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SEMINAR 1 INTRODUCTION

1.1 WHAT IS A COMPANY?

1.1.1 HISTORY OF CORPORATE LAW

United Kingdom

- Early boroughs and guilds
- Incorporation by Royal Charter;
 - o regulated companies → purpose was to get King's approval and exclude others
- Incorporation by private act of parliament
 - o statutory companies
- The rise of Joint Stock Companies;
 - o de facto incorporation; i.e. mimicked the benefits of regulated and statutory companies
- In 1711, a war with Spain left the UK 10 million pounds in debt. They needed financing. They went to the South Sea company for help. SS company financed the debt + 6% interest. UK government said that it will give SS company exclusive trading rights with the South Seas (Mexico etc.) and slave trade. SS company issued shares successfully. Share price shot up. However, the boom in the market extended to the joint stock companies. Every company was doing well. SS company complained that joint stock companies are abusing the process of incorporation. Hence, the Bubble Act of 1720 designed to ban joint stock companies.
- *Bubble Act 1720*
 - o Designed to outlaw joint stock companies
- The act was not successful because market plummeted.
- Repeal of Bubble Act in 1825.
- Joint Stock Companies Registration and Regulation Act 1844
 - o Permitted statutory incorporation of joint stock companies as a right
- *Limited Liability Act 1855*
- *Companies Act 1862*

Australia

- Administration of company law complicated by political system
- s 51 (xx) of the Constitution gives the Cth a limited power to make laws with respect to 'foreign corporations and trading or financial corporations formed within the limits of the Cth'
- Power to legislate for the registration of corporations belongs to the State
- 1901-1950: Separate State Acts
- 1961-1963: Uniform Companies Act 1961
- 1978-1991: Co-operative Scheme: Companies Code 1981
- 1989: Corporations Act 1989
 - o Successfully challenged in NSW v Cth (1990)
 - o the Cth has no power over incorporation
- 1990: The Alice Springs Agreement
- 1991: Corporations Law 1991
- 1999-2000: Constitutional challenges to the Corporations Law 1991
 - o R v Hughes (2000)
 - o Re Wakim; ex parte McNally (1999)
- 2000: Inter-Governmental Reference Agreement
- 2001: Corporations Act 2001

1.1.2 THEORIES AND CONCEPTIONS OF THE CORPORATION

- **The Corporation as an Artificial Entity: Concession theory**
 - o The corporation is seen as an artificial entity whose privileges have been granted by the state. Emphasis is on the separate legal status accorded, or conceded, to the corporation by the state
 - o Reflected reality during the Royal Charter period, however now after 1844, there is a general right to incorporate which diminishes the importance of this debate.
 - o However, may be relevant when thinking about the fact that the state plays a primary role in regulating corporations
- **The Corporation as a Group of Individuals: Aggregate/Contractualist Theory**
 - o Corporation= A group, or aggregate, of individuals who operate like a partnership
 - o The corporation is essentially the product of private dealings, aka. corporation is no more than a nexus of contracting relationships between shareholders, managers and other employees, lenders, suppliers and other stakeholders.
 - o Modern adaption: 'Nexus of contracts' theory: Easterbook and Fischel Stakeholder/political theory
 - o The State's role is properly limited to assisting the efficient implementation of those dealings since the contracting parties as rational utilitarian's are entitled to structure their relations as they wish
- **The Corporation as a Real Entity: Corporate Realism**
 - o The corporation is a distinct entity with a 'life of its own'
 - o Noting the emergence of a management hierarchy which was able to monitor and co-ordinate activities of a number of business units more effectively than market mechanisms.
 - o 2 key strategies:
 - Strengthen legal duties imposed upon directors and senior management
 - Requirement of shareholder approval for a wider range of corporate transactions.
 - o E.g. it is appropriate that criminal liability and criminal sanctions should be imposed on the corporation itself, or it is appropriate for corporations to have certain rights
 - o Underpins 'managerialism'
- Trying to address problem with contract theory...**The team production model**
 - o Public corporation is a team of people who enter into a complex agreement to work together for their mutual gain
 - o Suggests that those in the corporate hierarchy (BOD) ultimately work not for the shareholder owners but for the team members such as employees in a manner to keep everyone happy enough that the productive coalition stays together.
- **Communitarian theory**
 - o Concept of multi-fiduciary obligation, i.e. duty owed by corporate managers to all stakeholders in the company and not merely to shareholders.
 - o Precludes management from making short term shareholder gains if doing so would frustrate legitimate non-shareholder expectations. Instead, management should pursue profit-seeking strategies that harmonize shareholder and non-shareholder interest where possible

