
**Paper for ICJ Expert Legal Panel on Corporate Complicity
in International Crimes:**

***The Impact of the Corporate Form on
Corporate Liability for International Crimes:
Separate Legal Personality, Limited Liability
and the Corporate Veil –
An Australian Law Perspective***

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1. Executive Summary

1. In Australia, corporations can be held liable for the commission of international crimes (as defined in this paper) under both Australian criminal and civil law. Traditional problems with holding corporations to account have, to some extent, been overcome by legislative change. A company's *mens rea* can now be established where a corporation 'expressly, tacitly or impliedly authorised or permitted the commission of the offence', which includes where a corporation failed to create and maintain a corporate culture that required compliance with the particular law.
2. Under corporations law principles, however, obstacles exist to the successful prosecution of corporations for their involvement in the commission of international crimes. The three most significant obstacles are:
 - (a) **Separate Legal Personality** – By affording corporations separate legal personality, it both enables liability to attach to corporations but can also present two obstacles to the resolution of claims against corporations. First, claimants will not necessarily have a right of access to the assets of the corporation's members, directors or parent companies, effectively minimising the corporation's liability. Secondly, despite statutory provisions attributing *mens rea* to corporations, there remain conceptual difficulties in attributing a fictitious legal person with an intention or physical abilities to commit offences.
 - (b) **Limited Liability** – Limited liability enables the personal assets of investors and managers of a company to be protected from creditor claims. However, it also places the responsibility for involvement in human rights violations or international crimes on the company itself, rather than the shareholders. The effective owners, therefore, do not have an incentive to monitor the risk management of the company.
 - (c) **Corporate Groups** – Where corporations are organised in a group structure, the company can reduce the exposure of its assets by establishing a subsidiary with responsibility for high risk operations that has limited liability, thereby effectively quarantining the parent company's assets from liability for the high risk operations.
3. Under corporations law principles, it is possible, in certain circumstances, to 'pierce the corporate veil' in order to search within the corporate entity to hold a director, shareholder or related company responsible for the actions of the corporation. However, in Australian law, piercing the veil is restricted to the most extreme cases and there has been, to date, no common or unified jurisprudence developed on the circumstances in which the courts will pierce the corporate veil. Piercing remains the exception rather than the rule.
4. There is, however, an emerging body of jurisprudence in the United Kingdom that suggests a new mode of liability to be used for corporations, or their subsidiaries, where the subsidiary has engaged in, or is involved in the commission of international crime. This has become known as 'process liability', with plaintiffs utilising the legal approach of direct negligence, rather than attempting to pierce the corporate veil. That is, the negligence of the parent company is based on the parent company's direct involvement in the harmful

processes employed by the subsidiary for which they ought to be directly liable. The process liability cases present a new approach to liability in response to the limitations that present when attempting to pierce the corporate veil.

2. Overview – Aims of this Paper

5. This paper was written in response to a request from the International Commission of Jurists, Geneva, for a research paper focused on those aspects of the corporate form that impact on corporate liability for involvement in serious international crimes and human rights violations.
6. The paper is to be submitted to the ICJ's Expert Legal Panel on Corporate Complicity in International Crimes.
7. It is written from the Australian law perspective with some references, by way of comparison, to the domestic laws of other jurisdictions.
8. In writing this paper, we have aimed, at first instance, to outline how a corporation might theoretically be found liable for the commission of international crimes or human rights violations under Australian criminal and civil law.
9. We have then sought to analyse how those aspects of the corporate form that are embedded in its legal and operational structure - its separate legal personality, the liability accorded to its directors, shareholders and related corporate entities, and the formal limitations on that liability - might impact on the ability of third party claimants to seek to attribute liability to a corporation for alleged involvement in serious international crimes and human rights violations.
10. Discussion of these obstacles invariably led to an analysis of the impact of the corporate veil when seeking an avenue of redress for alleged violations of this nature, and in particular capacity to pierce the corporate veil in the context of the corporate group structure.
11. A discussion of the positive and negative aspects of these perceived obstacles to corporate liability for serious international crimes is provided.
12. Recognition is also given to the practical dimensions of corporate operations at the multi-national level, including in the developing world. This includes acknowledgement of some of the practical issues associated with litigating these types of claims, though discussion of issues of jurisdiction is specifically not provided, on request of the ICJ.
13. The paper concludes with a broad discussion of perceived future trends in the area of multinational liability for international crimes and human rights violations, with particular reference to statutory reforms, developments in the international arena and changes in corporate behaviour with respect to compliance with human rights standards.

3. Forms of liability: Corporations and International Crime in Australian Law

3.1 What are international crimes in the context of Australian law?

14. The concept of 'international crimes' requires some defining. In this paper, liability for international crimes is used broadly, to include liability for those internationally recognised crimes (such as jus cogens offences) under Australian criminal law that are committed either within or outside the jurisdiction and also corporate civil liability in Australian law for serious harm caused within and outside the jurisdiction, to the extent that it intersects, and overlaps, with serious human rights abuses.
15. Australia does not have a federal statutory charter of human rights or a constitutional bill of rights entrenched in its Constitution. Although Australia has acceded to a number of international human rights law instruments,¹ international human rights law is not justiciable in Australian courts. As a general rule, international law, including international human rights law, is not an automatic source of individual rights and duties enforceable in Australia unless Parliament enacts specific legislation incorporating it into Australian law.² As a result, statutory and general criminal law, and the civil law of torts, are the primary means by which legal persons may be held to account for involvement in serious human rights violations or international crimes.
16. Notably, Chapter 8 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) makes various crimes under international law offences under Australian law. Chapter 8 creates the offence of genocide, various crimes against humanity, and various war crimes (including slavery, torture, rape and, apartheid). Aiding and abetting such offences is also a crime. These provisions were introduced to the Criminal Code as part of Australia's ratification of the Rome Statute of the International Criminal Court.³ Corporate manslaughter has also recently been introduced in the State of Victoria, Australia.⁴

¹ Including –

- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);
- ICCPR;
- ICESCR;
- Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**); and
- Convention on the Rights of the Child (**CROC**).

² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, at 287 (Mason CJ and Deane J); *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, at 447 (Sackville, North and Kenny JJ), citing *Dietrich v The Queen* (1992) 177 CLR 292, at 305-306, 321, 348, 359-360; *Victoria v Commonwealth* (1996) 187 CLR 416, at 480-482; and *Sinanovic v The Queen* (1998) 154 ALR 702, at 707.

³ See the *International Criminal Court (Consequential Amendments) Act 2002* (Cth)

⁴ *Occupational Health and Safety Act 2004* (Vic), s32

3.2 Criminal liability of corporations in Australia

(a) Pursuant to Statute - The *Criminal Code*

17. As legal persons, corporations can be held to account under Australian law for direct or indirect involvement in international crimes committed in Australia or overseas. Part 2.5 of the *Criminal Code*, which creates forms of corporate liability that apply to all federal statutes, sets out the manner in which corporations can be found to have criminal responsibility.
18. Under this Part of the *Criminal Code*, corporations can be found guilty of an offence, including an offence punishable by imprisonment (s12.1).⁵ Even where legislation does not expressly state that a corporation can be liable for an offence, the *Acts Interpretation Act* 1901 (Cth) states that 'person' is defined to include a body corporate (s22). Corporations may also be liable for breach of criminal laws enacted at the State and Territory level.
19. The physical element of an offence (*actus reus*) can be established where the offence is committed by an employee, agent or officer of a company acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority (s12.2).
20. Significantly, the *Criminal Code* varies the common law, so that corporations can be found guilty of an offence even where this offence requires intention on the part of the principal.
21. To this end, the *mens rea* of a corporation can be established where a corporation 'expressly, tacitly or impliedly authorised or permitted the commission of the offence' (s12.3(1)). Authorisation or permission can be established (s12.3):
 - where the corporation's board of directors or high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
 - where a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - where a corporation failed to create and maintain a corporate culture that required compliance with the relevant provision (s12.3).
22. We note that these corporate culture provisions are an innovative feature of Australia's *Criminal Code*, that to a significant extent redefine the criminal liability of corporations. However, this paper does not seek to address specifically, on request of the ICJ, forms of corporate liability in criminal law. Further, under the *Criminal Code*, a person (or corporation) who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence (s11.2). Therefore a corporation can be liable as an aider and abetter of an offence committed by an employee, or an employee can be liable as an aider and abetter of an offence committed by the corporation.

⁵ Note that sanctions imposed on corporations will vary according to the legislation in which the offence is created. For discussion of various penalties that may apply to corporations see footnote to survey 'Commerce Crime & Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law and Related Illicit Economic Activities' Australia Survey Questions and Responses.

23. As a result of the attribution of criminal liability under the Criminal Code to corporations, though not yet tested by the courts, it appears that corporations can be found liable for those serious international crimes incorporated into Australia's Criminal Code as a result of its ratification of the Rome Statute.

(b) At common law

24. A company's vicarious criminal liability at common law is limited to the crimes of public nuisance and criminal libel.⁶ This is on the basis that, as a general rule, the common law will not impose a penalty on one person on the basis of a particular relationship they had to another person, such as the relationship of employer and employee.⁷

25. However, at common law a company can have primary liability for the commission of an offence if it is possible to show that the person or persons who constitute the company's *directing mind and will* (usually the directors or high level management) had the requisite mental state to commit the offence. Referred to as the 'Tesco Principle' in reference to the case establishing it in the UK jurisdiction, this principle has been described as asserting that the employee or agent had such a degree of control or influence over the company that it was acting as the corporation, rather than *for* the corporation.⁸

26. Where a corporation is held liable as the principal on the basis of a director's directing mind and will, the director can also be held liable as an accessory. This is because, as separate legal persons, directors can be held liable as well as the corporation in question.⁹

27. Where a company is vicariously liable for the act of an employee, and therefore liable as a principal, the employee can also have primary liability, creating, in effect, co-principals.¹⁰

28. We do not propose to discuss the doctrine of directing mind and will in this paper, however we note that it has been criticised on a number of bases, including its application in the context of corporate groups, to which we return below.¹¹

29. Notably, proposed legislation in the UK would abolish the use of directing mind and will in determining gross negligence manslaughter for corporations and replace it with a new offence of corporate manslaughter, in which a corporation is guilty where there is 'management failure' that causes death.¹²

⁶ *R v Kellow* [1912] VR 162.

⁷ See *R v Huggins* (1970) 2 Ld Raym 1574.

⁸ See *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170-1 adopted in *Hamilton v Whitehead* (1988) 166 CLR 121 and *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia Ltd* (1986) 85 FLR 285.

⁹ *Hamilton v Whitehead* (1988) 166 CLR 121.

¹⁰ See *Mallan v Lee* (1949) 80 CLR 198.

¹¹ For a discussion of the limitations of directing mind and will principle enunciated in *Tesco*, see J Hill, 'Corporate Criminal Liability in Australia' [2003] *JBL* 1 at 11-15 or K Wheelwright 'Goodbye directing mind and will, hello management failure: A brief critique of some new models of corporate criminal liability' (2006) 19 *Australian Journal of Corporate Law* 287.

¹² See *Corporate Manslaughter and Corporate Homicide Bill (UK)*.

