nature … as a medium for the vindication of the claimant’s rights against the defendant’.\textsuperscript{14}

Weinrib observed that the study of the law of torts often commences with the “simple and obvious idea” that “the point of a tort action is to undo the injustice that the defendant has done to the plaintiff.”\textsuperscript{15} Perhaps the main feature of corrective justice theory is that “there is a ‘unity of doing and suffering’: that is, a correlation of the doing of, and the suffering of, harm. The claimant’s right and the defendant’s duty not to interfere with that right are correlative, and the reasons for imposing liability on the defendant must correlate with the reasons for the claimant’s right.”\textsuperscript{16} Weinrib argued:

… the parties are viewed as purposive beings who are not subject to a duty to act for any purpose in particular, no matter how meritorious. The capacity for purposive action underlies the rights and duties that are its juridical manifestations. Personality signifies that all persons possess an equal capacity for rights and duties without being obligated to act toward any particular purpose; it therefore reflects the structure of the law of obligations as a series of negative duties of non-interference with the rights of others. This does not mean that so circumscribed, a notion of duty is exhaustive of one’s moral obligations in all moral contexts.

**B** *The Application of Corrective Justice to the Economic Torts*

Recent theorising on the application of corrective justice principles has largely occurred in the context of the law of negligence, as Witting and Beever have noted.\textsuperscript{18} The ways in which the principles of correlativity and personality apply to the context of the law of negligence is now well understood: the harm suffered by the claimant is to a right such as bodily integrity

\textsuperscript{12} Erbacher, n 6 at p 24.

\textsuperscript{13} Weinrib, n 9 at 109.


\textsuperscript{15} Weinrib, n 9 at 108. Hence, damages put a plaintiff in a position as if an action never occurred.

\textsuperscript{16} Erbacher, n 6 at p 20.

\textsuperscript{17} Weinrib, n 9 at 111.

or a proprietary interest, with the defendant breaching a duty which correlates with that right.\(^{19}\) Only in recent years has scholarship of the economic torts begun to be influenced by corrective justice theory.

In two articles published in 2008 and 2009, Jason Neyers addressed this gap. Previously, the general economic torts had been perceived as a pocket of the law of torts which was “inconsistent with the private law principles accepted by rights-based theorists.”\(^{20}\) There had been concerns about violation of the doctrine of privity of contract, perceived infringement of a basic private law principle that liability should only attach to the person who has infringed a plaintiff’s right, and the anomaly that certain of the torts allow suits for losses ‘parasitic’ on unlawful acts committed by defendants against third parties.

Neyers concluded that each of the general economic torts was capable of being conceptualised as a manifestation of corrective justice and that the torts were able to be justified from a rights-based perspective.\(^{21}\)

The reasons for Neyers’ conclusions can be concisely summarised. He identified a specific primary right that is interfered with for each individual tort, and coupled this with an analysis of which interpretative theory is most appropriate in each case.\(^{22}\) He also specifically examined whether rights-based theories can explain the innominate tort of causing loss by unlawful means (which he termed, in his 2009 article, “unlawful interference with economic relations’). For this tort, Neyers sought to identify “an independent right of the defendant” that when violated should entitle a defendant to sue in its own right. He considered and largely dismissed ‘right to trade’, ‘remoteness’ and ‘abuse of right’ as justifying the tort (due to problems of coherence and fit with case law). He then found potential justification in a ‘public right’ theory: “the plaintiff is not suing for a violation of any of her private rights but rather to vindicate her enjoyment of public rights created by the criminal law (whether statutory or common law).”\(^{23}\)

As was seen in the preceding Chapter Four, Part VII, Neyers explained this theory by reference to the dictum of Palles CB in \textit{Leathem v Craig}.\(^{24}\)

Whilst not viewing the public right theory as a complete satisfactory justification for the innominate tort, due largely to logical difficulties in “accepting that ‘unlawful means’ would be limited to crimes and would not include either torts or breaches of contract,” Neyers saw

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\(^{21}\) Ibid at 166-67.

\(^{22}\) Ibid at 167. Neyers’ observations are incorporated within the analysis in Part III of the following Chapter Six.


\(^{24}\) \textit{Leathem v Craig} [1899] 2 Ir R 667 (Div Ct). See Neyers, n 20 at 229.
this theory could potentially be used to explain the tort of unlawful interference with economic relations in a way that would not violate the privity principle.25

Neyers said: “the law is correct to award damages for economic loss in situations of inducing breach of contract, conspiracy and unlawful interference with economic relations quite simply because the ‘key to recoverability’ is the fact that economic loss flows from a violation of the plaintiff’s rights.” He also noted that a rights-based view of tort law can readily explain both three-party and two-party intimidation, for example where there is “a threat by D to destroy X’s personal property unless X refrains from a contemplated course of action.”26

Neyers advanced a separate ‘justified exception theory’ under which the law creates a composite person out of the third party and plaintiff to unify the right with its loss.27 He saw that a claim for economic loss by unlawful means could be based on a right deriving from what he called “the composite justification whereby the plaintiff and the third party against whom the unlawful means are directed are treated as a unity with the result that the loss for which the compensation is sought is for the infringement of a right of the composite.”28

In a subsequent 2011 article Neyers concluded that an action for economic loss caused by unlawful means can potentially be founded on breach of a primary right of the plaintiff, the right to be free from the targeted infliction of gratuitous harm. He rejected the claim that the torts can only be understood from the perspective of policy or of distributive justice.29

C Critiques of the Corrective Justice Framework

Various criticisms have been made of corrective justice theory by those who prefer a distributive justice approach. Erbacher summarised the main concerns about corrective justice as:

… that it provides no criteria for choosing one liability rule over another in a particular case; that it is wrong (even absurd) to suggest that torts law does not, or should not, pursue external goals; that it is overly dogmatic and fails to account adequately for the need for pragmatism, flexibility and discretion [in negligence law]; and that it is an ideologically right-wing explanation of torts law. Contemporary corrective justice theorists are criticised for ‘re-writing or re-engineering the case law’.30

26 Ibid at 236.
27 Ibid at 231-33.
28 This is how Mark Lunney described Neyers’ justified exception theory when he critiqued it in ‘Book Review – Torts in Commercial Law’ (2012) 20 Torts Law Journal 145 at 146.
30 Erbacher, n 6 at p 22. As authority for these propositions she cited Cane P, ‘Corrective Justice and Correlativity in Private Law (1996) Oxford Journal of Legal Studies 471; Robertson, n 3 ch 11; Dietrich J,
Neyers himself suggested a series of reasons why corrective justice theories have been considered “suspect” in connection with tort law, including their inability to account for the strict liability imposed by vicarious liability, the rule in *Rylands v Fletcher* or trespass torts.31

He also highlighted a number of ‘heterodoxies’ embodied in the general economic torts which have been argued to undermine any claim that they are a manifestation of corrective justice. The first is that inducing breach of contract, which “places burdens on strangers” seemingly “converts the *in personam* right created by the law of contract into an *in rem* right for the purposes of tort law … in violation of the doctrine of privity of contract … [and] the basic private law principle that the only person on whom liability is to be foisted is the person who it can be said has infringed the plaintiff’s right.” The unlawful means tort and three-party intimidation “allow a plaintiff to sue a defendant for a loss that is ‘parasitic’ on an unlawful act committed by that defendant against a third party” which again “seemingly violates the basic private law principle of privity … the plaintiff is only a secondary and indirect victim of the wrongdoing.” The tort of conspiracy, in both forms, “changes generally unactionable activities into torts when they are done in combination with another with the requisite intent” - raising the question whether this is “an instance of the generally prohibited *damnnum absque injuria* since no primary right of the plaintiff has been violated.”32

Various commentators have challenged Neyers’ arguments. Lunney described Neyers, in his 2011 article, as making “heroic and scholarly attempts to make the results fit the rights’ model but whether they are convincing depends on whether one sees the need to make the law conform to the theory.”33 This reaction is typical of those who doubt the success of the effort (to date) to identify a rights basis for the unlawful means tort.

Bagshaw questioned whether Neyers selected the most appropriate claim-right for investigation. He suggested the focus might instead have been on “a right not to have others intentionally cause harm to you by using unlawful means to interfere with the liberty of third parties to deal with you.” He also observed that some would argue that “an appropriate balance between facilitating a flourishing market and preserving valuable liberty” would be struck by protecting a claimant’s interest in the freedom of third parties against those who intentionally seek to damage that interest and use unlawful means.” Bagshaw asked whether an alternative underlying theory for the tort might be “the importance of third parties’ freedom to human flourishing in a society where competitive markets are relied on as a major mechanism for allocation.” He pondered whether a better balance might be struck by broadening the definition of ‘unlawful means’ whilst insisting that the means must be the

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31 Neyers, n 20 at 164-66.

32 Ibid at 165-66.

33 Lunney, n 28 at 146.
instrumentality’ by which the defendant causes loss to the claimant, i.e. adopting the ‘wider view’ of unlawful means favoured by Lord Nicholls in his dissenting judgment in OBG.  

McBride noted that Neyers canvassed a wide range of rights of the plaintiff that might be the basis for the unlawful means tort, but expressed particular discomfort with Neyers’ proposition that a plaintiff might have a ‘general right to trade’. He saw that this would have the result that “everyone else has a duty not to get in the way of her trading; or she has nothing. There is no ‘in between’ right allowed – but why not?” McBride preferred an approach whereby a plaintiff might have “a measured or limited right by reference to considerations of the public interest.” McBride was strongly critical of the rights-based theorists’ view that a rights-based account “should provide us with an account of tort law that makes no reference to the public interest, and should certainly not see tort law as existing to serve the public interest.” The implications of these ideas will be explored in Part IV below.

Weinrib’s viewpoints have been criticised by those who favour “a more contextual approach to law” and incorporation into law of “the findings of the social sciences.” Priel characterised those with “allegiances to Weinrib’s view of tort law” as subscribing to “autonomy versus community.” He rejected “the view that solutions to problems of social order can be found through a scientific-like process of investigation, largely because these one-size all solutions are imposed on society from outside” and preferred approaches which take account of questions of moral responsibility, distributive justice and appeal to broader ‘policy’ considerations.

Cane referred to the argument for the ‘priority of rights’ as ‘rights-fundamentalist’ because “it sets out to explain all the features of a legal phenomenon such as private law … in terms of the single concept of a ‘right.’” He observed that adherents to this view, because they privilege coherence, “have few qualms about dismissing aspects of the law as ‘mistakes’ if this is necessary to reveal it in the best light, as conceptually unified and internally coherent.” He acknowledged that the concept of rights must be taken into account in any analysis because “private law is riddled with rights and rights-talk” but dismissed the view that primary rights provide a ‘sufficient’ explanation of private law as ‘ideologically based.’


36 Ibid.

37 Ibid.


39 Priel, n 30 at 2.

40 Ibid at 5.

41 Ibid at 9.

42 Cane P, ‘Rights in Private Law’ in Nolan and Robertson, n 35 at p 40.
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Cane concluded that:

… contrary to what fundamentalists want to argue, private law is not ‘all about rights’ and the fundamentalist concept of primary rights is not sufficient adequately to explain the shape and scope of liability in private law. Protection of individual autonomy is certainly one of the values underpinning private law, but it also protects social interests.43

It was acknowledged by Neyers that there has been an unevenness of adherence to principle in the common law cases which have developed the economic torts. This ‘incompleteness’, he conceded, could potentially lend weight to those who might claim that these torts could only be understood from the perspective of policy or of distributive justice.44

D Implications of an Approach based on Corrective Justice

Despite the various criticisms that have been made of the rights theorists and their advocacy of corrective justice theory, the case for deciding economic tort suits according to corrective justice principles has been strongly made. Corrective justice theory aims to provide a clear explanation of economic tort liability, on the basis of consistency of principle, coherence and alignment with the precedents.45

If corrective justice theory were to be accepted as providing the best framework for the resolution of general economic tort claims, there would be a number of important implications. One implication would be that “the focus must be on considerations that are relevant to both parties to the interaction”46 – “considerations that reflect the correlative situation of the two parties set terms for their interaction that take account of their mutual relationship and therefore are fair to both parties.”47 This is because “a singular focus on the claimant’s conduct privileges the defendant at the expense of the claimant.”48

Corrective justice is structurally rigid. It manifests firm principles of correlativity and personality, which must be present and act as reference points for the availability of the remedies. As Erbacher explained, corrective justice sees that “it is inconsistent with the correlative structure of corrective justice to decide liability and entitlements by reference to considerations that focus solely on the conduct of one party.” Expressed differently, it is seen as inappropriate to “focus unilaterally on the conduct of one of the parties, or on the effect of the claim on third persons who are not parties to the claim, rather than relationally on the parties to the interaction.”49

43 Ibid.
44 Ibid at 166-67.
45 See Neyers, n 20 at 167.
46 Erbacher, n 6 at p 26.
49 Erbacher, n 6 at p 26.
External policy considerations would therefore need to be largely disregarded in the formulation of the key principles attending the torts. Corrective justice insists that a claim must be assessed “according to its justificatory structure rather than external policy considerations or social goals.” As Weinrib argued, “tort law is not public law in disguise.” Stevens reiterated this, asserting that “the law of torts is not a proxy for the achievement of [social] goals.”

A further implication of embracing corrective justice theory, then, is that “judges should be focused only on factors that pertain to the relationship between the parties as doer and sufferer of the same harm, and should not impose on the relationship an independent policy of their own choice.” Otherwise, what may occur is “a ‘judicial confiscation’ of what is due to the claimant in order to subsidise external policy objectives.”

III. DISTRIBUTIVE JUSTICE THEORY

A The Distributive Justice Viewpoint

The alternative conception of the purpose and function of tort law, distributive justice theory, has been favoured by ‘instrumentalists’ who regard tort law as functionalist (consequentialist) in nature. It has been said that “most policy arguments are consequentialist: they justify or oppose a legal rule or outcome because of the consequences that a rule or outcome of that type is expected to produce.” Distributive justice can be “a vehicle for promoting wide social or economic goals such as loss-spreading, deterrence and retribution.”

For decades, proponents of distributive justice held sway in the academic discourse around tort law in Australia, due largely to the ascent of legal realism. Weinrib chronicled the way in which, by the second half of the twentieth century, corrective justice was largely supplanted by instrumental conceptions of law and “displaced by policy analysis and its concomitant intellectual disciplines.” The term ‘policy’ can be understood as referring to “normative reasoning – reasoning about what the rights and obligations of individuals ought to be.”

There are two main strands of distributive justice. The first is economic analysis of the law which pursues the policy goal of wealth maximisation. This has been described as the most

50 Nolan and Robertson, n 35, Chapter 1 at pp 10-13.
51 Weinrib, n 14 at 403.
53 Erbacher, n 6 at p 20, referencing Beever, n 18 at p 71.
54 Erbacher, n 6 at p 17.
55 Robertson, n 3 at p 263.
56 Erbacher, n 6 at p 17. It should be noted, however, that advocacy of those goals has been much stronger in connection with the law of negligence than the economic torts.
57 Weinrib, n 9 at 108.
common type of consequentialism. Erbacher commented on the extent to which law and economics theorists and legal realists have been centrally involved in instrumentalism. An illustration is provided by the work of Lipstein who, in 1963, wrote that “the protection of private interests against external interference must vary with the change in the evaluation of those interests in a changing society and economy.” What he appeared to have in mind was the need to foster the postwar proliferation of commerce: “modern conditions require the protection against indirect violations of the economic potential of the individual and of commercial or industrial enterprises.” Lipstein noted that by 1963, tort law had developed a higher level of concern with “indirect violations of the economic potential of the individual and of commercial and industrial enterprises.” He contended that the range of protected interests changes with the evaluation of those interests in a changing society.

The second major strand, which has grown in prominence in recent decades, seeks to promote ‘community interests.’ Robertson saw a distinction between approaches based on “policy considerations relating to the interests of the community” and those emphasising “considerations of justice or fairness to or between the parties to a particular dispute.”

B The Application of Distributive Justice to the Economic Torts

Legal realists regard policy as instrumental to torts decisions and see potential for the application of policy to promote social and economic goals across the spectrum of tort law. An Indian Supreme Court decision, Rohtas Industries v Its Union, starkly illustrates the way the law develops in divergent ways depending on the societal lenses being applied. In 1948, in an area of India, workmen went on an illegal strike on account of trade union rivalry. Arbitrators awarded ‘huge compensation’ against the workmen for losses incurred by their employers during the strike period, based on common law principles relating to the tort of conspiracy. The Supreme Court’s decision, finally handed down in 1975, said:

The English cases laying down the rule of common law were a response to the requirement of Industrial civilisation of the 19th Century England. Trade and industry on the laissez faire doctrine flourished and the law of torts was shaped to serve the economic interests of the trading and industrial community. Whatever the merits of the norms … it is a problem for creative Indian jurisprudence to consider how far a mere combination of men working for furthering certain objective(s) can be prohibited as a tort according to the Indian value system … English history, political theory and life style being different from Indian conditions where the Father of the Nation organised boycotts and mass satyagrahas we cannot incorporate English conditions without any adaptation into Indian law.

59 Robertson, n 3 at p 263.

60 Erbacher n 6 at p 17.


62 Robertson, n 3 at pp 261-63.


64 1976 AIR 425.

65 Ibid at [4].
Robertson, although not himself a supporter of rights theories, has highlighted that “the legitimacy of community welfare or policy considerations in deciding cases and shaping private law rules has recently come under sustained attack from scholars advocating a strict corrective justice or rights-based approach.” The questions that need to be considered for the purposes of this thesis are: is it desirable to determine the outcome of economic tort litigation according to policy considerations, in line with distributive justice theory; and should an approach grounded in this theory guide the future development of the torts?

There is now a well-developed school of thought that says ‘no’ to these questions. There are at least four reasons to be wary of the use of policy-based reasoning in connection with the general economic torts.

The first reason is of fundamental importance. Analysis of a tort scenario based mainly on extrinsic considerations and social policy inevitably diminishes the autonomy of the plaintiff. In Dworkin’s conception of autonomy, ‘self-rule’ requires two conditions: independent deliberation and choice free from the manipulation of others. Economic coercion (whether it is applied by a trade union, a business rival or an activist group) can transgress rights and cause economic dislocation and other pernicious economic effects, and therefore threatens this autonomy.

A second concern is based on precedent. In 2001, the High Court of Australia clearly expressed its preferred position on ‘policy’ in the context of judicial decision-making in Sullivan v Moody. This was the watershed case in which the Court rejected the three-stage test of the duty of care in negligence applied in English courts. In a single judgment of its full bench the Court said:

… [t]here are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

In Sullivan v Moody the High Court indicated its lack of appetite for formulating wide social policy, or reasoning by way of ad hoc policy considerations, preferring “to reason by reference to policy already inherent in the law.” The Court showed a “desire to reason by reference to principle – and to avoid the use of policy – in determining duty of care issues,” noting also that where it “has no choice but to reason by reference to policy, it would prefer to reason by reference to established policies rather than ad hoc policy concerns.”

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66 Robertson, n 3 at pp 261-63.


70 Ibid at 579.

71 Witting, n 18 at 572, 582 and 590.
As Witting noted, since (and despite) *Sullivan*, the High Court has regularly engaged in “in-depth consideration of ad hoc policy issues” in the context of negligence. It therefore cannot be discounted that in the future a High Court constituted by members sympathetic to distributive justice theory may bring policy considerations into scope in its consideration of the economic torts. Stevens remarked upon the advocacy of American-style legal realism by former High Court judge Kirby J, who favoured “openly deciding cases according to the relevant policy concerns,” contrasting this with the views of his contemporary on the Court, Heydon J, who argued for a return to strict legalism.

A third reason for concern, which has been argued by Stevens, is that trusting the future development of areas of law such as the economic torts to approaches steeped in distributive justice would logically ultimately lead to the need for American-style initiatives: public scrutiny of proposed new judicial appointees’ views on social issues prior to confirmation of their appointment, or perhaps even the necessity to elect judges.

The fourth objection to an approach grounded in distributive justice, frequently highlighted by rights-based scholars, is that “judges who take account of policy considerations in private law decision-making exceed their judicial role and improperly act as legislators.” Some argue that the economic torts can only be understood through an examination of the extrinsic goals they are said to serve, with the evolution of those extrinsic goals guided by judges. However, there is greater strength in the opposed argument that, in connection with these torts, courts should be wary about the use of policy-based reasoning because policy is ‘unstable’ and incapable of consistent application. An important concern is that courts are “limited in their ability to predict the future consequences of different legal rules for disparate parties.”

Stevens has noted that the temptation for judges, particularly at appellate level, “to seek to shape the law of torts according to the exigencies of policy concerns,” often arises because “on a loss-based model of the law of torts, a judge has no option but to weigh the policy factors which militate in favour of and against liability.” To highlight the dangers of this approach he referenced *Mogul Steamship Co v McGregor Gow & Co* and *Allen v Flood*. He saw these cases as “illustrative of the difference between the powers of the courts and the

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72 Ibid at 583.

73 Stevens, n 52 at 311.

74 Stevens, n 52 makes these arguments at pp 310-11.

75 Robertson, n 3 at p 261, referencing Weinrib, n 19.

76 See Priel, n 30.

77 Witting, n 18 at 569 and 578.

78 Stevens, n 52 at p 306.

79 Ibid at p 307.

80 (1889) 23 QBD 598.

81 [1898] AC 1.
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legislature to make law” and of the issue that “within a liberal democracy unelected judges lack the political competence to weigh competing policy claims.” He asked “How can a court draw such boundaries? It cannot.”

It must be acknowledged that these sentiments play into broader debates about the merits of ‘judicial activism’. The counter-view is that activism balances out the past tendency of conservatively-minded judges to subconsciously impose their own values when deciding cases, and that ‘judicial activism’ has become code language for denouncing important judicial decisions with which conservative critics disagree.

However, a rights-based approach offers the solution that, rather than having no option but to apply a normative evaluation of the societal merits of parties’ opposed arguments, judges who zero in on the nature of the respective rights at stake will find a more objective basis on which to conduct their evaluation.

The preferred position of rights theorists is that “judges should adjudicate on rights and leave issues of policy to be discussed by academics, and determined by the legislature.” Stevens encapsulated this argument:

Our rights should not be decided, or altered, according to a judge’s personal assessment of the balance of a basket of policy concerns … The claim that a judge can act as a spokesman for society and its values is implausible. The judge does not have, and should not claim, special competence to assess this. Further, we no longer live in a homogeneous society, if we ever did. In a pluralist society attempting to decide a case according to whether it accords with general current social mores is, put at its lowest, naïve.

Therefore, Stevens said: “we should not, and could not, seek to justify private law in terms of its extrinsic ends, regardless of whether those extrinsic ends come from social practice, morality, economic efficiency, or anything else.” Although “there is nothing objectionable to assessing the law of torts according to external criteria (eg. Is it efficient? … Does it lead to a fair distribution of resources?)” he argued that “the law of torts cannot be understood by reference to such criteria.” This echoes former Chief Justice Mason’s view that, while “legal principles are applied to decide cases … policy considerations can only be used to inform the development of legal principles.”

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82 Stevens, n 52 at p 308.
83 Ibid at pp 308-9.
85 Stevens, n 52 at p 311.
86 Stevens, n 52 at pp 309-11.
87 Ibid at p 325 and 326. (Stevens also referenced Weinrib, n 19 at p 6.)
These arguments lead to the conclusion that departures from established common law precedents should, ideally, be achieved overtly via legislation and political processes, not through judicial activism. Lord Scarman’s view was that, although there are cases in which “principle inexorably requires a decision which entails a degree of policy risk,” the court’s overriding function is to “adjudicate according to principle, leaving policy curtailment to the judgment of Parliament.”

C  A.I. Enterprises: An Illustration of Difficulties Created by the Application of Policy

A.I. Enterprises Ltd v Bram Enterprises Ltd\textsuperscript{90} illustrates the blurring of principle that can occur when a judicial approach steeped in distributive justice is employed. It will be recalled from Chapter Three that in this case a Full Court of the Canadian Supreme Court considered the unlawful means tort in the light of the House of Lords decisions in \textit{OBG v Allan}\textsuperscript{91} and \textit{Revenue and Customs Commissioner v Total Network}\textsuperscript{92} and sought to answer the question “what rationale best reflects the modern role that the tort should play in the broader scheme of civil liability?”\textsuperscript{93} The Court fashioned a ‘best rationale’ for the tort which it termed ‘liability stretching’.\textsuperscript{94}

Cromwell J based his preference for confining the unlawful means tort “within narrow bounds” (and his associated preference for a narrow definition of ‘unlawful means’) on four considerations.\textsuperscript{95} The first of these was that “tort law has traditionally accorded less protection to purely economic interests than to physical integrity and property rights.”\textsuperscript{96} The second consideration was that the common law has historically been “reluctant to develop rules to enforce fair competition” and “generally prefers a limited role for the economic torts in the modern marketplace.” Thirdly, there was a concern “not to undermine certainty in commercial affairs” which might be “put in jeopardy by adopting vague legal standards based on ‘commercial morality’ or by imposing liability for malicious conduct alone.”\textsuperscript{97}

\textsuperscript{89} McLoughlin v O’Brien [1983] 1 AC 410 (HL) at 430. This quote is a reminder of a practical problem impinging on the discussion of the application of policy undertaken in this Chapter: the potential for statute to render moot debates about the best means of evolving the common law. This risk was discussed in Part H of Chapter One, and can be seen in play in Chapter Nine which analyses the restrictions on secondary boycotts housed in Australia’s competition and consumer law legislation.

\textsuperscript{90} [2014] 1 R.C.S. 177. This case is referred to hereafter as “A.I. Enterprises”.

\textsuperscript{91} [2008] 1 AC 1. This case is referred to hereafter as “OBG”.

\textsuperscript{92} [2008] 1 AC 1174.

\textsuperscript{93} A.I. Enterprises [2014] 1 R.C.S. 177 at 198 [36].

\textsuperscript{94} See Chapter Three, Parts III C and IV.

\textsuperscript{95} A.I. Enterprises [2014] 1 R.C.S. 177 at 179.

\textsuperscript{96} Ibid at [30]. See also [29].

\textsuperscript{97} Ibid at 201 [42].
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Cromwell J’s fourth consideration supporting a limited scope for the tort was that “the history of the common law shows that tort liability, if unduly expanded, may undermine fundamental rights.” He saw a “risk inherent in the economic torts generally that they will undermine legislated schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of association and expression” and “the risk that expanded liability for the economic torts may be used to undermine legislative choices and perhaps even constitutionally protected rights of expression and association” but said that “a narrow and clear definition of the scope of liability reduces this risk.”

Lee criticised the A.I. Enterprises decision. Her observations are valid and incisive. She observed that Cromwell J seemed to understand himself to be endorsing a rationale in line with the majority position in OBG, when he stated “the liability stretching rationale underlies Lord Hoffmann’s speech.” However, Lee concluded, on close analysis, the decision was justified “on a conceptual premise that appears to differ from that assumed in OBG.” In particular, she noted that Lord Hoffmann “located the tort’s rationale in the need to protect one’s liberty to trade” and said “the tort is ultimately premised on the broader purpose of ‘[enforcing] basic standards of civilised behaviour in economic competition’.” Accordingly, the result of A.I. Enterprises was that Canadian law features “a tort that bears close resemblance to that crafted in OBG but which also differs from it in subtle but important ways” and “liability-stretching does not really explain the rationale of the tort.” Lee then argued that:

… the true rationale underlying the civil tort of conspiracy by unlawful means is to protect members of society against injury that results from the deliberate subversion of the law. On this view, it is the agreement among the conspirators to perpetrate an unlawful act that is the essential wrong of the tort, while the elements of intention and ensuing injury help to identify the appropriate claimant … The law objects to the perpetration of illegality through concerted conduct, even if the same act is not civilly actionable when it is done by an individual.

Further flaws in the analysis in A.I. Enterprises can be seen if viewed through the lens of corrective justice. What was being suggested in this case was that the matter could be determined not by considerations reflecting the correlative situation of the two parties but rather macro-level issues such as the common law’s purported attitude towards fair competition and concerns the tort might “undermine legislated schemes favouring collective action in, for example, labour relations.” There was an absence of analysis of the economic interests the plaintiff companies were seeking to uphold in the case at hand. If not for the

98 Ibid at 179 and 195 [29].
99 Ibid at 197-98 [34].
100 Ibid at 201 [43].
104 Cromwell J did, however, reference Neyers’ position that a right of the plaintiff needs to be engaged by the defendant’s conduct, and noted that a “modest expansion of the range of persons who can sue is justified where the breach of an existing duty to one party is intended to, and does, economically harm another.” Cromwell J acknowledged a potential objection to his analysis if no right was impeded. A.I. Enterprises, Ibid at 204 [48].
finding of a breach of fiduciary duty, the plaintiffs might well have been left without remedy as the result of the narrow construction of the unlawful means tort adopted by the Supreme Court.

The discussion in the case blurred the divide between private and public law which Burrows has described.\(^\text{105}\) Cromwell J’s approach conformed to a trend Collins described as the “insertion of fundamental rights into litigation over ordinary contractual, tortious and property disputes” as part of a broader effort by human rights law proponents to “colonise the whole of private law and force a fundamental and disruptive reorganisation of its existing rules and principles.”\(^\text{106}\) The concern expressed about an undermining of fundamental rights and legislated schemes (Cromwell J’s “fourth consideration”) was prospective and speculative and had nothing at all to do with the conduct in issue in the *A.I. Enterprises* case. It involved making allowance for the potential for future unspecified legislative action, the nature of which would in any event be impossible to anticipate. Concerns relating to a particular substantive law context (labour law) were made the basis for reshaping a generalised common law principle, in a case which was not about labour law.

It can also be argued that an unnecessary insertion of policy considerations into the decision was made when Cromwell J said he favoured the liability-stretching rationale “because it establishes a clear ‘control mechanism’ on liability in this area of the law, consistent with tort law’s reticence to intrude too far into the realm of competitive economic activity.”\(^\text{107}\) Baroness Hale’s statement in *OBG* that it is “consistent with legal policy to limit rather than encourage expansion of liability in this area”\(^\text{108}\) was cited, together with Hazel Carty’s academic view that “a narrow remit … based on existing civil liability is the best policy.”\(^\text{109}\)

Another perplexing aspect of the analysis in this case was the weight Cromwell J gave to his observation that economic interests may rank lower than physical integrity and property rights. This may well constitute a factor to be taken into account in any weighing a court may undertake of the relative interests at stake (bilaterally) between two parties to a dispute, but it hardly provides a basis for a diminution of the priority given to the protection of economic interests generally (which would be the effect of the curtailment of the unlawful means tort in the way His Honour proposed).

Finally, Cromwell J’s view that the common law inherently prefers a limited role for the economic torts is contestable; it is arguably at odds with the historical antecedents of these torts. The general economic torts are, at core, about the protection of economic interests. Deakin and Randall observed that “all the great cases in the area of the economic torts … have been based on the principle that the right to pursue a trade, business or livelihood free of certain forms of interference, deemed to be illegitimate, deserves the protection of the law,”


\(^\text{107}\) *A.I. Enterprises* [2014] 1 R.C.S. 177 at 202 [44].

\(^\text{108}\) *OBG* [2008] 1 AC 1 at [306].

with the concept of ‘trade interests’ seen to include “interests bound up in a particular commercial business as well as the pursuit of a chosen livelihood or profession.”

The ‘traditional’ view of the importance of protecting economic interests was encapsulated by Glasbeek as follows: “Endeavours which promote free enterprise activity should be supported by the law in imposing liability on those who interfere with such endeavours.”

Admittedly, the progenitor tort of inducing breach of contract needs to be viewed in its historical context: “at the height of the Industrial Revolution, a tort to protect the integrity of contract relations would help stabilize the underlying structure of a rapidly developing market economy”

However, the law of torts has traditionally protected economic, trading and property interests against intentional intrusion and provides “an uncharacteristically strong protection of the plaintiff’s economic interests, a protection that is in apparent contrast with the very limited protection given such interests in negligence.”

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113 Neyers, n 20 at 166.
Chapter Five: The Application of Policy to Shape the Economic Torts

IV. INTERMEDIATE THEORIES

A number of scholars have noted the potential for development of ‘intermediate’ or ‘mixed’ theories that seek to blend corrective and distributive justice theory. One of Porat’s criticisms of Weinrib was that he “dismisses deterrence and loss distribution as irrelevant to tort law and, consequently, objects to mixed theories that strive to accommodate both corrective justice and deterrence within tort law.”114 There is an “emerging intermediate view that tort law is primarily concerned with interpersonal justice, but that it is appropriate for courts to make reference to broader policy considerations in limited circumstances and under strict constraints.”115 Witting argued the terms ‘principle’ and ‘policy’ cannot be spoken of as fixed and binary opposites, observing that “policy contributes to the development of principle.”116

Referring to nuisance and trespass cases, Cane noted that there are cases where a landowner tends to be held to be “entitled to use the law of tort to protect his legal rights even when, judged from a social point of view, his interest in doing so is slight compared with the defendant’s interest in interfering with his rights.”117 This example demonstrates the way in which the common law may on occasions give differential weighting to certain interests, in certain circumstances. Cane saw a “crucial question” as “when the law is justified in giving effect to ‘social’ valuations of interests and ignoring the value assigned by the interest-holder.” He concluded: “English law is prepared to do this only in extreme circumstances.”118

Fleming commented that “much depends on the nature of the plaintiff’s interest that has been violated” and elegantly expressed the need for a discriminating allowance ordering various interests according to the scale of human values:

… the law has to differentiate between the various kinds of interests for which individuals may claim protection against injury by others. Elementary in all legal systems is the protection afforded to personal security and the claim to freedom from interference with tangible property … People wish to be safeguarded, not only against physical aggression, but also against detrimental consequences to their pocket-book. … In each of these instances, the human interest involved holds a different place in the scale of social values and for this a discriminating analysis must perforce make allowance.119

Robertson saw potential for development of a middle way “between unconstrained instrumentalism and the policy-free ‘anti-instrumentalism’ of corrective justice and rights-based theories.” He contended that “considerations of community welfare have a legitimate role to play in private law decision-making and in shaping private law rules because they are constrained by the framework of judicial decision-making in general, and private law

115 Erbacher, n 6 at pp 17-18, referencing Witting, n 18 and Robertson, n 3.
116 Witting, n 18 at pp 572-73.
118 Ibid at p 237.
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decision-making in particular” and he sought to “sketch the different ways in which common law judges are constrained in the use they can make of policy considerations in framing legal principles and deciding cases.”  

He identified factors such as institutional constraints on judges (including the need to explain their reasons in writing, the desire to maintain their reputations and the certainty of peer scrutiny); adherence to the doctrine of precedent; and considerations of the form of the law itself (encompassing the need for certainty, coherence and consistency with other legal rules).

Robertson argued that, taken together, these constraints “significantly limit the extent to which, and the ways in which decision-making in private law can be guided by policy considerations” and that their existence “undermines the formalist claim that judges cannot take account of community welfare considerations without taking on an illegitimate legislative role.” He noted that “policy considerations … underlie and are embedded in many private law doctrines and are given effect in many cases where they are not explicitly mentioned.”

Embedded within Robertson’s analysis was the idea of a distinction between forms of taking account of policy considerations which would be uncategorically repugnant to rights theorists – for example, where “community interests … operate as a trump … in relation to the denial of rights that a person would otherwise have” – and ‘lighter’ forms of interference with the ‘purity’ of corrective justice theory.

