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Civil Liability in Australia for international human rights violations

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Research Paper 8. Civil liability in Australia for international human rights violations*

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1. Introduction

> *The involvement of corporations in human rights violations has a long history but it is only fairly recently that business came onto the human rights agenda and, subsequently, human rights onto the business agenda*.[1]

This research paper examines a number of issues concerning the civil liability of corporations in Australia and in other jurisdictions for international conduct which violates human rights.[2]

The issue of corporate accountability and corporate social responsibility is of increasing concern internationally.[3] In 2011, the United Nations Human Rights Council adopted the *United Nations*

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* This paper is a revised and updated version of an earlier publication by the author: Peter Cashman, 'Civil Liability in Australia for International Human Rights Violations' chapter 6 in Richard Meeran (ed) *Human Rights Litigation Against Multinational in Practice'* (Oxford University Press, 2021).

[1] Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2(3) *Journal of Education, Teaching and Learning* 221, 225. As the author notes, international human rights law currently only plays a modest role in holding corporations to account.

[2] For a more comprehensive analysis of the law and procedure in other jurisdictions see Richard Meeran (ed) *Human Rights Litigation Against Multinational in Practice'* (Oxford University Press, 2021). See also, with particular reference to the United States, the United Kingdom and Canada: Ahmad, Hassan, 'The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States' (October 6, 2020). *American Journal of Comparative Law*, 2021, Available at SSRN: https://ssrn.com/abstract=3706423.

[3] See, e.g., the report by the UN High Commissioner of Human Rights, '*Guiding Principles on Business and Human Rights*', HR/Pub/11/04 (2011). See also: John G. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (2017) Corporate Responsibility Initiative, Harvard Kennedy School, Working Paper 67/2017.

Guiding Principles on Business and Human Rights.[4] This sets out guidelines concerning the duty of states to protect against human rights abuses, including by businesses; the responsibility of businesses to protect human rights, including through supply chains and the rights of victims to a remedy.

The Guiding Principles clarify that all business enterprises have an independent responsibility to respect human rights, and that in order to do so they are required to exercise human rights due diligence to identify, prevent, mitigate and account for how they address impacts on human rights.

Thereafter regular forums have been held to 'serve as a global platform for stakeholders to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights...as well as identifying good practices'.[5] The UN Forum is the world's largest annual meeting on business and human rights.[6]

In its report to the General Assembly, the *Working Group on Business and Human Rights*[7] highlights key features of human rights due diligence and why it matters; gaps and challenges in current business and government practice; emerging good practices; and how key stakeholders, states and the investment community, in particular, can contribute to improving the effectiveness of human rights due diligence.[8]

The topic of business and human rights gives rise to a wide range of legal and policy issues. This includes consideration of whether there should be a treaty to address compliance and enforcement problems.[9] This gives rise to problematic questions concerning the effectiveness of various forms of regulation. Although important, these issues are outside the scope of the present paper.

The present focus is more modest. This paper examines a number of complex questions concerning whether civil legal proceedings may be brought in Australia, or in some other jurisdictions, against (a) Australian companies and (b) related corporations, for conduct resulting in loss or damage outside Australia.

It also touches on remedies that may be available under Australian law where Australian corporations may be dealing commercially with otherwise unrelated entities in the chain of supply of products or services where such other entities may have violated human rights in the course of their commercial conduct.[10]

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[4] Report by the UN High Commissioner of Human Rights, '*Guiding Principles on Business and Human Rights*', HR/Pub/11/04 (2011). These were later adopted in a human rights chapter of the OECD Guidelines for Multinational Enterprises.

[5] Human Rights Council, Resolution 17/4 *Human rights and transnational corporations and other business enterprises*, Seventeenth session, UN Doc A/HRC/RES/17/4 (6 July 2011).

[6] Office of the High Commissioner for Human Rights '2018 UN Forum on Business and Human Rights' <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2018ForumBHR.aspx>. For a summary prepared by Australian Lawyers for Human Rights see *Report on ALHR Attendance at UN Forum on Business & Human Rights* (Geneva 2018) https://alhr.org.au/wp/wp-content/uploads/2019/03/30-11-18-F-ALHR-BHR-report-on-attendance-UNForum_BusinessHumanRightsReport-Geneva.pdf.

[7] UNGA 'Report of the Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises (16 July 2018) (A/73/163) <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163.

[8] Office of the High Commissioner for Human Rights, 'Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018' (A/73/163) <https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryA73163.pdf>.

[9] See, e.g., Claire Methven O'Brien and Jolyon Ford, 'Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty' (2017) 40(3) *UNSW Law Journal* 1223.

[10] This issue is considered in more detail by various authors. See, e.g., Justine Nolan, 'Human rights and global supply chains: Is effective supply chain accountability possible?' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017); Justine

Of interest is the fact that Australia has recently adopted a 'modern slavery' law to address forced labour in the supply chains of Australian companies.[11] The legislation requires large Australian companies and organisations (those with consolidated revenue of A$100 million), to report annually on steps they are taking to address forced labour. However, there are no penalties for companies that fail to comply and limited independent scrutiny.[12] Moreover, smaller companies are under no obligation to report but may do so voluntarily. Due to the Covid-19 crisis, the deadline for the first statements was deferred.[13] The register of online statements is available online.[14]

On 18 June 2020, the Australian Government released its first annual report to Parliament on the implementation of the Act. On 23 November 2021, the Government released the second annual report to Parliament on the implementation of the Act. On 22 December 2022, the Government

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Nolan 'Regulating Human Rights and Responsibilities in Global Supply Chains' in Joy Murray, Arunima Malik, and Arne Geschke (eds) *The Social Effects of Global Trade* (Pan Stanford, 2017); Justine Nolan and Gregory Bott 'Global supply chains and human rights: spotlight on forced labour and modern slavery practices' (2018) 24(1) *Australian Journal of Human Rights* 44. See also: Law Council of Australia, Submission to the Department of Foreign Affairs and Trade, *Consultation Paper on International Strategy on Human Trafficking and Modern Slavery* (11 May 2020). The Law Council has advocated, inter alia: strengthening sanctions and improving remediation processes. For an international perspective, see Martijn Scheltema, 'The Mismatch between Human Rights Policies and Contract Law: Improving Contractual Mechanisms to Advance Human Rights Compliance in Supply Chains' in Liesbeth Enneking et al (eds) *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge, 2020).

[11] *Modern Slavery Act 2018* (Cth) which took effect on 1 January 2019. The likely effectiveness of the statutory regime may be limited. As Olivia Dean and Shelley Marshall note: the 'mediocrity' of responses of Australian banks under the UK framework does not inspire optimism', 'A race to the middle of the pack: an analysis of slavery and human trafficking statements submitted by Australian banks under the UK *Modern Slavery Act*' (2020) 26(1) *Australian Journal of Human Rights* 46, 66. It has also been suggested that the law will not be able to address adequately the gendered dimensions of the problem: Ramona Vijeyarasa, 'Women, work and global supply chains: the gender-blind nature of Australia's modern slavery regulatory regime'(2020) 26(1) *Australian Journal of Human Rights* 74. The Commonwealth statute can be contrasted with the more robust legislative framework adopted by France in 2017 (Duty of Vigilance Law) or the Netherlands *Child Labour Due Diligence Act 2019*. See generally Claire Bright, Axel Marx, Nina Pineau and Jan Wouters, 'Towards a corporate duty for lead companies to respect human rights in their global value chains?' 22(4) *Business and Politics* (2020), 667; Nino Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International and Comparative Law Quarterly* 789; and Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (NewSouth Publishing, 2019) chapter 4.

[12] As noted by Redmond, there are significant weaknesses in laws based on market sanctions rather than public sanctions. Slavery due diligence statutes would be improved by the inclusion of penalties and precluding non-compliant organisations from tender processes for government contracts: Paul Redmond, 'Regulating through reporting: an anticipatory assessment of the Australian Modern Slavery Acts' (2020) 26(1) *Australian Journal of Human Rights* 5. It is possible that the due diligence required by modern slavery acts, based on the guiding principles, may merely lead to less effective forms of reporting such as social auditing: Jolyon Ford and Justine Nolan, 'Regulating transparency on human rights and modern slavery in corporate supply chains: the discrepancy between human rights due diligence and the social audit' (2020) 26(1) *Australian Journal of Human Rights* 27, 29. Difficulties also arise from the application of specific terminology in modern slavery statutes by courts to the dynamic nature of labour exploitation which can lead to inconsistency in judicial outcomes, as has occurred in the UK: Lisa Hsin, 'Modern slavery in law: towards continuums of exploitation' (2020) 26(1) *Australian Journal of Human Rights* 165, 166. More generally, see Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20(1) *Melbourne Journal of International Law* 221.

[13] Recent Australian developments are referred to in the submission by the Law Council of Australia to the Department of Foreign Affairs and Trade: Law Council of Australia, *International Strategy on Human Trafficking and Modern Slavery* (11 May 2020).

[14] See <https://modernslaveryregister.gov.au/>. See also the Commonwealth Government 'National Action Plan 2020-2025' (December 2020) < https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf >.

published the *Commonwealth Modern Slavery Statement 2021-22.* This is the third Commonwealth Statement published by the Government and covers the 2021-22 Australian financial year.

An Expert Advisory Group provides the Attrorney-General's Department with advice on the implementation of the legislation.

On 25 May 2023 the review of Australia's *Modern Slavery Act 2018* was tabled in the Federal Parliament following a review of the operation of the legislation during its first three years conducted by Professor John McMillan.[15] It makes 30 recommendations to strengthen the legislation. As noted in a media release by the Attorney-General Mark Dreyfus KC MP the recommendations include:

- introducing penalties for non-compliance with statutory reporting requirements
- lowering the reporting threshold from $100M to $50M
- requiring entities to report on modern slavery incidents or risks
- amending the Act to require entities have a due diligence system in place
- strengthening the administration of the Act through proposed legislative amendments and expanded administrative guidance; and
- proposing functions for the federal Anti-Slavery Commissioner in relation to the Act.[16]

In a recent investigative report it was found that many Australian companies are failing to identify obvious risks of forced labour in their supply chains or to take action to address them.[17] The report makes a number of recommendations for reform.

The State of New South Wales has also passed its own legislation[18] which imposes a lower revenue reporting threshold of A$50 million and provides for penalties for businesses that do not comply. It also creates the position of Independent NSW Anti-Slavery Commissioner.

In recent times there has also been an increasing focus on the role of banks and financial institutions in financing mining and infrastructure projects which result in adverse human rights impacts on local communities.[19]

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[15] Australian Government, Report on the statutory review of the *Modern Slavery Act 2018* (Cth): The First Three Years, by Professor John McMillan, AO. Available at: https://www.ag.gov.au/sites/default/files/2023-05/Report%20-%20Statutory%20Review%20of%20the%20Modern%20Slavery%20Act%202018.PDF

[16] https://ministers.ag.gov.au/media-centre/modern-slavery-act-review-25-05-2023. See also: https://www.unsw.edu.au/law-justice/our-research/impact/australia-modern-slavery-laws-demand-overhaul.

[17] Human Rights Law Centre, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act,* 2022.

[18] *Modern Slavery Act 2018* (NSW). As a result of concerns over inconsistencies between the Commonwealth and NSW statutes, the NSW legislation was reviewed by the NSW Legislative Council's Standing Committee on Social Issues. In March 2020, the Committee tabled its report, expressing support for the NSW Act, proposing amendments to allow for harmonisation with the federal law, and recommending its commencement on or before 1 January 2021. See Amy Sinclair and Justine Nolan, 'Modern Slavery Laws in Australia: Steps in the Right Direction?' (2020) 5 *Business and Human Rights Journal* 164, [2020] UNSWLRS 30.