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30. We also note that the Canadian approach (also called the Identification Doctrine)¹³ differs slightly from the *Tesco* principle, requiring the offence to be committed by a sufficiently senior person, acting within the field of operation assigned to him or her, such actions not totally in fraud of the company and for the benefit of the company.¹⁴ This Identification Doctrine also operates in a number of other common law jurisdictions.¹⁵

3.3 Civil Liability of Corporations in Australia

31. First, a corporation has vicarious liability for certain actions of its employees. A corporation is liable in tort for the acts and omissions of its employees occurring within the scope of their employment.¹⁶
32. Where a corporation's civil liability is created under statute, employees or officers may be liable as accessories. For example, under the *Trade Practices Act 1974* (Cth) a director or other person who is 'involved' in a corporation's contravention of that Act (ss75B and 79), or who is 'involved' in a contravention of the *Corporations Act* by a company (s79 of the *Corporations Act*), can be liable to pay compensation to a third person who suffers loss.
33. In fewer circumstances, a corporation may have primary liability (as opposed to being vicariously liable on the basis of the acts or omissions of its employees). This is established where the fault of a manager or director is imputed to the company. The case law establishes that the corporation will be liable where persons sufficiently senior in the company (such that they are not mere agents) can be said to be the directing will and mind of the company, such that they act as the company. This test is the same as the test under the common law criminal liability established in *Tesco*.¹⁷

Having outlined how, in theory, a corporation might be held liable under criminal or civil law in Australia for involvement in international crimes or human rights violations, we now move onto examine the effect of the corporate form and corporations law principles on attributing this liability. The starting point in this respect is a corporation's 'separate legal personality'.

¹³ It should be noted that some academics and commentators collapse the 'directing mind and will' principle and the Identification Doctrine. See for instance discussion in Clough J and Mulhern C 'The Prosecution of Corporations', Oxford university Press 2002, Chapter 3 generally.

¹⁴ See *Canadian Dredge and Dock Co Ltd v The Queen* (1985) 19 DLR (4th) 314.

¹⁵ See for instance, Weels, C. 'International Trade in Models of Corporate Liability' drawn from papers presented at conferences, University of Parma (2000) and Foundation Ius et Lex, Warsaw.

¹⁶ See *Ford's Principles of Corporations Law* at [4.051].

¹⁷ See *Lennards Carrying Company Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

4. Corporate Liability and the Corporate Form: The Role of Separate Legal Personality

4.1 Separate Legal Personality – What is it?

Humans have always used allegory to explain their relationships, their obligations and their consequent liabilities; the law contains many examples of such 'inventions' in order to facilitate property holding, legal action or contractual agreements. The idea of a legal personality is one such creation of the legal system...¹⁸

34. The concept of a corporation having a separate legal personality evolved by analogy to the legal personality, rights and obligations accorded to natural persons.
35. This concept involves the corporation being endowed with a separate legal personality from its members or shareholders, and managers or directors. This separateness of the corporation protects its members and directors from personal liability by viewing the corporation as an independent body or 'legal person'.¹⁹ As a result, a corporation can be found directly or indirectly liable in its own right for civil and criminal acts.
36. As well as addressing these liability concerns, the invention of a corporate personality was in response to a need for a recognised legal vehicle to accommodate the shared commercial objectives of a group of individuals: a corporation's separate legal personality allows it to carry out routine functions such as holding monies and assets, entering into contracts and appearing in court, albeit through human agents.²⁰
37. The doctrine of separate legal personality of corporations is a legal assumption that is universal across countries with common law systems.²¹ It remains a fundamental tenet of company law.²² It is also consistently recognised and utilised in those statutory regimes governing corporate activity in these jurisdictions.

4.2 Recognition of separate legal personality under Australian law

38. The concept of a corporation having separate legal personality was first articulated in *Salomon v Salomon & Co* when the rule that the corporate entity is entirely separate from its shareholders, managers and indeed from any other person in the universe, was established.²³ The effect of this judgment was that, even where the corporation consists of a single person, its rights and liabilities are entirely its own.²⁴

¹⁸ Parker, D 'Piercing the Veil of Incorporation: Company Law for a Modern Era' (2006) 19 *Australian Journal of Corporate Law* p39.

¹⁹ A S Shane, 'The Corporation as a Person: the Language of a Legal Fiction' (1987) 61 *Tulane Law Review* 563.

²⁰ Puig, G. 'A Two-Edged Sword: Salomon and the Separate Legal Entity Doctrine', *Murdoch University E-Journal of Law*. Volume 7, Number 3 (September 2000) p 206.

²¹ Parker, D (n17) p35.

²² Hood, P 'Saloman's case and the single business organisation" *The Journal of Business Law*, London: Jan 2001, p 58.

²³ *Salomon v Salomon* [1897] AC 22.

²⁴ *Lee v Lee's Air Farming Ltd* [1961] AC 12.

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39. Having inherited its legal structures and traditions from the United Kingdom, including the doctrine of separate legal personality, the notion of a corporation having separate legal personality now permeates the statutory and common law regime that governs Australian corporations.
40. The *Corporations Act 2001* (Cth) (the **Corporations Act**) defines an 'entity' as including any reference to a natural person, a body corporate (other than an exempt public authority), a partnership or a trust.²⁵
41. In accordance with the Corporations Act:
A company comes into existence as a body corporate at the beginning of the day on which it is registered. The company's name is the name specified in the certificate of registration.²⁶
42. The company remains in existence until it is deregistered.²⁷
43. By virtue of being granted separate legal personality, a company, or body corporate, is granted the legal capacity or power of a natural person within and outside the jurisdiction in which it is registered or incorporated.²⁸
44. This is also recognised by the *Acts Interpretation Act 1901* (Cth) which states that any Act that makes reference to a person is taken to include bodies corporate (s22).

4.3 Attributes of a Corporation provided by Separate Legal Personality

45. The *Corporations Act* defines a 'corporation' for the purposes of the Act as a company, any body corporate, and any unincorporated body that under the law of its place of origin may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.²⁹
46. Further rights and powers of corporations as a result of it having separate legal personality include:
- the right to enter into contracts;³⁰
 - the right to perpetual succession, meaning that its existence continues unchanged as a legal persons regardless of whether the company is taken over, directors change or shareholders change;³¹
 - property rights, being the power to own or dispose of property (shareholders do not have property rights in the corporation's assets);³² and
 - the right to limit the liability of its members for any debts that as an entity it incurs.³³

²⁵ *Corporations Act 2001* (Cth), s54A.

²⁶ *Corporations Act 2001* (Cth), s119.

²⁷ *Corporations Act 2001* (Cth), Chapter 5A.

²⁸ *Corporations Act 2001* (Cth), s124.

²⁹ *Corporations Act 2001* (Cth), s57A(2).

³⁰ A company can enter into legal relations, including a contract, through the actions of a person with actual or apparent authority of the company, *Ford's Principles of Corporations Law*, Chapter 13.

³¹ *Sutton's Hospital Case* (1612) 10 Co Rep 1a.

³² *Macaura v Northern Assurance Co Ltd* [1925] All ER Rep 51.

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47. In addition, a corporation has power to issue and cancel shares in the company, to issue debentures, to distribute any of the company's property amongst the members, in kind or otherwise, to arrange for the company to be registered or recognised as a body corporate in any place outside the jurisdiction, and to do anything that it is authorised to do by any other law, including a law of a foreign country.³⁴
48. There are some attributes of natural persons that are not possessed by a company. These include, for instance, that a company cannot avail itself of the privilege against self incrimination.³⁵

4.4 Separate Legal Personality and Corporate Liability for Human Rights Violations and Serious Intentional Crimes

49. The concept of separate legal personality has dual significance in the context of corporate liability for serious international crimes: it enables liability to attach to corporations but may also impact on liability attaching to other players operating within the corporate structure.

(a) A corporation can be liable for human rights violations

50. As already discussed, first and most importantly, as a result of its separate legal personality, a company can be subject to direct liability or indirect liability for criminal and civil acts. This includes that the company may be found liable for the acts of those persons who are considered to act as the company and to embody the directing mind and will of the company,³⁶ and the individuals who committed the criminal acts may be considered accomplices to the company in those crimes.³⁷ The reverse can also be true, where a director or other individual can commit a criminal act and the company of which that individual is a part can be found to have been an accomplice or to have aided and abetted in the commission of that crime.³⁸
51. This means that, prima facie, a corporation can be found liable, in its own right, for involvement in human rights violations and serious international crimes.
52. Second, separate legal personality means that any debts or civil liability that are incurred by the company do not transfer to its members, directors or related bodies corporate. Therefore, for example, directors are not, as a general rule, liable for the debts incurred by a company and shareholders are only liable to the extent that they have not fully paid the debt owing on the purchase of their shares.³⁹

³³ *Multinational Gas Petrochemical Co v Multinational Gas & Petrochemical* [1983] 2 AllER 563 at 566.

³⁴ s 124 *Corporations Act 2001*.

³⁵ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 118 ALR 392 at 393.

³⁶ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

³⁷ *Hamilton v Whitehead* (1988) 65 ALJR 80

³⁸ *Hamilton v Whitehead* (n36).

³⁹ *Multinational Gas and Petrochemical Co* p25 at 566.

(b) Separate legal personality as an obstacle to liability for international crimes

53. From a human rights law and international crime perspective, however, separate legal personality often presents as an obstacle to the resolution of claims made against corporations for commission of, or involvement in, international crimes or major torts. This is for two reasons.
54. First, claimants do not necessarily have a right of access to the assets of the corporation's members, directors or parent company and companies are able to quarantine risk in a subsidiary company, effectively minimising their liability.⁴⁰ It is legal for corporations to establish subsidiary companies to engage in risky or hazardous activities, protecting the rest of the corporate group from exposure to that risk. As a result, where the subsidiary is found to be liable for a human rights abuse or the commission of a crime, the liability will not necessarily attach to related companies and therefore it will not necessarily be the case that a successful claimant can access the assets of the corporate group to which the corporation belongs, or the assets of its members or directors.
55. Secondly, despite statutory provisions like those contained in the *Criminal Code* and the 'directing mind and will' common law rules of liability, there still remains conceptual difficulties in attributing a fictitious legal person with an intention or physical ability to commit offences.
56. It is perhaps ironic that today as a result of its characterisations as a legal person, a corporation is afforded the protection of many laws as if it were a natural person. In addition, corporations are often well positioned and resourced to enforce these rights.⁴¹
57. It is only on exceptional occasions that the universal rule of separate legal personality is challenged, resulting in the corporate veil being pierced and in liability shifting from the corporation to its members, directors or others within its corporate grouping. This is discussed in greater detail below, at Part 7.

5. Corporate liability and the corporate form: the role of members' liability in a corporation's structure

5.1 What is the relevance of limitation of liability of members to corporate liability?

58. The limitations on the liability of members accorded by the corporate form may be considered to impact on the resolution of human rights type claims brought against corporations, by preventing tort claimants from gaining access to the assets of a parent company or other shareholders when a subsidiary company's assets are exhausted.
59. Members, or shareholders, are a primary organ of a corporation. As a result, a corporation's structure formally designates the status and power of its members. A key aspect of any corporate structure is the form of the liability accorded to its members. It is a fact that Corporate enterprises with limited liability are a feature of most developed legal

⁴⁰ Ramsey and Stapledon 'Corporate Groups in Australia' (2001) *Australian Business Law Review* 7.

⁴¹ See for instance, *McDonalds Corporation v Helen Steele, David Morris* [1993] EWH CQB 366 (unreported, 19 June 1993) in which a corporation sued for defamation.

systems.⁴² In Australia, the role of members within the corporate structure, including in relation to their liability, is governed by the company's constitution, the *Corporations Act* and the common law.

