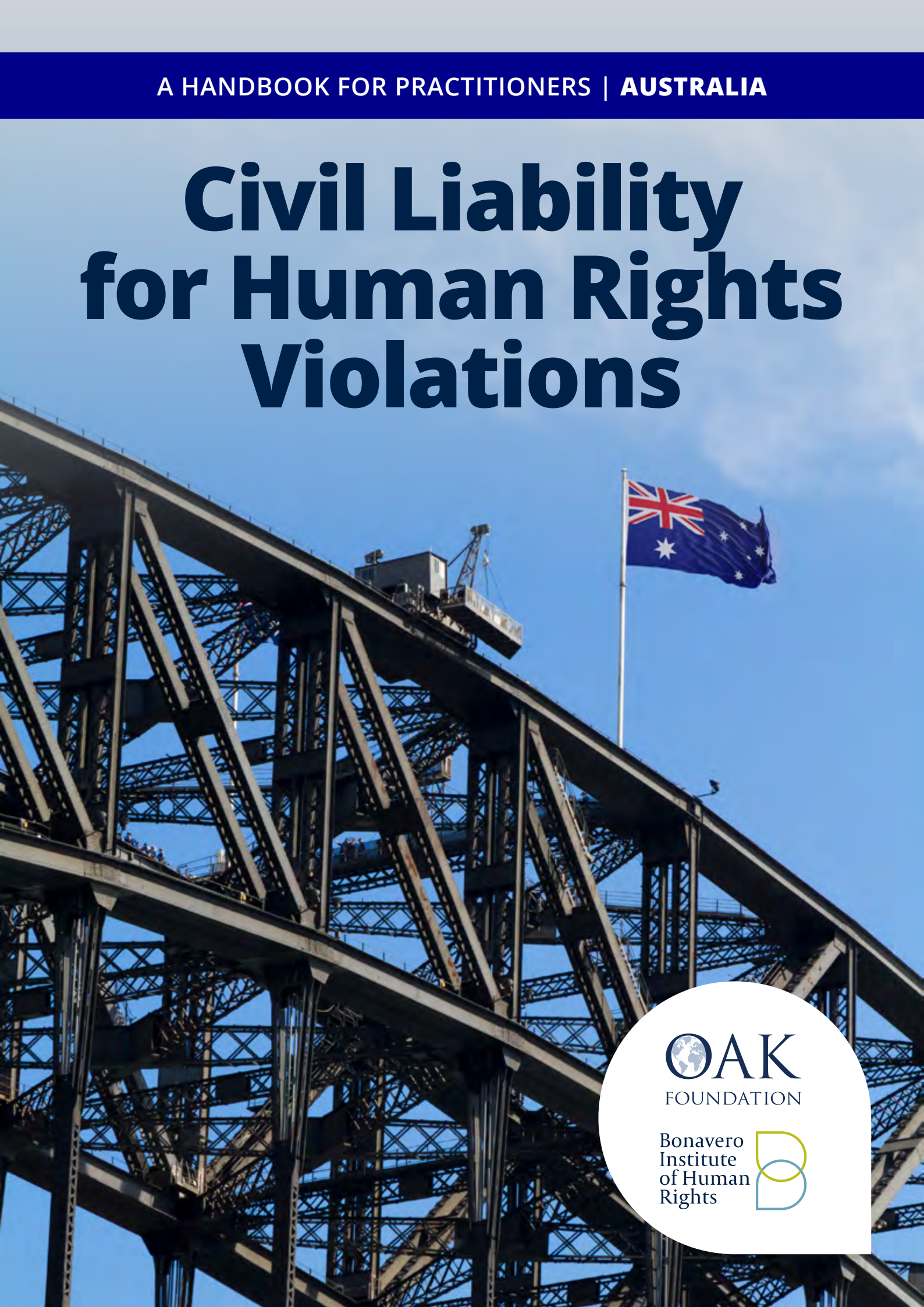
A HANDBOOK FOR PRACTITIONERS | **AUSTRALIA**

Civil Liability for Human Rights Violations



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INTERACTIVE

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AUSTRALIA

Australia is a rare example of a modern state without any express national human rights protection. As a result, non-human rights statutory protections and tort law offer a basis for litigants to pursue civil claims as a means of human rights protection, even if those claims rarely rely upon human rights language. Australian tort law originates in English common law, so its foundational principles are shared with other Commonwealth countries. Certain harms could also be remedied by engaging with statutory protections in addition, or in the alternative, to the common law tort protections. A few cases have contributed to the development of principles of parent-company direct liability for negligent harms caused by subsidiaries. However, Australian courts have exhibited a distinct conservatism in addressing these questions.

INDICES

9/167
Democracy Index 2021 Ranking

95/100
Freedom House 2022 Score

18/180
Transparency International Corruption Index 2021 Ranking

The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: Democracy Index by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); Freedom House (rates people's access to political rights and civil liberties with 100 being an optimal score); and Transparency International Corruption Index (ranks 180 countries by their perceived levels of public sector corruption).

Introduction

1. Australia was settled by the British in 1788, with Indigenous sovereignty never ceded and with the result that the common law of the UK became the law of Australia.[1] In a piecemeal fashion since federation in 1901, the Australian legal system has gained independence from the British and imperial legal systems, but the influence of those connections remains in important respects, including in the inheritance of the common law concerning torts.

2. As a **federation** (like the USA or Canada), each constituent body politic within Australia has its own statute (parliament-made) laws covering matters not covered by national laws. The country as a whole shares a common (judge-made) law.[2] While most laws on most topics will result in much the same legal outcome in the various parts of Australia, there are some stark differences, including in the regulation of government functionaries. For example (and relevantly to Case Scenario 1 discussed below), in the Northern Territory of Australia a civil proceeding against a police officer must be commenced 'within 2 months after the act or omission complained of'[3] whereas in Victoria, such a proceeding may be able to be commenced decades later.[4] The applicable limitations period may also vary between states depending on the age of the plaintiff.[5] In that light, the applicable law of civil remedies would differ (possibly markedly) depending on the part of Australia in respect of which the claim arises.

3. The **Australian Constitution offers both limited and relatively obscure rights protection.**[6] It contains no bill of rights and, despite some efforts to change this,[7] none is likely for the foreseeable future. Further, there is no national statutory protection of human rights or, at least, no enforceable legislative instrument that adopts the language and concepts of international human rights law. To the limited extent to which there is enforceable statutory human rights protection, it is only provided in the states of Victoria (the Charter of Human Rights and Responsibilities Act) and Queensland (the Human Rights Act), and in the Australian Capital Territory (also called the Human Rights Act).[8] Each of those jurisdictions have statutory human rights protection modelled on British and New Zealand human rights legislation. These statutory human rights protections do not create standalone causes of action[9] and none permit awards of compensation for human rights breaches.[10] For these reasons, human rights language and concepts from international law appear rarely in civil litigation in Australia.

4. All legal texts referred to below are available at no charge at either www.jade.io/ or www.austlii.edu.au.

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1 *Mabo [No 2]* [1992] HCA 23; 175 CLR 1 at 34.

2 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [135].

3 Police Administration Act 1978 (NT) s 162.

4 Limitation of Actions Act 1958 (Vic).

5 Limitations Act 2005 (Western Australia) s 31.

6 For example, property can only be taken by government on just terms (s 51xxxi), trial is by jury for some criminal offences (s 80), and there cannot be a religious test for qualification for any office or public trust (s 116).

7 Frank Brennan, *National Human Rights Consultation: Report* (Commonwealth of Australia, 2009).

8 Charter of Human Rights and Responsibilities Act 2006 (Vic) (CHRR); Human Rights Act 2019 (Qld); Human Rights Act 2004 (ACT). However, these can apply in a federal court if the proceeding is issued in the relevant state or territory; see *Hobson v Commonwealth of Australia* [2022] FCA 418 at [9].