[19]See, e.g., Christopher Hutto & Angela Jenkins, '*Report on Corporate Complicity Litigation in the Americas: Leading Doctrines, Relevant Cases, and Analysis of Trends*', Human Rights Clinic, University of Texas (February 2010) <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2010-HRC-Report-CorporateComplicity.pdf>; Benjamin Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?' (2018) 14(2) *Utrecht Law Review* 84.

More recently, there has been an increasing focus on human rights in the context of environmental degradation[20] and in respect of privacy concerns arising out of increasingly sophisticated forms of technology. The latter was the subject of a recent inquiry by the Australian Human Rights Commission.[21]

The violation of human rights may, of course, give rise to criminal proceedings against the individuals and/or corporate entities responsible. This is the subject of a considerable body of jurisprudence[22] but a detailed consideration of this is outside the scope of this paper. It would appear that Australia's criminal laws have seldom if ever been used in connection with extraterritorial violation of human rights by Australian corporations.[23] Moreover, corporations are not within the jurisdiction of the International Criminal Court.[24] By way of contrast, Australian legislation imposes criminal liability on corporations and the previous introduction of 'international offences' in the *Criminal Code Act 2005* (Cth)[25] encompasses the crimes of genocide, crimes against humanity and war crimes.[26]

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[20] See e.g., Lauren E Bartlett, 'Human Rights Guidance for Environmental Justice Attorneys' (2020) Saint Louis University School of Law Legal Studies Research Paper No 2020-20, published in 98 *U Det Mercy Law Review* (Summer 2020).

[21] Further information is available at: Australian Human Rights Commission website: <https://tech.humanrights.gov.au>. In July 2018 the Commission published an *Issues Paper*. A *Discussion Paper* was published in December 2019. A response to the issues paper by academics and students at the law school at the University of NSW has been published as a research paper: Adam Yu et al, 'Response to Issues Paper on Human Rights and New Technology' [2019] UNSWLR 12 <http://ssrn.com/link/UNSW-LEG.html>. The final report was published in 2021: Australian Human Rights Commission, *Human Rights and Technology, Final Report* (2021).

[22] See, e.g., Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations', 40 (3) UNSW L J (Sept 2017); several chapters dealing with criminal prosecutions in Liesbeth Enneking et al (eds) *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge, 2020). See also the recent comparative analysis by Jennifer Hill, 'Legal Personhood and Liability for Flawed Corporate Cultures' (2020) European Corporate Governance Institute Working Paper Series in Law Working Paper No 431/2018 <http://ssrn.com/abstract=3309697>; and Nick Friedman 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' (2020) 83(2) *The Modern Law Review* 255 <http://ssrn.com/abstract=3309697>.

[23] Human Rights Law Centre, *Nowhere to Turn: Addressing Australian corporate abuse overseas* (December 2018), 4. As noted by Simon Bronitt and Zoe Brereton, an important shortcoming of the *Criminal Code Act* is that there are no provisions which expressly extend liability to agents or subsidiaries of the corporation: Simon Bronitt and Zoe Brereton, Submission to the Attorney General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995 (Cth)* (10 May 2017) [4.1]. <https://www.ag.gov.au/Consultations/Documents/Proposed-amendments-to-the-foreign-bribery-offence-criminal-code-act-1995/Foreign-bribery-submission-Bronitt-Brereton.pdf>.

[24] As noted by Grear and Weston, the International Criminal Court only has jurisdiction over natural persons: Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21, 41.

[25] Previously Division 268, *Criminal Code Act 1995* (Cth). As Kyriakakis notes, the provisions were introduced by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) as part of the ratification of the *Rome Statute of the International Criminal Court.* Joanna Kyriakakis, 'Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law' (2005) 31 *Monash University Law Review* 95, 104. Commonwealth criminal legislation has subsequently been substantially amended, the details of which are outside the scope of the present paper.

[26] In the *Anvil Mining* matter in 2005 representations were made by solicitors acting for those seeking compensation resulting in the referral of issues to the Australian Federal Police for investigation of whether the company was responsible for aiding and abetting crimes against humanity under the *Criminal Code*. It was alleged that the company helped government troops quell an uprising in the Democratic Republic of Congo.

Human rights violations occurring outside Australia may also give rise to civil liability for breach of applicable civil laws in the jurisdictions in which such conduct occurred. However, many countries lack meaningful civil remedies, or effective enforcement mechanisms, for conduct that may violate domestic or international law.

As Gear and Weston note: 'Highly problematic is the plain fact that the states in which [transnational corporations] operate are frequently developing states which, for lack of effective administrative, judicial and policing mechanisms or because of a widespread culture of corruption (frequently encouraged by TNC management), are commonly unable to regulate TNC conduct effectively or are unwilling to do so.'[27]

This paper examines a number of cases in which tort law has been invoked for the purpose of seeking redress on behalf of persons suffering loss or damage as a result of human rights abuses or other corporate conduct. As noted by one author, many recent cases comprise civil liability claims pursued on the basis of the tort of negligence rather than the corporate law doctrine of piercing the corporate veil or customary international law on human rights.[28]

The objective in some such cases is to establish direct liability of the parent company, including through the breach of the duty of care it is alleged that it owed to the claimants, who are often employees of foreign subsidiaries or members of the local community who have suffered loss and damage.[29] Whether or not the parent owes a duty of care to those making a claim is often a vexed and highly disputed legal question. As noted below, this will often turn on complex issues of fact relating to its management and supervision of the activities of subsidiaries.[30]

It is of course the case that not all 'tort rights' are also 'human rights' and not all 'human rights are also 'tort rights' but there is considerable overlap and human rights and tort law may be considered as 'brothers in arms'.[31]

The mechanisms for effective legal redress for human rights abuses by domestic or transnational corporations, through tort law or otherwise, are limited.[32] Moreover, there are considerable procedural, economic and legal constraints and hurdles to be overcome in seeking to counter what others have referred to as the 'rights evading mutations of corporate power'.[33]

See Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11(1) *Yale Human Rights and Development Law Journal* 127.

[27] Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21, 27.

[28] Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14(2) *Utrecht Law Review* 6.

[29] See, e.g., *Connelly v RTZ* [1998] AC 854 (HL) and *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB).

[30] In the European context, see generally Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 20 *European Business Organisation Law Review* 1. The authors examine a number of reform proposals including a UN sanctioned business and human rights treaty. In the Australian context, see, e.g., Helen Anderson, 'Piercing the veil on corporate groups in Australia: The case for reform' (2009) 33(2) *Melbourne University Law Review* 333.

[31] Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2(3) *Journal of Education, Teaching and Learning* 221, 243.

[32] Proposals for reform include a binding treaty outlined by the Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises-Zero Draft* (July 16, 2018). The UN Human Rights Council's Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (the Working Group) released a report on February 6, 2019, summarizing the fourth session of negotiations on the Zero Draft.

[33] Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21,24.

One obvious difficulty arises out of the 'fundamental discrepancy between the transnational nature of...powerful entities and the territorially limited assumptions of the traditional state-centric international human rights system [which]...presents a profound impediment to effective human rights accountability in the corporate sector.'[34]

As Grear and Weston note, the problem is exacerbated by the 'complicated interlocking layers of corporate entities that present a structural density that makes accountability extremely difficult'.[35]

Before turning to the Australian context, we examine a number of developments in the United States, the United Kingdom and Canada where various strategies have been adopted to hold corporate entities responsible for human rights abuses in which they have been implicated.

2. Developments in other jurisdictions

2.1 The United States as a forum for civil proceedings arising out of human rights abuses

For some time, the United States was considered an attractive forum for civil proceedings arising out human rights violations or other conduct that gave rise to civil liability, notwithstanding that such conduct did not occur in the United States or was not engaged in by United States corporations.

From 1980,[36] foreign litigants brought civil actions under *Alien Tort Statute* (ATS) for conduct amounting to human rights abuses.[37] In addition to the (then) jurisdiction, the US possessed further advantages in terms of the available damages, the jury system, the ability of lawyers to act on a percentage fee basis, the absence of a 'loser pays' costs rule and the absence of many of the procedural and substantive limitations of any other available forum.[38]

Eventually, this avenue for redress became circumvented.[39]

In *Kiobel,* the Supreme Court unanimously held that the ATS was limited in its application to cases that '*touch and concern'* the territory of the United States with '*sufficient force'* to displace the presumption against the extraterritorial application of United States laws.[40]

The outcome is consistent with other cases in which the Supreme Court has closed the doors of US courts to 'foreign-cubed' claims where foreign plaintiffs seek to bring civil claims against foreign defendants in respect of conduct occurring outside the United States.[41]

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[34] Ibid, 26.

[35] Ibid, 28.

[36] In *Filartiga v Pena-Irala* 603 F.2d 876 (2nd Cir 1980), a case was successfully brought under the ATS against a former police officer for abuses committed in Paraguay.

[37] The *Alien Tort Statute* is a section of the United States Code that provides: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'; 28 USC § 1350.

[38] Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21, 29; Quinn Emanuel Urquhardt & Sullivan, *Business Litigation Report* (October 2018) 4.

[39] See, e.g., *Sosa v Alvarez-Machain* 542 US 692 (2004) 725, in which the two-stage test was developed, and the scope was restricted to 18th century paradigms.

[40] *Kiobel v Royal Dutch Petroleum* 569 US 108 (2013), opinion of Chief justice Roberts, 124-5. See Center for Constitutional Rights, 'Kiobel v Royal Dutch Petroleum Co. (Amicus)' <https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus>. In 2000, in a companion case to Kiobel heard prior to *Sosa*, the Second Circuit Court of Appeals had found that the Federal Court had personal jurisdiction over the Shell parent companies; *Wiwa et al v Royal Dutch Petroleum et al* 266 F.3d 88 (2nd Cir 2000) 92, 94-99. That case settled on the eve of trial.

[41] See, e.g., *Morrison v National Australia Bank* 561 US 247 (2010), in which the Supreme Court held that where a statute gives no clear indication of an extraterritorial application, it has none.

However, *Kiobel* left open a number of significant questions concerning the reach and interpretation of the ATS, leading to differing views in subsequent circuit appellate court judgments.[42]

Some clarification was provided in the (5:4 majority) decision of the Supreme Court in *Jesner v Arab Bank PLC.*[43] The Supreme Court held that *foreign* corporations cannot be sued under the ATS.[44] The majority intimated, without deciding, that international human rights norms may apply solely to *natural* persons and not to *corporations*, noting that the '*international community*' has yet universally to accept corporate liability for employee acts.[45]

Justice Sotomayor, in dissent, provided that the relevant question was not whether international law has a norm of *corporate* liability, but whether there was any good reason to distinguish between a corporation and a natural person under the ATS.[46] In her opinion there was not. Justice Sotomayor concluded that the ATS does not categorically foreclose corporate liability.

