



AUSTRALIA

SURVEY QUESTIONS & RESPONSES¹

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

1. Sections 674 *Corporations Act 2001* (Cth) requires a listed entity to make disclosure in accordance with the listing rules of the Australian Stock Exchange (ASX).

¹ The initial responses to this survey of Australian law were provided by Richard Meeran, Attorney-at-law, Slater & Gordon LLP, Australia. Comments on the responses have been provided by Dr. Jonathan Clough, Senior Lecturer, Monash University; Professor Sarah Joseph, Director Castan Center for Human Rights Law, Monash University; Professor Bernadette McSherry, Associate Dean, Monash Law School, Monash University and Justine Nolan, Deputy Director, Australian Human Rights Centre, University of New South Wales. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Australia (Richard Meeran), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

2. ASX Listing Rules (3.1) require an entity to report to ASX any information that a *reasonable person would expect to have a material effect* on the price or value of the entity's securities. A number of exceptions apply where a reasonable person would not expect the information to be disclosed and the information is confidential. For example, where disclosure is prohibited by law, where the information concerns an incomplete proposal or negotiation or comprises matters of supposition or are insufficiently definite to warrant disclosure, where the information is generated for the internal management of the company or the information is a trade secret.

3. *S52 Trade Practices Act 1974 (Cth)* makes it unlawful for a business to engage in conduct that is likely to "mislead" or "deceive" consumers.

4. *Section 299(1)(f) of the Corporations Act 2001 (Cth)* requires Australian public companies and certain proprietary companies (that exceed certain thresholds) are required to include within their annual report, a directors' report that states:

If the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory – give details of the entity's performance in relation to environmental regulation.

5. *Section 1013D(1) of the Corporations Act 2001 (Cth)* requires limited disclosure of environmental, social and ethical factors. In March 2004, a requirement that institutions offering financial products with an investment component disclose (in their product disclosure statements)

"the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realization of the investment" became mandatory."

Note: In 2000 an Australian Senator introduced the *Corporate Code of Conduct Bill 2000* into the Senate. The Bill aimed to regulate the overseas activities of Australian companies on matters of human rights, environmental practice, labour relations, and occupational health and safety and provided for mandatory corporate disclosure of activities relating to these subjects. The Bill was referred to a Joint Committee of the Australian Parliament for consideration. The Bill did not pass the Senate but is periodically raised as a potential way forward to impose greater obligations on companies but is unlikely to pass in the current political climate.²

² The draft Corporate Conduct Bill proposed the imposition of obligations on Australian corporations employing more than one hundred persons in another country to take all reasonable measures to prevent any material adverse effect on the environment, and to promote the health and safety of its workers. The Bill required such corporations not to use, or obtain benefit from, forced or compulsory labour or child labour, and to comply with human rights standards concerning equality of opportunity in matters concerning race, colour, sex, sexuality, religion, political opinion, national extraction or social origin. Corporations were required to comply with applicable tax laws, and to ensure that goods and services provided by the corporation complied with relevant consumer health and safety standards and consumer protection and trade practice standards. Corporations would be required to submit detailed annual compliance reports to the Australian corporate regulator, the Australian Securities and Investments Commission (ASIC). A contravention of any of these requirements would make the

2. Is there a right to know statute enabling one to obtain information from your government?

1. “Freedom of Information” legislation in virtually the same form exists at Federal and individual state level to enable public access to information in the possession of Commonwealth and state departments and agencies.
2. Documents *exempt* from disclosure include documents covered by legal professional privilege and ; documents containing information provided to an agency in confidence.

II. Status of business entities under criminal law in AUSTRALIA

- 3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**
- 4. What types of sanctions are applied to business entities, as opposed to natural persons?**

Section 12.1 of the Commonwealth Criminal Code Act of 1995 (Cth) (“Criminal Code”) provides that a body corporate may be found guilty of any offence, including one punishable by imprisonment. The Criminal Code applies to bodies corporate in the same way as it applies to individuals, with such modifications as are set out in Part 2.5 and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals. A body corporate may therefore be found guilty of an offence against s 70.2 (Bribing a Foreign Public Official), for example. Division 268 sets out the offences of genocide, crimes against humanity and war crimes, which may also extend to corporations. The six Australian states and two territories also have criminal legislation setting out offences for which corporations may be liable.

