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Piercing the Corporate Veil in Australia

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There is a significant amount of literature by commentators discussing the doctrine of piercing the corporate veil. However, there has not been a comprehensive empirical study of the Australian cases relating to this doctrine. In this article, the authors present the results of the first such study. Some of the findings are (i) there has been a substantial increase in the number of piercing cases heard by courts over time; (ii) courts are more prepared to pierce the corporate veil of a proprietary company than a public company; (iii) piercing rates decline as the number of shareholders in companies increases; (iv) courts pierce the corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or more individual shareholders; and (v) courts pierce more frequently in a contract context than in a tort context.

I INTRODUCTION

The House of Lords in *Salomon v Salomon*[1] affirmed the legal principle that, upon incorporation, a company is generally considered to be a new legal entity separate from its shareholders. The court did this in relation to what was essentially a one person company. Windeyer J, in the High Court in *Peate v Federal Commissioner of Taxation*,[2] stated that a company represents:

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[1] *Salomon v Salomon & Co* [1897] AC 22 (*Salomon*). For extended discussion of *Salomon*, see R Grantham and C Rickett (eds), *Corporate Personality in the 20th Century*, 1998.
[2] *Peate v Federal Commissioner of Taxation* (1964) 111 CLR 443 (HC, McTiernan, Kitto, Taylor, Windeyer and Owen JJ).

> "[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 word in one of its senses means a mask: Eriptur persona, manet res."[3]

The separate legal entity principle has continued unexpurgated from Anglo-Australian corporate law for more than one hundred years. When a company acts it does so in its own right and not just as an alias for its controllers.[4] Similarly, shareholders are not liable for the company's debts beyond their initial capital investment, and have no proprietary interest in the property of the company.[5]

At the same time, courts have acknowledged that the corporate veil of a company may be pierced to deny shareholders the protection that limited liability normally provides. "Piercing the corporate veil" refers to the judicially imposed exception to the separate legal entity principle, whereby courts disregard the separateness of the corporation and hold a shareholder responsible for the actions of the corporation as if it were the actions of the shareholder. A court may also pierce the corporate veil where requested to do so by the company itself or shareholders in the company, in order to afford a remedy that would otherwise be denied, create an enforceable right, or lessen a penalty. Since *Salomon*, the courts in the United States, England and Australia,

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[3] Ibid, 478.

[4] Lord Sumner in *Gas Lighting Improvement Co Ltd v Inland Revenue Commissioners* (1923) AC 723 at 740 – 741 stated:

> "Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham...the idea that it is mere machinery for effecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts."

Quoted with approval by Kitto J in *Hobart Bridge Company Ltd v Federal Commissioner of Taxation* (1951) 82 CLR 372, 385.

[5] Latham CJ, in *The King v Portus; ex parte Federated Clerks Union of Australia* (1949) 79 CLR 42, in the course of deciding that the employees of a company owned by the Federal Government were not employed by the Federal Government, stated (at 435) 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…"

Similarly, in *KT & T Developments Pty Ltd v Tay* (Unreported, Parker J, Supreme Court of Western Australia, 23 January 1995), Parker J remarked (at 7) that:

> "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 shareholders any proprietary interest in the property of the company…"

have found exceptions to the general principle stated in *Salomon* and have pierced the corporate veil to reveal those who control the company.[6]

There is an increasing literature by Australian commentators on piercing the corporate veil. However, there has not been a comprehensive empirical study of the Australian cases relating to piercing the corporate veil. In this article, we present the results of the first such study. One hundred and four cases involving an argument to pierce the corporate veil were found and examined. The results of the empirical study are presented in Part IV following a summary of the economic justifications for limited liability in Part II and a review of the grounds under general law for piercing the corporate veil in Part III.

The phrase "piercing the corporate veil" was described in a 1973 case as "now fashionable".[7] In 1987, the phrase "lifting the corporate veil" was referred to as being "out-of-date".[8] The English courts expressly separate the meaning of the two phrases. Staughton LJ, in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)*,[9] stated that:

> "To *pierce* the corporate veil is an expression that I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose."[10]

The distinction between the meaning of the two phrases is perhaps not as widely recognised in Australia, with courts sometimes referring to lifting when the effect is piercing.[11] Young J, in *Pioneer Concrete Services Ltd v Yelnah Pty Ltd*,[12] defined the expression "lifting the corporate veil" as meaning "[t]hat although whenever each individual company is formed a separate legal personality is created, courts will on

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[6] See the empirical study of the frequency with which courts in the United States pierce the corporate veil: R Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 *Cornell Law Review* 1036; and a similar study in the United Kingdom; C Mitchell, 'Lifting the Corporate Veil in the English Courts: An Empirical Study' (1999) 3 *Company Financial and Insolvency Law Review* 15.
[7] *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, 480 (Bray CJ).
[8] *Walker v Hungerfords* (1987) 44 SASR 532, 559 (Bollen J).
[9] *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769.
[10] Ibid, 779.
[11] See, for example, *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70 (NSWCA, Herron CJ, Sugerman and McLelland JJA).
[12] *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 (SCNSW, Young J).

occasions, look behind the legal personality to the real controllers."[13] It is important to note that courts may refer to "lifting" or "looking beyond" the corporate veil at any time they want to examine the operating mechanism behind a company. Although the ultimate effect of piercing is to "look beyond the corporate veil",[14] we use the phrase "piercing the corporate veil" in preference to the phrase "lifting the corporate veil", in order to reinforce their separate meaning.

The application of the doctrine of veil piercing is far from clear from case law. It is said that "in Australia it is still impossible to discern any broad principle of company law indicating the circumstances in which a court should lift the corporate veil".[15] Another commentator has noted that "[i]t is impossible to list the cases in which the veil will be lifted."[16] Herron CJ, in *Commissioner of Land Tax v Theosophical Foundation Pty Ltd*,[17] described "lifting the corporate veil" as an "esoteric" label.[18] He further stated that:

> "Authorities in which the veil of incorporation has been lifted have not been of such consistency that any principle can be adduced. The cases merely provide instances in which courts have on the facts refused to be bound by the form or fact of incorporation when justice requires the substance or reality to be investigated…"[19]

Professor Farrar has described Commonwealth authority on piercing the corporate veil as "incoherent and unprincipled."[20] Rogers AJA was of a similar view in *Briggs v James Hardie & Co Pty*,[21] stating that:

> "[T]here is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities."[22]

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[13] Ibid, 264.
[14] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 558 (Rogers AJA).
[15] H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, 9th ed, 1999, [4.400].
[16] S Ottolenghi, 'From Peeping Behind the Veil to Ignoring it Completely' (1990) 53 *The Modern Law Review*' 338, 352.
[17] *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70.
[18] Ibid, 75.
[19] Ibid, 75.
[20] J Farrar, 'Fraud, Fairness and Piercing the Corporate Veil' (1990) 16 *Canadian Business Law Journal* 474, 478.
[21] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 (NSWCA, Hope and Meagher JJA, Rogers AJA).
[22] Ibid, 567 (Rogers AJA).

Indeed, courts tend to take a fact-based approach to questions of piercing the corporate veil, and no particular trend is readily discernible from an overview of the cases. At least one commentator has noted that "[t]o some extent difficulties in formulating a generally applicable test may be attributed to the intensely factual nature of the issues involved in piercing cases."[23] Another has noted that a problem with determining a pattern of reasoning "is the courts' own disinclination to describe a set of principles by reference to which their decisions on the point should be taken: they would prefer to reserve a discretion to themselves to judge each case on its merits."[24]

Hill J, in *AGC (Investments) Limited v Commissioner of Taxation (Cth)*,[25] stated that the "circumstances in which the corporate veil may be lifted are greatly circumscribed."[26] However, a rigid application of the piercing doctrine has been widely criticised as sacrificing substance for form. Windeyer J, in *Gorton v Federal Commissioner of Taxation*,[27] stated that this approach had led the law into "unreality and formalism."[28] Indeed, it has been argued that the fundamental problem with the decision in *Salomon* is not the principle of separate legal entity, but that the House of Lords gave no indication of:

> "[W]hat the courts should consider in applying the separate legal entity concept and the circumstances in which one should refuse to enforce contracts associated with the corporate structure."[29]

II ECONOMIC JUSTIFICATIONS FOR LIMITED LIABILITY

When courts pierce the corporate veil, they can remove the protection of limited liability otherwise granted to shareholders. It is therefore relevant to review the

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[23] H Gelb, 'Piercing the Corporate Veil – The Undercapitalization Factor' (1982) 59 *Chicago Kent Law Review* 1, 2.
[24] Mitchell, above, n 6, 15.
[25] *AGC (Investments) Limited v Commissioner of Taxation (Cth)* (Unreported, Federal Court, Hill J, 22 February 1991).
[26] Ibid, 44.
[27] *Gorton v Federal Commissioner of Taxation* (1965) 113 CLR 604 (Barwick CJ, Taylor and Windeyer JJ).
[28] Ibid, 627.
[29] M Whincop, 'Overcoming Corporate Law: Instrumentalism, Pragmatism and the Separate Legal Entity Concept' (1997) 15 *Company and Securities Law Journal* 411, 420.

reasons why companies are granted limited liability. We evaluate some of these reasons later in this article when we present the results of our empirical study. In particular, we examine the circumstances when courts pierce the corporate veil to see if some of the reasons for limited liability are less relevant in these circumstances.