Jesner is said not only to have eliminated ATS claims against foreign corporations, but also signalled a reduced role for such litigation in United States courts generally.[47]

Following *Jesner,* there may be greater focus on claims against corporate officers and directors in lieu of actions against corporations or claims under state rather than federal law.[48] The focus may also shift to United States citizens who may sue foreign corporations under United States federal laws.[49] United States corporations may be amenable to other potential litigation arising out of human rights related issues, such as consumer class actions or shareholder litigation.[50]

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[42] 569 US 108 (2013) 125. See, e.g., Ralph Steinhardt, '*Kiobel* and the Weakening of Precedent: A Long Walk for a Short Drink' (2014) 107 AJIL 841, cited in Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21, 35; on appellate decisions see Andrew Sanger, 'Transnational Corporate Responsibility in Domestic Courts: Still out of Reach?' (2019) University of Cambridge Faculty of Law, Legal Studies Research Paper 4/2019, and the decisions of *Balintulo v Daimler* 727 F 3d 174, 192 (2nd Cir 2013); *Mujica v AirScan* 771 F 3d 580, 594 (9th Cir 2014); *Doe v Drummond* 782 F 3d 576, 592 (11th Cir 2015); *Warfaa v Ali* 811 F 3d 653, 660 (4th Cir 2016); and *RJR Nabisco v European Community* 136 S Ct 2090 (2016).

[43] 138 S Ct 1386 (2018).

[44] The decision of the majority relied largely on the two-tier test propounded in the earlier decision in *Sosa v Alvarez-Machain* 542 US 692 (2004).

[45] Such a conclusion was reached by the Second Circuit in *Kiobel* on the basis that there is no *'norm of corporate liability under customary international law'* 621 F. 3d 145. As noted elsewhere, this appears to have overlooked general principles of law as referred to by Article 38(1)(c) of the *Statute of the International Court of Justice* and the fact that the large majority of legal systems in the world recognise corporate liability in some forms: Ludovica Chiussi, 'Jesner et al. v Arab Bank PLC: Closing the door to litigation against foreign corporations under the Alien Tort Statute?' (*SIDI Blog,* 12 September 2018) <http://www.sidiblog.org/2018/09/12/jesner-et-al-v-arab-bank-plc-closing-the-door-to-litigation-against-foreign-corporations-under-the-alien-tort-statute/>.

[46] As a number of authors have noted, in a number of respects there has been an uneven treatment of individuals and corporations in international human rights law. See, e.g., Daniel Augenstein and David Kinley, 'Beyond the 100 Acre Wood: In which International Human Rights Law finds new ways to tame Global Corporate Power' (2015) 19 IJHR 828.

[47] Rebecca J Hamilton, 'Jesner v Arab Bank' (2018) 112(4) AJIL 720; University Washington College of Law Research Paper No 2019-02.

[48] Quinn Emanuel Urquhardt & Sullivan, *Business Litigation Report* (October 2018) 5-6, citing Seth Davis and Christopher A Whytock, 'State Remedies for Human Rights' (2018) 98 *Boston University Law Review* 397, 483.

[49] For example, under the *Anti-Terrorism Act* 18 USC § 2333(a), which provides that any United States national injures by an act of international terrorism can sue for treble damages in federal court.

[50] One author contends that a functional interpretation of foreign corporation could be useful to overcome the current difficulties in bringing actions against multi-national corporations under the ATS: Kelly Geddes, 'Legal Fictions and Foreign Frictions: An Argument for a Functional Interpretation of Jesner v Arab Bank for Transnational Corporations' (2019) 86 *University of Chicago Law Review* 2193.

In 2018, the District Court allowed an action to proceed against a former colonel in the Armed Forces of Liberia under the ATS and the *Torture Victim Protection Act*.[51] The Court found that although the events occurred in Liberia, the Defendant's residence in the United States, his allegedly fraudulent participation in the US immigration program, and attacks on US agencies over the course of the Lutheran Church massacre were sufficient to '*touch and concern'* the United States so as to rebut the presumption against extraterritoriality.

In February 2020, an appeal from a ruling of the District Court on former Sri Lankan Secretary of Defence Rajapaksa's entitlement to foreign official immunity for alleged involvement in rights violations was dismissed without prejudice and the original ruling of the District Court was vacated by the Ninth Circuit Court of Appeals. While Rajapaksa enjoys head of state immunity during his tenure as the Sri Lankan President, there remains the possibility of litigation once he leaves office.[52]

The Supreme Court re-visited the question of corporate liability under the ATS for human rights abuses in *Nestlé USA, Inc. v. Doe* (*Nestlé*). [53] In *Nestlé,* the Court considered whether a claim of aiding and abetting child slavery against a domestic corporation under the ATS can have extraterritorial operation where the claim is based on allegations of general domestic corporate activity and where the plaintiffs cannot trace the alleged harms to the activity, which occurred abroad at the hands of unidentified foreign actors, and whether the judiciary is able to impose liability on domestic corporations under the ATS.

The Court held (by an 8:1 majority) that the Respondents, who alleged that they had been trafficked from Mali to the Ivory Coast as child slaves to produce cocoa, could not bring aiding and abetting claims under the ATS against US based companies that purchased cocoa from Ivory Coast farms and provided the farms with technical and financial resources. The extra-territorial application of the ATS was rejected because the allegation that major operational decisions by the companies were made in the US did not establish a sufficient connection between aiding and abetting forced labour overseas and domestic conduct.[54]

2.2 Developments in Canadian law

Canadian courts have accepted jurisdiction in various cases brought by non-Canadian claimants against Canadian companies, and parent companies, in respect of alleged human rights violations.[55]

In a recent decision, the Supreme Court held that a Canadian corporation may be sued in Canada for violations of international human rights law that occur in other jurisdictions.[56] Damages were sought

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[51] *Jane W v Moses W Thomas*, Civil Action No 18-0569, In the United States District Court for the Eastern District of Pennsylvania, Memorandum, 14 December 2018.

[52] A summary of procedural history is available on the Centre for Justice and Accountability website: Centre for Justice and Accountability, 'Assassination of Sri Lankan Journalist', <https://cja.org/what-we-do/litigation/wickrematunge-v-rajapaksa/>.

[53] 141 S. Ct. 1931, 593 U.S.___ (2021). The author was one of a number of persons who submitted an amicus brief to the United States Supreme Court in this case.

[54] For a recent review of relevant United States law see Paul Hoffmann, 'International Human Rights Litigation in the United States' chapter 7 in Richard Meeran (ed) *Human Rights Litigation Against Multinational in Practice'* (Oxford University Press, 2021). See also Clara Petch, 'What Remains of the Alien Tort Statute after Nestlé USA, Inc. v. Doe?' 42(3) *Northwestern Journal of International Law & Business* 397, Spring 2022.

[55] For a review of relevant Canadian law see Bruce W Johnson, 'Liability of Multinational Corporations in Canada for International Human Rights Violations', chapter 5 in Richard Meeran (ed) *Human Rights Litigation Against Multinational in Practice'* (Oxford University Press, 2021).

[56] *Nevsun Resources Ltd v Araya* 2020 SCC 5 (CanLII) (28 February 2020). For two of the many reviews of the decision see: Winston Anderson, Friendly judicial challenges from the North: The decision of the Canada Supreme Court in *Nevsun Resources Ltd v Araya* available at: https://journals.sagepub.com/doi/full/10.1177/14737795211055781; Jason Haynes, The Confluence of

for breaches of customary international law prohibitions against forced labour, slavery, cruel inhuman or degrading treatment and crimes against humanity, as well as breaches of domestic torts including conversion, battery, unlawful confinement, conspiracy and negligence. The defendant corporation sought to strike out the claim on the basis that the 'act of state doctrine' precluded domestic courts from considering the sovereign acts of a foreign government and that claims based on customary international law had no reasonable prospect of success.

The (4:3) majority in the Supreme Court held that the 'act of state doctrine' and its underlying principles, as developed in Canadian law, were not a bar to the claims. The majority also concluded that it was not 'plain and obvious' that the customary international law claims had no reasonable prospect of success. As customary international law automatically forms part of Canadian law, and as the defendant was a company bound by Canadian law, the claims were allowed to proceed for judicial determination.[57]

The Ontario Superior Court has allowed a human rights claim based in negligence against a Canadian mining company for acts and omissions which occurred abroad.[58] The case related to alleged harms including gang rape perpetrated against members of an indigenous group by private security personnel working for a subsidiary of the company in Guatemala in the course of evictions in 2007 which the company was said to have requested and supported. In 2020, the Court rejected an attempt by the defendant to prevent the plaintiffs from amending their pleadings to include sexual assaults carried out by the police and military at the same time.[59]

2.3 Developments in English law

English jurisprudence is particularly instructive for its consideration of traditional tort law remedies, including those arising out of the law of negligence. As Meeran notes, tort litigation has the advantage of less complexity.[60]

English consideration of the liability of parent companies for human rights abuses informs debate and legal developments across the globe.[61] However, most English cases involving attempts to sue parent companies in England arising out of the conduct of foreign subsidiaries have been resolved at an early procedural stage following applications to strike out or stay the proceedings on the basis of lack of jurisdiction, summary judgment *or forum non conveniens* grounds.[62] Very few cases have

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National and International Law in Response to Multinational Corporations' Commission of Modern Slavery: *Nevsun Resources Ltd. V. Araya*, available at: https://www.tandfonline.com/doi/abs/10.1080/23322705.2020.1832785.

[57] Another recent Canadian lawsuit was brought against a Canadian mining company (Tahoe Resources Inc) by victims alleging human rights abuses when protestors in Guatemala were shot and injured by private security officers outside one of the company's mines. This led to a confidential settlement and apology.

[58] *Choc v Hudbay Minerals Inc.,* [2013] ONSC 1414.

[59] *Caal Caal v Hudbay Minerals Inc.,* [2020] ONSC 415.

[60] Richard Meeran, 'Tort Litigation Against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1. Notwithstanding this 'lack of complexity' as Meeran notes, many cases in the UK and Australian courts have resulted in protracted delay and procedural warfare.

[61] Amnesty International, Submission to the Supreme Court of the United Kingdom, *Okpabi and others v Royal Dutch Shell plc and another* UKSC 2018/0068 (26 April 2018). <https://www.amnesty.org/download/Documents/AFR4483212018ENGLISH.PDF>. See also Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (2014) <https://www.amnesty.org/en/documents/POL30/001/2014/en/>.

[62] As noted by Aristova, following the decision in *Owusu v Jackson* [2005] ECR 1-1383 there are constraints on English courts staying proceedings on the basis of *forum non conveniens*: Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14(2) *Utrecht Law Review* 6, 11.

gone to trial,[63] and where jurisdictional barriers are overcome, there may still be vexed choice of law complications as to the applicable substantive law. However, as Chambers notes, 'there are reasons to be cautiously optimistic for plaintiffs about the gradual expansion of direct liability in transnational business and human rights litigation in English case law.'[64]

English civil procedural rules allow a foreign subsidiary to be sued in England where there is a legitimate claim between the claimant and the UK domiciled parent and where the subsidiary is a necessary and proper party.[65]

In *Vedanta,* proceedings were brought against a Zambian company and its UK parent arising out of pollution from a copper mine alleging negligence and, in respect of the subsidiary, contraventions of Zambian environmental laws. In 2016, the Technology and Construction Court held that there was *good arguable case* that the parent company owed a duty of care to the Zambian villagers. This decision was upheld by a majority of the Court of Appeal.[66]

An appeal from the decision of the Court of Appeal was heard in January 2019.[67] The Supreme Court dismissed the appeal, allowing the suit to proceed to trial on the substantive issues.[68]

The Court rejected the contention that finding a duty of care would involve a novel and controversial extension of the boundaries of negligence. As Lord Briggs observed:

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[63] Two notable exceptions are *Chandler v Cape Plc* [2012] EWCA Civ 525 and *Thompson v Renwick Group Plc* [2014] EWCA Civ 365, which went to trial in relation to the duty of care alleged to be owed by the parent to *employees* of a subsidiary.