Although Commonwealth law does provide for some sanctions directed specifically at corporate offenders, such as adverse publicity orders, corporate probation and the like, these are generally found in specific statutes concerned with corporate regulation. Sanctions for federal criminal offences such as those under discussion are found in the *Crimes Act 1914* (Cth), with the most likely corporate penalty being a fine

corporation liable to proceedings for the recovery of a civil penalty. Corporate officers could also incur liability if their involvement in the contravention was done knowingly, recklessly or negligently, and they were in a position to influence the corporation’s conduct in relation to the contravention. See Australian Parliament Joint Statutory committee on Corporations and Securities, REPORT ON THE CORPORATE CONDUCT BILL OF 2000 (June 2001) available at http://www.aph.gov.au/SEnate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf#search=%22australian%20corporate%20conduct%20bill%202000%22

Section 4B of the Commonwealth Crimes Act sets out a means of calculating penalty units (fines) payable by a corporate defendant where an offence would otherwise involve imprisonment or for increasing the monetary penalty that applies to a corporation instead of a natural person.

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

- a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?**
- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present? ; and**
- c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?**

Part 2.5 of the Criminal Code contains general principles of corporate criminal liability. Offences under the Criminal Code consist of physical elements and fault elements (Section 3.1). A physical element of an offence may be conduct, a result of conduct or a circumstance in which conduct or a result of conduct occurs (Section 4.1). The fault element for a particular physical element may be intention, knowledge, recklessness or negligence (Section 5.1).

Pursuant to s.12.2 of the Criminal Code, where the physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, that physical element must also be attributed to the body corporate. The fact that the conduct in question was illegal will not automatically render it outside the scope of an employee, agent or officer's actual or apparent authority. 'The relevant distinction...is between a mode, albeit improper, of doing that which the employee is employed to do and conduct which is outside the scope of the employee's employment' (*Tiger Nominees v State Pollution Control Commission* (1992) 25 NSWLR 715 at 721 per Gleeson CJ).

For many of the offences under discussion, the fault element will be intention or recklessness (see, for example, s. 70.2 discussed below). Section 12.3 of the Criminal Code provides that the fault element for an offence must be attributed to a body corporate that 'expressly, tacitly or impliedly authorised or permitted' the commission of the offence. The Code sets out four ways in which this may be proved:

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

- (b) proving that a *high managerial agent* of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence (Under 12.3(6) a 'High managerial agent' means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy. It therefore does not require a formal title, but is based on functional responsibility and an objective assessment of whether he or she represents the company's policy.) This basis of liability is subject to a defence of due diligence under s 12.3(3)
- (c) proving that a *corporate culture* existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision ('Corporate culture' means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place; s.12.3(6)); or
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Although there are provisions under federal law where the conduct of a business entity may be attributed to an individual, these are generally found in statutes dealing specifically with corporate regulation. Except in the case of corporate criminal liability, (discussed above) the Criminal Code preserves the general principle of the criminal law that a person should only be liable for his or her own conduct. An individual may, however, be liable for ancillary offences such as complicity or conspiracy with a business entity.

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Pursuant to s 11.2 of the Criminal Code, a person who *aids, abets, counsels or procures* the commission of an offence by another person is taken to have committed that offence and is punishable accordingly. The person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person, and the offence must have been committed by the other person.

A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or found guilty (s.11.2 (5)).

Although the fault element for an accessory is an intention that his or her conduct would aid, abet, counsel or procure the commission of any offence, the fault element for a corporation is that found in Part 2.5: Once the physical element is established and attributed to the corporation, the corporation has committed the offence if it expressly, tacitly or impliedly authorised or permitted the commission of the offence. This may be established in the ways outlined above.

The offence of conspiracy is found in s.11.5 of the Criminal Code. It provides that a person who conspires with another person to commit an offence is guilty of the

offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed. A conspiracy requires that the person entered into an agreement with one or more other persons, where that person and at least one other party to the agreement intended that an offence would be committed pursuant to the agreement and the person or at least one other party to the agreement committed an overt act pursuant to the agreement.

Although the fault element for complicity and conspiracy is intention, the fault element for a corporation is that found in Part 2.5. Once the physical element is established and attributed to the corporation, the corporation has committed the offence if it expressly, tacitly or impliedly authorised or permitted the commission of the offence. This may be established in the ways outlined above.

