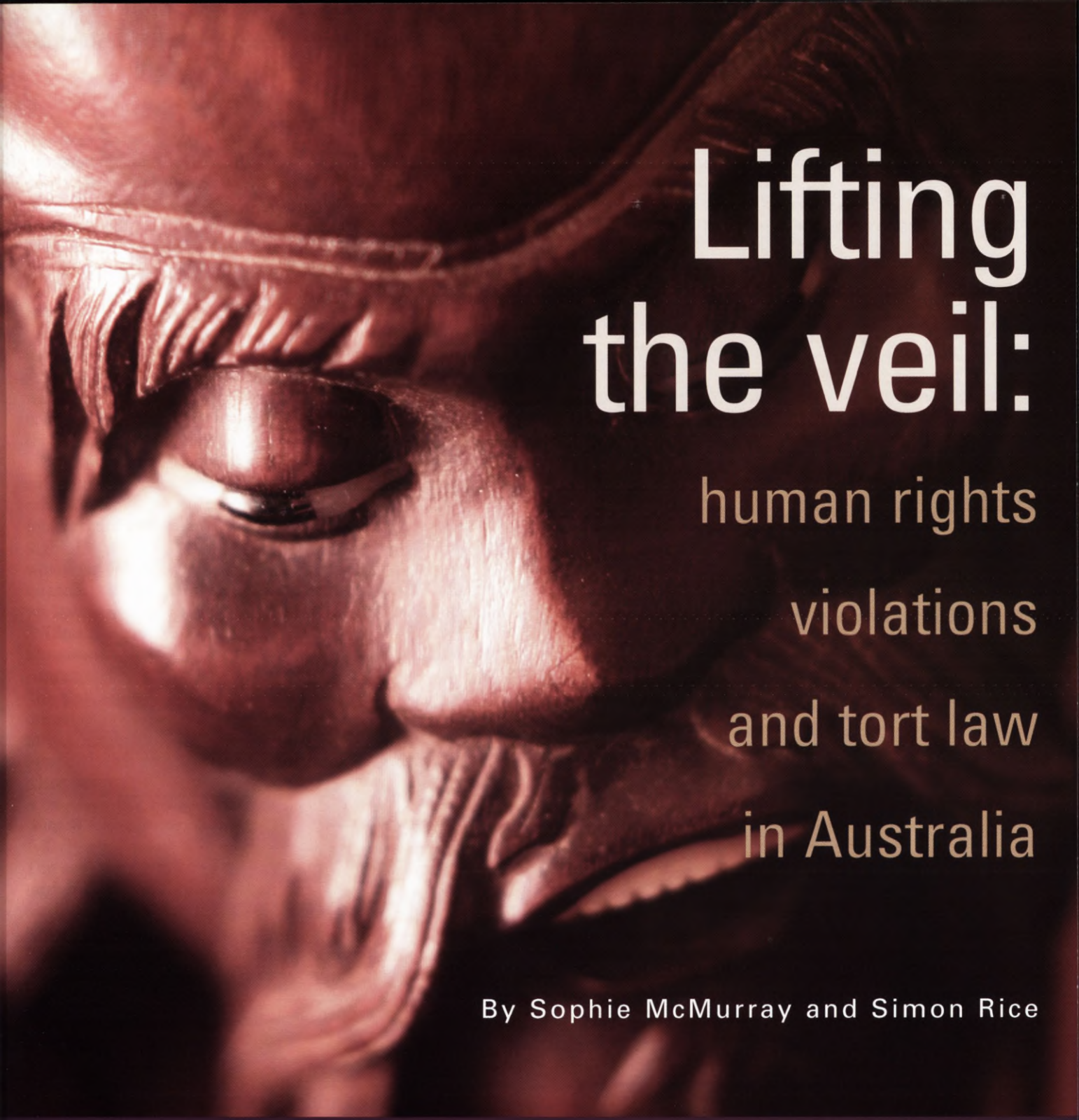

Lifting the veil: human rights violations and tort law in Australia

By Sophie McMurray and Simon Rice

If – and it is only an 'if' – an Australian corporation were to engage in conduct that violated human rights in another country, what cause of action might the victims have? Although no human rights legal action is available in Australia, how might the same conduct give rise to a common law claim in tort? And what are the procedural aspects of making and sustaining a common law claim against an Australian corporation for its conduct in another country? »

In the absence of justiciable human rights standards for Australian corporations in their overseas operations, tortious claims could be developed as an important tactic in protecting human rights, and in holding companies accountable to the 'good citizen' claims that they are increasingly making for themselves.