At their current state of development intermediate theories still fail important tests, which Robertson articulated. They do not circumvent the overriding imperative that in each case justice should be done to the particular parties before the court. Furthermore, relieving the defendant from liability on the basis of an extrinsic consideration “means denying the plaintiff” and offends “the bipolarity constraint in private law.” However, mixed theory ideas, if more fully developed, have the potential to establish a broadly acceptable basis for admitting consideration of policy issues into the analysis of an economic tort problem, albeit on a limited basis. The question that needs to be addressed is how best to achieve this.

120 Robertson, n 3 at pp 262 and 279.

121 Ibid at pp 268-72.

122 Ibid at p 279.

123 Ibid at p 277.

124 Ibid at p 272.
V. CONCLUSION

As has been seen in this Chapter, corrective justice theory and distributive justice theory offer alternative and very different approaches. Both theories have potential to provide a conceptual framework for the future development of the general economic torts. It is important to observe, however, that not all commentators on the economic torts ground their views in either corrective justice or distributive justice; some are agnostic as to which of these theories is correct.

Some commentators consider the general economic torts a “quintessential embodiment” of the concept of corrective justice, as Mendelson described them.\(^\text{125}\) It can be argued that the future coherence of the torts depends upon their having an underpinning rationale consistent with corrective justice theory, and this being consistently adhered to. Although scholarship examining the implications of corrective justice for the economic torts is at a relatively early stage of development, the case for accepting corrective justice theory as the explanation for liability under these torts is at least as strong as for the law of negligence.

Application of the general economic torts necessitates the assessment of interests and rights.\(^\text{126}\) This supports the argument that the rationale of these torts should be consistent with the precept of corrective justice that the analysis of liabilities should be founded on scrutiny of the bilateral relationship of the claimant and defendant. The guiding star of corrective justice theory is its insistence that disputes should be determined based on considerations of justice between the parties to a particular dispute, rather than factors relating to broader community concerns.

Reliance on policy-based reasoning (for example, the use of policy on the part of judges to seek to re-shape the economic torts according to some interest judicially determined to be a collective goal of the community as a whole) can lead to unpredictable and selective context-specific outcomes which fail to pass the tests of coherence. It has been argued in this chapter that *A.I. Enterprises*\(^\text{127}\) demonstrates some of the pitfalls in an analytical approach to the general economic torts grounded in distributive justice. When it eventually has the opportunity to consider the status of the unlawful means tort in Australia, the High Court of Australia should resist the temptation to apply this case as a precedent.

It follows that it is undesirable to approach the general economic torts from a starting-point that they need to be inhibited as a matter of policy.\(^\text{128}\)

If proponents of a policy-based approach were to go to work on reshaping the general economic torts from the standpoint of distributive justice theory, the torts would most likely be launched on a pathway to minimisation and, perhaps, eventual irrelevance. But this family of torts are of enduring importance. Common law protection of individual economic interests

\(^\text{125}\) Mendelson, n 1 at p 314.

\(^\text{126}\) This will be further demonstrated in the following Chapter Six.

\(^\text{127}\) *A.I. Enterprises* [2014] 1 R.C.S. 177.

\(^\text{128}\) Carty appears to have approached her analysis from this starting point (see n 109 at p 172). As explained above in Part IV, the policy-based desire to inhibit the torts was also a basis for the decision of the Full Court of the Supreme Court of Canada in *A.I. Enterprises* [2014] 1 R.C.S. 177.
is vital to the free functioning of markets and the upholding of the freedoms which underpin individual autonomy.

Questions may be raised as to whether it is now practical for corrective justice theory to be evenly applied to the economic torts, given the extent to which considerations of policy and morality, including “commercial morality,” have already been introduced into the analysis.

A key difficulty with application of an approach steeped in corrective justice theory, in the context of the economic torts, is its inflexibility. The absolutism of what has been denigrated as a ‘rights-fundamentalist’ approach presents a problem, in that it seeks to completely preclude consideration of policy factors. There are undoubtedly some circumstances in which it is legitimate for courts to take into account policy considerations.

For example, as will be seen in the following Chapters Six, Seven and Nine, tests of public benefit or public interest potentially have important roles to play in the weighing of interests and the determination of liabilities under the economic torts. A range of circumstances can arise in which it is necessary to analyse the torts according to extrinsic goals they are seen to serve, which might include deterrence, community welfare or wealth maximisation.

The greater flexibility (relative to corrective justice theory) promised by intermediate or mixed theories should therefore be welcomed, notwithstanding that the exact character of these theories has not as yet become clear. The practical reality is that courts are unlikely to feel constrained by any particular theory as the common law evolves (based on the factual situations courts are presented with) but there is merit in the development of a structured approach grounded in theory which might help guide the courts’ deliberations.

The common law could potentially be developed to implement a mixed theory consisting of three core requirements. First, courts faced with the task of determining a matter, and re-shaping a tort, by reference to policy considerations should only do so following a threshold evaluation of the respective rights of the claimant and defendant at play. This would bring to bear the valuable contributions rights theorists are making to understanding of the theoretical foundations of the torts, and the rights which underpin the torts. Second, the notion of public interest would need to be at the centre of any analysis. Third, judges would need to, increasingly, engage in the weighing and measuring of competing rights.

To assess how this proposal might work in practice it is necessary to more closely evaluate the nature of rights and interests. This exploration is undertaken in Chapter Six which follows.

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129 This term was used by Cromwell J in A.I. Enterprises [2014] 1 R.C.S. 177 at 201 [42].

130 By contrast distributive justice, with its ready embrace of policy is highly flexible, arguably too flexible.

131 This is Cane’s term, as was explained in Part II C above, see n 42 at p 40.

132 Cane, n 117 at p 235 provided examples, including “the balancing of factors” required under the common law defence of necessity to actions for trespass.
Chapter Six saw scope for development of an intermediate or mixed theory that might enable the general economic torts to develop with primary reference to considerations of justice between the claimant and defendant, but also take into account public interest considerations, in limited circumstances.

The proposal made at the end of Chapter Five consisted of three core components. First, the evaluation of the rights and interests at stake in a given dispute. Second, a stronger emphasis on public interest considerations. Third, judicial weighing of competing rights and interests.

This chapter explores how each of these three components might be put into effect. Parts II, III and IV are concerned with the analysis of rights and interests and, in turn, address three important questions. What are the essential features of a rights-based view of tort law, and how does this view apply to the general economic torts? Is it sufficient for something having the status of a mere interest to constitute the basis for an economic tort cause of action, or should these torts have a basis in a higher-order right? What are the rights and interests that have been argued to be protected by each of the torts?

In Part V public interest is addressed. The notion of public interest is vexed because the mechanisms for assessing it are undeveloped and ambiguous, evaluations can be value-laden and courts are reluctant to become involved in weighing competing interests. Part VI reviews the case law which provides guidance on how courts should approach the task of evaluating countervailing rights and interests.

Economic tort litigation is essentially about a contest of rights and interests. A claimant seeks (explicitly or implicitly) to ground its claim in the infringement of a right or an interest which it possesses. Defendants will counter that no such legitimate right or interest exists, or – if a justification defence is to be run – that it is outweighed by some higher countervailing right or interest which justified the defendant’s conduct. The proposition advanced in this chapter is that the resolution of disputes in this area of law should involve evaluation of the respective rights of the claimant and defendant.
II. THE RIGHTS-BASED VIEW OF THE ECONOMIC TORTS

The articulation of a rights basis for tort law is not novel, but rather a re-assertion of the historical origins of tortious remedies. Edelman, Goudkamp and Degeling described these origins in the foreword to *Torts in Commercial Law*:

… the great common law scholars of the eighteenth and nineteenth centuries … argued passionately that the law of torts could be systematically organised. More specifically, they asserted that torts protected particular rights (for example, rights to reputation, rights to the security of one’s goods, rights to liberty and rights to land) … That conception of the law of torts was met head-on by Lord Atkin … in *Donoghue v Stevenson*. He posited that the law of torts is based upon “a general public sentiment of moral wrongdoing for which the offender must pay” [and] conceived of torts as based on fault … [But] the law of torts that emerged after *Donoghue v Stevenson* was not based exclusively upon Lord Atkin’s conception of fault. The law of torts continued to protect particular rights … The result was that the law became, and remains, bi-focal … Liability might arise as a result of the fault of the defendant. But it also might be imposed as a consequence of the infringement of particular rights … the law of torts was divided into two categories: one category focused upon liability for harm caused by fault and another upon infringement of particular, nominate rights.¹

Addressing this distinction, McBride challenged other tort academics to think of tort law as “concerned to provide us with a range of rights against other people, and help us vindicate those rights when they are violated or threatened with violation” rather than simply “concerned to determine when we can sue other people for compensation for losses.”² Goldberg and Zipursky saw that one of the main senses in which rights figure in the law of torts is that relational norms of conduct impose duties on defendants not to mistreat others and recognise correlative claim rights not to be mistreated.³

The literature review conducted in Chapter Four showed a distinction in approach between ‘rights theorists’ and those, such as Carty, who are comfortable with the admission of policy considerations into the determination of economic tort disputes. Fundamental to the ‘rights-based view’ of tort law is the idea that judges do not have a general jurisdiction to reallocate losses from plaintiffs to defendants just because they think it would be ‘fair, just and reasonable’ to make the defendants bear losses.⁴ Instead, liability needs to be grounded in the existence of a right.

‘Rights-based’ analysis is closely related to corrective justice theory, in that it depicts various aspects of tort law as “driven, primarily or exclusively, by the recognition of the rights we have against each other, rather than by other influences on private law, such as the pursuit of


³ Goldberg J and Zipursky B, ‘Rights and Responsibilities in the Law of Torts’ in Nolan and Robertson, n 2, Chapter 9, p 251. Goldberg and Zipursky saw three further senses in which rights figure: power is conferred on victims to hold wrongdoers liable, the legal principle of civil recourse recognises a victim’s claim right, good against the state, to hold the wrongdoer accountable; and there is a ‘natural right’ of response to wrongdoing (at pp 261-70).

⁴ McBride, n 2 at p 335.
community welfare goals.” Nolan and Robertson cautioned that it would be unwise to treat rights theories and corrective justice theories as synonymous, noting that some rights theorists, such as Stevens, are expressly critical of corrective justice. Contradicting this, Neyers said corrective justice and a rights-based approach “can be treated as synonyms and refer to a legal and philosophical tradition that simultaneously defines the rights persons hold against each other and elucidates how courts should respond to violations of those rights.”

The school of thought which is based on the ‘rights model’ tends to envisage the infringement of something having the status of a right as “the gist of all torts.” Stevens’ pithy summary was as follows: “A tort is a civil wrong. A civil wrong is the breach of a duty owed to someone else. The breach of a duty owed to someone else is, synonymously, the infringement of a right they have against the tortfeasor.”

For Stevens, torts are about the infringement of primary rights. In his conception, certain rights (but not all) are ‘primary’ rights, the violation of which gives rise to ‘secondary’ obligations. The essence of a ‘wrong’ is “the infringement of a primary right which generates a secondary right, commonly but not always a liability to pay compensation.” Stevens viewed rights of reputation, rights of bodily safety and freedom and rights of property as examples of “classes of rights which are personal and which are exigible against the rest of the world.” Hohfeld, he said, had distinguished between four usages of the word ‘right’: “a claim right, a liberty (called by Hohfeld a privilege), a power and an immunity.”

The distinction between a right and a ‘liberty’ was particularly important to Stevens. He explained that “in many situations we have a liberty to act in a certain way and this liberty is further protected by one or more claim rights,” noting that “once we have a picture of our rights, the negative is an image of the liberty of others.” Stevens’ use of the term ‘rights’ means “either specific claim rights, or the claim rights which arise together for a common reason and which are specific to a larger bundle of different species of rights.”

The practical effect of this analysis is demonstrated by this example provided by Stevens:

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5 Nolan and Robertson, n 2 at p 1.
6 Ibid at p 26.
8 Stevens R, Torts and Rights (Oxford University Press, Oxford, 2007) at p 2. Stevens’ views were briefly introduced earlier at Chapter Four, Part VI. He contrasted the rights model with a “loss-based model” (at p 307).
9 Ibid at p 39.
10 Ibid at p 287.
11 Ibid at p 5, referring to the list of personal rights itemised by Cave J in Allen v Flood [1898] 1 AC 1 at 29.
13 Ibid at p 4.
On this approach we do not have a ‘right’ at common law to freedom of expression. I have a liberty as against everyone to speak as I choose. Subject to exceptions, no one has the right to stop me. If you do not like what I say, I have a right that you do not punch me on the nose, or lock me up. However, these rights are not specifically tied to the liberty to speak. You have a duty to me not to do these things regardless of your motivation. By contrast my liberty to go where I choose is protected by a right against others that they do not detain me against my will, a right specifically tied to my liberty of movement.14

The rights-based view has particular strength when applied to the general economic torts, a species of tort which is built upon the transgression of rights (primarily, economic rights).15 Deakin and Randall identified this in their 2009 article Re-thinking the Economic Torts when they said that “the economic torts belong to that broad class of civil wrongs in which the gist of the action lies not in damage caused by fault, as in the case of the tort of negligence, but in an interference with an interest which the law protects.”16

As a practical matter, these insights lead to the conclusion that a three-stage analytical process is required when contemplating economic tort litigation. The first stage involves the classical assessment of potential tortious causes of action in terms of their component elements. All of the necessary elements of a given tort must be proven.17 Although Stevens has argued that a ‘recipe’ based approach to analysis of the economic torts is fundamentally wrong,18 in Australia, at least, this remains standard practice.

Stage two is the diagnosis of the rights or interests of the claimant that are being impugned. Stevens saw this as a threshold step, and suggested that discussion of the torts should begin with a rights-based analysis.19

In stage three, any opposed rights or interests the defendant may seek to assert need to be discerned. This is relevant to the pleading of a justification defence, a topic which is discussed in depth in Chapter Seven. Stages two and three should ideally be undertaken at the same time, and at the outset of litigation.

This recommended approach would require courts to adopt the following logic: a tort is being alleged here; if we are going to afford a remedy, we must be comfortable that a sufficiently important right is at stake that warrants the remedy; and we must assure ourselves that there is no countervailing right that affords justification for the conduct.

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14 Ibid at p 5.
15 Chapter Five of this thesis explained the reasons for this viewpoint.
16 Deakin S and Randall J, ‘Re-thinking the Economic Torts’ (2009) 72 Modern Law Review 519 at 533. It should be noted that Deakin and Randall argued (at 533) that “unless a direct interference with trade, business or employment is made out, a vital element of the wrong is missing, even if loss or damage is also present.”
17 The elements of each of the general economic torts, under Australian law, were explained in Chapter Two.
19 Stevens, n 8 at p 39. See also Stevens, n 18.
III. RIGHTS AND INTERESTS: DOES TERMINOLOGY MATTER?

Deakin and Randall argued that an interference with an interest which the law protects must be present in a particular case before a court should proceed to establish the nature of the liability which could arise. Their choice of terminology highlights a significant threshold issue: can a mere interest constitute the basis for a cause of action, or in each case is it necessary that a higher-order right be at stake?

Leading academics have highlighted the inherent ambiguity of the term ‘right’. Goldberg and Zipursky said the term provides “a trap for the unwary and an opportunity for the rhetorician.” Hohfeld saw it as a “chameleon-hued word” that can be “a peril both to clear thought and lucid expression.” Cane, referencing Hohfeld, noted that, both within and outside the law, the word ‘right’ is given various different meanings. He viewed the term as “systematically ambiguous.” As part of his critiquing of rights theorist he argued it was particularly important to be alert to this imprecision “when considering arguments that [tort law] is not only replete with rights but also built on a foundation of rights, and that every other concept found in private law is, in some sense, secondary to and derivative of the foundational concept of a right.”

The term ‘interests’ is similarly broad, and has no technical legal meaning, as Cane observed. Heydon regarded ‘interest’ as “a remarkably ambiguous word.” He remarked that tests employed under United States law often depended on a balance “not of ‘rights’ but of ‘interests’: the plaintiff’s interest in his contractual rights must be balanced against the defendant’s interest and the ‘public interest,’ if any.”

In making sense of the distinction between these notions, the contributions of Hohfeld, Stevens and Neyers are helpful. In the early 20th century Hohfeld analysed the meaning of the phrase ‘legal rights’ and produced:

… a taxonomy of legal relationships consisting of what he called: claims, privileges, powers or immunities. He defined a power as ‘one’s affirmative “control” over a given legal relation as against another’. ‘[P]erson (or persons)’, states Hohfeld, ‘whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem’. Power, he also explained, can be understood in relation to its jural correlative and its jural opposite. The jural ‘correlative’ to a power results in the imposition of a

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20 Goldberg and Zipursky, n 3 at p 273.

21 Hohfeld, n 12.

22 Cane P, ‘Rights in Private Law’, Chapter 2, p 35 in Nolan and Robertson, n 2 at p 39. In this passage, Cane also observed that the term ‘interests’ has been used to describe a particular theory of rights – the interest theory.

23 Ibid at p 35.


25 Ibid at 161 and 170-71.
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‘liability’ in the person over whom control is exerted, or in other words, a ‘subjection’ or ‘responsibility’.

Stevens devoted considerable energy to the analysis of various definitions and categories of rights. One potential conceptual division he canvassed was “to try and divide the law according to the sort of ‘interests’ the claimant’s right seeks to protect,” as this connects with “the common but not universal view that ‘rights’ in the general sense are concerned with protected interests.” He noted the tendency to confuse so called ‘rights’ and ‘interests’ and that “although an interest may be the subject matter to which a right relates (e.g. my interest in my body) it is not the right itself.” He saw that a significant disadvantage associated with focusing on the interest rather than the right was that an interests-based classification can cause sight to be lost of the distinction between a claim-right and a liberty. Stevens concluded that “a classification which furthers our understanding of the primary rights we have is to be preferred over an interests-based classification.”

Neyers referenced the following statement in the nineteenth century Privy Council case of Rogers v Dutt: “it is essential to an action in tort that the act complained of should under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests is not enough.” Neyers also cited the dictum in Victoria Park Racing and Recreation Grounds Co Ltd v Taylor that “it is a fundamental principle of the law that tortious liability requires both a right and an interference that is not too remote – one without the other will not do.”

These passages challenge Deakin and Randall’s viewpoint that an interference with interests can suffice to ground an action under the general economic torts. Purist rights-theorists would argue that the interference should be capable of being substantiated as having the elevated status of a right.

However, from the perspective of precedent, the exact nature of the rights and interests protected by the various economic torts has not been precisely settled. This can lead to confusion. In the literature, a wide range of different notions of rights and interests have been argued to underpin each of the general economic torts. These diverse perspectives will now be considered.


27 Stevens, n 8 at pp 289-90.

28 (1860) 13 Moo 208 (PC).

29 Neyers J, ‘Causing Loss by Unlawful Means: Should the High Court of Australia follow OBG Ltd v Allan?’ in Degeling, Edelman and Goudkamp, n 1 at p 125.

30 (1937) 58 CLR 479 at 524 per McTiernan J.


32 It should be noted that Deakin and Randall did not flesh out in detail the considerations upon which their conception of interests was based.

33 The discussion in Part IV below is, in effect, a continuation of the literature review in Chapter Four above.
IV. PROTECTED INTERESTS TORT-BY-TORT

A Inducing Breach of Contract

The ‘interests’ protected by the *Lumley v Gye* tort are contractual. Deakin and Randall’s view, citing *OBG*, was that the interest protected is an “actionable contractual expectation” and the interference prohibited is a “knowing and intentional procurement of breach.”

Causes of action under the tort of inducing breach of contract have also been said to involve direct interference with pre-existing ‘rights’ of a plaintiff. The tort aims to protect a plaintiff’s contract rights against “a defendant’s direct interference through persuasion or inducement,” although “only those intentional breaches where the defendant has himself deliberately persuaded the contractual partner into breach are covered.” Bagshaw described “the orthodox understanding of the tort … as offering special protection to the contractual relationship.”

In *OBG* Lord Hoffmann explained that the tort:

… treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so. In this respect it is quite distinct from the unlawful means principle, which is concerned only with intention and wrongfulness and is indifferent as to the nature of the interest which is damaged.

Any discussion of interests and interferences as they relate to the tort of inducing breach of contract should recognise that a large body of commentators question whether there is a legitimate basis for the tort’s existence. Writing soon after the publication of the *OBG* decision, Lord Hoffmann described himself as part of a “school of opposition” to the outcome in *Lumley*, on the basis it was an unprincipled decision which “made the law irrational and sometimes incoherent.” He noted other opponents include “the law and economics people, who regard the case as an obstacle to efficient breach of contract.” Weir drew attention to:

… a law and economics justification for sanctioning inducement of breaches of contract, that is, bribing or bullying someone into breaking his contract with someone else. To make the inducer pay gives him an incentive to go to the promise and bargain with him rather than seducing or browbeating the promisor. This saves transaction costs.

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34 Deakin and Randall, n 16 at 552.


37 *OBG v Allan* [2008] 1 AC 1. This case is referred to hereafter as “*OBG*”.


Chapter Six: The Contest of Rights and Interests

Lord Hoffmann identified two theories which approve of *Lumley*:

The first is that which emphasises the moral obligation to keep a promise and, correspondingly, the immorality of tempting or persuading someone to break it … The other theory is that a contract is a chose in action, a species of property, which the law should protect from interference or devaluation in the same way as any other property.  

Carty’s scholarly analysis of the rationale for the torts in her book *An Analysis of the Economic Torts*, concluded that “those who support the tort” have offered three separate rationales for its existence: “the property theory, the social policy theory and the secondary civil liability theory.” In her analysis, “it may be possible to compare the protection given by this tort to at least some of the protection given by the law to property” but “the contract does not as such give rise to property rights.” Bagshaw, on the other hand, suggested that “rather than see the contract as property, the law ‘borrows’ well-tested arguments for protecting private property rights against the world and that this provides a secure foundation for the *Lumley v Gye* tort.” Lee argued that at times the focus “on ‘property’ or ‘quasi-property’ really reflects a moral justification for the tort.”

Carty saw that “the second policy justifying the tort … relies on the policy benefits of the tort, ‘establishing norms to encourage private order’.” She referenced Danforth’s view that the protection of the integrity of contract reflects “the important role of contractual relations as a reliable, structure-giving element in any market economy.” It is necessary to see the tort in its historical context: as Cane noted, this tort has frequently been used as between employers and trade unions “at the forefront of bitter arguments about the (ab)use and control of economic power in society.”

The third theory identified by Carty, which she regarded as the “true principle” underpinning the tort, was that it “provided special protection for contract rights by imposing ‘secondary liability’ on a person who procures a breach, that liability dependent on the contracting party having committed an actionable wrong.” For this position she cited the authority (in *OBG*) of Lord Hoffmann and Lord Nicholls, who said “this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of a third party

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40 Hoffmann, n 38 at pp 105-6.
41 Carty, n 35 at p 57.
43 These words are Carty’s (n 35 at p 59) referring to Lee Pey Woan, ‘Inducing Breach of Contract, Conversion and Contract as Property’ 29 *OJLS* (2009) 513 at 513.
45 Danforth, n 36 at 1493.
47 Carty, n 35 at pp 60 and 62.
who committed a breach of contract’ and therefore provides a claimant with an “additional cause of action.”\(^{48}\)

Against this, Stevens doubted the existence of a general principle of secondary liability for wrongs committed by others as an explanation for the inducing breach of contract remedy, for six reasons: \(^{49}\)

First, one party who induces another to breach a contract is not held jointly liable with the party in breach of contract for the commission of the same wrong … Secondly, the modes of participation in another’s conduct which suffice for the attribution of action can be wider than is sufficient for the purposes of inducing breach of contract … Thirdly, and conversely, some forms of inducement of breach of contract are actionable which would not be sufficient for the purposes of the attribution of action … Fourthly, the remedies available against a party who induces a breach of contract differ from those available against the contracting party … Fifthly, the view that the claim in \textit{Lumley v Gye} is a form of secondary liability is difficult to support in the light of the fact that the inducer may be liable when the contracting party is not … Sixthly, the attempt to generalize \textit{Lumley v Gye} into a general principle of secondary participation was (rightly) rejected in \textit{Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department}. \(^{50}\)

Stevens argued that “all contracts carry with them a right good against everyone else that they do not induce the infringement of the contractual right.” In his view “the essence of the tort [of inducing breach of contract] is that by inducing a voluntary breach the claimant undermines the bond of trust between persons.”\(^{51}\)

The earlier writings of Glasbeek maintained that “the ability to indulge in contract-making plays such an essential role in our society that it must be protected by the law” and that “public interest demands that such interference with contract-making be more positively discouraged and, therefore, an additional remedy is given to the promise.”\(^{52}\) He regarded Lord Macnaghten’s much-cited passage in \textit{Quinn v Leathem} summarising the tort as “a violation of legal right to interfere with contractual relations recognised by law”\(^{53}\) as a variant of a general principle that “the law wishes the acknowledged right to be respected and to deter would-be violators by punishing actual violators. That is, inherent in the cause of action is the notion that certain modes of behaviour are not to be condoned and ought to be punished.”\(^{54}\) This is consistent with the courts’ interest in enforcing promises which are a product of the private autonomy of individuals. \(^{55}\) Glasbeek identified a range of important propositions emanating from \textit{Lumley}:

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\(^{48}\) \textit{OBG} [2008] 1 AC 1 at [36] and [172].

\(^{49}\) Stevens, n 8 at pp 275-78.

\(^{50}\) [2000] 1 AC 486 (HL).

\(^{51}\) Stevens, n 8 at pp 280-81.


\(^{53}\) \textit{Quinn v Leathem} [1901] AC 495 at 510.

\(^{54}\) Glasbeek, n 52 at 189.

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... where the right violated was a contract, the nature of the behaviour of the stranger who procured or induced the breach of contract did not have to be evaluated: liability would follow if the breach was the result of the defendant’s conduct, whereas if the right interfered with was not a contract, the nature of the defendant’s conduct might make him liable although mere malice would not ... The view that a contract is the kind of right which will justify the imposition of liability upon a stranger should it be breached as a result of that stranger’s conduct, is supported by respect that the common law has evinced over the centuries for private contract-making. The contract is seen as the cornerstone of our individualistic society. The making of contracts depends on the ability of free activity of individuals to voluntarily treat and to negotiate with each other and to agree to be bound to each other on such conditions as they choose. Accordingly, its status should be protected by the law wherever possible, thereby promoting these manifestations of individual freedom and enterprise.56

In contrast, Carty’s view was that “simply to focus on the ‘protected interest’ misses the point of Lumley v Gye liability. The contract right is only protected against the defendant in certain circumstances. There have to be special reasons for making the defendant liable where the wrong concerned is the wrong of another.”57 As a sufficient reason, she nominated Weir’s “the defendant ‘got something unlawful done’.”58 Carty acknowledged that “contract rights are clearly important” but argued the focus on contract rights has led to unfounded extensions of liability in case law, with the unsuccessful attempt to assert a tort of interference with contractual relations in OBG being a prime example. She characterised Lord Macnaghten’s approach in Quinn v Leathem referencing “violation of legal right”59 as “misleading.”60

B Conspiracy

Goodman saw that the fundamental rationale of civil conspiracy was “the significance of plurality” and that its purpose, in both the lawful means and unlawful means forms, is “protection of the individual or the public vis-à-vis the activities of combinations.”61 This derived from comments of Bowen CJ in the Mogul case that “it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals, or of the public.”62 Lee argued that regard must be had to the tort’s historical role as the civil analogue of criminal conspiracy, conceived to deter combinations that result in serious harm to social or economic order.63

56 Glasbeek, n 52 at 191.
57 Carty, n 35 at p 60.
58 Weir, n 39 at p 23.
59 Quinn v Leathem [1901] AC 495 at 510.
60 Carty, n 35 at p 59.
62 Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) 23 QBD 598 at 610, cited by Goodman, n 59 at 81. This case is referred to hereafter as “Mogul”.
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The coercive potential of combination was demonstrated in *Quinn v Leathem* where one of the bases of the plaintiff’s action was the publication by the defendants “of ‘black lists’ containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him.” The black lists were termed “a real object of coercion.”

In *Quinn v Leathem* Lord Macnaghten explained the innate concern about parties acting in combination:

> That a conspiracy to injure – an oppressive combination – differs widely from an invasion of civil rights by a single individual cannot be doubted … A man may resist, without much difficulty, the wrongful act of an individual … but it is a very different thing … when one man has to defend himself against many combined to do him wrong.

Bowen LJ in the *Mogul* case said: “The distinction [i.e. between the infliction of harm by one compared with a combination] is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise.”

Goodman termed this the “strength in numbers” argument and contended this was no longer sustainable:

> It is not the mere fact of numbers that is potentially oppressive; oppression is the product of protean factors. Thus, for example, the relative power of the parties to a dispute vis-à-vis one another as well as the means at their disposal to bring about a result may outweigh the significance of plurality.

Elias and Ewing commented that “motive and purpose became relevant where a combination of persons was acting together,” especially where “a group of trade unionists were combining together” and the apparent justification for this was the belief that the coercive pressure of a group far outweighed that of an individual acting alone.” They thought “this was always a naïve assumption once the doctrine of separate legal personality for corporate bodies had been accepted into English law. And what was once simply naïve became positively grotesque with the development of very large and powerful corporate organisations.”

Lee balanced the debate, observing that “although it is true that a large corporation is often more powerful than several individual traders combined, it does not follow that the latter cannot constitute an unfair or intimidating force against a lone trader.”

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64 *Quinn v Leathem* [1901] AC 495 at 510 at 518.

65 Ibid at 511, per Lord Macnaghten.

66 *Mogul* (1889) 23 QBD 598 at 616.

67 Goodman, n 61 at 82.


69 Ibid at 324.

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The validity of basing liability for lawful means conspiracy on “the mere fact … of a combination of persons” has been criticised by others.\textsuperscript{71} According to Carty the torts have been muddled by judicial “inability to appreciate the legitimacy of collective pressure.”\textsuperscript{72}

Goodman saw that the House of Lords in \textit{Lonrho Ltd and Ors v Shell Petroleum Co Ltd and Ors (No 2)} made clear their belief that civil action in conspiracy was anomalous, referencing a dictum of Lord Diplock in that case:

\begin{quote}
… [T]o suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multi-national conglomerate … does not exercise greater economic power than any combination of small businesses is to shut one’s eyes to what has been happening in the business and industrial world since the turn of the [20\textsuperscript{th}] century and, in particular, since the end of the 1939-45 war.\textsuperscript{73}
\end{quote}

Writing in 1991, Goodman contended that “in contemporary Australia … it has become not uncommon for one person or a small group of persons to control, for example, virtually an entire industry and/or large numbers of employees” and that in that event the “dubious rationale upon which civil conspiracy is premised becomes totally eroded.”\textsuperscript{74}

A number of commentators have regarded \textit{lawful} means conspiracy as anomalous. Stevens expressed concern at the liability being based on “the mere fact … of a combination of persons.”\textsuperscript{75} Lee said “the anomaly of lawful means conspiracy is too well recognised. It assumes that a combination has the magical power to transform a lawful act into an unlawful one although it is not clear why that is necessarily so.”\textsuperscript{76} Carty thought “lawful means conspiracy could be seen as an anomaly, out of line with OBG’s reassertion of the abstentionist policy.”\textsuperscript{77}

Neyers considered the main arguments generally advanced by those who argue that lawful means conspiracy is anomalous, but he concluded that the tort is justified and the criticisms can be explained away. He noted that a common critique is that lawful means conspiracy is in violation of the well-accepted common law principle that “an act that is legal in itself will not be made illegal because the motive of the act may be bad.”\textsuperscript{78} Neyers’ view was that in order

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\textsuperscript{71} Stevens, n 8 at pp 276-77, referenced by Neyers, n 29 at p 132.

\textsuperscript{72} Carty, n 35 at p 3.

\textsuperscript{73} \textit{Lonrho Ltd and Ors v Shell Petroleum Co Ltd and Ors (No 2)} [1982] AC 173 at 189, cited by Goodman, n 61 at 17 [or 84] and Elias and Ewing, n 68 at 325.

\textsuperscript{74} Goodman, n 61 at 83.

\textsuperscript{75} Stevens, n 8 at pp 276-77.

\textsuperscript{76} Lee, n 63 at 261.

\textsuperscript{77} Carty, n 35 at p 25.

\textsuperscript{78} Neyers, n 29 references this argument at p 132, citing \textit{Sorrell v Smith} [1925] AC 700 (HL) at 718-19 per Lord Dunedin and \textit{Sanders v Snell} (1998) 196 CLR 329 at 342.
to explain the rationale for lawful means conspiracy, “one must demonstrate that there exists a right to be free from gratuitous harm and that this right can consistently and coherently exist with the other rights recognised by law.” He persuasively argued that such a right exists.\(^{79}\)

In Deakin and Randall’s view the interest protected by unlawful means conspiracy is an economic interest in a trade.\(^{80}\) However, Lord Wright noted in the *Crofter* case that the doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes and thus non-economic purposes may also be in scope. In *Crofter* Viscount Maughan said that amongst the types of combination that may be actionable are “combinations the object of which may be a dislike of the religious views, the politics, the race or the colour of the plaintiff provided that the plaintiff is harmed as a result of the combination.”\(^{81}\)

Deakin and Randall proposed a broadening of the interest protected by unlawful means conspiracy to “economic damage, not confined to trade interests.” This was in line with “the residual market-protecting role” they suggested for the economic torts in general.\(^{82}\)

Their proposal – in that it envisaged limitation of availability of the remedy to players in a marketplace – was at odds with the outcome of the *Total Network* case in which, by a bare majority, access to the tort was extended to a government agency, Her Majesty’s Revenue and Customs. A dictum of Lord Walker, part of the majority in that case, asserted that it was “not necessary, in the context of the unlawful means conspiracy tort, for the claimant to be a trader who is injured in his trade.”\(^{83}\)

Another concise encapsulation offered by Deakin and Randall described the interference prohibited by the tort of conspiracy by unlawful means as “combination coupled with intention to harm.” They noted that for this tort the defendants’ activities need not be “independently actionable by the party interfered with.”\(^{84}\)

In a thought-provoking article published in 2016, Lee explored a further extension of the tort – to use it, as an alternative to ‘the piercing of the corporate veil’ to either “stretch a company’s liability to its controllers, or to enable a controller’s creditors to reach the assets of a company under his or her control.” She noted potential for the tort to be used “in disputes involving corporate defendants, as a means of circumventing the company’s veil of incorporation to reach directors, shareholders or related companies who might in one way or another have been involved in a company’s alleged wrongdoing.” This would leverage the characteristic of the general economic torts that they allow a plaintiff to “reach beyond the immediate perpetrator of a particular injury, and attach liability to those whose involvement

\(^{79}\) Ibid at 132. See, further, Chapter Four (Part VII) and Chapter Eight of this thesis.

\(^{80}\) Deakin and Randall, n 16 at 552.

\(^{81}\) *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] 1 All ER 142, per Lord Wright at 166 and Viscount Maughan at 152, referenced by Goodman, n 61 at 69.

\(^{82}\) Deakin and Randall, n 16 at 534 and 552.

\(^{83}\) *Revenue and Customs Commissioner v Total Network* [2008] 1 AC 1174. This case is referred to hereafter as “*Total Network*”.