Five reasons, based upon principles of economic efficiency, can be provided for why companies are granted limited liability.[30] First, limited liability decreases the need for shareholders to monitor the managers of companies in which they invest because the financial consequences of company failure are limited. Shareholders may have neither the incentive (particularly if they have only a small shareholding) nor the expertise to monitor the actions of managers. The potential costs of operating companies are reduced because limited liability makes shareholder diversification and passivity a more rational strategy.

Secondly, limited liability provides incentives for managers to act efficiently and in the interests of shareholders by promoting the free transfer of shares. This argument has two parts to it. First, the free transfer of shares is promoted by limited liability because under this principle the wealth of other shareholders is irrelevant. If a principle of unlimited liability applied, the value of shares would be determined partly by the wealth of shareholders. In other words, the price at which an individual shareholder might purchase a share would be determined in part by the wealth of that shareholder which was now at risk because of unlimited liability. The second part of the argument (that limited liability provides managers with incentives to act efficiently and in the interests of shareholders) is derived from the fact that if a company is being managed inefficiently, shareholders can be expected to be selling their shares at a discount to the price which would exist if the company were being managed efficiently. This creates the possibility of a takeover of the company and the replacement of the incumbent management.

Thirdly, limited liability assists the efficient operation of the securities markets because, as was observed in the preceding paragraph, the prices at which shares trade does not depend upon an evaluation of the wealth of individual shareholders.

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[30] These reasons are drawn from F Easterbrook and D Fischel, *The Economic Structure of Corporate Law*, 1991, 41-44.

Fourthly, limited liability permits efficient diversification by shareholders, which in turn allows shareholders to reduce their individual risk. If a principle of unlimited liability applied and the shareholder could lose his or her entire wealth by reason of the failure of one company, shareholders would have an incentive to minimise the number of shares held in different companies and insist on a higher return from their investment because of the higher risk they face. Consequently, limited liability not only allows diversification but permits companies to raise capital at lower costs because of the reduced risk faced by shareholders.

Fifthly, limited liability facilitates optimal investment decisions by managers. As we have seen, limited liability provides incentives for shareholders to hold diversified portfolios. Under such circumstances, managers should invest in projects with positive net present values, and can do so without exposing each shareholder to the loss of his or her personal wealth. However, if a principle of unlimited liability applies, managers may reject some investments with positive present values on the basis that the risk to shareholders is thereby reduced. "By definition this would be a social loss, because projects with a positive net present value are beneficial uses of capital".[31]

III GROUNDS UNDER GENERAL LAW FOR PIERCING THE CORPORATE VEIL

Jenkinson J, in *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation*,[32] stated that:

> "[T]he separate legal personality of a company is to be disregarded only if the court can see that there is, in fact or in law, a partnership between companies in a group, or that there is a mere sham or facade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated."[33]

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[31] Ibid, 44.
[32] *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 (FC, Woodward, Jenkinson and Foster JJ).
[33] Ibid, 272.

Australian courts have recognised a number of discrete factors that may lead to a piercing of the corporate veil, including some not mentioned by Jenkinson J. Therefore, these factors might be grouped into the following broad categories:

(a) agency;

(b) fraud;

(c) sham or façade;

(d) group enterprises; and

(e) unfairness/justice.

These categories are probably not exhaustive.

(a) Agency

The Full Federal Court, in *Balmedie Pty Ltd v Nicola Russo*,[34] noted that:

> "It is trite law that a company is a separate entity, and distinct legal person, from its shareholders and does not become an agent for its shareholders simply because of the fact that they are shareholders."[35]

However, the "agency" ground has been used to argue that the shareholder of a company (whether it be a parent company or human shareholder) has such a degree of effective control that the company is held to be an agent of the shareholder, and the acts of the company are deemed to be the acts of the shareholder. Agency has also been used interchangeably by the courts with the phrase "alter ego".[36]

The requirement in tort law of a relationship of proximity is also closely linked to the doctrine of piercing the corporate veil. Rowland J, in *Barrow v CSR Ltd*,[37] in finding a parent company responsible for the actions of a subsidiary in relation to an employee of the subsidiary that had contracted asbestosis, stated that:

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[34] *Balmedie Pty Ltd v Nicola Russo* (Unreported, Ryan, Whitlam and Goldberg JJ, Federal Court, 21 August 1998).
[35] Ibid, 13.
[36] For example, Bray CJ in *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, at 480, referred to an argument that the plaintiff was "merely the agent trustee or *alter ego*…".
[37] *Barrow v CSR Ltd* (Unreported, 4 August 1988, Supreme Court of Western Australia, Rowland J).

> "Now, whether 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."[38]

Cases of pure negligence, such as *Briggs v James Hardie & Co Pty Ltd*,[39] demonstrate the difficulty that the courts are faced with in attempting to reconcile piercing principles with traditional tort notions of foreseeability and causal nexus.[40]

The different judicial approaches to the question of whether a company has acted as an agent make it difficult to rationalise the judgments. In *The Electric Light and Power Supply Corporation Limited v Cormack*,[41] the earliest judgment in our empirical study, Rich AJ refused to pierce the veil of a one-man company. The defendant had contracted with the plaintiffs to use their power supply for his works for two years, and not to install any other form of motive power during that period. During the two-year period, the defendant sold his works to a company of which he was the manager and shareholder. The new company then installed motive power other than that supplied by the plaintiffs. Rich AJ refused to find that the defendant had breached the contract, viewing it as a personal undertaking. Rich AJ held that "[t]hese acts are in fact being done, not by the defendant personally, but by him as agent for A.W. Cormack Ltd., which even if a "one-man company" is a different entity."[42] Rich AJ found no evidence that the sale of the business by the defendant was done with the object of evading his personal obligations.

Australian jurisprudence has developed considerably since this decision, and courts are now more prepared to pierce the separate legal status of a company. In the case of a small company, courts are perhaps more willing to apply agency principles, certainly where the control has been absolute such that the company can properly be seen as a mere agent for the shareholder. Fullagar J, in *Ampol Petroleum Pty Ltd v*

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[38] Ibid, 5.

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

[40] Farrar has noted that: "Canadian practitioners are beginning to argue tort principles as a way of circumventing the strict logic of the *Salomon* principle [and] [w]hether these tort cases are regarded as outside *Salomon's* case or examples of piercing the corporate veil does not seem to matter. The end result is the same. The law is in a state of flux." Farrar, above, n 20, 478-79.

[41] *The Electric Light and Power Supply Corporation Limited v Cormack* (1911) 11 NSWSR 350 (SCNSW, Rich AJ).

[42] Ibid, 353.

Findlay,[43] examined a contract claim in which the defendant sought to pierce the veil of his own private company to show that the losses of the company were his losses, thereby increasing the quantum of damages payable. Fullagar J stated:

> "If the defendant does embark on establishing loss of profits (or capital or goodwill) at an enquiry as to damages, I consider on the present state of the evidence that the "corporate veil" may be pierced for these purposes, that is to say, I consider that the defendant will be entitled to include losses to his company or companies flowing from the breach, provided he establishes (in addition to causation) that the loss to the company was his loss...The evidence presently before me strongly suggests that the defendant wholly controlled the relevant companies and their monies and other assets, and dealt with the monies and assets as though they were his own."[44]

A court may sometimes apply agency principles to reduce the severity of a penalty, which is a controversial use of the doctrine of piercing the corporate veil. In two cases, charges were laid against companies under the *Occupational Health and Safety Act* 1983 (NSW) following the death of employees. In both cases, the companies successfully argued that their own veil should be pierced to reveal a partnership[45] and an individual,[46] thereby substantially reducing the applicable penalty. In the first case, Fisher CJ found that piercing was appropriate because the company was "a shelf company structure operating for the convenience of accounting".[47] In the second case, Fisher CJ stated that the penalty ought to be paid by "an individual whose one-man company may qualify as a corporation merely because it has been convenient to employ a shelf company for the purposes of business and taxation arrangements."[48] In both cases a substantially reduced penalty was paid by an individual who stood behind the company, because Fisher CJ found that to be the "commonsense matter"[49] and "industrial reality"[50] of the circumstances. It is submitted that recourse to piercing principles in order to reduce the penalty for a manslaughter conviction is, in

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[43] *Ampol Petroleum Pty Ltd v Findlay* (Unreported, Fullagar J, Supreme Court of Victoria, 30 October 1986).
[44] Ibid, 27.
[45] *Workcover Authority of NSW v Baker-Duff Pty Limited* (Unreported, Industrial Relations Court of New South Wales, Fisher CJ, 2 April 1993).
[46] *Workcover Authority of NSW v Krcmar Engineering Pty Ltd* (Unreported, Industrial Relations Court of New South Wales, Fisher CJ, 18 May 1993).
[47] *Workcover Authority of NSW v Baker-Duff Pty Limited*, 4.
[48] *Workcover Authority of NSW v Krcmar Engineering Pty Ltd*, 1.
[49] Ibid.
[50] *Workcover Authority of NSW v Baker-Duff Pty Limited*, 4.

