Tortious Liability for Subsidiaries

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Over 800 ASX listed companies are involved in mineral exploration and development in more than 100 countries

"An emerging body of jurisprudence in the United Kingdom and Canada indicates a judicial willingness to find parent companies directly liable in negligence in respect of acts or omissions of subsidiaries on the basis that the parent company owed a duty of care to those harmed"[3]

This 'emerging body of jurisprudence' may not replicate in Australia (discussed below) but there are laws and proposals in the UK, France and Switzerland for extra-territorial laws regarding parent companies and human rights impacts by their affiliates.[4] This jurisprudence and legislative change on the other side of the world makes the issue of tortious liability for foreign subsidiaries a topic for consideration regarding Australia's extractives sector. Australian mining and services companies have a growing global footprint. Over 800 ASX listed companies are involved in mineral exploration and development in more than 100 countries,[5] and a 2016 study of mining companies showed over half with investments in foreign companies.[6]

This paper summarises two cases, currently underway, concerning parent company tortious liability for subsidiaries. In the United Kingdom, Zambian villagers are suing Vedanta Resources plc (**Vedanta**) and in Canada, Eritrean citizens are suing Nevsun Resources Ltd (**Nevsun**). The paper examines the implications arising from these, internationally, before turning to their relevance to Australian case law around tortious liability for subsidiaries.

Vedanta Resources (UK company, Zambian subsidiary)

In 2015, over one thousand Zambian citizens commenced proceedings in the UK courts against Konkola Copper Mines (**KCM**) and Vedanta for contamination of watercourses (used for drinking, livestock and irrigation) from the Nchanga Copper Mine in Zambia.[7] Vedanta, incorporated and domiciled in the United Kingdom, is the ultimate parent company of KCM, a public company incorporated in Zambia.[8]

Vedanta challenged the jurisdiction of the UK Courts to hear the matter. In April 2019, the UK Supreme Court affirmed lower court decisions, allowing the case to proceed in the UK.[9] One of Vedanta's grounds of appeal had been that there was no triable issue against it because it had not 'done anything in relation to operation of the mine sufficient either to give rise to a common law duty of care in favour of the claimants or a statutory liability'.[10]

The Supreme Court rejected Vedanta's appeal, referring to 'published materials in which Vedanta … asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the mine, [and] also implemented those standards by training monitoring and enforcement...'.[11] The judgment signals that a parent company's potential liability in negligence for activities of its subsidiaries may be drawn from group-wide standards and policies,[12] sustainability reports,[13] and published statements. The Court

reasoned this would be especially where a parent company has some intervention in operations and 'holds itself out as exercising the degree of supervision and control of its subsidiaries, even if it does not in fact do so' and where management services agreements existed between the parent and subsidiary.[14] The claim has been combined with similar proceedings, and a trial date set for October 2021.[15]

Nevsun resources (Canadian company, Eritrean subsidiary)

When proceedings commenced, Nevsun was a publicly-held British Columbia corporation.[16] The Canadian Court proceedings arose from Nevsun's 60% interest, through a chain of subsidiary corporations, for the development of a gold, copper and zinc mine located in Eritrea.[17] The plaintiffs (Eritrean refugees) assert that Nevsun has liabilities from the conduct of its subsidiary Bisha Mine Share Company (**BMSC**). The claim, filed in November 2014, alleges that Nevsun was 'complicit in the use of forced labour, slavery, torture, inhuman or degrading treatment, and crimes against humanity at the mine'.[18] Nevsun argued that it did not owe a duty of care because of the 'several corporations in the corporate ladder between itself and BMSC'.[19] Further, Nevsun explained, 'BMSC required that no forced labour be used to build the mine and had various policies in place including a Construction, Environmental and Social Management Plan to guard against abuses.'[20] The lower Canadian courts rejected Nevsun's jurisdictional challenges, and this was also the decision of the Canada's Supreme Court in February 2020 in *Araya v Nevsun Resources*.[21] There have been subsequent interlocutory decisions, and the parties had a mediation scheduled for June 2020.[22]

Like the UK Supreme Court decision in *Vedanta*, the Canadian *Araya* decision is not a precedent that a parent company *is* liable for the impacts from a subsidiary's mining operations, but these decisions confirm *such a claim may succeed*. The Canadian proceedings also examine corporate violations of international customary law.[23] That is, the plaintiffs claim 'damages under customary international law...for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity' on the argument this is actionable through Canadian common law.[24] The Canadian Supreme Court rejected Nevsun's application for summary dismissal that such a claim could not succeed, with the majority judgment (Wagner CJ, Abella, Karakatsanis, Gascon & Martin JJ) commenting as follows.