\(^{84}\) Deakin and Randall, n 16 at 552.
is either indirect or insufficiently causative of the claimant’s injury.” Lee noted that a liberal application of conspiracy liability to companies and their insiders could potentially encroach upon the limited liability principle and undermine the benefits of incorporation.  

C Intimidation

With the tort of intimidation, the ‘interest’ protected is an “economic interest in the relation being interfered with.” The need for courts to evaluate the nature of interests at stake, from the perspective of both plaintiff and defendant, is illustrated by Ansett Transport Industries (Operations) Pty Ltd & Ors v Australian Federation of Air Pilots & Ors in which four airline companies, who together employed about 1500 air pilots, took action against the Federation for interference with contractual relations, conspiracy and intimidation, following a dispute about pay increases for pilots. The defendants, union officials, issued a directive to pilots that they should only work between the hours of 9am and 5pm, causing the plaintiff airlines considerable loss of income. They also advised pilots to resign their employment, which they did en masse, and placed advertisements in various publications warning of adverse consequences for any pilots accepting employment from the plaintiffs. The defendant advertised in newspapers that any pilot seeking employment with airlines in Australia would be considered a strike breaker, and that the terms of settlement of the dispute would include a provision for immediate cancellation of the employment contracts of those pilots. The airlines alleged that the advertisement by the defendant prevented pilots from seeking employment with them.

The court said:

The warning notice certainly had a tendency to deter pilots from seeking employment with the plaintiffs … It may be that some pilots were deterred from taking employment with the plaintiffs by the notice. The … factors operating to influence the minds of pilots … include (in the case of those who had resigned) self-interest and loyalty and (in the case of all pilots) the fear of unpleasant consequences of one kind or another if they took up employment and anxiety about what their position would be, in every respect, quite independently of the threat in the notice, if the dispute was settled and those who had resigned returned to work.

Deakin and Randall detailed various interferences, falling within the rubric of ‘threats of unlawful conduct’, that led to the development of the tort of intimidation – threats of serious violence; actual violence; and the need to address ‘the problem of the coercive power of threats.’

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85 Lee, n 63 at 257-59.

86 Deakin and Randall, n 16 at 552.

87 (1989) 95 ALR 211 at 273. This case is referred to hereafter as “Ansett”.


90 Garret v Taylor (1620) Cro Jac 567.

91 Tarleton v M’Gawley (1793) 1 Peake 270.

92 Deakin and Randall, n 16 at 548 and 552.
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D Causing Loss by Unlawful Means

According to Deakin and Randall the tort of causing loss by unlawful means protects “an economic interest in the relation being interfered with” or alternatively “substantial interests in a trade, business or livelihood.”

Neyers suggested that claims for economic loss caused by unlawful means can potentially be justified “on the basis that the defendant’s actions violate a (specially constituted) primary right of the plaintiff” that is infringed “when the defendant injures the third party.” In Neyers’ treatment “the term ‘primary right’ refers to a right that: (1) is recognised by the substantive law (such as rights to bodily integrity, to property, to contractual performance, and to reputation …; and (2) exists prior to the wrongful interference with it. A primary right is contrasted with secondary rights which arise when a primary right has been infringed (that is, the right to damages).”

As “the unlawful means tort is a three-party tort involving a plaintiff, a defendant and an injured or threatened third party” it “expands the number of persons liable for a civil wrong.” Thus, the tort “allows a plaintiff to sue a defendant for a loss that is occasioned by an unlawful act committed by that defendant against a third party.” The tort is therefore sometimes referred to as “anomalous” or “a peculiar cause of action” because, as Pearson LJ commented in *Rookes v Barnard*, “the plaintiff is only a secondary and indirect victim of the wrongdoing.”

The unlawful means tort “necessarily has a multi-party structure and is conceptually distinct from two-party liability contingent upon the use of unlawful means.” Lord Hope warned in *Total Network* that “caution is needed where the unlawful act is directed against a third party at whose instance it is not actionable because he suffers no loss. In such circumstances the

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93 Ibid at 552-53, citing the authority of *OBG* [2008] 1 AC 1.

94 Neyers, n 29 at p 131.


96 Ibid at p 119.

97 Ibid at p 121.

98 Carty, n 35 at pp 84, 155 and 314.

99 Neyers, n 29 at pp 121-22.

100 *Rookes v Barnard* [1963] 1 QB 623 (CA) at 688, per Lord Pearson.

101 Lee, n 70 at 331-32.
plaintiff’s cause of action is, as Carty put it, ‘parasitic on the unlawful means used by the defendant against another party’.”

Carty also commented that “the debate as to the existence and scope of two-party economic torts has been set alight by the House of Lords decision in Total Network, a debate which may lead to the emergence of two frameworks for economic tort liability and possibly the distortion of established areas of tort liability.” Lee’s view was that “it is unclear if the legal principles enunciated in OBG v Allan apply only to indirect interferences, or extend also to those involving direct, two-party interferences.” Neyers said:

For clarity’s sake it should be noted that acceptance of the ‘composite justification’ of the unlawful means tort does not cast doubt upon the existence of two-party intimidation provided that unlawful means in that tort are understood to be limited to threatened violations of a plaintiff’s primary rights. On this analysis, a two-party version of the unlawful means tort is redundant since actual/direct violations of a plaintiff’s rights can be remedied by the respective torts which protect those rights.

Deakin and Randall identified the kinds of interferences restricted by the tort of causing loss by unlawful means as “intentional harm via independently actionable unlawful means, limiting freedom to trade” and “interventions which are direct and targeted.”

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103 Carty, n 35 at p 3.

104 Lee, n 70 at 331.

105 This is the justification Neyers favoured, n 29 at pp 126-28. See Part VII of Chapter Four of this thesis.

106 Neyers, n 29 at p 127. It should also be noted that “the unlawful means tort originated from the early cases on intimidation.” (Carty, n 35 at p 77)

107 Deakin and Randall, n 16 at 552-53.
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V. THE VEXED NOTION OF PUBLIC INTEREST

Having considered the nature of the rights and interests that can potentially underpin a claimant’s cause of action, discussion can now turn to the kinds of countervailing rights and interests that may be argued to found justification defences. Justification is explored in detail in Chapter Seven, but it is appropriate to elaborate here on the proposition (advanced at the end of Chapter Five) that the notion of public interest needs to be considered in any analysis of the respective rights of the parties to a dispute. Considerations of public interest provide the most compelling explanation for denying a claimant recourse it would otherwise be entitled to.

McBride argued that it would be a “wrong turn” or a “big mistake” to interpret the requirements of a rights-based theory of law to “abjure any reference to the public interest all the way down – not only in its account of why and when tort remedies will be available, but also in its account of what rights we have and what rights we don’t have.” His view was that:

… rights-based theorists of tort law are right to be suspicious of those who claim that all tort cases will ultimately come down to questions of ‘public policy’ – but they throw the baby out with the bath water when they claim that considerations of what is in the public interest are never relevant to claims in tort. Plainly they are, and plainly they should be … the fact that the courts are ill-equipped in some difficult cases to decide what is, and what is not, in the public interest does not mean that they are always incapable of reaching accurate conclusions on such issues. In cases where it is very clear – even to a judge – that it would be contrary to the public interest, or that it would not be contrary to the public interest, to grant someone a particular right, why should the courts not take that into account in deciding whether or not to recognise that right?

Where a sufficient public interest exists it is legitimate for a court to grant a claimant only a measured or limited right against a defendant. However, a series of problems need to be overcome if this proposition is to be carried into effect.

The first is the need to develop better mechanisms for assessing the public interest, in order to determine its sufficiency. Cheer noted that “considerable judicial and other ink has been spilled trying to define what the public interest means” but the meaning of the term is still debated, and unclear. Where statutory tests of public interest have been put in place, e.g. the test of ‘benefit to the public’ under s 90(8) of Australia’s Competition and Consumer Act 2010 (Cth), comprehensive methodologies of assessment based in economics have been developed. Comparable methods have not been developed to guide assessments under the common law.

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108 McBride, n 37 at p 339.

109 Ibid at pp 340-41.


111 See Chapter 9, Part VIII of this thesis.
Even in the *Competition and Consumer Act* example, there is undoubted potential to design and implement more rigorous assessment processes which take into account a wider range of considerations, including “broader social values.”

The second set of issues to be overcome are essentially political. According to Powell and Clemens, the idea of public good is “vexed and contested and one must ask questions like ‘which public?’ and ‘for whose good?’” and assess “what is the yardstick that assesses how organizational actions best meet broad societal goals?” An illustration of how value-laden the process of assessment can be was provided by Cane when he observed that “furtherance of the self-interest of workers can be seen as in the public interest because it provides a counterweight to the ability of employers, by virtue of their economic strength, to protect their own interests within the law.” Evaluations become especially challenging when courts are asked to determine matters of morality or fairness. The difficulty of deciding where the public good lies between competing views of a contentious political nature has been noted by the Court of Appeal of New Zealand.

The final problem which needs to be addressed is judicial reluctance to engage in the process of weighing rights and interests. This reluctance has been overcome in some areas of law: Cane discussed the “balancing of factors” (often involving “difficult and controversial moral and social judgments”) required under the common law defence of necessity to actions for trespass. He also highlighted that “there are many areas of the law of tort in which the courts give effect, explicitly or implicitly, to ‘public policy’ arguments. The results may sometimes be controversial, but the courts are not always in a position to shirk the responsibility of deciding such matters; nor do they always wish to do so.”

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114 Cane, n 46 at p 278. Cane generally explored the category of ‘interest-based’ defences which assert some public interest which “competes with the interest the plaintiff is seeking to protect” (at p 232).

115 Ibid at p 236.


117 Cane, n 46 at p 235.

118 Ibid at p 279.
In an article which mapped the development of remedies for economic duress, Stewart concluded that:

… every day courts are required to resolve commercial dilemmas, and frequently there is no clear-cut precedent or obviously applicable rule to guide them. In these ‘hard cases’ it becomes necessary for judges to rely on their own acquired knowledge of commercial practices and standards; and it is these which … must be applied when the use of commercial pressure is alleged to be wrongful.\textsuperscript{119}

Uncertainty will arise if litigation is resolved by approaches which depend on a judicial value-judgment of the justifiability of certain conduct (for instance, commercial pressure) but this can be moderated if public interest considerations are part of the evaluation.

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VI. THE WEIGHING OF COMPETING RIGHTS AND INTERESTS

Since it is being advocated in this thesis that the courts should be prepared to engage in the weighing of competing rights and interests, it is necessary to review the guidance that is available in the case law as to how this should be done.

Before considering the cases it is useful to reflect upon the conceptual observations of Peter Cane in his 1991 text *Tort Law and Economic Interests*, in which he engaged in some “skirmishing about the proper role of general principles” in tort. Cane analysed the various ways in which defences to tortious actions, grounded in competing interests, may result in a refusal to impose liability. He saw two types of cases. The first was where a “competing interest nullifies a (prima face) liability in tort,” allowing the competing interest to be “recognized as affording a legal justification for conduct otherwise tortious.” This can arise where a defendant “acted to protect some stronger legal interest of his own,” and in this case “the onus of establishing nullifying factors will normally rest on the defendant.” The second case – where the competing interest “negatives tort liability” – can arise where a defendant pleads “that some public interest justified” the action. Here, “the plaintiff will normally be responsible for establishing that there are no negativing factors.”

Cane elaborated:

> Reasoning in terms of nullification of liability most commonly occurs in cases where the tort on which the plaintiff’s cause of action is based is one which has the protection of a property interest (or some kindred type of interest), or of a contractual interest, as its juristic focus: trespass, for example, or defamation, or interference with contract … Thus we speak of justifying trespass or interference with contract, and of raising a defence to a prima-face case of defamation.

In *Read v The Friendly Society of Operative Stonemasons of England, Ireland and Wales*, an early inducing breach of contract case, it was held that sufficient justification for interference with a claimant’s right hinged on the existence of an *equal or superior right*.

Important questions flow from this principle. Should certain economic interests receive a higher degree of protection than others, and is there a hierarchy of interests? Whilst the idea of a settled hierarchy has not been entertained by the courts, Deakin and Randall thought that a hierarchy of interests is implicit in the structure of the economic torts, with contractual rights enjoying a higher level of protection than general economic interests, and that some degree of prioritisation is inevitable.

*Read* was subsequently elaborated in the *Glamorgan Coal* case where it was said that “the circumstances which will constitute sufficient justification cannot be satisfactorily defined, and it must be left to the determination of the Court in each case whether there is sufficient

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121 Ibid at p 230.

122 Ibid at p 231.

123 [1902] 2 KB 732.

124 Deakin and Randall, n 16 at 535-56.

125 *Glamorgan Coal Co Ltd v South Wales Miners’ Federation* [1903] 2 KB 545.
justification for the interference.” Romer LJ provided a list of relevant factors which could potentially be weighed, where the tort in play is inducing breach of contract:

... in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach.

The Read and Glamorgan Coal precedents were reviewed in Independent Oil Industries Ltd v Shell Co of Australia Ltd, a decision of three judges of the Supreme Court of New South Wales. There it was noted that no case had, as yet, authoritatively decided that “anything short of the protection of an actually existing superior legal right will justify the wilful procuring of a breach of contract.”

Independent Oil involved a suit by a petrol wholesaler which was supplying to retail dealers on the condition they would sell petrol at a retail selling price fixed by the wholesaler. After a series of transgressions of the agreed pricing arrangements certain dealers broke their agreements with the plaintiff and increased the price of petrol beyond the selling price fixed by the plaintiff. While the outcome of the case turned on failure to prove the elements of the tort of inducing breach of contract, rather than justification arguments, the judgments in the case contained several important dicta bearing on the considerations to be taken into account when weighing competing interests.

Jordan CJ said that justification rested on the principle that “an act which would in itself be wrongful as infringing some legal right of another person may be justified if shown to be no more than reasonably necessary for the protection of some actually existing superior legal right in the doer of the act.” In support of this he gave the example of an occupier of land who may, after notice, lawfully eject a trespasser by acts which would in other circumstances constitute the tort of assault.

Zhu v Treasurer of the State of NSW concerned actions taken by the Sydney Organising Committee for the Olympic Games (SOCOG) to instruct TOC Management Services Pty Ltd (TOC), the trustee of the Olympic Club Trust, to terminate an agency agreement between TOC and the plaintiff Zhu. The facts can be concisely summarised:

In March 1999 Z entered into a contract with the trustee of an ‘Olympic Club’ which appointed him as an agent to sell memberships of the club to residents of China for use in conjunction with transport and accommodation for the 2000 Olympic Games in Sydney. In November 1999, the Sydney Organising Committee for the Olympic Games (SOCOG) procured the termination of Z’s

126 Ibid at 545.

127 Ibid at 574.

128 (1937) 37 SR (NSW) 394. This case is referred to hereafter as “Independent Oil”.

129 Ibid at 415.

130 (2004) 218 CLR 530. This case is referred to hereafter as “Zhu”.

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contract. In proceedings brought by Z, SOCOG conceded that its acts interfered with Z’s contract and were intended to do so, but it pleaded that the interference was justified.\footnote{131}{Ibid 530.}

The defendant SOCOG made a number of key submissions: that as defendants they needed some insulation from the rigours of the widening tort of interference with contract and that the function of the justification defence was to achieve this end; that it had rights resulting from its responsibility to protect the intellectual property which it was custodian of; and “that there were two inconsistent sets of legal rights: the plaintiff’s contractual rights against TOC, and SOCOG’s rights.” However, “SOCOG accepted that it had no superior statutory right positively authorising the commission of the tort and no superior proprietary right.”\footnote{132}{Ibid at 566-67 [106] - [107].}

In Zhu, the High Court established a general principle that: “Ordinarily, to justify the wilful attempt of a stranger to procure a breach of contract, a superior legal right must be established”\footnote{133}{Ibid at 580 [138].} and that the “approach to the defence of justification [which] should be accepted for Australia” was that “an ‘actually existing superior legal right’ is required.”\footnote{134}{Ibid at 582 [144].} An ‘actually existing superior legal right’ could be taken to mean “a right in real or personal property, not merely a right to contractual performance.” The High Court observed that “two competing rights to contractual performance involving no proprietary interest would be equal rights” but, significantly, Jordan CJ in Independent Oil\footnote{135}{Ibid at 580 [139].} had not mentioned the protection of an equal right as a form of justification.”\footnote{136}{Ibid at 577 [135].} To reinforce the general principle, it was also said that “a right which is ‘superior’ to the plaintiff’s contractual right must be proprietary” and “statute apart, where reliance is placed on the defence of justification to protect a right which is equal or superior to the contractual right of the plaintiff … normally … a superior right will be proprietary.”\footnote{137}{Edwin Hill and Partners v First National Finance Corp [1989] 1 WLR 225.}

The High Court addressed an inconsistent English example of a superior right making out a defence of justification in Edwin Hill\footnote{138}{Ibid at 582-3 [145], [147] and [149].} where “the defendants lent money to a property developer to enable him to develop a particular property and secured the loan by charges on the property.” They noted a dictum in that case that “justification for interference with the plaintiff’s contractual rights could be based upon an equal or superior right in the defendant derived from contractual rights.” However, this was discounted on the basis it found ‘no support” in the statements of Jordan CJ in Independent Oil and the Full Court of the Supreme Court of New South Wales in that case only supported “the existence of justification in superior, ie, proprietary rights.”\footnote{139}{Ibid at 582-3 [145], [147] and [149].}
It had been commonly understood that “the superiority of the defendant’s contract apparently rests on its temporal priority” but Zhu established that “in stating the law for Australia, it should now be accepted that, when the superiority of right rests in some characteristic of the general law then … temporal priority of other purely contractual rights will not suffice.”

The High Court held that:

The assertion of justification by a stranger to interfere with [compliance with a contractual obligation] necessarily impinges on the law. It is for that reason that justification requires either the authority of statute … or some other superior right if the interference is to be lawful.

The combined effect of these reasons was that SOCOG’s conduct did not meet the criteria for a defence of justification. Its acts were more than was reasonably necessary to protect its rights. As a result of Zhu an ‘actually existing superior legal right’ has arguably become, in Australia, the only justification for inducing a breach of contract.

It should be noted that in Zhu the High Court downplayed the ‘balancing and weighing’ function of the judiciary (although the necessity for this task to be undertaken will still arise whenever two comparable sets of rights grounded in property and/or contract are in issue). SOCOG unsuccessfully submitted that the court should “engage in a flexible discretionary ‘balancing exercise,’ weighing social and individual interests, to determine which set of rights should prevail.” The High Court said:

The primary difficulty with the approach SOCOG would have this Court take is that in Australian law the defence of justification does not depend upon a discretionary ‘balancing’ of social and individual interests. The statement of Romer LJ in Glamorgan Coal Co Ltd v South Wales Miners Federation may be relevant, at a high level of generality, in the elucidation of the law, but appears never to have been decisive of the outcome in any particular case.

The weighing of countervailing rights and interests is a task that courts have traditionally disdained. Nevertheless, it is submitted, the weighing of rights is terrain that the courts will increasingly be called upon to traverse.


141 Ibid at 587 [159].

142 Ibid at 531. A concluding comment was also made (at 587 [159]) as to the “striking … absence in Anglo-Australian law of occasions when such a defence, however understood, has succeeded.”

143 Carty, n 35 at p 65.

144 Zhu (2004) 218 CLR 530 at 567 [107].

145 Ibid at 570-71 [117], also noted at 531.
Chapter Six: The Contest of Rights and Interests

VII. CONCLUSION

This chapter has explored the idea that the general economic torts should be approached from the vantage point of rigorous rights analysis – that is, based on evaluation of the respective rights of the claimant and defendant. It has been concluded that causes of action in this field of law are essentially grounded (whether explicitly or implicitly) in interference with rights or interests and that diagnosis of the rights and interests at stake should be an essential early step in economic tort litigation.

It was also found that the interference that ground the action will have greater consequence if it is capable of being substantiated as having the elevated status of a right (as opposed to a ‘mere’ interest). However, the nuances of the differences between rights and interests and their respective weighting do not appear to have been judicially considered in a recent Australian economic tort case. Terminology relating to notions of rights and interests tends to be employed in a confused and inconsistent manner by advocates, judges and academics alike.

It has been seen that there is potential for the development of new approaches, grounded in refinements of intermediate theories, under which the general economic torts could be developed with primary reference to correlative considerations of justice between the claimant and defendant, but also potentially taking account of public interest considerations. This will require courts to be involved in the balancing of competing rights and interests.

Precisely articulating the rights at stake becomes vitally important if justification defences are to be asserted. The state of development of the justification defences applicable to the general economic torts is examined in detail in Chapter Seven which follows.
CHAPTER SEVEN

JUSTIFICATION DEFENCES

I. INTRODUCTION

The notion of justification has been central to the economic torts from their inception, but limited attention has been paid to delineating the justification defences. This position stands in contrast to other areas of tort law such as defamation where the common law developed a series of “formalised privileges”\(^1\) which ultimately were converted, in Australia, into statutory exceptions embedded in the Defamation Acts of the various States and Territories (including the “defence of justification”).\(^2\)

In part, this lack of attention may be attributable to the tendency courts have displayed to rely on definitions of unlawful means and/or intention, malice or purpose in preference to justification as control mechanisms for the torts.\(^3\) Another explanation may be that when statutes were introduced to confer immunity from economic tort liability on collectives involved in industrial action, this “in effect fulfilled the function of the defence of justification in the labour context … and made unnecessary further judicial consideration or development of the common law doctrine.”\(^4\) As a result, as Lord Hoffmann has said (extra-judicially), after *South Wales Miners Federation v Glamorgan Coal Co Ltd*\(^5\) in 1905, “justification more or less disappeared from the calculation.”\(^6\) Whatever the reason, the state of development of the justification defences is surprisingly immature.\(^7\)

Deakin and Randall proposed a revised conceptual basis for the general economic torts which, in part, would give greater emphasis to “the nature of justifications which should be accepted as defences.”\(^8\) They saw the need for “a more nuanced account” of justification, noting that the defences have potential to delimit the outer limits of these torts. The conclusion of their article suggested a new basis for reformulating the torts, built on general principles which included “a broad range of justification defences based on collective

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\(^2\) See *Defamation Act 2005* (Vic), s 25; *Defamation Act 2005* (NSW), s 25; *Defamation Act 2005* (Qld), s 25; *Defamation Act 2005* (WA), s 25; *Defamation Act 2005* (Tas), s 25; *Defamation Act 2005* (SA), s 23; *Defamation Act 2006* (NT), s 22; *Civil Law (Wrongs) Act 2002* (ACT).

\(^3\) The concern of courts to apply one or more control mechanisms to inhibit the potentially very broad ambit of the torts was discussed in Chapters Two and Three and of this thesis.


\(^5\) [1905] AC 239.


Chapter Seven: Justification Defences

economic self-interest, pre-existing contracts, etc.” 9 Deakin and Randall commented that “the justification defences … have not received the attention which they deserve” but went on to note that there are signs that this is changing with indications in decisions since the turn of the 21st Century of the interplay between torts and immunities again becoming the focus of judicial activity. 10

Despite these insights, Deakin and Randall’s proposals have, to date, gained limited traction and received relatively little judicial support or analysis. In part, this is because they did not themselves undertake a detailed evaluation of potential ways justifications might be elaborated in the future, only offering a high-level sketch. They did not flesh out in any detail the considerations upon which their conception of interests might be based. The absence of exploration by other commentators (especially in Australia) of the potential identified by Deakin and Randall for expansion of the justification defences constitutes a gap in the economic torts literature.

This chapter aims to address this gap by reviewing in some depth the relevant case law, identifying the judicial perspectives reflected in the English and Australian precedents and examining the role justification defences play within the architecture of the economic torts. It then explores the potential for future expansion of the defences. A number of obstacles to expanded justifications – some erected by the case law, others arising from theory – are considered, and a refocusing on notions of public interest in the future development of the defences is anticipated. The chapter considers the question: should a defendant who has engaged in illegal activity ever be able to claim the benefit of a justification defence?

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9 Ibid at 550.

10 Ibid. Deakin and Randall’s formulation also favoured an enhanced focus on ‘targeting’ as a basis for liability (at 553).
II. JUSTIFICATION DEFENCES TORT-BY-TORT

To understand the current status of justifications under the economic torts it is necessary to review the position tort-by-tort, as there are significant differences in the way the defences are applied (or not applied) to the underlying causes of action. Just as no underpinning unifying principle of liability has been arrived at for the various economic torts,\(^{11}\) it is difficult to discern a common thread of logic in the application of these defences. Deakin and Randall’s 2009 article set out a simple typology for justifications:\(^{12}\)

<table>
<thead>
<tr>
<th>TORT</th>
<th>JUSTIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>GENERAL PRINCIPLES OF ECONOMIC TORT LIABILITY</td>
<td>Broad range of justification defences based on collective economic self-interest, pre-existing contracts, etc</td>
</tr>
<tr>
<td>INDUCING BREACH OF CONTRACT</td>
<td>Limited (eg. rights under pre-existing contract: <em>Edwin Hill</em>)</td>
</tr>
<tr>
<td>LAWFUL MEANS CONSPIRACY</td>
<td>Collective economic self-interest (<em>Crofter</em>)</td>
</tr>
<tr>
<td>UNLAWFUL MEANS CONSPIRACY</td>
<td>None</td>
</tr>
<tr>
<td>INTERFERENCE WITH TRADE, ETC BY UNLAWFUL MEANS</td>
<td>None</td>
</tr>
</tbody>
</table>

*Figure 1: Deakin and Randall’s Assessment of Justifications after OBG and Total Network*

According to this analysis, the position established by 2009 was that there is no place for justification in connection with two of the five torts with which this thesis is concerned: the category where the defendant has intentionally interfered with the plaintiff’s trade, business or livelihood using unlawful means; and unlawful means conspiracy.

However, there is potentially a significant role for justification in relation to both lawful means conspiracy and the tort of inducing breach of contract, as Heydon noted. These torts, he said, were “dependent on a notion of justification or privilege” and he concisely described the operation of this notion as follows: “if one party to a contract is induced to break it by the defendant, the latter is liable unless he justifies his conduct; two who conspire to injure another are liable unless they are advancing legitimate interests.”\(^{13}\) Heydon favoured a widening of justifications and regretted that they had simply not been worked out.\(^{14}\)

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\(^{11}\) See Part II of Chapter Four of this thesis.

\(^{12}\) This table is reproduced from Deakin and Randall, n 8 at 552. The sequencing of the torts here is reordered.

\(^{13}\) Heydon JD, ‘The Defence of Justification in Cases of Intentionally Caused Economic Loss’ (1970) 20 U Tor LJ 139 at 171-82.

Courts, especially in England, have specified a range of disparate circumstances in which defences of justification may be available. It is useful to review these cases with the objective of identifying principles that could potentially be generalised. The precedents also indicate a range of circumstances that will not amount to a justification defence.

A  **Inducing Breach of Contract**

Of all the general economic torts, justification defences have been most fully developed for inducing breach of contract. Hazel Carty commented that “as unlawful means are not part of the tort, it is likely that the defence will be different (and wider) in this tort than any defence of justification that might apply to the unlawful means tort.”

Deakin and Randall assessed the prospects of availability of a defence based on a pre-existing contractual obligation of the defendant which was successfully argued in *Edwin Hill and Partners v First National Finance Corp.* The complex facts of *Edwin Hill* involved a defendant finance company which had provided a substantial loan to a property developer to enable him to develop a property under a contract which contained an express power of sale and power to appoint a receiver, which upon default chose to finance the development itself rather than exercise its power of sale. Stilitz and Sales cited *Edwin Hill* as the basis for their view that, in the case of ‘the tort of knowing direct interference with contracts’, a defence of justification is established.

*Edwin Hill* has been taken as authority for the proposition that the absence of an intention to injure the person whose contract is broken does not amount to justification. As Slade J observed in *Greig v Insole*, “good faith and absence of malice on the part of a defendant do not as such provide any defence to an action based on inducement of breach of contract.”

The origin of the justification defence under inducing breach of contract can be traced to *Glamorgan Coal Co Ltd v South Wales Miners’ Federation.* In this case miners employed at a colliery, “without giving notice to their employers and in breach of their contracts with them, abstained from working on ‘stop-days’ … under the direction or order of a federation

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15 In many ways the courts have been clearer in setting out what is not justified than defining what may qualify.

16 Carty, n 7 at p 36. Carty largely confined her discussion of the defence of justification to a chapter of her book dealing with inducing breach of contract (its Chapter Three), and did not explore justification to the same extent in connection with other torts.

17 Deakin and Randall, n 8 at 552 f/n 123.


19 Carty, n 7 at p 66.


23 [1903] 2 KB 545.
Chapter Seven: Justification Defences

of the miners.” The court’s view was that “the object of procuring this breach of contract was to keep up the price of coal, upon which the amount of the miners’ wages depended.”

At first instance the judge found that the federation and other defendants, as miners’ agents or leaders, “had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop-days, it was their duty and right to give them advice, and to do what might be necessary to secure that the advice should be followed.”

The Court of Appeal found that no sufficient justification was made out:

To my mind the ground alleged affords no justification for the conduct of the federation towards the employers … it was said that the federation had a duty towards the men which justified them in doing what they did. For myself I cannot see that they had any duty which in any way compelled them to act, or justified them in acting, as they did towards the plaintiffs. And the fact that the men and the federation, as being interested in or acting for the benefit of the men, were both interested in keeping up prices, and so in breaking the contracts, affords in itself no sufficient justification for the action of the federation as against the plaintiffs.

However, in the course of his judgment Romer LJ, introduced the concept of the crossing of a difficult-to-determine “line” as the basis for justification:

I respectfully agree with what Bowen LJ said in the Mogul Case, when considering the difficulty that might arise whether there was sufficient justification or not: ‘The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell.’

Romer LJ also said “I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is ‘sufficient justification’, and most attempts to do so would probably be mischievous.

In James v The Commonwealth, which involved alleged breaches of “the duty of a common carrier to carry the dried fruit of Mr James,” Dixon J made a number of observations about ‘the principle in Lumley v Gye’. He said: “What constitutes a lawful justification is a matter of some difficulty. The question which appears to me to arise in the present case under the head of justification or excuse is whether the bona-fide execution of a law for the time being upheld as valid by the competent judicial power amounts to just cause or excuse.”

24 Ibid at 545.
25 Ibid at 577, per Romer LJ.
26 Ibid at 575-6.
27 Ibid at 574, per Romer LJ, citing Bowen LJ in Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) 23 QBD 598 at 618-9.
28 Ibid at 573.
29 James v The Commonwealth (1939) 62 CLR 339 at 339.
30 Ibid at 370-371, per Dixon J.
Chapter Seven: Justification Defences

Court found no breach of tort on the part of the Commonwealth (largely because it was under different obligations to private citizens).

*Camden Nominees v Forcey*\(^{31}\) established the principle that a mere common interest does not provide justification in law. An association of tenants of a block of sixty flats had banded together with the intention of refusing to pay their rents in breach of their tenancy agreements. The defendants pleaded that they were justified and therefore should be excused from an otherwise actionable wrong on two grounds. The first was that they and those they sought to persuade to break their contracts had a common interest in making the landlords perform their obligations. The second was that there was “on the one side tenants who are weak and on the other landlords who are strong and take advantage of their strength.”\(^{32}\) It was argued that, because of this mismatch, it was justifiable for the defendants to use a weapon which would otherwise be wrongful. Simonds J held that there was no validity in either of these contentions and that the defendants interfered with the plaintiff’s contractual rights without justification: “The defendants owed no duty to their fellow tenants; they sought their cooperation for their own ends … There is neither reason nor authority for the suggestion that in such circumstances a common interest can justify the interference with contractual rights.”\(^{33}\)

**The Possibility of Morality-Based Justifications**

There is a line of cases which suggest that an impersonal or disinterested motive may afford justification, particularly where the defendant, acting under a moral duty, seeks to protect a person to whom the defendant stands in a relationship of responsibility. *Stott v Gamble*\(^{34}\) was one such case. There, a licensing authority banned an objectionable film which the plaintiff had arranged to exhibit at another’s theatre.

In *Crofter Hand Woven Harris Tweed v Veitch*\(^{35}\) an example was given of circumstances in which a party may be able to justify procuring a breach of contract (at that time). It was said that “a father may persuade his daughter to break her engagement to marry a scoundrel … The father’s justification arises from a moral duty to urge … that the contract should be repudiated.”\(^{36}\) This echoed the earlier case of *Findlay v Blaylock*\(^{37}\) where a father persuaded his daughter in good faith to break off an engagement to marry an undesirable suitor.\(^{38}\)

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\(^{31}\) [1940] 1 Ch 352.

\(^{32}\) Ibid at 365.

\(^{33}\) Ibid.

\(^{34}\) [1916] 2 KB 504.

\(^{35}\) [1942] AC 435.

\(^{36}\) Ibid at 442-3. The tort at stake was abolished in Australia by the *Marriage Act 1961* (Cth), s 111A.


\(^{38}\) *Stott v Gamble* [1937] SC 21. See also *Gunn v Barr* [1926] 1 DLR 855, another case involving a father convincing his daughter to breach a contract of marriage to a “scoundrel.”
Chapter Seven: Justification Defences

There was an expansion of this principle in Brimelow v Cassan,\(^3^9\) in which an “actors’ protection society” persuaded a theatre proprietor to break their contracts with the manager of a theatrical troupe who had paid female chorus members “such a low rate that they were ‘forced’ into prostitution to survive.”\(^4^0\) Russell J decided that the defendants’ actions were justified, arguably creating a new category of ‘public morality’ defence.

Read v The Friendly Society of Operative Stonemasons of England, Ireland and Wales\(^4^1\) is a case which creates difficulties of precedent for those who would advocate a morality-based exemption for the economic torts, based on a dictum of a reasonably obscure County Court judge in England at the turn of the 20\(^{th}\) Century. The ‘salient facts’ of this case were summarised in Edwin Hill by Stuart-Smith LJ:

The plaintiff was 25 years old and the son of a mason. He entered into a contract with Messrs Wigg & Wright under which he agreed to work for 3 years at 15 s. a week, which were ordinary labourer’s wages; in return Wigg & Wright were to instruct and teach him in the trade and business of a mason. Wigg & Wright were members of the defendant society. One of the rules of the society provided: ‘boys entering the trade shall not work more than three months without being a legally bound apprentice, and in no case to be more than 16 years of age, except mason’s sons and stepsons. Employers to have an apprentice to every four masons on average.’ On learning of the plaintiff’s contract the defendants threatened that their members employed by Wigg & Wright would strike if the defendant started work on the terms of his contract. As a result Wigg & Wright terminated the plaintiff’s contract.\(^4^2\)

Read sued the society for “wrongfully and maliciously procuring to be broken an indenture of apprenticeship.” It was argued on behalf of the defendants that they had a “sufficient justification” for their interference because they had themselves entered into a contract with Wigg & Wright. Rose J said:

… it is not a justification that they ‘acted bona fide in the best interests of the society of masons,’ i.e. in their own interests. Nor is it enough that that ‘they were not actuated by improper motives.’ I think their sufficient justification for interference with the plaintiff’s right must be an equal or superior right in themselves, and that no-one can excuse himself to a man of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage.\(^4^3\)

The decision at first instance was affirmed by Lord Alverstone CJ and others in the Divisional Court, and then by the Court of Appeal, per Collins M.R. The Master of the Rolls observed: “how can they possibly justify taking the law into their own hands and compelling the opposing litigant by coercion to give effect to their view of a disputed obligation by

\(^3^9\) [1924] 1 Ch 302.