60. The type of shareholder liability accorded to members is a primary factor that differentiates companies registered under the *Corporations Act*. The types of member liability that may be adopted by a corporation under Australian law include general liability, unlimited liability, liability limited by guarantee, no liability and limited liability.
61. Each of these forms of liability is discussed in more detail below. Aside from a 'no liability' company, each of these forms to some extent limit the liability of a corporation's members for the debts or obligations of the company.
62. In addition, in Australia, corporations are also classified according to their public or proprietary status. A proprietary company must have its share capital issued as either a limited or unlimited liability corporation, but it cannot offer those shares to the public or engage in activity that would require certain disclosures to investors. Any company not of a proprietary nature, including a company limited by guarantee or a no liability company, is classified as a public company.⁴³ Public companies are more heavily regulated and are able to invite investment from the public.
63. In certain circumstances, the extent of shareholder liability will be challenged and, if successfully challenged, could result in the court's allowing access to the assets of members where a corporation is unable to meet its debts or obligations. In this way, the corporate veil is said to be 'pierced' allowing access behind the veil of corporation to the members and importantly, their assets. The concept of piercing the veil of incorporation is discussed in detail in Parts 7 to 10 below.

5.2 Types of shareholder liability

64. As stated above, the liability of members of a corporation may vary according to the corporate structure chosen.

(a) General liability

65. Under this organisational structure, past and present members have a general liability to pay a company's debts and liabilities, such as the costs, charges and expenses of winding up, adjusting the rights of contributions amongst themselves.⁴⁴ A past member need not contribute in respect of any debt incurred after he or she ceased to be a member⁴⁵ or if he or she was not a member at any time during the year prior to the day of commencement of a company's winding up.⁴⁶ Only if existing members are seen by the court as unable to satisfy the debt, will past members be liable.⁴⁷

⁴² Puig (n19) at para [11].

⁴³ *Corporations Act 2001* (Cth) s9.

⁴⁴ *Corporations Act 2001* (Cth) s515.

⁴⁵ *Corporations Act 2001* (Cth) s520.

⁴⁶ *Corporations Act 2001* (Cth) s521.

⁴⁷ *Corporations Act 2001* (Cth) s522.

(b) Unlimited liability

66. The oldest type of corporate structure is that of an unlimited company. An unlimited company can be either proprietary or public.⁴⁸ While the company remains a going concern, members, if called upon, are only liable to pay that amount unpaid on each share, if called upon to do so. Significantly, in the event of a winding up, members can be made liable without limitation. In those circumstances, the members' liability for the company's debts will depend on whether the company's assets are inadequate. Creditors must apply to the court for a winding up order to recover from members their unpaid share capital, and even further contributions if the company's liabilities are still not disgorged.
67. The title of unlimited liability companies does not need to include the word 'unlimited'. However the recent trend of investment companies using this structure to take advantage of the ability to wind-up by re-purchasing of their shares⁴⁹ has compelled the Australian Securities and Investment Commission to make it a requirement that unlimited liability companies display a warning of their status on any prospectus circulated to the public.⁵⁰

(c) Liability limited by guarantee

68. A company limited by guarantee does not have the power to issue shares.⁵¹ Members' liability is limited to the extent of the capital they guarantee they will contribute in a winding up. While it can be left open to the company to negotiate the amount of the guarantee with each member, most companies will have a uniform guarantee in place. Members' interests in the company are determined by the amount of their guarantee (rather than shareholding).
69. If a company is winding up, and does not have adequate funds to discharge its debts, each member will be liable to contribute only to the extent of the guarantee they provided.⁵² Persons who have been members within a year of the winding up can be considered by the court to be liable to honour their guarantees.
70. Since a company limited by guarantee will always be a public company, it will never enjoy the lesser degree of regulation applicable to proprietary companies. Unless restricted by its constitution, this type of company can distribute profits to its members. Companies limited by guarantee are a common corporate structure used by not-for-profit organisations.

(d) No liability – only for mining corporations⁵³

71. It is not mandatory, but a mining company, and only a mining company, can elect to form as a no liability public company.⁵⁴ This structure is specifically designed to reflect the

⁴⁸ *Corporations Act 2001* (Cth) s112.

⁴⁹ R. P. Austin and I. M. Ramsay, *Ford's Principles of Corporations Law*, Butterworths, 2005, 12th Edition, p. 153.

⁵⁰ See also s7 of the *Corporations Act*.

⁵¹ *Corporations Act 2001* s124.

⁵² *Corporations Act 2001* s517.

⁵³ Under s9, CA: "mining purposes", whether in Australia or elsewhere, means any or all of: a) prospecting for ores, metals or minerals b) obtaining, by any mode or method, ores, metals or minerals; c) the sale or other disposal of ores, metals, minerals or other products of mining; d) the carrying on of any business or activity necessary for, or incidental to, any of the foregoing purposes.

speculative nature of investment in mining exploration, so that only a portion of the issue price of shares is payable at the outset of a venture, with the balance called up as needed.

72. Under this structure, members have no liability at all for the debts of the company,⁵⁵ regardless of whether the company is a going concern or is being wound up.⁵⁶ However a company can contract outside its constitution with members who promise to pay the full issue price of the shares. The company could then sue under contract for the obligation to pay the full amount.⁵⁷
73. Pursuant to s148(8) of the *Corporations Act*, 'No liability or NL' must be included in the company name of an unlimited liability company.

(e) Proprietary Limited liability

74. Limited liability is by far the most predominant form of corporate organisation in Australia. In particular, proprietary limited companies (cf companies limited by guarantee) are the most widely used corporate form. The essence of this form of organisational structure is that members' liability is limited to the extent unpaid on their shares.⁵⁸ This means that, subject to certain exceptions, in the event of a winding up of a limited liability company, the liability of a member, or any holder of shares within the previous 12 months, is limited to the outstanding amount of what the existing or past member agreed to pay the company for the shares it holds.
75. Unless a company is exempt from doing so,⁵⁹ it must have 'Pty Ltd', 'Ltd' or 'Limited' included in its name.⁶⁰ In this way, the *Corporations Act* seeks to ensure that potential creditors are warned of their limited recourse against members.

5.3 Limiting the liability of members - arguments for and against

76. Regardless of the provenance of limited liability, as outlined above there are many advantages to limited liability that make this form of corporate structure so prominent. According to *Easterbrooke & Fischel*, limited member liability is not a benefit bestowed on investors by the State; rather, it is a logical consequence of the corporate form.⁶¹
77. The reason most commonly advanced in choosing a limited liability structure is that the personal assets of their investors and managers of the business are protected from creditor claims. Limited liability allows investors, who only risk their shareholdings, the freedom to bear additional risk through participating in numerous ventures. Unlike members of partnerships, these investors cannot be sued for their personal wealth in the event of

⁵⁴ *Corporations Act*, s112.

⁵⁵ *Corporations Act*, s9, s112.

⁵⁶ *Corporations Act*; s254M(2).

⁵⁷ *Theseus Exploration NL v Foyster* (1972) 126 CLR 507.

⁵⁸ *Corporations Act 2001* (Cth), s516.

⁵⁹ *Corporations Act 2001* (Cth), s 150.

⁶⁰ *Corporations Act 2001* (Cth), s 148(2).

⁶¹ FH Easterbrooke and Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89.

corporate insolvency or other financial claims against the company. In fact, to put it simply, the corporation must pay back its members for their 'benevolence in investing' and it is the first duty of the directors of a company to act in the best interests of the company, which is generally taken to be the interests of shareholders.⁶²

78. Limited liability also reflects economics – by allowing investors of moderate means to invest, limited liability protection keeps entry into these markets competitive and so facilitates economic progress.⁶³
79. There are also numerous operational efficiencies accorded by a limited liability structure, for instance a publicly held limited liability corporation can separate its businesses engaged in high risk activity from the provision of capital, thereby quarantining the risk associated with that particular business. Investors also have a decreased need to monitor the company and its management as closely because they are only protecting their potential loss as limited to the amount of their investment. Limited liability also makes the identity of other shareholders irrelevant and so reduces the cost of monitoring them.
80. Operational efficiency is also facilitated by the fact that the free transferability of shares means there is the potential for managerial displacement if investors pursue large discounted blocks of shares. This encourages management to maintain the efficient operation of a company in order to keep share prices high.⁶⁴

(a) Arguments against limiting the liability of members

81. One of the key arguments against the doctrine of limited liability, particularly in the context of corporate liability for involvement in human rights violations or serious international crimes, is that the onus is not on the shareholders, the effective owners, to monitor the risk management of the company. Rather the risk is shifted to those parties least able to afford it, such as unsecured creditors, employees and tort claimants. Millon states:

overly broad limited liability imposes too great a cost on corporate creditors. This is because limited liability can facilitate opportunistic efforts by shareholders to extract value from third parties without consent or compensation. They can do this by increasing the risk of corporate default beyond the level accepted by contracting parties or by engaging in risky activities that have the potential to cause harm that the corporate tortfeasor cannot redress⁶⁵.

82. From a criminal liability perspective, Chesterman considers that it may be conceptually unsound to subject the company to criminal law on the basis of the criminal acts or omissions of the director, but then to effectively absolve those same directors of liability by

⁶² The question of whether acting in the best interests of the company requires directors to act in the 'interests' of existing shareholders, future shareholders, creditors and employees or the community in which it operates is not considered in this paper. However, for a full discussion of this topic see *Ford*, (n15) at Chapter 8.

⁶³ Callison, W. 'Rationalising Limited Liability and Veil Piercing', *The Business Lawyer*, Vol 58, May 2003, 1063 at 1066.

⁶⁴ F.H. Easterbrooke and Fischel, "Limited Liability and the Corporation" (1985) 52 *University of Chicago Law Review* 89, p 96; see also Ramsey and Noakes 'Piercing the Corporate Veil in Australia (2001) 19 *Co & Section J250-271* at 256.

⁶⁵ Millon, D. 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability'. *Washington and Lee University Public Law Research Paper No. 03-13* at 1

exercising the prosecutorial discretion to charge only the company and not the directors personally. This allows directors to shift their liability onto the company which, because of limited liability, in effect shifts it to innocent shareholders and creditors. Chesterman also questions the adequacy of fining a company as a deterrent effect, given that the effect falls on the innocent, ie. the shareholders and creditors.⁶⁶

6. The Effect of Corporate Groups on Corporate Liability

83. Following separate legal personality and the limited liability of members, another key aspect of the corporate form that has to date affected attribution of liability for alleged corporate involvement in human rights violations is the corporate group structure.

6.1 What are corporate groups?

84. A corporate group is a group of companies that are 'related'. Under the *Corporations Act*, corporation A is 'related' to corporation B where (s 50):

- Corporation A is a holding company of Corporation B;
- Corporation A is a subsidiary of Corporation B; or
- Corporation A is a subsidiary of a holding company of Corporation B.

85. The *Corporations Act* provides that Corporation A is a 'subsidiary' of Corporation B *only* where (s46):

- **It has control of the board:** Corporation B controls the composition of Corporation A's board;⁶⁷ or
- **It has control of more than 50% of votes:** Corporation B is in a position to cast or control the casting of more than one half of the maximum number of votes that might be cast at a general meeting of Corporation A;⁶⁸ or
- **It has control of more than 50% of issued shares:** Corporation B holds more than one half of the issued share capital of Corporation A (excluding any part of issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital),⁶⁹ or
- Corporation A is a subsidiary of a subsidiary of Corporation B.