9 Although, if a plaintiff claims relief not under the Charter, the relief can be given under that Charter; eg *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 at [184], [191]-[193], [542]-[556].

10 CHRR s 39(3) discussed at *Gebrehiwot v State of Victoria* [2020] VSCA 315; 287 A Crim R 226 at [132]-[133].

General Questions

1

Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

2

What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

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Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

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What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

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Can civil claims be brought against a foreign defendant and if so, what are the rules for that?

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Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

CS

Jump straight to the Case Scenarios by clicking here...

Q1 Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

5. Yes, such a claim could be brought through tort law and, by implication or express terms, under statute passed by a Parliament. Unless a statute provides otherwise,[11] such options are available in respect of public bodies also.[12]

6. The relevant misdeeds in most of the Case Scenarios would be classified in Australian law as intentional torts. They would fall into three **sub-categories of intentional tort – battery, assault and false imprisonment**. As intentional torts, they are actionable per se – that is, without need to prove any actual personal injury.[13]

7. The tort of **battery** will be made out if the plaintiff proves, on the balance of probabilities,[14] that a voluntary and positive act was done intending to cause contact with that plaintiff where contact occurs. There is no requirement that the person knows that the contact is unlawful.[15] There is no need to prove that the defendant intended harm nor that the plaintiff suffered any harm, although those will be matters relevant to the quantification of damages.[16] A defence of consent or necessity is available in such a claim.[17]

8. The tort of **assault** will be proved, further or alternatively, if there is any direct or intentional threat made to the plaintiff which gives rise to a fear of imminent contact.[18] The contact can be either by the defendant themselves or someone in that person's control.[19] Such a threat is a common precursor to battery.

9. The tort of **false imprisonment** requires the deprivation of liberty without lawful authority or in excess of lawful authority.[20] Unlike the other torts, the burden of proof in a false imprisonment claim is on the detainer.[21] So, in Case Scenario 1, the police would have to rebut the presumption of Australian law that detention is unlawful[22] by 'clear and cogent' evidence.[23] Whether the detention is lawful will depend on the specific statutory powers given to the detainer.

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11 *Bropho v Western Australia* [1990] HCA 24; 171 CLR 1.

12 Constitution of the Commonwealth of Australia, s 75(iii).

13 *Lewis v Australian Capital Territory* [2020] HCA 26 at [45], [72], [134].

14 Evidence Act 1995 (Cth) s 140.

15 *Croucher v Cachia* (2016) 95 NSWLR 117.

16 *Carter v Walker* [2010] VSCA 340; 32 VR 1 at [215]-[216].

17 *State of NSW v McMaster* [2015] NSWCA 228.

18 *State of NSW v Ibbett* (2005) 65 NSWLR 168.

19 *ibid*.

20 *Re Yates; Ex parte Walsh and Johnson* [1925] HCA 53; 37 CLR 36, 75; *Commonwealth v Fernando* [2012] FCAFC 18; 200 FCR 1, [89]; *Myer Stores Ltd v Soo* [1991] 2 VR 597.

21 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223 at [282]; *Lewis v Australian Capital Territory* [2020] HCA 26 at [24]; *Trobridge v Hardy* [1955] HCA 68; 94 CLR 147 at 152; re-stated at *Ruddock v Taylor* [2005] HCA 48; 222 CLR 612 at [140]; see also *Re Bolton; Ex parte Beane* [1987] HCA 12; 162 CLR 514 at 528-529, *R v Carter; Ex parte Kisch* [1934] HCA 50; 52 CLR 221 at 227.

22 *Ruddock v Vadarlis* [2001] FCA 1329 at [73]; see also *Tervonen v Finland* [2008] FCA 99 at [8]; *Hicks v Ruddock* [2007] FCA 299 at [53]; *Sadler & State of Victoria v Madigan* [1998] VSCA 53 at [33].

23 *McHugh* (n 21) [57], see also [53]-[60], [254]-[283].

10. The **tort of misfeasance in public office** is an intentional tort that provides a means to access damages. Despite it being a tort requiring a particular intention, it is not actionable per se: loss or damage must be proved. The tort can be made out if a public officer commits a criminal offence, including as an accessory, or where the perpetrator aided or abetted the commission of criminal offences. An example of such a claim involved a person who sued Australian government officials who knew of and took a minor role in his rendition overseas in the so-called War on Terror during which he was allegedly tortured.[24]

11. The general law of **negligence** could also be utilised to access damages including where the perpetrator has not engaged in one of the above intentional torts. That body of law adopts broadly the same thresholds as the British common law and the elements for this are set out below at [18].

12. A claim in **nuisance** might also be available (as in Case Scenario 2). To prove that claim, the plaintiff would have to satisfy the court that the perpetrator had interfered, for example, with their use and enjoyment of land in a way that was substantial and unreasonable. It would cover property damage, personal injury and non-physical damage to the use and enjoyment of the land. This final form of damage is already recognised to cover pollution.[25] Negligence is not needed to make out such a claim and pure economic loss can be recovered for nuisance.[26]

13. Any of the above tort claims will be subject to **limitations periods**. These are, most commonly, either three or six years.[27] The longer period is ordinarily for intentional torts, such as battery, assault and false imprisonment. Such periods are commonly extendable if, for example, the victim was a child or was under a disability.[28]

14. Some of the same harms could also be remedied by engaging with statutory protections in addition, or in the alternative, to the common law protections just explored:

    i. In a workplace setting, the primary mechanism for protecting against harmful or unfair labour conditions is through the federal Fair Work Act 2009 (Cth). It creates a range of workplace offences and most of them can result in financial awards. Unusually for Australian law, as discussed below at [72], the victim of unfair labour conditions could then personally receive the financial benefit of that civil penalty personally.

    ii. In respect of environmental harms, there are a range of statutory protections offered in both federal and state legislation. For example, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) prohibits action in coal seam gas or large coal mining development that is likely to have a significant impact on water resources.[29] For the reasons explored at [58]-[61] below, these prohibitions may give a civil remedy for persons impacted by a breach of that protection, but are not likely to do so.

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24 *Habib v Commonwealth of Australia* [2010] FCAFC 12; 183 FCR 62 at [118].

25 *Marsh v Baxter* [2015] WASCA 169; 49 WAR 1 at [244]-[245], [252].

26 *Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379 at [175]-[182].

27 Limitation of Actions Act 1974 (Qld), ss 10 and 11.

28 *ibid* ss 29 and 31.

29 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 24D. Relevantly to Case Scenario 2, this prohibition does not cover oil extraction.

15. There is also scope to seek **public law remedies** in respect of the three Case Scenarios, including, for example, seeking release from detention by way of issue of the writ of *habeas corpus,*[30] or seeking judicial review of a decision of a government entity. However, because public law remedies are not means by which the perpetrator can be held civilly liable, these remedies are not discussed further below.

16. In some factual situations other civil claims may be available in Australia under, for example, unjust enrichment, or as a consumer claim based on misleading and deceptive conduct. These are not discussed below because of word limitations and since they are less likely to be engaged as routes to a remedy in the Case Scenarios.

Q2 What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

17. In order to make out a claim under the law of torts, the person bringing the claim (the plaintiff) would be required to establish that an entity against whom a civil remedy is sought (the defendant) fulfilled each element of the cause of action brought against that defendant.