In this article we examine how Australian companies may be liable for human rights violations that occur in their overseas operations, particularly when their business is conducted through a separate legal entity such as a subsidiary.

The issue is particularly current. Anvil Mining Limited, one of an increasing number of Australian companies exploring business opportunities overseas, is under investigation for its involvement in the death of up to 100 people in the Democratic Republic of the Congo,[1] and so finds itself among a growing list of companies from around the world alleged to have violated human rights. Some of the more prominent cases involve the conduct of Shell in Nigeria, Nike in Vietnam, Unocal in Burma, ExxonMobil in Indonesia, and Coca-Cola in Colombia.

TORTS AND HUMAN RIGHTS

Human rights standards and liability in tort share a common purpose: to protect people from harm by deterring others from certain conduct. The conduct proscribed by international human rights standards is considerably wider in scope than that proscribed by conventional common law principles, but it is the area of overlap between the two that interests us here.

An equation between human rights violations and tortious liability would be familiar to those who are aware of the *Alien Torts Claims Act* in the US. By that Act, a human rights violation outside the jurisdiction can be fought through the legal process, and is pleaded as a tort when the conduct is a violation of customary international law: torture, for example. With no equivalent in Australia to the *Alien Torts Claims Act*, and with questions both about pleading a violation of customary international law in Australia, and about the exercise of extraterritorial jurisdiction, the US experience is of interest but little practical relevance to Australia.

Contemporary developments in the UK are similarly jurisdiction-specific, and of limited application to Australia. Rather than looking at how an action in tort might be a proxy for a human rights claim, the UK debate is about the effect that the *Human Rights Act* 1998 (UK) and associated European human rights law have, or should have, on the development of tort law.

In Australia, the best-known recent claim in tort against a corporation for its offshore conduct is the Ok Tedi claim against BHP. The wrongful conduct that was alleged – the discharge of ore-tailings, waste products, cyanide and heavy metals into rivers – was said to have caused harm to the lives and occupations of 30,000 people. In 2000, claims were made in nuisance and negligence in the Victorian Supreme Court in the cases of *Dagi* and *Gagarimabu v Broken Hill Proprietary Company Limited*.

The essential point is that the same claims could as readily have been cast as violations of internationally recognised human rights. By reference to the International Covenant on Economic Social and Cultural Rights, for example, the allegations were of violations of Articles 6 and 7: the rights to work, to a decent living, to safe and healthy working conditions, and to good health.

NON-JUSTICIABILITY OF HUMAN RIGHTS STANDARDS

However, these economic, social and cultural human rights are not justiciable in Australia, nor in most of the world. They are standards, but not enforceable. In the Ok Tedi litigation, a claim in tort was a realistic way of trying to hold a corporation accountable for what were in effect human rights violations.

An analysis of corporate conduct by reference to treaty-based human rights standards is problematic, as the treaties are not expressed in terms that readily apply to corporate conduct. They were drafted with an eye to the conduct of governments towards citizens of the state, not the conduct of corporate bodies across state borders. Efforts to refine their expression to more obviously address corporate conduct have culminated in the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

> How might an action in tort be a proxy for a human rights claim?

The UN Norms 'are meant to include all the key human rights laws and standards that could 'reasonably apply to businesses [except when a business's actions have an entirely local impact, a business has no connection with a transnational corporation, or the violation complained of is covered by the security standards in the Norms] . . . such as: the right to equality of opportunity and treatment; the right to security of persons; the rights of workers, including a safe and healthy work environment and the right to collective bargaining; respect for international, national, and local laws and the rule of law; a balanced approach to intellectual property rights and responsibilities; transparency and avoidance of corruption; consumer protection; environmental protection; and respect for economic, social, and cultural rights, as well as civil and political rights, indigenous rights, and the right to development.'[2]

The UN Norms are strongly evocative of the text and intent of the Australian Democrats' Corporate Code of Conduct Bill 2000 (Cth) and later draft Corporate Code of Conduct Bill 2004 (Cth). The Democrats' proposal was to impose reporting requirements and civil penalties, and to enable civil claims, for corporations' breaches of prescribed obligations in relation to

the environment, health and safety, employment, consumer protection and general human rights. The regime was to apply only to the overseas operations of Australian corporations.