⁶⁶ Chesterman 'The Corporate Veil, Crime and Punishment' *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch* (1994) 19 *Melbourne University Law Review* 1064, 1065.

⁶⁷ Control must be legally enforceable power (cf effective control), that is, power that is able to be used to effect control notwithstanding the attitude of other shareholders: *Mount Edon Gold Mines (Aust) Ltd v Burmine Ltd* (1994) 12 ACSR 727; *Bluebird Investments Pty Ltd v Graf* (1994) 13 ACSR 271. See also s47 which sets out circumstances in which an implication of control arises.

⁶⁸ This test is more broad than the composition of the board, in that present ability to cast more than 50% of votes, that does not amount to legal control, may suffice to create a relationship of holding company and subsidiary: see *Bluebird Investments Pty Ltd v Graf* (1994) 13 ACSR.

⁶⁹ See *Re Swan Brewery Company Ltd* (1976) 3 ACLR 164 and *NCSC v Brierly Investments Ltd* (1988) 14 NSWLR 273 for further discussion of where a corporation is a subsidiary.

86. Despite the legal and effective control of one corporation over another that exists in many group structures, the doctrine of separate legal personality, for the most part, prevails. That is, each company within the group structure is taken to have separate legal personality and as a matter of law the companies within the group are treated as separate bodies.⁷⁰ As a result, each company is responsible for their own liabilities – one member of the corporate group is not taken to be responsible for the liabilities incurred by another.

6.2 Advantages to corporate groups

87. The advantages to forming corporate groups are many. In their empirical study of corporate groups in Australia, Ramsay and Stapledon set out six reasons why companies arrange themselves in a group structure.⁷¹

- the company can reduce exposure of assets by establishing a limited liability subsidiary, effectively quarantining the parent company's assets from liability;⁷²
- tax benefits;
- organisational, management and accounting efficiencies;
- attracting external capital investment;
- in an acquisition with an unrelated company or individual, arranging shareholding to reflect the interests of the parties; and
- greater flexibility in debt financing.

88. Ford states that the limited liability of parent companies for the actions of their subsidiaries is, in many respects, more controversial than the limited liability of members for the actions of the company.⁷³ This is on the basis that, in practice, parent companies, unlike ordinary members, exercise a degree of control over the business of the subsidiary and therefore there is more likely to be a real basis upon which to impose liability. He therefore states a view that there is more reason to ignore the limited liability of a parent company than there is the limited liability of a shareholder in the company.⁷⁴ It should be noted though, that often the parent company is the primary shareholder in a subsidiary.

89. The conflict or disjuncture between on the one hand the commercial reality of a corporate group that operates for management, tax and other purposes as a single entity, and on the other hand the legal approach of treating each member of the corporate group as an independent, separate legal entity, has been the subject of judicial consideration and considerable commentary, including in the context of major tort claims brought against multinational companies operating across jurisdictions where, for instance, a parent company is in one state and the subsidiary in another where the tort has occurred.

⁷⁰ See for example the decision of the High Court in *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.

⁷¹ I Ramsay and G Stapledon 'Corporate Groups in Australia' (2001) *Aust Business Law Review* 7.

⁷² ie where the parent company invests in a subsidiary and the subsidiary becomes insolvent, the parent company will not be required to contribute to the winding up shortfall.

⁷³ *Ford's Principles of Corporations Law* at [4.270]

⁷⁴ At par [4.310] Ford cites PI Blumberg 'Limited Liability and Corporate Groups' [1986] 11 *Jnl of Corp Law* 573 at 623.

As outlined above, separate legal personality, the limited liability of members and the formation of corporate groups are closely intertwined aspects of the corporate form that, independently and in combination, or impact on attribution of liability to the corporation itself or to various players within the corporate structure.

Currently, the primary counterbalance to these limitations on liability is the doctrine of 'piercing the corporate veil'. This doctrine works as an exception to the concept of separate legal personality and limited liability, allowing liability to be attributed to a corporation's members or other related entities within the corporate group. The way in which this doctrine has been applied, including its effectiveness, is discussed in the following section.

7. Challenging Separate Legal Personality - Piercing the corporate veil

7.1 What is piercing the corporate veil?

90. The doctrine of 'piercing the corporate veil' emerged as an exception to the universal application of maintaining the separate legal personality that is attributed to a company upon incorporation.⁷⁵ 'Piercing the corporate veil' refers to the courts' ability to search within the corporate entity and, where necessary, hold a director, shareholder or related company responsible for the actions of the corporation.⁷⁶
91. Justice Young in *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* stated that:
- although whenever each individual company is formed a separate legal personality is created, courts will on occasions, look behind the legal personality to the real controllers.⁷⁷
92. According to Parker, piercing the veil has a number of meanings:
- the narrowest (and most basic) definition of piercing the veil, is for a court to ignore the corporate veil in order to find the shareholders liable for some wrongdoing committed on behalf of the company. An alternative and wider definition would be one where a court examines what is occurring within the company entity in order to make the decision as to the behaviour or the relationship of the controllers, rather than just assuming separateness of the company from its owners and controllers.⁷⁸
93. The broader approach, which often occurs without judicial reference to the term 'piercing', would also cover those instances where judicial consideration is given to the liability of players within the company structure, such as managers, employees or even related companies.
94. In this way, courts may hold individuals personally liable for wrongs, thereby preventing owners and operators from standing behind the protection of a corporation's separate legal entity. Courts may also use the doctrine of piercing to hold shareholders or other corporations within the corporate group liable, including parent companies, thereby

⁷⁵ *Salomon v Salomon & Co* [1897] AC 22.

⁷⁶ See "Corporate Veil" entry *Encyclopaedic Australian Legal Dictionary* available online through www.lexisnexus.com.au.

⁷⁷ (1986) 5 NSWLR 254 at 264.

⁷⁸ Parker, D (n17) p37.

providing claimants with access to the perhaps more extensive assets held by these parties.

95. Despite the strict adherence to the doctrine of separate legal entity in Australian law, there have been a number of circumstances in which the courts have used the common law so as to lift the corporate veil between the corporation and its members, or between the subsidiary and the parent company, resulting in the members or parent company being found liable for the actions of the subsidiary. However, it is clear that piercing remains the exception rather than the rule: a Court will only challenge the separate entity doctrine and the protections it provides to a corporation in exceptional circumstances.
96. The state of piercing the corporate veil in Australia has been summarised as: '(1) an acceptance of the *Salomon* principle; (2) a reluctance to pierce; (3) actual piercing as the need arises; and (4) no predictable set of principles by which the courts will or will not pierce.'⁷⁹

7.2 Piercing the corporate veil and international crime

97. The concept of piercing the corporate veil is of particular relevance to international crime. Whilst multinational corporations are often based in the comparatively regulated developed world, their operations increasingly span continents with subsidiaries often existing in numerous developed and developing countries. Where the actions of a subsidiary overseas cause harm, claimants may choose to seek redress from a controlling entity. This may be desirable because the parent company exercised meaningful control over the actions of the subsidiary, or because in practice the controlling entity is better resourced to compensate claimants for harm done. This may be the case because corporate structures are frequently, and legitimately, used to quarantine liability for high risk enterprises.
98. If the corporate veil is unable to be pierced, the claimants can only seek redress from the subsidiary, which may well be incapable of providing compensation.

7.3 Piercing the corporate veil under Australian law

99. In Australia, as in many other common law jurisdictions, statute provides comparatively little guidance on how and when the corporate veil might be pierced. As a result, most piercing in Australia occurs by recourse to the common law.
100. The following two sections of the corporate veil outline those circumstances in which the corporate veil may be pierced by statute, and by reliance on the common law.

8. Statutory direction to pierce the corporate veil

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101. While the common law remains the primary avenue by which piercing occurs, there are numerous examples of legislation that pierces the corporate veil as between the corporation and its members, directors or related companies.

⁷⁹ D. Parker , 'Piercing the Veil of Incorporation: Company, Law for a Modern Era' (2006) 19 *Australian Journal of Corporate Law* 35 at 45.

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102. Examples of legislation lifting the corporate veil to address the liability of management include:
- Section 75B of the *Trade Practices Act 1974* (Cth):⁸⁰ a director, or other person, who is 'involved' with a corporation's breaching of the *Trade Practices Act* may be found personally liable to compensate those persons affected.
 - Pt IVA of the *Income Tax Assessment Act 1936* (Cth): an individual may be personally liable for company tax avoidance.
 - *Environment Protection Act 1970* (Vic): persons who generates pollution and waste may bear the cost of containment, avoidance and abatement.
 - S 26(1) of the *Occupational Health and Safety Act 2004* (Vic): a person who has the management or control of a workplace may be liable if that workplace is not safe or risks the health of any person.
103. A court may also find that a statute contains an implied requirement that acts of a company may be ascribed to its members. This may occur where the legislation would not achieve its aims unless a requirement to look behind the corporate veil was implied.⁸¹
104. The *Corporations Act* also provides for certain circumstances in which the existence of a corporate group structure will affect a company's ability to act in particular ways.
105. For example, the *Corporations Act* recognises the influence of companies within a corporate group, and controls the actions within the group, in the following circumstances:
- Section 260A limits a company's ability to give financial assistance to a person to acquire shares in the company. The provision applies equally to a company's ability to give financial assistance to a person to acquire shares in a holding company of the company.
 - A company must not acquire shares in itself (part 2J.2). This includes, subject to certain exceptions, the issue of shares to an entity that the company controls (s259C).
 - Public companies are prevented from entering into uncommercial transactions with related companies so as to protect the company and its shareholders from transactions which would diminish the company's assets and adversely affect shareholders' interests: (Part 2E).
106. Notably, a court may find a holding company liable for a subsidiary company which is trading insolvently (s588V(1)) (Part 5.7B *Corporations Act*). Similarly, groups of companies must disclose their accounts together. Under s588G whereby directors may be liable for knowingly allowing insolvent trading, a company, if considered a shadow director⁸² may find itself liable for the insolvency of the subsidiary⁸³ even if the directing company does not give proper instructions covering all aspects of the company.⁸⁴

⁸⁰ (1975) (Cth).

⁸¹ *Ford's Principles of Corporation Law* at [4.245] and cases cited therein.

⁸² Section 9 determines that any 'person' who acts as a director will be defined as a director. A company can therefore be defined as a director if a subsidiary follows its instructions as directed.

⁸³ *Standard Chartered Bank of Australia v Antico* (1995) 38 NSWLR 290; 131 ALR1.

9. Piercing the corporate veil using the common law

9.1 No settled principle on piercing

107. Under common law, there is no clear doctrine or established principle by which courts will pierce the corporate veil to acknowledge the role of other companies in a corporate group or the liability of members for corporate obligations. As Rogers AJA stated in *Briggs v James Hardie* (1989) 16 NSWLR 549 (at 567):

The threshold problem arises from the fact there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil. Although ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities...

108. Despite comments made decades ago by judges such as Windeyer J that a trend is emerging whereby courts are able to look behind the legal personality to examine the purpose of its creation and control, there remains no settled jurisprudence on the circumstances that require such an examination.⁸⁵

109. And despite the comments of Rogers AJA – also made over a decade ago – that there is merit in the argument that the assets and liabilities of a parent and subsidiary should be aggregated where it can be shown that the attitude of the company in commercial life was to treat the assets and liabilities as those of the group, there is no settled doctrine in law in those terms.⁸⁶

110. However, in *James Hardie* Rogers AJA states two propositions that can be safely accepted. First, that potential only to exercise control over the subsidiary is insufficient to pierce the corporate veil; and second, the fact of some control over the subsidiary is insufficient (at 575). Beyond that, he says, lies uncertainty.

