CRITIQUE AND COMMENT

CORPORATE STRUCTURES, THE VEIL AND THE ROLE OF THE COURTS

THE HON CHIEF JUSTICE
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The topic of the corporate veil is one that has been long-discussed, but which remains the subject of considerable debate and uncertainty. This lecture will look at a few areas related to veil-piercing or lifting, used in a broad sense, which usefully highlight the tensions the courts have to grapple with when faced with corporate structures and the question of whether to look behind those structures to commercial realities. The topics canvassed are directors' liability for corporate fault, limited liability and corporate groups, and direct liability of parent entities in tort.

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I Preface: Professor Ford

This lecture is in honour of Professor Harold Ford, an Australian doyen of corporations law and trusts law.

Professor Ford enrolled in the Articled Law Clerks course at the University of Melbourne prior to World War II, and completed it after six years of service in the Royal Australian Navy during the war. He won the Supreme Court Prize for Articled Clerks in 1948, and shortly after commenced his illustrious academic career at this university.[1]

He was Professor of Commercial Law at Melbourne Law School until his retirement in 1984, and was Dean of the Law School in 1964 and from 1967 to 1973.[2] Beyond the Law School, he was engaged in extensive law reform work, including chairing the federal government's Companies and Securities Law Review Committee.[3] In the Committee's final report, the Committee members acknowledged Professor Ford's 'industry and intellectual leadership' as being the 'driving force' in the Committee's achievements.[4] He was also the founding chairman of the Leo Cussen Institute.[5] He was made a Member of the Order of Australia in 1994 for his services to the law.[6]

For those who did not have the privilege to be taught by, or work with, Professor Ford, his influence is strongly felt through his seminal texts. Professor Ford's textbook *Principles of Corporations Law*[7] — which was unprecedented on its initial publication, Australian students and practitioners having previously relied on Gower's English text, with an Australian supple-

[1] Ian Ramsay, 'Professor Harold Ford and the Development of Australian Corporate Law' (2011) 29 *Company and Securities Law Journal* 30, 31.

[2] Ibid 33. See also Silvia Dropulich, 'Professor Emeritus Harold Ford AM: Innovation in Legal Education', *MLS News* (online), September 2009 <http://law.unimelb.edu.au/alumni/mls-news/issue-2-september-2009/professor-emeritus-harold-ford-am-innovation-in-legal-education>.

[3] Ramsay, above n 1, 33.

[4] Companies and Securities Law Review Committee, *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action*, Report No 12 (1990) 2.

[5] See Ramsay, above n 1, 33. The Leo Cussen Institute is now called the Leo Cussen Centre for Law.

[6] Ibid 35.

[7] The book was first published in 1974 and is now in its 16th edition with Dr Robert Austin and Professor Ian Ramsay as co-authors: R P Austin and I M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015).

ment — is indispensable to those studying or practising in the area.[8] Similarly, every good legal library has a copy of Ford and Lee's *Principles of the Law of Trusts*.[9]

Those who were fortunate enough to be taught by, or work with, Professor Ford speak not only of an intellectual giant, but also of a kind and generous man of integrity. He was a respected teacher and mentor who influenced generations of law students and lawyers. It is a privilege to have been invited to give this lecture in Professor Ford's memory.

II Introduction

In this lecture, I have chosen to canvass a topic that has been the subject of intense discussion for a long time, but which remains fascinating and in significant parts unresolved. That is the problem of the 'veil' — to what extent can courts look behind legal structures to commercial realities in determining the disputes before them?

The topic of piercing the veil has been described as an 'unprincipled and "arbitrary"' area of the law.[10] In a sign of how controversial this area is, in the 2013 United Kingdom Supreme Court decision of *VTB Capital plc v Nutritek International Corporation* ('*VTB*'),[11] Lord Neuberger queried whether it was even possible for a court to pierce the corporate veil in the absence of a statutory mandate to do so.[12] His Lordship subsequently drew back from this position in the case of *Prest v Petrodel Resources Ltd* ('*Prest*'),[13] which was

8 Email from Robert Austin to Ian Ramsay, 10 September 2010, quoted in Ramsay, above n 1, 34–5. Gower's text is now in its 10th edition: Paul L Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (Sweet and Maxwell, 10th ed, 2016).

9 H A J Ford and W A Lee, *Principles of the Law of Trusts* (Lawbook Co, 2nd ed, 1990). This is now published as a looseleaf service: Harold Ford et al, Thomson Reuters, *Ford and Lee: The Law of Trusts* (at November 2016).

10 Jason Harris and Anil Hargovan, 'Cutting the Gordian Knot of Corporate Law: Revisiting Veil Piercing in Corporate Groups' (2011) 26 *Australian Journal of Corporate Law* 39, 43, quoting Stephen M Bainbridge, 'Abolishing Veil Piercing' (2001) 26 *Journal of Corporation Law* 479, 535. See also *Century Medical Inc v THLD Ltd* [1999] NSWSC 731 (29 July 1999) [25] (Einstein J); *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 567 (Rogers AJA).

11 [2013] 2 AC 337.

12 See ibid 385 [130].

13 [2013] 2 AC 415.

decided a few months after *VTB*. In *Prest*, Lord Neuberger was persuaded by Lord Sumption that the doctrine of veil-piercing did have a place in the law, albeit a narrow one.[14] In reaching that conclusion, however, Lord Neuberger remarked that:

> It is … clear from the cases and academic articles that the law relating to the doctrine is unsatisfactory and confused. Those cases and articles appear to me to suggest that (i) there is not a single instance in this jurisdiction where the doctrine has been invoked properly and successfully, (ii) there is doubt as to whether the doctrine should exist, and (iii) it is impossible to discern any coherent approach, applicable principles, or defined limitations to the doctrine.[15]

The fact that the highest court in the United Kingdom ('UK') was, very recently, having discussions about the *existence* of a purported legal principle that has been the subject of reams of legal writing is a sign of the unsettled nature of this topic.

Before I launch into substantive discussion, I will define the scope of this lecture. Commentators have noted that 'pure' veil-piercing is a narrow concept.[16] In *Atlas Maritime Co SA v Avalon Maritime Ltd; The Coral Rose [No 1]*,[17] Staughton LJ drew a distinction between strict 'veil-piercing' and the looser notion of 'veil-lifting', saying that the former involves 'treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders', while the latter involves 'hav[ing] regard to the shareholding in a company for some legal purpose.'[18] At the same time, some commentators and courts have used the terms 'veil-piercing' and 'veil-lifting' interchangeably.[19]

In this lecture, I will discuss the veil and scrutinise corporate structures in a broader rather than narrower sense. The debate surrounding veil piercing or lifting in its broad sense is a rich area for case law and academic discussion, and I do not purport to provide a comprehensive overview of the extant debates. Rather, I want to focus on a few areas which I think are interesting

14 Ibid 502–3 [80]–[81].

15 Ibid 498–9 [64].

16 See, eg, Helen Anderson, 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform' (2009) 33 *Melbourne University Law Review* 333, 342.

17 [1991] 4 All ER 769.

18 Ibid 779.

19 See, eg, *VTB* [2013] 2 AC 337, 382 [119] (Lord Neuberger); Anderson, above n 16, 333 n 1.

and usefully highlight the tensions the courts have to grapple with when faced with corporate structures.