The Parliamentary Joint Statutory Committee on Corporations and Securities reported on the first Bill in 2001. There were in fact three reports, reflecting the differing views of the Government, Opposition and Democrat members of the Committee. The Government view was that the extraterritorial operation of the Bill was paternalistic, and that the proposal had a 'very real potential for offending foreign nations'.[3]

If legislation such as the Corporate Code of Conduct Bill were in place, there would be no need to turn to the common law for ways of holding corporations accountable for human rights violations.

But before looking to the common law, why not simply enforce the UN Norms? Quite simply, because they are no more justiciable in Australia – or anywhere else – than is the International Covenant on Economic Social and Cultural Rights referred to above; in fact, less so. Even treaties to which Australia is a party are not enforceable unless legislated for domestically, and in any event international law has not yet attached legal obligations directly to corporations.

There is one important but limited area in which international human rights standards do apply to corporate conduct: genocide, crimes against humanity and war crimes. The *Criminal Code* 1995 (Cth) was recently amended to criminalise such conduct, and confers extraterritorial jurisdiction on Australian courts to adjudicate egregious human rights violations outside Australia. This stands as an exception to the problem of holding corporations accountable in Australia for offshore human rights violations.

A COMMON LAW SOLUTION

The common law offers two ways in which the UN Norms might be given substantive effect in Australia. The first is by recognising certain human rights as part of customary international law. This argument could not attach to the UN Norms themselves, as they would not be regarded as having achieved the status of customary international law, but it can be made for the treaty-based rights that the UN Norms reflect.

Australian courts can give common law effect to international law 'where it does not contradict express statute law or settled common law'.[4] It is no more than arguable, however, that the rights set out in the international treaties that are relevant to the UN Norms have the status of customary international law (but for crimes against humanity). Thus, before any of the treaty-based rights reflected in the UN Norms could be relied on in Australian courts as grounding a cause of action, an argument would have to be made and won first for their recognition in customary international law, and then for their reception into Australian common law.

ACTION IN TORT

An alternative path is to go straight to our domestic common law, and plead a wrong that is analogous to the violation of a human right. In short, a violation of the UN Norms could converge with liability in tort when deliberate corporate conduct causes foreseeable harm.

Many of the UN Norms can be equated with actions in tort. Where, for example, the UN Norms require corporations to provide a safe and healthy working environment, the common law would pursue actions in nuisance and negligence; torture and forced or compulsory labour would be addressed through actions such as false imprisonment and civil assault; protection of consumers can be achieved through claims in negligence and misleading or deceptive conduct; and protection of the environment invites nuisance, negligence and trespass claims.

Beyond these usual common law categories of wrongful conduct, corporate conduct in breach of the UN Norms invites a claim for, say, intentional infliction of emotional distress such as in *Wilkinson v Downton*, or an action on the case within the bounds set by the High Court in *Northern Territory of Australia v Mengel*. There might be an argument that the UN Norms set a standard of conduct for corporations in a manner analogous to the statutory duty of public authorities, where a breach of duty may be evidence of negligence and give rise to a separate cause of action.

PROCEDURAL BARRIERS

As a matter of procedure, liability in tort for what are, in effect, breaches of the UN Norms, can be pursued only when the >>

corporation can properly be the subject of common law proceedings in Australia. This is a simply stated issue that is in fact a series of hoops and hurdles, which we briefly describe.

When an alleged wrong occurs outside Australia, an Australian court will have jurisdiction in respect of a defendant that is incorporated in Australia or is incorporated outside Australia but is doing business in Australia through, say, a registered office or agent. A limitation on this is that the court will not have jurisdiction if the claim turns on establishing possessory or proprietary rights to or over foreign land: depending on the facts, this might preclude claims for trespass and nuisance, as was the case in the Ok Tedi litigation.