111. In the absence of a settled doctrine, it is necessary to look at the case law in which the notion of piercing the corporate veil has been considered. The following looks at some of the authorities, and seeks to assess those circumstances in which courts may lift the corporate veil. These categories are discussed below. It should be noted that these categories are not rigidly defined.⁸⁷ We will discuss relevant Australian case law, as well as UK law, which is in some regards further advanced than the Australian jurisprudence.⁸⁸

112. We have endeavoured to focus on that case law that establishes basic principles of piercing and then turn to case law that is most relevant to the context of holding corporate liability for involvement in serious international crimes or human rights violations.

⁸⁴ *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504.

⁸⁵ *Gorton v FCT* (1965) 113 CLR 604 at 627.

⁸⁶ *Qintex Australia Finance Ltd v Schroders* (1990) ACSR 267 at 269.

⁸⁷ *Ford's Principles of Corporation Law* at [4.250].

⁸⁸ UK law, although persuasive in Australian law, is not binding on Australian courts. The UK cases are often cited in Australian judgments.

9.2 Piercing the corporate veil - agency⁸⁹

113. As a general rule a company will not be found to be an 'agent' of its member, even in the case of a company owned and controlled by a single shareholder, or an agent of a parent company that exercises control over it. This is said to flow from the separate legal entity doctrine established in *Salomon's case*.⁹⁰
114. In certain circumstances, however, a subsidiary may be treated as 'carrying on the business' of a parent company, or alternatively treated as the 'agent' of a parent company, where the parent company fails to adequately resource the subsidiary to perform its function. In such cases the parent company may be liable for the actions of the subsidiary.
115. Courts have also accepted agency type arguments to establish that where the director or shareholder of a company has such a degree of effective control over that company the acts of the company are deemed to be acts of the shareholder.
116. Australian courts have been reluctant to pierce the corporate veil on the grounds of agency, however they appear to be more willing to adopt agency principles for justifying piercing the corporate veil in cases involving small companies. In these cases it is sometimes easier to establish absolute control by another, so the subsidiary company can properly be seen as a mere agent for the shareholder.⁹¹
117. There have been cases where the company itself has successfully applied agency principles to reduce the severity of a penalty; a controversial use of the doctrine of piercing the corporate veil.⁹²

(a) The UK decisions – agency and corporate groups

118. The English cases provide useful authorities for the use of agency principles or, alternatively, circumstances in which a company effectively runs the business of another and should therefore be liable for the business of the other company. The cases do not concern international crimes or torts, but demonstrate the level of control by a parent company that is required in order to pierce the corporate veil.
119. *Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* [1939] 4 All ER 116 concerned a parent company that held all the shares in a subsidiary, save for those shares held by the directors in trust for the company. The subsidiary purported to run a waste business, although the profits of the waste business

⁸⁹ It should be noted that some commentators dispute whether the establishment of agency between members of a corporate group or indeed between a company and a shareholder merely represents the proper application of agency principles and not any lifting of the corporate veil at all. See Palmer's Company Law at [2.1519]; *Idoport Pty Ltd v National Bank Ltd* [2004] NSWSC 695 at [144] per Einstein J.

⁹⁰ *Fords Principles of Corporations Law* at [4.250] and cases cited therein.

⁹¹ Ian Ramsay & David Noakes, 'Piercing the Corporate Veil in Australia' [2001] 19 *Company and Securities Law Journal* 250 at 254.

⁹² See eg *Workcover Authority of NSW v Baker-Duff Pty Ltd* (unreported, Industrial Relations Court of New South Wales, Fisher CJ 2 April 1993) and *Workcover Authority of NSW v Krcmar Engineering Pty Ltd* (unreported, Industrial Relations Court of New South Wales, Fisher CJ 18 May 1993). In both cases the court pierced the corporate veil to reveal a partnership or an individual which reduced the OH&S penalty amount the individual was required to pay.

were treated as the profits of the parent company, the parent company appointed the managers of the business and the parent company stayed in control of the business. When the local council tried to compulsorily acquire the waste business, the parent company claimed the waste business as its own, rather than the business of the subsidiary and claimed compensation for disturbance of its business.

120. The court held the subsidiary was carrying on business as the parent company and therefore pierced the corporate veil. In that case the court stated that it is a question of fact in each case whether the subsidiary was carrying on its business as its own, or whether it was carrying on the business as the business of the parent company. Further, Atkinson J went on to state six factors relevant for the determination of that question of fact:
- (a) Were the profits treated as the profits of the parent company?
 - (b) Was the person conducting the business appointed by the parent company?
 - (c) Was the parent company the head and the brain of the trading venture?
 - (d) Did the parent company govern the venture, decide what should be done and what capital should be embarked on the venture?
 - (e) Did the parent company make the profits by its skill and direction?
 - (f) Was the parent company in effectual and constant control?
121. The facts of *Smith Stone and Knight* are so extreme, in that the parent company exercised so much control over subsidiary company, as to make it an uneasy basis of principle.⁹³ Nonetheless, it has been followed in a number of Australian cases.⁹⁴
122. Similarly, where a parent company does not properly resource its subsidiary, such that the subsidiary cannot operate as an independent entity, the subsidiary may be held to be acting as an agent of the parent.⁹⁵ This was the case in *Smith, Stone and Knight*, where although the subsidiary company ostensibly ran the business, in fact the parent company had not transferred the business to the subsidiary and the subsidiary did not have any resources. It conducted the business in question in name only.
123. In *DHN Distributors v London Borough Council Tower Hamlets* [1976] 3 All ER 462, the Court of Appeal followed the decision in *Smith, Stone and Knight*, but expanded its application to treating two subsidiaries and their parent as the one company for the purpose of providing compensation.

⁹³ See the comments of Young J in *Pioneer Concrete v Yelnah* (1986) 5 NSWLR 254 at 266.

⁹⁴ *Hotel Terrigal Pty Ltd (in liq) v Latec Investments Ltd (No 2)* [1969] 1 NSWLR 676 and *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679.

⁹⁵ In *Re FG (Films) Ltd* [1953] 1 All ER 615 an American film company held 90% of shares in a British company. The British company was essentially without resources, having a share capital of £100, no place of business (save for a registered address) and no employees. When the British company sought to register a film under the Cinematographic Films Act 1938-1948 as the company that had made the film, the registration was rejected. Vaisey J stated that the English company did not have the resources to make the film and therefore its participation in the film making must have been as agent of the American company.

(b) Agency in Australian law

124. In Australia, piercing the corporate veil on the basis of agency or dominance and control by a parent company is not established legal principle. The case law errs in favour of upholding the predominance of separate legal entity.⁹⁶
125. In the leading case of *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567, creditors sought access to the corporate group's assets for payment of debts incurred by one company within that group. In practical terms, the group operated as single unit, with consolidated accounts, and for tax purposes it was a recognised group structure. However the High Court confirmed that the corporations legislation did not expressly deny the separate legal personality of each company in the group and therefore, in the absence of a contractual obligation giving the creditors an additional right, the creditor could only look to recover from the company that had incurred the debt (at 577).
126. Similarly in its decision in *Walker v Wimbourne* (1976) 137 CLR 1, the High Court emphasised the necessity of confining the liability of a company to the entity that entered into the transaction in question (not the corporate group to which that company belonged) (at 6-7).
127. In *Pioneer Concrete v Yelnah Pty Ltd* (1986) 5 NSWLR 254 at 267 Young J further distanced the UK agency cases, stating that the UK decision of *DHN* (discussed above) is to be 'confined to its special facts' and that otherwise it would be inconsistent with the decision of the High Court of Australia in *Industrial Equity Ltd v Blackburn*.
128. In *Pioneer Concrete* Young J stated the corporate veil will only be pierced if there is a sham or façade. He said that piercing the corporate veil does not apply even though the 'ultimate controllers would very naturally lapse into speaking of the whole group as 'us' and merely utilise separate companies for commercial purposes' (at 267).⁹⁷
129. However there has been some judicial acceptance of the *Smith, Stone and Knight* principles in relation to determining where a corporation 'carries on the business' of another corporation. In *Bray v Hoffman-La Roche* [2002] FCA 243, a case concerning alleged cartel conduct in the pharmaceutical industry, Merkel J acknowledged the principles.
130. However his comments on the level of control required to lift the corporate veil are also interesting. He stated the importance of a high threshold where it is alleged that parent companies located overseas 'carried on the business' of the subsidiaries (at [81]):

⁹⁶ *Ford's Principles of corporations Law* at [2.1.0143]; see also Parker at 44-47.

⁹⁷ In *Pioneer Concrete* the court refused to lift the corporate veil in a corporate group situation involving an alleged breach of deed. The case concerned a dispute in the concreting industry. In 1982 a number of individuals and companies within the corporate group known as the Hi-Quality group, entered into a deed with the plaintiff. In 1985 another subsidiary company in the Hi-Quality group, which subsidiary was not party to the 1982 deed, entered into transactions which breached the 1982 deed. The plaintiff sought to lift the corporate veil to establish that the company which breached the transaction was essentially controlled by the same corporation that had entered into the deed in 1982, and that therefore there had been breach of the terms of the deed. Young J, in the Supreme Court of New South Wales, relied on the fact that although the Hi-Quality holding company was a party to the deed, the covenants in the 1982 deed were made by the subsidiary and not the parent company (although the parent company guaranteed the covenant). He stated that the intention of the parties was to exclude the holding company from the covenant provisions.

In my view ***something more than the indirect legal and commercial capacity of the parent companies to control and direct the subsidiaries, plus the parent's involvement in implementing the cartel arrangement***, is required to lift the corporate veil between the subsidiaries and their parents or to find that each of the subsidiaries is carrying on its business as the agent for the parent. That is particularly so where it is contended (as it is in the present case) that the parent, rather than the subsidiary, is carrying on business in Australia or, put another way, the subsidiary is engaging in all of its commercial activities on behalf of, and therefore as agent for, the parent. **[emphasis added]**

131. Merkel J's approach suggests that direct involvement of the parent company is necessary to lift the corporate veil in an agency-type situation.

9.3 Piercing the veil - fraud

132. It is uncontroversial that where a corporate structure is used to perpetrate a fraud, the courts will look behind the corporation to the perpetrators of the fraud. Australian and British Courts will disregard the existence of a corporate structure and attribute liability to those behind the company where they use the structure as a vehicle for committing fraud.⁹⁸

9.4 Piercing the veil – sham, façade or avoidance of an existing legal duty

133. Another well established principle in corporations law is that a company structure cannot be used to avoid an existing legal duty or obligation. If a court finds that persons, including a company, who are under an existing legal obligation (such as in contract, liability for debts, or vicarious liability in tort) formed a company for the sole or dominant purpose of breaching their obligation or avoiding the obligation, the court may find that the actions of the company that breach the obligations are in fact the actions of the person under the obligation, namely, the company that instituted the sham or façade corporation.
134. For example, in *Jones v Lipman* [1962] 1 WLR 832, Mr Lipman agreed to sell land to Mr Jones, but instead, prior to the settlement of the contract, acquired a company and sold the land to the company. Mr Lipman was the director and only shareholder in the company. He admitted to the court that he had sold the land to the company to avoid a ruling of specific performance of the contract of sale with Mr Jones.⁹⁹
135. The court held for Mr Jones, and ordered specific performance of the contract of sale. Russell J stated that the company was a 'device and a sham' behind which Mr Lipman sought to avoid his obligations to Mr Jones and the equitable jurisdiction of the court. In the circumstances, it was appropriate to lift the corporate veil.¹⁰⁰
136. Australian courts, however, have still exercised some caution about lifting the corporate veil in cases where it is alleged that an individual is using the corporate structure to avoid personal liability. In *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* Justice Young stated

⁹⁸ *The Laws of Australia* at [4.1.16]; *Re Darby; Ex parte Brougham* [1911] 1 KB 95 is the leading case in this area. The case involved two bankrupts who registered a company which they used as a front for making money under the guise of an investment 'opportunity.' The court allowed a claim against one of the bankrupts to access the secret profits as the entity was found to be a fraudulent venture.