III Directors' Liability

A good place to start might be the collapse of Queensland Nickel Pty Ltd ('Queensland Nickel'), which has received considerable media attention in recent months. As has been widely reported, Queensland Nickel went into voluntary administration in January 2016.[20] Queensland Nickel operated the Yabulu refinery — employing all the workers there and contracting with suppliers — but did not own any of the refinery assets. Instead, those assets are owned by QNI Metals Pty Ltd ('QNI Metals') and QNI Resources Pty Ltd ('QNI Resources').[21] Between them, QNI Metals and QNI Resources hold all of the shares in Queensland Nickel.[22]

On 11 April 2016, FTI Consulting released its administrators' report on Queensland Nickel. The report estimated that Queensland Nickel owed over $200 million to secured and unsecured creditors.[23] According to news reports, these debts include workers' entitlements, unpaid council rates and the cost of remediation of the refinery site.[24]

20 'Clive Palmer's Queensland Nickel Goes into Voluntary Administration', *ABC News* (online), 19 January 2016 <http://www.abc.net.au/news/2016-01-18/qld-nickel-goes-into-voluntary-administration/7094818>.

21 Amanda Saunders, 'Clive Palmer and the Nickel Refinery Collapse that Wasn't', *The Sydney Morning Herald* (online), 25 January 2016 <http://www.smh.com.au/business/mining-and-resources/clive-palmer-and-the-nickel-refinery-collapse-that-wasnt-20160124-gmd5v3.html>.

22 John Park et al, *Queensland Nickel Pty Ltd (Administrators Appointed) ACN 009 842 068: Report by Administrators Pursuant to Section 439A of the Corporations Act* (11 April 2016) 22 [5.1].

23 Ibid 25 [5.6].

24 Kerrin Binnie, 'Clive Palmer: Government to Chase Refinery Owner for $74m Owed to Queensland Nickel Workers', *ABC News* (online), 15 April 2016 <http://www.abc.net.au/news/2016-04-15/queensland-nickel-federal-government-to-pursue-clive-palmer-$74m/7327036>; Josh Bavas, 'Clive Palmer's Queensland Nickel Creditors Meet over Liquidation Vote', *ABC News* (online), 22 April 2016 <http://www.abc.net.au/news/2016-04-22/clive-palmer-queensland-nickel-liquidation-creditors-meet/7348598>.

On 22 April 2016, Queensland Nickel's creditors voted to put the company into liquidation, in accordance with the administrators' recommendation.[25] The first courtroom hearing involving Queensland Nickel has already occurred. In mid-April 2016, QNI Metals and QNI Resources sought an interlocutory injunction in Queensland's Supreme Court to block FTI Consulting, as administrators of Queensland Nickel, from seeking to recover \$190 million from them.[26] Burns J was due to hand down judgment on the interlocutory injunction on 29 April 2016, but on the afternoon of 28 April, the applicants advised the Court that they were withdrawing the interlocutory injunction application.[27] According to an article in *The Australian*, Burns J was critical of this last-minute move, stating in Court: 'I've wasted enough time this week on this matter writing a judgment that won't be delivered.'[28]

These kinds of situations with gaping debts and sheltered assets reveal the promise and the problem of limited liability. Limited liability encourages desirable economic activity by separating out the reward from the risk.[29] Contracts that advance shareholders' interests can be entered into while ensuring that recourse can only be made against company assets rather than shareholders' personal assets.[30] This construction is an accepted reality of

[25] Mark Ludlow, 'Clive Palmer's Queensland Nickel into Liquidation', *The Australian Financial Review* (online), 22 April 2016 <http://www.afr.com/news/politics/clive-palmers-queensland-nickel-into-liquidation-20160422-goci5w>.

[26] Nick Wiggins, 'Queensland Nickel Debts Will Probably Not Be Paid, Former Director Clive Mensink Tells Court', *ABC News* (online), 20 April 2016 <http://www.abc.net.au/news/2016-04-20/qld-nickel-debts-probably-wont-be-paid-clive-mensink-tells-court/7343486>; Sarah Elks, 'Clive Palmer Tries Injunction to Block Access to Queensland Nickel Funds', *The Australian* (online), 20 April 2016 <http://www.theaustralian.com.au/business/clive-palmer-tries-injunction-to-block-access-to-queensland-nickel-funds/news-story/18d22855e143824274aab294a7fca815>.

[27] Sarah Elks, 'Queensland Judge Accuses Clive Palmer of Wasting Court Time', *The Australian* (online), 29 April 2016 <http://www.theaustralian.com.au/business/mining-energy/queensland-judge-accuses-clive-palmer-of-wasting-court-time/news-story/1be3edf9dd493f05c03bf17ad790535e>.

[28] Ibid.

[29] Peter Edmundson and James Mitchell, 'Knowing Receipt in Corporate Group Structures' (2005) 23 *Company and Securities Law Journal* 515, 529. See also Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) 41–4.

[30] Austin and Ramsay, above n 7, 132–3 [4.160].

business. The risk of insolvency is instead borne by creditors whom, it is argued, are able to factor that risk into their required return.[31]

An existing incursion into the corporate veil is that limited liability applies to shareholders but not to directors. Courts can and do look through the company to its actors and penalise those who, for example, fail the duty enshrined in s 181 of the *Corporations Act 2001* (Cth) to act in good faith in the best interests of the company.

To return to Queensland Nickel as an example, the administrators' April report into the company expressed the opinion that there had been 'reckless' conduct by the directors.[32] The administrators stated that since mid-2012, 'over $189.3M of related party loan balances has been forgiven' by Queensland Nickel for the benefit of director-related parties.[33] The report also noted an additional $26 million was transferred as donations to political parties, transfers which may have indirectly benefited a director of Queensland Nickel.[34]

The administrators also expressed the view that Clive Palmer, a former director of Queensland Nickel, 'appears to have acted as a shadow/de facto director of [Queensland Nickel] at all material times from February 2012', excluding three periods in which he was an appointed director (most recently ending in February 2015).[35] Mr Palmer has denied this allegation.[36]

Recognition of shadow directors is a powerful way in which the courts look past corporate structures to the commercial realities behind them. However, it is not lightly exercised. The extension of directors' responsibilities to those who assist in decision-making carries the risk of inculpating myriad professional advisers. For example, it is not uncommon for lenders to get

31 David A Wishart, 'Models and Theories of Directors' Duties to Creditors' (1991) 14 *New Zealand Universities Law Review* 323, 336. See also Easterbrook and Fischel, above n 29, 50.

32 Park et al, above n 22, 30 [6.4.3].

33 Ibid 33 [6.6.2].

34 Ibid.

35 Ibid 28 [6.4.1].

36 Mark Ludlow, 'Clive Palmer Acted as Shadow Director of QN, Administrator Claims', *The Australian Financial Review* (online), 12 April 2016 <http://www.afr.com/news/politics/clive-palmer-acted-as-shadow-director-of-qni-administrator-claims-20160411-go40wv>. See also George Roberts, 'Clive Palmer Says Joint Venture Agreement Clears Him of Queensland Nickel Shadow Director Claim', *ABC News* (online), 13 April 2016 <http://www.abc.net.au/news/2016-04-13/clive-palmer-releases-joint-venture-agreement-queensland-nickel/7324234>.

involved in attempts to save troubled companies.[37] In this context, the analysis of exactly what role has been played by the alleged shadow director must be extraordinarily precise.