> Treaties were drafted with an eye to the conduct of governments towards citizens of the state, not the conduct of corporate bodies across state borders.

But it is not enough merely to establish jurisdiction. Australia may, nevertheless, be an inappropriate forum, depending on the degree of connection Australia has with the matter, and perhaps too on whether a fair trial would be available in what is otherwise a more appropriate forum.

The latter point may well arise in countries where Australian companies commonly operate. The Ok Tedi experience illustrates the point. The Papua New Guinea government was said to have been determined to prevent the plaintiffs having access to the local legal system, and the plaintiffs came to the Australian courts because local avenues had failed.[5]

The fact is that conduct leading to human rights violations is more readily carried out in countries with weak domestic controls over foreign corporate activity. The weaknesses may derive from a mix of under-developed regulatory and review processes, poorly trained officials, corruption, uncritical dependence on foreign investment and international political deference. These same phenomena make pursuing legal action unattractive in such countries, particularly if a more established, stable, independent and accountable legal system is available in Australia.

If Australia has jurisdiction *and* is the appropriate forum, the process will be that of the Australian court, but the law will be the law of the place of the wrongful conduct. This could be an obstacle, and is slightly circular. It means that although the claim might be made for a common law wrong (said to be) recognised in Australia, the court may decide that the applicable law does not recognise that wrong.

Under the law of many countries where Australian companies are active, limited or even no tortious liability may attach to the conduct, so it becomes important to decide where the wrongful conduct occurred. This is sometimes problematic, as action in one place can cause damage in another. Thus if a company's negligent conduct in Australia – a boardroom or operational decision, for example – causes damage in another country, it is arguable that the wrong occurred in Australia, and that Australian law is the applicable law.

The claim, if it can be made in Australia, would have to be made against the corporation that is present in Australia. But the usual method of transnational corporate conduct is to carry out offshore operations through a subsidiary: how can liability be sheeted home to the Australian entity? Can a holding company be liable for acts or omissions of subsidiaries that cause harm?

THE CORPORATE VEIL

The rule in the 19th *Salomon* case is that corporations are separate legal entities, with limited liability, and are not usually liable for the debts of their subsidiaries. Exceptionally, however, it is possible to pierce the corporate veil, and to attribute tortious liability to a holding company by establishing an agency relationship between it and its subsidiary. When it is possible is a question of fact, based on considerations set out below. But the law on this issue is uncertain and unpredictable, despite repeated calls for reform from the judiciary, the media, academics, advisory bodies and, most recently, the Commissioner for the James Hardie Inquiry.

A question echoing in courtrooms, parliaments and commissions of inquiry around the world is, 'what is the proper role of limited liability within a corporate group in relation to claims in respect of persons killed or physically injured as a result of wrongs committed by a company in the group?'. Those who allege human rights violations against a company that is undercapitalised, under-insured or, even more problematic, incorporated overseas, face not only the entrenched principles of limited liability, but the added difficulty that some of the affiliated companies are in different jurisdictions.

The only shareholder of a company operating offshore is often the holding company, so the parent company enjoys a double layer of immunity – limited liability within limited liability. The rule in *Salomon*, despite being laid down at a time when economic circumstances were vastly different, continues 'notwithstanding the proliferation of conglomerates, holding companies and subsidiaries'.[6] In the *James Hardie* case Rogers A-JA lamented that 'it may be that only the High Court and perhaps not even it can alleviate the consequences of the decision in *Salomon* so as to adapt the principle of limited liability to the economic realities of today'.[7]

Limiting liability is a traditional reason for incorporating a separate legal entity. So at the heart of the tension between the corporation and accountability for harm it causes is the very purpose of incorporation: to limit liability for claims for loss and injury. Not only is this liability limited, but the larger, public policy object of tort law – to deter harmful conduct – is avoided.

If incorporating a separate legal entity is done deliberately, and with specific intent to escape liability for a particular tort or class of torts, the cause of justice may require courts to disregard the corporate entity. But there are many cases where the courts have refused to lift the corporate veil, even though a subsidiary was incorporated for the very purpose of limiting the impact of tort claims.