Where the relevant conduct is committed by a subsidiary incorporated outside Australia, it would not be possible to prosecute that entity, as it has no presence in the jurisdiction. However, the parent company may be prosecuted for aiding and abetting the commission of an offence by a subsidiary, for incitement under s 11.4 or for conspiracy under 11.5, subject to jurisdictional issues discussed below. Corporate liability is again imposed in accordance with Part 2.5.

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

There are practical issues associated with securing the attendance of a corporation at trial. The trial of serious offences requires the personal presence of the defendant. Obviously a corporation cannot appear in person, it can only appear by representative. Although we are concerned with federal offences, in Australia such offences are tried in state courts applying state rules of procedure. The rules relating to corporations appearing by representative varies between states, although some do have specific provisions to this effect; for example, s.10 of the Criminal Procedure Act 1986 (NSW).

Where one is dealing with a prosecution of a home parent company in respect of activities that also involved its subsidiary operations in a host state, then the “corporate veil” issue obviously arises.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8 Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.

9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?

10. **Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?**
11. **May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?**

Response (combined answer to questions 8-11)

Only international criminal laws which are incorporated onto Australian domestic law are actionable in Australia. International crimes can be prosecuted under domestic law by applying Australian criminal law principles set out in the Commonwealth Criminal Code.

A. Torture Convention

Ratified by Australia.

Section 23Q of the Commonwealth Crimes Act of 1914 as amended reads:

“A person who is under arrest or a protected suspect must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment”

The Criminal Code amendments that introduced the provisions of the Rome Statute into domestic law also contain provisions relating to torture in the context of war crimes (see below).

B. ICC Statute

Chapter 8 of the Commonwealth Criminal Code incorporates into Australian Federal law provisions that mirror the offences against humanity contained in the Rome Statute of the International Criminal Court. The express intention of Chapter 8 is to give Australian Courts complementary jurisdiction with the International Criminal Court (S268.1 Criminal Code).

Corporations may themselves be criminally liable – directly or as accessories – under Chapter 8 (see above discussion).

Pursuant to Chapter 8:

1. A person will commit a “*crime against humanity – murder*” where that person intentionally causes the death of one or more persons *as part of a widespread or systematic attack directed against a civilian population* (S.268.8).

2. A person will commit a “*crime against humanity – torture*” where that person intentionally inflicts severe pain or suffering on one or more persons who are in custody or under the control of that person, as part of a widespread or systematic attack directed against a civilian population (S268.13).
3. A person will commit a “*war crime – murder*” where that person causes the death of one or more persons who are not taking an active part in hostilities and the person knows that fact, or is reckless to that fact, and his or her conduct takes place in the context of an *armed conflict* which is *not international*. (S.268.70)
4. A person will commit a “*war crime – attacking civilians*” where that person directs an attack, the object of the attack is a civilian population or individuals not taking a direct part in hostilities and his or her conduct take place in the context of an *armed conflict* which is *not international*. (S.268.77)

Section 268.117 of the Criminal Code provides that *extended geographical jurisdiction – Category D* applies to the offences of crimes against humanity and war crimes as well as the offences of people smuggling (ss 73.1-73.12), terrorism offences (Divisions 101-105); slavery and sexual servitude (Division 270) and trafficking in persons and debt bondage (Division 271). (S.15.4 of the Criminal Code (extended geographical jurisdiction – Category D) provides that the Australian courts shall have jurisdiction in respect of crimes committed outside Australia). Category D jurisdiction really amounts to universal jurisdiction with no foreign law defence available and it is not limited to nationals (corporate or natural persons) of Australia.³ Proceedings in relation to genocide, crimes against humanity or war crimes may only be commenced with the consent of the Commonwealth Attorney-General (s 268.121), but charges can still be brought prior to the grant of such consent

Principles of responsibility, aiding and abetting and conspiracy for these new international crimes are derived from Australian criminal law so they may differ from the development of jurisprudence from the ICC in due course.

³ Amendment of the Criminal Code Act 1995, § 268.123 (1) (Geographical jurisdiction) (*obtainable from <http://www.aph.gov.au/house/committee/jsct>*). That provision reads: "Section 15.4 (extended geographical jurisdiction - Category D) applies to genocide, crimes against humanity and war crimes." The current wording of Section 15.4 describes the extended geographical jurisdiction of Category D as follows:

“If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
 (a) whether or not the conduct constituting the alleged offence occurs in Australia;
 and
 (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.”

This provision does not contain the restriction found in other extended geographical jurisdiction provisions in Section 15.4 to Australian citizens, so it would apply to anyone and therefore give Australia universal jurisdiction over genocide, crimes against humanity and war crimes.