The relevant test was set out in the trial judgment in *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* ('*Buzzle*'),[38] which was approved on appeal by the New South Wales Court of Appeal:[39] 'the directors collectively in the exercise of their powers of management … must be accustomed to act on the instructions or wishes of the putative shadow director for the definition to be satisfied.'[40] In his exploration of this definition, White J noted that, although this did not require proof that the directors of the company exercised no discretion of their own, it did require 'a causal connection between the instruction or wish of the shadow director and the act taken by the directors.'[41]

This requirement can be difficult to apply in practice. For example, in *Buzzle*, Apple had insisted on Buzzle being restricted from incurring financial indebtedness outside a certain prescribed list of permissions.[42] A Buzzle director deposed that he felt he had no choice but to agree to this term.[43] Certainly, the arrangement indicated Apple's influence on Buzzle's management.[44] However, the expectation or presumption is that individual directors are to responsibly exercise their independent judgement. There are numerous commercial arrangements where a company or an individual is in a dominant position. As White J reasoned:

> [For a company] to insist on such terms as a commercial dealing between a third party and the company is not ipso facto to give an instruction or express a wish as to how the directors are to exercise their powers. Unless something

[37] Pearlie M C Koh, 'Shadow Director, Shadow Director, Who Art Thou?' (1996) 14 *Company and Securities Law Journal* 340, 340.

[38] (2010) 238 FLR 384.

[39] *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47.

[40] *Buzzle* (2010) 238 FLR 384, 441 [250] (White J).

[41] Ibid 440 [247].

[42] Ibid 410 [116]–[117].

[43] Ibid 410 [118].

[44] See, eg, ibid 411 [123].

> more intrudes, the directors are free and would be expected to exercise their own judgment …[45]

Another recent example where the issue of shadow directorships arose is the Royal Commission into Trade Union Governance and Corruption. There was a suggestion that an individual directed the operations of two businesses, which had each reportedly been through around four companies that had been liquidated with outstanding debts.[46] He was not a director. At the hearing, the questions of counsel assisting the Royal Commission revolved around the individual's practical control of the businesses. Yet, the testimony provided fell short of satisfying the threshold set out in *Buzzle*. When asked if the individual gave directions, an appointed director responded: 'Not specific directions, but certainly most things were discussed with him.'[47]

Shadow directorship cases demonstrate a tension. It is important to ensure that those defrauding creditors are held accountable, but the scrutiny of interpersonal dynamics and commercial realities is complicated by the important presumption that directors are free-thinking actors.

Moving beyond the question of who is or is not a director (appointed or de facto), there is also the courts' ability to hold directors personally liable for corporate fault. A statutory example of directors' personal liability is for misleading or deceptive conduct under the previous *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1999* (Vic) ('*FTA*') regime, or the current Australian Consumer Law regime.[48] Under the previous regime, claims against directors[49] for misleading or deceptive conduct could either be made under the accessorial liability provisions of the *Trade Practices Act 1974* (Cth)[50] or directly under s 9 of the *FTA*. The latter had the advantage of circumventing the requirement to prove mental intent for accessorial liability, as set out by the High Court in *Yorke v Lucas*.[51] Further, the High Court's

[45] Ibid 439 [243].

[46] See Transcript of Proceedings, *Royal Commission into Trade Union Governance and Corruption* (Commonwealth, Commissioner John Dyson Heydon, 15 July 2014) 6.

[47] Transcript of Proceedings, *Royal Commission into Trade Union Governance and Corruption* (Commonwealth, Commissioner John Dyson Heydon, 1 September 2014) 15 (D Westerway).

[48] *Competition and Consumer Act 2010* (Cth) sch 2.

[49] And others, such as employees or officers of a company.

[50] *Trade Practices Act 1974* (Cth) s 75B.

[51] (1985) 158 CLR 661.

decision in *Houghton v Arms* cleared another hurdle for finding individuals personally liable for misleading or deceptive conduct carried out in the course of acting for a corporation.[52] In that case, employees acting on behalf of a corporation made representations to the corporation's client which were found to be misleading or deceptive.[53] The employees argued that they could not be held liable under s 9 of the *FTA* because they were not 'persons' for the purposes of the provision, and further, that they were not 'for themselves' acting 'in' trade or commerce as required by the provision but instead were only acting in the trade or commerce of the corporation.[54]

The High Court rejected both these arguments. On the former argument, the Court noted that it would be contrary to the purpose of the *FTA* to encourage fair trading practices to read down 'person' to exclude employees.[55] On the latter argument, the High Court held:

> statements made by a person not himself or herself engaged in trade or commerce may answer the statutory expression if, for example, they are designed to encourage others to invest, or to continue investments, in a particular trading entity. … It is not to the point that Mr Houghton and Mr Student themselves were not business proprietors or that their activities were an aspect or element of the trade or commerce of [their employer and their employer's client] but not of 'their' trade or commerce. Mr Houghton and Mr Student nevertheless engaged in conduct in the course of trade or commerce and were thus within the ambit of the [*FTA*].[56]

The above principles continue to apply to actions for misleading or deceptive conduct against directors under s 18 of the Australian Consumer Law.[57] An example of where the provision has been applied to impose personal liability on a director is *Australian Competition and Consumer Commission v Energy Watch Pty Ltd*,[58] in which a CEO's involvement in misleading radio advertising conducted by his company led to adverse declarations being made against

[52] (2006) 225 CLR 553.

[53] See ibid 561 [15].

[54] Ibid 564 [30].

[55] Ibid 567 [41].

[56] Ibid 565 [34]–[35] (citations omitted).

[57] *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

[58] [2012] FCA 425 (30 April 2012). This judgment established liability.

him and the imposition of a \$65 000 penalty (in addition to the \$1.95 million penalty imposed on the company).[59]

There are other avenues by which directors may become personally liable for corporate fault.[60] I do not have the space to delve into this area further, but I would like to note in passing the idea that directors may owe a duty to consider the interests of creditors and may therefore be liable for failing to do so. The passage most often cited as the origin of this idea is that of Mason J in *Walker v Wimborne*:

> it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them.[61]

However, as explained by Justice Hayne in this very lecture in 2014,[62] close analysis of the context of that statement and subsequent decisions shows that under the law as it currently stands, directors do not, by reason of their position as directors, owe an independent duty to, and enforceable by, creditors.[63] The key avenues for holding directors personally liable for corporate fault remain statutory.[64]

59 *Australian Competition and Consumer Commission v ACN 135 183 372 (in liq)* [2012] FCA 749 (13 July 2012) [25] (Marshall J). This judgment imposed the penalty.

60 See Janine Pascoe and Helen Anderson, 'Personal Recovery Actions by Creditors against Company Directors' (2002) 10 *Insolvency Law Journal* 205.

61 (1976) 137 CLR 1, 7.

62 Justice K M Hayne, 'Directors' Duties and a Company's Creditors' (2014) 38 *Melbourne University Law Review* 795.

63 Ibid 799–804, 816.

64 See Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault: Report* (2006) <http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/personal_liability_for_corporate_fault.pdf>. In that report, the Committee canvassed the statutory provisions under which directors may be held personally liable for corporate fault, and expressed concerns that the panoply of legislative provisions resulted in inconsistent standards on, and potentially unfair penalties for, directors: at 8–9 [1.5.1], ch 2.

IV LIMITED LIABILITY AND CORPORATE GROUPS

I turn now to that ubiquitous commercial structure, the corporate group.[65] The advantages of corporate groups as economic units to carry on business have been thoroughly canvassed elsewhere[66] — needless to say, there are very good reasons why corporate groups have become the structure of choice for commercial enterprises. A 1997 empirical study of the top 415 Australian Securities Exchange-Listed companies by Professor Ian Ramsay and Associate Professor Geof Stapledon found that 89 per cent of those companies controlled at least one other entity, and that 90 per cent of the controlled entities were wholly-owned.[67] A 2007 update on that study by two University of Sydney academics produced very similar statistics.[68]

The prima facie position reached by applying the principle from *Salomon v A Salomon & Co Ltd* ('*Salomon*')[69] to corporate groups is that each member company of a corporate group is a separate legal entity. So, creditors are generally expected to only look to the group member with which they have contracted,[70] and the group can structure itself so that liability from its activities will fall on a particular member and that member only.[71] As Templeman LJ commented rather colourfully in *Re Southard & Co Ltd*:

> English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company.

