Government Liability:
Principles and Remedies
In law as in life, we hold contradictory expectations of governments in particular and public institutions more generally. Their actions should be judged by the same standards that we apply to people in the private sector, except that we expect better behaviour from government in some circumstances just because they act in our name, and should have no personal axe to grind. Public bodies usually have more power than private actors, and in a perfect world, one might expect more power to attract more responsibility for its misuse. As this book explains, however, our legal world is far from perfect. This is partly because the sources and histories of its component parts all differ, making it impossible to see them as otherwise than a patch-work quilt. It is also due in part to the fact that our public institutions rarely have the budgets to meet the demands that they face. Something has to give, and in this book, we see compensation as the poor relation in our system of legal accountability.

This is no ordinary book. It has, I think, two audiences. First, it will be invaluable for law students – quite simply, it has no competitor in its sheer scope. Secondly, it will quickly establish itself as the ‘go to’ book for practitioners who may know quite a bit about specialist pockets of public law, but who cannot possibly be across it all.

The authors have set their sights on the practical needs of those seeking to act for those who seek to make claims against government, whether those claims be in the courts, or before ombudsmen, or merits review tribunals, or even applications for recompense for those who have legitimate grievances but no legal entitlements. Indeed, its scope is so wide that the book’s title does its contents an injustice. Yes, it has specialist chapters on topics that fit reasonably comfortably beneath the umbrella concept of ‘Government Liability’. Readers will find expert summaries of judicial review’s principles and remedies, and of Australia’s generalist merits review tribunals. They will also find expert summaries of damages principles relevant to government liability, and of our human rights laws. Also included are chapters discussing the special rules (both in the general law and in statute) relating to government’s liability in tort, equity, contract, and restitution. The book goes well beyond legal ‘liability’, however. It has a chapter on ombudsmen, followed by a chapter on permanent and ad hoc investigative agencies such as anticorruption bodies and royal commissions. Government as ‘promise breaker’ also receives detailed treatment, as do the special rules regarding government as litigator. And prefacing that huge sweep of law and practice are two chapters that tackle boundaries, real or imagined. There is a chapter on the diminishing relevance of any legal conception of the Crown, and another on the persistent complexities confronting any attempt to compartmentalise law as either ‘public’ or ‘private’.

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Foreword

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I congratulate the authors, and confidently predict that their work will live through many editions.

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Shakespeare reflected on the nature of remedies more than once in his plays, and his opinion of them varied. In the first scene of *All's Well That Ends Well*, Shakespeare has the character Helena say:

> Our remedies oft in ourselves do lie,
> Which we ascribe to heaven ... ¹

Compare this to Lady Macbeth's fatalistic advice to her husband:

> ... Things without all remedy
> Should be without regard: what's done is done.²

These oft-repeated observations remain worthy of consideration centuries after they were written. Helena's remark suggests that what befalls us owes less to mystical causes than we might suppose.³ Lady Macbeth's argument that Macbeth should not entertain 'thoughts which should indeed have died with them they think on' is not particularly laudable to the extent that it posits that we ought not repent of inadmissible because those we kill will not be back. It is, however, good advice in the abstract — there is no value in pondering ceaselessly on things that cannot now be altered.

However, regardless of the fact that Shakespeare's writing remains captivating so long after it was first published, these quotations have little application to obtaining remedies in legal disputes with public authorities. In such disputes, we must generally accept the remedies that the law offers (rather than one which might lie within us, no matter how appealing that thought might be) and in regard to which there is often a long road to be travelled before we can say with resignation 'what's done is done'.⁴

There are indeed many remedies available to people engaged in disputes with public authorities. It requires a book such as this to explore them, because they are not limited to the standard administrative law remedies and often apply the relevant private law doctrines in a way that differs from their application between private entities.

This book is not the first of its kind. In 1982, Mark Aronson and Harry Whitmore commenced their preface to *Public Torts and Contracts* with the words:

> This book is designed for both the 'public' and the 'private' lawyer."
Like the authors of that influential predecessor to the book before you, we have also written with the intention that it will be useful to ‘public’ and ‘private’ lawyers alike. Indeed, one of the central motivating factors behind writing this book is that dealing with government is no longer (if it ever was) the sole domain of ‘public’ lawyers; by extension, being a ‘private’ lawyer will not protect you from having to deal with legal issues involving government. Public law cannot sensibly be restricted within the traditional boundaries of administrative law, a fact that has been recognised by the expansion of more than one judicial review text to cover other forms of government liability. Increasingly, to distinguish between ‘public’ and ‘private’ law is only to make a distinction that lacks a conceptual basis.

The consequence of this point is that the remedies that we might seek against a public authority encompass a broad range, but also require an understanding of how those remedies have developed differently than when they are applied to private entities. This is an area deserving of some precision, and one which has necessarily become too detailed for standard texts within private law to analyse in detail. Such a result is understandable and contributed to us concluding that this book needed to be written.

It has been an undertaking that required each of our expertise on various subjects. Consequently, we divided the initial task of writing the manuscript. Nina drafted Chapters 4, 5, 7, 12, 15 and 17. Ellen drafted Chapters 3, 9, 11 and 14. Greg drafted the remaining chapters. We each take responsibility for the entire book, which is the result of a collaborative approach throughout. Each chapter is the cumulative product of our collective knowledge. While we have not adopted each other’s work uncritically, we nonetheless follow the standard administrative law convention that, like a minister advised by their department, we each share not only in the credit for whatever is good in this text but also in the odium that arises from any mistakes that have found their way into print.

Writing a book is a significant undertaking and one best embarked upon by authors with sufficient humility to accept help and advice wherever they can find it. We found that help and advice was generously provided by a large number of friends and colleagues. Some commented on chapters of this book in draft, others answered specific queries or engaged in valuable discussions which helped us refine our approach to certain issues. Our particular thanks are owed to Mark Aronson, both for his advice

5. It remains so; see Searle v Commonwealth of Australia [2019] NSWCA 127 at [92], [114], [124] (Bell P).