> *[85]... Some areas of international law, like treaties, require legislative action to become part of domestic law ... [86] On the other hand, customary international law is automatically adopted into domestic law without any need for legislative ... In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. ...*
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> *[114] Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or jus cogens, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.*
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> *[132] Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.*

International implications

Any Australian company with British or Canadian links will be following these cases carefully, because the final decisions may well have direct ramifications in value chains and responsibilities.

There is, however, a broader import from these cases, and their attention to parent-company actions and policies, because of the developments for companies to pay more attention to their supply chains and subsidiaries. The last decade has involved significant global movement for companies to use more due diligence within their operations, and to remediate and report regarding impacts identified. Examples include the *Guiding Principles on Business and Human Rights*[25] and the *OECD Guidelines for Multinational Enterprises*.[26] These have resulted in some domestic law changes.[27] But perhaps more significant is their presence or influence in developments by industry bodies, such as the MCA's *Enduring Value* framework[28] and its Canadian equivalent forerunner,[29] as well as the London Metals Exchange.[30] Documents created through these processes may have interesting ramifications in tortious proceedings. For instance, Nevsun had commissioned an earlier Human Rights Due Diligence[31] which addressed the issue of slavery, so it will be interesting to see what implications that has in the Canadian proceedings.[32] Various commentary considers the UK and Canadian decisions will cause changes in corporate behaviour, or at least the publication of group-wide policies/ procedures.[33]

Australian parent-subsidiary liability

In Australia, with the exception of asbestos-related cases, there are few court decisions of parent-company responsibility for harm done by its subsidiary. There are, of course, various *statutory* regimes where other parties may be liable for a company's actions[34] but these are not examined here. The focus of this paper is the potential for *common law* – in the absence of any statutory regime – to impose liability on a parent company because of activities performed by a subsidiary.[35]

In 1997, the NSW Court of Appeal ruled a parent company (CSR Ltd) liable for its subsidiary (Asbestos Products Pty Ltd) because 'CSR brought itself into a relationship with the employees of Asbestos Products Pty Ltd by placing its staff in the role of management at Asbestos Products Pty Ltd'.[36] This approach is consistent with WA cases. The first Australian decision which directly imposed liability on a parent company from its subsidiary[37] was the WA Supreme Court's 1988 decision *Barrow v CSR Ltd*. Justice Rowland's reasoning there was similar to that in *CSR Ltd v Wren*, that it was the extent of the parent company's involvement and control which grounded the direct duty and liability.[38] A similar result occurred in 1998 NSW proceedings *CSR v Young*.[39]

These decisions are not necessarily 'piercing the veil' but perhaps better understood in a different way. That is: the courts are *not* examining and consciously ignoring the corporate structure, but rather the particular facts show parent company officers directly involved, sufficient to legally implicate the parent company itself. Justice Rowland, in *Heys v CSR*, saw this as perhaps semantics.

> *'[W]hether one defines all of the above in terms of agency, and in my view it is, or control, or whether one says that there was a proximity between CSR and the employees of ABA, or whether one talks in terms of lifting the corporate veil, the effect is, in my respectful submission, the same.'*[40]

Asbestos in its natural mineral form

However, His Honour's analysis there has not relevantly featured in any subsequent jurisprudence.[41] Much of the asbestos jurisprudence seems more influenced by the dynamics of product liability (and the circumstances in which that arises and attaches liability to the producer[42]) rather than making general precedents around parent-subsidiary liability.

A useful indication of contemporary Australian approaches on potential parent-subsidiary liability is the 2007 decision of *Premier Building v Spotless Group* (causes of action were in negligence, nuisance and statutory compensation).[43] The Victorian Supreme Court's reasons outlined the relevant criteria it considered:

- managerial control including the number directors of the subsidiary who were also directors of the parent company;[44]
- accounting practices especially which company had paid accounts and wages;[45]
- dealings with regulatory authorities, specifically which company held licences;[46] and
- the company making the strategic decisions.[47]

In *Premier*, the Victorian Supreme Court concluded that the facts did not attach liability for the polluting acts of the subsidiary to the parent company.[48] There has been a similar result in the NSW Court of Appeal, in *James Hardie & Co v Hall,*[49] with the unanimous reasoning there unequivocal.