[65] The classic definition of the corporate group was provided by Mason J in *Walker v Wimborne* (1976) 137 CLR 1, 6: 'a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control.'

[66] See, eg, Companies and Securities Advisory Committee, *Corporate Groups: Final Report* (2000) 3–4 [1.8] <http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2000/$file/corporate_groups,_may_2000.pdf>.

[67] Ian M Ramsay and G P Stapledon, 'Corporate Groups in Australia' (2001) 29 *Australian Business Law Review* 7, 8–9.

[68] Sandra van der Laan and Graeme Dean, 'Corporate Groups in Australia: State of Play' (2010) 20 *Australian Accounting Review* 121. Van der Laan and Dean found that over 88 per cent of the surveyed Australian Securities Exchange-Listed companies had controlled entities: at 128. Further, they found that over 91 per cent of those controlled entities were wholly owned: at 126.

[69] [1897] AC 22.

[70] *Walker v Wimborne* (1976) 137 CLR 1, 6–7 (Mason J).

[71] *Adams v Cape Industries plc* [1990] 1 Ch 433, 543–4 (Slade LJ for Slade, Mustill and Ralph Gibson LJJ).

> If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.[72]

Corporate groups effectively take the protection offered by limited liability and double it. The shareholders of a parent company that allocates a risk-bearing activity to its subsidiary receive a dual layer of protection: the first layer being the limited liability enjoyed by the parent in respect of the liabilities of the subsidiary, and the second being the limited liability enjoyed by the shareholders in respect of the liabilities of the parent.[73]

As many commentators have pointed out, the limited liability principle preceded the rise of the corporate group.[74] *Salomon* itself was centred around a one-man or private company.[75] Corporate groups were virtually unknown at the time of that decision. Yet, when they did begin to emerge, the principle from *Salomon* was applied to this new structure without detailed consideration of the rationales underlying the decision in *Salomon* and whether those rationales apply equally in the corporate group context.[76]

Academics have identified a number of bases on which parent company shareholders are distinguishable from individual shareholders when it comes to the issue of limited liability. In a 2001 article, Professor Ian Ramsay and David Noakes observed that typical justifications for limited liability — such as reducing the need for shareholders to monitor management, promoting the free transfer of shares and permitting efficient diversification by holders — have limited or no application to parent companies.[77] Professor Helen Anderson has also observed that imputing a subsidiary's liability to a

[72] [1979] 1 WLR 1198, 1208.

[73] Austin and Ramsay, above n 7, 156–7 [4.310].

[74] See, eg, Phillip Lipton, 'The Mythology of *Salomon*'s Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40 *Monash University Law Review* 452, 474; Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporation Law* 573, 610–11; Anderson, above n 16, 334, 356.

[75] [1897] AC 22.

[76] See, eg, *The Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 (one of the earliest English cases applying *Salomon* to a parent–subsidiary relationship). See also *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 576 (Rogers AJA); Lipton, above n 74, 474–5.

[77] Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250, 263–4, citing Blumberg, above n 74, 623–6.

parent company 'does not impose unlimited personal liability on any individual shareholder.'[78]

There is a lot of merit in these arguments. However, the problem is that the *Salomon* principle is now so entrenched in our law that it has become almost too late for the courts, at least, to return to a first principles analysis of the desirability or otherwise of the application of limited liability to corporate groups. To borrow the language of Lord Templeman, the *Salomon* principle has become an 'unyielding rock' on which 'complicated arguments' become 'shipwrecked'.[79]

High Court decisions such as *Walker v Wimborne*[80] and *Industrial Equity Ltd v Blackburn*[81] direct a strict application of the separate entity doctrine by Australian courts, and thus a corresponding judicial reluctance to engage in veil-piercing. Dodds-Streeton J described this reluctance in the case of *Varangian Pty Ltd v OFM Capital Ltd*:

> the underlying unity of economic purpose, common personnel, common membership and control have not been held to justify lifting the corporate veil. … [E]ven the complete domination or control exercised by a parent over a subsidiary is not a sufficient basis for lifting the corporate veil. This is an area in which 'the law pays scant regard to the commercial reality'.[82]

This strict attitude towards the veil has manifested in a variety of contexts. One recent example is the BHP Billiton litigation, concerning tax deduction claims.[83] In that case, BHP Billiton had established a wholly-owned subsidiary treasury company ('Finance'). Finance's role was to borrow large sums of money from third parties, at commercial rates of interest, and loan those funds to entities within the BHP Billiton group to fund operational activities

78 Anderson, above n 16, 352 citing Easterbrook and Fischel, above n 29, 56.

79 Lord Templeman, 'Company Law Lecture — Forty Years On' (1990) 11 *Company Lawyer* 10, 10.

80 (1976) 137 CLR 1.

81 (1977) 137 CLR 567.

82 [2003] VSC 444 (12 November 2003) [142], quoting *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577 (Rogers AJA).

83 *Federal Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526; *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746.

and new projects.[84] Loans made by Finance to related entities were at a higher rate of interest which earned substantial profits and generated income tax liabilities.[85] Finance's workforce was drawn from other companies within the group, its directors were appointed by the parent company, and its decision-making had regard to group interests.[86] In disputing tax deductions claimed by Finance, the Federal Commissioner of Taxation sought to argue that Finance was a 'mere conduit' of its parent.[87] This argument failed to find favour with the trial judge,[88] and on appeal to the Full Federal Court, and the High Court refused leave to appeal on this point.[89] Hargovan and Harris commented shortly after the decision of the Full Federal Court that the outcome of the BHP Billiton litigation was unsurprising in light of Australian courts' steadfast application of the *Salomon* principle in the context of corporate groups.[90]

Indeed, despite the arguments for piercing the corporate veil more frequently in the case of parent–subsidiary relationships, Ramsay and Noakes' empirical study of all Australian veil-piercing cases up to December 1999 showed that, surprisingly, the veil is *less* likely to be pierced in parent–subsidiary cases compared to cases involving one or more individual shareholders.[91]

As has been demonstrated by history, the strict application of the separate entity doctrine by the courts may lead to results that are discomfiting to the public. In 1993, in the introduction to an edited collection titled *The Law Relating to Corporate Groups*, Michael Gillooly wrote:

[84] *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746, 753–4 [9]–[10] (Gordon J).

[85] Ibid 759 [24].

[86] Ibid 756–7 [15]–[18].

[87] Ibid 776 [98].

[88] Ibid.

[89] Transcript of Proceedings, *Federal Commissioner of Taxation v BHP Billiton Ltd* [2010] HCATrans 229 (3 September 2010). Other aspects of the dispute were decided by the High Court in *Federal Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325.

[90] Anil Hargovan and Jason Harris, 'Together Alone: Corporate Group Structures and Their Legal Status Revisited' (2011) 39 *Australian Business Law Review* 85, 92–3.

[91] Ramsay and Noakes, above n 77, 264.