18. Where the cause of action is negligence, as in most common law countries, the plaintiff will be required to establish that the defendant owed a **duty of care and acted in breach** of the scope of that duty in a way that caused injury.[31] The test to be applied by the courts to determine causation will be an assessment based on all the facts on a common-sense basis. A 'but-for' test is instructive in determining that answer ('But for the existence of X, would Y have occurred?').[32] As to whether there is a duty of care, the court will consider all factors to establish whether there was a relationship of sufficient connection to provide a basis for liability to arise.[33] That assessment will be done by reference to the salient features of the relationship to determine whether it is appropriate to impute a legal duty.[34]

19. As noted above, the **tort of assault** requires proof of a threat that is both direct and intentional, and that is one that gives rise to a reasonable apprehension of imminent contact. By contrast, the elements of the **tort of battery** require actual contact, rather than a threat of contact.

20. The **burden of proof** for all elements of each of the above torts will fall on the plaintiff and will have to be established on the balance of probabilities.[35] The primary relevant exception to this rule[36] is in relation to any claim of **false imprisonment**.[37] The elements of a tortious claim for false imprisonment are

30 As to it generally and it being a public law remedy, see *McHugh* (n 21) at [247].

31 As an example in a human rights context, see *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. The general common law principles are sometimes modified by statute in ways of no relevance for present purposes; Civil Liability Act 2002 (WA); Civil Liability Act 2002 (NSW); Civil Liability Act 2002 (Tas) or Civil Liability Act 2003 (Qld).

32 *March v Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506, especially per Mason CJ.

33 *Stuart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215, dealing with an unsuccessful claim against police for failing to intervene before a person committed suicide.

34 *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649 at [101]-[103].

35 EA s 140 (n 14).

36 Other examples to consider of unusual onuses in Australian law include Sex Discrimination Act 1984 (Cth) (SDA) s 7C; Disability Discrimination Act 1992 (Cth) ss 6(4), 30; Age Discrimination Act 2004 (Cth) s 15.

37 *McHugh* (n 21) at [282]; *Lewis v Australian Capital Territory* [2020] HCA 26 at [24]; *Trobridge* (n 21) at 152; re-stated at *Ruddock* (n 22) at [140]; see also *Ex parte Beane* (n 21) at 528-529, *Ex parte Kisch* (n 21) at 227.

simpler – the detained person must prove the fact of their imprisonment and then, responsively, demonstrate why any claimed lawful authority on the part of the defendant was absent.

21. The elements of any statutory obligation giving rise to a civil remedy are determined by the terms of that statute. A statutory claim and a common law claim can be (and commonly are) pursued concurrently where the facts support both (unless the statute bars concurrent pursuit of a common law claim).

SPOTLIGHT: FAIR WORK ACT 2009

To give one example of a statutory claim relevant to Case Scenario 3, the Fair Work Act is the principal legislative tool for protection of employment conditions in Australia. While tortious proceedings may also be available in such a situation, this legislation is tailored to the employment context and would be at least as effective in many contexts. As an example of how legislation might prescribe the elements of the civil remedy scheme, an employer can be found to have acted in 'serious contravention' of worker protections under that legislation if the court is satisfied that their act was 'part of a systematic pattern of conduct'. In turn, that will require consideration of the number and the frequency of the breaches.[38]

Q3 Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

22. Yes, a non-primary perpetrator could be liable principally through the doctrine of vicarious liability and also through accessorial liability.

23. A party may be liable for the commission of a tort by another if they can be shown to have **overborn** that other.[39] For example, they might be found to have overborn the primary actor if they caused or procured, aided or abetted the relevant misconduct, or if that misconduct would not have occurred but for that party's intervention.[40]

24. Similarly, **vicarious liability** extends to those hierarchically different from the primary actor: for example, an employer can be vicariously liable for the actions of an employee where that employee was pursuing the employer's interests or acting within the scope of their contract of employment.[41] This means that a person or entity will be civilly liable even if they took no direct action against the victim themselves, but they are responsible at law for those actions. That liability will be established by the common law[42] or can be prescribed by statute.[43]

38 Fair Work Act 2009 (Cth) s 557A.

39 *Porter v OAMPS Ltd* [2005] FCA 232; 215 ALR 327 at [42].

40 *Coles Myer Ltd v Webster* [2009] NSWCA 299 at [106], [108], [113]-[119].

41 *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106; 71 NSWLR 354 at [21]-[29]; see also *Burton v Babb* [2020] NSWCA 331 at [75] concerning indemnification by the employee.

42 *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511.

43 For example, in respect of police officers see Law Reform (Vicarious Liability) Act 1983 (NSW) s 9; or, as a further example in a different context, a landlord is said to be vicariously liable for the actions of the landlord's agent and a tenant vicariously liable for damage to premises by a visitor, see Residential Tenancies Act 1999 (NT) ss 9 and 12.

25. **Accessorial liability** is another means by which a secondary actor might be held liable for misconduct performed by another. By way of relevant example and returning to the employment context, a person is liable for a civil penalty (which can be awarded to the employee) if that person was 'involved in a contravention' of a statutory protection for that employee.[44] The concept of 'involvement' is broad and it includes inducing, aiding, abetting, counselling or procuring the contravention.[45] An example of such a claim involved severe underpayment of foreign workers in regional motels for which the motel managers themselves were found personally liable in addition to the motel corporate entity.[46]

26. It is also possible for a party to be civilly liable where that party has legal responsibility **jointly, severally, or jointly and severally**, with the primary perpetrator. A party will be jointly liable if it is liable equally to the full extent as another party. It will be severally liable if it is only partly liable with another party. And it will be jointly and severally liable if it can be pursued for either part or the whole amount. The extent and nature of liability will be determined by the legal relations between the perpetrators. This might be set out in a written agreement between those actors, or it might be determined by reference to the general law of tort or a statute governing proportionate liability.[47] Practically, if there are two or more parties who are jointly and severally liable, the case can be brought against any or any combination of them. Where one party has more assets than another or one is within the jurisdiction and the other is not, this might determine the party against whom the claim for civil remedies is brought.

Q4 When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or independent contractor in a supply chain?

27. The default position under Australian law is that separate legal personality divorces liability of that entity from others.[48] However, as in the UK, a parent company will generally be liable for acts of a subsidiary or independent contractor where it is found that the parent company itself owed a duty of care (see [18] above).[49] This was the case concept pursued to settlement in two notable cases concerning detention of immigrants, one on a remote Australian island[50] and the other on a remote, foreign island at the behest of Australia.[51]

28. In addition, a parent company could be held liable if the corporate arrangement is a sham or a device to avoid liability. In such circumstances, courts have been willing to '**pierce the corporate veil**' – that is, to look behind the legal entities to see who is truly behind them and whether the legal entities were created or maintained solely or predominantly to protect that otherwise-hidden entity.[52]

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44 Fair Work Act s 550. For a like example in a corporate law context, see Corporations Act 2001 (Cth) s 598.

45 Discussed in *Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134.

46 *Fair Work Ombudsman v NSW Motel Management Services Pty Ltd & Ors (No 2)* [2019] FCCA 2638.

47 Wrongs Act 1958 (Vic) ss 24AA, 24AB, Part 4AA.

48 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 at [577].

49 *CSR Ltd v Wren* (1997) 44 NSWLR 463; this possibility was left open in a dispute over pleadings, see *Dagi and Others v The Broken Hill Proprietary Company Ltd and Another (No 2)* [1997] 1 VR 428. Please also refer to [48]-[52] in the English report. To access all country reports, please **click here**.

50 *AS v Minister for Immigration and Ors* [2017] VSC 476; 54 VR 500; [2017] VSC 300; [2017] VSC 162; [2017] VSC 137; [2016] VSC 774; [2016] VSC 351; [2015] VSC 642; [2014] VSC 593; [2014] VSC 486.