the absence of evidence that the company is unable to pay the fine and other relevant factors, an inappropriate use of the doctrine.[51]

(b) Fraud

An argument of "fraud" relates to the alleged use of a corporation by the controller to evade a legal or fiduciary obligation. To be successfully argued, the controller "must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right."[52] In *Re Edelsten ex parte Donnelly*,[53] the trustee of Dr Edelsten's estate in bankruptcy commenced an action claiming that certain property owned by the VIP Group of companies had been obtained by Edelsten before the bankruptcy had been discharged. The trustee argued that the companies had been incorporated and used for the purpose of evading a legal obligation or perpetrating a fraud. Northrop J, at first instance, held that:

> "Even if the whole scheme of the companies was devised by Dr Edelsten for the purpose of defeating his creditors the overall facts of this case do not justify the conclusion that the property of VIP Health Corporation is the after acquired property of Dr Edelsten and thus vests in the trustee."[54]

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[51] Note that we do not argue that companies should in all events be the liable party. Sometimes, a company may be insolvent, making an order against the company a futile exercise and thereby providing an opportunity for piercing the corporate veil to fix responsibility on directors and shareholders. See S Chesterman, "The Corporate Veil, Crime and Punishment: *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch*" (1994) 19 *Melbourne University Law Review* 1064, for discussion of a case where the prosecution for manslaughter of a director who was also one of two shareholders in the company was dropped in exchange for a guilty plea by the company, which was subsequently unable to pay the fine because it went into liquidation less than a month before the trial. The company in *Workcover Authority of NSW v Krcmar Engineering Pty Ltd* was insolvent (although it is not evident from the judgment that this was a reason for the decision to fine the shareholder personally) but the company in *Workcover Authority of NSW v Baker-Duff Pty Ltd* was not. The "reality" of the circumstances may be that the shareholder will pay the fine, but that should not mean that the appropriate level for the fine should be reduced to the amount of a fine for an individual. This is particularly so where Fisher CJ did not impose the highest fine allowable for an individual in either case. This was despite, in the case of *Workcover Authority of NSW v Krcmar*, Fischer CJ's reference (at 2) to the "neglect and negligence" of the employer and the "major and obvious deficiencies of the safety equipment."

[52] J Payne, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56 *Cambridge Law Journal* 284, 290.

[53] *Re Edelsten ex parte Donnelly* (Unreported, Federal Court, Northrop J, 11 September 1992).

[54] Ibid, 7.

On appeal by the trustee,[55] the Full Court of the Federal Court upheld the decision of Northrop J. The Full Court also held that an argument of fraud is closely related to an argument that the corporate form is a sham or façade. The court stated:

> "The argument [of fraud] is, of course circular. It can only succeed if the argument of sham succeeds, because if no property was acquired by, or devolved upon, Edelsten, no duty capable of being evaded could arise under the Act…The submission that the VIP Group had been used to perpetrate a fraud was coincident, and stood, or fell, with the submissions which sought to have the transactions, by which the VIP Group acquired property, treated as shams."[56]

Therefore, no "fraud" had been perpetrated because the court found that the creation of a business was not to be characterised as a sham merely because "it was undertaken for the purpose of ensuring that any property acquired after bankruptcy did not fall into the hands of a trustee in bankruptcy."[57]

The more 'blatant' the sham, the more likely it is that a fraud has been perpetrated. In *Re Neo*,[58] the Immigration Review Tribunal was asked to review a decision to refuse an application for a visa where sponsorship had been arranged by a company formed on the same day as the application was lodged, and the company did not carry on any business. The Tribunal held that:

> [T]he company was merely a vehicle used to circumvent Australian migration law. It was only a façade, its true purpose being to allow the applicants to remain in the country."[59]

(c) Sham or façade

An argument that a company is a "sham" or "façade" is used to pierce the corporate veil on the ground that the corporate form was incorporated or used as a "mask" to hide the real purpose of the corporate controller. A façade is "used as a category of illusory reference to express the court's disapproval of the use of the corporate form to evade obligations, although the courts have failed to identify a clear test based on

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[55] *Donnelly v Edelsten* (1994) 13 ACSR 196 (FC, Neaves, Ryan and Lee JJ).
[56] Ibid, 206.
[57] Ibid, 205.
[58] *Re Neo* (Unreported, Immigration Review Tribunal, Metledge M, 30 July 1997).
[59] Ibid, 7.

pragmatic considerations such as undercapitalisation or domination."[60] Lockhart J, in *Sharrment Pty Ltd v Official Trustee in Bankruptcy*,[61] stated that:

> "A 'sham' is…something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."[62]

As noted above, a "fraud" argument is dependent upon a "sham" argument as the courts have held that no fraud can be perpetrated where the corporate form is real and not a façade.

It has been argued that the courts have gone too far in piercing the veil of companies deemed to be "shams", on the grounds of the "inutility" of the proposal that a properly incorporated company could be anything other than "real".[63] One commentator has noted that:

> "[A]lthough the behaviour of the controlling shareholder is contemptible, it is suggested that this method of disregarding the company's separate entity has gone too far. Not only is it against the legal system: taken too literally, it deprives the courts themselves of the possibility of issuing orders against the company as such, if and when they deem fit."[64]

Windeyer J, in *Peate v Federal Commissioner of Taxation*,[65] stated that:

> "If a company is duly incorporated and registered under the Act and the proper records are kept in due form and the prescribed returns are made, it continues to exist as a legal entity. In that sense it is a reality and not a sham."[66]

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[60] J Farrar, 'Legal Issues Involving Corporate Groups' (1998) 16 *Company and Securities Law Journal* 184, 185.

[61] *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 82 ALR 530 (FC, Lockhart, Beaumont and Foster JJ).

[62] Ibid, 537.

[63] See H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, 9th ed, 1999, [4.350], where the authors state:

> "To say that a company is a sham does not advance debate. When the law says that a corporation is a person it is expressing conventional acceptance of a falsehood or pretence. It does that for many socially useful purposes. A company will be seen to be a sham only when the conditions for that conventional acceptance are not fulfilled."

[64] Ottolenghi, above, n 16, 351.

[65] *Peate v Federal Commissioner of Taxation* (1964) 111 CLR 443.

[66] Ibid, 480.

A “sham” argument refers to the use of a legitimate company as a “front” to “mask” the real operations. In *ICT Pty Ltd v Sea Containers Ltd*,[67] the Court of Appeal of the Supreme Court of New South Wales noted that the use of the description “sham” does not easily explain the doctrine of piercing, stating that:

> “A sham is an apparent transaction intended to cloak a different one, and not intended to take effect in accordance with its terms. If the apparent transaction is a sham it must be disregarded and legal rights and liabilities determined according to the real transaction… The so-called sham principle is merely an application of the principle that an apparent agreement will not give rise to a binding contract if the parties had no intention of entering into legal relationships.”[68]

Neither is it necessary for the sham company to have been incorporated for the purpose of perpetrating the fraud, as “[a] fraud is no less of a fraud because a pre-existing company is used and an intention is no more of an intention because a wholly new company did not need to be set up for the purpose.”[69]

(d) Group enterprises

An argument of “group enterprises” is that in certain circumstances a corporate group is operating in such a manner as to make each individual entity indistinguishable, and therefore it is proper to pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary. Piercing the corporate veil is one way to ensure that a corporate group, which seeks the advantages of limited liability, must also accept the corresponding responsibilities. It may also be argued where there are overlapping directors, officers, and employees,[70] or where there is a “partnership between companies in a group.”[71]

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[67] *ICT Pty Ltd v Sea Containers Ltd* (1995) 39 NSWLR 640 (SCNSW, Clarke, Handley and Sheller JJA).

[68] Ibid, 655-656.

[69] Payne, above, n 52, 290.

[70] See, for example, *Taylor v Santos Ltd* (Unreported, Supreme Court of South Australia, Doyle CJ, Prior and Olsson JJ, 11 September 1998).

[71] *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267, 272. Also see *James Hardie & Coy Pty Limited v Putt* (1998) 43 NSWLR 554 (SCNSW, Sheller, Beazley and Stein, JJA), where Sheller JA stated (at 579-580) that:

> “The characterisation of a group of companies, linked by shareholding, as a single enterprise where one is an actor, whose acts or omissions should be attributed to another or others within the group, involves either “lifting the corporate veil”, treating the actor as an agent or imposing upon another or others within the group a duty by reason of the degree or manner of control or influence over the actor. The distinction between these ideas is easily blurred.”