\(^4^0\) Cane P, Tort Law and Economic Interests (Clarendon Press, Oxford, 1991) at p 277.

\(^4^1\) [1902] 2 KB 88, D.C.


breaching his contract with the plaintiff?" The belief, however honest, that in what they did they were acting in the best interest of the society of masons could be no excuse for conspiring to deprive the plaintiff of the advantages of his contract and that "a strong belief on the part of the persuader that he is acting for his own interests does not seem to me to improve his position in any respect … Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiff’s expense by coercion."

The general position under this tort is, as Deakin observed, that the courts have not yet developed formalised privileges, although there are potential bases for examining whether a defendant’s ‘ultimate purpose’ has been “so meritorious as to require sacrifice of the plaintiff’s claim to freedom from interference.” Carty referred to an "uncertain" defence of justification under the tort of inducing breach of contract, and also noted that it is desirable that the defence should not be left vague. In OBG v Allan, Lord Nicholls was equivocal, saying “a defence of justification may be available to a defendant in inducement tort cases.”

B Lawful Means Conspiracy

The potential for justification to be pleaded in response to the lawful means conspiracy tort is clearly established, as noted by Carty. Stiltz and Sales said that within the tort of conspiracy “the concept of intent to injure and justification have been assimilated.” Deakin and Randall observed that economic self-interest can be a justification under this tort, citing Crofter. According to Cane, “simple conspiracy, that is conspiracy to injure not involving the use of unlawful means, can be justified not only by assertion of some legal right, but also by the assertion of legitimate self-interest.”

Goodman’s view was that liability for lawful means conspiracy “depends upon what the court perceives to be the predominant purpose of the combiners [and] to ascertain that purpose the court embarks upon a dual exercise … First, it ascertains the intention of the combiners in order to make a finding as to the purpose or object of the combination. Second, the court ascertains whether the activity which resulted in harm occurring was justified.” She saw that justification will be established “if the predominant purpose of the combination is not the infliction of harm but rather the legitimate protection or furtherance of an interest by the

45 Ibid.
46 Deakin S, ‘Economic Relations’ Chapter 30 in Fleming, n 1 at p 779.
47 Carty, n 7 at pp 36 and 63.
48 OBG v Allan [2008] 1 AC 1 at [193].
49 Carty, n 7 at p 137.
50 Stiltz and Sales, n 20 at 418.
51 Deakin and Randall, n 8 at 552; Crofter Hand Woven Harris Tweed v Veitch [1942] AC 435.
52 Cane, n 40 at p 278, referring to Heydon, n 14 at pp 16-18.
combiners such as the pursuit of business or employment advantages.”\(^{53}\) She argued “self-interest of the combining parties as the overriding factor will dispose by implication of substantial desire to injure.”\(^{54}\) Goodman thought that:

… According to Australian law, if the combination executes its object by lawful acts it is possible to avoid liability by showing that the ‘motive’, ‘intent’ or ‘purpose’ of the combination was predominantly the protection or advancement of legitimate interests. Thus, if parties to a combination are motivated by dislike of the religious or political views, or by the race or colour of the plaintiff, or their acts were a ‘mere demonstration of power by busybodies’, then a combination of such persons the acts of which cause damage to a plaintiff, cannot be justified.\(^{55}\)

In *Sorrell v Smith*, Viscount Cave said: “If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.”\(^{56}\) This was reinforced by Evatt J of the High Court of Australia in *McKernan v Fraser*: “If the common purpose or object is the protection or advancement of trading, professional or economic interests common to the defendants there is no liability.”\(^{57}\) But His Honour also said that “if an alleged conspiracy has as its purpose the carrying out of some religious, social or political object, the law prefers to examine the motive or object in each case before pronouncing an opinion.”\(^{58}\)

*Pratt v British Medical Association*\(^{60}\) involved an association formed for the purpose of maintaining “the honour and interests of the medical profession.” The Association and other defendants who were its members “instituted and pursued a system of professional and social ostracism or boycott against the plaintiffs, who were medical men, by means of threats and widely extended coercive action” and they sought to justify the boycott on the basis the conduct of the plaintiffs “was detrimental to the honour and interests of the profession.”\(^{61}\) McCardie J held that “no justification existed by reason of the fact that the defendants acted either for the advancement of their own trade interests or of the interests of those with whom they were associated”\(^{62}\) saying “how can mere self-interest be such a justification?”\(^{63}\)


\(^{54}\) Ibid at 80.

\(^{55}\) Ibid at 80.

\(^{56}\) *Sorrell v Smith* [1925] AC 700 at 712.

\(^{57}\) *McKernan v Fraser* (1931) 46 CLR 343.

\(^{58}\) Ibid at 399.

\(^{59}\) Ibid at 399-400.

\(^{60}\) [1919] 1 K.B. 244.

\(^{61}\) Ibid at 244.

\(^{62}\) This passage was quoted in *Camden Nominees v Forcey* [1940] 1 Ch 352 at 364.

\(^{63}\) *Pratt v British Medical Association* [1919] 1 K.B. 244 at 266.
Cane noted that “the protection of the legitimate interests of workers has also been treated by the courts as providing justification for simple conspiracy.” However, an objective evaluation must be undertaken, involving “consideration of evidence which reveals the reasons which prompted the defendants to act as they did.” Thus, although the defendant union officials in *Quinn v Leathem* might well have been acting in what they perceived to be their own interests, their actions in compelling a customer of a butcher who had employed non-union labour to stop dealing with the butcher were not justifiable.

*Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* suggested defendants who have engaged in a conspiracy, but acted in accordance with a moral imperative, may claim justification. The case concerned “a desire by coloured musicians to oppose their employer’s policy of all-white audiences.” The plaintiffs, proprietors of a ballroom, had a policy of excluding from the dance floor people of colour, though they were prepared to employ coloured musicians in the orchestra. The Musicians Union had many members who were “coloured musicians” and “gave notice to the plaintiffs that its members would not be prepared to perform at the ballroom as long as the policy of racial discrimination continued.”

At first instance Diplock J held: “So long as the defendants had a predominant object which was not in itself unlawful, this was a legitimate interest which they were entitled to agree to forward by any means not in themselves unlawful. It was not unlawful to advocate the abolition of the colour bar and to use all methods not in themselves unlawful to achieve that object. It was the right of all citizens to advocate policies in which they bona fide believed. It did not become unlawful for them to agree together on such a course of action unless their predominate object was to injure a man in his trade.” Diplock J’s decision was affirmed by the Court of Appeal (Hodson LJ, with whom Sellers LJ agreed, and Morris LJ) and although as Heydon says “the exact reasoning of the courts which heard the case is not wholly clear” Morris LJ stated a wide test “based on honest belief by the defendant union officials that union members wanted discrimination to end.”

C  Unlawful Means Conspiracy

It is difficult to envisage circumstances under which a justification defence may be available for the tort of conspiracy by unlawful means. In *Williams v Hursey* the High Court said the fact that conspirators have been actuated by the desire to further their own interests will not absolve them from liability if they have in fact utilised unlawful means. Balkin and Davis were emphatic that “the fact that the defendants have acted in defence of their own business
or trade interests – a matter which is relevant to conspiracy by lawful means – cannot provide a defence by way of justification for this type of conspiracy.”

Goodman explained:

… a combination of persons who act in concert so as to intentionally injure the plaintiff in his/her trade or other legitimate interests by an act which is independently unlawful … [i.e. they resort to unlawful means to attain their purpose] are liable in tort if actual injury is caused to the plaintiff, notwithstanding that their predominant purpose is to further their own legitimate interests.

De Jetley Marks v Greenwood involved an alleged unlawful means conspiracy to cause a breach of contract, where company directors were said to have conspired together “to secure the dismissal by the company of one of their number.” Here, a primary motivation was seen to be to promote the defendant’s own trade interest, to avoid insolvency. Porter J entertained an argument that the defendants had good cause to induce the company to break its contract with the plaintiff, but held:

The good cause which excuses the procurement of a breach of contract must be something more than a belief by the servants or agents of a company that the company might become insolvent if the contract were not broken … the justification must, I think, involve an action taken as a duty, not the mere protection of the defendants’ own interests.

D Intimidation

For intimidation, there has been little judicial guidance on “the metes and bounds of the defence” of justification. However, it was suggested in Latham v Singleton that the defence may be available under this tort in circumstances where trade union officials were acting for the protection of their members (although a defence on this basis would not be available in an action for interference with contractual relations). Nagle CJ said that, in causes of action founded on intimidation, if the tort is committed in the course of an industrial dispute the defendant may be able to demonstrate justification if able to “show a motivation primarily or predominantly to preserve and foster the purposes of the trade union of which the defendant was a member.”

Stickley’s view was that “it is unlikely that such a defence, one that involves unlawful acts and an intention to harm the plaintiff, would find favour.” It also seems clear that if the


73 Goodman, n 53 at 73.

74 [1936] 1 KB 863.

75 Ibid at 873.

76 Ibid at 873.

77 Balkin and Davis, n 72 at 612 [21.40]. It should be noted that Deakin and Randall did not separately itemise intimidation in their tabularised summation of the justification defences (Figure 1 above), apparently regarding this as a subset of the innominate unlawful means tort.

78 [1981] 2 NSWLR 843 at 872-5.

defendant’s making of demands and threats was “actuated by spite or ill-will against the plaintiff” the defence will not be available.\textsuperscript{80}

The potential for justification defences to apply to intimidation also arose in \textit{Universe Tankships Inc. of Monrovia v International Transport Workers Federation and Others},\textsuperscript{81} which concerned the application of commercial pressure between persons carrying on business through the threat of industrial action. In this case the plaintiffs owned a Liberian registered ship which docked at a UK port without a ‘blue certificate’. This was a document issued by the defendant union (the International Transport Federation, or ITF) exempting a ship from ITF ‘blacking’. The ITF had a “policy of improving wages and conditions for crews on ships flying flags of convenience.” This seemingly philanthropic aim was also “ultimately designed to prevent such crews undercutting ITF wage rates which tended to be a great deal higher and therefore less attractive” to many shipping companies. Port workers who were members of the ITF refused to service the ship with tugs, thus preventing it leaving the port, and made a range of demands.\textsuperscript{82}

The ITF demands included “payment to the ITF of US$80,000 by way of, inter alia, back pay for the crew of the ship and a contribution of $6,480 to the ITF’s Welfare Fund.”\textsuperscript{83} The plaintiffs eventually agreed to the demands, the ‘blacking’ was lifted and the ship left port. However, “twelve days later the plaintiffs commenced proceedings against the ITF … to recover the money paid to the Welfare Fund … the plaintiffs contending that it had been paid under economic duress.” There was "no doubt that the ITF officials, in procuring the blacking of the plaintiffs' ship, had threatened to induce breaches of the tugmen's contracts of employment and thus committed the tort of intimidation."\textsuperscript{84} It was argued that the officials were protected by the statutory immunity operating in the United Kingdom at that time but a majority of the House of Lords held that the ITF's actions fell outside the immunity and that the moneys paid to the Welfare Fund were recoverable by the shipowners.

The application of commercial pressure between business rivals has been the setting for a number of recent Australian intimidation cases.\textsuperscript{85}

\begin{flushright}
\textsuperscript{80} Balkin and Davis, n 72 at 612 [21.40].
\end{flushright}

\begin{flushright}
\textsuperscript{81} [1982] 2 W.L.R. 803. This case is hereafter referred to as “Universe Tankships” and is discussed further in Part III below.
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\textsuperscript{82} The quotations in this paragraph are from Stewart A, ‘Economic Duress – Legal Regulation of Commercial Pressure’ [1984] 14 MULR 410 at 413.
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\textsuperscript{83} Universe Tankships [1982] 2 W.L.R. 803 at 366.
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\begin{flushright}
\textsuperscript{84} Stewart, n 82 at 414.
\end{flushright}

\begin{flushright}
\textsuperscript{85} See, for example, \textit{Uber BV & Anor v Howarth (No. 2)} [2017] NSWSC 889.
\end{flushright}
E  Causing Loss by Unlawful Means

Despite their general enthusiasm for better delineating the justification defences, in view of the precedents Deakin and Randall saw no place for justification in connection with the tort of causing loss by unlawful means. They regarded the prospects of building a justification defence under this tort as “limited,” describing the position thus: “As the law currently stands, there seems to be no possibility of invoking a justification defence where unlawful means have been used.”

Carty thought the prospects for development of a justification defence “at best … very residual.” Sales and Stilitz rejected the possibility altogether, stating that in the case of the unlawful means tort “there is no defence of justification” – a view that was cited with approval by Lord Nicholls in OBG v Allan. Ong noted that “none of the House of Lords in OBG expressly referred to such a defence in relation to the unlawful means tort,” that “certainty … would be undermined by a justification defence” and that the courts would be reluctant to be drawn into the need to “openly assess the fairness or unfairness of the defendant’s conduct towards the claimant.”

The contrary view, that a defence of justification should be available, has been expressed by a number of commentators including Weir. Heydon also saw potential for the availability of justification under the tort of causing loss by unlawful means. He observed that in Rookes v Barnard:

… there was a case for pleading justification, because the party threatened, B.O.A.C., was in breach of an agreement made with the union not to employ non-unionists such as the plaintiff, but that B.O.A.C. was not taking steps to rid itself of the employee and fulfil its agreement.

Deakin and Randall acknowledged potential arguments relating to rights under a pre-existing contract for this tort, referencing Edwin Hill. These sentiments were echoed in the 2011 edition of Fleming on Torts where it was said “it is unclear what part justification plays in this tort;” however, “possible justifications may be as open-ended as in relation to the tort of interference with contract.”

86 Deakin and Randall, n 8 at 532 and 551-52.
87 Carty, n 7 at p 101.
88 Stilitz and Sales, n 20 at 418.
89 OBG v Allan [2008] 1 AC 1 at [173].
91 Heydon, n 14 at p 126, referencing Rookes v Barnard [1964] AC 1129. Heydon said the situation in this case differed from the position in Corey Lighterage v TGWU [1973] 1 WLR 792 which involved unionists refusing to work with non-union labour in the absence of such an agreement.
93 Fleming, n 1 at p 788.
Chapter Seven: Justification Defences

III. POTENTIAL BASES FOR EXPANSION OF JUSTIFICATION

Against this background, it is possible to discern five broad thematic bases for justification which serve as potential ‘beachheads’ for expansion of the justification defences. The first is “a defence based on a pre-existing contractual obligation of the defendant.” This is typified by Edwin Hill and Partners v First National Finance Corp and can be observed in operation in relation to the Lumley v Gye tort (inducing breach of contract). Deakin and Randall speculated that such a defence could potentially “apply in trade union cases where union rules, which constitute a contract, require members to take strike action to defend union rates of pay and protective practices.” They noted, however, that such an argument “appears never to have succeeded” and “it is not even clear that it has been attempted” due to statutes occupying the field – the long-standing statutory immunities which apply in England and Wales “now contained in the Trade Unions and Labour Relations (Consolidation) Act 1992, Part V”.

According to Carty’s analysis, the defence of justification, at least for inducing breach of contract covers the protection of both private rights and private interests. The former category was said to protect “a defendant who asserts a legally enforceable right” and “such right may derive from property, real or personal, or from contractual rights,” with the most common example being “a collision of contracts.” She cited examples of overriding property rights. To illustrate her second category, private interests, Carty speculated that English courts would support a justification for inducing breach of contract based on the protection of health and safety. She referenced Cane’s observation that there is a public interest in the protection of persons from death and bodily injury or illness. Cane had commented that “a competing interest may provide a defence to an action in respect of conduct which is prima face tortious.”

Second, there is potential for building on the idea that “on grounds of policy, a privilege is warranted wherever a servant or agent acts, not in capricious pursuit of self-advantage, but for the bona-fide protection of his employer” or, perhaps, members. To develop this thread, it would be necessary to overcome precedents that say “the mere fact … that an association has undertaken a duty to its members to protect their interests and acted in pursuance thereof, does not by itself provide a justification, for the courts take the view that otherwise a ready

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94 Deakin and Randall, n 8.


96 Deakin and Randall, n 8 at 551.


98 Carty, n 7 at p 67.

99 Cane, n 40 at p 230.

100 Fleming, n 1 at p 788.
excuse would be at hand for almost any actionable interference provided by collective action at the prompting of trade unions, trade associations and other protective societies.”

It would also be necessary to overcome the precedent in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots*, a decision of the Supreme Court of Victoria. The facts of this case were described in Chapter 6, Part IV C. The defendants, from the Australian Federation of Air Pilots, contended that they were morally obliged, and also bound by the rules of their federation, to act in accordance with the outcome of a secret ballot. Brooking J considered that the defendants failed to establish the defence of justification. Furthermore, it was held that a trade union and its officials “cannot set up as a defence of justification in an action for interference with contractual relations the suggestion that what they did was by way of performance of a duty to advise members of the union and to protect their interests in relation to an industrial dispute.”

In *Building Workers' Industrial Union of Australia v Odco Pty Ltd*, which concerned actions taken in opposition to labour outsourcing arrangements, the appellant trade union argued that the activities of its officials were justified because “they believed it was necessary in order to protect award wages and conditions and the operation of the Victorian building industry agreement.” However, a Full Court of the Federal Court of Australia held that the appellants' actions were not justified.

A third category is what Deakin and Randall termed “justification based on the economic self-interest of the group” or “collective economic self-interest”. This would be an extension of a general principle Cane described as follows: “The defendant may succeed in a plea of justification if he was acting in his own self-interest.” However, in *De Jetley Marks v Greenwood*, it was said that justification must “involve an action taken as a duty, not the mere protection of the defendants’ own interests.” Motivation to promote the defendant’s own trade interest, of itself, is unlikely to be sufficient. Cane suggested that “the true basis of self-interest, to the extent that it provides a legal justification, is that it also furthers some wider public interest.”

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101 Ibid at p 780, citing *South Wales Miners Federation v Glamorgan Coal Co* [1905] AC 239.

102 [1991] 1 VR 637. This case is hereafter referred to as “Ansett.”

103 Ibid at 677. This case concerned actions for interference with trade or business by unlawful means, inducing breach of contract, conspiracy and intimidation.

104 *Building Workers' Industrial Union of Australia ("B.W.I.U.") v Odco Pty Ltd* [1991] FCA 87 (21 March 1991) at [113], per Wilcox, Burchett and Ryan JJ.

105 Ibid at [121].

106 Deakin and Randall, n 8 at 550.

107 Cane, n 40 at p 281.

108 [1936] 1 All ER 863.

109 Ibid at 873. The action taken in *De Jetley Marks v Greenwood* (the breaching of a contract) was taken to avoid a company’s insolvency.

110 Cane, n 40 at p 279.
In *Zhu v Treasurer of the State of NSW*, a case which was discussed at length in Part VI of Chapter Six, the High Court of Australia referred to difficulties that confront a claimant arising from the authorities which have established that justification cannot be found in “mere self-interest.” The arguments of the defendant organisation in *Zhu*, the Sydney Organising Committee for the Olympic Games (SOCOG) hinged on the desire to protect its own interests as organiser of the Olympic Games.

A fourth notion, advanced by Deakin and Randall, is that the common law could expand the range of collective actions that might be considered justified. Deakin and Randall saw that “a wide justification defence is essential if collective action is to be preserved” and noted that in the past the extension of principle occurred “somewhat exceptionally” in *Universe Tankships of Monrovia v ITF.* They thought the courts might, for example, be called upon in the future to take this approach in the context of the European Union law on free movement.

Stewart observed that “there are some signs in *Universe Tankships* that the House of Lords is moving away from the rigid ‘unlawful acts’ test and towards a broader inquiry as to the justifiability, in moral and commercial terms, of the pressure used.” He gave the example of *The Siboen* where “it was ‘legitimate’ for the charterers, on the assumption that was made, viz. that their representation of imminent bankruptcy was not fraudulent, to threaten breaches of contract to secure lower rates. Not only are renegotiations of charters apparently common, but it would seem reasonable to attempt to force renegotiation of an agreement with a major creditor in order to avoid liquidation, a course which would also benefit the other party, who would not become merely a general creditor in liquidation proceedings.” Although Stewart’s observations were made with reference to the doctrine of undue pressure in contract law, they have potential application to the deployment of justification defences under the economic torts. Stewart further commented that “it cannot be denied that any approach resting on a value-judgment of the justifiability of commercial pressure presents considerable problems” and that “questions such as whether there has been “an improper exercise of superior power for private advantage … can only be answered on a case-by-case basis: … it is impossible to do more than generalise about the sort of factors that will influence the resolution of situations of commercial pressure.”

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111 *Zhu v Treasurer of the State of NSW* (2004) 218 CLR 530 at 571 [118]. This case is hereafter referred to as “Zhu”.

112 In this case the Treasurer of New South Wales was the named defendant, having succeeded to SOCOG’s assets and liabilities.

113 *Universe Tankships* [1982] 2 W.L.R. 803; Deakin and Randall, n 8 at 550.


115 Stewart, n 82 at 429.


117 Stewart, n 82 at 429-430.
Chapter Seven: Justification Defences

There is a fifth potential basis for expansion of the defences. Justification may be available where a moral imperative or public duty exists, or where there has been altruistic action designed to protect the interests of third parties. The case law discussed in this chapter indicates that “justification based on public interest” is likely to offer fertile ground for a general widening of the justification defences. An impersonal or disinterested motive may afford justification, particularly where the defendant, acting under a perceived moral duty, seeks to protect a person to whom the defendant stands in a relationship of responsibility.

It can be argued that Brimelow v Cassan, which concerned the payment of low wages to chorus girls, gave rise to a ‘public morality’ defence. This case has been cited as authority for the proposition that interference in contract in circumstances that lead to improvement in the pay of workers may be justified as an assertion of the public interest. Carty cautioned that “no case has applied this [public morality] principle subsequently” but agreed that this precedent “shades into a justification based on a moral imperative or duty.” Cane saw Scala Ballroom (Wolverhampton) Ltd v Ratcliffe as an illustration of courts:

… allowing altruistic action designed to protect the interests of third parties to be pleaded in justification of simple conspiracy. Such a defence would, in essence, be a defence of public interest, because the courts would be unlikely to allow the defence to succeed unless they considered that what had been done did further some interest of the public generally. The Scala case concerned the public interest in eliminating racial discrimination.

It should be noted however that in Camden Nominees v Forcey, Simonds J reviewed Brimelow v Cassan and said that neither that case “nor any other case supports the view that those who assume the duty of advising the withholding of rent or any other breach of contract can justify their action by protesting that they are performing a public service … and there is no reason to suppose that the giving of such advice is justifiable except by those persons to whom the law recognizes a moral duty to give it.” The moral duty, it seems, must have a basis in law, rather than mere protestation, and the courts will be reluctant to entertain those who are simply “busybodies.”

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118 See Stott v Gamble [1937] SC 21 where a licensing authority banned an objectionable film which the plaintiff had arranged to exhibit at another’s theatre.

119 Carty, n 7 at pp 68-70.

120 Brimelow v Cassan [1924] 1 Ch 302, discussed by Carty, n 7 at p 69.

121 See Cane, n 40 at p 277.

122 Carty, n 7 at p 69.


124 Camden Nominees v Forcey [1940] 1 Ch 352.

125 Ibid at 366.

Chapter Seven: Justification Defences

It is plausible based on the authorities reviewed above that the notion of a ‘legitimate collective interest’ not grounded in economic interests could become the basis for justified actions. Environmental activism is an obvious likely test-bed for this concept.  

Heydon and Deakin and Randall each saw that it was important and desirable that justifications should be more readily available, but for different reasons. For Heydon, there was a principle at stake – it was desirable as a matter of policy that the architecture of the torts should place heightened focus on motive; this would be assisted by embracing a wider view of unlawful means to ‘widen the net’ of conduct qualifying as prima-facie tortious, then ameliorating this by expanding justifications. Deakin and Randall viewed the broadening of justifications as a necessity, given the pattern of development of the economic torts since the 1960s, if collective conduct is to be preserved: “a necessary corrective to some of the expansionary tendencies” (especially under the *Lumley v Gye* tort).  

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127 This potential is explored in some depth in Chapters Eight and Nine.  
128 In Chapter Three this was described as adoption of a ‘justification-enabling’ conception of unlawful means.  
129 Deakin and Randall, n 8 at 550-551.
<table>
<thead>
<tr>
<th>POTENTIAL DEFENCE</th>
<th>APPLICATION</th>
<th>CONSIDERATIONS</th>
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<tbody>
<tr>
<td><strong>DEFENCE BASED ON EXISTING CONTRACTUAL OBLIGATION, PROPERTY RIGHT OR OTHER PRIVATE INTEREST</strong></td>
<td>Inducing breach of contract; potentially generalisable.</td>
<td><em>Edwin Hill; Zhu.</em> Contract should be pre-existing. Property rights can override other interests. An equal or superior right of the defendant.</td>
</tr>
<tr>
<td><strong>BONA FIDE PROTECTION OF EMPLOYER/MEMBERS</strong></td>
<td>Inducing breach of contract; potentially generalisable.</td>
<td><em>B.W.I.U. v Odco; Ansett.</em> No capricious pursuit of self-advantage. Mere common interest does not suffice. Potentially available to trade unions, trade associations, other protective societies. Necessary to overcome objections to illegality.</td>
</tr>
<tr>
<td><strong>COLLECTIVE ECONOMIC SELF-INTEREST</strong></td>
<td>Inducing breach of contract; unlawful means conspiracy; potentially generalisable.</td>
<td><em>De Jetley Marks v Greenwood.</em> Actions taken as a duty. Something more than a belief. Argument assisted if a wider public interest furthered.</td>
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<tr>
<td><strong>EXPANDED COMMON LAW DEFENCES FOR COLLECTIVE ACTIONS</strong></td>
<td>Potentially generalisable.</td>
<td><em>Universe Tankships; The Siboen.</em> Consider moral and commercial justifiability of pressure used.</td>
</tr>
<tr>
<td><strong>MORAL IMPERATIVE OR PUBLIC DUTY</strong></td>
<td>Inducing breach of contract; lawful means conspiracy; potentially generalisable.</td>
<td><em>Brimelow v Cassan; Scala Ballroom; James v Commonwealth.</em> Altruistic action designed to protect the interests of third parties. Civil rights independent of contract may be taken into account. Moral duty. Hinges on arguments of public benefit.</td>
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*Figure 2: Summary of Potential Widened-Out Justification Defences*
IV. CONSTRAINTS ON THE EXPANSION OF THE DEFENCES

There are three main constraints on the potential expansion of the justification defences: the ‘bipolarity constraint’ which flows from the application of corrective justice theory; the requirement of a ‘special reason’ for shifting loss; and the need to arrive at measures of ‘public benefit’ around which there is community consensus. A fourth consideration is the impact of statute.

A  The Bipolarity Constraint

The first constraint derives from the view that the general economic torts have their theoretical foundation in corrective justice theory. As was seen in Chapter Five, it can be argued that the general economic torts should be conceptualised as a manifestation of corrective justice and this would carry the consequence that claims must be assessed according to the “justificatory structure” of corrective justice theory, rather than “external policy considerations or social goals.” A corrective justice approach “restores the equilibrium, through an award of compensation, within the … [bipolar] relationship of the injured plaintiff and the defendant.”

If a conception of the torts based on corrective justice theory were to be adopted, this would place limits on the capacity of judges to have reference to social goals in determining cases, because relieving the defendant from liability on the basis of an extrinsic consideration “means denying the plaintiff.” Liability and entitlements should be determined “relationally” with reference to the interaction between parties to a dispute, rather than “the effect of the claim on third persons who are not parties to the claim.”

B  The ‘Special Reason’ Requirement

The second constraint is the need to find ‘special reason’ for shifting loss. As Deakin noted, the search is for circumstances in which “the defendant’s ultimate purpose may … be so meritorious as to require sacrifice of the plaintiff’s claim to freedom from interference.” Fleming, in the preface to the fifth edition of his text *Law of Torts*, articulated some key evaluations required of courts undertaking the weighing of conflicting interests:

… a shifting of loss is justified only where there exists special reason for requiring the defendant to bear it rather than the plaintiff on whom it happens to have fallen. The task confronting the law of torts is, therefore, how best to allocate these losses, in the interests of the public good. For the

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135 Deakin, n 46 at p 779.
solution of this problem, no simple and all-embracing formula can be offered, because the concrete fact problems which arise in tort litigation are manifold and often complex.136

Cane saw that, where a justification defence operates, “the defendant is able to point to some competing interest which outweighs that of the plaintiff and justifies the law of tort in refusing to come to the plaintiff’s aid.” He noted that “some … policy arguments may involve the assertion by a defendant of a countervailing interest.”137

The need for judicial weighing of competing interests emanates from the dictum in Read that an equal or superior right is the basis of “sufficient justification for interference with a plaintiff’s right.”138 In the subsequent Glamorgan Coal case it was said that “the circumstances which will constitute sufficient justification cannot be satisfactorily defined, and it must be left to the determination of the Court in each case whether there is sufficient justification for the interference.”139 Romer LJ provided a list of relevant factors which may be weighed:

... in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach.140

If the third, fourth and fifth ‘beachheads’ for extension of the justification defences described in Part III above are to gain traction, questions of ‘public benefit’ will inevitably come into play. In applying tests of public benefit decisions must be made about what assessment mechanism should be deployed; and what actually constitutes public benefit.141

C Measuring ‘Public Benefit’

The third constraint, then, is the need to ‘flesh out’ the meaning of ‘public benefit’. Stewart highlighted that “there are many areas of the law of tort in which the courts give effect, explicitly or implicitly, to ‘public policy’ arguments. The results may sometimes be controversial, but the courts are not always in a position to shirk the responsibility of deciding such matters; nor do they always wish to do so.”142 He further commented that:


137 Cane, n 40 at pp 230-1.


139 Glamorgan Coal Co Ltd v South Wales Miners’ Federation [1903] 2 KB 545 at 545.

140 Ibid at 574, referenced in Fleming, n 1.

141 Some of the issues that can arise in these deliberations were described in Part V of Chapter Five. Aspects of public benefit will be considered further in Chapter Nine.

142 Cane, n 40 at pp 279.
Chapter Seven: Justification Defences

... every day courts are required to resolve commercial dilemmas, and frequently there is no clear-cut precedent or obviously applicable rule to guide them. In these ‘hard cases’ it becomes necessary for judges to rely on their own acquired knowledge of commercial practices and standards: and it is these which ... must be applied when the use of commercial pressure is alleged to be wrongful. 143

Cane explored the category of ‘interest-based’ defences which assert some public interest which “competes with the interest the plaintiff is seeking to protect.” 144 For example, “furtherance of the self-interest of workers can be seen as in the public interest because it provides a counterweight to the ability of employers, by virtue of their economic strength, to protect their own interests within the law.” 145 According to Cane a key question to be asked is what should be considered “a matter of morality or fairness”? 146 To illustrate the problematic nature of the assessment, he discussed the “balancing of factors” (often involving “difficult and controversial moral and social judgments”) required under the common law defence of necessity to actions for trespass. 147 The difficulty of the assessment sometimes required is illustrated by the following hypothetical scenario proposed by Goodman, writing in 1991:

Would a court find a combination to be ‘lawful’ if the parties to that combination were a group of medical practitioners who agreed to refuse to work with another medical practitioner who performed in vitro fertilisation or gave contraceptive advice with the result that the latter’s contract of employment is terminated? Arguably if the medical practitioners who agreed to enforce such policies ‘honestly believed’ that their legitimate interest in maintaining medical ethics was thereby furthered then their ‘object’ is lawful and therefore justified. If justification extends to protect such interests then the scope of civil liability would embrace any social, political or religious purpose provided that it furthered the interests of the parties to the agreement irrespective of the public utility of that purpose. 148

The enlivening of common law justification defences will therefore depend upon the exercise of “judicial initiative.” 149 This will require the courts to overcome their traditional reluctance to become involved in the weighing and measuring of competing interests. Cane noted, for example, that “the courts are unlikely to relish the prospect of being expressly asked which political or social causes justify conspiracies to injure.” 150 In a given case, a ‘public interest’ might be able to be specified, but assessment also needs to be made of whether it is of such moment as to justify relieving the defendant of liability. Any defence of public interest “has to be weighty enough to persuade the court that it is a social interest ‘of greater public import than is the social interest involved in the protection of the plaintiff’s interest’.” 151

143 Stewart, n 82 at 440-l.
144 Cane, n 40 at p 232.
145 Cane, n 40 at p 278.
146 Ibid at p 236.
147 Ibid at p 235.
148 Goodman, n 55 at 75.
149 Stewart, n 82 at 440.
150 Cane, n 40 at pp 278.
151 Carty, n 7 at p 68, citing Carpenter C, ‘Interference with Contract Relations’ 41 Har L Rev (1928) 728 at 745.
D The Statutory Path

There are statutory routes to a widening of justification. Fleming noted that in England “the statutory immunities for industrial action effectively provide a form of legislative justification.” This avenue is explored in Chapter Eight which follows, in the specific context of environmental activism.

Lessons and parallels can be drawn from other areas of tort law, and related disciplines. Cheer examined legislated public interest exemptions available to media organisations from defamation laws, noting that by contrast to the very wide-ranging defence of public interest that applies in the United States, which can be equated to ‘newsworthy’ (probably reflecting the supremacy of freedom of expression within the American constitution) in Australia and New Zealand “a balancing approach is favoured where many elements are weighed.”

An economics-driven frame of analysis is evident under the authorisation provisions of Australia’s Competition and Consumer Act 2010 (Cth) (the CCA). They provide for an assessment of whether proposed conduct “would result, or be likely to result, in such a benefit to the public that … [it] should be allowed to take place” centring around “the economic goals of efficiency and progress … allocative efficiency, production efficiency and dynamic efficiency.” The applicable tests require a weighing of public benefits and detriments. The CCA also provides for an exemption from its secondary boycott prohibitions for conduct if “the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection.”

Whether the enactment of legislation to provide exemptions for conduct offers the best solution to a given problem can depend on the perspective from which they are viewed. As the discussion in Part V of Chapter Six demonstrated, it is often difficult to determine where the public good lies between competing views of a contentious political nature. Because statutory solutions are subject to politics, a special interest group receiving the benefit of an exemption may find that status reversed following a subsequent election. Ongoing certainty depends upon a broad-based community and political consensus around the need to ‘ privilege’ certain conduct.

Statutory exemptions tend by their nature to be piecemeal – they focus in on specific contexts, often in response to an ‘issue of the day.’ The risk of a patchwork of exemptions lacking a basis in coherent principle is real. As Edelman, Goudkamp and Degeling observed, although torts have long been ‘promiscuously entangled’ with statutes, “in the present ‘age of statutes’, the coherence that the law of torts has achieved is under threat.”

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152 Fleming, n 1 at p 788.


154 See ss 45D, 45DA, 45DB, 45DD(3) and 90(8) of the CCA; Miller, R Australian Competition and Consumer Law Annotated, 36th Edition (Lawbook Co, Sydney, 2014) at [1.45DD.10] and [1.90.15]. These provisions are discussed in depth in Chapter Nine of this thesis.