[64] Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court' (2020-2021) 42(3) *University of Pennsylvania Journal of International Law*, 519. Available at https://ssrn.com/abstract=3682273 or http://dx.doi.org/10.2139/ssrn.3682273.

[65] Andrew Sanger, 'Transnational Corporate Responsibility in Domestic Courts: Still out of Reach?' (2019) University of Cambridge Faculty of Law, Legal Studies Research Paper 4/2019, 5, citing UK *Practice Direction* 6B, 3.1(3) at note 14. As noted by Aristova, establishment of jurisdiction on this basis could be exceptionally wide as it does not require the existence of any territorial connection between England and the joined defendant. Thus Aristova notes that English courts have approached claims brought under the '*necessary or proper party*' gateway carefully to ensure that a specious claim against an 'anchor' defendant is not used as a device to bring a foreign defendant within the jurisdiction: Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14(2) *Utrecht Law Review* 6, citing: *Witted v Galbraith* [1893] 1 QB 577, 579; *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch. 258, 274; *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1990] 2 Lloyd's Rep 215, 222; *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*, [2011] UK PC 7 [76]-[87].

[66] *Lungowe v Vedanta* [2017] EWCA Civ 1528 (UK). The Court reviewed decisions applying the three-part test articulated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL). The three elements comprise: (a) a sufficient degree of proximity between the parties, (b) foreseeability of harm and (c) whether it is fair, just and reasonable to impose liability.

[67] In oral argument and written submissions, the appellant referred to Australian authorities on the duty of parent companies to ensure that subsidiary operations are not harmful. In *CSR v Wren* (1997) 44 NSWLR 463 (CA NSW) it was held that CSR owed a duty to ensure that the operations of the subsidiary were not harmful to subsidiary employees. There has been considerable litigation against the James Hardie group by claimants suffering injury from exposure to asbestos. The legal history is summarised in a Research Note prepared by the Australian Parliamentary Library, 'In the shadow of the corporate veil: James Hardie and asbestos compensation' (10 August 2004) <https://www.aph.gov.au/binaries/library/pubs/rn/2004-05/05rn12.pdf>.

[68] *Vedanta Resources PLC and Anor v Lungowe and Ors* [2019] UKSC 20 (10 April 2019).

> 'Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in or control, supervise or advise the management of the relevant operations (including land use) of the subsidiary'.[69]

By way of contrast to the outcome in *Vedanta*, in *Shell* both the High Court[70] and the Court of Appeal[71] rejected the claim that the English parent company, Royal Dutch Shell, owed a duty of care in respect of oil spills emanating from the pipelines and infrastructure operated by its Nigerian subsidiary.[72] The Court of Appeal distinguished between the conduct of a parent company which takes steps to ensure that there are proper controls in place by establishing an overall system of policies, processes and practices from those situations where a parent company actually seeks to exercise control.[73] It was held that only in the latter situation a duty of care may arise.

However, that was not the end of the matter. The case proceeded to the UK Supreme Court.[74] The Supreme Court upheld the appeal on the basis that the two Nigerian communities had an arguable case that the UK domiciled parent company owed them a duty of care in respect of alleged systemic health, safety and environmental failings of its Nigerian subsidiary.[75]

In *Unilever* both the High Court and the Court of Appeal[76] held that Unilever did not owe a duty of care to the claimants to take effective steps to protect them from 'serious inter-tribal violence' at the time of the 2007 Kenyan presidential election. The Court found that the foreign subsidiary did not receive relevant advice from the parent company and regarded itself as being responsible for risk management and the handling of the crisis. The Supreme Court refused the claimants' application for permission to appeal the Court of Appeal judgment.

In a recent decision, the Court of Appeal confirmed that a UK mining company was not liable in relation to human rights abuses in Sierra Leone arising out of the use of excessive force by police when local unrest broke out.[77]

As the English cases demonstrate, questions of jurisdiction, duty of care and liability may turn on very specific factual questions in each case as to the nature of the relationship between the parent and the subsidiary.[78]

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[69] *Vedanta Resources PLC and Anor v Lungowe and Ors* [2019] UKSC 20 (10 April 2019) [49]. The Court went on to approve at [50] the 'correct summary' by Sales LJ in *AAA v Unilever plc* [2018] EWCA Civ 1352 [36]. The judgment is also of interest for the discussion of whether the English forum was the 'proper place to bring the claim' and the real risk that substantial justice could not be obtained in Zambia, at [66],[86] and [101]-[102].

[70] *Okpabi v Royal Dutch Shell* [2017] EWHC 90.

[71] *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191.

[72] See also *Thompson v Renwick Group Plc* [2014] EWCA Civ 365 where no duty of care was found to exist between the parent company and the employees of its subsidiary given the absence of evidence of any relevant involvement in the activities of the subsidiary other than the holding of shares.

[73] In an earlier decision, the House of Lords held in *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL) 1555 that the question of parental corporate liability 'will be likely to involve and inquiry into what part the defendant played in controlling the operations of the group.'

[74] The Supreme Court granted permission for two written interventions by Corner House Research, and the International Commission of Jurists and CORE Coalition.

[75] *Okpabi & others v Royal Dutch Shell Plc and another* [2021] UKSC 3.

[76] *AAA v Unilever* [2018] EWCA Civ 1532 (UK).

[77] *Kadie Kalma & Ors v African Minerals Ltd* [2020] EWCA Civ 144.

[78] For more comprehensive reviews of UK jurisprudence see Richard Meeran, 'Perspectives on the Development and Significance of Tort Litigation against Multinational Parent Companies' and Daniel Leader 'Human Rights Litigation against Multinational in Practice- Lessons from the United Kingdom' chapters 2 and 3 in Richard Meeran (ed) *Human Rights Litigation Against Multinational in Practice'* (Oxford University Press, 2021).

Law firm Debevoise & Plimpton has recently published a review of decisions of English courts concerning the liability of UK-incorporated or UK-domiciled companies for the alleged acts or omissions of other companies located outside the jurisdiction.[79]

Recent developments in the United Kingdom and Europe are also discussed by Davies.[80]

3. Developments in Australia

Under Australian law the question of whether there may be direct liability of an Australian corporate parent or related entity for tortious or other unlawful conduct by related entities has been considered in a number of cases.

In *CSR Ltd v Wren,*[81] the NSW Court of Appeal upheld a judgment in favour of an injured worker who succeeded in a tort claim against the defendant, CSR Ltd, following an injury suffered on the premises of its wholly owned subsidiary, Asbestos Products Pty Ltd.

In their joint judgment Beazley JA and Stein JA noted that in the normal course of events the management staff are responsible for the day-to-day operational aspects of a business operation and in that case the management staff were all CSR staff. That, in their opinion, was sufficient to establish a relationship between the plaintiff and CSR so as to give rise to a duty of care owed by CSR to the plaintiff.[82]

As to whether there is a breach of any such duty of care, the well-known passage from *Wyong Shire Council v Shirt*[83] is frequently invoked, where Mason J stated:

> In deciding whether there has been a breach of a duty of care the tribunal of fact must first ask itself whether a reasonable man [sic] in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man [sic] would do by way of response to the risk. The perception of the reasonable man's [sic] response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man [sic] placed in the defendant's position.[84]

The circumstances in which there may be direct liability of corporate parent or related entities for tortious or other unlawful conduct by associated corporate entities or persons may be a vexed question depending upon the facts in issue. In many instances, the limited liability of companies, based on the *Salomon*[85] principle, may become an 'unyielding rock' on which 'complicated

[79] Available at: https://www.debevoise.com/-/media/files/insights/publications/2023/09/debevoise-london-climate-change-and-esg-litigation.pdf?rev=9af505f40b084f3eb7aea005e240e7bf.
[80] Paul Davies, *Corporate Liability for Wrongdoing within (Foreign) Subsidiaries: Mechanisms from Corporate Law, Tort and Regulation*, National University of Singapore Working Paper 2023/007.
[81] (1997) 44 NSWLR 463; (1998) *Aust Torts Reports* 81-461.
[82] (1997) 44 NSWLR 463 [7].
[83] (1980) 146 CLR 40.
[84] (1980) 146 CLR 40, 47-8.
[85] *Salomon v A Salomon & Co Ltd* [1897] AC 22.

arguments' become 'shipwrecked'.[86] As the former Chief Justice of the Victorian Supreme Court has noted: 'issues of corporate morality and fairness are constrained by established legal principles'.[87]

However, established legal principles in Australia have adapted to and accommodated the direct liability of parent companies for the tortious conduct of subsidiaries through a series of cases determined in the 1980s and 1990s, particularly in the context of personal injury claims arising out of exposure to asbestos.[88]

Notwithstanding these developments, it has not always been plain sailing for plaintiffs. In *James Hardie,*[89] a New Zealand plaintiff exposed to asbestos in New Zealand sought to recover against both the employer New Zealand entity and also two NSW companies which the plaintiff alleged controlled and managed the factory in New Zealand where he worked. Although successful at first instance the NSW Court of Appeal found that the two New South Wales companies did not have a duty of care to the plaintiff. The decision in *CSR Ltd v Wren* was distinguished and narrowly interpreted.

As noted by former Victorian Chief Justice Warren,[90] the Australian cases up to and including *James Hardie* were decided at a time when the '*proximity*' test was determinative of whether there was a duty of care, whereas this was subsequently rejected by the High Court.[91] However, as she proceeds to note: 'the analysis in those cases was not wedded to the proximity analysis such that they would not be relevant under the modern 'salient features' approach.[92] In her view, the main difference between the then applicable English law and the Australian approaches 'is not so much the different test applicable for duty of care, but rather a difference in attitude towards imposing direct liability on parent companies. The approach in the Australian cases is rooted in a reluctance in corporations law to lift the corporate veil, and thus sets the bar high for the parent-subsidiary relationship that would give rise to a duty of care on the part of the parent.'[93]

However, more recently, in *Strategic Framework Pty Ltd v Hitchen,*[94] both the company that employed the plaintiff and another related company that exercised *control* over the employer were found liable for breaches of the duty of care that both owed to the plaintiff.

At this 'hazy intersection of company and tort law', established principles sometimes coalesce but frequently collide.[95] Problems in establishing liability are exacerbated where it is sought to hold parent companies directly liable for the conduct of foreign subsidiaries which impacts on persons who are not employees.

Generally, courts will seek to examine the 'salient features' of the relationship between the parent company and the person bringing the claim to establish whether there is a sufficiently close

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[86] Adopting the language of Lord Templeman, 'Company Law Lecture-Forty Years on' (199) 11 Company Lawyer 10, 10 quoted by the former Chief Justice of the Victorian Supreme Court, Marilyn Warren AC in 'Corporate Structures, the Veil and the Role of the Courts' [2016] 40 *Melbourne University Law Review* 657, 670.

[87] Marilyn Warren AC in 'Corporate Structures, the Veil and the Role of the Courts' [2016] 40 *Melbourne University Law Review* 657.

[88] In addition to *CSR Ltd v Wren*, see for example: *Barrow v CSR Ltd* (unreported, Supreme Court of Western Australia, Rowland J, 4 August 1988); *CSR v Young* (1998) Aust Torts Reports 81-468.

[89] *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554.

[90] Marilyn Warren AC in 'Corporate Structures, the Veil and the Role of the Courts' [2016] 40 *Melbourne University Law Review* 657, 684.

[91] *Sullivan v Moody* (2001) 207 CLR 562, 578-9 [48].

