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THE LAWS OF AUSTRALIA

TORTS

FOREWORD TO THE THIRD EDITION

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Former Justice of the High Court of Australia
Editor in Chief of The Laws of Australia

In October 2007 I wrote the foreword to the second edition of this work. At the time, I was still serving as a Justice of the High Court of Australia. I had no formal connection with *The Laws of Australia* (TLA) series. However, the editor of the TLA title on Torts was Dr Paul Vout of the Victorian Bar. He had earlier served as one of my associates when I was President of the New South Wales Court of Appeal. I admired his analytical skills and his industry. I expressed deep appreciation for his clear thinking about the categories and rules that make up the law of torts.

Now, ten years later, I endorse this new edition. In doing so, I acknowledge the many times during the intervening decade that I have had recourse to the earlier edition. Out of the semi-chaos of the modern law of torts in Australia it draws a taxonomy that makes the whole appear seamlessly united and coherent, when the opposite is often the case.

TLA is the premier legal encyclopaedia for the Australian legal profession. It relies substantially on experienced members of the practising legal profession to elaborate the titles and subtitles into which the detail of the law is divided. Working closely, and in harmony with

dedicated full time employees of Thomson Reuters (themselves skilled lawyers), it picks the eyes out of the myriad of cases, statutory provisions and other sources of law. It conceptualises the subdivisions of topics in ways that will be congenial and helpful to users. It presents the resulting material in a discursive form, but under headings and subheadings that are designed to take the reader quickly to areas of need. I pay tribute to all the editors and sub-editors who work on the TLA project: In this book, specifically those who have contributed to the close analysis of the law of torts in Australia, found in these pages.

In the decade since the last edition, many things have changed, to which this book bears witness. Amongst the largest changes has been the shift of the majority of subscriptions from the loose leaf hard copy system that existed in 2007 to the electronic presentation of the work that predominates today. With the electronic version of TLA came a demand by subscribers for more up to date material. Users expect that computerised material will be up to date and immediately accessible. Because of the constant emergence of new cases and fresh statutes, this presents a huge challenge in maintaining an encyclopaedia. It means that users of a book like the present, however useful at the moment of publication, must constantly be vigilant to check that nothing significant has changed in the law since the moment of time when it was stated in the book as published. Fortunately, the new technology itself, with search engines and burgeoning online legal data, make it easier to be up to date than was the case when I began my legal journey.

Also arising out of the new technology has come the means of regularly producing new “dropout” monographs such as the present. Whereas in the past, producing a book of encyclopaedic knowledge about the law

was something of a nightmare because of the need to check scrupulously the thousands of citations over and over again. Now the production process is simpler and cheaper.

Experience has taught that legal practitioners, however accomplished with the new technology, still like hard copy books to collect that law at a given time. The process of dropout publication will make updates easier and cheaper to produce than they were in the past. I congratulate Thomson Reuters on supplementing the TLA service by producing, including for non-subscribers, highly valuable texts such as the present. I know from my own use of this book that it is a constant resource of invaluable material and analysis. Presenting the titles and sub-titles so clearly necessarily provokes the mind of the reader to question some of the directions of the law. And to consider the needs of law reform.

The grand reform of much of the law of torts, proposed in 1974 by the National Accident Compensation Inquiry of Sir Owen Woodhouse and [Sir] Geoffrey Palmer QC was never finally adopted in Australia. Some of the reforms that have been adopted by statute appear to have been motivated less by simplification and modernisation of the law of torts than by reduction of 'green slip' insurance costs for politicians and short sighted electors who complain about the system until they or their families need to rely on it to extract compensation based on the legal obligations of others.

A decade after the last edition of this text will close in July 2016, at the University of Cambridge in England many Australian and international experts on the law of torts will gather for the Obligations VIII conference.

Ten major changes that have come about in this discipline in recent decades will be discussed there. The changes include:

- (1) The decline in the unifying role of the House of Lords and Privy Council;
- (2) The rise of wider comparative law sources;
- (3) Clearer acknowledgment of the legislative creative role of the judge in expressing the common law;
- (4) The impact of human rights law and of judicial review on concepts of law;
- (5) The decline and fall of civil jury trial for resolving factual disputes;
- (6) New approaches to the construction of expanding legislative provisions;
- (7) The adoption of greater realism about the function of tort law;
- (8) The intrusion of artificial statutory limitations on liability;
- (9) The impact of new technology; and
- (10) The greater inclination of lawyers and litigants to criticise and to express high expectations of justice in the law.

These and doubtless many other changes mean that the law of torts, in practice, will continue to change and adapt to new times and new expectations.

These phenomena will lead, in shorter catch up times, to new editions of this work to help the busy legal practitioner and judge. I congratulate Paul Vout and thank all those who have contributed to this volume.

Jeremy Bentham espoused the idea of a legal encyclopaedia that would bypass those whom he disparagingly called “Judge & Co”. It would, he hoped, allow the law to speak about its rules more clearly and directly to the people governed by it. We are by no means close to realising Bentham’s dream as yet. But TLA and works like this book are precious steps in the right direction.

A handwritten signature in black ink, appearing to read "L. Weir". The signature is written in a cursive style with a prominent dot above the 'i'.

Sydney, 22 June 2016