

The Company in the 21st Century: Piercing the veil: reconceptualising the company under law

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Abstract

The corporations law describes the legal identity of a company as being a "separate" entity, or having a separate personality from its owners or managers. Piercing the veil of a corporation occurs when a court disregards this distinction to hold people to account. The paper reviews the historical development of the legal form of companies, three theories which assist in understanding the role of companies in society, and how and why piercing of the veil has developed. The author argues that contemporary law lacks an adequate definition of a company and the doctrine of piercing is becoming increasingly irrelevant. In this context he proposes a new definition of a company appropriate for today's society.

Introduction

'Piercing the veil of incorporation' is a statement which uses the metaphor of the company entity as a 'veil', whereby under some circumstances the courts will not recognise the separate entity of a corporation from its controllers – but will hold those controllers personally liable. The concept of 'veiling' presumes a legal entity exists, and that the entity is separate from its owners and operators; but what this entity actually represents is rather unsettled, both in legislation and in jurisprudence. The modern company is a concept that has evolved from the artificial entities of ancient times, basically as a result of sheer convenience and practicality. The boundaries of that entity have been subject to much criticism and perhaps mysticism as the courts have invented mythology to both create the entity, explain it, but to also constrain it by refusing its separate existence from its members should that mythology be misused.

I propose that the concept of piercing the veil, and in fact the incorporation of a company as a separate legal entity, which is then equated to that of a body with a personality, is not an appropriate analogy. I propose that the analogy of a body, the mythology that views a company as a human like 'organic being' obfuscates the true nature of the company, or at least a perception of what it should be. Similarly, the idea of piercing the veil is inappropriate and has been surpassed by a new reality of the company entity, or at least it should. The legal perception of a company under law has significant implications in whether a company as a humanized form must therefore display the same duties, ethics and social responsibility expected of a human citizen.

Creation of companies

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The corporate, limited liability entity is a great invention. One writer described it as equivalent to the invention of electricity! Take the statement of President Nicholas Murray of Columbia University in 1911.

I weigh my words when I say that in my judgment the limited liability corporation is the greatest single discovery of modern timesEven steam and electricity are far

less important than the limited liability corporation, and they would be reduced to comparative impotence without it.¹

¹ Quoted in William Hackney & Tracey Benson, 'Shareholder Liability for Inadequate Capital' (1982) 43 *University of Pittsburgh Law Review* 837, 841.

Company law, as it relates to the creation of a company and its regulation has occurred haphazardly and incrementally in order to service each economy in which it sits, e.g. whether that be the growth of railways in the United States, or the facilitation of mining ventures in Victoria,² or the encouragement of micro business in Australia in the last 10 years.³ In the last 140 years since the creation of companies (if we use the English legislation as a benchmark) there has been a massive creation of regulation, particularly in relation to directors and officer's duties in the way the company must operate in keeping records, procedures etc. However, there is little in company legislation that states what essentially a company is designed to do, nor its responsibility to the community – at least in the process of its creation.

Company legislation in Australia does not define the role of company in our society

Under Australian legislation there is no statement as to what the company actually is but a rather vague reference that it is a separate entity according to law, with no further explanation of what that means, something which is then left to the courts to determine. The lack of any direction by statute means that it is difficult to determine whether the company is a human like body, or not, and in turn whether there can be a claim to citizen's rights, and further whether such 'privileges' accordingly require human like ethics and responsibilities.

The corporate entity is defined in s 9 of the *Corporations Act 2001* (Cth) but silent on the notion of the personality of a company, with simplistic statements that a certificate of registration is conclusive of registration.⁴ The company comes into existence at the beginning of the day it is registered: s 124 then states that a company has the legal capacity of an individual, as a legal person without explaining what that 'person' actually is. The *Acts Interpretation Act 1901* (Cth) similarly gives little explanation of the term 'person', in s 2C the term 'person' includes a reference to companies, corporations or bodies corporate, thereby leaving to other sources of law to explain a company. A survey of the legislation from other common law countries demonstrates similar bland statements as to the meaning of registration, e.g. the *Companies Act 1989* (UK) gives no guidance as to the separation principle with very open statements as to the essence of a company, for instance: 's 1(1) Any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act'. It is the symbology of the common law which has equated the legislated entity to that of natural person with comparisons to bodies, arms, organs and brains.

The response of the courts has been to equate the company with that of a natural person in order to give themselves extensive powers in determining the distinction between a company and its members. The courts have been forced to interpret the Corporations Act in such a way because of its complexity and gaps of the Act, particularly in relation to a lack of any stated policy within the Act.⁵ The Corporations Act is more of a regulatory document, remaining silent on policy issues, unlike for instance the Income Tax Assessment Act (Cth) 1997 which very clearly states policy and intention as a preamble to each chapter of the Act.

² E.g., the creation of a non-liability company in Victoria to facilitate risky ventures during the gold rush in the 1800s.

³ E.g., the creation of one person companies.

⁴ Issued by the ASIC after specific formalities have been fulfilled: ss 118 & 119 *Corporations Act 2001* (Cth).