[92] Marilyn Warren AC in 'Corporate Structures, the Veil and the Role of the Courts' [2016] 40 *Melbourne University Law Review* 657, 684.

[93] Ibid, 684.

[94] [2018] NSWCA 54 (Basten JA, Simpson JA and Sackville AJA).

[95] Adapting an extract from Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 *Modern Law Review* 603, referred to by Marilyn Warren AC in 'Corporate Structures, the Veil and the Role of the Courts' [2016] 40 *Melbourne University Law Review* 657, 685.

relationship so as to give rise to a duty of care and direct liability.[96] Such 'salient features' serve not as a formula but as a control mechanism used as part of the evaluative assessment of the degree of connection between the parent company and its subsidiary.[97] Considerations of public policy may require an alleged duty of care to be abrogated or modified.

Apart from doctrinal and jurisprudential issues, problems of proof loom large. As noted by Warren: '...this kind of litigation against a parent requires the plaintiff to provide a considerable amount of evidence about the parent subsidiary relationship and the control the parent exercises over the subsidiary. This is no easy task in many cases.'[98]

At least in proceedings brought or anticipated in Australia, procedures for discovery of documents and preliminary discovery of documents are available.

3.1 Discovery and preliminary discovery of documents

There are established and frequently utilised procedures for discovery of documents in civil cases in all Australian state and federal jurisdictions. For example, In the federal sphere the *Federal Court Rules 2011* (Cth) make provision for orders for discovery of documents.[99]

Most if not all jurisdictions also now have relatively liberal, but seldom utilised, rules for obtaining orders for preliminary discovery, before substantive proceedings are commenced. Some permit such discovery not only to ascertain the identity of the appropriate defendant but also to ascertain whether there may be a good cause of action. In many jurisdictions, historically restrictive rules against 'fishing' expeditions have been superseded. In large and complex litigation orders are not infrequently made for the use of technology assisted review of documents.[100]

Foreign defendants sued in Australian courts are subject to orders being made for discovery of documents in their possession or control.

Relevant documents that are the subject of valid claims of privilege need not be produced but are usually required to be identified.

3.2 The involvement of Australian companies in human rights abuses and environmental damage in other jurisdictions

A report by the Human Rights Law Centre (HRLC) in Australia refers to the alleged involvement of various Australian companies in various parts of the world where human rights violations and major environmental damage have occurred. According to that report, some of Australia's most prominent companies, from ANZ to BHP, have been implicated in serious human rights violations overseas.[101]

A report by Friends of the Earth Australia alleges that Australia's big four banks are providing financial assistance to companies accused of land grabs, deforestation and labour abuses in

[96] *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253-254.
[97] Ibid, 254.
[98] Marilyn Warren AC in 'Corporate Structures, the Veil and the Role of the Courts' [2016] 40 *Melbourne University Law Review* 657, 686.
[99] See e.g., the discussion by the Full Federal Court in *Clifton (Liquidator) v Kerry Investment Pty Ltd* [2020] FCAFC 5; 379 ALR 593 (Besanko, Markovic and Banks-Smith JJ).
[100] See the discussion in Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Technology in Complex Litigation and Class Actions' Vol 19 *Macquarie Law Journal* 39-79 (2019).
[101] Human Rights Law Centre, *Nowhere to Turn: Addressing Australian corporate abuse overseas* (*HRLC,* December 2018) 4 <https://www.hrlc.org.au/reports/nowhere-to-turn>.

developing countries. It is also alleged that there have been widespread human rights abuses in the supply chain of companies and subsidiaries in the palm oil trade, financed by Australian banks.[102]

The HLRC report identifies a number of case studies and incorporates various recommendations for action by the Australian Government. The case studies encompass:

- BHP's responsibility for the Samarco Dam Disaster in Brazil
- The involvement of ANZ in providing financial backing to a Cambodian company allegedly responsible for forced evictions and other human rights violations
- The alleged involvement of an Australian security firm in criminal conduct against asylum seekers in in offshore detention centres
- The alleged involvement of an Australian-Canadian mining company in the torture, rape and murder of residents in a small town in the Congo where an uprising was brutally suppressed by the Congolese military
- The alleged involvement of an Australian managed development company and an Australian based building and construction company in the forcible eviction of residents of Port Moresby from their homes
- The alleged involvement of Rio Tinto in human rights abuses and environmental damage on the island of Bougainville[103]
- The alleged involvement of a security firm in sexual assaults alleged to have occurred at an offshore immigration detention centre
- The responsibility of an Australian petroleum company for major environmental damage from a major oil spill in the Timor sea and significant financial loss alleged to have been suffered in Indonesia, including by seaweed farmers
- The responsibility of an Australian manufacturer of medical safety equipment for allegedly exploitive and unsafe working conditions in Sri Lanka
- The role of a private technology company in supplying technology allegedly used to locate, identify and target peaceful protesters in Bahrain.

A number of matters have resulted in major civil litigation before Australian courts.

- A class action on behalf of Indonesian seaweed farmers arising out of damage allegedly caused by the Montara oil spill progressed (slowly) to a trial in the Federal Court in Sydney in 2019. The respondent to the proceeding, the Australian company that operated the offshore oil drilling operation, denied that it owed a duty of care to the Indonesian class members and denied that oil or dispersant reached the parts of Indonesia in question.[104] In a judgment handed down on 19 March 2021 Yates J found that the foreseeability of the risk of harm arising from the respondent's negligent operation of the oil well was established and that the respondent had breached its duty of care to the Applicant and Group members. His Honour also accepted that oil from the blowout caused or materially contributed to the death and loss of the applicant's seaweed crop.[105] An award of damages and pre-judgment

[102] Friends of the Earth Australia, 'Draw the line: A black book about the shady investments of Australian banks in palm oil' (28 June 2019) <https://www.business-humanrights.org/en/australia-report-accuses-big-four-banks-of-financing-palm-oil-companies-linked-to-land-grabbing-human-rights-violations#c190598>.

[103] This was the subject of a further detailed report by the Human Rights Law Centre in 2020: Human Rights Law Center, *After the Mine: Living with Rio Tinto's deadly legacy* (*HRLC,* March 2020) <https://www.hrlc.org.au/rio-tinto-deadly-legacy>.

[104] As one member of the Federal Court of Australia has commented extrajudicially: 'Such litigation is costly, time- and resource-consuming, and its outcome is ever uncertain until settled or judgment is given.' Justice Steven Rares, 'Charting a new course - Promoting the development of an international convention on liability and compensation relating to transboundary damage from offshore oil and gas activities' [2019] FedJSchol 11 [23].

[105] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237; 14 ALR 325.

interest was made in favour of the lead Applicant. Two of the 'common questions' required further submissions from the parties. Thereafter, a further judgment was delivered on 25 October 2021.[106]An appeal to the Full Federal Court was discontinued following a settlement agreement between the parties which was approved by the Federal Court.[107]

- Several investor class actions were commenced in Australia (and elsewhere) against BHP arising out of the environmental and other damage following the failure of a dam holding back wastewater from a mine operated by joint venture partners in Brazil. The disaster resulted in the death of 19 people. Recently, the company had been unsuccessful in its application to stay the consolidated Australian class actions in light of pending criminal proceedings elsewhere.
- A class action against the security company, the Australian Government and various contractors arising out of events at the Manus Island detention centre was settled before trial in 2017 for $70 million.[108]
- Proceedings arising out of events in the Congo were brought in both Australia and Canada but failed at early procedural stages.
- The legal proceeding brought in New Guinea by displaced residents of Port Moresby was dismissed on procedural grounds.
- Proceedings brought by Bougainville residents in the United States were ultimately dismissed on jurisdictional grounds after 13 years and a number of appeals.
- A number of women who allege that they were raped at the offshore detention centre in Nauru have brought proceedings in Australia. In November 2019, Wilson Security settled out of court with a woman who alleged that she was raped in 2014.[109]
- Striking workers in Sri Lanka who were dismissed were eventually reinstated after a complaint made to Australia's OECD National Contact Point for alleged breaches of human rights and following years of negotiations and an international campaign.
- In 2014, 681 Cambodian families brought a complaint against ANZ through the OECD National Contact Point, seeking to have ANZ divest its profits from the loan in question and to compensate the affected families. In February 2020, ANZ agreed to pay compensation of the gross profits of the loan to the families and admitted its failure to conduct adequate due diligence.

In addition to investor class actions against BHP arising out of the mine disaster in Brazil (referred to above) claims for damages by victims against BHP in England have been brought. Efforts to stay the lawsuit were initially deferred after the British and Brazilian governments imposed lockdowns hindering the company's lawyers and experts from travelling to review the evidence. The company filed a motion to halt the proceeding on jurisdictional grounds over concerns it overlaps with litigation in Brazil, where BHP faces massive claims for damages and reparation. Proceedings were originally filed in Liverpool ostensibly on behalf of 235,000 Brazilian individuals and organisations, including municipal governments, utility companies, indigenous tribes and the Catholic Church.

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[106] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 8)* [2021] FCA 1291.

[107] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Approval)* [2023] FCA 143.

[108] *Kamasaee v Commonwealth of Australia and Ors* [2017] VSC 537. Detailed information on the proceedings may be found at: '*Kamasaee v The Commonwealth of Australia*' (*Kaldor Centre*, 12 September 2018) <https://www.kaldorcentre.unsw.edu.au/publication/kamasee-v-commonwealth-australia-ors-2017-vsc-537>. In a later decision Justice Cameron Macauley declined to allow 64 persons to belatedly be included in the settlement: *Kamasaee v The Commonwealth of Australia* [2018] VSC 138.

[109] *JN v Wilson Security Pty. Ltd* (Victorian Supreme Court, Case No. S CI 2017 02933). The individual alleged that Wilson Security knew its employees engaged in sexual misconduct and failed to address it. See Miki Perkins, '*Wilson Security settles alleged rape claim from refugee on Nauru*' *Sydney Morning Herald* (online, 25 November 2019) <https://www.smh.com.au/national/wilson-security-settles-alleged-rape-claim-from-refugee-on-nauru-20191125-p53dzi.html>.

Originally the action was just against BHP's UK-listed company, but it was expanded to include the Australian-listed company.

At first instance the proceeding was struck out as an abuse of process by the High Court in December 2020. This was initially upheld by the Court of Appeal. However, permission to appeal as granted on the basis that the matter had a 'real prospect of success'. The matter was heard by the Court of Appeal in April 2022 which held that the action should be permitted to proceed. Thereafter the Supreme Court refused BHP's application for permission to appeal on the basis that it did not raise an arguable point of law.

A consolidated class action proceeding against BHP in Australia on behalf of investors is ongoing after the High Court rejected BHP's attempt to prevent eligible shareholders not resident in Australia from being included in the class.[110]

Historically, there have been other cases against Australian companies arising out of their conduct in other countries. Notably, in 1994 proceedings were brought by Papua New Guinean villagers in the Victorian Supreme Court against BHP arising out of major environmental damage at the Ok Tedi mine.[111] This eventually resulted in a substantial settlement in 1996 and agreement to remediation works.

This became the subject of ongoing controversy.[112] In 2000 and 2001 further proceedings were commenced in the Victorian Supreme Court against BHP Billiton and Ok Tedi Mining Company seeking injunctive, declaratory and other relief, including specific performance, arising out of alleged failures to comply with a settlement agreement entered into in June 1996. Interlocutory proceedings were also instituted for alleged contempt of court. The proceedings resulted in a number of judgments.[113]

In 2002, BHP completed its withdrawal from the Ok Tedi copper mine by transferring its 52% equity to PNG Sustainable Program Limited following a failure to secure agreement for closure of the mine. The arrangement sought to protect BHP Billiton from any further liabilities, including legal claims, arising from the operation of the mine subsequent to its exit.