A court may pierce the corporate veil on the ground of "group enterprises" where there exists a sufficient degree of common ownership and common enterprise. Some relevant factors were identified in *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd*[72]:

> "The inter-relationship of the corporate entities here, the obvious influence of the control extending from the top of the corporate structure and the extent to which the companies were thought to be participating in a common enterprise with mutual advantages perceived in the various steps taken and plans implemented, all influence the overall picture."[73]

A judicial reluctance to pierce the corporate veil in the case of corporate groups is evident in the decision of the High Court in *Walker v Wimborne*.[74] Mason J continued this formal separation between the legal identities of parent and subsidiary in *Industrial Equity Ltd v Blackburn*.[75] Here, the High Court rejected an argument that the profits in subsidiaries lie within the disposition of the parent company which may, by virtue of its capacity to control the general meeting of each subsidiary, ensure the distribution of profits to it by declaration and payment of dividends. Mason J stated that:

> "It has been said that the rigours of the doctrine enunciated by *Salomon v Salomon & Co Ltd* have been alleviated by the modern requirements as to consolidated or group accounts...But the purposes of these requirements is to ensure that members of, and for that matter persons dealing with, a holding company are provided with accurate information as to the profit or loss and the state of affairs of that company and its subsidiary companies within the group... However, it can scarcely be contended that the provisions of the Act operate to deny the separate legal personality of each company in a group. Thus, in the absence of contract creating some additional right, the creditors of company A, a subsidiary company within a group, can look only to that company for payment of their debts. They cannot look to company B, the holding company, for payment (see *Walker v Wimborne*)."[76]

[72] *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd* (1995) 18 ACSR 566 (SCQ, Macrossan CJ, Fitzgerald P and Davies JA).
[73] Ibid, 568-569.
[74] *Walker v Wimborne* (1975-76) 137 CLR 1 (HC, Barwick CJ, Mason and Jacobs JJ).
[75] *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 (HC, Stephen, Mason, Jacobs, Murphy and Aickin JJ).
[76] Ibid, 577.

Furthermore, courts appear reluctant to become involved in cases where parties have clearly reached a contractual bargain in relation to which piercing the corporate veil would produce a different result. As Professor Thompson notes:

> "Because the market-related reasons for limited liability are absent in close corporation and corporate groups, the most important justification for limited liability is permitting parties in a consensual relationship to use the corporate form to allocate the risks of the transaction and the enterprise."[77]

In *Pioneer Concrete Services v Yelnah Pty Ltd*,[78] Young J refused to treat a contractual promise in a deed executed by a subsidiary company, for the purposes of a claim by the promisee that there had been a breach of the contractual term, as a promise also by the parent company. Young J stated that:

> "It would appear that the parties have deliberately chosen not that there should be a covenant by the Holding company but rather a covenant by the subsidiary which covenant is to be guaranteed by the Holding company, obviously a very different sort of obligation. When one sees a deed couched so deliberately it is very difficult to apply some broad brush commercial approach to give it some meaning other than its literal meaning."[79]

The absence of any evidence that the subsidiary company had the purpose of avoiding a legal obligation was also relevant to Young J's decision.

In the case of corporate groups, courts will typically not pierce the veil on the ground of control alone.[80] The mere exercise of control over a subsidiary by a parent company is an insufficient reason to pierce the corporate veil in the group situation.[81] Rogers AJA, in *Briggs v James Hardie & Co Pty Ltd*,[82] examined a "group enterprises" argument that the plaintiff (a former employee of a subsidiary company who had contracted asbestosis) was entitled to pierce the corporate veil to sue the

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[77] Thompson, above, n 6, 1071.
[78] *Pioneer Concrete Services v Yelnah Pty Ltd* (1986) 5 NSWLR 254.
[79] Ibid, 264.
[80] In *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440 (SCWA, Steytler J), Steytler J held that a media release by the City of Subiaco which ascribed the conduct of a wholly subsidiary company to that of its parent company was defamatory. In the course of the decision, Steytler J stated (at 451) that:

> "The fact that a parent company exercises control over its subsidiary does not of itself justify treating acts of the subsidiary as being those of the parent…".

[81] A Nolan, 'The Position of Unsecured Creditors of Corporate Groups: Towards a Group Responsibility Solution which gives Fairness and Equity a Role' (1993) 11 *Company and Securities Law Journal* 461, 479-480.
[82] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549.

parent company, because it had the capacity to exercise complete dominion and control over its subsidiary and had in fact exercised that capacity. Rogers AJA dismissed this argument as "entirely too simplistic".[83] He went on to state that:

> "The law pays scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary. If the test were as absolute as the submission would suggest, then the corporate veil should have been pierced in the case of both *Industrial Equity* and *Walker v Wimborne*."[84]

Rogers CJ, in *Qintex Australia Finance Ltd v Schroders Australia Ltd*,[85] noted that the development of the rigid application of the separate legal entity principle to corporate groups is problematic, often resulting in a divergence between the "realities of commercial life and the applicable law."[86] Rogers CJ considered that the piercing the corporate veil doctrine had a larger role to play in the case of corporate groups, as long as it is used appropriately and fairly distributes the burden and benefit of the corporate form amongst the various corporate actors. He reflected that:

> "As I see it, there is today a tension between the realities of commercial life and the applicable law in circumstances such as those in this case. In the every day rush and bustle of commercial life in the last decade it was seldom that participants to transactions involving conglomerates with a large number of subsidiaries paused to consider which of the subsidiaries should become the contracting party. A graphic example of such an attitude appears in the evidence of Ms Ferreira, a dealer in the treasury operations department of the defendant. In her written statement…she said:
>
> 'In my discussions with either Craig Pratt or Paul Lewis when I confirmed deals undertaken for Qintex, it was not my practice to ask which of the Qintex companies was responsible for the deal. I always treated the client as Qintex and did not differentiate between companies in the group. Paul Lewis and Craig Pratt always talked as being from "Qintex" without reference to any specific company.'…
>
> It may be desirable for parliament to consider whether this distinction between the law and commercial practice should be maintained. This is especially the case today when the many collapses of conglomerates occasion many disputes. Regularly, liquidators of subsidiaries, or of the holding company, come to court to argue as to which of their charges bears the liability… As well, creditors of failed companies encounter difficulty when they have to select from among the moving targets the company with which they consider they concluded a contract. The result has been unproductive expenditure on legal costs, a reduction in the amount available to creditors, a windfall for some, and an unfair loss to others. Fairness or equity seems to have little role to play."[87]

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[83] Ibid, 577 (Rogers AJA).
[84] Ibid, 577 (Rogers AJA).
[85] *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 (SCNSW, Rogers CJ).
[86] Ibid, 268.
[87] Ibid, 269.

Comments such as those of Rogers CJ, and a general concern resulting from holding companies walking away from insolvent subsidiaries leaving creditors of the subsidiaries unpaid, led to the Australian Commonwealth Parliament amending the Corporations Law in 1993 to introduce section 588V. This section imposes liability on the holding company of a subsidiary where the subsidiary trades while it is insolvent and certain other conditions are satisfied.[88]

[88] For discussion of section 588V, see I M Ramsay, 'Holding Company Liability for the Debts of an Insolvent Subsidiary: A Law and Economics Perspective' (1994) 17 *University of New South Wales Law Journal* 520.

(e) Unfairness/justice

Sometimes a party may seek to pierce the corporate veil on the grounds that to do so will bring about a fair or just result. In *RMS Glazing Pty Ltd v The Proprietors of Strata Plan No 14442*,[89] the court heard an argument based upon the interests of justice in relation to piercing. A body corporate sued the plaintiff company and Mr Lo Surdo (a director and shareholder of the plaintiff) for losses in relation to contracts entered into with the plaintiff. The body corporate succeeded on some of its claims and, on the question of costs, sought an order against Lo Surdo personally. The body corporate argued that the company was a 'body of straw' and that, because Lo Surdo had played an active part in the case and had a stake in the outcome, the interests of justice required that an order be made against Lo Surdo. Cole J disagreed, finding that with the company's record of profitable trading it could not be said to be a body of straw. Cole J continued:

> "Quite apart from that I am not satisfied that justice would require the making of such an order. The Body Corporate dealt with RMS over a period of more than a decade. It was prepared to deal with the company rather than Mr Lo Surdo personally and to enter into contractual relationships with the company resulting in the payment of many millions of dollars. I do not think that the interests of justice requires that it now be permitted to simply disregard the corporate veil."[90]

A shareholder in a company may also seek to pierce the corporate veil to get to the underlying reality of the situation, in order to avoid an unfair outcome. In *Harrison v Repatriation Commission*,[91] the applicants sought a review of the decision of the Commission in relation to their application for service pensions under the *Veterans' Entitlements Act* 1986 (Cth). The applicants were joint shareholders in two companies whose only assets were debts owed to the companies by the applicants. The applicants sought to pierce the veil of their own companies to prevent the Commission from attributing a separate value to the companies' assets in the form of loans and the shareholders' assets in the form of shares (in order to avoid the effect of double-counting their asset level). The Administrative Appeals Tribunal held that the

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[89] *RMS Glazing Pty Ltd v The Proprietors of Strata Plan No 14442* (Unreported, Supreme Court of New South Wales, Cole J, 17 December 1993).

[90] Ibid, 4.