51 *Kamasaee v Commonwealth of Australia and Ors* [2018] VSC 138; [2017] VSC 537; [2017] VSC 272; [2017] VSC 171; [2017] VSC 167; [2016] VSC 770; [2016] VSC 605; [2016] VSC 595; [2016] VSC 492; [2016] VSC 438; [2016] VSC 404; [2015] VSC 148.

52 *Australian Securities and Investments Commission v Caddick* [2021] FCA 1443 at [275]-[279].

SPOTLIGHT: MODERN SLAVERY ACT 2018

Although it has no civil remedy consequence, the Modern Slavery Act 2018 (Cth) requires commercially significant entities based or operating in Australia to report annually on the risks of modern slavery in their operations and supply chains, and on actions taken to address those risks. The resulting statements are required to be published free and online. The fact of a failure to provide such a statement can be published by the responsible Minister, but there is no other penalty under this regime.

Q5 What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?

29. Broadly, there are two classes of remedy that would be available to such victims – private law remedies in damages or compensation (ie money) and public law remedies (eg injunctions or means of rectification, without money).

30. The **private law remedies of damages or compensation** would result in an award of money to the victim to return the victim as close as possible to the position they would have been in had the misconduct not occurred (being compensatory damages).[53] If the conduct is sufficiently reprehensible, there may also be an award of damages to reflect the gravity of the misconduct of the perpetrator (being exemplary damages). This requires analysis of the counterfactual – that is, consideration of what would have been the situation had the breach of law not occurred. For example, if someone was detained by reason that the law was not complied with, but had it been complied with the person would still have been detained, the damages will be merely nominal.[54] If they would have otherwise been at liberty, damages could be substantial.[55]

31. **Exemplary and aggravated damages** could be awarded if the act is done in deliberate disregard for the person's rights.[56] Abuses of the kind dealt with in the Case Scenarios would likely engage such damages awards.

32. **Public law remedies** relevantly include a declaration as to right.[57] A victim might be able to obtain this remedy to vindicate their rights deprivation. A declaration 'will go some way to redressing the hurt felt by those injured. It will serve to restore the esteem and social standing which has been lost as a consequence of the contravention.'[58]

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53 For example, see *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27.

54 *Lewis* (n 37).

55 *Majinkdi v The Northern Territory of Australia, Miller and Fitzell* [2012] NTSC 25; *White v South Australia* [2010] SASC 95. In both cases, over AUD$150,000 (approximately USD$115,000 was awarded, adjusted for inflation to 2021, and calculated as a daily amount.

56 *Lewis* (n 37) at [110], [117], [161].

57 As to the breadth and flexibility of the remedy, see *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* [1972] HCA 19; 126 CLR 297 at [12].

58 *Eatock v Bolt* [2011] FCA 1103; 197 FCR 261 at [466]; *David Nolan v Executive Director, Land Management Policy, Department of Environment and Primary Industries* [2015] VSCA 301 at [72].

33. Other public law remedies might also be available to undo decisions of public authorities which have ongoing harmful effects. By way of example in the environmental harm context, if a public body decided not to limit or restrain polluting conduct that it regulates, that decision could be challenged if the public body did not consider the 'potential impacts' on climate change of their decision.[59] If a court were to declare that that provision had not been complied with, it would have the same practical effect[60] as if the decision had been quashed (by the remedy known as *certiorari*).[61] The public body would then have to remake the decision having regard to the climate change effects of the decision.

34. If there was evidence that the actions of the defendants were going to be repeated or were ongoing, an **injunction** might be issued preventing them from committing unlawful conduct again. That is, where a tort is anticipated (ie *quia timet*) or ongoing, relief in the nature of an injunction compelling certain action may be available.[62] Naturally, injunctive relief can also be obtained where the harm is ongoing.

35. The writ of *habeas corpus* is also available as a remedy to restore a person's liberty where there is no lawful basis for it to be deprived.[63]

Q6 What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

36. Australia is a rare example of a modern state **without any express national human rights protection**: the Constitution is almost silent on any form of human rights protection[64] and there is no national legislative means of human rights protection per se.[65] Two points follow from this:

    i. Civil claims are the only effective means of substantial human rights protection which can be both pursued by an individual and determined by a court.

    ii. In the absence of goodwill by the perpetrator after a human rights violation,[66] remedies for human rights breaches can only be achieved by use of civil claims based on substantive human rights concerns, even if those claims rarely rely upon human rights language.

59 Climate Change Act 2017 (Vic) s 17.

60 *Davies v Minister for Urban Development and Planning* [2011] SASC 87; 109 SASR 518 at [24].

61 *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; 252 CLR 480 at [25].

62 *ELF18 v Minister for Home Affairs* [2018] FCA 1368; *Plaintiff S99/2016* (n 31).

63 *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423 at [45]-[69]; *Hobson v Commonwealth of Australia* [2022] FCA 418.

64 There are very limited rights implied in the Constitution, including the right to freedom of political communication discussed at *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18; see also discussion above at [3].

65 Discussed in *Dietrich v the Queen* [1992] HCA 57; 177 CLR 292, especially at [18].

66 For example, by way of *ex gratia* payment or compliance with a recommendation by the Australian Human Rights Commission; Australian Human Rights Commission Act 1986 (Cth) (AHRC) s 29(2)(c).

SPOTLIGHT: HUMAN RIGHTS STATUTORY PROTECTION

While there is no national human rights protection, as mentioned in [36] above, there is express human rights statutory protection in three jurisdictions of Australia at present – the Australian Capital Territory, Victoria, and Queensland. In those jurisdictions – and only in those jurisdictions – international human rights jurisprudence may have a direct role in how a court would determine the issues before it.[67] This is especially so where those scenarios relate to public authorities.[68] If the scenarios were litigated in Australia where the laws of those three jurisdictions did not apply, human rights law would have a limited, if any, role in determining the outcome of each case.[69] It should be noted too that compensation for breaches of human rights under the state instruments of the Australian Capital Territory, Victoria and Queensland is expressly prohibited. Relief beneficial to the person bringing the claim is only available to the extent that that relief could otherwise be claimed in a public law proceeding, as discussed above at [3].

37. Civil claims concerning human rights in Australia have the advantage of being able to be **deployed quickly**. In cases where a person's life or health is at risk, it is not unusual for an Australian court to convene out of hours, including over the weekend, to determine whether interlocutory (that is, temporary) relief should be granted.[70] This is especially so when the relief would 'preserve the subject matter' (ie the human) of the case.[71]

38. A further advantage of civil claims is to **shed light** on what has occurred. Court proceedings provide a means to compel perpetrators to divulge their internal workings. In particular, discovery can be ordered by a court including to redress the 'information asymmetry' that is likely between victim and perpetrator.[72] Subpoenas to compel the provision of material from non-parties to the proceeding can also be sought if a civil proceeding is ongoing.[73] These mechanisms serve the interests of transparency and openness which are at the heart of litigation in Australia. Those ideals are similarly reflected in court hearings being open to the public[74] on all but rare and exceptional occasions.[75]

39. The **disadvantages** of bringing a civil claim are, primarily, two-fold:

    i. A substantial risk of crippling **adverse costs orders** if the proceeding is unsuccessful – the default position is that the party that loses the case pays the legal costs of the party that wins the case. Usually that adverse costs order will be for most, but not all, of the costs incurred by the successful party, but in

67 CHRR s 32(2).

68 *ibid* s 4 and 38.

69 Subject to the so-called principle of legality, by which all legislation is read on a presumption that it has been passed with the intention that Parliament was protecting fundamental rights; see *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41; 256 CLR 569 at [11] and *Oates v Attorney-General (Cth)* [2003] HCA 21; 214 CLR 496 at [45].

70 *FJG18 v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1585, in which orders were made at 1 am on a Sunday morning.