1.1.4 TYPES OF COMPANIES

A) CLASSIFICATION OF COMPANIES ACCORDING TO MEMBER'S LIABILITY

Proprietary companies	Limited by shares Unlimited with share capital
Public companies	Limited by shares Limited by guarantee Unlimited with share capital No liability company

- Company limited by shares:
 - o s 9: Company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them
- Company limited by guarantee:
 - o Usually for non-profit companies

- s 9: one formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up
- Has no share capital
- Unlimited companies:
 - s 9: A company whose members have no limit placed on their individual liability to contribute to the debts of the company
- No liability companies:
 - s 112 → a company may be registered as no liability only if
 - Has a share capital
 - Company's constitution states that its sole objects are mining purposes and
 - The company has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them
 - i.e. If the directors make a call on the shares, the members can choose whether to pay or not

B) CLASSIFICATION BY CAPITAL RAISING POWER AND SIZE

- A company which is not a proprietary company is a public company (s 9 'public company')

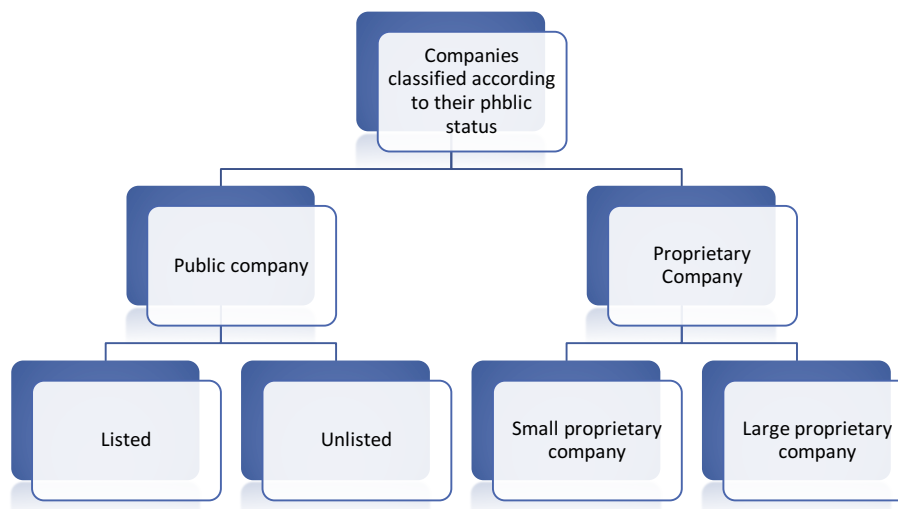
	Proprietary (Pty Ltd)	Public (Ltd)
Shareholders S 45A (1), note 2; s 113	1 shareholder max 50	1 shareholder no max
Members S 114	1 member min	1 member min
Directors S 201 A	1 director (1 resident)	3 directors (2 residents)
Finance S 45 A (1), note 2, s 113	Can't get funds from the public	Can get funds from the public (with disclosure document)
Listing S 45 A (1), note 2, s 113	Can't be listed	Can be listed or unlisted
Type S 45 A (1), note 2, s 113	Limited by shares	Unlimited with shares