> The law's reluctance to broaden its focus beyond the individual companies that comprise corporate groups to take in the group as a whole, has led to a growing tension between legal theory and commercial expectations and practice.[92]

I think an editor of a modern book on corporate groups could continue to express that sentiment. In the same book edited by Gillooly, then Justice Andrew Rogers argued that Australian law had failed to come to grips with the commercial reality of a world dominated by 'conglomerates with subsidiaries in different fields of activity and locations',[93] as opposed to single companies. His Honour was echoing similar observations he had made in *Qintex Australia Finance Ltd v Schroders Australia Ltd*,[94] where he called for consideration of legislative reform in an area where '[f]airness or equity seems to have little role to play.'[95]

One of the most notorious examples of the perceived unfairness of corporate group structures is the James Hardie saga and the James Hardie group's treatment of liabilities to people who had been harmed by its asbestos products.[96] The report of the New South Wales ('NSW') Special Commission of Inquiry into James Hardie's asbestos compensation fund was critical of the arrangements that had led to the separation of the compensation fund from the other parts of the corporate group, the latter of which were relocated overseas.[97] The James Hardie case has been analysed in depth by a number of academic articles,[98] and I do not wish to cover the same ground, but I will make the following observation: part of the fuel behind the outrage at the

[92] Michael Gillooly, 'Introduction' in Michael Gillooly (ed), *The Law Relating to Corporate Groups* (Federation Press, 1993) xix, xix.

[93] Justice Andrew Rogers, 'Corporate Groups — Problems for Outsiders' in Michael Gillooly (ed), *The Law Relating to Corporate Groups* (Federation Press, 1993) 123, 123.

[94] (1990) 3 ACSR 267.

[95] Ibid 269.

[96] For a detailed exposition of the James Hardie litigation see Paul von Nessen and Abe Herzberg, 'James Hardie's Asbestos Liability Legacy in Australia: Disclosure, Corporate Social Responsibility and the Power of Persuasion' (2011) 26 *Australian Journal of Corporate Law* 55.

[97] D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) 11–12 [1.21].

[98] See, eg, Peta Spender, 'Weapons of Mass Dispassion: James Hardie and Corporate Law' (2005) 14 *Griffith Law Review* 280; H J Glasbeek, 'Contortions of Corporate Law: James Hardie Reveals Cracks in Liberal Law's Armour' (2012) 27 *Australian Journal of Corporate Law* 132.

James Hardie group's behaviour was, I think, the fact that its conduct adversely affected tort victims — vulnerable, involuntary creditors. I will return to this idea shortly.

For courts, of course, issues of corporate morality and fairness are constrained by established legal principles. This was noted by Byrne J of the Victorian Supreme Court in *Premier Building & Consulting Pty Ltd (rec apptd) v Spotless Group Ltd*,[99] in which a parent company sought to distance itself from the consequences of chemical contamination caused by its subsidiaries. Byrne J expressed the view that the parent company's stance reflected poorly on the commercial morality of the managers of the parent company, but continued: 'That said, I emphasise that this is not a court of morals. This case, like any other, will be decided according to law.'[100]

If sweeping changes are to be made to veil-piercing within corporate groups, that will have to be done by legislation. Some statutory change has already occurred, to a limited extent, with the introduction of s 588V of the *Corporations Act 2001* (Cth), which imposes liability on holding companies for the insolvent trading of their subsidiaries in certain circumstances.

Given the current lack of clarity around the circumstances in which veil-piercing will occur, statutory codification of veil-piercing could be a good opportunity to provide some certainty in this area. I note, however, that previous suggestions for large-scale legislative reform in this area, in the shape of the *General Insolvency Inquiry* ('*Harmer Report*'),[101] and the Companies and Securities Advisory Committee's suggestion of an 'opt-in' procedure to create consolidated corporate groups,[102] have fallen by the wayside. I will not hazard a guess as to how long it will be before there is sufficient impetus to bring in legislative change in this area, and to lift the issue from the 'too hard' basket.

V Direct Liability of Parent Entities

I turn now to what may seem a rather unexpected area of law — tort law, or at least, tort law as it intersects with corporations law. In particular, I want to talk

99 (2007) 64 ACSR 114.

100 Ibid 185 [324].

101 Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) vol 1, 146–7 [334]–[336].

102 Companies and Securities Advisory Committee, above n 66, 39–40 [1.109]–[1.110].

about cases that have imposed liability in negligence on a parent company for a breach of duty of care to an employee of its subsidiary, and to consider the ramifications of those cases.

This issue gained some prominence in the UK in recent years with the decision of the Court of Appeal of England and Wales in *Chandler v Cape plc* ('*Chandler*').[103] That case represented one of the first times in the UK that a parent company was found to have been directly liable for breach of duty of care to an employee of its subsidiary.[104] The same issue had been considered at some length by Australian courts in a series of cases in the late 1990s.[105] Unfortunately, the Court of Appeal in *Chandler* does not appear to have been referred to those Australian cases.

A Chandler v Cape

The facts of *Chandler* were as follows.[106] Mr Chandler had been employed in the late 1950s and early 1960s as a brick loader by a company called Cape Products. There was an asbestos factory on the site where Mr Chandler worked, which had open sides. No measures were taken to prevent the asbestos from the factory from escaping into the brickyard. Mr Chandler was therefore exposed to asbestos and, many years later, he contracted asbestosis. By this time, Cape Products had ceased to exist. However, its parent company, Cape, still existed. Mr Chandler sought to recover damages from the parent company. He alleged that the parent company owed a direct duty of care to employees of Cape Products to ensure a safe system of work.[107]

During Mr Chandler's employment with Cape Products, all of its shares were owned by the parent company. The asbestos factory had originally been owned by the parent company, but it sold the asbestos business to Cape Products before Mr Chandler commenced employment.[108] The board of Cape Products always had one or more directors of the parent company on it, and

103 [2012] 1 WLR 3111.
104 Ibid 3113 [2] (Arden LJ).
105 See below Part V(B).
106 [2012] 1 WLR 3111.
107 Ibid 3113 [1]–[4] (Arden LJ).
108 Ibid 3114–15 [8]–[10].

its meetings usually took place at the parent company's head office.[109] Minutes from Cape Products' board meetings indicated that the board's decision-making was at times expressed to be subject to approval by the board of the parent company.[110] Cape Products was unable to incur capital expenditure without the parent company's approval.[111] Products made at the Cape Products asbestos factory were manufactured in accordance with instructions and product specifications issued by the parent company, and product development was carried out in the parent company's central laboratory.[112] Having said that, Cape Products remained a separate company to its parent — it owned its own assets, and handled its sales with third parties.[113]

On health and safety issues, Cape Products was responsible for the day-to-day implementation of health and safety measures at its factory.[114] It had its own works doctor and a works safety committee.[115] But the parent company also looked at health and safety issues for the whole group of companies. It appointed group medical advisers from the 1950s onwards, and there was evidence that those advisers conducted extensive research into the link between asbestos and lung disease.[116]

Against this background of facts, the Court of Appeal found that the parent company owed a direct duty of care to Mr Chandler.[117] The focus of the judgment of Arden LJ (with whom Moses and McFarlane LJJ agreed) was on the 'proximity' step in the three-stage test in *Caparo Industries plc v Dickman*[118] used by the English courts in determining novel duty of care questions. Arden LJ held that it was not necessary for a parent company to exercise absolute control of the subsidiary for a direct duty of care to arise.[119] Here, there was sufficient or 'relevant' control exercised by the parent company over

[109] Ibid 3115 [10].
[110] Ibid 3115 [12], 3130 [73].
[111] Ibid 3130 [73].
[112] Ibid 3130 [73]–[75].
[113] Ibid 3115 [11].
[114] Ibid 3130 [74].
[115] Ibid 3116 [18].
[116] Ibid 3116 [19]–[20].
[117] Ibid 3131 [79].
[118] [1990] 2 AC 605, 618 (Lord Bridge).
[119] *Chandler* [2012] 1 WLR 3111, 3127 [66].