[91] *Harrison v Repatriation Commission* (Unreported, Administrative Appeals Tribunal, Barbour SM, 18 October 1996).

asset value of the shares, for the purpose of calculating the applicants' assets, should be regarded as nil. Barbour SM stated that:

> "It would be an unreasonable outcome in the circumstances of this case to simply rely on the fact that the companies are a separate legal entity. It is appropriate to lift the corporate veil to consider the reality of the situation and the nature of the relationship between the applicants and the companies. The way in which the [Commission] has calculated the assets provides an unfair result and a result which is inconsistent with the beneficial interpretation of the requirement in the legislation to value a persons assets."[92]

The Commission appealed to the Federal Court on the basis that the Tribunal had acted contrary to the law in piercing the corporate veil in holding that the shares had no value.[93] Tamberlin J agreed, holding that the Tribunal "treated the shareholder directors and the corporate entity as indistinguishable for the purpose of calculating the value of the shareholders' assets."[94] Tamberlin J stated that piercing the corporate veil in this case would be "contrary to settled principle."[95] Tamberlin J's "remarkable decision",[96] although "traditionally correct",[97] overturned the Tribunal's treatment of "the legal position as, in effect, the economic or commercial position."[98] The decision had the effect of enforcing the separate legal status of the companies despite the economic reality that the companies were no different to the applicants, and despite the fact that this resulted in an outcome that was unjust.

IV THE EMPIRICAL STUDY

(a) Methodology

In this section we present the results of a study of Australian cases where an argument has been put to the court that it should pierce the corporate veil. The study endeavours to ascertain whether any trends can be detected in the factors used by the courts in making a decision whether to pierce or not.

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[92] Ibid, 4.
[93] *Repatriation Commission v Harrison* (1997) 24 ACSR 711 (FC, Tamberlin J).
[94] Ibid, 716.
[95] Ibid.
[96] R Baxt, "The Corporate Veil Remains" (1998) 16 *Company and Securities Law Journal* 49, 50.
[97] Ibid, 51.
[98] Ibid, 49.

For the purposes of this study the authors only examined cases where the argument to pierce the veil was in relation to a shareholder of the company. In some instances, this will involve the actions of persons who are directors *and* shareholders of the company, but cases were ignored where the "controller" is solely a director and is either not a shareholder, or this is not clear from the court's decision.[99] Related to this is the fact that excluded from the study were those cases involving insolvent trading under the statutory provisions of the Corporations Law.[100] This is because section 588G imposes liability only upon directors and, in addition, it is clear why the courts have pierced the veil.

The sample is limited to cases that proceeded to trial, and therefore presumably involve borderline questions of law. The sample included both reported and unreported judgments. In a very small number of cases, the court did not have to decide whether to pierce the corporate veil even though the court considered an argument that the veil be pierced. These cases were excluded from the data set.

An argument to pierce the corporate veil may have been put in order to ascribe liability to a shareholder. For example, in one of the cases involving the Qintex group, debtors were seeking to enforce debts against other group companies.[101] A piercing argument may also be put to gain a right for a shareholder to which they may otherwise not have been entitled. For example, in the compulsory acquisition cases, a company in a corporate group may attempt to pierce the corporate veil in order to gain further compensation for losses incurred by related companies due to the

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[99] See Mitchell, above, n 6, 19, where the author notes in his UK study that:

> "Cases in which it was sought to fix a shareholder with liability for his company's torts because he had "assumed responsibility" for them in his capacity as a director were included, on the basis that the effect of finding a shareholder liable in such cases is to deprive him of the protection afforded by the corporate form…"

[100] Section 588G of the *Corporations Law* imposes personal liability on a director of a company where:

- the company is insolvent when it incurs a debt or becomes insolvent by incurring that debt; and
- at that time there are reasonable grounds for suspecting that the company is insolvent or would become insolvent; and
- the director is aware at that time there are such grounds for so suspecting or a reasonable person in a like position in a company in the company's circumstances would be so aware.

From 1989 to the end of 1997, there were 63 reported judgments in the *Australian Corporations and Securities Reports* involving section 588G or its predecessor.

[101] *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 (SCNSW, Rogers CJ).

acquisition.[102] Some of the piercing arguments were also brought in response to a party seeking the protection of the veil (described as "reverse piercing the veil").

The study includes all cases in Australia up to December 1999 where an argument has been heard by the court or tribunal that it should "pierce the corporate veil."[103] A larger data set of 104 cases was compiled than in the only previous Australian study undertaken by one of the authors.[104] This is partly due to an increased time frame for the study, an increased data set due to more comprehensive electronic databases, updated electronic record-keeping of early cases and more effective search engines. Particularly in the last few years, the recording of unreported cases in electronic form has increased manifold.

Once the cases had been classified according to specified criteria (these criteria are reflected in Table 1-14 in the following section of the article), Chi-square tests were performed where appropriate. The Chi-square test determines the likelihood that an observed data set comes from a given distribution. In this study, the given distribution is that the likelihood of the corporate veil being pierced is the same for each category within each of the Tables where the Chi-square test was applied.

Statistically significant evidence of differing piercing rates between categories is a probability of less than 5% of the observed data occurring if the piercing rates were constant across categories. The test could not be applied where there was an insufficient number of cases within particular categories in a Table.

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[102] See, for example *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476 (SCSA, Bray CJ, Walters and Wells JJ), where this argument was rejected.

[103] The study involved a review of cases to 31 December 1999 from various electronic and hardcopy sources, using the search terms 'corporate veil' and '*Salomon v Salomon*'. The electronic search involved online search engines and CD ROMs. The online search engines used were: AustLII (Australian Legal Information Institute); CaseBase (Butterworths); LawNet (LBC); Lexis (Butterworths); and Corporate Law Judgments (Centre for Corporate Law and Securities Regulation). The CD ROMs used were: Bankruptcy and Insolvency Cases (LBC); Criminal Cases (LBC); Current Judgments (LBC); Federal Cases (Archive and Current) (LBC); TimeBase Federal Cases (TimeBase); NSW Law Reports (Butterworths); Queensland Reports (Butterworths); Unreported Judgments (Butterworths); and Victorian Reports (Butterworths). The hardcopy search involved citations to *Salomon* in the Australian and New Zealand Citator to UK Reports (Butterworths); Australian Current Law (Butterworths); and The Australian Digest (LBC).

[104] See the preliminary discussion of the results of a study of 55 Australian cases in I Ramsay, 'Models of Corporate Regulation: The Mandatory/Enabling Debate' in C Rickett and R Grantham (eds), *Corporate Personality in the 20th Century* (1998), 259-264.

(b) The results

Table 1: Australian Courts' Willingness to Pierce the Corporate Veil

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
All cases	104	40	64	38.46

Table 1 indicates that in 104 cases brought in Australian courts and tribunals, an argument to pierce the corporate veil was accepted in 40 cases (about 38.5%). The percentage of cases where piercing occurred is lower than in the United States[105] (about 40%) and in the United Kingdom[106] (about 47%).

Table 2: Temporal Changes to the Australian Courts' Willingness to Pierce the Corporate Veil

Time Period	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Pre-1960	6	2	4	33.33
1960s	4	2	2	50.00
1970s	12	1	11	8.33
1980s	23	12	11	52.17
1990s	59	23	36	38.98

Table 2 indicates that there has been a substantial increase in the number of cases involving arguments about piercing the corporate veil. In fact, over half of the cases in the study (59) have been brought in the 1990s. However, there has been a good deal of statistical variance in the piercing rates and no trend is discernible over time.[107]

The first judgment in our study was decided in 1911.[108] However, prior to 1960, very few cases were decided on principles of piercing the corporate veil. Less sophisticated corporate relationships and slower development of corporate law jurisprudence may partially account for the few cases heard on the issue. Indeed, the

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[105] See Thompson, above, n 6, 1048.
[106] See Mitchell, above, n 6, 20.
[107] Once pre-1960 and 1960s cases have been combined, applying the Chi-square test, there is a 26.5% likelihood that piercing probabilities do not differ between the categories.
[108] *The Electric Light & Power Supply Corporation Ltd v Cormack* (1911) 11 NSWSR 350.

use of "lifting" or "piercing" the corporate veil in Australian decisions did not really arise until the 1960s,[109] with cases prior to that using analogous terms.

The sample for the 1960s is too small to make statistical comment. The 1970s were an unusual decade, with only twelve cases heard and only one resulting in the corporate veil being pierced.[110] During the 1980s, over half of all cases heard resulted in a piercing of the veil. In the 1990s the average piercing rate was about 39%, which approximates the average for the overall study.

Table 3: Nature of the Company Sought to be Pierced: Proprietary vs Public

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Proprietary	86	36	50	41.86
Public	18	4	14	22.22

Table 3 examines the nature of the company whose veil is sought to be pierced. There is an increased incidence of piercing where the company is proprietary (private) (about 42%) as opposed to public (about 22%).[111] Thompson's study of United States piercing decisions revealed that no cases held shareholders in a public corporation liable for the company's debts.[112] This makes sense because, as a practical matter, shareholders of a publicly traded corporation usually do not exercise control.[113] An exception is where a public company is wholly or majority owned by another company.