Proprietary company/private company

- Privileges attached to private company:
 - can register with a single shareholder and trade with a single director
 - requirement to hold AGM only applies to public companies (s 250 N)
 - All proprietary companies may use the facility of passing shareholder resolutions without holding a meeting (s 249A). A mechanism permits single director decisions to be taken by the recording of a decision to a particular effect which record also counts as minutes of the passing of the solution (s 249 A and 251 A)
 - Stand outside prohibition upon participation by directors in deliberation of the BOD in relation to matters in which they have a material personal interest and upon related party transactions
- Prohibitions:
 - Company must have no more than 50 members excluding employees, and
 - Company must not engage in any activity that would require the lodgment of a prospectus or other disclosure document although the company may offer its shares to existing shareholders and employees
- ASIC may direct proprietary company to change to a public company if satisfied that a company has contravened these prohibitions.
- A proprietary company is a small proprietary company if it satisfies at least 2 of 3 criteria in s 45 A (2):
 - (i) The consolidated gross operating revenue for the financial year of the company and any entities it controls is less than \$ 25 million

- (ii) The value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million
- (iii) the company and any entities it controls have fewer than 50 employees
- A proprietary company is large if it is not small: s 45 A (3)
- Benefits only applicable to small proprietary companies:
 - Companies other than SPC must keep written financial records and prepare financial statements for each financial year. The statements need to be audited and lodged with ASIC so that they are publicly accessible. However, SPC is required to prepare financial statements and send them to members only if: (s 286, s 295)
 - shareholders with at least 5% of votes direct the company to do so (s 293)
 - the company is controlled by a foreign company and is not included in consolidated accounts lodged with ASIC by the foreign company (s 929), OR
 - ASIC directs it to do so (S 294)
 - Financial statements need not be lodged with ASIC so as to be publicly available (s 319 (2))

C) COMPANIES CLASSIFIED BY PUBLIC STATUS



1.1.5 CORPORATE CONSTITUTION AND ORGANS

Corporate Constitution

- Refer to Topic 3
- Note: the company's constitution and any replaceable rules that apply to it have effect as a k between:
 - the company and each member
 - the company and each director and secretary and
 - the members themselves
- under which each person agrees to observe and perform the constitution and rules so far as they apply to the person (s 14)
- Failure to comply with a replaceable rule is not of itself a contravention of the act (s 135 (3)) and the intention is clear that the rules and constitution are on an equal footing in terms of their status and enforceability
- Constitution may include a restriction or prohibition upon the exercise of any of the company's powers, e.g. limit borrowings. However, the exercise of power is not invalid merely because it contravenes the restriction of the prohibition (s 125 (1))
- Company may include objects in its constitution although acts beyond those objects are not thereby invalid (s 125 (2))
- Third parties dealing with companies are protected against limitations upon the powers and authority of the professing agents by assumptions which the Act permits them to make
- Replaceable rules do not apply to a proprietary company while the same person is both its sole shareholder and sole director.

- Such a company has little need for a formal set of rules governing its internal relationships

The Corporate Organs

- Historically, 2 groups of individuals have been recognized as having an authority to act for the corporation: members assembled in GM and its board of directors/governing committee
- 1844 Act imposed a rigid demarcation between membership and management function. i.e. shareholders were prohibited from acting in the ordinary management of the company otherwise than by means of directors.

1.1.6 CORPORATE GROUPS

- Corporate group general meaning: a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control
- 2 competing legal conceptions of the group:
 - as a family of subsidiary companies under a holding company which has majority ownership or voting control of the subsidiary company OR
 - as an economic entity of a parent and its controlled entities under a broader and more generally expressed definition of corporate control
- s9 Definition → '**holding company**' in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary
- s 46 → A body corporate (in this section called the first body) is a **subsidiary** of another body corporate if, and only if,
 - (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) 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 the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
 - (b) the first body is a subsidiary of a subsidiary of the other body
- s 47 → A company controls the composition of the board of a second company if it has the power to appoint or remove all or the majority of the directors of that company even if only with the consent of another person; a company is deemed to have that power if:
 - no person can be appointed to the board of the second company without the exercise by the first company of the power in favor of that person OR
 - the person's appointment as director of the second company follows necessarily from the person being a director of the first
- Later s 259 E control is measured now by reference to a wider and more fluid standard through the capacity to determine the outcome of decisions about the financial and operational policies of the entity, a capacity marked by:
 - the practical influence that the putative controller has rather than the rights it can enforce and
 - any practice or pattern of behaviour affecting those policies
- Accounting definition of control: s 50AA