> *'In the absence of any evidence that a subsidiary company is a mere facade, the fact that a parent company exercises control and influence over its subsidiary does not of itself justify lifting the corporate veil so as to create a duty of care on the part of the parent company towards an employee of the subsidiary'.*[50]

These developments led to the view of Professor Warren (until 2017, the Chief Justice of the Supreme Court of Victoria) that: 'The Australian experience has certainly been that direct parent liability has almost completely fallen off the radar, although much of that can probably be attributed to the narrow approach taken by the Australian cases'.[51]

Implications

There is academic commentary suggesting these UK and Canadian developments may be replicated in Australia,[52] but there is little jurisprudence supporting that view. Indeed, what decisions there are, point the other way. On current Australia precedent, it seems unlikely our common law would emulate the recent Canadian and UK approaches.

Australian courts take a different approach to Canada's automatic adoption of international *customary* law (and its rights) by the common law. The few Australian precedents that exist indicate such a development needs statutory intervention. In *Nulyarimma v Thompson*, a majority of the Full Federal Court indicated that courts/common law cannot 'enforce' international customary law without legislative enactment of that law.[53] While there has been academic critique of that decision,[54] it has been subsequently noted and approved.[55] The strongest the argument might be put, which has some judicial support, is that customary international law can be 'a potential *source* of Australian common law but not an automatic part of it'.[56] In relation to rights under international *treaty* law: the courts have repeatedly indicated that Australia's entry into a treaty does not give rise to a direct source of rights and obligations in Australian domestic law.[57]

Australian courts also have a different approach to the UK in relation to parent – subsidiary liability in tortious claims. This is succinctly outlined in Warren's 2017 article.

> *'[T]he English law has taken a more generous approach when delimiting the circumstances in which it will consider imposing a duty of care on a parent company. ...[F]eatures of parent company control of the subsidiary, such as the issuing of instructions to the subsidiary; parental approval for capital expenditure; products manufactured to parent company standards; and superior knowledge on the part of the parent company regarding health issues... were enough [in the UK case of Chandler v Cape[58]] to sustain a duty of care on the part of the parent; but in the judgment of the NSW Court of Appeal in James Hardie,*[59] *they fell short of the circumstances required to lift the corporate veil.'*[60]

Warren's view was that any significant changes to 'be made to veil-piercing within corporate groups, that will have to be done by legislation'.[61] This is further confirmation (in addition to the cases noted above) that Australian common law seems unlikely to develop that way anytime soon.[62] Indeed, a search of Australian court databases (for issues and cases arising in *Vedanta*) revealed almost nothing of relevance.[63]

So, absent future High Court authority or legislative change, there is limited basis for Australian tortious liability for the actions of overseas subsidiaries. Such liability could arise where the structure is a façade or where the Australian parent acts in such a way that the relevant impacts are effectively direct actions of the parent company itself. The role of group-wide policies and procedures is interesting. The *Vedanta* decision might suggest some caution (with its potential to contribute to attaching control and thus liability) but other commentary sees these as a way to help inform and protect *against* liability.[64] The current state of Australian authority – particularly *James Hardie v Hall*[65] – make it unlikely that parent liability for foreign subsidiaries would arise solely from group policies.