⁵ Dimity Kingsford Smith, 'Interpreting the Corporations law – Purpose, Practical Reasoning and the Public Interest' (1999) 21 *Sydney Law Review* 161. Dimity Smith refers to a type of stratification of law whereby statutes are regulatory and deliberate acts of transformative social policy whereas equity and contract are for private interests.

In the absence of legislative guidance it is the common law which provides the principle that companies are separate from their owners and controllers, basically starting with the celebrated Salomon case, which without stating anything in particular about corporate entities, firmly established the separateness of the corporate entity from its promoters and operators.⁶ An apt comment in a case note, attributed to Sir Frederick Pollock,⁷ sums up the problem: 'Our Legislature...delivered itself on the Companies Act in its usual oracular style, leaving to the Courts the interpretation of its mystical utterances'. In a further comment, the same writer states: 'The House of Lords has said....that the one trader and the six dummies will do, treating the statutory conditions as mere machinery'.⁸

Equating a company with a human person, the use of metaphors

Humans have always used allegory to explain their relationships, their obligations and their consequent liabilities; the law contains many examples of such 'inventions' in order to facilitate property holding, legal action or contractual agreements. There are two aspects to the use of the metaphors in relation to companies, the first is that the metaphor can take over and become the law itself, and secondly the use of metaphors may substitute for a real analysis of what the personhood of the company actually is.

Probably the essence of the first 'modern' companies (if we focus on British companies), is that the essence of incorporation was to recognize legally a company of persons, with common interests, knowledge and cooperation with each other, rather than the large corporate bodies now existing, with little interaction of its company members,⁹ particularly pronounced by the separation of ownership and control in a large modern company.

The idea of a legal personality is one such creation of the legal system, which begins with a recognition of humans as having a recognised legal entity, at least in modern times,¹⁰ while restricting the legal 'abilities' of some categories of humans e.g., children and the mentally impaired. The extension therefore of a legal personality to other artificial entities has developed out of sheer convenience in order that the entity can carry out everyday functions of holding monies, entering into contracts and appearing in court,¹¹ albeit through human agents.

Entities similarly have certain abilities within the law, while being denied other rights which may be available to a natural (human) entity.¹² Governments, corporations and even an idol¹³ may be deemed

⁶ *Salomon v Salomon* [1897] AC 22.

⁷ (1897) 13 *Law Quarterly Review* 6, the case note was anonymous but Sir Frederick Pollock was the editor and is assumed to be the author.

⁸ *Ibid* Pollock.

⁹ The word 'company' has been suggested as one of 'breaking bread together', pane referring to bread. Compagnia, a form of partnership firms that dominated medieval Italian cities from the thirteenth to the sixteenth century, literally meant sharing bread (L. panis) together (L. com), the partners are sharing everything together: Collins Concise English Dictionary (Australian 1991). Paul Redmond refers to word company as possibly 'cum pane' literally 'with bread', your companion being the one with whom you break bread: Companies and Securities Law, 2000 LBC.

¹⁰ Historically slaves, monks, unborn children and prisoners were deemed in different societies, at different times, to lack any civil entity or personality and hence rights.

¹¹ *Molnar Engineering Pty Ltd v The Herald and Weekly Times Ltd* (1984) 1 FCR 455. A company cannot appear in court without a representative.

¹² Noting that companies may have individual rights not available to humans eg, the right to issue shares: s 124 *Corporations Act 2001* (Cth). Interestingly in the city of Melbourne, Australia, companies have the right to vote in local council elections if they pay rates, admittedly through the person of a director or company secretary. See Victorian Electoral Commission at <http://www.vec.gov.vic>

to have a legal personality for the purposes of law. The legal persona then operates through its agents, and in order to do this the law has therefore created a collective known as a body corporate, a created entity to which it ascribes certain legal characteristics. This body then has the right to enter into relationships that give rights to that body, while at the same time imposing liabilities and responsibilities on the creation designating that body as a legal person. To explain that body there is an expansive use of metaphor and equation of human rights (and liabilities) to entities such as companies.¹⁴ Those metaphors both create a human like persona for companies, but are also used to undo that persona, to discard the separate legal entity so presumed, in order to hold the humans behind the entity personally liable by undoing their protection in the event that they misuse the corporate form.

George Paton¹⁵ makes the observation that Greek philosophy imputed the persona as being more about the individuality of a human, ‘the rational substratum of a human being’, whereas it has been interpreted to designate a human as a ‘right and duty bearing unit’,¹⁶ a different concept altogether. Interestingly the term ‘personality’ purportedly derives from the Greek word *per-sonare* and *persona*, being an actor’s mask behind which stood the anonymous speaker.¹⁷

The Romans adopted the ideas of the Greeks and developed further the notions of corporate entities with a legal persona, whereby some bodies were recognised in law as capable of having legal rights, but also bound by certain legal duties – though not necessarily in the same strict sense as today.¹⁸ Patrick Duff’s study of Roman law demonstrates the Romans had a very unsophisticated idea of legal personality, he refers to writings with ‘hundreds of passages where *homo* could be substituted for *persona* without any apparent change in the sense’. Roman law had no particular advanced theory on artificial entities, but the barest principles were adequate enough to cope with the activities of collegia, societates publicanorum, hereditas iacens, municipalities and charities.¹⁹ The use of the corporate personality to facilitate the holding of property by these ancient peoples is interesting in that they developed the notion of a separate entity, but did not equate this with a human in terms of its rights and civil liberties.