V. JUSTIFICATIONS AND ILLEGALITY

A final constraint on expansion of justification defences is judicial disdain for the presence of illegality. The employment of unlawful means has generally been considered fatal to the pleading of a justification defence. Deakin referenced an immutable principle that “fraud or physical violence cannot be justified in any circumstance.”156 Cane highlighted that:

When it comes to justifying the use of unlawful means in torts such as intimidation or unlawful means conspiracy or several forms of interference with contract, the general question is whether the use of unlawful means can ever be (legally) justified.157

Until recently, the courts have said ‘no’ to this question. Cane suggested three reasons underpinning this position.158 The first was that “as a matter of public policy, courts are unwilling to give legal remedies to a party who founds his cause of action on his own illegal act. The judges do not wish to be seen as giving aid or encouragement to law breakers.”159 Second, if an “illegal act was a cause of, or was closely associated with … loss … it would be an ‘affront to the public conscience’”160 to afford him relief.” Third, courts will not “promote or countenance a nefarious object or bargain which it is bound to condemn.”161

As former Chief Justice of the High Court of Australia Robert French said in 2017, the rule of law, well-established in Australia, is fundamental to “the long term protection of rights and freedoms” and “an essential element for a free society.”162 In line with this sentiment the Full Court of the Federal Court of Australia said in Building Workers’ Industrial Union of Australia v Odco Pty Ltd: “There is good reason for the rarity of cases where justification has been shown. In a society which values the rule of law, occasions when a legal right may be violated with impunity ought not to be frequent.”163 In Pratt v British Medical Association, McCardie J confessed his “inability to discover any head of justification which will sanction the employment of violence or of threats.”164

A common thread running through the torts of unlawful means conspiracy, intimidation and causing loss by unlawful means has been that the element of illegality required under these torts has been fatal to the pleading of a justification defence. The tort of inducing breach of contract does not, however, have unlawful means as an element. This is an important

156 Deakin, n 46, referencing Heydon, n 14 at p 125.
157 Cane, n 40 at p 279.
158 Ibid at pp 238-9.
159 Holman v Johnson (1775) 1 Cowp. 341 at 343; [1775-1802] All ER 98 at 99.
160 Thackwell v Barclays Bank PLC [1986] 1 All ER 676 at 687.
161 Saunders v Edwards [1987] 1 WLR 1116 at 1134, per Bingham J.
163 Building Workers’ Industrial Union of Australia v Odco Pty Ltd [1991] FCA 87 (21 March 1991) at [118], per Wilcox, Burchett and Ryan JJ.
164 Pratt v British Medical Association [1919] 1 K.B. 244 at 266.
differentiator and gives scope for defences associated with this tort to be “different (and certain wider)” than for some of the other torts, although illegal conduct may defeat justification under this tort as well.

In the Ansett case,166 Brooking J expressed the view, based on authorities including Read,167 Posluns v Toronto Stock Exchange168 and the Australian case Latham v Singleton169 that justification is no defence where a plaintiff “complains of interference with contractual relations by unlawful means or interference with his business by unlawful means.”170 In Read (a case decided on the basis of an illegal act carried out by illegal means) Collins M.R. said:

The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might in given circumstances be ‘just cause’.171

Later, in Glamorgan Coal Company v South Wales Miners Federation, there was a judicial comment on the Read case. Vaughan Williams J asked: “can there be a ‘just cause or excuse’ for the use of illegal means to procure a breach of a legal right?” and then “What was the end in Read?” He referenced approvingly the answer given by the counsel for one of the parties: “It was to defeat the plaintiff’s purpose of becoming a stonemason. The end was illegal, the object illegal, and the means illegal. If the means taken are illegal, it is unnecessary to inquire whether what was done was done with just cause or excuse.”172

However, in an important series of English cases, courts have been prepared to contemplate justification defences despite the occurrence of illegality. Assessing the position as at the mid 1970s, Heydon noted “There was a dogma that illegality could not be justified; but Lord Denning M.R. has often asserted the contrary and has allowed for the defence.” Heydon identified Lord Denning as the modern originator of the movement towards specifying and widening justification mechanisms, noting that as Master of the Rolls he often asserted a contrary view which allowed for a justification defence.173

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165 Carty, n 7 at p 63.
172 Glamorgan Coal Co Ltd v South Wales Miners’ Federation [1903] 2 KB 545 at 566.
173 Heydon, n 14 at p 125.
Chapter Seven: Justification Defences

Lord Denning’s sentiments were initially expressed in *Morgan v Fry*, in which an action against trade union officials was unsuccessful on the basis they “did not use any unlawful means to achieve their aim …; they were not guilty of intimidation; and they were not guilty of conspiracy to injure since they acted honestly and sincerely in what they believed to be the true interests of their union.”¹⁷⁴ Russell LJ in the same case “queried whether every breach of contract constituted sufficient unlawful means to found the tort” (of intimidation). (Stilitz and Sales opposed this approach, arguing that there should be no defence of justification for intimidation, as this would spare the courts “the task of trying to classify the gravity of different forms of unlawful conduct” and that justification cannot apply where “the defendant’s actions are unlawful in themselves, in the intentional harm tort.”)¹⁷⁵

*Initial Services v Putterill* concerned a defendant who resigned from the plaintiff’s employment as a sales manager but took with him a number of documents which he handed to a national newspaper, leading to publication of articles alleging a liaison system between laundries to keep up prices. This was alleged to be in breach of an implied term of his contract of service to not disclose to strangers confidential information obtained by him in the course of his employment. Lord Denning entertained arguments that it may have been in the public interest that misconduct was disclosed to the press, saying that there were exceptions to the obligations of employment that “extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others” although disclosure should “be to one who has a proper interest to receive the information.”¹⁷⁶

In *Hubbard v Vosper* Lord Denning considered an action for breach of copyright and confidence by representatives of the Scientology cult against the author and publishers of a book which was very critical of the cult. The author had been a member of the Church of Scientology for 14 years and it was argued that the book contained information obtained in confidence. It was held that as “the defendants had reasonable defences of fair dealing and public interest they should not be restrained from publication.”¹⁷⁷

*Corey Lighterage Ltd v TGWU* involved a dispute about union membership where the majority of workers refused to work with non-union workers. Lord Denning MR found that “the other men and the union may have sufficient justification or excuse for what they did.”¹⁷⁸ Heydon highlighted the peculiarity of Lord Denning “saying that to cause loss by unlawful means to an employer of a non-unionist could be justified if he ‘abused … beyond measure’ his rights not to join a union and not to work, and simply acted ‘maliciously’, a fact shown by such remarks as ‘I will not rest until I have Mr Lindley’s head on a platter’.¹⁷⁹

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¹⁷⁴ *Morgan v Fry* [1968] 2 QB 710 at 712.

¹⁷⁵ Stilitz and Sales, n 20 at 418.

¹⁷⁶ *Initial Services v Putterill* [1968] 1 QB 396 at 405.

¹⁷⁷ *Hubbard v Vosper* [1972] 2 QB 84 at 85.

¹⁷⁸ *Corey Lighterage Ltd v TGWU* [1973] 1 WLR 792 at 817.

Chapter Seven: Justification Defences

Subsequently, in *Universe Tankships*, a question for the Court was whether the economic pressure applied by the International Transport Federation was ‘illegitimate’ pressure. In this case the court had no doubt that the ITF officials, in procuring the blacking of the tugmen’s contracts of employment, had committed the tort of intimidation, but it said:

The question naturally arises as to how the law is to distinguish ‘legitimate’ from ‘illegitimate’ pressure. Perhaps the obvious answer is to ask whether the act (or omission) threatened, or the actual threat itself, is independently unlawful. Presumably an ‘unlawful act’ would include at least commission of a crime or a tort or, of course, a breach of contract.

Neither Lord Diplock nor the other Law Lords found it “necessary to articulate the criteria which courts should utilise in making the necessary value-judgment as to the use of commercial pressure. It is difficult therefore to predict how far, if at all, their Lordships might really wish to see the concept of illegitimate pressure divorced from that of independent illegality.” However, the *Universe Tankships* decision needs to be viewed “against the background of the statutory immunities system which operated under the labour law of the United Kingdom. Briefly, the system seeks to prevent unions, their officials and their members from becoming liable for certain types of industrial action.”

Lord Diplock acknowledged that there may be circumstances [although he did not enter into the question of what kinds] in which “commercial pressure, even though it amounts to coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of redress” but he also spoke of “pressure ‘which the law does not regard as legitimate’ without identifying the issue as one of ascertaining illegality.”

Deakin and Randall described the limited possibility of invoking a justification defence where unlawful means have been used as an “unsatisfactorily rigid position” and advocated a more flexible approach which “would be to allow the courts to weigh the nature of the illegality involved against the strength of the potential justifying factors.”

Heydon’s position, expressed in 1970, was that if the basis of the law were to change from illegal means to unjustifiable motives, the dogma that illegal means cannot be justified might

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180 *Universe Tankships* [1982] 2 W.L.R. 803. The facts of this case were described in Part II D above.

181 Stewart, n 82 at 425. This passage reflects uncertainty, at the time of this case, as to the nature of the unlawful means required.

182 Ibid at 430.

183 Ibid at 414.

184 *Universe Tankships* [1982] 2 W.L.R. 803 at 813, referenced by Stewart, n 82 at 429.

185 Stewart, n 82 at 429.

186 Deakin and Randall, n 8 at 551.
change too. Although the English and Australian common law has not developed in the way Heydon was possibly anticipating in making these comments (that is, towards a greater focus on analysis of motive) his comments illustrate the greater flexibility that can be created if a wider view of unlawful means is adopted.

Cane answered his own question as to whether use of unlawful means can ever be justified:

… there seems a good argument for saying that there is no reason why illegal acts should never be justifiable in a civil action for intentionally inflicted loss. If the illegality is no more than incidental to the purpose which the defendant was pursuing, and if the interest he was seeking to protect by his actions was sufficiently important to outweigh the negative impact of the illegal conduct involved (because, for example, the illegality consisted of breach of a merely regulatory provision), then it may be that a defence of justification should succeed.

187 Heydon, n 13 at 178.

188 This question was noted at n 155 above.

189 Cane, n 40 at p 279.
The development of justification defences for the economic torts appears to have stalled. Apart from Zhu, which firmly established the importance under Australian law of establishing a ‘superior legal right’ as a basis for justification, it is difficult to identify any cases this century that have meaningfully grappled with the potential for expansion of the justification defences. Even in the leading recent cases of OBG, Revenue and Customs Commissioner v Total Network and A.I. Enterprises the possibilities of justification were only lightly entertained, typified by Lord Nicholls’ statement in OBG: “I mention, but without elaboration, that a defence of justification may be available to a defendant in inducement tort cases.”

There are a number of constraints on the expansion of justification. These arise from both the case law and from theory, in particular the principle in corrective justice theory that holds that “judges should be focused only on the relationship between the parties as doer and sufferer of the same harm, and should not impose on the relationship an independent policy of their own choice.”

However, there is potential for these constraints to be overcome. As the discussion above shows, there are sufficient wellsprings of authority in the common law (both in England and Australia) to enable an enlivening of justification. The defence of justification has the capacity to be highly flexible. There is a school of thought, reflected in the words of Slade J in Greig v Insole, that the defence “should not be confined to narrow straightjackets.” For Australia, an enlivening of justification is a clear option. Expanded and better delineated justification defences can play an important role in cataloguing the forms of pressure or interference with the rights of others that are legitimate.

The thread of authority established in Zhu showing a preparedness to take into account the civil rights of litigants has considerable potential for development, when read together with the dictum of Dixon J in James v The Commonwealth that ‘the principle in Lumley v Gye’ is wide enough “to include within its protection civil rights which exist independently of contract.” It can be anticipated that an opportunity will arise in the not-too-distant future, in a case where collective action is undertaken in pursuit of a ‘moral principle,’ for the ‘beachheads’ for expansion of justification canvassed in this chapter to be put to the test.

Some advocate statutory solutions, but it is desirable that legislative interventions be buttressed by consistent common law principles. As Stewart observed, “legal doctrine … will

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191 [2008] 1 AC 1174.
193 OBG v Allan [2008] 1 AC 1 at [193].
194 Erbacher, n 132 at p 20. See the discussion in Part II D of Chapter Five of this thesis.
196 James v The Commonwealth (1939) 62 CLR 339 at 370-371, per Dixon J.
Chapter Seven: Justification Defences

fall into disrepute if it is not fleshed out with coherent and consistent principles to regulate its application.\textsuperscript{197} It is desirable that the further development of justification defences should be underpinned by thought-through, coherently formulated common law rules.

Finally, as Cane envisaged, despite the well-established principle that illegality cannot be countenanced, it can be anticipated that courts may be prepared to make justification available in instances where illegal conduct has been incidental and has occurred in pursuit of an interest judged to be of high importance.\textsuperscript{198} There is scope for courts to weigh the nature of illegality involved against the strength of potential justifying factors. The following Chapter Eight explores the potential for the development of justification arguments, despite the presence of illegality, in the specific context of environmental activism.

\textsuperscript{197} Stewart, n 82 at 441.

\textsuperscript{198} Cane, n 40 at p 279.
CHAPTER EIGHT
ENVIRONMENTAL CAMPAIGNS AND THE GENERAL ECONOMIC TORTS

I. INTRODUCTION

Context has affected development of the general economic torts to a significant degree. This chapter considers the application of the general economic torts in an important contemporary arena of collective conduct: environmental activism directed against business interests.

Development of the economic torts has been spurred along by the advent of a series of social movements. Aggressive nineteenth century competition, freemasonry and the growth of trade unionism, in turn, became focal points. As each of these phenomena gathered momentum and gave rise to new patterns of collective conduct it was necessary for the common law to redefine established principles, taking account of the exigencies of novel social behaviour.

As was mentioned in the Introduction to Chapter Three, recent discussion of the torts has most often occurred in the context of labour law, the primary battleground for their development in the twentieth century, or commercial rivalry. Commercial dealings have provided the setting for many of the important cases of the past decade. It will be recalled that OBG concerned the actions of defendants who took control of the claimant company’s assets as receivers appointed under a floating charge which proved to be invalid and A.I. Enterprises involved machinations amongst family members over the sale of a valuable investment property.

To date, environmental activism has been under-explored as a context for the application of the torts. However, in view of the increasing sophistication of environmental campaigning and its disruptive impact on business activities, this is likely to be a domain in which established legal principles pertaining to collective conduct will be tested and re-shaped over the next decade or so. Carty predicted that “claimants will attempt to rely on the torts beyond their traditional setting in areas where other civil liability is problematic … such as the consumer picket.”

1 Lumley v Gye (1853) 118 ER 749 (QB); Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) 23 QBD 598.
3 As Lord Hoffmann commented, the strike, or the threat of a strike, quickly became an object of “judicial consternation” and as recently as Temperton v Russell [1983] 1 QB 715 (CA) “one cannot read the description of the union’s activities by the Master of the Rolls without seeing disapproval dripping from every sentence” – Hoffmann L, ‘The Rise and Fall of the Economic Torts in Torts in Commercial Law’ in Degeling S, Edelman J and Goudkamp (eds), Torts in Commercial Law (Thomson Reuters, Sydney, 2011) 105 at p 109.
4 The facts of these cases (OBG v Allan [2008] 1 AC 1 and A.I. Enterprises Ltd v Bram Enterprises Ltd [2014] 1 R.C.S. 177) were described in detail in Chapters Two and Six.
Chapter Eight: Environmental Campaigns and the General Economic Torts

An extensive body of literature describes the benefits of collective environmental activism and its contribution to “public good.” Mathews highlighted the ways campaigning groups “breed new ideas, advocate, protest and mobilize public support,” “shape, implement, monitor and enforce national and international commitments”, “disrupt hierarchies,” spread “power among more people and groups” and have promoted an unprecedented “power shift” from states to liberal private organizations. Keck and Sikkink suggested that world politics have been fundamentally transformed by liberal transnational networks that “multiply the channels of access to the international system,” most notably in the environmental field. NGOs are seen as enhancing the legitimacy of international law and playing important roles as “guardians of the environment” in processes of international regulation and supervision. Binder and Neumayer found empirical evidence that the presence of environmental nongovernment organisations (NGOs) leads firms to reduce their emissions of toxic chemicals. It follows that, in certain circumstances, it may be legitimate for campaign actions to interfere with property and business interests.

However, the question of where the boundaries of the arena of legitimate conduct should be set is contestable. In defining the limits of permissible conduct courts and lawmakers need to deliberate on conflicts between competing rights and priorities – between the interests asserted by those taking collective action and the private or civil rights of individuals and corporate interests. The areas of law which regulate collective economic coercion seek to resolve a conflict between rights of reputation and personal freedom (to be free from attacks on assets, property and businesses and to have redress for infringement of those rights) and rights of the public (for awareness and freedom of expression).

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6 See Part II(A) below.

7 According to Powell and Clemens the idea of “public good” is “vexed and contested and one must ask questions like ’which public?’ and ‘for whose good?’” and assess “what is the yardstick that assesses how organizational actions best meet broad societal goals?” – Powell W and Clemens E (eds), Private Action and the Public Good (Yale University Press, New York, 1998) at p xiv.


Chapter Eight: Environmental Campaigns and the General Economic Torts

To date in Australia, there have been few reported cases involving economic tort actions against environmental campaigners, with the Gunns litigation series the leading example. The Gunns cases, discussed in Part II of this chapter, have been described as “a legal and public relations disaster for the company.” They illustrate practical difficulties involved in litigating the economic torts.

The economic torts are politically contentious, a legacy of their intermittent deployment against trade unions and environmental lobbies object to the potential use of these causes of action against community groups, seeing them as avenues for “suppressing adverse public debate and participation.” As Gunns showed, any party utilising the torts against environmental groups needs to be prepared to face a fierce public relations backlash. Maxwell suggested that firms facing an NGO campaign “must decide to either embrace the NGO’s demands … or invest in a reputation of intransigence; the middle ground is hard to sustain.” Two recent decisions in international jurisdictions, Resolute Forest Products and Sea Shepherd v Fish & Fish, demonstrate the willingness of some firms, if they have sufficiently strong cases, to pursue the litigation path.

This chapter aims to deepen understanding of ways in which the general economic torts may evolve in the future by evaluating the potential application of the range of “control mechanisms” that can be deployed to inhibit the scope of the torts: the common law justification defences, definitions of intentionality and unlawful means, and statutory exemptions. As Chapter Seven showed, for Australia, an enlivening of the justification defences is a clear option and this might be associated with a widened conception of unlawful means under the innominate tort of causing loss by unlawful means. It is argued in this chapter, with reference to the specific context of environmental activism, that there is a need to clarify the optimum blend of control mechanisms.

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14 Gunns Ltd v Marr [2005] VSC 251 (18 July 2005); Gunns Ltd v Marr (No 2) [2006] VSC 329 (28 August 2006); Gunns Ltd v Marr (No 3) [2006] VSC 386 (20 October 2006); Gunns Ltd v Marr (No 4) [2007] VSC 91 (3 April 2007); Gunns Ltd v Marr [2008] VSC 464 (7 November 2008); Gunns Ltd v Marr (No 5) [2009] VSC 284 (20 July 2009).


19 2014 ONSC 3996.


21 It will be recalled from earlier Chapters that Carty referred to “the fear of disproportionate and limitless liability” if control mechanisms were not applied (Carty, n 5 at p 1).
This chapter is structured as follows. Part II outlines some developments which suggest increasing potential for environmental activism to be an arena for future economic tort litigation and canvasses concluded cases where the underlying principles of the torts have been applied to the context of environmental campaigns. Part III then considers the potential application of control mechanisms. The chapter concludes with some observations about the important disciplining role private law solutions play in the overall accountability framework for groups acting collectively.
II. ENVIRONMENTAL CAMPAIGNS AS AN ARENA FOR LITIGATION

A Application of the Economic Torts to Environmental Activism

The benefits that have resulted from collective environmental activism have been widely celebrated.22 Scholarship of the sociology of social change identifies institutions based in civil society as catalysts for an ecologically sustainable society.23 Within the broad spectrum of the environmental movement some argue, with a sense of urgency, that “the reason why we are not fixing up the planet, even though it is to the advantage of all that we work together in our common interest, is that specific class interests [of business, of transnational companies, of corporations] intrude upon the process.”24 This view would see that it is legitimate to interfere with property rights and other economic interests in pursuit of environmental causes. Environmental NGOs are a “diverse and heterogeneous group” that differ markedly in how they operationalise activities:

Some NGOs use completely non-confrontational means to achieve their goals of protecting ecosystems for conservation purposes. Some … work closely with existing institutions to bring about corporate and social change. Others choose to remain outside those institutions … working in a more confrontational style. Still others prefer to engage in acts of sabotage and deliberate violation of the law.25

However, those involved in environmental campaigns are susceptible to the economic torts. This susceptibility is demonstrated by the frequently deployed pattern of conduct which involves well-resourced non-government organisations (NGOs), operating on a network basis, setting out to coerce customers of a company to stop doing business with a target company (unless the company accedes to the NGOs’ demands).26 Business lobbies contend that campaign methods are increasingly calculated to impose costs upon and cause financial damage to “targets.”27 Each of the five torts under study in this thesis can potentially be applied against activists.


26 See Maxwell, n 18 at p 136.

Campaign actions may constitute inducing breach of contract if steps are taken to deprive the plaintiff of legal rights arising under a contract and if it can be shown that the defendants intended to interfere with the plaintiff’s legal rights.

Conduct occurring in the course of an environmental campaign could potentially be “a combination or conspiracy aimed at harming the plaintiff in his trade or business” (the classic Quinn v Leathem test) if the conduct is found to have been motivated by malice. Lawful means conspiracy could arise if there was unjustified combination leading to economic pressure or harm (even if no unlawful means had been used). If a conspiracy or combination involved the use of unlawful means (most obviously, trespass or acts of defamation) it could be tortious without the need to show malice.

It should be noted, however, that conspiracy actions face real practical difficulties. In Gunns Ltd v Marr (No 2), Bongiorno J was concerned by the plaintiffs’ attempt “to characterise virtually all of the defendants’ activities as being in furtherance of one extensive conspiracy,” noting that “conspiracy trials tend to be of inordinate length.” His Honour referred to a general reluctance of the Victorian Supreme Court to entertain civil conspiracy trials, observing that in the criminal jurisdiction, “such trials are now a rarity and are strictly controlled by statute.”

As was explained in Chapter Three above, the tort of intimidation arises where a defendant has, “by a threat to commit an unlawful act, coerced another person into acting in a way in which the latter did not wish to act, the defendant having thereby intended and caused economic damage to the plaintiff.” In Boral Resources (Vic) Pty Ltd v CFMEU, the Supreme Court of Victoria affirmed the tort of intimidation as part of the law of Australia, consisting of three elements: that the defendant makes a demand coupled with a threat; that the threat is a threat to commit an unlawful act; and that the person threatened complies with the demand, thereby causing loss to the plaintiff.

The discussion in Chapter Three also established that the unlawful means tort has two essential ingredients: unlawful means, and an intention to thereby cause loss to the claimant.

Increasingly, scenarios are arising in which environmental NGOs are adopting the latter two of the operating styles identified by Hoffmann and Bertels (involving confrontation and/or deliberate violation of the law). In such situations, it can be anticipated that campaigning groups will find themselves exposed to actions under the torts of intimidation and causing loss by unlawful means.

28 Gunns Ltd v Marr (No 2) [2007] VSC 329 (28 August 2006) at [26].

29 Balkin and Davis, above n 16 at p 608 [21.31].

30 Boral Resources (Vic) Pty Ltd v CFMEU [2014] VSC 429. The decision in this case was confirmed on appeal. The case was discussed in Chapter Three, Part IV of this thesis and by Tuck J and Creighton B in Victorian Supreme Court Confirms Tort of Intimidation is Part of Australian Law (Case Note): see www.corrs.com.au/publications (20 October 2014).

31 Hoffman and Bertels, n 25 at p 51.
B  The International Experience

Some of the most prominent examples of litigation against environmental activists emanate from Canada. In the action in Resolute Forest Products v 2471256 Canada Inc, before the Superior Court of Justice of Ontario, a statement of claim was filed alleging “defamation, malicious falsehood and intentional interference with economic relations.” The defendant activists were said to have targeted the plaintiff’s stakeholders, disseminated an “Unsustainability Report” for the purpose of damaging the company’s reputation and took steps to “harass, intimidate and otherwise exert pressure on Resolute’s customers” in a manner “designed to have customers refrain or alter their business relations with Resolute.”

By contrast, in Daishowa Inc. v Friends of the Lubicon,33 which involved a boycott campaign aimed at customers and consumers of the plaintiff’s paper products by supporters of an indigenous group, it was held that:

The plaintiff’s claim against the defendants under the tort of interference with economic interests cannot succeed because the means used by the Friends was not unlawful. The claim that breach of contract was induced cannot succeed because the evidence failed to establish contractual relations between the plaintiff and its distributors and customers. One of the crucial elements of the economic tort of intimidation, an unlawful threat, is absent. The lack of a common intent to act unlawfully means that the tort of conspiracy to injure has not been established.34

A scan of developments on the international scene offers more recent illustrations of conduct containing the key triggers of use of unlawful means and intentional conduct targeting the economic interests of another, which could form the basis for economic tort actions.35 Sea Shepherd UK v Fish & Fish Ltd36 concerned an incident in the Mediterranean Sea where an operation was mounted to disrupt blue fin tuna fishing activities and a protest vessel rammed and tore open fishing cages.

There is a new trend in activist thinking towards the direct targeting of individuals, possibly extending to extra-judicial orchestrated ‘naming and shaming’. This is evident from a

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33 [1998] 39 O.R. (3d) 620 (Ontario Supreme Court)

34 Ibid. Though the plaintiff’s economic tort claims failed the Court noted that substantive limitations on the defendant’s activities included inducing breach of contract and ‘telling lies about the business.’


36 Sea Shepherd UK v Fish and Fish Ltd [2015] UKSC 10. The issue on appeal in this case concerned accessory liability in tort.
Chapter Eight: Environmental Campaigns and the General Economic Torts

detailed “Practitioner Handbook” on “Motivating Business to Counter Corruption” produced by Germany’s Humboldt-Viadrina School of Governance (“HVSG”) in 2013. HVSG reviewed potential “sanctions and incentives for companies and their representatives” in legal, commercial and reputational areas and concluded that “all 3 categories are of near-equal importance in motivating business.” Activists were encouraged to consider “making the application of sanctions public, as this may not only raise financial costs, but also social costs and (potentially) even psychological costs.” The Handbook detailed social costs individuals targeted may experience – “exclusion/ostracism within the community/neighbourhood, etc.; social rejection from colleagues, friends and family; public association with behaviour that damages society” and noted the practical application of these methods in the context of environmental protection. A related survey of “223 international anti-corruption experts,” published in 2012, showed that “80% of ‘civil society’ respondents agreed with the proposition that “public campaigns and press articles should target business representatives rather than businesses.”

The HVSG research suggested that measures should:

… not only influence the targeted individual or company, but also the opinion of key stakeholders or the general public … The internet and in particular social media have given new momentum to reputational sanctions and incentives, widening their scope and enabling high-speed information distribution … the internet means external scrutiny can potentially be globalized.

As Waddell demonstrated, the true power of modern activism resides in “global, multi-stakeholder, inter-organizational change networks,” comprising people numbering in the many millions, which work to assert new rules, laws and values and set up circumstances in which “organizations will no longer be considered ‘legitimate’ and will be denied opportunities if they don’t follow the new rules and integrate the values.” He named these “Global Action Networks.” Campaign-oriented NGOs now have a real capability to effect damage to businesses and individuals they target. Maxwell observed that the proliferation of the internet and social media has enabled citizens hungry for change to achieve “a dramatic reduction in the costs of mobilizing individuals and communicating concerns to the broader public and that this has allowed NGOs to be much more effective in dealing with the general


38 Ibid at 52-54.

39 Ibid at 74-75.


43 Ibid at xiv.
public, raising their private political power. In 2013 the German newspaper Handelsblatt reported that:

Greenpeace and the Food Guardian Foodwatch group have, in Germany alone, each well over 80,000 Facebook fans, with which they can quickly start mass protests. The campaign website ‘campact.de _democracy in action’ represents more than 825,000 deferred activists and for almost any topic – from rents to waterworks nationalization – can mobilise many supporters fast.

In the course of setting boundaries for permissible conduct, account should be taken of factors such as the relative power (including political influence) of groups applying coercion and those targeted. At some point, past assumptions about the relative strength of opposed parties may need to be revisited.

It is one thing for highly organised and well-resourced environmental groups to target large corporations; quite another if the targeting is of particular individuals unaided by large-scale corporate backing, or of small-scale business interests. There is potential for the common law rules to take account of disequilibrium in power and influence between those applying economic coercion and the party targeted.

C The Australian Experience

The highest profile Australian litigation against environmental activists was brought by Gunns Ltd, a Tasmanian forestry company, in the Supreme Court of Victoria over the 2005-2009 period. Proceedings were launched against seventeen individual and three corporate entities (the Wilderness Society, the Huon Valley Environment Centre and Doctors for Native Forests) over their efforts to protect Tasmanian forests. The initiating writ (which was accompanied by a 216 page Statement of Claim) described four separate “logging operations disruption campaigns” and a “corporate vilification campaign” tied together with a broad allegation of a “campaign against Gunns” and sought damages of more than A$6 million. The causes of action were initially pleaded as “interference with trade or business by unlawful means, wrongful interference with contractual relations, conspiracy to injure and defamation.” Eventually, after grants of leave to amend Statements of Claim, the actions were re-focused around intentional interference with contractual relations, “intentional injury to the plaintiffs in their trade and business” and trespass.

Six judgments were handed down in the Gunns litigation series but the matter never proceeded to a trial on the merits and was eventually settled on terms unfavourable to the plaintiffs. Most of the post-litigation analysis has focused on the reputation effects on the

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44 Maxwell, n 18 at 150. Maxwell reviews the ‘small but growing economic literature on NGO behavior’ at 136.


46 Gunns Ltd v Marr [2005] VSC 251 (18 July 2005) at [10].

47 Ibid at [11], per Bongiorno J.


plaintiffs, with Beresford commenting that “the attempt by Gunns to sue some of its main critics came to rival the notorious McLibel case in the United Kingdom as an example of corporate abuse of free speech.” Commentators have viewed the Gunns litigation as an overt strategy by the plaintiffs to distract and occupy their opponents in the courts, noting that the company’s actions were bolstered by political relationships.

The pleadings offer a cloudy and contested picture of the activists’ conduct, but Beresford’s 2015 book on the Gunns saga, based largely on insider interviews with campaigners, left little doubt as to the extent to which the campaigners were intent on disrupting and undermining the business of the plaintiffs. He details “blockades and tree-sits in addition to public-education campaigns about the forests … Those found chained to harvesting machines or making other attempts to halt logging were arrested, charged with trespass and ordered not to re-enter the prohibited zone.” Beresford also detailed the way in which, in late 2007, “the focus widened from electoral politics to the corporate backers of the project,” in particular “targeting the principal funder” (the ANZ Bank) as well as other institutional investors and financial institutions, with the objective of “creating a domino effect if ANZ could be pressured to drop the project.” An important aim was “putting pressure on major international banks and finance groups to declare publicly their opposition to funding the mill.” Key campaigners disclosed that “in these sorts of disputes, delay and uncertainty are your friends, because they can frighten off investors.”

It would be a mistake to interpret the outcome of the Gunns cases as suggesting the futility of future economic tort litigation against activist groups in Australia. What Gunns demonstrated, above all, is the need for claimants to plead economic tort causes of actions effectively. The task in this series of cases was rendered complex by the continuing ambiguity of the torts under Australian law and international case law developments occurring during the period in question, but it is clear that the lack of success of the plaintiffs was due largely to tactical and procedural errors in the conduct of the litigation. Bongiorno J initially criticised various parts of the Statement of Claim for “extreme prolixity,” and found they were “confusing and resort to formulas” and did not “adequately expose the case.” He also took issue with the inclusion of “quotations from newspapers, websites and correspondence which are inappropriate in form” and “formulaic uninformative particulars.” His Honour’s criticisms of the pleadings in a later 2006 decision included that “too much has been sought to be alleged against too

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51 Ibid.

52 Ibid at pp 290-1.

53 Ibid at pp 314-17. Ultimately, in mid 2008, ANZ Bank issued a statement saying it was withdrawing from the project.

54 Ibid at p 283 and p 343. See also comments at p 320.

55 Ibid at p 314.

56 Gunns Ltd v Marr [2005] VSC 251 (18 July 2005) at [51]-[52] and then at [59].
many defendants in the one proceeding,” that there were obstacles in the way of justice deriving from “the sheer magnitude of the case and its effect on interlocutory processes,” concerns about “processes of discovery and interrogation … of enormous proportions” and the perceived likely burdensome cost to individual defendants.\textsuperscript{57}

Animal rights activism and environmental activism are discrete movements based on different philosophies but two actions brought against animal rights activists should be noted. In\textit{ Australian Wool Innovations Ltd v Newkirk,}\textsuperscript{58} the torts of conspiracy and intimidation were alleged against People for the Ethical Treatment of Animals, Animal Liberation and a number of individuals associated with those organisations. In\textit{ Rural Export & Trading (WA) Pty Ltd v Hahnheuser}\textsuperscript{59} animal rights activists entered a sheep feed paddock where sheep were being held prior to shipment to the Middle East and placed pig meat into food troughs, rendering the animals unsuitable for export and causing hundreds of thousands of dollars of loss to the sheepowners. These circumstances gave rise to an ultimately successful anti-boycott action under s 45DB(1) of the \textit{ Competition and Consumer Act 2010 (Cth)} but they could equally have been the basis for a tort suit. Ogle viewed the actions as “arguably … on the margins of legitimate public participation.”\textsuperscript{60}

Another conspicuous example of conduct which could potentially lead to an economic tort suit occurred in January 2013 when a campaigner sitting in a protest camp in the Leard State Forest in New South Wales sent out a fake ANZ Bank press release from his laptop, saying that the bank had withdrawn a $1.2 billion loan to Whitehaven Coal, the target of a protest over a mine expansion. This cited “volatility in the global coal market, expected cost blowouts and ANZ’s corporate responsibility policy.”\textsuperscript{61} The hoax release was picked up by media and wiped 9% (a few hundred million dollars) off the market capitalisation of the company for a period of time, resulting in a trading halt. This incident demonstrates the potential for campaign conduct to move markets.

For all their possibility in tort law, potential claimants contemplating deployment of the economic torts are likely to be deterred by four factors: the lack of clarity around many aspects of the operation of the torts under Australian law, difficulties in adducing evidence, reputational risks and the observed negative experiences of litigants such as Boral and Gunns. Cases may not be initiated because of social or political reasons or, as Gunns showed, depend on the implicit endorsement of the government of the day.

\textsuperscript{57} \textit{Gunns Ltd v Marr} (No 2) [2006] VSC 329 (28 August 2006) at [23]-[25].


\textsuperscript{59} (2008) 169 FCR 583, discussed further in Chapter Nine.

\textsuperscript{60} Ogle G, n 15 at 39.