The fact that courts pierce the corporate veil less frequently in the case of public companies than proprietary companies can be justified on the basis of some of the economic explanations for limited liability which we outlined in Part II of this article. In particular, we saw that limited liability decreases the need for shareholders to monitor the managers of companies in which they invest because the financial consequences of company failure are limited. As a general rule, this explanation is

[109] See, for example, *Peate v Commissioner of Taxation* (1962-64) 111 CLR 443, 480 per Windeyer J (HC, McTiernan, Kitto, Taylor, Windeyer and Owen JJ).
[110] *Barnes Milling Ltd v Brisbane City Council* (1979) 6 QLCR 217 (Land Court (Qld), Mr Carter).
[111] Applying the Chi-square test, there is a 22.2% likelihood that there is no difference in piercing probabilities between the two categories.
[112] Thompson, above, n 6, 1055.

more relevant to public companies which have a diverse spread of small shareholders than proprietary companies with a small number of shareholders. It is often the case that these proprietary companies will have shareholders who play an active role in the company and therefore the monitoring explanation is less relevant.

We also saw in Part II that limited liability assists the efficient operation of the securities markets. Again, this explanation for limited liability is more relevant to public companies than proprietary companies. Indeed, proprietary companies will typically have a provision in their constitutions which restricts the ability of shareholders to freely transfer their shares. This provision may require a shareholder who wants to sell his or her shares to either obtain the permission of the directors or else first offer the shares to other shareholders. This means that the explanation for limited liability based upon the efficient operation of the securities markets and the promotion of the free transfer of shares is less relevant to proprietary companies than public companies.

Consequently, there appears to be justification for the fact that courts pierce the corporate veil more frequently in the case of proprietary companies than public companies and thereby deny the shareholders in proprietary companies the protection of limited liability they would otherwise have.

Table 4: Nature of the Company Sought to be Pierced: Number of Shareholder(s) in the Company

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Proprietary 1 s/h	30	15	15	50.00
Proprietary 2-3 s/h	27	10	17	37.04
Proprietary 4-8 s/h	6	4	2	66.67
Proprietary; s/h unclear	23	7	16	30.43
Public	18	4	14	22.22

[113] F Gevurtz, 'Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil' (1997) 76 *Oregon Law Review* 853, 865.

While Table 3 looks at whether the company whose veil is sought to be pierced (the ***target company***) is public or proprietary, Table 4 examines the identity of the shareholders in the target company. Shareholding in Table 4 was not determined by who the ultimate controllers were - rather the Table examines the number of immediate shareholders of the company to whom the piercing argument is directed.

The first three categories give the number of shareholders for proprietary target companies. No distinction was made between whether the target company had corporate or human shareholders, as in many cases the shareholding was mixed. In the few cases where the immediate shareholders of a proprietary target company included a public company, this was included at the appropriate level in the first three categories.[114] In addition, where shares were held as a nominee for another, it was counted as the ultimate beneficiary's share. For example, if there were two shareholders in the target company, but one shareholder held their shares on trust for the other, the case was included in the category of "one shareholder".

The fourth category contains figures from cases where the identity of the immediate shareholders of a proprietary target company was unclear from the judgment or the court itself could not determine the shareholding. The final category of "Public", included public target companies that either had a diverse shareholding, or were a subsidiary of another public company.

While the immediate shareholder(s) may not be the persons or entities that are sought to be made liable,[115] the number of shareholders tends to reflect a pattern in the propensity of a court to pierce the veil. As in the United States study by Professor Thompson, the number of shareholders seems to be an important factor in the judicial decision-making process.[116] Generally, the more closely held the company, the more likely courts are to pierce. This may reflect greater willingness of the courts to pierce

[114] For example, the category of 2-3 shareholders includes: *Hobart Bridge Company Limited v Federal Commissioner of Taxation* (1951) 82 CLR 372 (HC, Kitto J), in which the veil of Derwent Investments Pty Ltd was sought to be pierced, the company being owned by two individuals (950 shares each) and the plaintiff, a public company (16,700 shares).
[115] At Table 5, we examine the difference in piercing rates depending upon the identity of the ultimate controller to whom the piercing argument is directed.
[116] Thompson, above, n 6, 1055. In the United States study, companies with one individual shareholder were pierced about 49.5% of the time.

proprietary companies that are closely controlled with shareholders managing the company.

The highest incidence of piercing was in cases where there was only one shareholder (50%). Where there are 2 or 3 shareholders, the veil is pierced in 37% of cases. Companies with between 4 and 8 shareholders are too few in number to be statistically significant.[117] Where the shareholding was unclear in a proprietary company, the courts were reluctant to pierce the veil (only about 30.5%). Finally, where the target company was a public company, the courts pierced the veil in only about 22% of cases.[118]

Table 5: Piercing Rates According to the Identity of the Controller of the Company Whose Veil is Sought to be Pierced

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Human shareholder(s)	59	25	34	42.37
Parent company	43	14	29	32.56
Other controller[119]	2	1	1	50.00

Table 5 examines the identity of the controller to whom the piercing argument is directed. Companies in the study infrequently had a combination of human and corporate entity shareholders, but invariably a piercing argument is directed towards one or the other.[120] The table reveals that piercing rates differ according to the identity of the controller of the company whose veil is sought to be pierced. Where human shareholders stand behind the company, courts pierce the corporate veil in about 42.5% of cases. Where a parent company is behind the corporate veil, courts

[117] The results in this category are also potentially misleading because three of the four instances of piercing were three separate decisions in the same case: *Walker v Hungerfords* (1987) 44 SASR 532 (SASC, Bollen J); *Walker v Hungerfords* (1987) 49 SASR 93 (SASC, King CJ, Jacobs and Millhouse JJ); *Hungerfords v Walker* (1988) 84 ALR 119 (HC, Mason CJ, Wilson, Brennan, Deane, Dawson JJ).

[118] Once proprietary 2-3 shareholder and proprietary 4-8 shareholder categories have been combined, applying the Chi-square test, there is a 42.4% likelihood that there is no difference in piercing probabilities between categories.

[119] An unincorporated theosophical society (*Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70); and the Federal Government (*The King v Portus; ex parte Federated Clerks Union of Australia* (1949) 79 CLR 42).

[120] In other words, where the ownership is mixed, the decision was made based on whom of the shareholders the piercing was seeking to reach. For example, the category of parent company includes *Hobart Bridge Company Limited v Federal Commissioner of Taxation* [1951] 82 CLR 372 (HC, Kitto J).

are less likely to pierce (about 32.5%).[121] Are there any possible explanations for this difference?

In Part II we outlined a number of the economic justifications for limited liability. Professor Blumberg has demonstrated that a number of these justifications have either limited application or no application to parent companies and their wholly-owned subsidiaries.[122] First, the justification that limited liability decreases the need for shareholders to monitor managers does not apply because of the clear incentive of a parent company to monitor the activities of its wholly-owned subsidiaries.

Secondly, the justification that limited liability provides incentives for managers to act efficiently and in the interests of shareholders by promoting the free transfer of shares has less application to parent companies and wholly-owned subsidiaries, although limited liability may reduce transaction costs in sales of the shares of a subsidiary because it can assist the separation of liabilities between the parent company and its subsidiaries.[123]

Thirdly, the fact that limited liability assists the operation of the securities markets is largely irrelevant in the case of a wholly-owned subsidiary, although this justification is still relevant in the case of partially-owned subsidiaries where there is a market in which the publicly held shares are traded.[124]

Finally, the fact that limited liability permits efficient diversification by shareholders, which in turn allows shareholders to reduce their individual risk, is less applicable to parent companies because they are less risk averse than individual shareholders. This follows from the fact that the individual shareholders of the parent company still receive the protection of limited liability, which means they can diversify their investments independently of the parent company's liability for the subsidiary.[125]

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[121] Excluding the category "Other controller", applying the Chi-square test, there is a 42.9% likelihood that there is no difference in piercing probabilities between the two remaining categories.
[122] P I Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporation Law* 573, 623-626.
[123] K Hofstetter, 'Multinational Enterprise Parent Liability: Efficient Legal Regimes in a World Market Environment' (1990) 15 *North Carolina Journal of International Law and Commercial Regulation* 299, 307.
[124] Blumberg, above n 122, 624.
[125] Hofstetter, above n 123, 307.

This conclusion is not unqualified however. If companies are risk averse, they may forego investment opportunities with positive net present values if they are denied the avenue of isolating the risk of the investment in a subsidiary.[126]

The above analysis suggests that courts should be more prepared to pierce the corporate veil when liability is sought to be attached to a parent company than when liability is sought to be attached to one or more individual shareholders. Certainly, this is the expectation of some commentators.[127] It is therefore surprising to note that, according to the results in Table 5, courts pierce the corporate veil less frequently when the controller is a parent company (32.6%) than when the controller is one or more individual shareholders (42.4%).