Cape Products,[120] demonstrated by the parent company's practice of issuing instructions to its subsidiary, and the subsidiary's consideration of parent company and group interests in its decision-making.[121]

Arden LJ identified four factors, in addition to the control exercised by the parent company over Cape Products, that made this an appropriate case to impose a direct duty of care.[122] These factors were that:

1 The businesses of the parent and subsidiary were the same.

2 The parent had superior knowledge on health and safety issues in the industry.

3 The parent knew the subsidiary's system of work was unsafe.

4 '[T]he parent knew or ought to have foreseen that the subsidiary or its employees would rely on [the parent] using that superior knowledge for the employees' protection.'[123]

Interestingly, her Ladyship commented that in looking at the last requirement, the focus was not on the parent's intervention in *health and safety* issues:

> The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[124]

So the Court of Appeal took a fairly broad approach to looking at the relationship between a parent company and its subsidiary in determining whether the parent should be held to owe a direct duty of care.

The subsequent Court of Appeal of England and Wales case of *Thompson v The Renwick Group plc* ('*Thompson*'),[125] also an asbestos case, drew some boundaries around the *Chandler* decision. There, the parent company in question did not carry on any business apart from holding shares in other companies. The parent had appointed an individual as a director of its

[120] Ibid 3123 [46].

[121] Ibid 3130 [73].

[122] Ibid 3131 [80].

[123] Ibid.

[124] Ibid.

[125] [2014] EWCA Civ 635 (13 May 2014).

subsidiary with responsibility for health and safety matters.[126] The plaintiff, who worked for the subsidiary, had argued that this was sufficient to give rise to a duty of care to him on the part of the parent.[127] The Court of Appeal rejected this. It held that in the day-to-day operations of the subsidiary, the director in question was acting not on behalf of the parent but pursuant to his fiduciary duty to the subsidiary.[128] The Court of Appeal further held that the totality of the circumstances of the case did not give rise to a duty of care on the part of the parent. The Court noted that the parent did not conduct its own business, there was no evidence that the parent had special expertise in asbestos safety issues, and the findings of the trial judge that the parent and the subsidiary shared resources and intermingled their businesses were insufficient to demonstrate that the separate legal personalities of the parent and subsidiary were not respected.[129]

Nonetheless, the Court in *Thompson* did not resile from the test laid out by Arden LJ in *Chandler*, and indeed remarked that the factors set out by her Ladyship do not exhaust the circumstances in which a parent company may owe a direct duty of care to those who interact with its subsidiary.[130]

B *The Australian Cases*

The approach taken by the Court of Appeal in *Chandler* can be contrasted with that taken by the Australian courts in a series of cases in the 1980s and 1990s.

The first case that directly imposed liability on a parent company for serious injury to an employee appears to have been the 1988 decision of Rowland J of the Supreme Court of Western Australia in *Barrow v CSR Ltd* ('*Barrow*').[131] In that matter, two former employees of Australia Blue Asbestos ('ABA'), a company involved in the mining and milling of asbestos at the Wittenoom asbestos mine, sued both ABA and its parent company for the mesothelioma and asbestosis that the employees suffered later in their life. The

[126] Ibid [24] (Tomlinson LJ).

[127] Ibid.

[128] Ibid [25].

[129] Ibid [38].

[130] Ibid [33].

[131] (Unreported, Supreme Court of Western Australia, Rowland J, 4 August 1988).

plaintiffs were able to successfully establish before Rowland J that, as then required under the test for duty of care in negligence cases, there was the requisite proximity between themselves and the parent company, such that the parent company owed them a duty of care to take reasonable care for the safety of the plaintiffs.[132]

Rowland J's preferred lens for looking at the relationship between parent and subsidiary was one of agency; there had been an agreement 'which was in terms sufficient, whenever it was invoked, to create an agency at law to enable [CSR] to direct all that occurred at [the asbestos mine].'[133] His Honour said that:

> 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.[134]

The next case was *CSR Ltd v Wren* ('*Wren*'),[135] decided in 1997. In short compass, the plaintiff in *Wren* had inhaled asbestos fibres whilst employed by Asbestos Products Pty Ltd ('Asbestos Products'), an asbestos cement manufacturing business, during the early 1950s. The factory in which the plaintiff worked was poorly ventilated and had no windows. The employees were not provided with protective masks. The plaintiff developed mesothelioma in the 1990s. By that time, Asbestos Products had long since been liquidated.[136]

At the relevant time, Asbestos Products was a wholly owned subsidiary of CSR and was described as being part of CSR's Building Materials Division. All of the directors on the board of Asbestos Products were staff members of CSR as well. One of Asbestos Products' directors was also CSR's CEO of the Building Materials Division. Management staff at the factory were all employees of CSR. The management staff routinely entered the work areas where the

[132] Ibid 218.
[133] Ibid 216.
[134] Ibid 218.
[135] (1997) 44 NSWLR 463.
[136] Ibid 466–7 (Beazley and Stein JJA).

manufacturing process was carried out.[137] CSR controlled the purchase of equipment by Asbestos Products.[138]

The plaintiff did not seek to press the agency argument that had found favour with Rowland J on the facts of *Barrow*.[139] Rather, Beazley and Stein JJA (with whom Powell JA agreed)[140] decided that a duty of care was owed on the basis that:

> given the fact that the whole of the management staff, who had responsibility for the operational aspects of Asbestos Products Pty Ltd's enterprise, and therefore the conditions in which Mr Wren worked, were CSR staff, CSR had a duty directly to Mr Wren and that duty was co-extensive with that owed by an employer to an employee.[141]

Their Honours emphasised the narrow scope of the decision.[142] They noted that in this case, the parent company had a close involvement in the subsidiary's activities 'over and above that expected in the case of a holding company.'[143]

The judgment in *Wren* was quickly followed by *CSR v Young* ('*Young*'),[144] also a decision of the NSW Court of Appeal, in early 1998. *Young* involved the asbestos mines at Wittenoom which were also the subject of the *Barrow* case. It is an interesting case because the plaintiff there was not an employee of the subsidiary, ABA, that putatively ran the asbestos mines, but rather a resident in the town situated next to the mines. Asbestos tailings were used throughout the town, including to form roads, to construct the airport, and as ground fill in the town hospital, school and backyards. The plaintiff, who had lived in the town as a young child, later contracted mesothelioma. She sued both ABA and its parent company CSR.[145]

137 Ibid 469.

138 Ibid 470.

139 Ibid 466.

140 Ibid 465–6 (Powell JA).

141 Ibid 485 (Beazley and Stein JJA).

142 Ibid.

143 Ibid 470.

144 (1998) Aust Torts Reports ¶81–468.

145 Ibid 64 951 (Giles AJA).

CSR had conceded in light of the decision in *Barrow*[146] that it, as well as ABA, owed a duty of care to the workers at the asbestos mines and in the mills. However, it resisted liability for injuries to the town residents.[147] The NSW Court of Appeal rejected that distinction.