⁹⁹ See also the UK case of *Gilford Motor Company Ltd v Horne* [1933] Ch 935.

¹⁰⁰ See also *Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935

that such an action required sufficient evidence for a 'finding by un rebutted inference that one of the reasons for the creation of the intervening company was to evade a legal or fiduciary obligation.'¹⁰¹

137. It is interesting to note that it is acceptable for corporations to establish a corporate structure that aims to limit the corporation's liability for *future* (cf existing) obligations and liability.¹⁰²

10. Piercing the veil in the context of major torts

138. The cases outlined above deal with the general principles of piercing the corporate veil, but none of the cases involve the commission of major torts or crimes by corporations or their officers. In recent years there has been increased consideration given to whether the corporate veil should be pierced as between parent companies and subsidiaries in the event of a major tort having been committed by a subsidiary company. Australian, English and US case law concerned with this context shows that, as with other circumstances, it remains a challenge to pierce the corporate veil. These cases are discussed below.

10.1 Direct liability for conduct within Australia

139. A parent company has been held to be directly liable in Australian law for the harm done to the employee of a subsidiary, albeit the harm was not done outside the jurisdiction. The case concerned an employee of a company that manufactured asbestos products and the plaintiff claimed that his mesothelioma was caused by inhaling asbestos fibres whilst employed by Asbestos Products Pty Ltd. Asbestos Products Pty Ltd was the wholly owned subsidiary of CSR Ltd and the plaintiff sought damages from CSR on the basis that CSR had breached its duty of care to him.
140. Interestingly, the plaintiff did not seek to pierce the corporate veil or to establish a relationship of agency between Asbestos Products and CSR. Instead it sought to establish direct liability on the part of CSR (see 466, 485).
141. In *CSR v Wren*, the Court of Appeal of the Supreme Court of New South Wales held, after considering the factual background to the relationship between Asbestos Products and CSR, that CSR was liable for Mr Wren's damage. In coming to this decision, the court placed great weight on the fact that all the management staff who worked at Mr Wren's factory were employed by CSR and Asbestos Products' board of directors were all staff members of CSR. In the circumstances, the control by CSR was sufficient to establish a relationship between Mr Wren and CSR to give rise to a duty of care. The court stated (at 485):

In our opinion, 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.

¹⁰¹ (1986) 5 NSWLR 254 at 267.

¹⁰² *Adams v Cape Industries Plc* [1991] 1 All ER 929; see also *Ford* at [4.250] and cases cited therein.

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142. The court also gave weight to CSR's interest in the financial affairs of Asbestos Products, which it considered to be 'over and above that expected in the case of a holding company'. For example, the approval of CSR was required in order to acquire any equipment of great expense. There was also regular reference to Asbestos Products at the board meetings of CSR. The court described this as evidence of direction control or involvement by the CSR board in the affairs of Asbestos Products (at 484).
143. The case highlights the ability of claimants to avoid the approach of piercing the corporate veil, by asserting the direct negligence of the parent company. There is no reason why such principles enunciated in this case could not apply to the liability of a parent company for the activities of its subsidiary overseas.

10.2 The case of James Hardie & Co – asbestos litigation in Australia

144. The James Hardie case is an example of where the Australian Courts have considered, albeit peripherally, the question of piercing the corporate veil to address the tortious liability of parent companies for the serious harm caused by their subsidiaries.
145. In *Briggs v James Hardie & Co Pty Ltd*, Briggs suffered from asbestosis that he alleged was contracted whilst employed by a subsidiary of James Hardie. James Hardie was, among other things, a producer of asbestos products which were proved to contribute to mesothelioma cancer. Briggs sought an extension of the limitation period in which to bring the action, one requirement of which was that there was 'evidence to establish a cause of action.' The case before the New South Wales Court of Appeal for an extension of time require the consideration of whether there was evidence to establish the cause of action against the parent company.
146. The plaintiff argued that the corporate veil should be lifted and the actions of the subsidiary treated as the actions of the parent company. The court stated that Briggs had to establish that there was a possibility that evidence existed as against the parent company – and in those circumstances it was relevant whether the actions of the subsidiary are treated as actions of the parent. In those circumstances, one of the Appeal judges, Rogers AJA, considered the test to be applied in piercing the corporate veil in group situations.
147. Rogers AJA considered the authorities in Australia and the UK and concluded that even the commercial reality of a parent company's complete control over a subsidiary may not be adequate to persuade a court to pierce the corporate veil (at 577), :
- ... as the law presently stands, in my view the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic. 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..
148. Importantly, however, Rogers AJA did state that different considerations should apply in lifting the corporate veil in torts cases as compared with contract or revenue cases. The rationale for this approach was that the tort victim has no choice in the selection of tortfeasor, whereas in contract or revenue cases, the contracting party may choose not to enter into a contract and otherwise guard against a possibility that a subsidiary will not be able to pay a debt. A tort victim cannot control who will do him or her harm (at 578-9).

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149. In any event, Briggs was granted an extension of time and his litigation settled, so the court did not have a further opportunity to develop precedent on piercing in the context of torts.

10.3 Piercing the veil in asbestos litigation – UK authorities

150. Interestingly, also in an asbestos case, the UK courts have been reluctant to pierce the corporate veil to hold parent corporations responsible for the actions of their subsidiaries overseas. In the UK, the basis of the refusal to pierce the corporate veil was that the parent company was not sufficiently involved in the operations of the subsidiary, or that the businesses conducted by the subsidiary were sufficiently separate from the parent company. This case law demonstrates the predominance of separate legal entity in the common law world.
151. In *Adams v Cape Industries plc* [1991] 1 All ER 929, the UK Court of Appeal considered the question whether US asbestos victims could enforce a favourable Texas judgment against assets of the parent company located in the UK. The Court of Appeal refused to pierce the corporate veil to allow the US asbestos victims access to UK assets, despite the request from the applicants to lift the corporate veil between the Illinois subsidiary company, NAAC, and Cape in the UK. The court held that the US courts could not take jurisdiction over a UK company in those circumstances.
152. The court looked at the operational realities of the company, which it described as follows (at 963):
- NAAC was an Illinois corporation, carrying on business in the United States from which it earned profits and on which it paid United States taxes. Its debtors were its debtors, not Cape's debtors. Its creditors were its creditors, not Cape's creditors. Cape was not taxed in the United Kingdom or in the United States on NAAC's profits. The return to NAAC's shareholders took the form of an annual dividend passed by a resolution of NAAC's board of directors. The corporate forms applicable to NAAC as a separate legal entity were observed. NAAC made its own warehousing arrangements for the storage of its own asbestos. It had its own pension scheme for its own employees.
153. The Court of Appeal concluded that the business carried on by the subsidiary (and also an independent corporation that marketed asbestos for the subsidiary in the US) was exclusively their own business, and not that of Cape. The Court relied on the fact that the defendants and the subsidiary and the independent marketing corporation could not be treated as a single economic unit.
154. However the Court also acknowledged that the subsidiary and the marketing corporation were a legal façade established by Cape to enable it to continue to sell asbestos in the United States, while reducing the appearance of its involvement and reducing, albeit by lawful means, Cape's risk of liability to the jurisdiction of the United States courts. The court stated, though, that the façade was not illegal, as the defendants could legitimately use a corporate structure for the purpose of minimising *future* legal liabilities to third parties, or moving those liabilities to another member of the corporate group. As such the court would not lift the corporate veil so that the presence of the subsidiary and the independent corporation in the US could be treated as the presence of the Cape in the jurisdiction of the US court. It followed that Cape had no presence in Illinois through their

subsidiary and the independent corporation at any material time and their assets were not available to the asbestos victims.

10.4 Piercing the corporate veil in the US - the *Alien Tort Claims Act*

155. We note that piercing the corporate veil has been a key issue in a number of claims against corporations brought in the US under the *Alien Tort Claims Act*. Examples of these include the Unocal Case¹⁰³ and the recent decision in the Talisman case.¹⁰⁴ As other research papers are being prepared for the Expert Panel covering liability issues under this Act, we do not seek to examine piercing of the corporate veil in this context.

10.5 Piercing the corporate veil: conclusions for international crimes and human rights liability

156. Despite the ability of courts to pierce the corporate veil in certain circumstances, the fact remains that separate legal personality exists for each member of a corporate group and piercing the corporate veil between a subsidiary and its parent company remains the exception rather than the rule. There is no settled principle or doctrine by which the court will lift the corporate veil and there has, to date, been little intervention by parliament to clarify the disjuncture between the commercial reality of control by a parent company and the legal approach that the parent and subsidiary are separate.
157. The ramifications of this arguable failure of the law to recognise the realities of the current commercial environment is that corporations can arguably avoid responsibility for actions of their subsidiaries, even where the parent has a considerable amount of control of the subsidiary's business.
158. It is interesting to note the judicial comment in *Briggs v James Hardie* that torts cases might present a basis for a different approach to piercing the corporate veil (discussed above) and it will be interesting to see if and how case law develops on the back of these, and other similar judicial comments. To date, however, this aspect of law remains relatively undeveloped. In fact, in a case study conducted by Ramsay and Noakes in 2001, an analysis was undertaken of cases in Australia relating to the doctrine of piercing the corporate veil. The result of this empirical study indicated, among other things, that courts pierce the corporate veil more frequently in a contract context than in a tort context.¹⁰⁵
159. This has consequences for human rights violations committed by overseas subsidiaries of multi-national corporations, as the level of control that is required to be shown by the corporation may never exist. Even where the parent company exercised control over the subsidiary's operations and perhaps even implemented the business practices and operations that caused the harm, there is no settled law that states that the courts would pierce the corporate veil. The separate legal personality of corporations therefore presents as a significant consideration for litigants bringing a civil claim for violation of human rights, or of the criminal law, by the parent company.

¹⁰³ *Doe v Unocal* [FN3] 395 F. 3d 932 (9th Cir 2002) at 971-972.

¹⁰⁴ *The Presbyterian Church of Sudan v Talisman Energy Inc*, 01 Cir 9882 at 97.

Having overviewed those components of the corporate form that impact on attribution of liability, we now turn to those legal and other developments that appear to be addressing corporate liability and corporate compliance with respect to human rights standards. These include the relatively novel approach to litigating these types of claims on the basis of direct negligence, using process liability. They also include perceived trends in the field, at the domestic law and interpretational levels, as well as in relation to corporate practice.

11. Future Trends

11.1 Direct Negligence and Corporate Groups – 'process' liability

160. With the limitations to recourse posed by the doctrines of separate legal entity, limited liability and piercing the corporate veil, a number of cases have been brought in the UK and Australia that seek to circumvent the need to pierce the corporate veil, by alleging direct negligence on the basis of 'process liability'. These developments are discussed below.