Note that the idea of the mask has also been used in Australia, for instance Windeyer J thought that a company personifies:

[A] new legal entity, a person in the eye of the law. Perhaps it were better in some cases to say a legal persona, for the Latin work in one of its sense means a mask; Eriptur persona, manet res’.²⁰

¹³ *Pramatha Nath Mullick v Pradyumna Kumar Mullick* [1925] L R 52 Ind App 245: this was an Indian case which was decided in England on appeal. See also Patrick Duff, ‘The Personality of an Idol’ (1927) 3 *Cambridge Law Journal* 42.

¹⁴ For example the ability of a company to sue for defamation. *McDonalds Corporation v Helen Steel, David Morris* [1993] EWHC QB 366 19th June.

¹⁵ G W Paton, *A Textbook of Jurisprudence*, (ed G W Paton and D P Derham), (4th ed 1972), pp 57–9, 130, 483.

¹⁶ John Dewey, ‘The Historic Background of Corporate Legal Personality’ (1926) 35 *Yale Law Journal*. 655.

¹⁷ Clement Webb, *God and Personality* (1971), Frederick Hallis, *Corporate Personality: a study in jurisprudence* (1930). See also Max Radin, *The Legislation of the Greeks and Romans on Corporations* (1910).

¹⁸ Patrick Duff, *Personality in Roman Private Law* (1938) 19. See his note that persona in Roman law referred to a human rather than a ‘juristic entity’, see also William Buckland, ‘Roman Law of Slavery’ (1908) 17 *Law Quarterly Review* 180.

¹⁹ ...hereditas iacens represented the person of the deceased.

²⁰ *Peate v Federal Commissioner of Taxation* (1964) 111 CLR 443. However, in a later case: *Gorton v FCT* (1965) 113 CLR 604 at 627. Windeyer J said in an income tax case that he detected ‘...an increasing tendency of courts in England and perhaps more markedly in the United States, to retreat

The metaphors range from the organic method, the idea of the company as a body with a 'brain' and organs that carry out the functions of the company. The metaphors, in the absence of any positive statement by the written law, have become law in itself.

Such metaphors abound in case law. One author²¹ identifies 25 different metaphors to describe the use and misuse of a corporate entity as amongst others as a

...mere adjunct, agent, alter ego, alter identity, arm, blind, branch, buffer, cloak, coat, corporate double, instrumentality, mouthpiece, name, nominal identity, phrase, puppet, screen, sham, simulacrum, snare, stooge, subterfuge, or tool.

In Australia and the United Kingdom, the most popular expression seems to be the use of the metaphor of the veil of incorporation. The expression of a 'veil' is in a sense a judgmental term and one dictionary term has it as 'to conceal (some immaterial thing, condition, quality, etc.) from apprehension, knowledge, or perception: to hide the real nature or meaning of (something)'.²² Another term often used is that of the 'mask' of incorporation, which again is the use of a 'covering' word and particularly pertinent given that the term persona is derived from Greek theatre, whereby a mask designated a certain character to the world, while the 'actors' remained anonymous.²³ As Paul Redmond states '...corporate personality is a human construct, created to solve human problems...',²⁴ and similarly Samuel Stoljar states that: 'Although separate legal personality is referred to in absolute terms, it is a relative notion referring to a subject's ensemble of legal rights'.²⁵ Professor Elvin Latty, an earlier but often quoted writer in this area,²⁶ offers an interesting statement on the fiction of a company:

[W]e are . . . told that the corporation admits of a real personality or at least of something so like personality that we may call it by that name; that it is a real person with a body, members and will of its own; that it is an artificial person; that it is a real person because what is artificial is real; that even an individual is after all but an artificial legal person, a subject of rights and duties; that a corporation is not a thing, it is a method; that the entity is a fiction but a rational fiction, not an arbitrary or artificial fiction; that the 'person' is a fiction but the entity or 'thing' is real.²⁷

The use of metaphors to explain the idea of corporate personality has itself been criticized, for instance Justice Cardozo in *Berkey v Third Ave Ry Co*²⁸ said that: 'Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it'. In the same passage he described veil-piercing as an area of law which is shrouded 'in mists of metaphor'.

from the position where they must refuse to look behind the legal personality which the law has given to a private corporation, and to examine the purpose of its creation and the manner of its control'.

²¹ R.W. Hamilton, *Corporations including Partnerships and Limited Partnerships* (4th ed 1990) 261.