1.2 ADMINISTRATION OF AUSTRALIAN COMPANIES

- History:
 - Section 51 (xx) of the Constitution empowers the Cth Parliament to make laws with respect to 'foreign corporations, and trading and financial corporations formed within the limits of the Cth'
 - *Huddart, Parker & Co Ltd v Moorehead (1909)* gave a restrictive interpretation of the power. Company law was primarily for the states.
 - There was building pressure for unified law. *Strickland v Rocla Concrete Pipes Ltd (1971)* overruled *Huddart*.
 - Fraser Government wanted to set up a co-operative scheme → *The Corporations Act 1989 (Cth)*. Received assent but was not proclaimed pending the outcome of a constitutional challenge concerning the scope of

Cth's power of general incorporation. Court decided no! (*NSW v Cth (1990)*). They went ahead proclaiming the act without the incorporation section.

- Ultimately, all states agreed to refer powers to enable the Cth Parliament to legislate with respect to corporations, corporate regulation and the regulation of financial products and services. → *Corporation Act 2001* and *Australian Securities and Investments Commission Act 2001* commenced on 15 July 2001.
- Key bodies in Australian Corporate Law
 - Australian Securities and Investments Commission (ASIC)
 - Australian Prudential Regulatory Authority (APRA)
 - Australian Securities Exchange (ASX)
 - Takeovers Panel (The Panel)
 - Australian Accounting Standards Board (AASB)
 - Financial Reporting Council (FRC)

THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

- It is charged with legislative implementation and the routine administration of the *Corporations Act*.
- Assigned goals/
 - maintain performance of companies, and the markets in which their securities trade
 - confidence of their investors
 - administer and enforce the corporations legislation.
- Practical roles:
 - investigate breaches of the national law, take civil enforcement action, initiate criminal prosecutions and exercise some adjudicative power
 - ASIC may apply for a declaration by the Takeovers Panel that an acquisition of shares, which though not unlawful, is nonetheless unacceptable
 - Wide discretionary powers with respect to fundraising, takeovers and financial market regulation.
- ASIC is a body consisting of between 3 and 8 members: ASICA ss 7-9. Members are appointed by the Governor-general on the nomination of the Cth minister and Parliament.
- ASIC remains independent from Cth and is scrutinized by the Parliamentary Joint Committee on Corporations and Financial Services (report to both Houses upon the activities of ASIC)
- ASIC's consumer protection powers in relation to financial services replicate the consumer protection provisions of the Australian Consumer Law. Regulatory tools:
 - disclosure requirements
 - licensing of market intermediaries
 - prevention of market abuse and unfair conduct
 - operation of complaints handling and resolution processes

OTHER BODIES:

- APRA → Responsible for prudential regulation, (i.e. oversight of capacity to honor financial commitments) of the financial sector, (i.e. banks, insurance companies and superannuation funds).
- RBA → monetary policy and stability of the financial system generally
- Australian Competition and Consumer Commission → retains responsibility for competition laws
- Council of Financial Regulators → coordinating body for principal financial regulatory agencies, i.e. RBA, APRA, ASIC and Treasury.
- Satellite bodies of ASIC:
 - Takeover Panel → ASIC Act s 174: declaration that acquisition of shares or certain conducts (made in context of company takeovers) are unacceptable
 - Companies Auditors and Liquidators Disciplinary Board → s 204 CA occupational regulation of those 2 groups of people
 - AASB → make accounting standards, subject to oversight of the Financial Reporting Council
 - Corporations and Markets Advisory Committee → principal source of law reform initiative and advice with respect to the corporations legislation and its administration: s 148