71 *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; 210 FCR 505 at [279]-[280]; *Tait v R* [1962] HCA 57; 108 CLR 620.

72 *O'Donnell v Commonwealth of Australia* [2021] FCA 1223 at [108]-[109].

73 Federal Court Rules 2011 (Cth) Chapter 2 Part 24.

74 Open Courts Act 2013 (Vic) s 4.

75 For a dramatic example involving claims of state secrecy arising from Australia bugging rooms used by East Timorese officials in treaty negotiations with Australia, see *R v Collaery (No 11)* [2022] ACTSC 40.

some circumstances it will be the 'full costs' of that party.[76] In robust or lengthy civil litigation, it would not be unusual for a costs order to be the equivalent of ten years of an average Australian's income. While Australian courts have a power to cap the costs risk early in a proceeding[77] and, in other circumstances, have shown a willingness to make no order as to costs when the failed case is a 'test case'[78] or when it concerns unlawful deprivation of liberty,[79] this is unlikely when a person is seeking a private benefit such as damages or compensation.[80]

ii. The final resolution of such claims will ordinarily **take years** if litigated to judgment. This is especially so if the case is brought as a class action.[81]

SPOTLIGHT: CASE STUDIES

Three cases illustrate this point, with each ultimately settled out of court after years of preliminary determinations. These cases concerned a challenge to:

i. the lawfulness of Australia sending asylum seekers to Papua New Guinea to be detained there;[82]

ii. the conditions of detention of asylum seekers on a remote Australian island, Christmas Island, to which corporate service providers were joined;[83] and

iii. the response of police to the community reaction of First Nations (also known as Aboriginal) people to a death in police custody on Palm Island.[84]

Q7 Can civil claims be brought against a foreign defendant and if so, what are the rules for that?

40. Yes, a claim can be brought in Australia against a foreign defendant, or for acts done by or on behalf of Australia outside Australia. Such a claim will only succeed if there is a sufficient nexus between the acts outside Australia and legal obligations within Australia.[85]

41. Examples of such proceedings are summarised at [10] and [39]. A further raft of examples were the 50-odd cases[86] brought successfully by those unable to access

76 For a rare, codified example, see Police Administration Act 1978 (NT) s 162(4).

77 *Environment East Gippsland Inc. v VicForests (No 3)* [2022] VSC 141.

78 *Minister for Immigration and Multicultural and Indigenous Affairs v X* [2005] FCAFC 209; 146 FCR 408 at [15].

79 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v MB* [2021] FCAFC 194 and *DBE17 v Commonwealth of Australia (No 2)* [2018] FCA 1793 at [21]–[24]; *J By His Litigation Guardian Maxwell Bernard Vardanega v Australian Capital Territory [No 2]* [2011] ACTSC 36.

80 *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; see also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL (costs)* [2021] FCAFC 75 at [14]-[15].

81 By way of example, the false imprisonment claim discussed at *A S v Minister for Immigration & Ors (Ruling No 7)* [2017] VSC 137 was resolved by consent four years later, after the ruling cited at *DBE17 (by his litigation guardian Marie Theresa Arthur) v Commonwealth of Australia (No 2)* [2021] FCA 556.

82 *Kamasaee* (n 51).

83 *AS* (n 50).

84 *Wotton v State of Queensland* [2018] FCA 1841; [2018] FCA 915; [2017] FCA 1315; [2017] FCA 639; [2017] FCA 406; [2017] FCA 245; [2016] FCA 1457; [2015] FCA 1075; [2015] FCA 1074; [2015] FCA 1073; [2015] FCA 910.

85 *Habib v Commonwealth* [2010] FCAFC 12; 183 FCR 62; *Plaintiff S99/2016* (n 31).

86 *FJG18 v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1585; *ELF18* (n 62); *Plaintiff S99/2016* (n 31).

the urgent medical attention they required during their period detained on a remote Pacific island by Australia's regional processing arrangements.[87] In each of these cases, an Australian court issued an injunction requiring that the refugee be brought to Australia for medical treatment to prevent the ongoing commission of a tort.

42. Where such a claim involves the interpretation of foreign law, Australian courts will generally seek to avoid determining the operation of that law unless it is necessary and the position at law is clear.[88] The court may also resolve such issues by reliance on a quirky presumption of the common law, namely the counterintuitive presumption that foreign law is the same as Australian law.[89]

Q8 Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

43. Organisations worth investigating for further and up-to-date information and research papers about legal developments in Australia on topics related to civil liability for human rights breaches, as well as summaries of relevant jurisprudence include:

    i. Human rights litigators, such as the Human Rights Law Centre or one of the state or territory publicly-funded legal aid schemes or community legal centres.

    ii. Private plaintiff group proceedings specialist law firms such as Maurice Blackburn Lawyers, Phi Finney McDonald, Slater and Gordon Lawyers, Gordon Legal or Shine Lawyers.

    iii. Human rights law advocates at Monash University's Castan Centre for Human Rights, Human Rights Watch or Amnesty International.

44. Reports by the Australian Human Rights Commission and recommendations issued by them are also a useful resource for the kinds of human rights issues that arise in Australia, albeit that the Commission is rarely involved in litigation itself.[90] Equally, a 2021 chapter by Peter Cashman and a 2022 chapter by Sarah Joseph and Joanna Kyriakakis touch on matters dealt with in respect of the Case Scenarios.[91]

87 Migration Act 1958 (Cth) Part 2 Division 8 Subdivision B.

88 The High Court did so in the extradition case from the Solomon Islands at *Moti v The Queen* [2011] HCA 50; 245 CLR 456.

89 *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; 223 CLR 331 at [125], [249], [275] relevantly discussed and applied at *Plaintiff S99/2016* (n 31) at [184]-[186].

90 Despite AHRC s 11(1)(o).

91 Peter Cashman, 'Civil Liability in Australia for International Human Rights Violations' in Richard Meeran and Jahan Meeran, *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021); Sarah Joseph and Joanna Kyriakakis, 'Australia: Tort Law Filling a Human Rights Void' in Ekaterina Aristova and Uglješa Grušić, *Civil Remedies and Human Rights in Flux: Key Legal Developments from Selected Jurisdictions* (Hart Publishing 2022).

CaseScenarios

1 Case Scenario

A wave of peaceful anti-government protests in the capital city of X Country denounced controversial legislation reforming electoral law. X Country's police responded to the peaceful protests with violence and brutality. The protesters were beaten and tear gassed. Some were detained for several days without charge or access to the lawyers. Human rights activists reported alleged torture and other ill-treatment in detention.

The protesters gathered in the market square where many shops and office buildings are located. Security Co is a private company providing security to the premises and personnel of the shops and offices. There is no evidence that personnel of the Security Co were involved in the violence that injured protesters. There is, however, evidence that on several occasions personnel of Security Co provided X Country's police with vehicles, equipment, and water. READ MORE

2 Case Scenario

X Group is a group of extractive companies. Parent Co is the parent company of X Group which is responsible for the overall management of X Group's business. X Group's extractive operations are carried out by its subsidiaries. Every subsidiary is incorporated as a separate legal entity and is responsible for an individual project. Subsidiary Co is a licence holder and operator of a major extractive project. Parent Co is the sole shareholder of Subsidiary Co.

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations. READ MORE

3 Case Scenario

Factory Co owns a garment factory that supplies many large international clothing retailers. The working conditions in Factory Co's factory have generally been poor and exploitative and have included physical abuse for non-compliance with production targets, sexual harassment of female workers by male supervisors, and compulsory unpaid overtime. Local trade unions have regularly accused Factory Co of poor factory workplace safety, including a lack of emergency procedures, ineffective fire safety equipment and few emergencies medical supplies. Two months ago, during a fire at Factory Co's garment factory, seventy-six workers died and fifty-eight were injured, many seriously. Preliminary investigations suggest that employees suffocated or were burned alive because windows were barred, emergency exits closed, smoke alarms did not work, and supervisors did not implement safety protocols and fire evacuation procedures.