²² The Macquarie English Dictionary (3rd ed 1998). Interestingly the dictionary defines 'fiction' as a 'something invented or imagined...'

²³ Clement Webb, *God and Personality* (1971).

²⁴ Paul Redmond, *Companies and Securities Law: Commentary and Materials* (1992) 141.

²⁵ Samuel J Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (1972) 4.

²⁶ Michael J, Gaertner, 'Reverse piercing the corporate veil: Should corporation owners have it both ways?' (1989) *William & Mary Law Review* 667. Carsten Alting, 'Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View' (1995) 2 *Tulsa Journal of Comparative and International Law* 187, 197, footnote 45.

²⁷ Elvin R Latty, 'The Corporate Entity as a Solvent of Legal Problems' (1936) 34 *Michigan Law Review* 597, 599. Note Lord Cooke, 'Corporate Identity' (1998) 15 *Company & Securities Law Journal* 160, 161 refers to Lord Halsbury's *Salomon* image of a company as 'a real thing' at 33 in his judgment and consequently ..it had a legal existence and if consequently the law attributed to it certain rights and liabilities in its constitution as a company it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it is entered'.

²⁸ See *Berkey v Third Ave Rye* 155 N.E. 58, 61 (N.Y. 1927).

Samuel Stoljar provides an Australian contribution and comments that the concept of separate legal personality is a perception that 'responds to our anthropomorphic instincts and runs the risk of retaining, even if regarded as only a fiction, a sort of residual strength'.²⁹ The separateness of the company detaches its members from personal liability by viewing the company as a metaphorical 'separate personality', 'body' or 'legal person'.³⁰ The company entity has taken on a life of its own as if the members are passive investors and the controllers work for a personified entity known as the company. Peta Spender takes up the comment by Stoljar pointing out that the concept of separate legal personality exists as both a powerful metaphor and a judicial reality',³¹ and later says: 'Unfortunately anthropomorphism has caused the separate legal personality of the family company to assume a life of its own as a persuasive metaphor. As a consequence, the law has focused upon fulfillment of the metaphor rather than the specific regulatory aims of the law in particular areas'.³² Such observations are not new; Bryant Smith³³ reached a similar conclusion over 70 years ago:

It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes . . . is to make . . . corporate personality . . . a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits. Issues do not properly turn upon a name.

The last 200 years of commercial growth and inevitable litigation has mythologized the company form. A legal arrangement has become a body, with 'a will and mind, with organs, hands and brains'.³⁴ Others have sought to draw back from this bald separation, for instance Buckley LJ said:

A corporation has neither body, parts nor passions. It cannot wear weapons nor serve in wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators, it can have neither thoughts, wishes or intention, for it has no other mind than the minds of the corporators.³⁵

Similarly Lord Chancellor Thurlow has said: 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?'"³⁶ noting that some would dispute this, by pointing to the fact that companies may have a corporate culture akin to a personality.³⁷ In 1250 AD, Pope Innocent IV is reputed to have forbidden the practice of excommunicating a corporation convicted of a crime; he reasoned that because a corporation had no soul, it could not lose it.³⁸

Personalising the entity of the company in modern times moves the conception of the company from a company of persons to legal person known as a company is quite a shift in perception. A comprehensive development of how the company entity should be treated is yet to come - clearly parliament can direct that that be done. The issue of how different the corporate entity is to that of a

²⁹ Samuel Stoljar *Groups and Entities: An Inquiry into Corporate Theory* (1973) 2.

³⁰ A S Schane, 'The Corporation as a Person: The Language of a Legal Fiction' (1987) 61 *Tulane Law Review* 563, '[Corporate personality doctrine] is one of the most enduring institutions of the law and one of the most widely accepted legal fictions'.

³¹ 'Family Companies and Women's Proprietary' (1997) 11 *Australian Journal of Family Law* 26, 42.

³² Spender was observing how the law solved problems in family companies, which normally allowed courts to fall back on the doctrine of separate entity, rather than considering that the company, particularly a family company, is essentially composed of family members with a common interest.

³³ Bryant Smith, 'Legal Personality' (1928) 37 *Yale Law Journal* 283.

³⁴ *Tesco Supermarkets Ltd v Natrass* [1972] AC 154.

³⁵ *Continental Tyre and Rubber Co (GB) Ltd v Daimler Co. Ltd* [1915] 1 KB 893.

³⁶ This was referred to in regards to the company trading on a Sunday in contravention of the *Sunday Observance Act 1677* (UK) *Rolloswin Investments Ltd v Chromlit Portugal Cutelaris E Produtos Metalicos S.A.R.L* [1970] 1 WLR 912.

³⁷ *Model Criminal Code 1992* (Cth).