Giles AJA, with whom Handley JA and Cohen AJA agreed, noted that CSR had established ABA as its wholly owned subsidiary and caused ABA to give it comprehensive powers as agent.[148] It did not matter whether the putative victim was an employee or not; '[t]he reality is still that CSR was engaged in the relevant acts and omissions, through ABA.'[149]

A few months after *Young*, the NSW Court of Appeal handed down *James Hardie & Co Pty Ltd v Hall* ('*James Hardie*'),[150] which underscored the narrowness of the Court's previous decisions. The leading judgment in *James Hardie* was written by Sheller JA, with whom Beazley JA[151] and Stein JA[152] agreed. As you may recall, both Beazley JA and Stein JA had sat on *Wren*. *James Hardie* involved a New Zealand plaintiff who had been exposed to asbestos dust at his place of work. He sought to recover from his New Zealand employer, as well as two NSW companies related to his employer.[153] One of those NSW companies, referred to as the 'Holding Company' in the judgment, held over 95 per cent of the shares in the New Zealand company. The other NSW company was a subsidiary of the Holding Company. The plaintiff alleged that both NSW companies had the control and management of the New Zealand factory where he had worked.[154]

The trial judge had imposed liability on the NSW companies on the basis that the totality of the evidence suggested that the three companies conducted one enterprise.[155] The trial judge referred to the fact that the NSW subsidiary

146 (Unreported, Supreme Court of Western Australia, Rowland J, 4 August 1988).

147 *Young* (1998) Aust Torts Reports ¶81-468, 64 951 (Giles AJA).

148 Ibid 64 953 (Giles AJA), 64 938 (Handley JA), 64 960 (Cohen AJA).

149 Ibid 64 953 (Giles AJA).

150 (1998) 43 NSWLR 554.

151 Ibid 585.

152 Ibid.

153 The three companies were called James Hardie & Co (NZ) (the New Zealand company), James Hardie Industries Ltd (the Holding Company) and James Hardie & Co Pty Ltd (the NSW subsidiary).

154 *James Hardie* (1998) 43 NSWLR 554, 557 (Sheller JA).

155 Ibid 561–2, 564.

would regularly give instructions to the New Zealand company which were adopted by the latter. The New Zealand company would also hold its directors' meetings and annual general meetings in Sydney. Correspondence between the New Zealand and NSW companies was on an 'interhouse' basis.[156] The asbestos acquired by the New Zealand company was procured by the NSW companies and then allocated to the New Zealand company. The NSW subsidiary provided both technical information on the manufacture of asbestos products and safety information about the risks of inhalation of asbestos dust to the New Zealand company.[157] The NSW subsidiary also recommended approval of capital expenditure by the New Zealand company.[158]

The Court of Appeal rejected the trial judge's analysis and found that there was no duty of care on the part of the NSW companies. The Court found that the incidences of control referred to by the trial judge were insufficient to justify lifting the corporate veil.[159] Sheller JA referred to the comments of Lord Keith in *Woolfson v Strathclyde Regional Council*[160] that it is only appropriate to pierce the corporate veil where special circumstances exist indicating that it is a mere façade concealing the true facts.[161] On the evidence here, the Court of Appeal said, it was not open to the trial judge to find that the New Zealand company 'was a mere façade' concealing the fact that the plaintiff was in fact employed by the NSW companies or that the New Zealand company was merely acting as the other companies' agent.[162]

The plaintiff had relied upon *Wren*[163] in its submissions. The Court of Appeal distinguished *Wren* and interpreted it narrowly. Sheller JA said:

> In *CSR Ltd v Wren*, it was the employees of CSR … who controlled the day-to-day operations of the subsidiary. … The factory manager and foreman was a CSR employee. CSR had direct control of the operational aspects of its subsidiary's factory. These facts illustrate that *CSR Ltd v Wren* is a very different case

156 Ibid 561.

157 Ibid 562.

158 Ibid 564.

159 Ibid 584.

160 [1978] SC (HL) 90, 95, citing *Tunstall v Steigmann* [1962] 2 QB 593, 601–2 (Ormerod LJ).

161 *James Hardie* (1998) 43 NSWLR 554, 584.

162 Ibid.

163 (1997) 44 NSWLR 463.

from the subject one. *CSR Ltd v Wren* did not involve any question of lifting of the corporate veil.[164]

C *Canada*

Before I turn to consider the differences between the Australian and English approaches to this issue, I want to briefly mention the situation in Canada. There is yet to be a final case along the lines of *Chandler* or *Wren* decided in Canada. But there are a few cases in the pipeline which involve plaintiffs attempting to sue Canadian parent companies for the conduct of *foreign* subsidiaries. A high profile example is *Choc v Hudbay Minerals Inc*.[165] In that case, a group of indigenous Guatemalan plaintiffs have brought proceedings against Canadian mining company Hudbay Minerals, alleging that security personnel hired by Hudbay's 98.2 per cent owned subsidiary in Guatemala committed a number of human rights abuses in the course of their employment. The plaintiffs allege that Hudbay owed a direct duty of care to them to prevent the harm in question.

Hudbay attempted to have the proceeding struck out as disclosing no reasonable cause of action. In 2013, the Ontario Superior Court of Justice ruled that the matter could proceed to trial. Brown J held that on the facts as pleaded, it was not plain or obvious that no duty of care could be recognised. Since then, the case has slowly wound its way through the initial phases of litigation. The last courtroom battle was in June 2015, over discovery.[166] It will be interesting to see how the case is resolved if and when it does finally make its way to trial. It has the potential to provide another fascinating plank in the jurisprudence on direct liability of parent companies in tort. And if a duty of care is found, it is likely to have a profound impact in Canada — which is home to over 50 per cent of the world's publicly listed exploration and mining companies[167] — and for all international parent companies with foreign subsidiaries.

[164] *James Hardie* (1998) 43 NSWLR 554, 583.

[165] (2013) 116 OR (3d) 674.

[166] *Choc v HudBay Minerals Inc* (Unreported, Superior Court of Justice of Ontario, Master Graham, 29 June 2015).

[167] Suzanne Daley, 'Guatemalan Women's Claims Put Focus on Canadian Firms' Conduct Abroad', *The New York Times* (online), 2 April 2016

D *Comparison of the Different Approaches to Liability*

I turn now to compare the approaches to the tort liability of parent companies in the UK and Australia. If we compare *Chandler* and the Australian cases, it is evident that the English law has taken a more generous approach when delimiting the circumstances in which it will consider imposing a duty of care on a parent company.

The parent–subsidiary relationship as described in *Chandler*[168] is, among the Australian cases, most similar to *James Hardie*.[169] In both cases it could not be said that the parent actually controlled the day-to-day running of the asbestos operation, or that there was an agency relationship between the parent and the subsidiary. Rather, there were features of parent company control of the subsidiary, such as the issuing of instructions to the subsidiary; parental approval for capital expenditure; products manufactured to parent company standards; and superior knowledge on the part of the parent company regarding health issues. In *Chandler*, these features were enough to sustain a duty of care on the part of the parent; but in the judgment of the NSW Court of Appeal in *James Hardie*, they fell short of the circumstances required to lift the corporate veil.

The narrowness of the Australian approach compared to that taken by the Court of Appeal of England and Wales in *Chandler* is exemplified by the obiter comments of Rogers AJA in *Briggs v James Hardie & Co Pty Ltd*.[170] His Honour took the view that the fact a parent exercised 'complete dominion and control over another' did not necessarily mean that the corporate veil should be pierced.[171] 'The law pays scant regard,' his Honour said, '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.'[172] In contrast, Arden LJ approached the issue from the other direction, saying in *Chandler*

<http://www.nytimes.com/2016/04/03/world/americas/guatemalan-womens-claims-put-focus-on-canadian-firms-conduct-abroad.html?_r=0>.

168 [2012] 1 WLR 3111.

169 (1998) 43 NSWLR 554.

170 (1989) 16 NSWLR 549.