Brand Co is the major purchaser of clothes produced by Factory Co's garment workers. It has been an enthusiastic and very public advocate for human rights standards and expressed its commitment to responsible business practices. Several civil society organisations wrote an open letter to the CEO of Brand Co calling on Brand Co to demonstrate leadership in preventing, addressing, and remedying adverse human rights impacts in its supply chain. READ MORE

CaseScenario 1

Q1 **Could injured or unlawfully arrested protesters bring civil claims against the police and or Security Co (and/or its personnel) in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.**

45. Yes, protesters could bring civil claims against the police (either as an institution or in the name of the Chief Commissioner of Police, depending on the structure of the relevant police force) and probably also Security Co in Australia, including in the forms discussed above at [6]-[10] and [17]-[19]. Without knowing the location within Australia of the police and the powers they were purporting to rely upon, the scope of their power to detain cannot be determined.[92]

46. **Torture** in the context of detention gives rise to an additional possible tort claim. Assuming for this purpose that the detention was otherwise lawful, the conditions of that detention may make the detention itself unlawful.[93] It is unresolved in Australian law whether the conditions of detention can convert otherwise lawful detention into being unlawful.[94] This may be a function of detention conditions in Australia not reaching a threshold of torture, nor there being reported instances of sexual assault or rape in detention on any occasion yet considered by a court.

47. Finally, but only in respect of the police officers, it may be possible to bring a claim in tort for **misfeasance in public office** for their conduct. This may be available where the actions were criminal in nature or where an officer aided or abetted the commission of criminal offences (for example, by Security Co officers).[95] Section 268.20 of the Schedule to the Criminal Code 1995 (Cth) prohibits torture, cruel, inhuman or degrading treatment, as well as arbitrary detention.

48. The Australian formulation of this tort has the five central elements:

    i. an invalid or unauthorised act;

    ii. by a public officer (which is the reason only the police officers could be the subject of such a claim, and not Security Co employees);

    iii. done in the purported discharge of that office;

    iv. done with malice or reckless indifference as to the power to perform that act; and

    v. loss or harm to the plaintiff.[96]

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92 *Gebrehiwot* (n 10) which dealt with a claim of unlawful arrest and false imprisonment against police pursuant to the Victoria Police Act 2013 (Vic) ss 72-74, including a claim concerning jury directions and statutory rights protection.

93 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; 219 CLR 486 at [51]; *MZYYR v Secretary, Department of Immigration and Citizenship* [2012] FCA 694 at [15].

94 *Prisoners A-XX Inclusive v New South Wales* (1995) 38 NSWLR 622 at 627-633; *Potier v General Manager, Dawn De Loas Correctional Centre* [2012] NSWCA 352 at [12].

95 Much like in *Habib* (n 24) 62 at [118].

96 *Northern Territory v Mengel* [1995] HCA 65; 185 CLR 307 at 370.

49. In Case Scenario 1, it would seem that each of the above elements would likely be made out. The invalid or unauthorised act would arise if the police defendants did the acts themselves or 'intentionally assisted or encouraged the principal offender to commit that offence'[97] – that is, if the police did the prohibited act themselves, or assisted or encouraged a Security Co officer to do the prohibited act. There would be no need for any agreement with that Security Co officer[98] and the claim would hold whether or not the Security Co officer knew of that police officer's assistance.[99]

50. As to the need to prove loss or harm, this aspect may not be strictly needed if the loss or harm is in the nature of an intentional tort which is, as noted above, actionable per se. Again, this question is presently unresolved in Australian law.

51. Case Scenario 1 presents a situation where both public and private actors are involved. As a broad proposition,[100] a party bringing litigation in Australia who has a choice of bringing a claim against a government, as compared with a non-government, entity would be **wise to bring it primarily (and perhaps even only) against the government entity**. This is so for three reasons:

    i. The government has the deepest and more reliable pockets (figuratively full of money). Private companies can be structured in a way that limit, or practically avoid, liability.

    ii. Litigating against government should be fairer[101] and less combative (and thus less costly) than against private entities. This is so because by common law or statute,[102] government entities are required to act as model litigants. That is, they are obliged to act in litigation against the 'almost instinctive … standard of fair play'.[103] This includes settling claims as early as possible and not taking technical points for the sake of doing so, including any limitations claims.[104] It also requires that they act 'honestly, consistently and fairly when handling claims and litigation'.[105]

    iii. If the private entity has a financial liability in the case, the government entity will probably join them to the proceeding and by so doing, carry the greater adverse costs risk if the claim against that private entity fails.[106]

52. Thus, a pragmatic consideration concerning Security Co would arise: what could be gained from bringing a case against it that could not be obtained from suing the police directly? Given that the police were the primary perpetrators and they acted together on the facts, there would seem to be little to gain for the plaintiffs in also bringing Security Co into the proceeding. Indeed, it would carry the considerable risk that if the proceeding was not successful, the adverse costs risk would be roughly doubled.

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97 *Giorgianni v R* [1985] HCA 29; 156 CLR 473.

98 *R v Oberbilig* [1989] QSCCCA 67; 1 Qd R 342; R v Nguyen [2010] VSCA 23.

99 *R v Lam & Ors* (Ruling No 20) [2005] VSC 294.

100 There are exceptions to this. For example, a private defendant may be more willing to settle a claim because it is less concerned about precedent-setting than a public defendant. This might make the private defendant the better party to initiate a proceeding against.

101 As a dramatic example of a government using its power to upend extant litigation in a way that could be described as unfair, see *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; (2016) 257 CLR 42, 149–50 [339]-[343]. In that instance, the Australian government passed legislation shortly before the hearing to defeat part of the case and then cajoled a foreign government to change how it administered its own laws to defeat another part of the case.

102 Judiciary Act 1903 (Cth), Pt VIIIC; Legal Services Directions 2017 (Cth), App B.

103 *Melbourne Steamship Company Limited v Moorehead* [1912] HCA 69; 15 CLR 333 at 342.

104 *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* [2020] HCA 43 at [35].

105 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing) (No 2)* [2019] NTCAT 12 at [26].

106 *AS v Minister for Immigration and Border Protection and Ors (Costs Ruling)* [2017] VSC 300.

53. That said, a claim could be brought against Security Co in the law of civil remedies if it was involved in one of the ways explored at [23]-[26] or if it could be shown that it owed the protesters a duty of care and acted in breach of the scope of that duty.[107] The difficulty on the limited facts provided would be in establishing that there was a duty of care owed. It is likely that there was no assumption of a particular responsibility to the protesters by Security Co. In the absence of that, making out the claim will be difficult. Although, it could be vicariously or accessorily liable for its involvement, applying the principles discussed at [23]-[25].

Q2 **If civil claims would not be the preferred route for holding perpetrators in Case Scenario 1 to account, please indicate any other legal avenues available to the protesters.**

54. It may be possible for a **complaint to be made to the Australian Human Rights Commission**, depending on the characteristics of the individuals involved.[108] This would be the case if, for example, the only protesters that were beaten were of a particular race or gender. Following a complaint, the Commission could conduct a conciliation process with a view to resolving the complaint. The Commission also has the power to recommend compensation be paid by government instrumentalities for breaches of human rights protection within its remit,[109] but these recommendations are not enforceable. Such a complaint can also be terminated and then used as a basis for litigation.[110]

55. Complaints could also be made to the **integrity institutions** associated with the relevant police force (these differ from jurisdiction to jurisdiction within Australia). For example, in Victoria, the relevant body was previously known as the Office of Police Integrity but has, since 2013, been incorporated into the Independent Broad-based Anti-corruption Commission (IBAC).[111] The IBAC does not, itself, award compensation but it is possible that a finding by it could lead the State to make an *ex gratia* payment arising from serious police misconduct.[112] (In other Australian jurisdictions, an office with a similar function has the title of Ombudsman.) Australia's first national integrity body is currently expected in 2023.