³⁸ Sheryl J Wragg, 'Corporate Homicide; Will Michigan Follow Suit' (1984) 62 *University of Detroit Law Review* 62, 67.

human should be determined. The challenge is to formulate some flexible definition of the corporate entity in order to accommodate those differences

The company has never been considered as a body equivalent to that of a human

English law, including the church through canon law, began to develop the concept of a corporate entity or *personae ficta* and to operate as an incorporate person in what is often referred to as the corporation sole.³⁹ Whether the fictitious body of the corporation sole was actually a separate entity or an embryonic version⁴⁰ probably doesn't matter, the practical use of separate entities was now recognised, if not embedded in law. However, the church was not the only body which embraced the use of fictional entities, Henry de Bracton, an English jurist and chancellor of Exeter Cathedral in 1264, wrote of bodies 'politick' and incorporate in one of the first works on English law.⁴¹ And so in the thirteenth and fourteenth centuries various corporate bodies began to develop, probably the most important being the guilds, which were descendants of the medieval guilds, originally formed to regulate the commercial activities of particular trades.⁴² The guilds were permitted to gain a charter (a separate entity), followed by other bodies which claimed a separate entity and these included the counties, boroughs, hundreds, manors, chantries, deans and chapters, monasteries and even societies of lawyers.⁴³

By the 1500s to the 1600s a company could be formed in the United Kingdom by royal charter, e.g. the Mineral and Battery Company 1568,⁴⁴ which was followed by a surge of unincorporated bodies claiming a type of corporate personality. In 1720 the *Bubble Act* (UK) was passed with the intention of preventing unincorporated joint stock bodies from claiming a corporate personality and to prevent them from trading their 'shares',⁴⁵ a piece of reactive legislation in response to a crisis, not dissimilar to modern times. Not that it stopped the promotion of unincorporated associations, which led Lord Eldon to declare that unincorporated associations who claimed a corporate personality committed an offence under common law: *Kinder v Taylor*.⁴⁶ This all led to the abolition of the Bubble Act in the *Bubble Act Repeal Act 1825* (UK). In 1844 there was the passing of the *Joint Stock Companies Act 1844* (UK), which gave the right (for the first time since the days of Republican Rome) for full, free and voluntary incorporation by mere registration rather than by charter or private act of parliament. After allowing limited liability in 1855 and 1856, parliament extended limited liability to members of registered joint stock companies (as distinct from limited companies) and a consequent increase in registrations then took place by joint stock companies. Registration as a company was taken as a right, a form of separate entity was created, but not one that was characterized as a human person.

³⁹ A corporation consisting of a certain office (such as a bishop) which continues as a legal entity, regardless of the human holder of that office. Halsbury's Laws of Australia: Lexisnexis para [120-1110].

⁴⁰ Frederic William Maitland in *The Collected Papers of Frederic William Maitland*, HAL Fisher (ed), (1911) 210, 243 claims it was not a juristic person and possibly land could pass if the office was vacant.

⁴¹ *De legibus et consuetudinibus Angliae* (On the Laws and Customs of England) reportedly the earliest attempt as a systematic treatment of the body of English law, he was an English jurist and writer, later Chancellor of Exeter Cathedral.

⁴² R Scott, *Joint Stock Companies to 1720* (1912), Colin A Cook, *Corporation, Trust and Company* (1950).

⁴³ William Holdsworth, *A History of English Law* Vol VIII (2nd ed 1925) 469.

⁴⁴ The New River Company 1606 and the Hudson Bay Company 1670, to name but a few.

⁴⁵ *The Bubble Act 1720* (UK) attempted to stop persons claiming that their unincorporated association had corporate personality and to prevent them using existing charters for novel and unintended purposes.

⁴⁶ (1825) 3 KH Ch 68, see also *Van Sandau v Moore* (1826) 1 Russ 441.

Historical studies of Australian company law, which till the latter part of the 20th Century were essentially colonial and then state law,⁴⁷ shows that Australian jurisdictions generally followed the UK model.⁴⁸ Companies could be created as of right, without there being any thought as to their place in society, other than in order to facilitate a new economy that required investment and limited liability to encourage entrepreneurship, new commerce and industrialization.

What is piercing and why does it occur?

Piercing by the courts usually takes place where the courts are convinced that the company entity has been misused in some way,⁴⁹ particularly by shareholders improperly using the company entity to shield themselves from potential third party claims. Which is a significant withdrawal of a right, given that a prime reason for forming a company is to shield an operator or owner from liability.⁵⁰ This does not discount other reasons for the creation of a company such as the need to collectively accumulate capital, to minimise tax or to have a transferability of ownership which flows from having a separate legal entity. An alternative type of piercing is reverse piercing whereby the shareholders attempt to have the courts show they are not separate entities from the company e.g., to find that the shareholders are realistically the owners of company property.⁵¹

In addition to the courts developing their own doctrines for discarding the separation of entity, there are some limited instances whereby Parliament has passed laws specifically making individuals liable for proscribed actions, irrespective of foundation entity statements in company legislation. Apart from some specific sections in legislation⁵² which remove the protection of the corporate entity, 'piercing' is basically considered to be a judicial technique whereby the courts have interpreted legislation establishing the creation of the company entity as unavailable to those who e.g., misuse the separation of entity protection, or where it is unfair to uphold the rigid separation. The fact that courts do this is interesting, in that it demonstrates a common law principle that courts are able to set aside the company entity under the universal Anglo system of law. This is a power derived by courts under the separation of powers, and in assuming the right to interpret the law they make law.