At the time, further proceedings (including class action proceedings under Order 18A of the Victorian *Supreme Court Rules*) were still pending in the Victorian Supreme Court in respect of alleged breaches of 1996 agreement to compensate local communities for the damage resulting from the dumping of tailings and to carry out remediation work.[114] These proceedings were eventually resolved by a settlement in December 2003 and the subsequent dismissal of the class action proceedings in January 2004, notwithstanding a substantial number of objections by Papua New Guineans concerned at the ongoing failure to remediate the environmental damage.

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[110] *BHP Group Limited v Impiombato* [2022] HCA 33; 96 ALJR 956; 405 ALR 402.

[111] See *Dagi v The Broken Hill Propriety Company Ltd (No 2)* [1997] 1 VR 428. The plaintiff's claims included causes of action in trespass, nuisance and negligence arising out of the discharge of by-products of copper mining into the local river(s) in Papua New Guinea. An issue arose as to the jurisdiction of the Victorian Supreme Court to entertain actions in respect of foreign land (the so-called *Moçambique* rule, derived from the case *British South Africa Company v Companhia de Moçambique* (1893) AC 602).

[112] For a brief history by John Gordon, one of the lawyers involved in the case, see: John Gordon, 'Ok Tedi – Reflecting on the case today' (*Slater and Gordon,* 10 August 2018) <https://www.slatergordon.com.au/blog/ok-tedi-reflecting-on-the-case-today>.

[113] See, e.g., *Dagi v Broken Hill Proprietary Company; Gagarimabu v Broken Hill Proprietary Company* [2000] VSC 486 (Hedigan J); *Gagarimabu v BHP & Ok Tedi* [2001] VSC 304 (Hedigan J); *Gagarimabu v BHP* [2001] VSC 517 (Bongiorno J); *Gargarimabu v BHP* [2002] VSC 525 (Bongiorno J); *Gargarimabu v BHP* [2003] VSC 416 (Bongiorno J).

[114] See generally: Judith Marychurch and Natalie Stoianoff, 'Blurring the lines of environmental responsibility: how corporate and public governance was circumvented by the OK Tedi Mining Limited disaster', paper presented at the 61st Annual ALTA Conference (2006).

3.3 **Jurisdiction and choice of law**

Whether or not Australian courts have jurisdiction in respect of claims against Australian corporations and their foreign subsidiaries arising out of conduct outside Australia maybe a vexed question, depending on the facts in issue and the nature of the conduct in question.

Personal jurisdiction over a defendant corporation arises where the corporation carries on business in the forum.[115] As noted by the Chief Justice of the Federal Court of Australia, the sole grounds for establishing a court's personal jurisdiction over a party at common law are the service of a writ upon that party within the court's territorial jurisdiction, or the party's voluntary appearance.[116]

Whether an Australian federal or state court has subject matter jurisdiction depends upon the conduct in question, the causes of action relied upon, and the applicable law. Where the cause of action is based on an Australian statute, it is clear that both the Commonwealth as well as state and territory Parliaments have constitutional power to enact legislation that has extraterritorial effect. Whether a particular statute has extraterritorial application may be clear from its wording.[117] In the absence of an express provision connecting the statute to Australian jurisdiction, both federal and state statutory laws as well as the common law incorporate a rebuttable presumption that the legislation only applies domestically.

Where a statute is silent as to the sphere of its intended territorial application, the court's task is to identify the central focus or central conception of the legislation, and to consider its connection with Australian jurisdiction.[118] This is done as a matter of statutory construction based on the subject matter and scope of the legislation, and with regard to internal indications in order to avoid improbable and absurd outcomes. The court considers the scope of the statute, the statutory purpose, and the need to avoid an unduly restrictive approach.

As noted by the former President of the New South Wales Court of Appeal, contrary legislative intention, sufficient to rebut or displace the operation of the statutory and common law presumptions of domestic application, may be evinced by express words, necessary implication, and reading the Act as a whole.[119] Such an approach is warranted if the legislative purpose would otherwise be frustrated or if the contrary is indicated by 'the object, subject matter or history of the enactment.'[120]

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[115] *National Commercial Bank v Wimborne* [1979] 11 NSWLR 156.

[116] Justice James Allsop and Daniel Ward, '*Incoherence in Australian Private International Laws* '(Federal Court of Australia: Digital Law Library, 10 April 2013) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop- cj-20130410>. State and territory courts, as well as the federal courts, have long-arm rules permitting service of process upon defendants in a broader range of circumstances than at common law. *See Federal Court Rules 2011* (Cth) ch 2 pt 10 div 10.4; *Uniform Civil Procedure Rules 2005* (NSW) pts 10 &11 sch 6.

[117] For example, under section 5(1) of the *Competition and Consumer Act 2010* (Cth), parts of the Act apply to conduct occurring outside Australia where the defendant is, *inter alia*, a foreign corporate body carrying on business in Australia or an entity incorporated in Australia. A number of cartel class actions brought in Australia have concerned Australian and multinational corporations, and these cases raised extraterritorial considerations given allegations of conduct occurring outside Australia. See, e.g., *De Brett Seafood Pty. Ltd. v Qantas Airways Ltd. (No. 7)* [2015] FCA 979; *Wright Rubber Products Pty Ltd v Bayer AG* [2010] FCAFC 85; *ACCC v Bridgestone Corp*. (2010) 186 FCR 214; *Darwalla Milling Co. Pty Ltd v F Hoffmann-La Roche Ltd* [2006] FCA 915.

[118] See *DRJ v Commissioner of Victims' Rights (No. 2)* [2020] NSWCA 242.

[119] *DRJ v Commissioner of Victims' Rights (No. 2)* [2020] NSWCA 242 [10].

[120] *DRJ v Commissioner of Victims' Rights (No. 2)* [2020] NSWCA 242.

Even where personal or subject matter jurisdiction is established, there may be controversy over which is the most appropriate or convenient forum.

In a number of respects, the Australian legal system and jurisprudence incorporate a number of attractive features which may permit local courts to accept jurisdiction over claims arising out of extraterritorial human rights violations where civil suits are brought against corporations. As Holly notes[121]:

- Foreign corporations are amenable to the exercise of personal jurisdiction where they conduct business in Australia.
- Australian courts may deal with cases where damage has been suffered partly within the jurisdiction in claims arising out of torts, wherever occurring.
- Assuming jurisdiction, cases will only be dismissed or stayed on *forum non conveniens* grounds where Australia is a clearly inappropriate forum.[122]
- Under Australian choice of law rules a *lex loci delicti* rule prevails in respect of both domestic and international torts[123] and this may provide for the application of foreign law.

More recently, the same author notes that 'Australian courts have shown themselves to be receptive to tort claims with an extraterritorial dimension, making it an underexplored but potentially attractive jurisdiction in which to bring such claims.'[124] She suggests that, while the application of the *lex loci delicti* rule is strict (and the harm may not be recognised in the place where the wrongdoing occurred), flexibility around the test for where the wrongdoing occurred provides scope 'to advantageously frame a claim through the characterization process to advance a credible case for Australian law to apply.'[125]

Although Australian choice of law rules provide for the application of the law in the jurisdiction in which the relevant conduct occurred (*the lex loci delicti*), in the absence of evidence to the contrary the Australian court will proceed on the assumption that this is the same as Australian law.[126] However, an obvious problem arises where the choice of law rules of that jurisdiction provide for the application of the law in which the proceedings are brought (the *lex loci fori*). As Prosser has suggested: '*The realm of the conflicts of laws is a dismal swamp, filled by quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer is quite lost when engulfed and entangled in it.*' [127]

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[121] Gabrielle Holly, 'Australia as a jurisdiction for transnational human rights litigation: Kamassee v Commonwealth' (*Cambridge Core Blog,* 30 April 2019) <https://blog.journals.cambridge.org/2019/04/30/australia-as-a-jurisdiction-for-transnational-human-rights-litigation-kamasaee-v-commonwealth/>. See also Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth' (2018) 19(1) *Melbourne Journal of International Law* 52; Joanna Kyriakakis, '*Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law'* (2005) 31 *Monash University Law Review* 95; and Peter Prince, 'Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach is Better' (1998) 47 *International & Comparative Law Quarterly* 573.

[122] See generally: *Oceanic Sun Line v Fay* (1988) 165 CLR 197 and *Voth v Manildra Flour Mills* (199) 171 CLR 538.

[123] See *Regie Nationale de Usines Renault SA v Zhang* (2002) 210 CLR 491.

[124] Gabrielle Holly, 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation' (2020) 21 *German Law Journal* 549, 550.

[125] Ibid, 556.

[126] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; 223 CLR 331 at 372 [125], 416-417 [267] and 411 [249].

[127] William Prosser, 'Interstate Publication' (1953) 51 *Michigan Law Rev* 959, 971, cited by former Chief Justice Spigelman AC (Speech at the launch of the Eighth Edition of *Nygh's Conflicts of Laws in Australia*, Sydney, April 16, 2010).

In particular, Australian courts have had difficulty in dealing with this problem of *renvoi*.[128] In the decision of the Australian High Court in *Neilson,* the majority were divided on various issues.[129] In his analysis of the case Davies commented that:

> '…the Court did not speak with one voice, or even two or three. The seven Justices produced six judgments and majorities of different composition on different issues. Between them, the six judgments contained support for each of the three 'wrong' answers to the renvoi question. A narrow majority chose the answer of double renvoi, which has the most profound and apparently insoluble defect, that of infinite regression. The majority managed to dodge the problem of infinite regression on the facts of the case, without giving any indication of how the problem should be solved when it does arise, or indeed, whether they would give the same answer in a case involving infinite regression. As a result, the decision virtually invites further litigation...'

This led him to the conclusion that '*Renvoi is a question without an answer — or, rather, it is a question with three possible answers, all of which are wrong for some reason or another.*' [130]

A problem may also arise in determining *where* the relevant culpable conduct in fact occurred.[131] Whilst this may be a vexed question in product liability cases (involving foreign designed, manufactured or tested products) it will normally be a relatively straightforward issue in cases of human rights abuse.

Whilst choice of law and conflicts of law questions may loom large as potential problems in a number of instances, in practice they do not normally give rise to insuperable difficulties.

In the Australian context, McGrath outlines the case for litigation against an Australian polluter in the forum of PNG, with subsequent enforcement of that foreign judgment in Australia. He argues that customary landowners seeking to vindicate their human rights 'who have established a causal link between a company polluting their environment situated in Australia and the damage they are suffering would have a strong case *in favour of* their award of damages not being defeated on public policy grounds.'[132]

Leaving aside considerations of private international law, as is the case with many other forms of civil litigation, claimants may face additional formidable economic and procedural barriers in seeking redress. A number of these barriers, including the issue of costs, are considered in research paper 11.