AUSTRALIAN SECURITIES EXCHANGE (ASX)

- ASX operates market for:
 - o corporate securities
 - o debt securities
 - o futures and options markets
 - o warrants
- Companies apply for admission to the Official List and for quotation of their securities.
- ASX specifies prerequisites for admission of a company to the Official List and quotation of its securities, including minimum capital and spread requirements
- ASX enforces its listing rules, particularly those relating to timely disclosure by listed companies of price-sensitive information, its business rules and the prudential risk standards it sets for industry participants such as stockbroking firms
- Advantages of listing and quotation:
 - o makes it easier for companies to raise funds through the new issue facilities of securities markets
 - o listing secures liquidity for corporate securities which enhances the appeal of the security to investors and facilitates raising further funds
 - o listing enables proprietors whose capital has been effectively locked up in illiquid shareholdings to realize the value of their investment through the market for the shares once they are granted quotation
 - o Securities exchange promotes investor confidence through monitoring of trading in securities and reduces transaction costs through its standard-form governance and transaction settlement rules
 - o Admission to the list conveys valuable reputational signal
- Disadvantages:
 - o exposes controllers to the threat of loss of control through takeover if they have used the listing to dispose of a significant portion of their holding
 - o Listing companies also suffer loss of privacy through their continuous exposure to the stock exchange
 - o subject to considerable expense for listing fees, share registry, annual reports
 - o face greater regulation of conduct through higher governance standards and trading restraints (listing rules)

1.3 WHY FORM A COMPANY

- Legal forms for business
 - o Sole trader
 - o Joint venture
 - o Partnership
 - o Company Trust
- Legal forms for charity/non-profit
 - o Unincorporated association
 - exposure to personal liability or the torts of the association
 - o Incorporated association
 - subject to number of obligations, e.g. committee must appoint a public officer who acts as a point of liaison between association and commissioner, must convene GM, etc.
 - limited liability
 - o Company
 - o Trust
- Choosing a Legal form of business
 - o Finance options: companies can raise share capital; obtain debt. Sole traders must provide their own capital or borrow
 - o Cost, formality and continuing obligation for corporations
 - o Taxation
 - double taxation for corporations. However, eliminated by the dividend imputation in 1980's → companies which have paid tax on their profits at company tax rate may pay dividends to shareholders which carry tax credits at this rate

- Control/ownership, i.e. decision making structure
- Perpetual succession
- Limited liability
- Start up and continuing/compliance costs
- Size
- Reputation
- Secrecy
- Transferability of interest

1.4 HOW TO FORM A COMPANY?

INCORPORATION BY REGISTRATION

- From 1 July 1988, incorporation is effected simply by written application by a single person, natural or corporate. Company need to have only one member (S 114) and no constitution.
- s 117 (2): To register a company, a person must lodge an application with ASIC, stating principally:
 - type of company that is proposed to be registered
 - proposed name
 - names and addresses of persons who consent to be members, directors/secretary of the company
 - proposed registered office and place of business
 - details of proposed share capital or guarantee obligation
- If an application is lodged, ASIC may register the company, give it an Australian Company Number (CAN) and issue a certificate of registration (s 118)
- A limited company is required to include 'limited' or 'Ltd' at the end, and a proprietary limited must have 'Proprietary Limited' or Pty Ltd' at the end of its name (S 148 (2))
- s 1274 (7A): certificate of registration is conclusive evidence that
 - (i) all requirements for registration under the Act have been met
 - (ii) the company was registered on the day specified in the certificate
- s 119: a company comes into existence as a body corporate at the beginning of the day on which it is registered.