Agency is the most common ground argued in support of lifting the corporate veil in Australia;[8] in a study of 55 Australian cases where it was argued that the court should do so, 34 were 'agency' cases.[9] Australian courts have been prepared to do this in 40% of torts cases, although the sample was too small to allow for any meaningful conclusions.[10]

Relevant to a court's decision whether to attribute tortious liability for the acts of a subsidiary to the parental decision-maker is the extent to which the parent exercises dominance and control over the subsidiary that increases the risk of injury to tort victims. For example, the failure of a subsidiary to comply with corporate formalities, such as the conduct of shareholders' and directors' meetings, might not increase the risk of injury, while decision-making that results in inadequate safety precautions or underinsurance might do so. Different from the US, even wholly owned subsidiaries are not necessarily agents of their parents; it is a question of fact to be determined in the particular case.

Other factors that may persuade a court to lift the corporate veil include intention, fraud, crime, and whether justice will prevail. These considerations might be particularly relevant in cases where tortious liability is attributed to a parent company for what are effectively human rights violations.

ACHIEVING JUSTICE

While a court may be ready to look through a parent company to its subsidiary when the strict application of *Salomon* would result in an injustice, 'it is far from true to say that an anomaly or injustice will always induce the court to depart from the strict rule'.[11] Even so, 'it does not seem a large step to treat the interests of those killed or injured by corporate torts as being at least as worthy of special treatment as the revenue'.[12]

The rhetoric is strong but, as we have outlined, there are substantial practical barriers to holding a corporation accountable for harm it causes through human rights violations in its offshore operations. Simply identifying the corporate culprit in the often complex circumstances of human rights violations in other countries is not enough, by itself, to prevent those abuses. ■

Notes: **1** Slater & Gordon, 'Federal Police Called to Investigate Perth Miner', media release, 7 June 2005. **2** *http://www1.umn.edu/humanrts/ataglance/faq.html* 4 July 2005. **3** Explanatory Statement to the Bill, Natasha Stott Despoja, July 2004. **4** Guilfoyle D, '*Nulyarimma v Thompson*: Is Genocide A Crime At Common Law In Australia?' [2001] *Fed L Rev* 1 at 22. **5** Prince, P, 'Bhopal, Bougainville and Ok Tedi: Why Australia's *forum non conveniens* Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 573 at 593. **6** *Briggs v James Hardie & Co Pty Ltd and others* (1989) 16 NSWLR 549 at 567. **7** *Ibid*, note 8 at 578. **8** I Ramsay and G P Stapledon 'Corporate Groups in Australia' (2001) 29(1) *ABLR* 7 at 7. **9** I M Ramsay 'Models of Corporate Regulation: The Mandatory/Enabling Debate' in R Grantham and C Rickett (eds), *Corporate Personality in the 20th Century* (Hard Publishing, Oxford, 1998) at 259-64. **10** I Ramsay and G P Stapledon 'Corporate Groups in Australia' (2001) 29(1) *ABLR* 7 at 16. **11** *Briggs v James Hardie*, note 8 at 580. **12** Jackson D, 'NSW Special Commission of Inquiry into Medical Research and Compensation Foundation Final Report', Annexure T, at *http://www.cabinet.nsw.gov.au/hardie/T.pdf*, 6 July 2005, at 424.

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EDITOR'S NOTE

The case of *Badraie v The Commonwealth of Australia & Ors* is now before the Supreme Court. The case will make interesting reading in the context of this article. The plaintiff in that case has sued the Department of Immigration and the former detention centre operators for psychiatric injuries suffered in immigration detention. He has argued that the defendants' conduct was negligent, that it amounted to a trespass to the person and an intentional infliction of emotional distress. This is pleaded against a background of findings by HREOC that the Department of Immigration breached the plaintiff's human rights during the period he was in immigration detention. It may be that *Badraie v The Commonwealth & Ors* will provide an example of the approach discussed in this article.

Delegates to the Lawyers Alliance 2004 National Conference will recall a paper by Rebecca Gilsenan on the Badraie case, *Claim by A Child Asylum Seeker*, arguing that international human rights standards could be used to inform the common law notion of what is 'reasonable'. Copies of the paper are available from the Lawyers Alliance by phone (02) 9258 7700 or email to *conferences@lawyersalliance.com.au*.