Endnotes

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3 Brumby, 'Parent Company Liability in the Extractive Industries: A New Frontier for Business and Human Rights' (2018) 36/3 *Company & Securities Law J* 185, 186.
4 Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4/2 *Business & Human Rights J* 265, 266.
5 Satchwell & Redden 'Redefining Australian mining: Understanding the new global footprint' (International Mining for Development Centre, May 2016), 4.
6 'Redefining Australian mining' (above n5), 12.
7 *Vedanta Resources & Anor v Lungowe & Ors* [2019] UKSC 20, [1] & [5].
8 *Vedanta Resources v Lungowe* (above n7), [2], indicating KCM was not a 100% subsidiary of Vedanta, and that the Zambian Government held a minor stake in KCM.
9 *Vedanta Resources v Lungowe* (above n7), [102].
10 *Vedanta Resources v Lungowe* (above n7), [17].
11 *Vedanta Resources v Lungowe* (above n7), [61].
12 *Vedanta Resources v Lungowe* (above n7), [52]-[53] & [55].
13 *Vedanta Resources v Lungowe* (above n7), [58].
14 *Vedanta Resources v Lungowe* (above n7), [53], [55] & [59].
15 *Lungowe v Vedanta Resources & Ors* [2020] EWHC 749 (TCC), [16].
16 *Gize Araya & Ors v Nevsun Resources* 2017 BCCA 401, [2]. Nevsun was acquired by Zijin Mining Group in December 2018: www.zijinmining.com/business/product-detail-47445.htm (accessed 27 May 2020).
17 *Araya v Nevsun Resources* (above n16), [2].
18 *Araya v Nevsun Resources* (above n16), [4].
19 *Araya v Nevsun Resources* (above n16), [13].
20 *Araya v Nevsun Resources* (above n16), [10].
21 *Nevsun Resources v Gize Araya & Ors* 2020 SCC 5.
22 *Araya v Nevsun Resources* 2020 BCSC 504, [1].
23 In addition to also seeking damages for torts including conversion, battery, false imprisonment, conspiracy and negligence: *Nevsun Resources v Araya* (above n21), [4].
24 *Nevsun Resources v Araya* (above n21), [60] extracting the pleadings.
25 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Annex to UN doc A/HRC/17/31, United Nations Human Rights Council, 21 March 2011).
26 'OECD Guidelines for Multinational Enterprises' (Annex to *Declaration on International Investment and Multinational Enterprises* OECD/LEGAL/0144, Organisation for Economic Co-operation & Development, 25 May 2011).
27 eg. the developments mentioned in the introduction about the UK and France, and Australia's *Modern Slavery Act 2018* (Cth).
28 'Enduring Value' (Australian minerals industry framework for sustainable development, Minerals Council of Australia, 2015 ed).
29 'Towards Sustainable Mining 101: A Primer' (Mining Association of Canada, 18 July 2019).
30 'Overview of LME responsible sourcing' (Setting the Global Standard, London Metals Exchange, October 2019).
31 LKL 'Human Rights Impact Assessment of the Bisha Mine in Eritrea' (Commissioned by Nevsun Resources Ltd, April 2014).
32 The trial court noted these materials and processes in its decision on jurisdiction (*Araya v Nevsun Resources* 2016 BCSC 1856, [57]-[65]), but the content and implications of the document (regarding potential corporate liability) has not yet been examined.
33 eg. Mulley & Leary, *Current Global Trends and Developments in Mining* (2019, Global Legal Group); Pamplona & Ebert, 'Business and Human Rights: Trends in International Governance and Domestic Litigation' (2019) 16/3 *Revista de Direito Internacional* 1, 6.
34 Such as **director's liability for breach of duties** (eg. *Corporations Act 2001* (Cth), s180-181; *Circle Petroleum v Greenslade* [1998] QSC 172; 16 ACLC 1577) or **misleading conduct** (eg. *Australian Consumer Law* Sch 2 to Competition and Consumer Act 2010 (Cth), s18; *Australian Competition and Consumer Commission v Energy Watch* [2012] FCA 425, [107]-[110]); **parent company liability for subsidiary insolvent trading** (eg. *Corporations Act*, s588V; *In the matter of: ACN 007 537 000 (liq), Robert Parker* [1997] FCA 1264; 80 FCR 1); **officer liability for corruption or other offences** (eg. *Corporations Act*, s1307 (falsification of books); *Gregg v Commonwealth Director of Public Prosecutions* [2019] NSWCCA 254); or **'shadow director' liability** (eg. *Grimaldi v Chameleon Mining* [2012] FCAFC 6; 200 FCR 296, [35]-[37]).
35 On *director's* potential liability for corporate human rights impacts, see Cermak, 'Directors' Duties to Respect Human Rights in Offshore Operations and Supply Chains: An Emerging Paradigm' (2018) 36/2 *Company & Securities LJ* 124.
36 *CSR Ltd v Wren* (1997) 44 NSWLR 463, 463 & 485. See also Turner, 'Revisiting the Direct Liability of Parent Entities Following Chandler v Cape Plc' (2015) 33/1 *Company & Securities Law Journal* 45, 52-55.
37 Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2017) 40/2 *Melbourne University LR* 657, 677.