⁴⁷ John Waugh, 'Company Law and the Crash of the 1980s in Victoria' (1992) 15 *UNSWLJ* 356, 358. Many of the original companies in Victoria were English companies though colonial legislation began to take over and companies could incorporate with the passing of the *Companies Statute 1864* (Vic) and its successor *Companies Act 1871* (Vic) later consolidated into the *Companies Act 1890* (Vic). Later followed by the *Companies Act 1896* (Vic).

⁴⁸ Rob McQueen, 'Limited Liability Company Legislation — The Australian Experience' (1991) 1 *Australian Journal of Corporate Law* 22 maps the evolution of company law in the Australian colonies. For the period 1901–1961 see McQueen R, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *UNSWLJ* 1.

⁴⁹ Young J, in *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254, 264, said '[t]hat although whenever each individual company is formed a separate legal personality is created, courts will on occasions, look behind the legal personality to the real controllers'.

⁵⁰ Noting that some suggest that limited liability is only one factor considered by those setting up a company: Companies and Securities Advisory Committee, Corporate Groups, Final Report, May 2000, para 1.52: states that limited liability has certain economic goals, which they go on to list.

⁵¹ *WorkCover Authority of NSW v Krcmar Engineering Pty Ltd* (Unreported, Industrial Relations Court of New South Wales, Fisher CJ, 18 May 1993). The defendant argued that as a \$2 (now insolvent) company that it was really an individual's business. The defendant invited the court to look behind the veil and disregard the company entity. The court in this case did in fact hold it to be a private business and as such reduced the penalties under the *Occupational Health and Safety Act 1983* (NSW) to that of an individual. The court in its reasoning specifically looked behind the veil to find the reality of the company.

⁵² These include taxation law, mining law, occupational health and safety law, environmental law and various other legislation which hold an individual personally liable and without the protection of the corporate entity.

Australia's view of veil piercing could be summarised as one - an acceptance of the *Salomon* principle, two- a reluctance to pierce, three – actual piercing as the need arises, and four – no predictable set of principles by which the courts will or will not pierce.

The grounds for piercing the veil in British law seems to have developed as a set of exceptions, created by different courts at different times, with some periods showing a greater propensity to pierce, but without establishing any firm grounds when a court might pierce. The body of law on piercing is therefore confusing and consists of a series of cases rather principles, though some suggest that this is a strength e.g., 'The jurisdiction to pierce the veil of corporateness gives the courts a considerable degree of discretion and enables them to do justice and to decide individual cases in accordance with equitable considerations'.⁵³ The downside of this is of course the unpredictability of veil piercing.

Smadar Ottolenghi⁵⁴ was a writer whose work demonstrates a more flexible idea of piercing the veil and refers to a number of different possibilities, such as reaching in, or outside, of the company entity in the event that a court believes there is unfairness or inequity occurring, while attempting to preserve the 'sanctity' of separate entity. Ottolenghi basically refers to the idea of the corporate veil as a type of company enclosure allowing outsiders to:

- Peep behind the veil: to find who are the actual shareholders or management without necessarily disregarding the company entity;
- Extend the veil: to find who is truly within the ambit of the company entity, i.e. some individuals use the company to cover their own illegal activities;
- Ignore the veil: disallow the company entity where it was fundamentally established for fraudulent purposes;
- Penetrate the veil: to find the shareholders or owners who should be personally liable for the company's actions.

Piercing as a doctrine or process has no set definition and can mean many things, just as the company format itself has various definitions and meanings. The result is that piercing is an indefinite concept, and in fact unpredictable, except perhaps where there is statutory piercing. Note there is a question as to whether statutory piercing is really piercing or in fact regulation.

Many jurisdictions of the world now recognise that it is both possible and at times necessary to pierce the veil of incorporation, but the doctrine has developed jurisprudentially as an erratic and uncertain doctrine without any real clear direction.⁵⁵ An observation by Frank Easterbrook and Daniel Fischel⁵⁶ suggests that:

...piercing seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.

The whole situation of piercing is made even harder to grasp by the fact that the name of the concept and any discussion dealing with the disregard of the company entity is basically conducted in

⁵³ Geoffrey Morse, *Palmer's Company Law* (1992), 2.159.

⁵⁴ 'From Peeping Behind the Corporate Veil to Ignoring it Completely' (1990) 53 *Modern Law Review* 338.

⁵⁵ Stephen Bainbridge says that piercing is on a factual basis and is therefore unpredictable and random and decided case by case: 'Abolishing Veil Piercing' (2001) 26 *Journal of Corporation Law* 479.