C. OFFENCES RELATING TO BRIBERY OF FOREIGN PUBLIC OFFICIALS

Division 70 of Chapter 4 of the Criminal Code, which is entitled “Bribery of foreign public officials”, came into effect on 17 December 1999. It incorporated provisions of the of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the Convention”) into Australian Federal law. The Convention was an integral component of the global strategy adopted by the international community to combat the political, economic, social and environmental impacts of corruption worldwide, in which bribery of public officials is a key aspect.

Section 70.2, provides that a person (including a corporation) will be guilty of an offence if that person provides, causes to be provided, offers to provide or promises to provide a benefit to another person in circumstances where that benefit is not legitimately due to that other person, and the intention is to influence a foreign public official in the exercise of his or her duties in order to obtain a business advantage. (In determining whether a payment was legitimately due, S.70.2(3) expressly provides that the fact a payment might be customary, perceived as such, or tolerated in the country in question, must be disregarded).

Section 70.2 is specifically given extraterritorial operation. Pursuant to s 70.5 of the Criminal Code, a corporation incorporated pursuant to Australian law at the time of the alleged offence and a person who is an Australian citizen or resident at the time of the alleged offence will commit an offence against s 70.2 even where the conduct constituting the offence occurs wholly outside Australia. However, where the offence is alleged to have occurred wholly outside Australia and the person alleged to have committed the offence is, at the relevant time, a resident of Australia but not an Australian citizen, proceedings may not be commenced without the consent of the Attorney General, but charges can still be brought prior to the grant of such consent.

IV. Alternative Mechanisms

12. Can you think of any bases in your country’s tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?

In Australia, there is no basis for suing directly in respect of international criminal law violations. But tort law, using the language of negligence, may be used instead. This would be an entirely separate action from any criminal proceedings, although evidence from the latter may be utilised.

There have been cases similar to the UK cases against Cape PLC and Thor Chemicals , which have been pursued along similar lines in Australia.⁴

For example the OK Tedi case pursued against BHP on behalf of Papua New Guineans whose land had been damaged by mining operations.⁵

⁴ *Lubbe v. Cape plc* [2000] 1 WLR. 1545; *Ncgobo v Thor Chemicals* and *Sithole v Thor Chemicals*, unreported, *Times Law Review*, 10 November 1995 and 15 February 1999

A claim is currently being investigated into whether Perth-based Anvil Mining Ltd aided and abetted the Congolese military in committing atrocities in the DRC. If pursued, this will be as a negligence claim.

V. Jurisdiction and related issues

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

Many Australian state courts can exercise jurisdiction if damage is suffered partly within the jurisdiction. In *Renault v. Zhang*, the Supreme Court of New South Wales had jurisdiction over a foreign defendant (Renault, which had no commercial presence in Australia) regarding a car accident in New Caledonia because the victim, a NSW resident, received medical attention in New South Wales. (See Rules of the Supreme Court of New South Wales, Part 10, rule 1A(1)(e). In general, state courts can exercise jurisdiction if there is a nexus between the State and the matter, but the nexus requirement is interpreted very liberally.

Federal courts have jurisdiction when granted jurisdiction under a federal statute, such as the Criminal Code.

Civil cases: defendant's domicile, presence, registration of a place of business in the jurisdiction, accession to the jurisdiction, place of commission of the wrongdoing, "necessary and proper party" to litigation over which court already has jurisdiction. (

Criminal cases: place of commission of the crime; geographical jurisdiction is specifically addressed in Part 2.7 Criminal Code. The Code makes clear which form of geographical jurisdiction applies to a particular offence. Although difficulties may arise where the alleged conduct occurs wholly outside Australia, many of the offences under discussion, including bribery of foreign officials, crimes against humanity and war crimes, are given extended geographical jurisdiction (i.e. universal jurisdiction) (discussed above). Eg in the Anvil Mining case, referred to above, the Australian Federal Police is investigating whether or not the parent company was complicit in the commission of crimes against humanity by the Congolese military.