171 Ibid 577.

172 Ibid.

that it was not necessary to show absolute control of the subsidiary by the parent for a duty of care to be imposed on the parent.[173]

Of course, the Australian cases up to and including *James Hardie* were decided on the basis of the 'proximity' test for duty of care, which was subsequently rejected by the High Court.[174] But the analysis in those cases was not wedded to the proximity analysis such that they would not be relevant under the modern 'salient features' approach. In any case, the key difference between the English and Australian approaches is not so much the different tests applicable for duty of care, but rather a difference in attitude towards imposing direct liability on parent companies. The approach in the Australian cases is rooted in a reluctance in corporations law to lift the corporate veil, and thus sets the bar high for the parent–subsidiary relationship that would give rise to a duty of care on the part of the parent. The approach taken by the Court of Appeal of England and Wales in *Chandler*, on the other hand, applies tort law without as much regard to the consequence that the imposition of a duty of care on the parent could have the practical effect of circumventing the separate legal status of group companies.

Both the trial judge and the Court of Appeal in *Chandler* were keen to emphasise that their decisions, in finding that the parent company owed a direct duty of care to Mr Chandler, did not raise issues of piercing the corporate veil.[175] That is true as a matter of doctrine. The English courts did not impose a duty of care on the parent company *because* of the parent–subsidiary relationship, or because it considered the separate legal status of the subsidiary was a 'sham'. Be that as it may, decisions such as *Chandler* and *Wren*[176] do as a practical matter have the effect of scaling back the benefit of limited liability for group entities.[177]

As you can imagine, there are diverging views on the desirability of skirting the corporate veil in cases such as *Chandler*, *Wren* and *James Hardie*. One

[173] [2012] 1 WLR 3111, 3127 [66].

[174] *Sullivan v Moody* (2001) 207 CLR 562, 578–9 [48].

[175] *Chandler v Cape plc* [2011] EWHC 951 (QB) (14 April 2011) [66] (Williams J); *Chandler* [2012] 1 WLR 3111, 3121 [37], 3128 [69]–[70] (Arden LJ). Beazley and Stein JJA made similar observations in *Wren* (1997) 44 NSWLR 463, 466. See also *Young* (1998) Aust Tort Reports ¶81–468, 64 953 (Giles AJA).

[176] (1997) 44 NSWLR 463.

[177] See *Barrow* (Unreported, Supreme Court of Western Australia, Rowland J, 4 August 1988) 218.

of the challenges of these cases is that they lie 'at the hazy intersection of company and tort law, where bedrock principles such as limited liability, separate corporate personality, and traditional principles of negligence collide.'[178] Tort law's objectives, including providing compensation for loss and injury and deterring wrongdoing, sit uneasily with the principle of limited liability where a company is unable to meet a judgment debt or it has been liquidated.[179]

One feature to note is that these cases involve what can be called involuntary creditors. Tort creditors generally have no or little choice as to the company that inflicts injury on them;[180] in this sense they stand apart from the usual (contract) creditors of a company for whom the law is reluctant to lift the corporate veil.[181] It also has to be remembered that tort creditors are usually victims of serious personal injury, and are therefore particularly vulnerable. Further, it has been noted that the company will usually be the cheapest cost avoider, since it has the ability to take out insurance or other precautions in relation to the activities in which it engages.[182] All of this provides a basis for approaching tort liability within corporate groups differently to other actions involving corporations.

Issues of deterrence also arise. Excessive risk-taking by subsidiaries, egged on by parent companies that enjoy limited liability, could lead to a significant social cost if the subsidiary causes a number of tort victims along the way. That cost may ultimately outweigh the economic benefits that are often cited in support of limited liability.[183]

At the same time, caution must be exercised so that the principles of tort law are not distorted in order to achieve what are seen to be desirable results. Some academics have suggested abrogating limited liability altogether for

[178] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*' (2013) 76 *Modern Law Review* 603, 603.

[179] Robyn Carroll, 'Corporate Parents and Tort Liability' in Michael Gillooly (ed), *The Law Relating to Corporate Groups* (Federation Press, 1993) 91, 92.

[180] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 578–9 (Rogers AJA).

[181] Ibid. See also Paul L Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (Sweet and Maxwell, 9th ed, 2012) 218–19 [8-8]; Lipton, above n 74, 481.

[182] Anderson, above n 16, 351, citing Bainbridge, above n 10, 503–4.

[183] Anderson, above n 16, 348, 350–1.

corporate torts.[184] Such a result could not be achieved in a doctrinally coherent way by the courts. It would require legislative intervention to effect such a large-scale change to the principles of both tort law and corporations law.

In the aftermath of the *Chandler* case, some academics criticised the decision as lowering the bar too much. In an article in the *Modern Law Review*, Martin Petrin noted that it is in the very nature of vertically organised group companies that the parent will exert a substantial amount of control over its subsidiaries.[185] Petrin argued that *Chandler* could 'open the floodgates' for all sorts of tort proceedings against parent companies by individuals affected by the actions of their subsidiaries.[186]

It will be interesting to monitor the aftermath of *Chandler* in the UK, but so far it does not seem to have resulted in much litigation that has reached the courts. It was a pillar of the plaintiff's argument in the *Thompson*[187] case which I have discussed, but no duty of care was found on the part of the parent company in that case. I think it needs to be remembered that this kind of litigation against a parent requires the plaintiff to provide a considerable amount of evidence about the parent–subsidiary relationship and the control the parent exerts over the subsidiary. This is no easy task in many cases, particularly where the events in question, as in asbestos cases, occurred many years ago. This factor, I think, reduces the likelihood of regular tort proceedings against parent companies for the activities of their subsidiaries; rather, it seems to me that they would be a proceeding of last resort for plaintiffs.[188]

The Australian experience has certainly been that direct parent liability has almost completely fallen off the radar, although much of that can probably be attributed to the narrow approach taken by the Australian cases.

Having said that, while most of the Australian and English cases have arisen around the parent–subsidiary–employee relationship, the case of *Young*[189] demonstrates that the parent company can owe a duty of care to a person,

[184] See, eg, Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879.

[185] Petrin, above n 178, 613–15.

[186] Ibid 619.

[187] [2014] EWCA Civ 635 (13 May 2014).

[188] Ryan J Turner, 'Revisiting the Direct Liability of Parent Entities following *Chandler v Cape plc*' (2015) 33 *Company and Securities Law Journal* 45, 51.

[189] (1998) Aust Torts Reports ¶81–468.

other than an employee, who is affected by their subsidiary's activities. This presents a potential avenue for the further expansion of direct parent liability, subject of course to the legal and evidentiary requirements to show a sufficient parent–subsidiary relationship to justify the imposition of a duty of care.

And going even further down this path, there is the possibility of holding parent companies directly liable for the activities of their foreign subsidiaries, as they impact non-employee plaintiffs. The Canadian proceeding in *Choc v Hudbay Minerals Inc*[190] is an example of an attempt to do this. These kinds of proceedings often raise private international law issues, which I will not go into here.[191] But to the extent that jurisdictional impediments can be overcome, they could become a prominent area of this kind of litigation, given the prevalence of transnational corporate groups.

VI Conclusion

As I hope I have demonstrated, the topic of the corporate structures and the veil is a complex but fascinating one. The tension between legal doctrine, commercial realities and public perceptions of fairness in the context of corporate groups is unlikely to dissolve any time soon. The courts' hands in this area are to a large extent tied. In light of this, rigorous academic research and law reform proposals have an essential role to play in the development of the law on the corporate veil. And that is a fitting point to reach in this lecture, as we reflect on the achievements of Professor Ford, who through his academic writing and extensive law reform work has left an indelible mark on modern corporations law.

[190] (2013) 116 OR (3d) 674.

[191] See, eg, *Lubbe v Cape plc* [2000] 1 WLR 1545.