⁵⁶ *Limited Liability and the Corporation* (1991) 89.

metaphors. Easterbrook and Fischel⁵⁷ go on to cite with approval a quote in Phillip Blumberg⁵⁸ where the legal analysis related to piercing the veil in the US was:

...jurisprudence by metaphor or epithet. It does not contribute to legal understanding because it is an intellectual construct, divorced from business realities. The metaphors are no more than conclusory terms, affording little understanding of the considerations and policies underlying the court's actions and little help in predicting results in future cases....As a result, we are faced with hundreds of decisions that are irreconcilable and not entirely comprehensible. Few areas of the law have been so sharply criticised by commentators.

Much is therefore left to the courts to determine the whole issue of the purpose of a company, who owns the property of the company and the whole issue of the separateness of company.⁵⁹

The concept of corporate entity therefore remains undefined in any conclusive way both at common law and under Australian legislation. The entity of the company has therefore been equated to that of a person for the purposes of understanding the company and its separation from its owners and controllers. This raises the question of whether a company should be considered as a unique entity and thereby removing the confusion of trying to explain the company as if it were a natural person.

The company's existence as right, concession or privilege

A consideration of the theory of the corporation discloses a plethora of company models which explain what a company's role, or at least what it should be, within our society, and in fact do much to explain the varied perceptions held by the observers of companies.

The most basic of theories is probably that of a contractarian model which demands the legal system uphold the primacy of the individual by creating and facilitating the company as part of contractual relationships. A good example might be Milton Friedman who wrote, 'There is one and only one social responsibility of business-to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud'.⁶⁰ Such a stance promotes economic efficiency for contracting parties such as shareholders, without considering the fall out of social costs and inequality. This is a utilitarian model which distinguishes a company as a private body and not subject to state control,⁶¹ except for its internal and external contractual relations. Variations of this stance include the perception of the company as a fiction (holding an aggregation of individuals),⁶² a

⁵⁷ Frank H. Easterbrook & Daniel R. Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89.

⁵⁸ Phillip Blumberg, *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations* (1985), no page reference given.

⁵⁹ See Parker J in *KT & T Developments Pty Ltd v Tay* (unreported, Supreme Court of Western Australia, 23 January 1995), he said: 'The selection of an incorporated entity as the vehicle for that endeavour brings with it the consequences of the vehicle. The most significant of those consequences...are that the company has a separate legal existence from its shareholders and that the ownership of shares in the company, while potentially valuable, does not give the shareholder any proprietary interest in the property of the company....' See Latham CJ in *The King v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 42, who said that: 'The company...is a distinct person from its shareholders. The shareholders are not liable to creditors for the debts of the company. The shareholders do not own the property of the company...'

⁶⁰ Friedman M 'The Social Responsibility of Business is to Increase its Profits' *New York Time Magazine* 13 September 1990, 32.

⁶¹ See the discussion in David Millon 'Theories of the Corporation' (1990) *Duke Law Journal* 201 at 211.

⁶² Sir John Salmond in *Jurisprudence* at 342-3 op cit '.....Although corporations are fictitious person, the acts and interests, rights and liabilities, attributed to them by the law are those of real or natural

mechanistic view of company law, and a laissez faire view without any notion of what social responsibilities such an entity should have.

At the other end of the theoretical spectrum is to hold the company as liable to all its stakeholders, a communitarian stance which means that a company has social obligations to more than just its shareholders. An extension of a social perception of the company is that the company is considered a privilege or concession by the state, and consequently must act appropriately in relation to those with whom it interacts, and that is more than just complying with contractual obligations, it means that it must act ethically, prudently and appropriately to maximize all social goals, not just economic ones.⁶³

A company and its operators should not be permitted to operate with unsafe work practices, using phoenixing to defeat creditors⁶⁴ or destroying documents to defeat legal actions.⁶⁵ Consider for instance: *Environmental Protection Authority v Caltex Refining Co Pty Ltd*⁶⁶ where Mason CJ and Toohey J cited the US case *Hale v Henkel*⁶⁷ to justify not allowing the company the privilege against self-incrimination. Justice Brown in that case had said:

[T]he corporation is a creature of the State. It is presume to be incorporated for the public. It receives certain privileges and franchises, and holds them subject to laws of the State and the limitations of its charter. Its powers are limited by law.'

A similar theory is the realist theory which ascribes to the corporation the reality of the company as a 'real' person with a mind and a will, expressed through 'organs' of the company.⁶⁸ Rather than a company being prescribed as a convenient fiction for legal activities, a company is viewed as the group of individuals who form and run the company, consequently the will and mind of the company can be formulated from the 'will' of the humans that make up the company. The persons bringing the company into existence act with a common purpose, their actions will make the company liable – just like any other individual.

The challenge in referring to theory is that there is no one size fits all, companies come in different sizes and are created for different purposes; each company is unique, though nevertheless the same legislation and common law applies to all.