\textsuperscript{61} See Davidson S, ‘Environmentalists have a right to protest – but not at all costs,’ \textit{The Conversation} (24 July 2014). See https://theconversation.com/environmentalists-have-a-right-to-protest-but-not-at-all-costs-28322 (accessed 26 April 2016). If a tort action had been pursued in this case the claimant would have faced a high level of socio-political resistance.
Chapter Eight: Environmental Campaigns and the General Economic Torts

III. CONTROL MECHANISMS

As mentioned in Chapter One, Part II (C) above, a range of judges\(^62\) and commentators\(^63\) have been concerned about the need for ‘control mechanisms’ to inhibit the scope of the general economic torts and prevent them from being “unmanageably broad. Environmental activism will present new varieties of cases in which the application of control mechanisms can be tested. The uncertainties that exist under Australian law have arguably acted as a disincentive to business interests initiating proceedings; equally, activists need to be wary that the state of flux and the immaturity of defence arguments may advantage plaintiffs.\(^64\)

This thesis has demonstrated that there are four potential avenues for inhibiting the scope of the general economic torts: the expansion of justification defences; adjusting the tests of intention and targeting; clarification and “tweaking” of notions of unlawful means; and statutory exemptions. The current state of development of the law in Australia is such that each alternative is “in play.” The discussion below considers each of these options in turn, with reference to the context of environmental campaigning.\(^65\)

A Justification Defences

Expanded and better delineated justification defences can play an important role in cataloguing the forms of pressure or interference with the rights of others that are legitimate. Deakin and Randall viewed justifications as a vital dimension of the overall architecture of the economic torts and noted potential for it to be “the justification defences which determine their outer limits.”\(^66\)

Chapter Seven identified five broad thematic ‘beachheads’ which could serve as potential starting points for expansion of justification defences. The first – a defence based on a pre-existing contractual obligation of the defendant - is typified by Edwin Hill and Partners v First National Finance Corp.\(^67\) Second, Deakin saw potential for building on the idea that “on grounds of policy, a privilege is warranted wherever a servant or agent acts, not in capricious pursuit of self-advantage, but for the bona-fide protection of his employer.”\(^68\) A third category is what Deakin and Randall termed “justification based on the economic self-interest

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\(^63\) See Carty, n 5 above at p 1 and p 171.


\(^65\) It should be noted that the concepts of justification and unlawful means have already been explored in some depth in this thesis, in Chapters Seven and Four respectively, so these concepts are only lightly covered here.


\(^67\) [1989] 1 WLR 225.

of the group” or “collective economic self-interest”. Fourth, the common law could expand the range of collective actions that might be considered justified, as contemplated in *Universe Tankships of Monrovia v ITF*.

The fifth potential starting-point for expansion of justification defences has obvious relevance to the context of environmental campaigning. Circumstances may arise where a moral imperative or public duty exists, or where there has been altruistic action designed to protect the interests of third parties. There is a category of cases in which an impersonal or disinterested motive may afford justification, particularly where the defendant, acting under a moral duty, seeks to protect a person to whom the defendant stands in a relationship of responsibility.

*Brimelow v Cassan* arguably created a new category of “public morality” defence. This was the case in which an actors’ protection society was held to be justified in inducing theatre operators to breach their contracts with a theatrical manager who paid female chorus members such a low rate that they took to prostitution to survive. The additional moral component provided a novel edge to this case. Carty highlighted that “the notion of moral duty raises two problems for a court: how to weigh economic loss against moral concern; conversely, how to ensure that support for that moral concern will be effective.”

In *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe*, after a musicians union objected to the plaintiffs’ policy of excluding “coloured people” from the dance floor and “gave notice to the plaintiffs that its members would not be prepared to perform at the ballroom as long as the policy of racial discrimination continued” the plaintiffs alleged a conspiracy to injure them in their trade. Cane noted that “even in 1958 it was possible to say that eliminating racial discrimination was a matter of public interest and not just a matter of interest to groups who were discriminated against” and saw that this case gave rise to potential for general arguments about moral imperatives to morph into a defence of public interest.

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69 Deakin and Randall, n 66 at 550.


71 For example, in *Stott v Gamble* [1916] 2 KB 504 a licensing authority banned an objectionable film which the plaintiff had arranged to exhibit at another’s theatre.

72 *Gunn v Barr* [1926] 1 DLR 855 involved a father convincing his daughter to breach a contract of marriage to a “scoundrel.”

73 *Brimelow v Cassan* [1924] 1 Ch 302, discussed by Carty, n 2 at p 69.


75 Carty, n 5 at p 69.

76 [1958] 1 WLR 1057.

77 Ibid at 1057. The case is discussed by Heydon JD, ‘The Defence of Justification in Cases of Intentionally Caused Economic Loss’ (1970) 20 UTLJ 139 at 153.

78 Cane, n 74 at pp 278-9. He commented that “for self-interest to be legitimate it is arguably necessary for the furtherance of self-interest to be, in some sense, in the public interest” (at p 278).
Chapter Eight: Environmental Campaigns and the General Economic Torts

The category of “moral imperative” raises the complication that courts would be called upon to decide which conduct should be considered matters of “morality or fairness?” There may be concern that this could lead to uncertainty but, as Heydon commented, “the current law of economic torts is also uncertain. The gains in rationality and predictability of development that would follow from generalisation and a greater concentration on justification might outweigh any uncertainty.” Some lack of judicial appetite for the task of weighing interests can be anticipated, but judges are already regularly called upon to adjudicate upon political and social issues. It is inevitable that, over the years ahead, the courts will be challenged to overcome their traditional reticence to become involved in the measurement and weighing of competing interests.

Cane considered the circumstances in which this type of weighing may occur, examining the example of the application of the defence of necessity to actions for trespass:

> What acts the defence will justify depends … on the nature and source of the evil avoided, the identity of the beneficiaries of the defendant’s action, and the seriousness of the interference with the plaintiff’s rights. Such balancing of factors may involve difficult and controversial moral and social judgments.\(^{81}\)

**B Intention and Targeting**

The legal settings for tests of intention can be fine-tuned so as to enhance, or alternatively dampen, the prospects of claimants. As Chapters Two, Three and Four of this thesis showed, it is necessary to inquire into the defendant’s intention or purpose (according to various tests) in order to make out each of the general economic torts.

The debates around intention and targeting which were canvassed in Chapters Two, Three and Four are highly relevant to the context of environmental activism, where claimants seeking to prove mental states or discover documents containing evidence of intention can face particular challenges. *Gunns* demonstrated that the deliberation processes of campaign oriented NGOs may be arranged so it is difficult for plaintiffs to access information about groups’ underlying motivations and the nature of strategies and actions taken in support of their strategic objectives.\(^{82}\) In the 2008 proceedings,\(^{83}\) Gunns applied for discovery of key documents needed to substantiate the torts pleaded in their revised Statement of Claim, but this was successfully resisted on the basis that these documents contained very sensitive internal information regarding the policies, finances and administration of the defendant Wilderness Society. The Supreme Court of Victoria declined to order disclosure of a series of the defendants’ documents which directly concerned campaigns, tactics, strategies and operations, including meeting, travel and telephone records, “constituent profiles” and a

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79 Ibid at p 236.


83 *Gunns Ltd v Marr* [2008] VSC 464 (7 November 2008).
document titled *Draft Strategy for Gunns Market Campaign – Background*, on the basis the plaintiffs and defendants were “in competition” with each other and that their disclosure might give Gunns a significant collateral advantage in its conduct of adversarial dealings with the Wilderness Society over the logging and management of Tasmanian forests. The Court adopted an interpretation of confidentiality pertaining to these key documents which was highly sympathetic to the defendants.

It will be recalled (from Chapter Four, Part VIII of this thesis) that Deakin and Randall advanced a revised conceptual basis for the general economic torts in which more attention would be paid to “their essential ingredients from the perspective of market regulation,” namely “to the interests which they protect, to the types of conduct which amount to illegitimate interference with those interests and to the justification arguments which determine their outer limits.” Deakin and Randall envisaged significant difficulties for plaintiffs if the requirement promoted by the House of Lords in *OBG* – that the defendant “actually realised the factual and legal effect of his actions, in addition to proving that he acted intentionally” – were adopted. They commented that the “requirement of ‘actual realisation’, coupled with the removal of the presumption of knowledge of the reasonable consequences of acts, leaves potential claimants facing an extremely high evidential burden” with the outcome of claims turning on “the attribution of ‘mental states’ many months or even years after the relevant events.”

It is open to Australian courts to act on the suggestions made by Deakin and Randall, and also by Neyers, advocating reiteration of the orthodox “aimed, directed or targeted” view of intention which acknowledges “the plaintiff’s right not to have others act with the predominant purpose of causing them injury.” There is merit in more explicitly taking ‘targeting’ into account in deciding if a defendant has transgressed the torts, and conduct should be critically examined where parties acting collectively have banded together with a provable intention of causing economic injury to a targeted party. When prima facie liability arises, it can then be subject to justification arguments.

**C The Unlawful Means Lever**

An alternative avenue for limiting the extent of application of the general economic torts is to employ a narrow definition of ‘unlawful means.’ It will be recalled from earlier chapters of this thesis that, in broad terms, two alternate conceptions of unlawful means have been developed by the common law – a ‘narrower view’ and a ‘wider view’ – and that there are significant variations in the meaning of the notion of unlawful means across the various torts.

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84 Ibid at [36].

85 Deakin and Randall, n 66 at 532.

86 Ibid at 539.

87 Ibid at 540.


89 See Chapter Three of this thesis.
Writing in 1970, Heydon usefully catalogued some of the variations in judicial approach from tort to tort, based on analysis of then-prevailing precedents. A considerable body of case law has ensued since 1970, but Heydon’s concise encapsulation remains informative. He saw that under inducing breach of contract “the means may be physical restraint, taking away essential tools, trespass to goods, persuading a third person to do an unlawful act, fraud and breach of the rules of natural justice;” 90 unlawful means under conspiracy “includes crimes; torts (e.g. violence, actual or threatened, restrictions on liberty of movement even though not amounting to false imprisonment, intimidation, defamation, trespass to the plaintiff’s goods); fraudulent misrepresentation to the plaintiff or presumably third parties” 91 and could also include “non-disclosure by company directors to an investigator of the reasons for the managing director’s absence,” 92 probably also breach of contract, and “to strike in breach of statute and to threaten such a strike;” 93 under the tort of intimidation “an unlawful act is probably any crime, tort … or breach of contract; a strike in breach of statute is probably an unlawful act for this purpose.” 94 As was noted in Chapter Three, illegal means under the innominate unlawful means tort “may be common law crimes like murder of a third party, or breaches of criminal statutes; torts, for example nuisance as against third parties, nuisance as against the plaintiff, trespass against the plaintiff, violence against third parties, defamation of the plaintiff, injurious falsehood … and breaches of contract.” 95

The problem with the narrow view is that it is at odds with the common law’s traditional intolerance, as a matter of policy, of illegality. Chapter Seven, Part V above described the ways in which, in his treatise analysing tort law and economic interests, Cane stated three key propositions regarding tort law’s discouragement of illegal conduct. The first was that “as a matter of public policy, courts are unwilling to give legal remedies to a party who founds his cause of action on his own illegal act. The judges do not wish to be seen as giving aid or encouragement to law breakers.” 96 A second proposition was that if an “illegal act was a cause of, or was closely associated with … loss … it would be an ‘affront to the public conscience’ to afford relief.” 97 Thirdly, a court will not “promote or countenance a nefarious object or bargain which it is bound to condemn.” 98


91 Ibid at p 172.

92 Ibid at p 172, referring to De Jetley Marks v Greenwood [1936] 1 All E.R. 863 at 872 per Porter J.

93 Ibid at p 173.

94 Ibid at pp 173-4.

95 Ibid at p 174.

96 Cane, n 74 at p 238, citing the authority of Holman v Johnson (1775) 1 Cowp. 341, 343; [1775-1802] All ER 98, 99.

97 Ibid at p 238. See Thackwell v Barclays Bank PLC [1986] 1 All ER 676, 687.

98 Ibid at p 239. See Saunders v Edwards [1987] 1 WLR 1116, 1134 per Bingham J. [It is possible to question here the relevance of illegality when it is by a party seeking to rely – the situation in focus is more about seeking to rely on a defence?]
Turning to the context of environmental campaigning, it is apparent that campaign actions on occasions veer into illegality, sometimes by design.\textsuperscript{99} Exclusion of criminal offences and breaches of statute from the ambit of the economic torts undermines the objective of inhibiting, in Lord Nicholls’ terms, “clearly excessive and unacceptable intentional conduct.”\textsuperscript{100} For the law to develop in a balanced manner, it should align with the “very simple” and common-sense observations of Lord Walker in the \textit{Total Network} case, which suggested that, to determine “what an unlawful act was” reference should be made to what “the man in the street” would say, if asked.\textsuperscript{101}

When the High Court of Australia has the opportunity to conduct a first principles review and to determine for itself the appropriate settings for the unlawful means tort for Australia the precedents from England and Canada will be influential but they will not be binding upon the court. As Neyers observed, referring to comments by Queensland’s Justice Dutney,\textsuperscript{102} they will represent the starting point (not the finish line) for a reconsideration of the position in Australia.\textsuperscript{103} (Neyers built a case for the wider conception of unlawful means based on a ‘predominant purpose’ justification – “the plaintiff’s right not to have others act with the predominant purpose of causing them injury.”)\textsuperscript{104}

\section*{D \quad Statutory Exemptions}

Legislatures can become involved in defining the circumstances under which collective actions are regarded as unacceptable, modifying common law rules. As Heydon noted, “Parliament, if it thinks the public interest requires it, can create any special exemptions of references needed for particular groups, as happens in England to a large extent with trade unions.”\textsuperscript{105} Carty viewed statutory exemptions as the preferred way forward, referencing the protections created in the labour law sphere and seeing the economic torts as “lacking the fine tuning or finesse of statutory law.”\textsuperscript{106} Cromwell J in \textit{A.I. Enterprises} echoed these sentiments, with his concern that the economic torts might “undermine legislated schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of expression and association.”\textsuperscript{107} The Victorian Court of Appeal took a different view in \textit{CFMEU}, pointing out that “the existence of a tort was not affected by legislation, \hfill

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\textsuperscript{99} See the examples of “direct action” listed by the New Zealand Court of Appeal in \textit{Greenpeace of New Zealand Incorporated} [2013] 1 NZLR 339 at [30]–[31].

\textsuperscript{100} \textit{OBG v Allan} [2008] 1 AC 1 at [153], per Lord Nicholls.

\textsuperscript{101} \textit{Revenue and Customs Commissioner v Total Network}, [2008] 1 AC 1174 at [90]–[91], per Lord Walker. See Lord Walker’s words quoted at Part IV C of Chapter Two of this thesis.

\textsuperscript{102} Dutney P, ‘The Economic Torts Revisited’ (2007) 28 \textit{Queensland Lawyer} 5 at 8; Neyers, n 88 at 139.

\textsuperscript{103} Neyers, n 88 at 139.

\textsuperscript{104} Ibid at 138.

\textsuperscript{105} Heydon, n 80 at p 132.

\textsuperscript{106} Carty, n 5 at p 172.

\textsuperscript{107} \textit{A.I. Enterprises} [2014] 1 R.C.S. 177 at 197 [34]. Cromwell J also expressed concern that expanded liability for the economic torts may undermine “perhaps even constitutionally protected rights of expression and association” (198 at [34]).
\end{flushleft}
Attempts to advocate special exemptions for activist groups have achieved only limited traction in Australia. Momentum built in the immediate aftermath of the *Gunns* litigation, which had become a *cause celebre* in activist circles. Exemption proposals made to date have sought to protect activists from “strategic litigation against public participation” (characterised as ‘anti-SLAPP’ suits). The term ‘SLAPP’ was conceived by Pring and Canan. According to Pring, SLAPP suits satisfy four criteria: a civil complaint or counterclaim for monetary damages and/or an injunction; filed against non-governmental individuals or groups; because of their communication to a government body, official, or the electorate; on an issue of some public interest or concern. Merriam suggested a fifth criterion: “the suits are without merit and contain an ulterior political or economic motive.” The advocates of statutory exemptions contended the *Gunns* litigation met these criteria, although this is debateable, as the plaintiffs in that case clearly acted in defence of a significant economic interest. Ogle defined SLAPP suits more broadly as “any lawsuit in relation to a political issue where the case has had, or could be assumed to have had, the effect of constraining the community’s right and ability to participate in public debate and political protest.”

The Australian anti-SLAPP proposals have asserted “the right to freedom of expression, the right to peaceful assembly and freedom of association, and the right to take part in public life.” They are illustrative of an emerging approach which seeks to apply principles of public law to private law contexts, via the invocation of fundamental rights.

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109 Beresford, n 50 at pp 296-7 described the stresses experienced by the defendants in the *Gunns* litigation, which were argued to be a basis for considering legislative relief.

110 “A Draft Bill for an Act to Protect Public Participation” was proposed to the Victorian Attorney General in the course of an Access to Justice inquiry by the Public Interest Law Clearing House (PILCH) in a submission dated 22 April 2009 (n 17). A pioneering anti-SLAPP Act enacted in the Australian Capital Territory in 2008 was characterised by Ogle (n 15 at 40) as “heavily amended by a timid government.” Momentum for this kind of legislation dissipated after the election of Liberal governments in Victoria in 2010 and federally in 2013.


114 Ogle, n 15 at 35.

Four main arguments are advanced for the passage of legislation exempting environmental campaigners from the economic torts. The first is that environmental groups are a ‘special case’ in moral and social terms, warranting differentiated treatment. This view objects to the ability of opponents to litigate against campaigning groups as “a clear deterrent to even basic forms of community organizing.”

The second argument emphasises that net community and public benefit is created by liberating the energy of activist groups, and points to the considerable achievements of environmental activism over the past two to three decades in transforming world politics, gaining public trust and positively contributing to societal welfare.

A third proposition is that there is a need to inhibit “an emerging practice in Australia of large corporations using litigation as a strategic means of suppressing adverse public debate, commentary and protest on issues of public importance.” Ogle referred to a trend towards “increasing use of claims brought under commercial and industrial laws.” However, this does not appear to be supported by a pattern of recent court activity and a counter-argument is that access to sympathetic media and the proliferation of social media ensures groups are able to make their voices heard, and loudly, in Australia today. The fourth set of arguments concern financial resources: the “threat of adverse costs orders in legal proceedings” is seen as unduly onerous for environmental groups and it is argued “there is invariably a significant resource imbalance with ‘poorly resourced community groups … pitted against major corporations and/or government authorities.”

The 2009 proposal for a ‘Bill for an Act to Protect Public Participation’ in Victoria sought to establish legislative recognition of a “right to engage in public participation.” It provided for dismissal of proceedings, including economic tort actions, and the awarding of damages and

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116 Contrasting viewpoints on this approach were debated at a conference on ‘Private Law in the 21st Century’ hosted by the University of Queensland in Brisbane in December 2015. See K Barker, K Fairweather and R Graham (Eds.), Private Law in the 21st Century, Hart, London, 2017.

117 Ogle, n 15 at 38.

118 See Keck and Sikkink, n 9 at p 1.


121 The examples quoted in the 2009 PILCH Submission, apart from Gunns, were from 1999. Neyers, n 88 at p 119, describes the relatively low occurrence of Australian economic tort litigation, up to January 2011.


123 Submission to the Victorian Attorney General by the Public Interest Law Clearing House (PILCH) dated 22 April 2009 proposing “A Draft Bill for an Act to Protect Public Participation” at 36. See also Ogle, n 15 at 37.

124 Kallies and Godden, n 120 at 194.
costs against plaintiffs instituting such proceedings, for underlying conduct assessed to constitute “public participation.” It sought to establish legislative recognition of a “right to engage in public participation” and defined public participation very broadly as encompassing “communication or conduct aimed, in whole or in part, at: (a) influencing public opinion; or (b) promoting or furthering action by the public, a corporation or by any government body, in relation to an issue of public interest.”\textsuperscript{125} The draft Bill also provided that “public participation does not include communication or conduct to the extent that such communication or conduct:

(i) constitutes unlawful discrimination under the Equal Opportunity Act 1995;
(ii) constitutes vilification under the Racial and Religious Tolerance Act 2001;
(iii) constitutes a deprivation of liberty;
(iv) constitutes a trespass to premises used primarily as a private residence;
(v) is by a party to an industrial dispute between a major employer and employee, former employee, contractor or agent and relates to the subject matter of the dispute;
(vi) intentionally or recklessly causes appreciable injury to tangible property that lowers its value;
(vii) intentionally or recklessly causes physical or mental injury to natural persons;
(viii) incites others or attempts to incite others to commit an act referred to in sub-section a(vi) or a(vii); or
(ix) is made in trade or commerce.”\textsuperscript{126}

Thus, the likely effect of this proposal would be that groups would be able to obtain protection from suits relating to trespass to premises (other than those used primarily as primary residences) and for damage to property which is less than ‘appreciable’.

A series of objections may be made to the proposed anti-SLAPP laws and the first is that they pay insufficient regard to the importance of inhibiting illegality. Legislatures need to be careful that restriction of the economic torts does not give too-broad licence for unlawful acts, and to collective conduct that unjustifiably damages individual and business interests.

The anti-SLAPP proposals blur the distinction between public wrongs and private wrongs: the former concern the relationship between the individual and the state and breaches and violations of public rights and duties, affecting the whole community\textsuperscript{127} while private wrongs involve “an infringement or privation of the private or civil rights belonging to individuals, considered as individuals.”\textsuperscript{128} Collins acknowledged that “insertion of fundamental rights into litigation over ordinary contractual, tortious and property disputes is perceived to present worrying challenges to basic structures of the legal order and the nature of private law,”\textsuperscript{129} and, although two parties involved in a private law dispute enjoy rights, they will also be duty-bearers:

\textsuperscript{125} Submission to the Victorian Attorney General by the Public Interest Law Clearing House (PILCH) dated 22 April 2009 proposing “A Draft Bill for an Act to Protect Public Participation.”

\textsuperscript{126} Ibid at 19-10. See section 3 of the proposed Bill.


Unlike the orientation in public law that typically treats fundamental rights as trumping arguments in order to control abuse of state power, the role of rights in private law is much more likely to be one of questioning the existing delicate balance struck by private law between rights, interests and public policy. 130

Caution should be exercised when proposals seek to take away existing legal recourse for parties damaged by intentional actions targeting their economic interests, because this is at odds with an idea that underpins the economic torts, that “the law should not legitimize the infliction on another of gratuitous harm.” 131

Other arguments against statutory exemptions in favour of environmental groups emphasise the growing sophistication and power of activist networks, 132 and the new trend towards direct targeting of individuals. 133 Environmental campaigns are generally portrayed as “David vs Goliath” contests, but there is potential for conduct to damage small-scale property and business interests, as in Rural Export. 134

For these reasons the proposals that have been made in Australia to date for statutory immunities for environmental groups should be rejected. However, the anti-SLAPP model is just one example of an effort to create statutory exemptions. 135 New proposals are sure to be advanced for the economic torts to be delimited by legislative initiatives, built upon fundamental rights arguments, and referencing freedom of expression and political communication. But the achievement of a political consensus as to the ‘right’ approach can be expected to take some time. 136

130 Ibid at p 221.


133 See Part III of this chapter.


135 An alternative formulation is the approach taken in 45DD(3) of Australia’s Competition and Consumer Act 2010 (Cth) which exempts secondary boycott conduct from liability if “the dominant purpose for which the conduct is engaged in is substantially related to environmental protection” although this test gives rise to a range of difficulties in discerning the purposes motivating the conduct of defendants. See Chapter Nine below.

136 In late 2016 a controversy about “foreign funding” of anti-coal campaigns and the use of “eco-litigation” by activist groups re-ignited political debates about the role legislation should play in impeding, or facilitating, the disruptive impact of environmental campaigning on business activities, leading Australia’s Prime Minister to express concern about the existence of “very systematic, well-funded campaigns against major projects” - ‘Turnbull government moves to shut court doors on anti-coal activists,’ The Australian, 25 October 2016. There have also been contentious recent proposals to criminalise protest activities in the States of Tasmania and Western Australia – see https://forcechange.com/152971/dont-criminalize-peaceful-forms-of-protest/ (accessed 5 November 2016).
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IV. CONCLUSION

When groups act in concert to apply economic coercion they have the capacity to cause significant economic injury to those they target. The availability of robust private law solutions plays an important disciplining role in the overall accountability framework for groups acting collectively – if they overstep permissible boundaries of conduct, they can be brought to account by aggrieved parties commencing litigation. Abandonment of common law protections for individual interests in property or personal reputation should be approached cautiously.

There is a considerable diversity of views amongst commentators as to the appropriate settings for the context of environmental activism. Some favour a restrictive approach; others advocate permissive settings with very few constraints – almost an ‘anything goes’ approach. The political debates are still immature and the new dynamics of activism are as yet little understood, as Maxwell has shown.¹³⁷ The spectrum of opinions resembles the debates that raged over trade union activities in the 20th Century, until a settled consensus began to emerge about the appropriate outer limits of unions’ liberties when operating collectively. This was associated with the creation of disciplines to make union activities more transparent. Equivalent transparency mechanisms have not at this point been developed for the environmental movement – in fact accountability lines are blurred by the global trans-jurisdictional nature of networks and the conscious design of operating methods which make actions difficult to trace and evidence hard to obtain.¹³⁸

Chapter Three of this thesis argued against use of a narrow view of unlawful means as the preferred control mechanism for the economic torts. As was contended in Chapter Three, exclusion of criminal offences and breaches of statute from judicial definitions of unlawful means has potential to undermine the aspiration, inherent in the torts, to inhibit excessive and unacceptable intentional acts. Courts, like legislatures, need to ensure settings are designed so as not to encourage or condone illegality.

Chapter Seven demonstrated that, for Australia, a clear option is to evolve common law rules to enliven notions of justification. This could allow courts to weigh the nature of illegality involved against the strength of potential justifying factors, and would necessarily be associated with a wide conception of unlawful means under the tort of causing loss by unlawful means.

Environmental campaigns directed against business interests present a new context for the application of the economic torts. The history of labour law suggests that the achievement of a political consensus which strikes the right balance in designing statutory exemptions in such a contentious area is the work of decades. Eventually, a middle ground will be attained but the shape of this cannot be discerned at this stage. It is by no means clear that the compromises reached in labour law will, or should, be exactly emulated. The existing Australian ‘anti-SLAPP’ proposals, which seek to apply public law principles to private law disputes and tolerate illegality by activists, are unlikely to quickly achieve broad community acceptance. Statutory exemptions grounded in notions of public interest, involving a balancing approach, are more likely to be accepted.

¹³⁷ Maxwell, n 18.

¹³⁸ See the discussion in Part II of this chapter.
CHAPTER NINE

EXEMPTING ENVIRONMENTAL PROTECTION BOYCOTTS FROM COMPETITION LAWS

I. INTRODUCTION

This chapter considers competition laws which regulate secondary boycott activities, an important dimension of the legal rules which inhibit economic coercion by persons in groups and by groups acting in concert. The legislative interventions which proscribe secondary boycotts were developed as extensions of the common law principles developed via the economic torts.

Should competition law allow groups to arrange boycotts of some other person or entity because that person or entity does business with a third person to whom the boycotters object on environmental or consumer grounds? This question was under review as part of the Harper Committee’s ‘root and branch’ review of Australia’s Competition and Consumer Act 2010 (Cth). In its Draft Report, released on 22 September 2014, the Committee noted that:

… where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech) a question arises whether that activity should be encompassed by the secondary boycott prohibition.

Secondary boycotts and boycotts affecting international trade are generally illegal in Australia and attract significant sanctions, but for the past two decades conduct has been exempted from these laws if “the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection”. The exemption, contained in s 45DD(3) of the CCA, was enacted in 1996 as the result of a political accommodation between the Howard Liberal/National Coalition Government and the Australian Democrats, which at that time held the balance of power in Australia’s Senate. The Democrats, a party with a strong environmental constituency, insisted on enactment of an exemption from secondary boycott laws in favour of activist groups as a condition for support of the Workplace Relations and Other Legislation Amendment Act 1996 which, inter alia, provided for transfer of modified secondary boycott and related laws from the industrial relations statute to the then Trade Practices Act. During the accompanying legislative debates in the Senate, the chief proponent of the exemption, Senator Murray said:

1 From this point the Competition and Consumer Act is referred to as the “CCA”.
3 The prohibitions, found in ss 45D, 45DA and 45DB of the CCA, are detailed in Part II of this paper.
4 Under s.76(1) of the CCA ‘pecuniary penalties’ may be imposed of up to $750,000 on any ‘body corporate’ involved in a contravention of section 45D or 45DB, and up to $500,000 on individuals. For s.45DA in the case of a corporation the consequence of a breach can be the imposition of pecuniary penalties of up to $10 million, the value of the benefit attributable to the breach or 10% of annual turnover (whichever is the greatest) with $500,000 the maximum penalty for individuals. Section 82(1) allows anyone who suffers a quantifiable loss as a result of a secondary boycott a right of action for damages against the perpetrators. Injunctions may be issued under s.80(1).
Chapter Nine: Exempting Environmental Protection Boycotts from Competition Laws

The Australian Democrats are very proud that our negotiations with the Government have delivered an improved legal position for those people who are often involved in the front line of fundamental change – activists and protesters.\(^5\)

The Final Report of the Harper Committee recommended the maintenance of the general prohibitions on secondary boycotts contained in the CCA, and also made the following comment regarding the exemption:

The Panel did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exemption in the CCA. In the absence of such evidence, the Panel does not see an immediate case for amending the exception. However, if such evidence arises from future boycott activity, the exceptions should be reassessed.\(^6\)

This inconclusive assessment means the desirability of continuation of the s 45DD(3) exemption is likely to remain under scrutiny from legislators. Perspectives on the issue tend to divide along political and ideological fault lines. The Harper Review elicited strong differences of view on the question, with opposing arguments expressed by pro-activist organisations and pro-business lobbies, reflecting fundamentally different viewpoints on approaches to accountability. For example, in its 2014 submission to the Harper Committee, the Australian Conservation Foundation urged that “environmental campaigns should not be held to the same level of scrutiny as claims made in the market,”\(^7\) while the Australian Forest Products Association advocated that the CCA “should subject activist groups to the same level of social standards and accountability expected of companies with regard to boycotts and the use of false and misleading information.”\(^8\)

A number of technical legal and practical difficulties in the application of s 45DD(3) were exposed by the Full Federal Court of Australia in *Rural Export and Trading (WA) Pty Ltd v Hahnheuser*,\(^9\) the leading case examining the provision. There, the Court saw potential for the language of the section to be subjected to “strained and uncontrolled construction supported only by Humpty Dumpty’s example of being able to choose a meaning for itself.”\(^10\) In view of the ongoing policy debate, it is timely to revisit the *Rural Export* case and the insights that can be discerned from it.

This chapter begins by detailing ss 45D(1), 45DA(1), 45DB(1) and 45DD(3) of the CCA. It then briefly summarises the history of Australian regulation of collective boycotts, clarifies some terminology and analyses the key operative phrases in the legislation. The rationales for prohibitions on boycott conduct and for the s 45DD(3) exemption, and associated normative

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\(^9\) (2008) 169 FCR 583. The case was also reported at (2008) 249 ALR 445. Hereafter in this chapter the case will be referred to as *Rural Export*.

\(^10\) Ibid at para [31], quoting Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 244-245.
and policy debates, are traced. The chapter outlines difficulties which can arise in the practical application of s 45DD(3) and examines the quirks identified in Rural Export. There is discussion of the alternative of basing exemption on case-by-case assessment of public benefit (instead of a generalised test based on dominant purpose), which would place the focus on conduct and its effects, rather than purpose. The mechanism by which existing authorization provisions in the CCA could be applied to secondary boycott conduct is described. The chapter also addresses the opportunity to refine approaches applied to determination of public benefit, to take better account of environmental and social considerations.

II. OUTLINE OF THE LEGISLATIVE SCHEME

The provisions which regulate secondary boycotts and boycotts affecting international trade are contained in ss 45D, 45DA and 45DB of the CCA. Section 45D(1), headed “Secondary boycotts for the purpose of causing substantial loss or damage” says:

… a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents
   i. a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
   ii. a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Section 45DA(1) is headed “Secondary boycotts for the purpose of causing substantial lessening of competition.” It is in identical terms to s 45D(1) except that in subparagraph (b) the words “substantial loss or damage to the business of the fourth person” are replaced by the words “a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services”. It provides:

… a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents
   i. a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
   ii. a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

In s 45DB(1), headed “Boycotts affecting trade or commerce” the particular concern of hindrance of international trade is addressed, as follows:

A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.
The exemption to these general rules is contained in s 45DD(3). The full text of this provision is as follows:

A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and
(b) engaging in the conduct is not industrial action.

III. A BRIEF HISTORY

The regulation of secondary boycotts has a long and fractious history in Australia and the current formulation of the anti-boycott provisions and the s 45DD(3) exemption cannot be understood without referring to that history. For two decades from the mid 1970s to the mid 1990s, secondary boycotts were a controversial aspect of Australian industrial relations and the justifications for limitations on boycott conduct were the subject of significant public debates, mainstream media coverage and academic interest. Accordingly, most of the cases on the subject that have come before the nation’s courts concern disputes between targeted companies and trade unions, acting in pursuit of industrial relations objectives.

The effective use of secondary boycotts can be traced to the 19th century, but the first critical stage in the development of Australia’s regulation of this area occurred when s 45D of the Trade Practices Act 1974 (Cth) was formulated, following the work of the Swanson Committee established by the Fraser Government in 1976. One of the terms of reference of this Committee was to give attention to the Act’s application to anti-competitive conduct by employer or employee organisations. When s 45D was enacted in 1977, it prohibited conduct which had the effect of causing “substantial loss or damage to a targeted person or; a substantial lessening of competition in a market.” This rendered acts done by employees in the course of secondary boycott activities unlawful. At the introduction of the provision, the then Minister for Business and Consumer Affairs (Mr Howard) said:

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14 The Liberal/National Coalition had become concerned at the use of secondary boycotts by a number of trade unions to try to prevent price-cutting in relation to bread and petrol.

15 See Creighton, Ford & Mitchell, n 11 at Chapter 37 for a discussion of the background to s 45D and for extracts from many relevant cases.
… boycotts have been used by some trade unions in this country to dictate the business arrangements of independent businessmen. In some instances these boycotts have resulted in higher prices to the consumer. The most common instance of a secondary boycott occurs where a group of employees collectively acts for the purpose of interfering with supply of goods and/or services by their employer to a company.  

The secondary boycott provisions were transferred into the Industrial Relations Act in 1993 by the Keating Labor Government, reflecting the then-prevalent paradigm which saw them exclusively as an aspect of employer/employee dynamics. In 1996, following the election of the Howard Liberal/National Coalition Government, the provisions were transferred back to the Trade Practices Act by the Workplace Relations and Other Legislation Amendment Act 1996.

Australian industrial relations history has seen periodic upsurges in the use of tort liabilities by employers against employees. In the late 1960s, and again in the late 1980s, employers regularly succeeded in obtaining injunctions against trade unions, utilising contempt of court and sequestration proceedings. By the mid 1990’s a settled consensus developed regarding the boundaries it was appropriate to establish around secondary boycott conduct in the employer/employee context, reflected in the current text of s 45E of the CCA which prohibits various forms of conduct which indirectly lead to such boycotts and s 45DD(1) which permits boycott conduct where the dominant purpose of the conduct relates to employment matters.