3.4 **Procedural mechanisms for obtaining redress in Australia**

[128] For example, in *Neilson v Projects Overseas Corporation of Victoria* [2005] HCA 54; 223 CLR 331.
[129] A convenient summary is to be found in Martin Davies et al., *Nygh's Conflicts of Laws in Australia* (8th ed, Lexis Nexis, 2010) 320.
[130] Martin Davies, 'Case Note: Neilson v Projects Overseas Corporation of Victoria, Renvoi and Presumptions about Foreign Law' [2006] *Melbourne University Law Review* 8.
[131] See e.g., the discussion by Anthony Gray, 'Before the High Court: Getting it Right: Where is the Place of the Wrong in a Multinational Torts Case' (2008) 30(3) *Sydney Law Review* 537.
[132] Chris McGrath, 'Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in PNG' (2020) 37 *Environmental & Planning Law Journal* 42, 64-5. There have recently been a number of instances in Australia where claims arising out of climate change have been pursued on human rights grounds. In May 2019, a formal complaint was lodged to the United Nations Human Rights Committee against the Australian Government by of a group of Torres Strait Islanders affected by climate change with the support of ClientEarth. There was also a challenge to the Galilee Coal Project in the Land Court in Queensland by a youth organisation, Youth Verdict, represented by the Environmental Defenders Office. Climate change litigation is discussed in more detail in research paper 9.

Where multiple parties are seeking redress representative action procedures in court rules or statutory class action mechanisms may be utilised. Australia has a very effective statutory class action regime available in the Federal Court and in the Supreme Courts of various states.

At a federal level, class actions were introduced when Part IVA of the *Federal Court of Australia Act 1976* (Cth) came into force in 1992. In subsequent years similar legislation has been enacted in Victoria, New South Wales, Queensland, Western Australia and Tasmania. Most recently, a legislative representative actions regime was introduced in the Tasmanian Supreme Court in 2019 and on 25 March 2023, Western Australia's class action regime came into force.[133]A comprehensive review of the operation of the regimes is published annually by law firm King & Wood Mallesons.[134]

The statutory regimes in each Australian jurisdiction are similar. The threshold criteria for the commencement of a class action are minimal. A class action may be commenced by one or more persons where there are (a) seven or more persons (b) with claims against the same person (c) arising out of the same similar or related facts (d) giving rise to a substantial common question of law or fact.

Unlike in the United States and Canada, there is no 'certification' requirement: a class action can be commenced if these minimal criteria are satisfied, without judicial approval being required. However, a defendant who objects to the matter proceeding on a class basis may contest the claim that the proceeding satisfies the class requirements. Also, the various statutes provide that the court may order that the case not proceed as a class action in a number of circumstances, including where the court considers that (a) the costs to the defendant of distributing money to class members would be excessive having regard to the amounts in issue, or (b) the class action will not provide an efficient and effective means of dealing with the claims of class members or (c) it is otherwise inappropriate to proceed by way of a class action.[135]

The class action regime is available irrespective of the causes of action (within the jurisdiction of the court) relied upon. However, in proceedings in the Federal Court at least one of the causes of action must arise under federal law.

It is an 'opt out regime' whereby any person that fits the definition of the class is automatically a class member unless they formally exclude themselves by 'opting out'.

In Australia there have been a number of class actions brought, against Australian based parties, arising out of alleged 'human rights' violations and other allegedly unlawful conduct by such bodies in Australia. These include actions arising out of: unlawful detention of young people[136]; systemic physical and sexual abuse perpetrated on children at a children's home[137]; allegations of physical mistreatment, psychological abuse, unjustified retention of pension payments, misappropriation of pension monies, failures to maintain and secure the premises so as to avoid the residents injuring themselves, and failures to adequately supervise and look after residents, especially those who were older or high care residents and those at risk of self-harm[138]; the rights of asylum seekers[139]; claims by Aboriginal and Torres Strait Islander people on Palm Island against the State of Queensland and the Commissioner of the Police Service of Queensland, alleging various breaches of s 9(1) of the *Racial Discrimination Act 1975* (Cth) arising out of the conduct of members of the Queensland

[133] *Civil Procedure (Representative Proceedings) Act 2022* (WA).
[134] Se the 2022-2023 Review of *Class Actions in Australia* at: file:///C:/Users/peter/Downloads/The-Review-Class-Actions-In-Australia-2022-2023.pdf.
[135] See, e.g., ss 33M and 33N of the *Federal Court of Australia Act 1976* (Cth).
[136] *Konneh v State of NSW (No 3)* [2013] NSWSC 1424.
[137] *Giles v Commonwealth of Australia* [2014] NSWSC 83.
[138] *McAlister v New South Wales (No 2)* [2017] FCA 93; *McAlister v New South Wales (No 3)* [2018] FCA 636.
[139] *Kamasaee v Commonwealth* [2017] VSC 537; *Kamasaee v Commonwealth* [2018] VSC 138.

Police Service in November 2004[140]; offshore detention[141]; wages 'stolen' from Aboriginal and Torres Strait Islanders[142]; the treatment of juveniles in detention centres in the Northern Territory.[143]

As noted above, the question of whether or not class action proceedings can be brought in Australia on behalf on non-resident class members has been the subject of controversy. Although turning on its idiosyncratic facts, the respondent (BHP Group Limited 'BHP') in a shareholder class action in the Federal Court of Australia[144] contended that the Australian federal class action regime does not apply to claims on behalf of persons who are not residents of Australia and who are not either a named party or have otherwise overtly invoked or submitted to the jurisdiction of the Court for the purpose of the proceedings.[145] It was contended that, as a matter of statutory construction, the class action legislation does not operate extraterritorially. It was also contended that the alleged contraventions of Australian law by the Australian corporate entity cannot have caused loss to persons outside Australia (who purchased shares in a different, albeit related company, on a foreign stock exchange).[146] BHP accepted that the Commonwealth Parliament has power to legislate extraterritorially with respect to the subject matter of class action proceedings but contends that it has not done so.[147]

The joint applicants in the proceeding opposed BHP's application, including on the basis that the class action legislation applies to bind both resident and non-resident group members in circumstances where the Court has jurisdiction over the proceeding derived from other statutory sources of jurisdiction.[148] Moshinsky J dismissed this interlocutory application in November 2020, concluding that Part IVA evinces an intention to encompass and bind all group members who have not opted out of the proceeding, irrespective of their place of residence.[149]

Moshinsky J noted:

- The jurisdiction of the court is not conferred by Part IVA, which merely establishes the powers and procedures by which the court exercises jurisdiction over the claims of seven or more people pursuant to s 33C, which it otherwise possesses in respect of a single claim (in the instant case, the provisions of the *Corporations Act* and ASIC Act and s 39B(1A)(c) of the *Judiciary Act*). The jurisdiction of the court is coextensive with the jurisdiction it otherwise possesses unless an express or necessarily implied restriction exists concerning the claims of foreign residents under Part IVA.
- There is no such express restriction in Part IVA.
- S 33ZB operates to bind foreign-resident group members '*from the perspective of Australian law*… in the sense that it will operate as a form of "statutory estoppel".[150] The enforcement of the judgment in a foreign jurisdiction raises separate questions which would depend upon the laws of the particular foreign jurisdiction concerning enforcement of judgments.
- Group members are not parties to proceedings and questions of personal jurisdiction over group members do not arise for consideration. Directions of the court which concern group

[140] *Wotton v State of Queensland (No 10)* [2018] FCA 915.
[141] *AUB19 v Commonwealth of Australia* [2019] FCA 1722.
[142] *Pearson v State of Queensland (No 2)* [2020] FCA 619.
[143] *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No 2)* [2020] FCA 215; *Jenkings v Northern Territory of Australia (No 2)* [2018] FCA 1706 (9 November 2018) (White J).
[144] *Impiombato v BHP Group Limited* (Federal Court of Australia, VID 649/2018, commenced 31 May 2018.
[145] BHP's submissions in support of its interlocutory application dated 12 May 2020 and 10 July 2020 [5]. The contentions are amplified in BHP's submissions in reply, dated 4 September 2020.
[146] BHP's submissions in support of its interlocutory application dated 12 May 2020 and 10 July 2020 [11].
[147] Ibid, [16].
[148] Joint applicants' outline of submissions in opposition to BHP's interlocutory application dated 12 May 2020, [2].
[149] *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720 [101]-[116].
[150] Ibid, [104].

members (such as the *manner in which* group members are to establish entitlement to part of the proceeds of the litigation; the *manner in which* disputes regarding that entitlement should be determined and the *manner in which* claims for payment should be made under s 33Z(4))[151] should not be conflated with the assertion of jurisdiction over those group members. The jurisdictional requirements of the court are the personal jurisdiction over the respondent and subject matter jurisdiction over the claims.

- No such restriction is evident from the language of s 33ZE concerning limitation periods, which relate to claims in the jurisdiction of the Federal Court and do not regulate claims in another jurisdiction based on that jurisdiction's laws.
- No such restriction exists in the notice requirements of s 33X: 'It cannot be said that any additional difficulty with giving notice to foreign-resident group members necessarily inheres in all representative proceedings; all the more so in shareholder class actions where the share register is the usual notice mechanism. Practical difficulties that might arise in particular cases are not a sufficient reason for construing the statute so as to exclude foreign-resident group members *in all cases*.'[152]
- The contentions of the respondent were not supported by the findings in *Lam*[153] or the legislative history or context of Part IVA. Moshinsky J commented that 'Indeed, it would run counter to the principal objectives of Pt IVA, as outlined above, if claims on behalf of non-residents (against a respondent amenable to the Court's jurisdiction) could not be included in a representative proceeding under the Part (with the result that each non-resident who wished to bring a claim would be required to commence a separate proceeding).'[154]

Finally, Moshinsky J noted that submissions asserting the customary application of the *lex fori* on issues of limitation periods under the common law was not necessarily supported by the intranational tort case cited.[155]

The Respondent's appeal to the Full Federal Court was dismissed.[156] In February 2022 the High Court granted special leave to appeal[157]but the appeal was unsuccessful.[158]

4. Commentary

The globalisation of capital, markets and sources of (cheaper) goods and services have served as a catalyst for corporate expansion and increased profit, on the positive side, but also an opportunity for exploitation and wrongdoing on an increasing scale.

Not only have corporations continued to expand in terms of their geographical reach, they continue to penetrate hitherto unknown and public sectors resulting in the privatisation of formerly public functions. As two authors have noted: 'corporations today have assumed central and controlling roles in the delivery of nearly all tele-communication services, vast portions of health care, municipal waste disposal and urban development and planning, infrastructure financing and even military warfare through extensive sub-contracting arrangements.'[159] In their view, the increasing

[151] Ibid, [109].
[152] Ibid, [111].
[153] *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83.
[154] *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720 [114].
[155] *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at [100] and [102].
[156] *BHP Group Limited v Impiombato* [2021] FCAFC 93**.**
[157] *BHP Group Limited v Impiombato and Anor* [2022] HCATrans 13.
[158] *BHP Group Limited v Impiombato* [2022] HCA 33; 96 ALJR 956; 405 ALR 402.
[159] Dionysia Katelouzou and Peer Zumbasen, 'The New Geographies of Corporate Law Production' (2020) Transnational Law Institute Think! Paper 12/2020 <https://ssrn.com/abstract=3575009> 4. Published in 42 (2020-2021) *University of Pennsylvania Journal of International Law* 51.

transnational human rights litigation against multinational corporations 'emphasizes the need to closely scrutinize the relations between corporations and local communities.'[160]

As MacDonald et al observe: 'In addition to positive impacts on livelihoods, ideas or technologies, business activities are also sometimes associated with significant human rights abuses – for example through land dispossession and forced resettlement, exploitation of workers, environmental damage or harm to peoples' health.'