Q3 **Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 1?**

56. A high-profile lawsuit of some relevance to Case Scenario 1 are the judgments concerning the response of police to the reaction to a death in police custody of a community of First Nations people on Palm Island.[113] An example of other legal avenues being utilised in a similar situation is the report of the Ombudsman in the state of Victoria into police responses to protests around the World Economic Forum in 2000.[114]

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107 *Plaintiff S99/2016* (n 31).

108 AHRC s 46P.

109 For example, see Chris Sidoti, 'Report of an Inquiry into a Complaint of Discrimination in Employment and Occupation; Discrimination on the Ground of Age' (Human Rights Commissioner, August 2000) .

110 AHRC s 46PO.

111 Independent Broad-based Anti-corruption Commission Act 2011 (Vic) s 52, 64, 65, 84.

112 The case of Corina Horvath and IBAC's Operation Yalgar; detailed at *Horvath v Australia*, Merits, UN Doc CCPR/C/110/D/1885/2009, IHRL 3892 (UNHRC 2014).

113 *Wotton* (n 84).

114 Available at http://www.austlii.edu.au/au/other/VicOmbPRp/2000/1.pdf.

CaseScenario 2

Q1 **Could the local community, or its representatives, or someone acting on their behalf, bring civil claims against Parent Co and Subsidiary Co in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.**

57. A civil claim could be brought against Subsidiary Co for the loss and damage arising from Case Scenario 2. Depending on the details of the role and involvement of Parent Co and its officers in the functioning of Subsidiary Co, it may also be vicariously or accessorily liable (discussed at [23]-[25]) and thus able to be joined as a second defendant, or it could be held directly negligent if a sufficient legal relationship was established.

Statutory protection breaches

58. The oil spills in this scenario would also engage a number of environmental protection laws. Which of those laws applied would depend on the location within Australia of the oil spill. Each of those laws will carry their own penalty for the relevant breach. For example, the Environment Protection Act 2017 (Vic) from the state of Victoria imposes heavy financial penalties on a person or body corporate who deposits oil in waterways.[115] It also empowers a court to award compensation for such a breach to a person who has management or control of those waters for the removal of that oil,[116] and, more relevantly, for injury, loss or damage suffered by an injured person as a result of the contravention.[117] A simple causation test is likely to be required to make out such a claim.[118]

59. In the absence of such an express compensation scheme, broadly speaking, where an Australian legislative provision prescribes a penalty (as Australian environmental legislation commonly does, see for example as discussed above at [14(a),(b)]) it is read as to have been intended not to give rise to any civil liability.[119] However, that rule does not apply if the penalty prescribed by statute is considered inadequate.[120] There have been situations where a penalty has been found to be inadequate enough to justify a conclusion that civil liability for provisions with prescribed penalties attached was also intended by parliament. This has arisen in cases where there has been catastrophic injury to a person where that person has

115 Environment Protection Act 2017 (Vic) ss 112(a), 115(2).

116 *ibid* s 120(1)(b).

117 *ibid* s 313, see also s 301(2)(e). Neither of these provisions has yet been utilised in any decided case.

118 By analogy, see *Marks v GIO Australia Holdings* [1998] HCA 69; 196 CLR 494.

119 *Ibrahimi v Commonwealth of Australia (No 9)* [2017] NSWSC 1051 [411], [443].

120 *Gardiner v State of Victoria* [1999] VSCA 100 at [25].

no other recourse under the Act.[121] It is possible that, given the repercussions for the affected community, a court may be willing to find that Parliament intended that the environmental offence provisions inevitably breached in Case Scenario 2 also carry an assumed civil remedy outcome.

Breach of statutory duty

60. A claim for a breach of statutory duty arising from environmental protection legislation may also be open.[122] This would only be so if a specific provision of legislation mandated that a company of X Group was required to do something or refrain from doing something. This may happen, for example, as a statutory condition on a licence by an Australian government for the extraction of resources of the kind held in Case Scenario 2 by Subsidiary Co.

61. Whether an Australian statutory provision gives rise to a statutory duty capable of being the subject of a civil proceeding will be determined by reference to the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation.[123] That is, it is a nuanced question which will turn on the specific provisions, read in their context.[124]

Negligence and nuisance

62. Quite apart from statute and any breaches of them, a community member could bring a claim in tort for any negligence by either the Parent Co or Subsidiary Co. Two issues arise in respect of the claims in the context of the Case Scenario 2:

    i. The plaintiff will have to prove who caused the oil spill.[125]

    ii. The plaintiff will have difficulty in recovering damages for claims arising from pure economic loss – for example, where the water supply pollution caused crop destruction. To succeed in such a claim, the plaintiff would have to prove that they were particularly vulnerable to the X Group's actions.[126] This will be a question of fact to be determined in all of the circumstances of the case.

63. A claim could also be brought by a member of the community in this scenario for the tort of nuisance, as discussed at [12].

Parent and subsidiary liability

64. For the purposes of Australian corporate law, Subsidiary Co would be regarded as a subsidiary and a related body corporate of Parent Co, a holding company, by reason of its shareholding.[127] If Subsidiary Co was insolvent, Parent Co would

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121 *Meredith v Commonwealth (No 2)* [2013] ACTSC 221; 280 FLR 385 at [570].

122 On the facts given, it is not clear what distance from a coast the relevant extraction is taking place. That would determine whether, for example, the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) applies. That legislation broadly incorporates a 'polluter pays' model.

123 *SOVAR v Henry Lane Pty Ltd* [1967] HCA 31; 116 CLR 397 at 405.

124 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]. As an example of the application of these principles in a detention (not environmental harm) context, see *AS v Minister for Immigration and Border Protection* [2016] VSCA 206.

125 *March* (n 32).

126 *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [102]-[103].

127 Corporations Act 2001 (Cth) ss 46, 50.

probably be liable for the judgment debt under statutes governing corporations.[128] That is, whether or not Parent Co is a defendant (see [57]), recovery from it will be possible if recovery of the judgment debt is not possible because Subsidiary Co is insolvent.

65. Depending on the location within Australia of the environmental issue, it is possible that Parent Co or even 'a director or [a person] otherwise concerned in the management of the' subsidiary or parent company could also be the target of a statutory environment protection order, and be responsible for the consequences of that (including any civil law consequences).[129]

Injunctive relief

66. If there is evidence that X Group might cause a further destructive spill or that the cause of the initial spill has not been remedied, an injunction would be another remedy that would probably be available, at least on an interlocutory basis. In that situation, the 'balance of convenience' would plainly favour the grant of the injunction preventing X Group from having further opportunity to cause destruction of the kind covered by the scenario. The balance of convenience would strongly favour a plaintiff community member and so a lesser standard of satisfaction in respect of the other element of the interlocutory injunction test – a *prima facie* case – would be required.[130] The court considering that application would take the course that carries the lower risk of injustice, which would be to prevent the risk of another oil spill.[131]

Q2 **If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 2 to account, please indicate any other legal avenues available to the local population.**

67. Civil claims would be the preferred route for holding the perpetrators to account. Such claims could be pursued alongside pursuit of complaints to the relevant state body for environmental law compliance.[132] That body might, for example, review (and potentially revoke) any licence given to Subsidiary Co or Parent Co, or pursue a prosecution.