2. CORPORATE PERSONALITY AND LIMITED LIABILITY

Key points

- ★ Advantages and disadvantages of limited liability
- ★ The relationship between separate corporate personality and limited liability
- ★ Why do we need mechanisms to lift the corporate veil of incorporation?
- ★ Who is exposed when the corporate veil is pierced?
- ★ Traditional common law categories where courts are prepared to lift the corporate veil

2.1 THE DOCTRINE OF CORPORATE PERSONALITY

- Consequence of registration:
 - Registration creates separate legal entity, which facilitates limited liability
- Corporate personality: business corporation is invested with an entity status, a personhood, distinct from that of its members

2.2 CONCEPTS OF SEPARATE CORPORATE PERSONALITY AND LIMITED LIABILITY

LIMITED LIABILITY

- What are the benefits of limited liability which have made it so successful? Justifications
 - o Encouragement investment by those who have no interest in or capacity for management participation.
 - o Shareholders are relieved from burden of monitoring fellow shareholders' capacity to contribute proportionately to company failure → can diversify portfolio
 - o Directors would be willing to take on more responsibility/encourages entrepreneur risk taking as there is limited liability.
 - o Encourages free liquidity of share capital → reduce cost of capital for company AND insinuates an accountability mechanism for management through the threat that poor performance reflected in stock price decline will stimulate acquisition of control by superior party
 - o Permits accumulation of large amounts of capital. Market will look different if there was no limited liability → companies will find it hard to access capital, not many shareholders.
 - o Unfairness in imposing unlimited liability on shareholders where they are not directly responsible for the acts of the corporation
 - o Creditors are better risk bearers than shareholders. Creditors can bargain either for protection (guarantee) or build risk into return demanded.
- What are the downsides of limited liability?
 - o Risk taking is good in moderation. But limited liability may encourage excessive risk taking. Directors feel like they can hide behind corporate personality and not take accountability
 - o Traditional justification for limited liability are absent in close corporations
 - o Traditional justifications for limited liability are absent in subsidiary companies (a more extreme version of the closely held corporation)
 - o Shareholders in close corporations may be personally responsible for corporate acts
 - o Should it be applied to all companies?

SEPARATE CORPORATE PERSONALITY

Salomon v A Salomon & Co Ltd [1897]

- Facts:
 - o Mr S made leather boots and shoes. His sons wanted to become business partners, so he turned the business into a limited company. The company purchased Salomon's business for £39,000, which was an excessive price for its value. His wife and five eldest children became subscribers and two eldest sons also directors (but as nominee for Salomon, making it a one-man business). Mr Salomon took 20,001 of the company's 20,007 shares.
 - o The company also gave Mr Salomon £10,000 in debentures (i.e., Salomon gave the company a £10,000 loan, secured by a floating charge over the assets of the company). On the security of his debentures, Mr Salomon received an advance of £5,000 from Edmund Broderip.
 - o Soon after Mr Salomon incorporated his business, the business failed, defaulting on its interest payments on the debentures (half held by Broderip). Broderip sued to enforce his security in October 1893. The company was put into liquidation. Broderip was repaid his £5,000. This left £1,055 company assets remaining, of which Salomon claimed under his retained debentures. This would leave nothing for the unsecured creditors, of which £7,773 was owing. When the company failed, the company's liquidator contended that the floating charge should not be honoured, and Salomon should be made responsible for the company's debts. Salomon sued.
- Key issues:
 - o Should Mr S's secured debt of 10000 take precedence over unsecured creditors who were owed approximately 11000?
 - Company law prioritizes secured debt in the event of a winding up
 - unsecured creditors would get nothing if Mr S won
- The argument