It is interesting to speculate why this might be the case. In a recent article which examines piercing the veil within corporate groups in the United States, Professor Thompson found that courts in that country pierce the corporate veil less frequently in the context of a corporate group than when piercing was sought against individual shareholders.[128] An explanation Professor Thompson advances for this finding is that those involved in the management of corporate groups may receive superior legal advice compared to individuals who operate a small business through a corporate form. This legal advice may provide guidance to those involved in corporate groups concerning the circumstances when courts are prepared to pierce the corporate veil. There may be other possible explanations for the different piercing rates. Professor Gevurtz suggests that one possible explanation for the difference in piercing rates by United States courts is that there is greater sophistication among management of parent companies and that this, in turn, may lead these managers to avoid the sorts of dealings and transactions more typically found in the small business context as a result of which courts might pierce the corporate veil.[129] Professor Gevurtz also suggests that another possible explanation is that unlike an individual who is a controlling shareholder, a parent company can only act through humans. It may be difficult for courts to determine whether individuals of the parent company took

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[126] G W Dent, 'Limited Liability in Environmental Law' (1991) 26 *Wake Forest Law Review* 151, 167.
[127] Easterbrook and Fischel, above, n 30, 56-57.
[128] R Thompson, 'Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors' (1999) 13 *Connecticut Journal of International Law* 379.
[129] Gevurtz, above, n 113, 897.

actions in the scope of their employment on behalf of the parent company with the result of making the parent company responsible for the conduct. The difficulty arises because the individuals whose actions are in question can be directors, officers, or employees of both the parent company and the subsidiary.[130]

Table 6: Context in Which Piercing Argument Made

Context	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Contract	20	9	11	45.00
Criminal	5	1	4	20.00
Procedural/Discovery	12	4	8	33.33
Statute	56	24	32	42.86
Admiralty (in rem)	2	0	2	0.00
Tort	14	5	9	35.71

Table 6 identifies differences in piercing rates according to the context in which the argument is brought. There are 109 cases listed, more than the overall study, as in some cases the piercing argument was made in more than one context. The categories are broken down into specific areas of law.

The Table shows that in the area of private contractual bargains between parties, courts have shown the greatest tendency to pierce the veil (45%). Cases in this area were often brought to enforce a remedy under a contract, or to seek an injunction. Lockhart J, in *Re State Bank of New South Wales and Commonwealth Savings Bank of Australia*,[131] stated in obiter that:

> "When considering whether covenants in restraint of trade have been infringed courts have not hesitated to "pierce the corporate veil". If what is being done by a defendant is in substance contrary to the covenant, the use of a different legal form, including corporate forms, will not protect the covenantor against a finding of a breach."[132]

Cases brought under specific statutes showed the next greatest propensity to result in piercing (about 43%). The statutes were many and varied. Cases involving procedural or discovery issues were included where the court had to consider, as a

[130] Ibid, 897-898.
[131] *Re State Bank of New South Wales and Commonwealth Savings Bank of Australia* (Unreported, Federal Court, Lockhart J, 23 April 1985).
[132] Ibid, 20.

preliminary matter, the question of piercing the veil in order to proceed, and demonstrated a piercing rate of about 33%.

Cases brought under tort law, such as actions in negligence,[133] resulted in a piercing rate around 36%. In criminal cases, the courts pierced in only one of five cases. Admiralty cases are a specific area combining statute and tort, however two reported cases are insufficient to draw any conclusions.[134]

In *Briggs v James Hardie & Co Pty Ltd*,[135] Rogers AJA suggested that different considerations should apply in deciding whether to piece the corporate veil in tort actions compared to other actions such as contract:

> "Generally speaking, a person suffering injury as a result of the tortious act of a corporation has no choice in the selection of the tortfeasor. The victim of the negligent act has no choice as to the corporation which will do him harm. In contrast, a contracting party may readily choose not to enter into a contract with a subsidiary of a wealthy parent. The contracting entity may enquire as to the amount of paid up capital and, generally speaking, as to the capacity of the other party to pay the proposed contract debt and may guard against the possibility that the subsidiary may be unable to pay."[136]

Are Australian courts more willing to piece the corporate veil in actions in negligence? As seen from Table 6, in fact the courts are more prepared to pierce the corporate veil in contract cases and also cases involving a statute. These results are similar to those found by Professor Thompson in his US study. He found that in contract situations, courts pierce in about 42% of the cases while in tort situations, the piercing rate is only about 31%.[137]

The results in Table 6 and also in Professor Thompson's study of US cases, are surprising given that commentators have argued that courts should be more prepared to pierce the corporate veil in tort cases than in contract cases.[138] Moreover, there has been an active debate in the literature concerning whether limited liability unfairly

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[133] See, for example, *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549; 7 ACLC 841.
[134] Excluding the categories of "Criminal" and "Admiralty (in rem)" from Table 6 (because the number of cases is too small), applying the Chi-square test, there is a 94.2% likelihood that there is no difference in piercing probabilities between the remaining categories.
[135] (1989) 7 ACLC 841.
[136] Ibid, 863.
[137] Thompson, above, n 6, 1058.
[138] Easterbrook and Fischel, above, n 30, 58.

prejudices tort victims because it may create incentives for excessive risk-taking by permitting companies to avoid the full costs of their activities (for example, by parent companies placing their hazardous activities in subsidiary companies which have a minimal amount of equity capital and are funded by debt).[139]

Table 7: Grounds Advanced for Piercing the Veil

Grounds	**Total No of Cases**	**Pierced**	**Not Pierced**	**Percentage Pierced**
Grounds	**Total No of Cases**	**Pierced**	**Not Pierced**	**Percentage Pierced**
Agency	63	25	38	39.68
Fraud	12	5	7	41.67
Sham or Façade	8	3	5	37.50
Group Enterprises	33	8	25	24.24
Unfairness/Justice	10	6	4	60.00

Table 7 examines the specific argument placed before the court for piercing the corporate veil. The Table lists 126 arguments, which is more than the number of cases overall, as parties sometimes advanced more than one argument in a particular case for piercing the corporate veil.

Unfairness/justice was the most successful argument (60%), however the number of cases in this category was small. The categories of fraud (about 41.5%) and agency (about 39.5%) both had piercing rates close to the average for the study overall. An argument that the company was a mere sham or façade had a lower rate of piercing (37.5%). The lowest piercing rate was for group enterprise arguments (about 24%).[140]

[139] H Hansmann and R Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879; D Leebron, 'Limited Liability, Tort Victims, and Creditors' (1991) 91 *Columbia Law Review* 1565; J Alexander, 'Unlimited Shareholder Liability Through a Procedural Lens' (1992) 106 *Harvard Law Review* 387; R B Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 *Vanderbilt Law Review* 1; R Carroll, 'Corporate Parents and Tort Liability' in M Gillooly (ed), *The Law Relating to Corporate Groups*, 1993, Ch 4.

[140] Applying the Chi-square test, there is a 55% likelihood that there is no difference in piercing probabilities between categories.

Table 8: Level of Court in Which the Piercing Argument was Raised

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Trial[141]	65	26	39	40.00
First Appeal	36	12	24	33.33
Second Appeal	3	2	1	66.67

Table 8 identifies the level at which the court heard the piercing question. For example, in *Mario Piraino Pty Ltd v Roads Corporation [No 2]*,[142] the Administrative Appeals Tribunal initially heard the question as to whether a planning permit could issue. The claimant then took the Victorian Roads Corporation to the Supreme Court for compensation, where the issue of piercing the corporate veil arose. This case was therefore classified as "Trial".

The level at which a case is brought shows some slight difference. A case is more likely to be successful where it is examined at trial (40%) than where it is examined at first appeal (33.5%). This demonstrates that appellate courts are less likely to pierce the veil than courts of first instance. The number of cases heard on appeal for the second time is too small to draw meaningful conclusions.[143]

Table 9: Jurisdictional Variation in Willingness to Pierce

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
State	63	24	39	38.10
Federal	41	16	25	39.02

There is almost no difference between piercing rates depending upon whether the case is heard in a state or federal jurisdiction.[144]

[141] Note that a review of the decision of a statutory authority (for example, the Repatriation Commission) was recorded as "Trial".
[142] *Mario Piraino Pty Ltd v Roads Corporation [No 2]* (1993) 1 VR 130 (SCV, Gobbo J).
[143] Excluding the category of "Second Appeal" for which the number of cases was too small, applying the Chi-square test, there is a 60% likelihood that there is no difference in piercing probabilities between the remaining categories.
[144] Applying the Chi-square test, there is a 94% likelihood that there is no difference in piercing probabilities between the two categories.

Table 10: Variation Among States

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
New South Wales	27	10	17	37.04
Victoria	6	4	2	66.67
South Australia	8	3	5	37.50
Queensland	11	4	7	36.36
Tasmania	1	0	1	0.00
Western Australia	10	3	7	30.00

Leaving aside Tasmania, which only heard one case, among the five remaining States the percentage of cases in which courts pierced ranged from 30% in Western Australia to about 66.5% in Victoria. New South Wales has produced the most piercing cases, and reflects a piercing rate of 37%, which closely approximates the result for the study overall. However, the small number of cases in each jurisdiction makes comparisons difficult.[145]

[145] The small number of cases in most jurisdictions meant that it was inappropriate to apply the Chi-square test.