68. If such an event were to occur in Australia, there is a good chance that it would result in the calling of a Royal Commission, an executive body created solely for the purpose of investigation of significant public issues deserving especial attention. Such a body would be created for the purpose and would compile a report, having conducted an inquiry with powers equivalent to a court.[133] What comes of that report would depend on the willingness of government to be responsive to it.

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128 *ibid* ss 588V and 588W.

129 Environment Protection Act 1993 (SA) s 103G.

130 *Woodley v Woodley* [2018] WASCA 200 at [47]; *Warner-Lambert Co LLC v Apotex Pty Ltd* [2014] FCAFC 59 at [70].

131 *EHW18 v Minister for Home Affairs* [2018] FCA 1350 at [9]-[10] citing *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* [1988] FCA 127 at 502.

132 Protection of the Environment Administration Act 1991 (NSW) Part 4.

133 Royal Commissions Act 1902 (Cth).

Q3 Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

SPOTLIGHT: MONTARA OIL SPILL

The Australian case closest to the facts of Case Scenario 2 was the class action arising from an oil spill at the Montara oil field in the Timor Sea. The lead plaintiff was an Indonesian seaweed farmer in the Rote/Kupang region of Indonesia who alleged damage to his crops caused by the oil spill.[134] The cause of action was negligence. The seaweed farmers succeeded on the basis that the defendant company (the Australian subsidiary of the Thai oil company PTTEP) had breached its duty of care to the farmers by failing to properly seal the well and that had caused the damage to the farmers' seaweed crops.[135]

69. There are no known Australian claims for direct environmental degradation of the gravity postulated in the Case Scenario 2.[136] Recent cases concerning nuisance caused by (much more minor) forms of pollution are concerned with crop damage. For example, in *Marsh v Baxter*, it was asserted that an organic certified canola plantation was 'polluted' by genetically modified canola from a neighbouring farm. That claim was not successful.[137] Similarly, a claim that the Minister for the Environment owed children a novel duty of care in respect of minimising environmental harm was rejected.[138]

134 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 3)* [2017] FCA 1272.

135 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237. For general discussion about Australian law impacting oil spills, see Peter Rose, 'Marine Oil Pollution Laws in Australia' (1991) Australian Mining and Petroleum Law Association Yearbook 175.

136 The closest proceeding at the time of writing is the subject of the ruling at *Haswell v Commonwealth of Australia* [2020] FCA 915 which concerns PFAS contamination.

137 *Marsh* (n 25).

138 *Minister for the Environment v Sharma* [2022] FCAFC 35.

CaseScenario 3

Q1 **Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.**

Claims against Factory Co

70. In respect of Factory Co, the conditions to which its employees were exposed would be an obvious breach of the **Fair Work Act.** That Act is the **principal legislative tool for protection of employment conditions in Australia**.

71. A claim under the Fair Work Act could be pursued by one or more of the affected workers, their workers union or through a body called the Fair Work Ombudsman.[139] The Fair Work Act contains a significant number of statutory worker protections. The worker protections are covered ordinarily by what are called Awards dealing with such things as hours of work and rest breaks.[140] The Act itself also regulates basic protections such as maximum working hours, which are set at 38 per week.[141] Factory Co would seem to be in extreme breach of many of these basic protections.

72. The Act also has civil penalty provisions. Unusually for Australian law, a court ordering that there be certain pecuniary penalties[142] has the power to award the penalty sum itself to be paid directly to the impacted employee.[143] That employee is also entitled to bring a proceeding seeking the penalty themselves, as is their workers union.[144] This effectively allows the court to award both compensation for breach[145] as well as an additional sum which is intended as a penalty for the employer. A court may be cautious not to give the employee too great of a 'windfall',[146] however it might also use such an order to ensure that the gravity of the harm is recognised in much the same way as aggravated damage might achieve.

73. **Tortious proceedings** could also be brought, and sensibly would be, if the particular damage to the victim was not or was not adequately covered by the statutory regime.[147] This would be the prudent course for those injured in the fire at Factory Co's garment factory. They would have a claim in tort for negligence against Factory Co for breach of its duty of care to the workers arising from the

139 Fair Work Act s 682(1)(d).
140 *ibid* s 139.
141 *ibid* s 62.
142 Listed at *ibid* s 539(2).
143 *ibid* s 546(3)(c).
144 *ibid* s 540.
145 *ibid* s 545.
146 *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338 at [80]-[93].
147 Noting especially the cap on such statutory awards prescribed by the Fair Work Act s 546(2).

combination of the lack of emergency procedures, ineffective fire safety equipment, barred windows, closed emergency exits and non-functional smoke alarms at the factory. It is very unlikely that such a claim could be sustained against Brand Co given that it was not responsible for any of those deficiencies at the factory.

74. A further route for seeking civil remedies would be in respect of the gross breaches of statutory duties[148] in **occupational health and safety legislation**, especially in respect of the fire. In some parts of Australia, there are particular criminal offences that would likely have been committed by officers of Factory Co.[149] Those express criminal offences negate an implication that Parliament intended that there be a private right under the same provision.[150] Whether that applies in respect of all occupational health and safety protective legislation would depend both on where in Australia this occurred and the terms of the statute applicable there.

Claims against Brand Co

75. In respect of Brand Co, it is difficult to conceive of who would bring this claim or why they would bring it, given the ready remedies against Factory Co. Since Brand Co does not employ the exploited workers, it is not likely to be liable under the Fair Work Act or any of the state legislation regulating Factory Co as a workplace. It is possible that if Brand Co's proportion of purchase from Factory Co was very high, an argument may be available that it was in effective control of the factory such as to have liability in tort. Such a claim would be ambitious and would depend on establishing that Brand Co was responsible in law for what Factory Co did. Similarly, while there are statutory obligations on directors to act in good faith and with care and diligence, this is very unlikely to yield any civil remedy in this scenario because those obligations are understood to be primarily focused on protection of any benefit to the company.[151]

76. If Brand Co was a public company, it is possible that **shareholders** may bring a proceeding against it, seeking compensation if (and only if) the company failed to disclose the risk to its share price as a result of its link to human rights abuses, and those shares were then devalued. Such a proceeding could only be brought by the shareholders and would almost certainly be run as a class action.[152]

148 *SOVAR* (n 123).

149 Occupational Health and Safety Act 2004 (Vic) ss 21, 22 and Part 5A; as to civil liability see s 34.

150 *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39; [2004] 2 AC 280.

151 *Australian Innovation Ltd v Petrovsky* [1996] FCA 587.

152 As occurred in *TPT Patrol Pty Ltd as Trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747. For information about co-ordination of and research into such initiatives in contexts similar to those covered by the Case Scenarios, see the work of the Australasian Centre for Corporate Responsibility described at www.accr.org.au.

Q2 If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 3 to account, please indicate any other available legal avenues available to the victims and/or their families?

77. A standalone claim could be made against Factory Co for the **sexual harassment** of female workers by male supervisors. That claim would be based on an initial complaint to the Australian Human Rights Commission which has been terminated and referred to a court. The court would then consider the claim in full and determine the quantum of damages it would order be paid.

78. In such an extreme scenario, it would also be possible that a Royal Commission might be called, as discussed above at [68].

Q3 Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 3?

79. Slavery litigation is rare in Australia, but it is high-profile when it occurs.[153] The leading case arose in respect of a criminal prosecution concerning a group of women who worked in a brothel.[154]

80. The work conditions described in the scenario would probably qualify as slavery as defined under the Modern Slavery Act 2018 (Cth), as discussed above (see Spotlight Case Study following [28]).

153 *DPP (Cth) v Kannan & Anor* [2021] VSC 439.

154 *R v Wei Tang* [2008] HCA 39.

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