- 1. The company was a mere agent or alter ego of S and thus S was liable for the company's debts
- 2. The debentures issued to S were invalid on the basis of fraud
- 3. The transfer of the business was said to be based on fraud
- 4. Alternatively, the liquidator claimed 2000 for S's shares on the basis that he had paid nothing for them
- Court of first instance:
 - The liquidator's view was accepted
 - It was held that the creditors should be paid by Mr S
 - The decision as rooted in notions that the company was S's nominee or agent
- Court of appeal:
 - Held that the creditors should be paid by S
 - S had abused the privileges of incorporation and limited liability provided by the Companies Act
 - These should only be enjoyed by independent bona fide shareholders who had a mind and will of their own and were not mere puppets of the individual who carried on his business in the same way as before, when he was a sole trader
- House of Lords:
 - The company at law is a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, ad the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them. Nor are subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act" (Lord Macnaughton)
- **So...the fact that a company, which is properly formed, is totally controlled by one person doesn't establish agency.**
- **GOLDEN RULE: A company exists as a separate legal entity separate to its members and to its directors.**

Lee v Lee's Air Farming Ltd [1961]

- Facts: Catherine Lee's husband Geoffrey Lee formed the company through Christchurch accountants, which worked in Canterbury, New Zealand. Mr Lee held 2999 of 3000 shares, was the sole director and employed as the chief pilot. He was killed in a plane crash. Mrs Lee wished to claim damages of 2,430 pounds under the Workers' Compensation Act 1922 for the death of her husband, and he needed to be a 'worker', or 'any person who has entered into or works under a contract of service... with an employer... whether remunerated by wages, salary or otherwise.' The Court of Appeal of New Zealand said Lee could not be a worker when he was in effect also the employer. North J said[2] "the two offices are clearly incompatible. There would exist no power of control and therefore the relationship of master-servant was not created."
- Issue: A worker was defined as someone who works under a k of service with an employer. Was L employed under a contract of service?
- Finding: CA rejected the widow's claim on the basis that because L was the governing director, who had full control, he could not also be the company's servant
- Appeal: On appeal to privy council, the court decided in favor of the widow, that this is an extension of Saloman in the same way that separate legal entity permits one governing the company and being a secured creditor. **A person can operate in a dual capacity in a company. Company is separate even from controllers.**

2.3 PIERCING THE VEIL OF INCORPORATION

- What is the corporate veil?
 - The corporate veil exists once a company is registered and it separates the company from the people who formed it (and from those who become its members)

Company	VEIL	Members
-Separate Legal Entity with own -Assets -Liabilities -Contracts		-own shares but not a proprietary interest in the company's assets -May also be a creditor, debtor or director of the company

- Why do we need mechanisms to lift the corporate veil?
 - o Legal personality and limited liability can permit the structuring of risky business in such a way as to quarantine liability
 - o What are the contours to the exceptions which allow the court to lift the corporate veil?
 - o Are these exceptions adequate?
- Corporate veil piercing=lightning (rare, unprincipled)
 - o Australian law on veil piercing has been described as being 'devoid of any common unifying principle (*Briggs v James Hardie and Co Pty Ltd (1989)*)

2.3.1 AT COMMON LAW

A) AGENCY

Smith, Stone & Knight Ltd v Birbingham Corp [1939]

- Facts:
 - o SSK, which operate a paper manufacturing business, bought out the partners of a paper distribution business, which it then had incorporated
 - o The paper distribution business remained under the full control of SSK:
 - Directors were appointed by SSK
 - All the profits went straight to SSK (without declaration of a dividend) and
 - all the shares were effectively owned by SSK
 - Subsidiary treated as a division, not a subsidiary
 - o The subsidiary's business was operated on land owned by SSK. The local council (Birbingham Corp) purchased the land to carry out public works. SSK applied for compensation for the cost of relocating the subsidiary's business. Compulsory acquisition laws provided that tenants without a long-term lease were not eligible for compensation. The subsidiary only had a temporary lease.
- Issue: Who was the proper party to sue for compensation: SSK or the subsidiary
- Finding: The degree of control and dominance that the parent company had over the subsidiary established an agency relationship, such that the parent SSK was entitled to compensation for disturbance to the business operated by the subsidiary, i.e. sufficient to establish agency, hence SSK, even though it had no business on the land, it was entitled to compensation.
- 6 questions for determining the existence of agency relationship? All must be answered in the affirmative
 - o Were the profits treated as the profits of the parent?
 - o Were the persons conducting the business appointed by the parent?
 - o Was the parent the head and the brain of the trading venture?
 - o Did the parent govern the adventure, decide what should be done and what capital should be embarked on the venture
 - o Did the parent make the profits by its skill and direction?
 - o Was the parent in effectual and constant control?
- This checklist approach has been highly criticized. *Soloman and Briggs rejected* this test.
 - o *Briggs (current position)* → Mere dominance by parent company over subsidiary is not enough to establish agency because every 100% owned company would satisfy this criteria. This is bad because the parent would be liable for the debt of the subsidiary, which undermines notion of limited liability.
 - o HOL in *Soloman* rejected it.
- Undercapitalization: A further question for determining agency? → Each entity needs to be able to survive by itself