(a) Process liability in UK law: an overview

161. There have been a number of negligence claims brought against parent companies incorporated in the UK for the alleged tortious actions of their subsidiaries overseas. It is interesting that in these cases a central issue was whether a parent company owed a duty to those affected by its subsidiary operations. However, the cases used the legal approach of 'direct negligence', rather than attempting to lift the corporate veil *per se*, and based the directness on the fact that the parent corporation was so involved in the processes employed by the subsidiary that they ought to be directly liable. Richard Meeran, the lawyer for the plaintiffs in each of the cases brought, described the basis of the parent company's 'process liability' as follows:

... provided there is sufficient involvement in, control over and knowledge of the subsidiary operations by the parent there is no reason why the general principles of negligence should not apply so that in certain circumstances such a duty should exist. Save that one is dealing with 'processes' rather than 'products', there is no reason in principle why an analogous duty to that owed by a manufacturer to consumers for its defective products should not be imposed ('process' liability). Indeed the proximity of a MNC to overseas employees of its subsidiaries is arguably closer than that of a manufacturer to consumers of its products.¹⁰⁶

162. It is worth considering, briefly, the facts surrounding each of the cases brought, although it should be noted the courts are yet to determine the question of process liability. The cases do, however, present some novel approaches to claiming liability of parent corporations in corporate group structures.

¹⁰⁵ Ian Ramsay & David Noakes, 'Piercing the Corporate Veil in Australia' [2001] 19 *Company and Securities Law Journal* 250 at 30.

¹⁰⁶ R Meeran 'Liability of Multinational Corporations: A Critical Stage' (1999) at <http://www.labournet.net/images/cape/campanal.htm>

(i) **Connelly v RTZ**

163. The first case was a claim for compensation brought by Mr Connelly, a man suffering from laryngeal cancer he claimed was caused by his employment at RTZ's Rossing uranium mine in Namibia. The RTZ group of companies was arranged in an extremely complex corporate structure, but the applicant claimed that key strategic technical and policy decisions relating to the Rossing mine were taken by the English-based companies, and that those decisions were central causes of the environment in which he developed cancer. In particular it was alleged that RTZ supervisors implemented or advised upon the policy on health, safety and the environment at the mine.¹⁰⁷
164. In the mid-1990s the parties engaged in a number of interlocutory proceedings on the question of whether and in what circumstances *forum non conveniens* would deny the applicant from bringing his claim in England. The ruling of the House of Lords held that Mr Connelly was allowed to bring his claim in England, a case considered 'landmark' in the context of English *forum non conveniens* law as the Lords took into account the fact that Mr Connelly would be unable to obtain legal assistance to bring his case in Namibia.¹⁰⁸ The courts did not deal with the substantive issues of liability of the parent company. Ultimately, Mr Connelly's claim was struck out for limitation period reasons, but the decision on forum allowed subsequent claims to be brought in the UK against parent companies whose subsidiaries were alleged to have engaged in negligent activity causing harm overseas.

(ii) **Thor Chemicals**

165. In another case, employees sued Thor Chemicals Holdings, the manufacturer of mercury-based chemicals in Margate, England. During the 1980s the health and safety of the workers at the Margate factory became a concern, after discovering that the employees at the factory had inflated levels of mercury in their blood and urine. As a result, Thor moved its Margate mercury operations to Cato Ridge, South Africa. The factory in South Africa suffered from the same deficiencies as those discovered in Margate and workers suffered mercury poisoning as a result. However the workers in South Africa who were found to have high levels of mercury in their blood had their employment terminated and they were replaced by casual labourers.
166. Twenty of the workers in the South African factory brought claims in the English High Court against the UK parent company and its chairman. The parent company and chairman's liability was based on the negligence of the *process* that the applicant alleged the parent company had established to run the factory in South Africa; that is, the negligent design, transfer, setup and operation, supervision and monitoring of 'intrinsically hazardous' processes.
167. After unsuccessfully attempting to stay the workers' claims on *forum non conveniens* grounds, Thor settled the claim for UK1.3 million in 1997.¹⁰⁹

¹⁰⁷ See *Connelly v RTZ Corp plc* [1997] 4 All ER 335 at 338.

¹⁰⁸ *Connelly v RTZ Corp plc* [1997] 4 All ER 335.

¹⁰⁹ See *Ngcobo v Thor Chemicals* TLR 10 November 1995.

(iii) Cape plc

168. The third case was against Cape plc, the company that had previously successfully defended an attempt by US asbestos victims seeking access to its assets to satisfy a judgment debt in Texas.
169. The case concerned the operations of Cape, an English company, that operated asbestos mines, mills and factories in, among other places, South Africa. The claimants sought damages from Cape in the UK courts for personal injury allegedly suffered as a result of exposure to asbestos in South Africa. Further, the South African subsidiary was insolvent and therefore the only 'realistic target for legal action was the parent company'.¹¹⁰
170. The claimants contended that although Cape sought to give the impression that the South African business was discrete and independent from UK operations, in fact the asbestos mined in South Africa formed part of a chain of production across continents, driven by demand in Europe and the United States and that the South African business was part of an integrated worldwide operation¹¹¹ The basis of liability was therefore the parent company's involvement in the process.
171. Following a number of proceedings on the question of forum, the House of Lords decided that the case could be brought in the UK.¹¹² However, the case was settled prior to any hearing of the substantive arguments on process liability of parent corporations.¹¹³

(b) Direct negligence in Australia – Ok Tedi

172. On one occasion, a claim was brought in Australia against an Australian company for harm caused overseas. The claimants were owners and occupiers of land next to the Ok Tedi river in Papua New Guinea (**PNG**). The claimants alleged that they had been harmed by the discharge of by-products from the Ok Tedi Copper Mine that flowed into the Ok Tedi river and made a claim, among other things, in negligence in the Supreme Court of Victoria. Further, they made the claim against both Ok Tedi Mining Ltd (**OTML**) for its 'conduct' of the mine and BHP, as 'manager' of the mine. It was alleged that the defendants 'own operate and manage the Ok Tedi Copper Mine. Although OTML was named as the principle, BHP was alleged to be an aider and abetter of the tortious acts of OTML'.¹¹⁴
173. The case settled without the court having the opportunity to decide whether BHP could be held responsible in tort for its overseas operations.¹¹⁵ However the claim was structured so as to circumvent the corporate veil obstacle. As such, it suggests the possibility of further

¹¹⁰ R Meeran, 'Cape Plc: South African Minworkers' Quest for Justice' 9(3) (2003) Int J Occup Environ Health 218 at 223

¹¹¹ R Meeran, 'Cape Plc: South African Minworkers' Quest for Justice' 9(3) (2003) Int J Occup Environ Health 218 at 219.

¹¹² Lubbe v Cape plc [2000] 4 All ER 268.

¹¹³ For a detailed discussion of the course the proceeding took, see R Meeran 'Cape Plc: South African Minworkers' Quest for Justice' 9(3) (2003) Int J Occup Environ Health 218.

¹¹⁴ See one of the interlocutory decisions in *Dagi v Broken Hill Proprietary Company* (No 2) 1997 1 VR 428 at 431.

¹¹⁵ See SE McMurray, 'Corporate Compliance with human rights' (2003) 31 *ABLR* 265 at 268

actions in Australia for harm caused overseas, based on a direct negligence-type approach.¹¹⁶

(c) Process liability – conclusions

174. The process liability cases brought in the UK have not created any authorities to be relied upon, but present new approach to liability in response to the limitations thrown up by the difficulty in piercing the corporate veil. This may represent a trend for the future in the litigation of mass torts. Although 'process liability' per se has not been run in Australia, similar cases, involving the direct negligence of parent companies, have been run successfully by claimants against parent companies.

11.2 Piercing the corporate veil and separate legal entity – statutory change?

175. As stated above, the current status of the law in relation to lifting the corporate veil may, at times, create a disjuncture between the legal approach of separate legal entity and the commercial reality of effective control by parent companies. Leaving the doctrine unaddressed by legislative reform has been criticised as leaving the deliberate misuse of corporate entities unresolved.¹¹⁷
176. Further, there have been calls for a redefinition of corporate personality to accommodate a more principled approach to liability, for instance in the context of tort law. Parker argues that if only humans have morality and a company is merely a nexus for contractual players, then surely it follows – even on a contractarian view – that the individual players should ultimately be held liable for their actions.¹¹⁸ He quotes D Fischel:¹¹⁹

'Those who argue the corporations have a social responsibility and therefore that managers have the right, and perhaps the duty, to consider the impact of their decisions on the public interest assumed that corporations are capable of having social or moral obligations. This is a fundamental error, a corporation, as discussed above, is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations. Only people can have moral obligations or social responsibilities, and only people bear the costs of the non-wealth maximising behaviour.'

177. The need for statutory guidance in order to avoid spasmodic and random piercing, and to guide the development and application of the doctrine, has also been recognised by the courts (*Qintex* at 266). However, legislative reform looks increasingly unlikely.

¹¹⁶ See R Meeran 'Corporations, Human Rights and Transnational Litigation', paper delivered at Monash University, 29 January 2004 (see www.law.monash.edu.au/castancentre/events/2003/meeranpaper.html)

¹¹⁷ See also Parker at 50-51, who stresses the need for the development of sound principles for piercing the corporate veil.

¹¹⁸ Parker, D page 52.

¹¹⁹ Fischel, D 'The corporate governance movement' (1982) 35 *Van derbilt Law Review* 1259 at 1273.

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178. One needs only to look at the case of James Hardie to see the resistance to legislative change.¹²⁰ The actions of James Hardie in recent years in moving its operations to the Netherlands, and establishing a compensation fund for asbestos victims that then fell short of funds needed to compensate claimants, garnered significant media and political attention. The James Hardie experience sparked calls for an overhaul not just of the doctrine of piercing the corporate veil but of corporations law in its entirety in Australia. The Attorneys General of the Australian States of New South Wales and Victoria, stated that the corporations legislation was deficient and needed to be changed so that there could be a lifting of the corporate veil from companies that strip assets from subsidiaries or move offshore to avoid liability. In any event, legislative reform of separate legal entity or piercing the corporate veil is yet to occur.
179. It is worth noting that legislative change was also sought, and failed, in 2000 with the introduction of the *Corporate Code of Conduct Bill* into the Federal parliament. The Bill sought to require Australian corporations employing more than 100 people overseas to meet international standards of environmental performance, employee health and safety, employment terms and conditions and human rights. The Bill made corporate officers liable for civil penalties for contravention and gave persons who suffered damage the right to seek injunctions and compensation.
180. The Bill was not passed by the parliament and lapsed in 2002. It was described by a parliamentary committee as 'unnecessary and unworkable.'

11.3 Does existing legislation create sufficient corporate liability?

181. Despite the unwillingness or lack of interest in reforming corporations legislation and directly reforming the human rights responsibilities of corporations, there are some recent changes in the Australian legal landscape that might affect corporate liability for international crimes, or at least encourage corporate compliance with international human rights law standards.