IV. THE VARIOUS FORMS OF BOYCOTT

Some key terminology requires clarification. A secondary boycott arises when two or more people decide to boycott some other person or entity because that person or entity does business with a third person to whom the boycotters object. The aim is to indirectly punish a company designated as a key target by punishing those whom the company relies upon or is connected with. Essentially, the effect of a secondary boycott is to harm a ‘third party’ (not the subject of a dispute) economically, so that party will bring pressure to bear on the subject of the dispute. Corporations may be targeted via action directed against their suppliers, or customers of their suppliers, or customers (through what might be termed ‘tertiary action’). A secondary boycott might consist of a refusal to handle or use goods or services which emanate from, or are destined for, the target. Equally, it might take the form of threats or pressure against a financial institution if it maintains funding to a company deemed objectionable. Baron and Diermeier deem this the “upstream” market campaign, citing the example of Rainforest Action Network targeting banks that finance environmentally damaging projects in the developing world. In the debates preceding the passage of the new package of provisions in 1996, Senator Murray said:


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The provisions we will vote for today … target expressly the cases of boycott activity which Labor, the Coalition and the Democrats have consistently regarded as undesirable – that is, boycotts where an innocent third party is involved in a dispute between two other parties. The law in this country and the law in many other countries have always precluded such boycotts as … undesirable and unsanctioned.\(^{19}\)

*Primary* boycott activity is, by contrast, generally permissible under the *CCA*, unless conduct adversely affects international trade. A primary boycott is a decision not to do business with a person because of a direct dispute. It could take the form of a boycott directly aimed at a company considered to have done something offensive by its consumers or potential consumers: you “don’t like how a biscuit manufacturer operates, so you and your friends stop buying their biscuits”\(^{20}\) or you make “a decision not to patronise a business that discriminates on the basis of race.”\(^{21}\)

As a matter of policy the *CCA* renders illegal primary boycotts which hinder international trade and commerce. It has been judicially observed that “Parliament sought, in s 45DB(1), to protect the nation’s overseas trade from concerted interference with the movement of goods in or out of Australia”.\(^{22}\) The policy rationale underlying this section was explained to the Senate by Senator Murray in 1996:

> The new 45D will be much narrower in scope than the old…It will not apply to primary boycotts, with the narrow exception of the movement of goods in and out of Australia … The reason for [the provision] is that primary boycotts on the wharves affect many other people. The effect is not limited to the immediate parties involved. If the waterside workers refuse to load perishable goods, the supplying factory might be forced to suspend operations and stand down workers, resulting in innocent employers and employees being hurt.\(^{23}\)

The category of primary boycott in which consumers of goods or services take collective action against their suppliers could also be illegal, falling within the ambit of the prohibition in s 45 of the *CCA* on contracts, arrangements or understandings that restrict dealings or affect competition.\(^{24}\)

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\(^{19}\) Commonwealth, *Parliamentary Debates*, Senate, n 5 PP5608. It should be noted that in these debates Senator Bob Brown of the Australian Greens advocated that the scope of the s 45DD(3) exemption be expanded to activities “related to” or which “draw public attention to” the areas of “human rights, social justice, peace, Aboriginal land rights, environmental protection or consumer protection” and moved an amendment to the legislation to this effect. However this was defeated in the Senate.


\(^{22}\) *Rural Export and Trading (WA) Pty Ltd v Hahnheuser* (2008) 169 FCR 583 at [34].


\(^{24}\) However, s 51(2A) says that in determining contraventions in Part IV of the Act, “regard shall not be had to any acts done, otherwise than in the course of trade and commerce, in concert by ultimate users or consumers of goods or services against the suppliers of goods or services”. This grants protection to groups of consumers and others who take collective action against suppliers, which extends to parties boycotting particular products or
V. KEY OPERATIVE PHRASES IN THE LEGISLATION

To determine whether conduct is in breach of any of ss 45D(1), 45DA(1) or 45DB(1), it is necessary to focus on the meaning of key operative phrases such as ‘in concert,’ ‘engaging in conduct’ and ‘purpose.’

The requirement that parties engaged in boycott conduct must have acted ‘in concert,’ which is common to each of ss 45D(1), 45DA(1) and 45DB(1), has existed in the vocabulary of the CCA since the original anti-boycott provisions were enacted in 1977. The phrase ‘in concert’ whilst general in nature is drawn from the common law. It resonates with the definitions used in assessing the tort of conspiracy, involving mutual consent by persons to a common design.

Acting in concert generally involves a degree of closeness in timing, as illustrated in Flower Davies Wemco Pty Ltd v BLF WA Branch. J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers, WA Branch suggested the necessity for evidence of communication between participants and that the parties must have demonstrated “contemporaneity and community of purpose”. It is not uncommon for defendants to argue that there were merely simultaneous actions occurring spontaneously.

AMIEU v Mudginberri Station Pty Ltd, in which conduct was engaged in at separate locations and at separate times, shows how this requirement of contemporaneity can give rise to evidentiary difficulty. Gray J held that “while there may have been arrangements or understandings between employees of each of the respective employers who were targeted and their union, there was no evidence that the individual employees in the various workplaces had acted in concert with each other.” Whilst the AMIEU “was at the centre of suppliers for reasons unrelated to commercial gain by the consumers involved. See Miller R, Australian Competition and Consumer Law Annotated (36th ed, Thomson Reuters, Sydney, 2014) at [1.51.70].


26 McClelland (1997), n 25 at 120.

27 Creighton, n 17 at 508. This may be considered a form of statutory re-enactment of pre-existing tort liabilities, reflecting the indirect form of the tort of interference with contractual relations.

28 McClelland (1997), n 25 at 120.


31 Epitoma Pty Ltd v Australasian Meat Industry Employees’ Union (1984) ATPR 40-469; Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union (1979) 27 ALR 367, per Bowen CJ.

32 (1985) AILR 393.

33 McClelland (2014), n 25 at 47. This demonstrates the importance in s 45D actions of the applicant discharging its evidentiary burden.
a coordinated campaign of stoppages” this “did not mean that employees who were its members acted in concert with it in any way in relation to employees other than their own”.\textsuperscript{34} Weight was given to evidence that the question of whether a stoppage would occur depended on the outcome of separate meetings of employees at individual workplaces.

In \textit{Springdale Comfort Pty Ltd v Electrical Trades Union}\textsuperscript{35} the Building Trades Association of Unions had imposed a picket-line around a construction site. It was alleged the union had, in concert with one of its members, engaged in boycott conduct. The applicant was unable to establish any communication between the union and its member. The employee indicated the reason he did not perform work on the construction site was because it was a long-standing policy of his union to not cross a picket line. There was no evidence that an officer of the union had addressed the meeting where it was decided to impose bans.

However, in \textit{Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees Union of Australia}\textsuperscript{36} bans against independent contractors imposed by a union contemporaneously but at separate industrial sites were held to establish workers had “acted in concert” with their union. There had been close temporal connection between bans at separate sites. The imposition of bans had been communicated to members in the union’s official magazine and other publications.

In practice, for liability to arise, s 45D requires both “communication” between the actors and an “engaging in conduct” which “hinders or prevents” the acquisition or supply of goods or services.\textsuperscript{37} In \textit{Australian Broadcasting Commission v Parish},\textsuperscript{38} Deane J said “the conduct of hindering or preventing supply or acquisition to which the section refers can be engaged in by threat and verbal intimidation as well as physical interference with the actual activities.”\textsuperscript{39} Mason CJ in \textit{Devonish v Jewel Food Stores Pty Ltd}\textsuperscript{40} said “‘hinder’ should be construed ‘in the general sense’ of in any way affecting to an appreciable extent the ease of the usual way of supplying the articles.”

Section 45D(1) requires ‘substantial’ loss or damage to be caused to a target corporation.\textsuperscript{41} However, given that much protest action, in order to be effective, is designed to have the

\textsuperscript{34} McClelland (1997), n 25 at 122.

\textsuperscript{35} (1986) ATPR 40-694.

\textsuperscript{36} (1987) ATPR 40-766.

\textsuperscript{37} This reflects the effect of s 4(2)(a) of the CCA which says “a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding …” See McClelland (1997), n 25 at 122.

\textsuperscript{38} (1980) 43 FLR 129.

\textsuperscript{39} Ibid at 153.

\textsuperscript{40} (1991) 172 CLR 32.

\textsuperscript{41} In contrast the common law torts provide an action in respect of “any” loss: McClelland (1997), n 25 at 127.
potential to hurt the target by inflicting loss, it is difficult to envisage as a practical matter matters giving rise to litigation that would be defeated on the basis of being “insubstantial.” French J (as he then was) summarised the case law on the concept of ‘purpose’ as used in s 45D in J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers, WA Branch.:

The purpose which attracts the application of s 45D(1) is the ‘operative subjective purpose of those engaging in the relevant conduct in concert’. It is identified ‘by reference to the real reason or reasons for, or the real purpose or purposes of the conduct and to what was in truth the object in the minds of the relevant persons when they engaged in the conduct in concert’.

A problem that can arise in taking action against a group affiliated to a corporate entity or like organisation is whether a corporation can have ‘a mind’. It has been generally held, in relation to the requirement of purpose in s 45 of the CCA, that a corporation (having no mind) can have no purpose. It follows that the purpose of a corporation is a legal conclusion expressed as an attributed state of mind. Nevertheless, if an environmental or consumer organisation is a body corporate, it is a ‘person’ capable of being subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1). Furthermore, each of its members may be a ‘person’ subject to the prohibitions in those subsections. If the organisation is not a body corporate it is not a ‘person’ and therefore not subject to the prohibitions in ss 45D(1), 45DA(1) and 45DB(1). Even so, each of its members will be considered a ‘person’ who may be subject to the prohibitions.

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42 Creighton, n 17 at 504.


44 Ibid at [88], citing Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union (1979) 42 FLR 331, per Deane J at 346-349.


46 Chandler v DPP [1964] AC 763, discussed in Miller, n 25 at [1.45.50].

47 This position arises by virtue of the definition of ‘person’ in s 4 of the CCA.
VI. RATIONALES

A The Rationale for Prohibitions

Secondary boycotts and trade-affecting boycotts are generally prohibited in Australia because they are perceived to have pernicious economic effects, distorting competition by seeking to force preferences for one supplier, or category of supplier, over another. As noted by Creighton, “very considerable pressure can be brought to bear upon [a] target … through action directed against their suppliers or customers” and boycotts by their very nature imply disruption and the infliction of economic harm or inconvenience. A pro-market view sees any secondary boycott – or boycott affecting international trade – as an arbitrary market distortion and an interference with free and open competition, antithetical to attainment of the objective of “cheaper prices, more growth and more jobs”. (The counter-view regards corporate interests as legitimate and impersonal targets for boycotts.)

The rationale for prohibitions on secondary boycotts was re-affirmed by the Harper Committee in 2015:

Secondary boycotts are harmful to trading freedom and therefore harmful to competition. Where accompanied by effective enforcement, secondary boycott prohibitions have been shown to have a significant deterrent effect on behaviour that would otherwise compromise consumers’ ability to access goods and services in a competitive market.

The impact on consumers can be significant. Baron and Diermeier traced the various forms of harm that can be inflicted by boycotts. These include strategic effects such as higher marginal costs and compounding competitive disadvantage for targets, generating regulatory risk and creating uncertainty that could increase the cost of raising capital, reducing the profits of targets and discouraging investment in an industry. Lyon and Maxwell showed that activist campaigns can create such an opportunity cost associated with the commitment of resources to an industry that some companies may exit a targeted industry altogether.

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49 Creighton, n 17 at 503.

50 These objectives of competition law were set out in the Second Reading speech accompanying introduction of the Competition Policy Reform Bill 1995: Commonwealth, Hansard, Senate, 29 March 1995, PP2433.

51 The submission of the Australian Conservation Foundation referenced at n 7 exhibited this view, arguing “Corporations are not ‘innocent’ third parties” (at 3).


53 Baron and Diermeier, n 19 at 604.

54 Ibid at 606.


observed in analysing the history of boycotts, campaigns are essentially confrontational and rely on threats and negative tactics. Konrad and Skaperdas suggested that, in their economic effects, activist campaigns can be similar to extortion.

Protection of individual and corporate rights has traditionally been the domain of the common law, including the economic torts. A considerable body of literature explains the rationale for these torts. The case for legal interventions to halt coercion and resulting economic dislocations derives from a utilitarian perspective, which seeks contractual freedom whenever loss of utility to third parties exceeds gains to parties to a transaction, but justifies antitrust laws in a carved out set of cases in which systematic losses to society at large justify some restraint on freedom of contract. There is also a libertarian rationale for the economic torts. This assumes that the state has a legitimate role to play in preserving property rights, upholds the private autonomy of individuals and hesitates to give effect to "(physical) duress, deceit or misrepresentation."

The areas of law which regulate collective economic coercion seek to resolve a conflict between rights of personal freedom and reputation (to be free from attacks on assets, property and businesses and to have redress for infringement of those rights) and rights of the public for awareness.

B The Rationale for the s 45DD(3) Exemption

The enactment of the s 45DD(3) exemption in 1996 was a function of politics. The Australian Democrats held the balance of power in the Senate at a time when the Liberal/National Coalition was seeking to make significant changes to workplace relations legislation, and were able to successfully leverage this position to achieve a positive result for key constituencies. The provision itself appears to have been negotiated and drafted hurriedly and does not seem to have been based upon a deliberative review or consultative process. The parliamentary debates of the time were robust, but no cohesive rationale for the exemption was articulated.

Friedman, n 48.


Measured by failure to produce goods to the point where social marginal revenue equals social marginal cost.

Epstein, n 59 at 1381.

Deakin and Randall, n 59 at 529-30.

According to Senator Murray, analysis by Professor Creighton of 200 applications for relief under s 45D made between 1977 and 1993 showed that action had only been threatened once against an environmental organisation. The section had never been used against a consumer boycott of any sort up to that time: Commonwealth, *Parliamentary Debates*, Senate, 19 November 1996, PP5676 (Andrew Murray).
In 2014 however, the opportunity arose for a well-coordinated series of submissions to the Harper Review inquiry by non-government organisations (NGOs) and associated lobby groups advancing a rationale for s 45DD(3). Four main sets of arguments for retention of the exemption were advanced.

The first group of arguments were concerned with rights of free speech and political communication. Australian Lawyers for Human Rights (ALHR), for example, submitted that “the anti-boycott provisions of the CC Act place unjustifiable limits on free expression.”64 The submission of the Australian Network of Environmental Defenders Offices (ANEDO) contended that removal or dilution of the exemption would support “the important public right of free speech and access to information that might otherwise be suppressed,” referencing an implied freedom of political communication in Australia’s federal Constitution65 and citing Nationwide News Pty Ltd v Wills66 and Unions NSW v State of NSW.67

In a judgement handed down subsequent to the Harper Review submissions, Tajjour v New South Wales; Hawthorne v New South Wales; Foster v New South Wales,68 the High Court of Australia considered freedom of communication and association arguments. The Court affirmed the principle emanating from Unions NSW that where a law has the legal or practical effect of burdening political communication, it is necessary to decide whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government. Hayne J said:

… application of the established principles must proceed in accordance with the two steps identified in Lange. Does the law have the legal or practical effect of burdening political communication? If it does, is the law proportionate to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government?69

Rights-based justifications for the exemption give rise to a need to assess the extent to which one set of rights (such as free speech) “can consistently and coherently exist with the other

64 Australian Lawyers for Human Rights, Submission in response to Issues Paper, Competition Policy Review, 13 June 2014 at 1. See also the submissions to the Review by Greenpeace Australia, The Wilderness Society, OXFAM Australia, GetUp!, Voiceless, Friends of the Earth and Aidwatch (the “Seven NGO Submission”), 6 June 2014 at 2, by RSPCA Australia, 13 June 2014 at 1 and Australian Conservation Foundation, n 8 at 1.


67 (2013) 88 ALJR 227. This case is hereafter referred to as Unions NSW.

68 [2014] HCA 35 (8 October 2014). This case, hereafter referred to as Tajjour, upheld the constitutional validity of s.93X of the Crimes Act 1900 (NSW) which makes it an offence for a person to habitually consort with two or more convicted offenders after being officially warned by a police officer, verbally or in writing, that they are convicted offenders and that consorting with an offender is an offence.

rights recognised by law,” including property and trading rights. According to Weinrib, “rights provide the space within which all right holders may pursue ends of their own. Such ends are consistent with the self-determining freedom of others only if the point of pursuing them is independent of the adverse effect on someone else… if the freedom to perform an act merely to frustrate the purposes of another were legitimate, rights would be transformed from markers of mutual freedom to instruments of subordination.” As Neyers noted, “if one accepts that implicit in the very nature of rights and liberties is a limitation on their use in certain circumstances, the only remaining question is how the legal system gives effect to such a limitation”.

ALHR also invoked the right to free expression “contained in international human rights instruments including the International Covenant on Civil and Political Rights, Article 19(2).” In Tajjour, the High Court unanimously determined that the statutory provision in question was not invalid because of inconsistency with the International Covenant on Civil and Political Rights. The Court affirmed that “the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law.”

A second theme in submissions to the Harper Review concerned the information effects of secondary boycotts and boycotts affecting international trade. This is, essentially, a utilitarian argument. A coalition of seven prominent NGO’s stated an objection of principle to “any attempt to narrow the capacity of organisations and individuals to provide the public with information about harmful corporate practices” and contended that “markets-based campaigns … serve the important public function of free provision of information”. The animal protection group Voiceless argued secondary boycotts “provide valuable information to consumers, allowing them to consciously make a decision to purchase products that are consistent with their ethical stance,” that the exemption “ensures transparency and accountability within the consumer market” and that “consumers rely on third party assessments and commentaries to make their consumer decisions”. ANEDO cautioned that “without s 45DD … s 45D has the potential to prevent … the free flow of information, political or otherwise, that promotes the transparency and accountability of organisations.

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72 Neyers, n 70 at p 134.
74 Tajjour [2014] HCA 35 (8 October 2014) at [96].
75 Seven NGO Submission, n 64 at 1-2.
trading in Australia.\textsuperscript{77} ALHR conceded that “the dissemination of particular information by activists may have the effect of reducing consumer demand for certain goods and services” but argued “by constraining the capacity of individuals and organisations to inform other consumers about the environmental and social implications of their purchases, the anti-boycott provisions work against the efficient functioning of the market”.\textsuperscript{78}

None of these submissions saw a distinction between the application of primary and secondary boycotts. Though it appears from their submissions that NGOs would consider any limitation on methods within the arsenal of campaign tactics as retrograde, it was unclear why the feared loss of desired information effects would occur under circumstances where primary boycotts are permissible, and in view of the continuing ability of activist groups to disseminate information on issues via other measures. If Parliament were to abolish s 45DD(3), NGO boycott campaigns would still be run, social media would still be actively utilised and information on environmental and other social issues would continue to be freely exchanged. Rather than bringing an end to political discourse, the probable consequence of any dilution of the s 45DD(3) exemption would be an imperative upon campaigning groups to proceed with greater caution in designing actions. This could potentially serve to encourage less confrontational dynamics and inhibit the “shoot first, ask questions later” instinct.

A third set of submissions argued a lack of necessity for regulation of boycott conduct under competition law, in view of the adequacy of tort law.\textsuperscript{79} According to ALHR “in Australia the law of defamation already provides sufficient protection to businesses that consider they have been the subject of inaccurate criticism”.\textsuperscript{80} This viewpoint must reflect a conviction that defamation protection should not be available to business interests: Australia’s uniform defamation laws by means of their definition of the concept of an “excluded corporation”\textsuperscript{81} prevent for-profit corporations suing in defamation unless they employ less than ten persons. The modern Australian law in this area stands in contrast with the pre-existing common law position\textsuperscript{82} which recognised “an entrenched right of all corporations to sue for damage done to their trading reputations, regardless of size.”\textsuperscript{83}

Another group of arguments for the retention of s 45DD(3) ventured that “removal or dilution of the exemption … would go against the intention of the legislature when it originally

\textsuperscript{77} ANEDO Submission, n 65 at 5.
\textsuperscript{78} ALHR Submission, n 57 at 1.
\textsuperscript{79} The ACF Submission (n 7 at 1) suggested that “laws such as the tort of injurious falsehood are sufficient to discipline environmental groups and to protect businesses and provide them with appropriate remedies should groups make deliberately false or misleading statements in their campaigns.”
\textsuperscript{80} ALHR Submission, n 57 at 1, citing John Fairfax Publications v Gacic 2007 HCA 28.
\textsuperscript{81} For example, in s.9 of the Defamation Act 2005 (Vic). See also Civil Law (Wrongs) Act 2002 (ACT) Ch 9; Defamation Act 2005 (NSW); Defamation Act 2006 (NT); Defamation Act 2005 (Qld); Defamation Act 2005 (SA); Defamation Act 2005 (Tas); Defamation Act 2005 (Vic); Defamation Act 2005 (WA).
\textsuperscript{82} See McDonald’s Corporation v Steel & Morris [1997] EWHC QB 366; Steel and Morris v McDonald’s Corporation [1999] EWCA Civ 1144.
enacted the exemption,”\(^\text{84}\) that immunity from secondary boycott laws had been effectively settled in 1996 and that “it was a Coalition Government that reintroduced secondary boycott provisions into the Trade Practices Act including the s 45DD exception.”\(^\text{85}\) However, Australian legislators today are unlikely to feel constrained by the outcome of decades-old debates. In determining the permissible boundaries of economic coercion, Parliament acts based upon political balances at a given point in time, reflecting then-prevalent community attitudes.\(^\text{86}\)

In weighing the arguments raised in favour of s 45DD(3), it is important to bear in mind the benefits that have resulted from proliferation of the transnational NGO sector, which – as was noted in Chapter Eight above – have been widely celebrated in the academic literature.\(^\text{87}\) Activism involves deliberate disturbance of the status quo in order to achieve certain ends, especially social and political ends. Activist conduct often collides with established political and economic interests and legally enshrined protections.

C Pro-Business Arguments and the Case for “Case-by-Case”

The regulatory settings for the non-profit sector have been characterised by an assumption of virtue, with groups perceived to be “invested with an ethical quality that places them beyond mere utilitarian concerns”\(^\text{88}\) and having “a general willingness to play by the rules of the game even when the umpire is not watching”.\(^\text{89}\) Goodin characterises non-profits as “voluntary organizations lacking any coercive powers”\(^\text{90}\) while Jepson sees the special nature of the sector as based around “public trust … built on the cumulative evidence of legitimacy.”\(^\text{91}\) In recognition of their perceived moral character and positive contribution to societal welfare and the “non-distribution constraint” which distinguishes them from for-profit corporations,\(^\text{92}\) non-profits have benefited from public fiscal subsidies and been subject to relatively light-handed regulation, with an emphasis on self-governance mechanisms. ‘Campaign-oriented’ NGOs have benefited from these settings.

\(^{84}\) ANEDO Submission, n 65 at 2.

\(^{85}\) ACF Submission, n 7 at 1.

\(^{86}\) Elias and Ewing, n 59 at 321.

\(^{87}\) These benefits were highlighted in the Introduction to Chapter Eight of this thesis.


\(^{92}\) Hansmann, n 88.
However, there is an increasing body of information which gives cause to question whether, in the case of activist groups committed to the achievement of societal change, ‘virtue’ should be automatically presumed. Several submissions made to the Harper Review by pro-business lobbies urging repeal of the s 45DD(3) exemption were in this vein.

The Australian Forest Products Association submission made reference to “direct market interference activities by increasingly sophisticated environmental activist groups and individuals” and asserted that the s 45DD(3) “loophole” is open to abuse and unethical behaviour by some groups and individuals. Other submissions gave emphasis to the significant advances that have occurred since 1996 in the impact of activist campaigns, noting that the capabilities of campaign-oriented NGOs have increased considerably as a result of access to private and public funding, advances in information technology and realisation of the power of coordinated transnational campaigning. A submission to the Harper Review by the consultancy ITS Global referred to specific examples of market distortions resulting from the actions of campaign-oriented NGOs and “advocacy campaigns that are aimed not merely at encouraging consumer-level protest and political advocacy against specific businesses or industries that it considers objectionable, but also protests against businesses that supply or purchase from these industries, from financiers to wholesale customers.”

ITS Global noted that some NGOs “are now large and sophisticated organisations that have offices in numerous countries, staff numbering in the thousands, and can draw on significant resources and funding from both private and public funds.”

The extent of the ambition and transformational potential of contemporary environmental and social movements is conveyed by the work of Waddell, who detailed aspirations for “Global Action Networks” of activists extending to such themes as “changing the logic of finance” and “transforming forestry.”

Global Action Networks build visions of how things can be different and create the necessary capacity to go about making them different. This usually means changing rules, procedures, laws, and values … a GAN aims to reach the ‘tipping point’ where organizations will no longer be considered ‘legitimate’ and will be denied opportunities if they don’t follow the new rules and integrate the values.

For Australia as a trading nation, the potential economic significance of the development of sophisticated transnational campaign networks (if they are successfully executed) is

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93 For example, Cooley A and Ron J, ‘The NGO Scramble: Organizational Insecurity and the Political Economy of Transnational Action,’ *International Security*, Vol. 27, No. 1 (Summer 2002), 5-39 challenge “widely-held assumptions” that environmental NGO actions have a benign influence and analyse in detail “competitive pressures and fiscal uncertainty that characterise the transnational sector.” Additional criticisms of the virtue perspective are reviewed at Part VI (E) of this Chapter, concerning illegality.

94 AFPA Submission, n 8 at 4.

95 Submission to the *Competition Law Review*, 2014 by ITS Global, June 2014 at 2 and 3.

96 Ibid at 2.


98 Ibid at 14.
considerable. The sophisticated nature of modern-day campaigns is illustrated by a 2012 document developed by a coalition of NGOs and donors titled “Stopping the Australian Coal Export Boom – Funding proposal for the Australian anti-coal movement.”99 This detailed a strategy for “gradually eroding public and political support for the industry”100 built around six elements: disrupt and delay key infrastructure; constrain the space for mining; increase investor risk; increase costs (for the coal sector); withdraw the social license of the coal industry; and build a powerful movement.101 Under the heading “Campaign outcome – what does ‘winning’ look like?” the proposal says “by disrupting and delaying key projects we are likely to make at least some of them unviable … we can delay most if not all of the port developments by at least a year, if not considerably longer” 102

Examples such as these raise questions about the suitability of a generalised test of ‘dominant purpose’ as the basis for an exemption for boycott conduct, and suggest that case-by-case assessment of public benefit may be a more appropriate mechanism. Implicit in the logic that has underpinned s 45DD(3) has been the notion that the actions of activist groups which have a dominant purpose of environmental or consumer protection will lead inexorably (or at least, usually) to improved societal welfare. However, as Maxwell stated, the extent to which benefits, in economic terms, are delivered by activist campaigns is contentious:

The most important question for policy economists is, do NGOs seek changes that on balance benefit society as a whole, or do they pursue narrowly defined environmental and social goals that may bring a level of harm to some sections of society (eg industry, consumers who care about low-cost products) that may outweigh the benefits brought about by their actions? If an NGO pursues the former objective, then economists would say that the NGO seeks to raise social welfare. If the latter, economists would tend to label it as perhaps one of many special interest groups.102

Such sentiments evoke the rationale for prohibitions of secondary boycotts articulated by the Swanson Committee nearly 40 years ago:

… no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms … If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute.104

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100 Ibid at 3.

101 Ibid at 5.

102 Ibid at 6.


VII. **RURAL EXPORT: THE DIFFICULTIES WITH A DOMINANT PURPOSE TEST**

The application of s 45DD(3) presents a combination of technical legal and practical difficulties. The first is the absence of definition of key terms upon which the exemption depends. A second is the peculiarity of requiring Courts to apply a two-step analytical process to discern the purposes motivating the conduct of parties to a boycott. A third practical difficulty is the challenge faced by an applicant for relief in adducing evidence of the purpose of boycotters, coupled with a lack of clarity as to who bears the onus of proof when the exemption is claimed. Fourth, there is a need to address an important question of policy: should illegality be condoned or tolerated? The conclusion of the analysis below is that the provision is flawed and there is work to be done if the Harper Review objective of rendering the law as “clear, simple and predictable as it could be”\(^{105}\) is to be delivered upon.

A  **The Rural Export Case**

The leading case on s 45DD(3), *Rural Export*, concerned the actions of a group of animal rights activists, members of Animal Liberation SA Inc., who entered into a sheep feed paddock in Portland, Victoria where some 1,700 sheep were being held prior to export to the Middle East. The activists placed pig meat into feed troughs, adding it to feed pellets which had been provided for the sheep. The respondent, Hahnheuser, made a video of the contamination of the feed and, the next day, issued a press release and participated in a series of media interviews about the actions taken. He explained that the contamination of the feed, by adding ham, was designed to prevent any exported animals meeting Halal requirements, rendering them unsuitable for Muslim consumers in the Middle East. Australian Government officials refused a permit for the export of the animals, and the owners of the sheep suffered losses estimated to be in the hundreds of thousands of dollars.\(^{106}\)

At first instance in the Federal Court,\(^{107}\) Hahnheuser was found to have engaged “in conduct for the purpose … of preventing or substantially hindering [the applicant] from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia,” contravening s 45DB(1). However, Gray J ruled that the s 45DD(3) defence was established because the activist’s purpose of preventing cruelty to animals came within the exemption and therefore the dominant purpose of the conduct was environmental protection. It was reasoned that the protection of sheep from suffering (which Hahnheuser perceived they would undergo if shipped to the Middle East) was within the meaning of the term “environmental protection” as used in ss 45DD(3). In disallowing the sheep owner’s application for declaratory and injunctive relief and damages, His Honour said: “All that a subjective dominant purpose requires is that the person holding it have a belief that such protection is necessary. Plainly, on the evidence in this case, Mr Hahnheuser had such a belief.”\(^{108}\)

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\(^{106}\) Damages were assessed subsequently at $70,000.


\(^{108}\) Ibid at 378 [70].
This decision was reversed on appeal. The Full Federal Court concluded that the concept of “environmental protection” did not extend as far as had been found at first instance. Submissions made on behalf of the appellants to the effect that the primary judge’s reasoning on dominant purpose involved “a syllogism” were acknowledged. The syllogism was said to be: “First, sheep were part of the environment. Secondly, sheep needed protection from the cruelty and suffering of being transported by ship. Thirdly, it followed that the protection of sheep from such treatment was environmental protection.”

B Lack of Definition of Key Terms

The first key difficulty faced in applying s 45DD(3) is the Parliament’s omission, when the provision was enacted in 1996, to provide definitions of key terms. The Full Court noted in Rural Export that “environmental protection” as an expression was not defined in any available dictionary, so the Court found itself in the position of needing to discern meaning from a conjoining of the independent words “environmental” and “protection”. Accordingly, it was open to the Court at first instance to adopt an interpretation of the scope of the defence which was highly sympathetic to the respondent animal rights activists, and which in all probability exceeded the intentions of Parliament. The position ultimately adopted by the Full Court accords more closely with Creighton’s view: ss 45D and 45DA were “introduced for the express purpose of outlawing secondary boycott activity, and it would be inconsistent with that objective to provide a defence in other than an exceedingly narrow range of cases.”

In Rural Export, the Full Federal Court identified the risk of uncontrolled construction that can arise if the test in the section is applied with reference to a subjective dominant purpose:

‘Environmental protection’ cannot be simply what the person seeking to invoke s 45DD(3) believes to be the dominant purpose for which he or she engages in the conduct. That would permit the person’s subjective belief to define conclusively the scope of the statutory provision.

The Full Court preferred the following approach to determination of the scope of the defence:

There must be an objective element in a dominant purpose substantially related to environmental protection which characterises what is relied upon by the person, in fact, as ‘environmental protection’.

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109 French CJ, Rares and Besanko JJ.


111 Ibid at [20].

112 Ibid at [21]. A Macquarie Dictionary definition of “consumer protection” was able to be referenced in the Full Court judgment – “noun the combined laws relating to the protection of purchasers of goods and services from excessively high prices, faulty design, injurious side-effects, etc.”

113 Creighton, n 17 at 502.

114 Rural Export and Trading (WA) Pty Ltd v Hahnheuser (2008) 249 ALR 445 at [31].
Another area of ambiguity is the precise meaning of “dominant purpose” in the s 45DD(3) context, although guidance can be obtained from areas of law outside competition law. For example, as a result of the changes to the law of legal professional privilege occasioned by O’Reilly v Commissioner of the State Bank of Victoria116 and Esso Australia Resources Ltd v Commissioner of Taxation117 courts in Australia apply a dominant purpose test when determining whether solicitor communications have been made for the dominant purpose of seeking legal advice or for the purpose of existing or reasonably anticipated litigation. In Federal Commissioner of Taxation v Spotless Services Ltd, the High Court defined the term “dominant purpose” in the context of legal professional privilege as “the ruling or prevailing, or most influential purpose”.118 Holmes J elaborated upon the notion of “dominant” in GSA Industries (Aust) Pty Ltd v Constable:

Satisfying the court that advice or litigation was one of the purposes of the communication is insufficient; it must be shown that, as a matter of objective fact, that purpose ‘dominated’ the decision to make the relevant communication.119

C Characterising Dominant Purpose as Substantially Related to Environmental or Consumer Protection

A conceptual peculiarity of s 45DD(3) is the way it requires a kind of analytical two-step to isolate whether the dominant purpose underlying the conduct of boycotting parties relates to environmental protection or consumer protection. In a first stage of analysis, to establish contravention of one of the anti-boycott sections (45D, 45DA or 45DB), it is necessary to identify the presence of a purpose proscribed under those sections (of causing either substantial loss or damage or substantial lessening of competition, or hindering trade or commerce). But because the terminology then employed in the s 45DD(3) exemption places focus on the overlapping operative phrase “dominant purpose,” a further sharpening of the analysis is needed to determine whether the conduct should be excused on the basis of a relevant purpose determined to be “dominant.”

The inquiries required to be made therefore necessitate the making of fine judgements: exactly how ‘dominant’ does the particular environmental or consumer protection purpose claimed as the basis for the s 45DD(3) exemption need to be; and does there need to be a single dominant purpose?

Sophisticated modern-day NGO campaigns generally exhibit multiple purposes. Environmental and consumer advocacy groups may simultaneously pursue a range of activities involving complex, intertwined objectives, including the pragmatic functions of fundraising, organisational development, recruitment and reputation management together

115 Ibid.
117 (1999) 201 CLR 49.
119 GSA Industries (Aust) Pty Ltd v Constable [2002] 2 Qd R 146 at [28].
with overt political objectives. Secondary boycott action may be intended to further some organisational, social or political objective of the boycotters themselves and boycotters rarely act independently of their own motivations.

While the ultimate or even the primary purpose of boycotters might be to achieve their own demands, it is clearly established that they can at the same time have the prohibited immediate purpose, which may be (for example) to cause substantial loss or damage. *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers, WA Branch* affirmed that “the relevant purpose may not be the ultimate purpose for which the participants acted in concert … the party applying the pressure may have the purpose proscribed … notwithstanding that this purpose is a means to a greater end.”

The substantive anti-boycott provisions acknowledge the likelihood of multiplicity of purposes. The operative provisions of both ss 45D(1) and 45DA(1) are buttressed by a following subsection (2), identically worded in both cases: “A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engaged in the conduct for purposes that include that purpose.” To constitute a breach of those sections, the proscribed purpose need not be the only purpose of the conduct, nor even a substantial purpose.

In *Concrete Constructions (NSW) Pty Ltd v ABCE and BLF* the plaintiff company sought orders against the Builders Labourers Federation following repeated entries by union representatives onto its building sites seeking to distribute pamphlets. Morling J determined that, while there was an industrial purpose behind the union officials’ actions, there was also a second purpose – to cause loss and damage to the plaintiff’s business. He held it was possible to infer from the evidence that the purposes behind the conduct included the purpose of causing substantial loss or damage to the applicant’s business.