One could argue the following:

1. That there is no conceptual framework for companies in Australia, rather an ad hoc and piecemeal bundle of rules and regulations under which a company forms. The natural conclusion might be that Australian law could do with some statement about what a company is and should be. However, if a company claims rights similar to a human, then should it not be subject to the same social, moral and ethical requirements placed on natural persons?
2. That the existing Australian framework, while not stating up front any absolutes in terms of perceptions of a company or official theory, is a product of a theory whether it be laissez faire or perhaps some form individualism which is tempered by a necessary intervention of the state when required. Perhaps the conclusion from this is that the company structure is working as it is and will be modified when and if it is necessary according to current social mores.
3. That company law provides a framework in which the prevailing theory or more crudely cultural and social aims will come to the fore as the judiciary makes its decisions.⁶⁹ This

person, for otherwise the law of corporations would be destitute of any relation to actual fact and of any serious purpose.'

⁶³ Parker, D. The undercapitalization of a company: Can this be the basis for piercing the corporate veil? Australasian Law Teachers Association – ALTA 2006 Refereed Conference Papers.

⁶⁴ Phoenixing is liquidation of a bankrupt company after transferring assets to a new company.

⁶⁵ *Crimes (Document Destruction) Act 2006* (Vic).

⁶⁶ (1994) 12 ACSR 452.

⁶⁷ 201 US 43v.

⁶⁸ 7th ed Sweet & Maxwell pp342-3.

⁶⁹ See *Statewide Tobacco Services Ltd v Morley* (1990)2 ACSR 405 and alternatively *Glavanics v Brunninghausen* (1996) 19 ACSR 543.

approach suggests that law is not static but is subject to current theory, even indirectly, whereby the judiciary in its wisdom will shape the theory of companies in Australia – just like it could be argued, it has done so in other countries.⁷⁰

Conclusion

The purpose of the doctrine of piercing is to hold those who operate under the protection of the separate entity of the company as liable for their personal actions, an action which can take place by a court disregarding the corporate entity, or where statute determines specific personal liability. Piercing the veil has occurred since legislation creating companies was first passed, it has also been refused by courts in many instances even though a refusal to pierce left an unfair situation unresolved. A refusal to pierce, even where it may have resolved an inequity, is a stance by a court to preserve the ideal of the company as a separate legal entity. The willingness or reluctance of courts to pierce has not slowed the use of companies, nor led to any particular outcry against the use of separate entity by companies, though by any stretch the growth of company regulation as an alternative means of piercing is self-evident.

The use of a doctrine such as piercing is increasingly irrelevant, particularly as companies, and their operators are becoming more and more regulated by a variety of legislation. To hold someone liable for their actions under the umbrella of the company is self-evidently demonstrated by the prolific numbers of cases litigated or prosecuted, where with or without a reference to piercing, individuals can be held liable for their actions. The mythology of piercing could be on a par with the mythology of the protection of the separate legal entity of a company.

If piercing occurs either by a court disregarding the entity of the company under common law, or by statute, this is in essence a regulation of the company, usually for the purpose of ensuring the company's operators comply with appropriate ethical standards as determined by community and business practice. If then piercing is essentially regulation, how can this means of regulation be enhanced without resorting to the fuzzy undefined concept of piercing?

One means of ensuring appropriate behaviour by those within a company, by self-regulation for fear of prosecution, or by compliance with accepted principles of good business, is to just leave the law to develop as it has. Indeed, statute has grown incrementally, if not haphazardly, usually as a response to some crisis or disaster.⁷¹ Legislation such as the need to retain documents within an organisation, even if potentially detrimental, the Occupational Health and Safety provisions placed on management, enhancement of directors duties and consequent liabilities, all point to increasing sensitivity to operators of companies to actually ensure that the company, and they themselves comply with appropriate community standards.

Under a fuzzy law concept, the less said the less problem there is in interpreting what is actually expected from the operators of a company. It would seem however the less stated is a bit at odds with currently 'nothing stated'. A glance at companies legislation from Australia, Canada, the UK and New Zealand shows no statement whatsoever as to the nature of a company, except for the allusion to the company as a separate entity. With one exception, i.e. s 7 (2) in the UK Companies Act there is a statement that a company must not be formed for an unlawful purpose; an interesting statement which might be the basis of bringing an action against those forming a company to facilitate phoenix activity or to promote some kind of fraud.

One means of possibly enhancing appropriate behaviour is to actually have some statement in company legislation that sets some form of benchmark as to 'what is a company?' and furthermore

⁷⁰ The UK and US in particular.

⁷¹ See CLERP 9 and the new provisions relating to auditors after the HIH and similar disasters.

what is expected of management. This follows the idea of a company as either a privilege or a concession, granted in response to a standard of expected behaviour from management.

A legislative statement as to company might be: 'A company is the legal representation of an individual or association of individuals, members, officers, managers and employees. That legal representation is considered under law as a legal entity as per the provisions of this legislation. The formation and operation of a company must be for a proper purpose according to community standards in addition to regulation imposed by corporate legislation. The controllers of a company are expected to operate according to appropriate social standards'. The statement targets 'controllers' of a company, which might in some instances be the shareholders who take on that role, whereas non-involved shareholders would not be held liable. The 18th Century companies evolved out of a particular stage in history, similarly the 21st Century companies sit in a different environmental complexity, and Australian law appears quite passive in its perception of what a company should be.