¹²⁰ The events that followed the James Hardie case provide a useful illustration of public and political response to limiting liability in a corporate group structure. James Hardie transferred its two subsidiaries to a medical research and compensation foundation (the Foundation) and provided AUD239 million to fund potential asbestos injury claims. Then, in 2001, the James Hardie Group moved to The Netherlands, a state with whom Australia does not have a treaty to enforce foreign judgments under the Foreign Judgments Act 1991 (Cth). It is worth noting that although it moved to the Netherlands, James Hardie conducted 80% of its business in the United States. Prior to moving offshore, in a proceeding before the Supreme Court of New South Wales to approve the scheme of arrangement for the corporate restructure that would see James Hardie move to the Netherlands, James Hardie gave assurances to the New South Wales Supreme Court that they could, if necessary, call upon AUD1.9 billion owed on partly paid shares for the fund if necessary. The assurance did not create a legal requirement to establish or fund the Foundation. However, shortly after transferring to The Netherlands, the Group cancelled the partly paid shares and in 2003 the Foundation reported that it was suffering a financial shortfall: see D Jackson, Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation, September 2004, pp28-35). A number of government inquiries were established to consider all aspects of the Foundation. One commission of inquiry estimated that James Hardie was liable for potential claim in the value of up to AUD1.5 billion. Further, the inquiry alleged that Foundation had been deliberately underfunded, that it was a deliberate mechanism used to distance the liability of the parent company from legal claims and that the Foundation's establishment had been a public relations exercise.

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182. First, the criminal law may already provide a mechanism by which to bring corporations to account for international crimes. The Criminal Code provides novel and innovative means of forming corporate *mens rea*, through establishing a 'corporate culture' that authorised or permitted the commission of an offence. In many ways this legislation, yet untried, may already provides a basis for recognising the liability of corporations for the actions of their subsidiaries overseas, particularly if the corporate culture is shown to emanate from the parent. Further, the aiding and abetting provisions of the Criminal Code mean that both the corporation and its officers can be liable for the commission of offences.
183. Secondly, we note that corporate manslaughter has recently been incorporated into Australian law.¹²¹
184. Thirdly, it should be remembered that legislation has now made some inroads into the separate entity concept - individuals acting on behalf of the company may find themselves personally responsible, even though they acted purely for the company, in a variety of fields of law from taxation, environmental law,¹²² occupational health and safety¹²³ and mining.¹²⁴
185. We would emphasise the importance of a principled basis to any criminal prosecution of parent companies, and note the comments of Clough that parent companies must not be held liable on the basis that they are the only targets available. Corporation must only be held liable where there is a proper basis in criminal law. As Clough states:
- In appropriate cases, the parent corporation should be prosecuted because of the criminality of its conduct. **To be knowingly involved in severe human rights abuses in the host jurisdiction, whether directly or indirectly, is conduct that should legitimately be the subject of criminal sanction.**¹²⁵ [emphasis added]
186. In fact, Hill argues that although in corporate law the commercial reality of the parent company exercising control over the subsidiary may not be sufficient to justify lifting the corporate veil, such a level of control by the parent company could be sufficient to carry with it the personal responsibility for criminal acts undertaken by the controlled party.¹²⁶ So although the parent company should not usually be held responsible for the criminal acts or omissions of another company in the group, where the parent company exercises complete control over the subsidiary, it could satisfy criminal liability tests.

¹²¹ *Occupational Health and Safety Act 2004* (Vic), s32.

¹²² *Environment Protection Act 1970* (Vic) S1 (F2) persons who generate pollution waste should bear the cost of containment, avoidance and abatement.

¹²³ *Occupational Health and Safety Act 2004* (Vic) S26(1) a person who has to any extent, the management or control of the workplace must ensure so far as is reasonably practicable that the workplace in the means of entering and leaving it are safe and without risks to health.

¹²⁴ *Mines Act 1958* (Vic) S384: every mine shall be under the control of the manager who shall be deemed the manager of the mine under this division and who shall be responsible for the management and direction of the mine.

¹²⁵ J Clough, (n135) at 10.

¹²⁶ J Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique at 15.

11.4 Incentives to compliance in domestic legislation

187. Human rights legislation that is aimed at controlling the power of government may provide an indirect incentive to corporations to comply with human rights, even where liability, per se, does not attach to contraventions of those rights by the corporation.
188. It has been said that for all the ability of corporations to minimise risk and liability through elaborate group structure, corporations still prefer to incorporate in the 'highly regulated and financially safe developed world'.¹²⁷
189. One characteristic of the developed world is its regulation of industry and the need for business to comply with government standards and gain approval for many of its routine operations. In this context, the advent of Charters of Human Rights in a number of Australian jurisdictions provides an interesting case study in an indirect incentive for corporations to comply with human rights standards.¹²⁸ The charters operate in a similar way to the UK's *Human Rights Act 1998*.
190. The Charters, put broadly, are statutory instruments that seek to protect and promote civil and political rights and place obligations on parliament, the courts and public officials to act in accordance with the human rights set out in the Charter. Corporations will only have direct obligations where they are considered to be public officials, that is that they carry on a public function or are owned by the government.
191. The Charters make it unlawful for 'public authorities' to Act in a way that is incompatible with a human right or, where making a decision, to fail to give proper consideration to a relevant human right. Therefore where business relies upon the approval of a statutory decision maker, as it so often does, the decision maker, as a public authority, will be required to take into account the human rights set out in the Charter in respect of that decision.
192. For example, if a government department is required to issue a lease or a licence in respect of a project, the statutory decision maker will be required to consider whether that project will infringe any of the human rights set out in the Charter, including the right to life, equality and non-discrimination. It is therefore increasingly in the commercial interests of business to ensure that its projects do not infringe the rights set out in the Charter. This does not have the enforcement power of the law behind it, but arguably such incentives to change behaviour can produce beneficial results whereby corporations themselves take steps to protect and promote rights. The impact of these Charters is yet to be seen.

11.5 Legal and Other Developments in the International Arena

193. Further reforms and future trends with respect to holding corporate entities to account for involvement in serious international crimes and human rights violations are also evidenced by the embracing of this issue by those operating in the international arena. There are:
- numerous initiatives of international organisations that deal with relevant content of human rights in the context of corporate activity;

¹²⁷ J Clough (n135) at 10.

¹²⁸ *Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2004 (ACT)*.

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- a growth in voluntary codes and international instruments seeking to govern this field; and
 - now, a consistent and high level dialogue on these issues at the international level.
194. As regards international initiatives, perhaps the most well known of these was establishment of the UN Global Compact in January 1999.¹²⁹ The UN's commitment to address these issues was also reflected in the work of its Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights. In August 1999, the first session of its working group on the working methods and activities of transnational corporations, decided to investigate development of a code of conduct for companies based on human rights standards.¹³⁰ The work of this Sub-Commission eventually led to the appointment by the Secretary General of a Special Representative on Business and Human Rights, with a relatively far reaching mandate to investigate the legal and other obligations of corporations at the international and domestic levels.¹³¹ During this time, the work of the UN has been supplemented by substantive undertakings by numerous civil society groups concerned with the human rights impacts of corporations, through to industry groups that have specifically formed to address these issues.¹³²
195. As regards the development of international instruments in this field, this starts at one end with voluntary codes governing the human rights and environmental impacts of corporations,¹³³ continues to discussion on whether existing international instruments impose human rights obligations on corporations,¹³⁴ and ends with the more recent work to develop binding international instruments focused squarely on corporations in their own right.¹³⁵
196. In the last decade, there has also been a minor explosion of academic, civil society, international organisation and government output and engagement in dialogue on these issues at the international level.

¹²⁹ In an address to the World Economic Forum on 31 January 1999, United Nations Secretary-General Kofi Annan invited business leaders to join the Global Compact, described as an international initiative 'that would bring companies together with UN agencies, labour and civil society to support universal environmental and social principles'. The Global Compact's operational phase commenced in July 2000. see generally www.globalcompact.org

¹³⁰ see minutes of Sessional working group on the working methods and activities of transnational corporations of the Sub-Commission on the Protection and Promotion of Human Rights August 1999. E/CN.4/Sub.2/1999/9

¹³¹ For the mandate of the UN Special Representative of the Secretary General on Business and Human Rights, see Office of the High Commission for Human Rights: Human Rights Resolution 2005/69

¹³² for one example of such an industry group see the Business Leaders' Initiative on Human Rights at www.blihr.org

¹³³ see for instance the US/UK Voluntary Principles on Security and Human Rights; UN Code of Conduct for Law Enforcement Officials; Equator Principles, Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises, ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, to name but a few.

¹³⁴ See for instance Engstrom, V. 'Who is Responsible for Corporate Human Rights Violations?' in Abo Akademi University Institute for Human Rights. January 2002. p26

¹³⁵ See generally, work undertaken to develop the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

11.6 Corporate practice is changing, regardless of legal obligations

197. It needs also to be recognised that corporate practice with respect to conduct of operations in accordance with human rights standards has changed dramatically in recent years. Just over a decade ago, the language of 'human rights' and 'sustainable development' was on the fringes of corporate understanding. Now, a number of corporations (generally large publicly listed companies) operating multinationally have sustainable development departments that stand in their own right next to other mainstream operational departments. Internal and external reporting by corporations on sustainable development and human rights is burgeoning. Company policies on the environment, community and human rights are publicly espoused – many including a commitment to operate in accordance with recognised international human rights instruments even though they are not legally obliged to do so.¹³⁶ Tools for measuring human rights impact assessment are being tested and operated.
198. Whether these industry reforms are a consequence of 'enlightened self interest', fear of litigation, fear for corporate reputation or a genuine increase in commitment to human rights values is arguable – but the fact that these reforms are continuing, at what seems like break neck speed, is not. Perhaps it is possible to view litigation, reputational damage or the threat of economic self interest as incentives to compliance with human rights standards, regardless of whether legally enforceable consequences will prevail. The outcome is a powerful one for compliance with human rights standards, if not for the enforcement of rights and obligations. Indeed it has been stated that the most effective way of creating change in the manner in which business is conducted is to create an incentive for a corporation to monitor its own processes and utilise its own internal policing mechanisms.¹³⁷ Where the interests of the members intersect with the interest of human rights compliance, corporate activity will change as of necessity.
199. The role of various organs within a corporation's structure is also evolving. This is demonstrated by the increased tendency for management or directors of a corporation to take into account the interest of all stakeholders, this being a gentle shift away from the sole focus on operating in the interests of only the corporation's shareholders. On the flipside, shareholders, including institutional investors, are increasingly taking proactive steps to change their corporations' activities and impacts with respect to human rights. Shareholder blocs or large scale shareholders are increasingly wielding the threat of withdrawal of funds to pressure corporate management into taking action they consider to be socially responsible. To this end, Annual General Meetings are increasingly used as leverage mechanisms, whereby members play on corporate reputation and shareholder opinion to achieve human rights-friendly action by their corporation. The use or threat of use of derivative actions by shareholders is another example of shareholders taking proactive steps to bring about corporate change.

¹³⁶ See for instance Rio Tinto's 'The Way We Work' at www.riotinto.com; and BP's 'Human Rights Policy' at www.bp.com.

¹³⁷ Clough, J. 'Not-so-innocents abroad: corporate criminal liability for human rights abuses' (2005) 11(1) *Aust Journal of Human Rights Law* 1 at 10.

11.7 Future Trends - Summary

200. In summary, the future trends appear to be:

- claims structured on the basis of direct liability for the actions of subsidiaries overseas;
- increased use of existing statutory, including criminal law, mechanisms;
- increased incentives to corporate compliance through indirect means such as statutory charters of human rights;
- increased attention in the international arena to corporate liability for human rights, including, potentially, the development of international law;
- increased self-regulation by large multinational corporations who are leading industry with respect to compliance; and
- development of corporate awareness, knowledge and tools to assist in the process of self-regulation.

In these circumstances, perhaps the perceived obstacles posed by the corporate form, and apparent lack of redress provided by the corporate veil, will have less significance in years to come.