38 *Timothy Barrow v CSR Ltd & Midalco* [1988] WASC 236, 217-218 (although the Judge framed the decision in terms of 'proximity', consistent with the negligence law at that time).
39 '[T]he reality was that CSR was itself conducting the operations, through ABA: it conducted the operations by establishing a wholly owned subsidiary and causing the wholly owned subsidiary to give it comprehensive powers as agent': *CSR Ltd v Young* 16 NSWCCR 56; (1998) Aust Torts Reports 81-468, 64-953.
40 *Barrow v CSR Ltd* (above n38), 218.
41 This quote appears in only two decisions since: *Queensland Newspapers and Ipswich City Council* [2015] QICmr 30, [43] (a footnote that, in some circumstances the concepts of 'agency', 'alter ego' and 'piercing the corporate veil' can produce similar results) and *Wintle v Stevedoring Industry Finance Committee* [2002] VSC 39 (an application for judicial recusal for apprehended bias).
42 eg. *Amaca P/L (formerly James Hardie) v Dennis Moss* [2007] WASCA 162; *Amaca P/L (formerly James Hardie) v Hannell* [2007] WASCA 158; 34 WAR 109.
43 *Premier Building and Consulting v Spotless Group* [2007] VSC 377, [15].
44 *Premier Building v Spotless* (above n43), [355], [372] & [388]
45 *Premier Building v Spotless* (above n43), [375] & [390].
46 *Premier Building v Spotless* (above n43), [360] & [375].
47 *Premier Building v Spotless* (above n43), [368] & [377].
48 *Premier Building v Spotless* (above n43), [384].
49 *James Hardie & Co v Hall (estate of Desmond Putt)* [1998] NSWSC 434; 43 NSWLR 554.
50 *James Hardie & Co v Hall* (above n49).The quote is from the headnote summarising the reasoning particularly at 584-585 per Sheller JA (agreed by Beazley & Stein JJA).
51 'Corporate Structures, the Veil and the Role of the Courts' (above n37), 686.
52 eg. 'Parent Company Liability in the Extractives' (above n3), 201.
53 *Nulyarimma v Thompson* [1999] FCA 1192; 96 FCR 153, [26] per Wilcox J; [57] per Whitlam J. This decision concerned whether customary international law on genocide was directly actionable. Merkel J was in dissent on this aspect, at [132] & [160]-[161].
54 eg. Cassidy, 'The Problematic Relationship Between Customary International Law and the Domestic Courts' (2009) 2 *J Applied Law & Policy* 119, 126; Walker & Mitchell, *A Stronger Role for Customary International Law in Domestic Law?* (2005, The Federation Press); Charlesworth & Ors, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25/4 *Sydney Law Review* 423, 455-457.
55 eg. *Mokbel v The Queen* [2013] VSCA 118; 40 VR 625, [28]-[30]; *Sumner v United Kingdom of Great Britain* [2000] SASC 91, [32].
56 *Sumner v GBR* (above n55), [32] (emphasis in original).
57 eg. *Minogue v Williams* [2000] FCA 125, [22]; *Dietrich v The Queen* [1992] HCA 57; 177 CLR 292, 305-306 per Mason CJ & McHugh J, 321 per Brennan J, 348-349 per Dawson J, & 350-360 per Toohey J.
58 *Chandler v Cape Plc* [2012] EWCA Civ 525.
59 *James Hardie v Hall* (above n49).
60 'Corporate Structures, the Veil and the Role of the Courts' (above n37), 683.
61 'Corporate Structures, the Veil and the Role of the Courts' (above n37), 673.
62 In a recent High Court decision, Justice Nettle referred to 'common law doctrines …developed in step with customary international law': *Love v Commonwealth* [2020] HCA 3, [264]. But that was a case concerning the implications of the term 'alien' in the constitution, and none of the other justices referred to customary international law.
63 There was one proceeding, against Anvil Mining companies, which did not progress beyond pre-action discovery to determine whether there was evidence about facilitating government troops in human rights abuses. The company brought an application objecting to the proceedings on the basis of the lawyers' funding (*Kunda Pierre & Others v Anvil Mining* [2008] WASC 30(S)). The whole proceedings were subsequently withdrawn after the applicants' instructions could not be obtained because the Congolese authorities were preventing the relevant NGOs from obtaining instructions, and there had been death threats: *Kunda Pierre & Others v Anvil Mining* [2008] WASC 30(S), [6]-[11].
64 eg. Pimentel 'SCC decision in Nevsun a warning for Canadian companies operating overseas' (Canlii, 5 March 2020). The *Nevsun* proceedings will be interesting to follow in this regard, see n32 above.
65 Above n49; noting also the High Court refused leave to appeal (*Putt v James Hardie* [1998] HCATrans 280 per Gleeson CJ & Gaudron J); and the NSWCA reasoning has been noted, and not disapproved, by a subsequent unanimous Court of Appeal in *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331, [65].