Access to a remedy for these abuses is frequently impeded by failures of domestic legal systems, limited options in terms of redress mechanisms, significant structural imbalances of power between corporations and local communities, and distance of various types including – geographic, cultural, bureaucratic, political and economic – from decision-makers and established redress mechanisms.'[161]

Failures of corporate governance, flawed corporate cultures[162] and the limitations of governmental and regulatory oversight mean that in many instances the only effective remedy available for persons in 'local communities' who suffer and sustain loss from unlawful corporate conduct is through private litigation in a jurisdiction other than where the events occurred.

The developing jurisprudence in other jurisdictions, and domestic Australian law and procedure, provide some encouragement for those seeking a remedy in Australia for human rights violations outside Australia which implicate Australian companies or their associated entities.

However, there continue to be a range of barriers to accessing judicial remedies in Australia. These include those which have been categorised as follows:

- 'financial: prohibitive costs and lack of funding or other forms of support for legal action;
- procedural: jurisdiction of the courts, statutes of limitations, disclosure requirements and rules governing applicable law;
- practical: public awareness and access to information, claimant security and difficulties associated with evidence gathering; and
- legal: limitations on parent company legal liability due to doctrines of limited liability, separate legal personality of companies and operation of the corporate veil.'[163]

As Bradshaw notes, parent companies 'reap the financial rewards of risky activity but are, generally, insulated from the subsidiary's liability', often leaving victims without an effective remedy.[164]

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[160] Referring to Pooja Parma, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (Cambridge University Press, 2015); Christiana Ochoa, 'Generating Conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands' in Celine Tan & Julio Faundez (eds) *Natural Resources and Sustainable Development: International Economic Law Perspectives* (Edward Elgar, 2017); Lauren Coyle, 'Tender Is the Mine: Law, Shadow Rule, and the Public Gaze in Ghana' in Charlotte Walker-Said and John Kelly (eds) *Corporate Social Responsibility? Human Rights in The New Global Economy* (University of Chicago Press, 2015).

[161] Kate Macdonald et al, *Redress for Transnational Business-Related Human Rights Abuses in Australia: Non-Judicial Redress Mechanisms Report Series 3* (2016) 5.

[162] See Jennifer Hill, 'Legal Personhood and Liability for Flawed Corporate Cultures' (2020) European Corporate Governance Institute Working Paper Series in Law Working Paper N°431/2018 <http://ssrn.com/abstract=3309697>. In her analysis, Hill focuses on two specific types of liability for misconduct arising from flawed corporate cultures: (i) criminal liability of the corporation as a legal person and (ii) personal liability of directors and officers for breach of duty to their company.

[163] Australian Human Rights Commission, 'Joint Civil Society Statement: Implementing the UN Guiding Principles on Business and Human Rights in Australia' (August 2016) [7.4(a)] referred to (at note 14, p 26) by Kate Macdonald et al, *Redress for Transnational Business-Related Human Rights Abuses in Australia: Non-Judicial Redress Mechanisms Report Series 3* (2016).

[164] Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court' (2020) 32 JEL 139, 140.

Application of the principles such as those enunciated in *Vedanta* may improve the chances of victims being successful, at least at the threshold jurisdictional stage.[165] But Bradshaw emphasises that the 'court placed limits on jurisdiction, and its focus on a voluntary assumption of responsibility may be the undoing of post-Vedanta optimism.'[166]

In future, multi-national corporations may be less willing to set up and implement policies centrally, for fear of assuming responsibility.[167] It is clear that the 'emphasis on control and assumption of responsibility underscores the fact parent duty of care to third parties is an exceptional form of liability and that in many transnational tort cases, separate legal personality will continue to obstruct access to justice.'[168]

Even where conduct outside Australia is susceptible to legal avenues for redress before Australian courts, whether through a class action or otherwise, mere access to the courts does not usually facilitate a quick or inexpensive resolution. Problematic corporate conduct is often exacerbated by a corporate culture which all too often steadfastly refuses to accept either responsibility or liability and a legal culture which not infrequently results in the aggressive defence of claims.

The current class action litigation in the Federal Court of Australia on behalf of Indonesian seaweed farmers against an Australian company, and the litigation on behalf of Australian consumers against the German Volkswagen company arising out of the diesel emissions scandal, are illustrative of the forensic difficulties that those seeking a remedy may experience.[169]

The oil spill giving rise to the Montara class action occurred in August 2009. In 2010 the Commonwealth Government appointed a Commission of Inquiry. The Commission described the most likely causes of the blowout arose from 'systematic' errors of a 'more deep-seated kind'. The Commission concluded that the oil company's actions did not come within a 'bull's roar' of sensible oilfield practice.

The Commission said further, '[t]he Blowout was not a reflection of one unfortunate incident, or of bad luck,' instead '[the company's] systems and processes were so deficient and its key personnel so lacking in basic competence, that the Blowout can properly be said to have been an event waiting to occur.' It further noted that the company 'did not seek to properly inform itself as to the circumstances and the causes of the Blowout. The information that it provided to the regulators was consequently incomplete and apt to mislead.'[170]

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[165] Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 BHRJ 265.

[166] Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court' (2020) 32 JEL 139, 141.

[167] Marilyn Croser et al, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 BHRJ 130, citing: Gabrielle Holly, 'Zambian Farmers can Take Vedanta to Court over Water Pollution. What are the Legal Implications?' (*Business and Human Rights*, 10 April 2019) <https://www.business-humanrights.org/en/zambian-farmers-can-take-vedanta-to- court-over-water-pollution-what-are-the-legal-implications> and Robert McCorquodale, 'Vedanta v Lungowe Symposium: Duty of Care of Parent Companies' (*Opinio Juris*, 18 April 2019) <http://opiniojuris. org/2019/04/18/symposium-duty-of-care-of-parent-companies/>.

[168] Andrew Sanger, 'Parent company duty of care to third parties harmed by overseas subsidiaries' (2019) *Cambridge Law Journal* 486, 489.

[169] The author acted as lead counsel for the plaintiffs in two of the five class actions in the Federal Court of Australia against Volkswagen and from its inception until 2019 was one of the counsel acting for the lead applicant and group members for parts of the Montara oil spill class action in the Federal Court.

[170] In June 2010 the Montara Commission of Inquiry reported on an oil and gas leak in the Montara oil field. The leak took place in the Timor Sea, off the northern coast of Western Australia, between 21 August and 3 November 2009. The incident resulted from a wellhead accident on an offshore drilling platform owned by PTT Exploration and Production (PTTEP) Australasia. The inquiry was established under Part 9.10A of *the Offshore*

The Commission recommended that the then-Minister for Resources and Energy review the company's operating licence at the Montara Oilfield. The Minister declined to issue a 'show cause' notice. The company subsequently pleaded guilty to four breaches of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and was fined $510,000.

Class action proceedings were commenced in the Federal Court of Australia in July 2017 and are being pursued on behalf of 15,000 Indonesian seaweed farmers whose income and livelihood is alleged to have suffered substantially due to the loss of seaweed they were cultivating. The case proceeded to trial in late 2019. Although judgments in favour of the applicant and group members were delivered in 2021 an appeal was filed.

Throughout the proceeding the oil company contended, inter alia: that it did not owe a duty of care to the Indonesian seaweed farmers because it was not reasonably foreseeable that the oil would reach the parts of Indonesia in question; the oil did not reach the areas in question; and the loss of seaweed was not caused by the Montara oil spill. Although losing in respect of all of these issues the matter remained unresolved until settlement was reached following a mediation in 2022 which was judicially approved in February 2023.[171] Settlement payments were not distributed to eligible group members until late 2023 and are still being distributed at the time of writing in 2024, some 13 years after the oil spill occurred and during which time over 1,000 of the group members had died.

In similar vein, the class action proceedings against Johnson & Johnson and other companies on behalf of women who suffered personal injuries allegedly caused by defective pelvic mesh or tape products were commenced in 2012; resulted in a trial in the period July 2017 to February 2018, with judgments handed down in favour of the applicants in 2019[172] and 2020[173]; an appeal judgment dismissing the unsuccessful appeals of the respondents handed down on 5 March 2021[174] and a subsequent unsuccessful application for leave to appeal to the High Court. Following a tender process and the appointment of a referee in respect of settlement administration, orders were made for the implementation of the settlement in September 2023[175] whereby the successful tenderer estimated that it would take a further two years or more for settlement payments to be paid to eligible group members. Thus, as at the date of writing, it is likely to be up to 15 years after the proceedings were commenced before women other than the lead applicants whose cases went to trial will receive any compensation payments.

The events giving rise to the Australian class actions against the German Volkswagen company, and related companies, arose out of the admission by VW in September 2015 that 'dual function' software had been installed in various models of diesel vehicles in numerous countries, including Australia, whereby the vehicles were able to meet emissions limits during laboratory testing but operated considerably in excess of such emission limits during on road use. Five class actions seeking damages on behalf of 100,000 Australian consumers were commenced in Australia in late 2015. Two regulatory proceedings seeking civil penalties were commenced at later dates by the Australian Competition and Consumer Commission (ACCC).

Throughout the Australian proceedings, and in litigation in other jurisdictions, the defendants steadfastly denied, on a multiplicity of highly problematic grounds, that the vehicles were fitted with illegal 'defeat devices'. The dual mode software was said at one point to have been implemented by

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Petroleum and Greenhouse Gas Storage Act 2006 (Cth). It examined the likely cause of the incident and the effectiveness of regulations.

[171] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Approval)* [2023] FCA 143. See *also Lay v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Distribution)* [2023] FCA 242.

[172] *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905.

[173] *Gill v Ethicon Sàrl (No 6)* [2020] FCA 279.

[174] *Ethicon Sarl v Gill* [2021] FCAFC 29; 288 FCR 338.

[175] *Gill v Ethicon Sàrl (No 13)* [2023] FCA 1131.

a small number of 'rogue' engineers.[176] The forensic position maintained throughout the Australian litigation was that the VW Board and senior management were not aware of the use of the 'cheat' software and that the European companies did not carry on business within Australia and thus were not amenable to being sued under certain Australian statutory laws.

The class action proceedings were recently resolved whereby VW has agreed to pay compensation of around $A 120 million to around 40,000 class members who filed claims within the required time.[177] This was after almost five years of forensic warfare. The legal costs incurred in the class action litigation are in excess of $A 100 million. The civil penalty proceedings were concluded after VW agreed to pay an amount of $75 million. The presiding Federal Court Judge, Justice Foster, increased this to $A 125 million[178]. This was unsuccessfully appealed to the Full Federal Court. The High Court declined to grant special leave to appeal that decision.

These cases are illustrative of the excessive costs and delays endemic in much Australian class action litigation against large multinational companies. The litigation defence strategies exemplify what an American author has referred to as 'industrial strength denial'.[179]

Those seeking redress in Australian courts against multinational corporations implicated in human rights abuses outside Australia need to be mindful of these potential problems and devise creative forensic strategies to circumvent or overcome them.

[176] Comments by Michael Horn, Head of VW's United States operations, in response to questioning by the US House of Representatives Oversight and Investigations Panel: 'Top US VW Exec Blames "A Couple of Software Engineers" for Scandal', *Reuters Associated Press* (8 October 2015) cited by Jennifer Hill, 'Legal Personhood and Liability for Flawed Corporate Cultures' (2020) European Corporate Governance Institute Working Paper Series in Law Working Paper N°431/2018, 7, note 48 <http://ssrn.com/abstract=3309697>.

[177] *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637.

[178] *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 (20 December 2019) (Foster J).

[179] Albeit with reference to other large corporations 'defending the indefensible' from the slave trade to climate change: Barbara Freese, *Industrial-Strength Denial* (University of California Press, 2020).