Re FG Films [1953]

- Facts: FG films wanted *Monsoon* registered as a British film. It applied to be declared as the 'maker' under the Cinematograph Films Act 1938-1948. The board of trade refused because it was made by the American' Film

Group Inc'. the American company had promised to finance and provide facilities to the UK company for making the film. 90 shares were held by an American director and 10 by a British one. No shares were held by the 3rd director, who was British. the film was made in India

- Finding: The film could not be considered British made, even though the company owning the rights was a UK company: participation was so small as to be practically negligible, and that they acted...merely as the nominee of and agent for the American company...the suggestion that this American company and that director were merely agents for the applicant is, to my mind, inconsistent with and contradicted by the evidence, and a mere travesty of the facts, as I understand and hold them to be.

B) FRAUD

- The company as an instrument of fraud
 - o the use of a company by its controllers in an attempt to avoid an **existing legal duty** that otherwise falls on the controller personally
 - o Whole purpose of incarnation must be to evade existing legal obligation. **Key is intent!**

Gilford Motor Co Ltd v Horne [1933]

- Facts: Horne had a restrictive covenant in his employment k that prevented him from competing with the business at any time during or after his employment. After Horne's k was terminated by agreement, he set up a company competing against Gilford Motor Co called 'JM Horne & Co Ltd'. The director of JM were Horne's wife and son and an employee of the business, with Horne being the effective manager and controller of the business. G applied to the court for an injunction to enforce restrictive covenant and prevent Horne from competing with G.
- Issue: Could H avoid the restrictive covenant in his k by running his competing business through a company?
- Finding:
 - o Horne's attempt to use the corporation to avoid his legal obligation not to compete with G justified lifting the corporate veil
 - o Lord Justice Romer: The company was formed and was carrying on business merely as cloak or sham for the purpose of enabling H to commit the breach of the covenant that he entered into deliberately with the plaintiffs on the occasion of and as consideration for his employment as managing director.

Jones v Lipman [1963]

- Facts: Lipman entered into a k to sell his house to Mr and Mrs Jones. Lipman subsequently decided that he did not want to proceed with the sale. In an attempt to keep control of the house, he entered into a further k to transfer the property to a new company created for this purpose. Lipman owned and controlled the company. He then sold the house of the company. Lipman wrote to the Jones's solicitors advising that he had sold the property. He admitted that this constituted a breach of k and offered to pay damages. But the Joneses wanted the house.
- Finding: Lipman sought to rely on Salomon, arguing that the company as now owner of the property. the Joneses relied upon Gilford and this was accepted by the court. The court described the company as a device, a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.

C. CORPORATE GROUPS

Fair Work Ombudsman v Ramsey Food Processing Pty Ltd [2011] FCA 1176

- Facts: Ramsey Group of companies was set up for the purposes of running an abattoir. Mr. Stuart R was the guiding mind of the group. Ramsey Food Processing Ltd operated the abattoir. Tempus Holding Pty Ltd supplied staff to Ramsey food under a purported labour-hire arrangement. In 2008, T notified all staff that their employment was terminated and went into voluntary administration. Substantial money was owed to the employees. The Fair Work Ombudsman initiated proceedings against Ramsey Food for the outstanding employee entitlement