Table 11: Piercing Rates According to the Court or Tribunal in Which the Argument was Raised

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
High Court (Full Court)	10	5	5	50.00
High Court (Single Judge)	2	0	2	0.00
Federal Court (Full Court)	7	1	6	14.29
Federal Court (Single Judge)	12	4	8	33.33
State Supreme Court (Full Court)	18	8	10	44.44
State Supreme Court (Single Judge)	36	11	25	30.56
State Supreme Court (Master)	3	1	2	33.33
Family Court (Single Judge)	2	0	2	0.00
Territory Supreme Court (Single Judge)	1	0	1	0.00
Land Court (Qld)	2	2	0	100.00
Industrial Relations Court (NSW)	2	2	0	100.00
Administrative Appeals Tribunal (Cth)	6	4	2	66.67
Immigration Tribunal (Cth)	2	1	1	50.00
Residential Tenancies Tribunal (NSW)	1	0	1	0.00

There are some notable differences in the piercing rates according to the court or tribunal in which the argument was raised. Leaving aside the Land Court (Qld), the Industrial Relations Court (NSW), and the Immigration Tribunal (Cth), which each heard only two piercing cases each, the Full Court of the State Supreme Courts (about 44.5%), the Full Court of the High Court (50%) and the Administrative Appeals Tribunal (about 66.7%) have high piercing rates. By contrast, single judges in the Federal Court (about 33%) and the State Supreme Courts (about 30.5%) are less inclined to pierce. Although it is a small sample, it is interesting to note that the Full Court of the Federal Court has pierced the veil in only one of seven cases it has heard.[146]

[146] The small number of cases in most of the categories in this Table meant that, in order to apply the Chi-square test, the categories were reclassified into High Court (combined), Federal Court (combined), State Supreme Court (combined) and all other courts. Applying the Chi-square test, there is a 51.7% likelihood that there is no difference in piercing probabilities between categories.

Table 12: Characteristics of Body Requesting the Court to Pierce the Veil

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Government	24	9	15	37.50
Company (self)	21	8	13	38.10
Shareholder	22	10	12	45.45
Unrelated entity	29	10	19	34.48
Bank	2	1	1	50.00
Trustee in Bankruptcy/ Liquidator/Receiver	6	2	4	33.33

Requesting that the court pierce the veil may be done to seek a remedy or to seek protection that would otherwise be denied. In this context, it is interesting to note that where a shareholder of the company seeks to pierce the veil, they are successful in about 45.5% of cases. Where the company seeks to pierce its own veil, courts have shown less inclination to pierce (about 38%). However, this is almost identical to the results for the overall study (about 38.5%) indicating that courts are reasonably generous in allowing companies to succeed in a veil piercing argument where this will benefit the company.

In contrast to the United Kingdom experience,[147] courts are less likely to pierce where the Government[148] seeks to pierce (37.5%). However, courts will pierce the corporate veil where the Government is seeking to enforce the clear intention of the legislature.[149] Outsiders who have no ownership in the company, for example those

[147] See Mitchell, above n 6, 23, where the author found that courts pierced the corporate veil in 65% of cases where an organ of central or local government was the requesting party.

[148] Commissioner of Taxation; Australian Trade Commission; Director of Public Prosecutions; Trade Practices Commission; Crown Prosecutor; Minister for Mines; Commissioner of Probated Duties; City of Subiaco; and Department of Social Security.

[149] See, for example, *Devant Pty Ltd v Minister for Mines* (Unreported, Supreme Court of Western Australia, Kennedy, Pidgeon and Steytler JJ, 18 December 1996). In that case, an individual surrendered a licence for prospecting and thirty minutes later registered it again in the name of the company in which he held two of the three shares. The Minister for Mines in Western Australia refused the application on public interest grounds. The Full Court recognised that a shareholder has no legal or equitable interest in the assets of the company and that consequently a person could have no interest in the prospecting licence held by the company in which he was a shareholder. Nevertheless, the Full Court recognised that it was within the jurisdiction of the Minister to refuse an application because the applicant was in substance the same as the former licence holder, which would be a breach of the principal and policy of the *Mining Act* 1978 (WA) and contrary to the public interest.

in a contractual relationship (classified as "unrelated entity" in Table 12), have a similar success rate (34.5%). The other results were too small to make comment.[150]

Table 13: Characteristics of Body Opposing Request to Pierce the Veil

Category	Total No of Cases	Pierced	Not Pierced	Percentage Pierced
Government	18	10	8	55.55
Company (self)	42	13	29	31.00
Shareholder	25	9	16	36.00
Unrelated entity	12	5	7	41.67
Bank/finance company	4	0	4	0.00
Trustee in Bankruptcy/ Liquidator	3	2	1	66.67

As shown in Table 13, where the government[151] opposes the request to pierce the veil, it has a limited success (56% of these cases resulted in piercing). An example of the government opposing a request to pierce the corporate veil is where a shareholder in a company, or the company itself, seeks to pierce the corporate veil because this will increase compensation the company will receive from the government in a compulsory land acquisition matter. More successful in opposing the request to pierce the veil are the company itself (31%) or a shareholder in the company (36%).[152]

[150] Excluding the categories of "Bank" and "Trustee in Bankruptcy/Liquidator/Receiver" (for which the number of cases is too small), applying the Chi-square test, there is a 93.9% likelihood that there is no difference in piercing probabilities between the remaining categories.

[151] Commissioner of Taxation; Victorian Roads Corporation; Commissioner of Land Tax; Australian Trade Commission; Minister for Resources; Commissioner of Highways; Brisbane City Council; Workcover Authority of NSW; Repatriation Commission; Lord Mayor, Councillors and Citizens of the City of Melbourne; and the State of NSW.

[152] Excluding the categories of "Bank/finance company" and "Trustee in Bankruptcy/Liquidator" (for which the number of cases is too small), applying the Chi-square test, there is a 55.8% likelihood that there is no difference in piercing probabilities between the remaining categories.

Table 14: Outcome of Cases Where a Particular Factor Mentioned as Absent by the Courts

Absent Factor Mentioned	No of cases in which absent factor mentioned	Pierced	Not Pierced	Percentage Pierced
Group enterprise	6	0	6	0.00
Sham or Façade	13	0	13	0.00
Fraud	14	4	10	28.57
Alter ego/mere conduit	3	1	2	33.33
Mistake	1	0	1	0.00
Unconscionable dealing	1	0	1	0.00
Common ownership	1	0	1	0.00
Intertwining	1	0	1	0.00
No parent/subsidiary relationship	4	0	4	0.00
Agency	6	0	6	0.00
Control	1	0	1	0.00
No beneficial ownership	2	0	2	0.00
Mere shell companies	1	0	1	0.00
Lack of substantive separation	5	2	3	40.00

The study also compiled a list of factors mentioned as absent in the particular facts of the case before the court. Courts infrequently review the law of piercing and make *obiter* comment on the traditional factors that will allow piercing. Although the numbers are mostly too low for meaningful analysis,[153] it is interesting to note that where the courts state that the company they were examining was not a sham or façade, a piercing argument was refused in every one of the thirteen cases in which it was mentioned as an absent factor. Similarly, an absence of fraud and absence of an agency relationship appear relevant to a number of decisions.

V CONCLUSION

A number of the key results of the study can be summarised. First, in the 104 cases in the sample, courts pierced the veil in about 38.5% of the cases.

[153] It was inappropriate to apply the Chi-square test to the categories in this Table because of the small number of cases in each of the categories.

Secondly, there has been a substantial increase in the number of piercing cases heard by the courts. The first judgment in our study was decided in 1911 yet almost 57% of the cases were heard in the 1990s. Another 22% were heard in the 1980s.

Thirdly, courts are more prepared to pierce the corporate veil of a proprietary company (about 42%) than a public company (about 22%). We have seen that this difference can be justified on the basis of some of the economic explanations for limited liability which were outlined in Part II of this article.

Fourthly, the number of shareholders in the company makes a difference to the piercing rate. In those cases involving a company with only one shareholder, the piercing rate was about 45%. The piercing rate declined as the number of the shareholders increased.

Fifthly, courts pierce the corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or more individual shareholders. This result is surprising given that there are a number of reasons why we might expect the opposite result. We identified a number of possible explanations for this finding.

Sixthly, courts pierce more frequently in a contract context than in a tort context. Again, this result is surprising given that commentators have usually argued that courts should be more prepared to pierce the corporate veil in tort actions compared to contract actions.

Seventhly, piercing rates are highest where the ground advanced for piercing the corporate veil is one of unfairness/interests of justice. All other grounds advanced for piercing the veil had significantly lower piercing rates with the lowest being the group enterprises argument.

Finally, where a company seeks to pierce its own veil, the rate of piercing is almost identical to the results for the overall study indicating that courts are reasonably generous in allowing companies to succeed in a veil piercing argument where this will benefit the company.

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