Similarly, in *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc*, a “primary purpose” of milk vendors who had enacted a supply ban on the appellant “was to protect their own businesses” but “another purpose which they had was to damage or injure” the appellant’s business: “that was the means by which they intended to achieve their primary purpose … that is enough.”

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120 In *Greenpeace of New Zealand Incorporated* [2012] NZCA 533, in considering the eligibility of the focal entity to be registered under the Charities Act, the New Zealand Court of Appeal viewed “political advocacy” as one of its independent stand-alone objects. This case is discussed further in section 7.5 below.

121 Creighton, n 17 at 489.


123 This passage is referenced by McClelland (1997), n 25 at 123 and (2014), n 25 at 48.


125 McClelland (1997), n 25 at 124 and (2014), n 25 at 49.

D Establishing the Purpose

A third and practical difficulty in the application of s 45DD(3) is the challenge faced by plaintiff companies of locating and adducing sufficient evidence to establish that boycotters have a prohibited purpose.127 The evidence necessary to be disclosed in order to ascertain purpose is invariably in the possession of the party seeking to rely on the exemption. Whilst the person whose conduct is complained of might be considered to be in the best position to give evidence as to his or her dominant purpose, the nature of that person’s evidence may be affected by the fact it might exculpate him or her from liability.

_J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers, WA Branch_128 shows the importance of fully probing individual representatives of boycotting groups as to their individual and organisational objectives, with the benefit of discovered material. In that case the court stated “where purpose or other state of mind of an individual in relation to a given transaction is an issue, the statements of that person in the witness box, in a sense, provide the best evidence.”129 Nevertheless, statements made must be tested and treated with appropriate scepticism.130

Inquiry into the purposes of an environmental activist group in conducting a boycott-based campaign would be expected to involve detailed review of available strategy documents and correspondence relating to the activities of the boycotters. However, this can prove problematic if Courts are reluctant to permit discovery of key documents deemed confidential to defendants. It was mentioned in Chapter Eight of this thesis that in _Gunns Limited & Ors v Marr & Ors_131 a case involving tortious actions for intentional interference with contractual relations, intentional injury to trade and business and trespass, the defendant Wilderness Society successfully resisted disclosure of parts of documents which concerned its campaigns, tactics, strategies and operations. Kaye J declined to order disclosure of a document titled “Draft Strategy for Gunns Market Campaign – Background” and various travel records, reasoning that the breadth of orders sought by the plaintiff was excessively broad. Reliance was placed on an affidavit sworn by an activist involved in the campaign to the effect that significant damage and irreparable harm would be caused to the Wilderness Society if it was required to disclose the documents sought.

Organisations which arrange boycotts take active steps to minimise the risk of suit. If globally coordinated boycotts involve multiple parties located internationally, the search for

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127 McClelland (1997), n 25 at 126. See _GTS Freight Management Pty Ltd v TWU_ (1990) AILR 225, where there was a lack of evidence that a union was actually involved in acting in concert, and _Concrete Constructions (NSW) Pty Ltd v ABCE and BLF_ (1988) ATPR 40-900, where difficulty was created by the novelty of the conduct.


129 See _ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)_ 1990 27 FCR 460 (at 482-3).

130 In 1996, in proposing the introduction of the new s 45DD(3) in the then Trade Practices Act Senator Murray acknowledged the concern that parties might “dress up inappropriate disputes about other issues as environmental or consumer or human rights issues”. Commonwealth, _Parliamentary Debates_, Senate, 19 November 1996, PP5676 (Andrew Murray).

key documents can be complicated by the wide geographical dispersal of networks. Quite rationally, the coordinators of environmentally-based boycotts are at pains to manage, and minimise, their paper trails, in order to make themselves the smallest possible targets. The nature of the current statutory exemption invites a calculated approach to documentation management.  

A further ambiguity attaching to s 45DD(3) is lack of certainty about the way in which the onus of proof should operate when applying the exemption. At first instance in RURAL EXPORT, it was concluded that an applicant for relief under s 45DB(1) – in this case, the sheep owner – had to negate the existence of the dominant purpose referred to in s 45DD(3). This interpretation would have the quite challenging consequence for a party affected by a boycott action that if plausible arguments were made that the boycott action was motivated by a dominant purpose of environmental or consumer protection, the ability to claim relief under s 45DB(1) – or s 45D(1) or 45DA(1) – would be lost.

In its judgement in Rural Export the Full Court stated a tentative view that it would be necessary for the respondent to an application to discharge the burden of proving that he or she fell within the exemption provided by s 45DD(3). However, their Honours emphasised that, based on their other findings to the effect that the respondent Hahnheuser did not have the dominant purpose required by s 45DD(3), it was not necessary for them to determine whether the primary judge erred in his construction of the burden of proof. Consequently, the precise nature of the onus of proof in s 45DD(3) matters remains unresolved.

E Condoning Illegal Acts?

A final difficulty in the application of s 45DD(3) is that it fails to address a key question of policy: should illegality be condoned or tolerated? Whilst it is important not to overstate their prevalence, activities associated with protest campaigns may include trespass, the breaking of locks and fences to gain access to property, graffiti and other property destruction, ‘hacktivism’, interference with police actions and pressure for economic disruptions such as blockades and embargoes. Assertive forms of ‘direct action’ (including violent tactics which utilise physical injurious force against persons or property) are sometimes employed. In its


134 Rural Export and Trading (WA) Pty Ltd v Hahnheuser (2008) 249 ALR 445 at [38] – [42]. Their Honours referenced the general rule of statutory construction stated by Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ in Vines v Djordjevitch (1955) 91 CLR 512 at 519-20 to the effect that a party seeking to rely on an exemption carries the onus of demonstrating, on the balance of probabilities, the additional or special matter relied upon (in this case, the dominance of purpose).

135 Commentary often draws a distinction between ‘non-violent direct action’ and ‘violent direct action.’ In a 2010 publication, the British Ministry of Justice expressed concern at potential for the latter conduct, using the term “environmental extremists” to describe groups and individuals committing “criminal activity motivated by the broad philosophy and social movement centred on a concern for conservation and improvement of the
submission to the Harper Review, Australia’s National Farmers Federation expressed alarm at the potential for “agri-terrorism.”

In placing emphasis on ‘purpose’ rather than the nature of actual conduct, s 45DD(3) has the characteristic that it can provide a shelter for illegal activities. This was, in effect, the outcome of the Rural Export decision at first instance. It is as true today as it was in the 1980s to state that “not only is the lawfulness or otherwise of the means employed irrelevant for purposes of establishing the existence of a contravention of s 45D, it is also irrelevant for the purposes of establishing the existence of a defence.”

A different approach, involving the ‘carving out’ of illegality, was in place in the regulation of Australian secondary boycotts from 1996 to 1998 by virtue of s 166A of the Workplace Relations Act (Cth). This set out a limitation on the bringing of actions in tort against trade unions, with a rider that the protection did not apply to conduct that resulted in personal injury or wilful or reckless damage to property. Modification of the current statute to include a similar rider could be considered.

More stringent approaches to questions of illegality can be identified under the CCA’s Authorisation processes and at common law, within the economic torts and in the regulation of charities. In each of these areas of law, safeguards against illegality have been embedded. For instance, in conducting Authorisation applications, the Australian Competition and Consumer Commission (ACCC) is specifically required to take into account whether conduct which is proposed to be authorised exhibits illegality.

The occurrence of unlawful conduct is also a key consideration under charities laws which govern the eligibility of activist NGOs for taxation and other fiscal benefits. The consequences of registered environmental groups being associated with illegality were placed in focus in Greenpeace of New Zealand Incorporated, in which the Supreme Court of New Zealand considered whether an organisation’s involvement in illegal activities should affect

natural environment”. This characterisation aroused criticism from libertarian groups - see Taylor M, ‘Ministry of Justice lists eco-activists alongside terrorists,’ The Guardian (London), 26 January 2010. A range of groups active in campaigning against the logging, meat, dairy and whaling sectors have openly advocated assertive forms of direct action against the industries they oppose, which they regard as systems of oppression.

136 Submission to the Competition Law Review, 2014 by National Farmers Federation, June 2014 at 15. The term “eco-terrorism” entered the lexicon when it was defined by the US Federal Bureau of Investigation as “the use or threatened use of violence of a criminal nature against people or property by an environmentally oriented, subnational group for environmental-political reasons, or aimed at an audience beyond the target, often of a symbolic nature.” See Jarboe JF, “Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI before the House Resources Committee, Subcommittee on Forests and Forest Health,” 12 February 2002, Congressional Testimony — http://web.archive.org/web/20080311231725/http://www.fbi.gov/congress/congress02/jarboe021202.htm (accessed 16 February 2015).

137 Creighton, n 17 at 509.

138 In Hospital Benefit Fund of WA v ACCC (1997) 157 ALR 105, discussed in Miller, n 25 at [1.90.60] it was found that the ACCC had failed to consider whether a proposed employer health insurance plan breached the National Health Act 1993 (Cth) even though submissions opposing the plan had suggested this was not the case.

139 [2014] NZSC 105.
its entitlement to registration as a charitable entity. The Court affirmed the earlier decision of the Court of Appeal of New Zealand that “a society that pursues illegal or unlawful purposes or activities is not entitled to registration as a charitable entity under the [Charities] Act and that a registered society with lawful charitable purposes which pursues them through illegal or unlawful activities should lose its registration.” An appeal against the determination that activities that are illegal or unlawful preclude charitable status was dismissed. The reasoning was that illegal activity cannot be considered to be for the public benefit, nor charitable.

The Court of Appeal had been referred to examples from Greenpeace’s website of “direct action” approaches, which included:

… boarding coal ships; occupying power stations and mines; preventing the delivery of coal to a factory by blocking it with wood fuel; boarding fishing vessels; protesting against whaling ships; disrupting whaling operations; boarding ships carrying genetically engineered food; boarding ships carrying palm kernel; placing signs on sites believed to be contaminated with dioxin; and planting trees on land thought to have been cleared for dairy farming.

Similar forms of direct action have been employed in Australia:

We have blocked train lines, occupied Lucas Heights, trespassed at the Lodge, and illegally raised banners at Parliament house… this history of civil disobedience is part of a much bigger history of individuals and organisations prepared to violate the law.

A review of reportage in Australian media suggests no lack of recent examples of unlawful activities undertaken in connection with environmentally motivated boycott campaigns.

140 Greenpeace of New Zealand Incorporated [2012] NZCA 533 at [96].


VIII. AUTHORIZATION AND PUBLIC BENEFIT

If s 45DD(3) were to be repealed and not replaced by an alternative exemption, the “safety valve” for conduct that would otherwise breach the secondary boycott provisions would be the existing (but largely dormant) authorization process under s 88(7) of the CCA. This provides:

The Commission may … grant an authorization … to engage in conduct to which s.45D, 45DA or 45DB would or might apply and, while such an authorization remains in force, that section does not apply in relation to the engaging in that conduct by the applicant and by any person acting in concert with the applicant.

The basis for authorization is elaborated by s 90(8):

The Commission shall not (a) make a determination granting … (ii) an authorization under subsection 88(7) … in respect of proposed conduct … unless it is satisfied in all the circumstances that the proposed … conduct would result, or be likely to result, in such a benefit to the public that … the proposed conduct should be allowed to take place.

The CCA does not define what constitutes ‘benefit to the public’. It is a seemingly nebulous concept, but in seeking to discern it the ACCC has developed comprehensive methodologies. A ‘future-with-and-without’ test is generally applied. Usually, a “consumer welfare standard” has been upheld though Fallon has argued for the more general adoption of a “total welfare standard” approach, where all efficiencies can be treated as public benefits, with prominence given to overall economic efficiency.

Application of these tests requires a weighing of public benefits and detriments: authorization cannot be granted unless the ACCC determines that conduct has public benefits which outweigh its detriments. In Re 7-Eleven Stores Pty Ltd, a case concerning authorization of a merger, it was said:

Public benefit has been, and is, given a wide ambit by the Tribunal as … ‘anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress’. Plainly, the assessment of efficiency and progress must be from the perspective of society as a whole; the best use of society’s resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass...

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145 This compares the situation with and without the conduct for which authorisation is sought. See Re Media Council (No 2) (1987) ATPR 40-774 at 48,418.


147 This approach is sometimes favoured in assessing mergers under s.50 of the CCA.

148 Miller, n 24 at [1.90.15].
‘progress’; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.\textsuperscript{149}

Activist groups are significant players in arranging boycotts and yet, as Maxwell highlighted, there is a relative paucity of economics literature on NGO behaviour. The function of understanding the objectives of NGOs (and actions they take to advance them) is undeveloped by the standards of economic theory.\textsuperscript{150}

There is a school of thought that the way in which public benefit tests have been applied in Australia over time, with a focus on “efficiency above all else”\textsuperscript{151} reflects a general failing of the economics discipline.\textsuperscript{152} Under this view there has been a failure to appreciate “that other considerations such as efficacy or equality may be equally or more important than efficiency” and that social constructivist approaches which “capture the cultural and cognitive realities of a society better” are to be preferred.\textsuperscript{153}

Fels and Grimwade suggested that the continuing relevance of the authorization process depends upon application by the Commission of a “net public benefit test that is broad enough to accommodate new public benefit arguments and economic and social changes”\textsuperscript{154} Brunt also recognised the potential for authorization to be granted “to address broader social values”.\textsuperscript{155} Although critics would argue that it has adapted too slowly and conservatively to changes in community standards, the ACCC has shown itself to be somewhat adaptive in the way it applies tests of public benefit, and cognisant of changes in community standards. As long ago as 1991, the Commission listed “steps to protect the environment” as items which could be considered to constitute public benefit.\textsuperscript{156}

Over the past two decades it has been unnecessary to exercise the s 88(7) authorization process in connection with matters covered by s 45DD(3), so the extent to which the ACCC would be likely to receive favourably applications based on environmental or social grounds is an unknown. However, clearly one obstacle activist groups seeking to mount public benefit arguments would face is that it is not enough for a benefit to be speculative or a theoretical

\textsuperscript{149} (1994) ATPR 41-357 at 42,677.

\textsuperscript{150} Maxwell, n 103.


\textsuperscript{154} Fels and Grimwade, n 144 at 199.


\textsuperscript{156} Re ACI Operations Pty Ltd [1991] ATPR (Com) 50-108, discussed in Miller, n 24 at [1.90.25]. See also Refrigerant Reclaim Australia Ltd, A90854, Final Determination, 7 May 2003, authorising an industry wide fee to fund recovery and destruction of ozone depleting and greenhouse gases.
Chapter Nine: Exempting Environmental Protection Boycotts from Competition Laws

possibility. There must be a real chance that claimed public benefits will eventuate and they should not be merely “ephemeral or illusory”.

A recurring issue is whether a private benefit that accrues to an applicant can also be seen as a benefit to the public. Fels and Grimwade described this as the private/public benefit debate. Viewed from the perspective of activists undertaking it, or the environmental movement generally, there may well be “benefit” to be derived from boycott conduct. Baron and Diermeier observe that the objectives of NGO campaigns include the funds raised and the career enhancement for individual activists resulting from the campaign and that “a campaign may be viewed as a local public good for those citizens sympathetic to the activist’s cause.” Based on its past approach it is unlikely the ACCC would recognise such benefits as a sufficient basis for an exemption. It can be assumed that “benefit to the public” would be interpreted as referring to the public as a whole, rather than just a section of it likely to benefit from a particular campaign.

In the past, a complication of use of s 88(7) in relation to secondary boycotts brought by trade unions was seen to be “the spontaneous character of most industrial action,” with authorization therefore viewed as “too unresponsive to short-term needs”. This concern can be argued to be not applicable to boycotts in pursuit of environmental and social objects, which by their nature are rarely spontaneous but planned over an extended period.

A consequence of the repeal of s.45DD(3) would be the need for the ACCC to refine its approach to determination of public benefit to take better account of environmental and social considerations in the context of s 88(7). The ACCC has begun to develop competency in areas of sustainability. Potential exists for development of a guideline to inform market players about factors which would be taken into account in the evaluation of applications for an authorization under this provision.

Considerable ground-breaking work has been undertaken internationally exploring how best to assess sustainability initiatives in terms of competition law. Such work could inform development of a distinctive Australian approach. The Netherlands Authority for Consumers

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157 Miller, n 24 at [1.90.85].


159 Re Qantas Airways Ltd [2005] ATPR 42-065 at [156].


161 Fels and Grimwade, n 144 at 202.

162 Baron and Diermeier, n 18.

163 Creighton, n 17 at 503.

and Markets (ACM) sees as relevant “what interest is served with the arrangement, how this interest can be defined in terms of economic and technological process and to what extent it relates to the associated restriction to competition”. The ACM view is that “solving a sustainability problem may result in welfare increases”\(^{165}\) but “not everything that is arranged collectively under the banner of sustainability actually benefits, on balance, consumer welfare”\(^{166}\).

For groups engaged in the organisation of secondary boycotts, working through the process of obtaining an authorization would be considerably more time-consuming and arduous than simply relying on the s 45DD(3) exemption. Submissions to the Harper Review contended that the environmental and consumer exemption should be maintained “because it serves the public interest,”\(^{167}\) but an authorization process would require demonstration of the necessary benefits to substantiate this contention based on rigorous assessment processes. In view of the potential wide-ranging economic effects of modern-day boycott campaigns,\(^{168}\) legislators may consider this to be appropriate.

**IX. CONCLUSION**

The contrasting perspectives presented above reflect an interplay between underlying rationales and changes in situational reality, principally the significant advances in the sophistication of environmental and social activism since 1996. On both sides of the debate, proponents and opponents refer to principles (of property rights, of utility, of freedom of expression and of human rights) to make their case. Crucial are the observations of Weinrib and Neyers\(^{169}\) that as right holders pursue their own ends there are limitations on their use in certain circumstances.

This chapter has concluded that the exemption in s 45DD(3) of the *CCA* is flawed. It has found that the undefined and hard-to-interpret language of the section is susceptible to obfuscation and the precise purposes underlying activist conduct are difficult to ascertain. There are difficulties in the practical application of the provision, including in locating and adducing evidence and exercising the onus of proof. Overall, contrary to the objectives of the Harper Review of the *CCA*, the law is not as clear, simple and predictable as it could be. Furthermore, s.45DD(3) can provide a shelter for illegal activities.

The chapter also reveals a strong case for basing any exemption on case-by-case assessment of public benefit, rather than a generalised test of dominant purpose. This can be achieved by a simple repeal of s 45DD(3), which would then bring into play the existing mechanisms of ss 88(7) and 90(8). Such an approach would place focus on conduct and its effects, not

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166 Ibid at 6.

167 Seven NGO Submission, n 64 at 2.

168 See the discussion at Part VI C of this chapter.

169 Weinrib, n 71; Neyers, n 70.
purpose, in determining whether to exempt proscribed boycott actions from the general provisions of the CCA.

The conduct under scrutiny would be secondary and trade-affecting boycotts, not primary boycotts. The need for scrutiny would arise in the circumstances defined in ss 45D(1), 45DA(1) and 45DB(1) – for instance, where boycotters act in concert against a targeted party, cause actual damage to that party and can be shown to have the purpose and effect of causing substantial loss or damage to the business of that party.

The central conclusion of this chapter was encapsulated by Fels and Grimwade in 2003:

A process through which exemptions are sought on a case-by-case basis, which is responsive to economic and social developments, that is independently administered, transparent and subject to merits review, and where the onus rests on those seeking to act anti-competitively to show that such behaviour is in the public interest remains the most appropriate means to exempt conduct.  

If analysis of boycotts were to be focused on their public benefit effects, refinement of the ACCC’s existing approaches to determination of public benefit would be desirable, to give greater emphasis to environmental and social considerations and broaden the past predominant emphasis on economic factors.

Policy deliberations on the issues canvassed in this chapter will influence the design and shape of future activist campaigns affecting Australian markets and consumers. As Weisbrod noted, any organisation’s decisions reflect the interplay of its goals and the constraints upon it and the regulatory environment can materially affect the conduct of groups engaged in the organisation of secondary boycotts.

The anti-secondary boycott provisions of the CCA supplement the general economic torts as a set of remedies that are potentially available to those targeted by collective economic coercion. Consideration of these remedies is therefore a central aspect of this thesis.

This concludes the substantive aspects of this study.

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170 Fels and Grimwade, n 144 at 214.

CHAPTER TEN

CONCLUSION

I. INTRODUCTION

This chapter summarises the key research findings of this thesis. It highlights the significance of this research and its implications for legal practitioners, and for legal theory and the economic torts body of knowledge. These findings may prove to be useful for policy-makers. Some areas for further research are suggested, followed by some concluding observations.

This thesis has explored the boundaries of permissible conduct when economic coercion is applied, by persons in groups and by groups acting in concert. The legal problem in focus is that of redress for collective economic pressure which causes loss or damage. When groups take collective action they can wield considerable power against those they target. This gives rise to the question of to what extent, and under what conditions, it should be legitimate for parties acting in concert to cause economic harm to a ‘target’. There needs to be a set of rules that articulate principles which set boundaries for permissible conduct, recognising also that – in certain circumstances – it may be considered legitimate for parties acting collectively to inflict economic harm upon targeted entities or individuals.

This thesis has shown that tort law has traditionally protected economic, trading and property interests against intentional intrusion. The law upholds rights to pursue a trade, business or livelihood free of illegitimate forms of interference. These rights are not protected from all interferences, “but rather only those which are unreasonable.” It is the role of law to determine demarcations when interests conflict.

A balance needs to be struck between conflicting considerations. In contemporary society there can be tension between personal, organisational and institutional rights and interests on the one hand, and the legitimacy of motivations to promote social and attitudinal change on the other. Contests of interests also arise in the context of competitive rivalry. When conflicts arise between economic interests and competing liberties, such as freedom of expression or freedom of association, legal mechanisms must order and balance competing priorities.

The principles developed by the common law through the medium of the economic torts, and under competition laws prohibiting secondary boycotts, address this need to balance competing interests. They set boundaries for permissible conduct, defend legitimate economic interests and should afford protection against unrestrained, or capricious, economic coercion by groups. The common law has shown itself to be remarkably agile in adapting principles to new contexts.

This thesis has argued that the established principles which underpin the general economic torts have enduring relevance and can offer workable and coherent solutions to the legal

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problems discussed in this study, albeit that there will be a need for ongoing adaptation to take account of societal trends and new contexts.

It was shown in Chapters Four, Five and Six that the general economic torts can be approached from a range of different perspectives. One approach is to see the torts as potentially oppressive remedies, in need of control mechanisms, as Carty viewed them. Another way is to start from the viewpoint that the torts serve as protectors of important rights, which has been the predominant perspective adopted in this thesis.

In Chapter Four, it was contended that is important that the capacity of groups to apply economic coercion to others should not be unfettered; in particular, that the utilisation of unlawful means to injure others is restricted. As Chapter Two and Three demonstrated, one of the roles of the economic torts has been to provide private law remedies which sanction illegality. Thus, the notion of unlawful means is an integral element of inducing breach of contract, conspiracy by unlawful means, intimidation and the tort of causing loss by unlawful means (although, as has been seen, the concept operates differently across the various torts). It has been argued throughout this thesis that, whilst there is an acknowledged need for control mechanisms to restrict the boundaries of the general economic torts, the design of legal tests and exemptions should continue to address the need to proscribe illegality.

Chapter Six of this thesis explained the considerations which have provided a rationale for the protection of economic interests under Australian law. These include the essential role that contract-making plays in our society, the commitment of courts to enforce promises which are a product of the private autonomy of individuals, inhibiting limitations on freedom to trade and addressing concern about the potentially high level of coercive pressure which can be applied by groups and collectives. It was concluded that common law protection of individual economic interests is vital to the free functioning of markets and the upholding of the freedoms which underpin individual autonomy.

A likely implication of the adoption of measures advocated in this thesis (for example, a widening of definitions of unlawful means, or the reshaping of tests around intentionality and ‘targeting’) is that groups acting collectively, such as networks of environmental activists, could face broadened liability exposure. This could potentially be offset by expanded justification defences and the adoption of statutory exemptions.

As this thesis showed, the elements that make up the general economic torts and the factors that need to be weighed up to analyse their application, are complex and highly technical. There is value in reflecting on Heydon’s invocation, four decades ago, that there is potential for this area of law to be “much more based on factors of substance rather than technicality.”

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6 Deakin and Randall, n 1 at 552-53.
II. SUMMARY OF FINDINGS

The central Research Question posed at the outset of this thesis was: when groups, or individual members of groups, acting in concert, band together to inflict injury upon third parties by economic coercion, what are – and what should be – the boundaries of permissible conduct?

A number of associated questions were also posed. When groups take collective action targeting another party, what forms of coercion are proscribed under Australian law? How has the law fashioned control mechanisms to confine the ambit of prohibitions? How does – and should – the law deal with the use of unlawful means and illegality in the context of collective economic coercion? Should justification defences be widened, and how might this be achieved?

The major conclusions of this thesis, following an extensive review of the academic debates and judicial analysis, are as follows.

First, the recent major common law developments concerning the general economic torts (in international jurisdictions) have not yet been authoritatively addressed by the High Court of Australia and as a result there is uncertainty as to how many aspects of the torts operate in Australia. In particular, there is a need to resolve for Australia the ‘competing agendas’ revealed by the analysis of the House of Lords in OBG and Total Network, and to clarify and achieve a more consistent application of the notion of ‘unlawful means’ as it applies to the torts. (Chapters Two and Three.)

Second, it is difficult to anticipate the choices that may be made by the High Court on matters of detail when it eventually has the opportunity to deliberate upon and clarify, for Australia, the open questions which continue to bedevil the torts. (Chapters Two and Three).

Third, there is a specific need for Australia’s High Court to affirm the existence in Australia of the innominate tort of causing loss by unlawful means, which would help to firmly establish the boundaries of permissible economic coercion. (Chapters Two, Three and Four).

Fourth, the level of inconsistency in the formulation of the component elements of the torts is undesirable. In particular, highly differentiated approaches taken to interpretation of the concept of unlawful means under the various torts have the potential to impede their practical application, and raise questions about their coherence. (Chapters Two, Three and Four).

Fifth, exclusion of criminal offences and breaches of statute from the ambit of the unlawful means tort undermines the aspiration, which is inherent in the economic torts generally, to inhibit clearly excessive and unacceptable intentional conduct? (Chapters Three and Seven.)

Sixth, for the innominate tort of causing loss by unlawful means, a wide conception of unlawful means, encompassing unlawful acts under civil law, criminal law and statute, is preferable to a narrow interpretation. This reflects a view that intentionality and consideration of whether ‘targeting’ has occurred provide better control mechanisms for the economic torts.

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9 The question whether, as a matter of policy, this aspiration would be undermined if a “narrow view” of unlawful means is taken was posed at the outset of this thesis, in Chapter 1, Part II (D).
than a narrow conception of unlawful means. This outcome would accord more closely with the sentiments of Lord Nicholls in *OBG* and Lord Walker in *Total Network* than the majority view in *OBG* (most notably articulated by Lord Hoffmann) and the judgment of Cromwell J in *A.I. Enterprises*. The adoption of a wider view of unlawful means would also comfortably align with an expansion of justification defences. (These arguments were developed through Chapters Two, Three, Four, Seven and Eight).

**Seventh.** an improved conceptual map for the economic torts is needed. The proposals of Deakin and Randall offer an effective starting point for their future development, based around consideration of interests, interferences and justifications. Their ideas have potential to be synchronised with those of theorists from the ‘rights model’ school, such as Weinrib and Stevens. (Chapters Four and Six).

**Eighth.** it is undesirable to approach the general economic torts from a starting-point that they need to be inhibited as a matter of policy. There is a strong case for accepting corrective justice theory as the explanation for liability under these torts. This may give rise to a preference for determining cases based on considerations of justice between the parties to a particular dispute, rather than a policy-based approach which would emphasise broad community welfare concerns. There is scope for courts to determine matters after evaluation of the respective rights of the claimant and defendant. Analysis of rights should be a core component of judicial evaluation of the application of these torts. (Chapters Five and Six).

**Ninth.** there is potential for the development of new approaches, grounded in refinements of intermediate theories, under which the torts could be developed with primary reference to correlative considerations of justice between the claimant and defendant, but also take into account public interest considerations. This will require courts to be involved in the balancing of competing rights and interests. (Chapters Five and Six).

**Tenth.** rather than ad hoc statutory interventions to create special categories of exemptions for specific contexts and particular interest groups, it would be preferable for a wider suite of common law justifications to be developed. Evolution of the common law, with its potential to establish generalised principles, can produce better outcomes than piecemeal statutory interventions addressing specific contexts. There are sufficient wellsprings of authority in the common law (both in England and Australia) to enable an enlivening of the justification defences, and the obstacles to the development of the defences erected by existing precedents can be overcome. Expanded and more clearly delineated justification defences can play an important role in cataloguing the forms of pressure or interference with the rights of others that are legitimate. (These arguments were built through Chapters Six, Seven and Eight).

**Eleventh.** the future evolution of the general economic torts is likely to be affected by the context of environmental activism, a relatively new frontier for the torts, and it is likely there will be ongoing pressure to create statutory exemptions in favour of activist groups in this arena. (Chapter Eight).

**Twelfth.** purpose-based statutory exemptions from general liability principles in favour of special interest groups (for example, those which exempt groups from liability for otherwise unlawful actions on the basis that actors had an ‘environmental purpose’) should be resisted. This has been argued in relation to both the economic torts and the secondary boycott provisions of Australia’s *Competition and Consumer Act*. Where proposals for statutory
Chapter Ten: Conclusion

reform seek to disrupt or take away traditional common law protections of rights, they should be grounded in, and incorporate tests of, public interest. (Chapters Eight and Nine).

Thirteenth, where statutory exemptions are adopted which exempt conduct from the operation of the economic torts or prohibitions on secondary boycotts, there is a strong case for the deployment of case-by-case assessments of public benefit, which require balancing of a range of considerations to discern whether ‘public good’ is being enhanced, in preference to broad, purpose-based exemptions. (Chapters Five, Six, Seven, Eight and Nine).

Fourteenth, a refocusing on notions of public interest in the future evolution of the economic torts and anti-boycott provisions can be anticipated. There is a specific need for a more refined approach to determination of public benefit which gives greater emphasis to environmental and social considerations, in addition to addressing economic factors. (Chapters Eight and Nine).

Overall, this thesis supports adjustments to current legal tests embedded within the common law and legislation, to evolve the boundaries of permissible conduct. It outlines modifications and adaptations of existing rules that may be considered by lawmakers to improve the coherence of long-established legal doctrines, while enhancing societal welfare.

III. SIGNIFICANCE OF THE FINDINGS

This thesis makes a contribution to legal theory by envisaging a mixed or intermediate theory applicable to the general economic torts. The potential approach (which was outlined in Chapters Five and Six) has three core components. First, economic tort litigation must involve the evaluation of the rights and interests at stake in a given dispute, consistent with the view that disputes should be determined with primary reference to considerations of justice between the claimant and the defendant. Second, stronger account should be taken of public interest considerations. Third, courts will be required to become involved, to a greater extent, in the weighing and balancing of competing rights and interests.

Another significant contribution to legal theory is the detailed examination in the thesis of the possibility of expansion of the justification defences for the economic torts (in Chapters Seven and Eight).

It is intended that this research will be useful for legal practitioners seeking to understand the economic torts and statutory prohibitions on secondary boycotts, as they apply in Australia. Courts may find that the insights set out in this thesis provide useful guidance in their conduct of litigation in these areas. This thesis has highlighted that there is a continuing need for the High Court of Australia to deliberate on a number of anomalies and open issues central to the application of these torts. The precise status of some key causes of action is still to be settled by the High Court. The research may also prove to be of value to those involved in public policy debates and, ultimately, to policy-makers, albeit that many of the issues canvassed are politically contentious. However, it is likely that there will be significant ongoing differences of viewpoint on a range of key issues before an enduring consensus is ultimately attained.
IV. AREAS FOR FURTHER RESEARCH

A number of topics canvassed in this thesis as corollaries of the main conclusions warrant additional research.

The thesis has advocated that, where proposals for statutory reform seek to disrupt or take away traditional common law protections of rights, they should be grounded in, and incorporate tests of, public interest or public benefit. However, the notion of public benefit has been shown to be imprecisely defined and highly contestable.

The alternative mechanisms for applying tests of public interest have not been comprehensively explored in this thesis. In Chapter Eight, with reference to the creation of statutory exemptions to excuse environmental groups from the operation of the economic torts it was suggested that tests such as those that apply under New Zealand’s privacy laws, or in connection with the qualified privilege defence under Australia’s uniform defamation laws, could be employed. In Chapter Nine, in connection with secondary boycott prohibitions, it was proposed that advantage could be taken of existing public benefit exemptions under the *Competition and Consumer Act*, although it was acknowledged that refinement of the existing approaches used by the Australian Competition and Consumer Commission in determining public benefit would be desirable – to give greater emphasis to environmental and social considerations and broaden the past predominant focus on economic factors. In each case there is scope for, indeed a need for, further research to be undertaken to evaluate and elucidate the ways in which tests of public benefit could be best applied and elaborated.

It was also noted – in Chapters Eight and Nine – that transparency mechanisms for environmental activist groups are, at this stage, relatively undeveloped. It was suggested that the new dynamics of activism are little understood, that past assumptions about the relative strengths of opposed groups may need to be revisited, that accountability lines are blurred and that the spectrum of opinions resembles the debates that raged over trade union activities in the twentieth century, until a settled consensus began to emerge about the appropriate outer limit of unions’ permissible actions when operating collectively.\(^{10}\) It can reasonably be anticipated that transparency mechanisms comparable to those that now exist under Australia’s industrial relations regime should, and in due course will, be developed for the environmental movement and that such disciplines are a desirable corollary of significant collective activity. If such mechanisms were to exist, concern about the need to access the disciplining effect of private law solutions might subside. Further research in this area might occur within the framework of broader debates about governance mechanisms for not-for-profit organisations generally,\(^{11}\) and environmental NGOs in particular.\(^{12}\)

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\(^{10}\) See Chapter Eight, Part IV of this thesis.


V. CONCLUDING OBSERVATIONS

This thesis has shown the considerable potential that exists in Australia for further refinement of the general economic torts. As debates progress about the degree of licence that should be granted to groups acting collectively, it is clear that laws such as the general economic torts and the provisions of the *Competition and Consumer Act* which inhibit secondary boycotts have important ongoing roles to play. These legal remedies serve to discipline, and place necessary boundaries around, the application of economic coercion by groups acting in concert. They have enduring importance.

The general economic torts are durable remedies in search of a settled framework. They would be strengthened if greater doctrinal coherence were achieved, if the continuing uncertainties which bedevil the operation of the economic torts in Australia were settled by the High Court, if evaluation of the rights at stake in a given contest could be more firmly embedded in judicial analysis and if expanded and more clearly delineated justification defences taking account of public benefit considerations were developed. This thesis has argued for a conception of the torts which takes a wide view of unlawful means placing emphasis on ‘targeting’, accompanied by a clearer articulation of the principles underpinning justification defences.
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Davidson S, ‘Environmentalists have a right to protest – but not at all costs,’ The Conversation (24 July 2014).


Heydon JD, Economic Torts (Sweet and Maxwell, London 1973).


Hohfeld WN, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16.


Reports and Major Submissions