Where the body corporate is incorporated outside Australia, then problems of asserting jurisdiction arise because of the difficulties of extradition. A company cannot be 'moved' from one country to another, and individual officers cannot be extradited unless they have personally been charged with an offence. Even if an

⁵ The Ok Tedi case involved a legal claim brought by 30,000 indigenous landowners from Papua New Guinea against one of Australia's largest corporations, Broken Hill Proprietary (BHP). Plaintiffs alleged that from 1986 onwards, BHP had dumped 80,000 tons of tailings and wastes from its Ok Tedi copper and gold mine into the Ok Tedi River, located in Papua New Guinea's rainforests. The lawsuit brought claims seeking compensation for the resulting environmental damage, including widespread deforestation, the destruction of local waterways, and the loss of wildlife habitats. A settlement was reached of approximately \$500 million in compensation and other environmental commitments in June 1996. The case returned to the Victorian Supreme Court in 2001 because of an alleged breach of the settlement agreement. *Gagarimabu v The Broken Hill Proprietary Company Ltd* [2001] VSC 517 (unreported) (SCt Vic) Supreme Court of Victoria

individual officer is present in the jurisdiction, this may not confer jurisdiction if the corporation has no presence in the country (see above).

14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

See response to 13 above: No problem with parent company. But subsidiary will only be caught if: a necessary and proper party to proceedings involving the parent; it has a registered place of business in Australia; it accedes to the jurisdiction .

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?

Position essentially the same as under UK law. Liability of parent for subsidiary wrongdoing requires lifting of veil or demonstration of effective control eg as in the decisions of the NSW Court of Appeal in the asbestos cases *CSR Ltd. v. Young* and *CSR Ltd. v. Wren*,⁶ where the evidence indicated that the parent in fact managed the subsidiary.

The other alternative is “direct liability” on the basis of established negligence principles. This means that a parent could be sued regarding its own actions and omissions which cause or generate the ultimate behavior of the subsidiary, rather than being sued via the process of lifting the corporate veil (to expose parent to liability for the acts of the subsidiary).

16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

See above: the OK Tedi case against BHP. *See James Hardie & Co v. Putt* (1998) 43 NSWLR 554, where asbestos victim employed at NZ subsidiary of Australian company sued in Australia (NB case dismissed by reason of “double actionability” principle, the claimant having no action under NZ law).

There may be potential (though this is currently untested) to bring an action under s52, 53, 75AZC of the *Trade Practices Act* for liability for misstatements. S52 prohibits misleading and deceptive conduct in trade or commerce. S 53 more specifically addresses misrepresentations about particular qualities of goods ad

⁶ *CSR Ltd v Wren* (1997) 44 NSWLR 463 (CA NSW). Employee of CSR subsidiary sued CSR for asbestos-related injuries. CSR held liable for injuries. Held that, on the facts, CSR owed a duty to ensure subsidiary’s operations were not dangerous; *See also CSR Ltd & Anor v. Young* (1998) 16 NSWCR 56

services, and s75AZC renders these representations a criminal offence. Conduct outside Australia by bodies corporate incorporated or carrying on business in Australia and Australian citizens fall within these sections of the TPA.

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

The key practical obstacles would be cost-related namely: in the absence of legal aid and US-style contingency fees, finding lawyers willing to take on the risk of a long running, costly and risky case; the adverse costs risk i.e. in view of the rule that “costs follow the event”, the risk of having to bear the defendant’s costs if the case fails. On the positive side, the Federal Court and the Supreme Court of Victoria have legislated for class action - of the “opt out” variety. This means that where a case has a federal element or a connection with Victoria, a class action is potentially possible. The effect would be to reduce overall costs of the case and limit the costs risk to the representative plaintiff(s) only, thereby potentially increasing access to justice.

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of forum non conveniens)?

In *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197 and *Voth v Manildra Flour Mills* (1990) 71 CLR 538 the High Court of Australia declined to adopt the "most suitable forum" approach, instead devising its own "clearly inappropriate forum" test.

Subsequently, in *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, the High Court affirmed the "clearly inappropriate forum" standard, while stating that even where the law of a foreign country had to be applied to decide a case, The High Court tightened the test further such that forum non-conveniens is only available if litigation in Australia “would be productive of injustice...oppressive in the sense of seriously and unfairly burdensome, prejudicial and damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment.” In *Renault*, proceedings against a non-resident company were allowed, even though there was only a tenuous link between the tort and the state of New South Wales. This case indicates that it will be virtually impossible for a resident company to secure dismissal on the basis of forum non-conveniens in Australia.

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism)?

Administrative (judicial) appeal might enable a successful challenge of a decision of prosecuting authorities not to investigate, but highly unlikely that courts would interfere in a decision not to prosecute.