

# SEPARATE LEGAL PERSONALITY; LEGAL REALITY AND METAPHOR

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Half the wrong conclusions at which mankind arrive are reached by the abuse of metaphors and by mistaking general resemblance or imagining similarity for real identity.<sup>1</sup>

The trouble with the law does not lie in its use of concepts, nor the use of 'lump concepts', the difficulty lies in part... in the fact that we have often forgotten that the 'lumps' are the creation of our own minds.<sup>2</sup>

In 1897 *Salomon v Salomon & Co Ltd*,<sup>3</sup> a case concerning the legitimacy of limited liability of a single beneficially owned company according to the companies legislation, created<sup>4</sup> the concept of the separate legal personality of a company. This idea, often described as a fundamental principle of Company Law by our judges, exists both as a powerful metaphor and a judicial reality. The interaction of these two aspects has in a sense caused the concept to assume a life of its own as a persuasive metaphor which has dictated the course of law focussed around its fulfilment rather than the specific regulative aims of the law in each discrete area. The principle's application in so many different situations each with utterly different consequences, indicate a sense in which the courts have often merely mapped out the logical consequences of 'separate legal personality' with inadequate examinations as to its specific ramifications.

Cases where the courts in Australia have not treated the company as a separate legal entity have taken place in the framework of a reluctant departure from the orthodoxy in *Salomon's* case in exceptional circumstances. This 'piercing the veil' jurisprudence has provided an

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1 Guedella PG, *Palmerston* (1927) at 226.

2 Fuller, L, *Legal fictions* Stanford University Press, Stanford, (1967) at 138.

3 [1897] AC 22 HL.

4 Although it has been said that the corporate veil is 'statutorily drawn' (Lord Diplock in *Dimbleby & Sons v National Union of Journalists* [1984] 1 WLR 427 at 435) the Act was inconclusive. As Farrar writes, 'the early Companies legislation merely referred to the subscribers forming themselves into an incorporated company and did not spell out the consequences in any detail.' (Farrar JH, *Company Law*, 3rd ed, Butterworths, London (1991) at 70.)

inadequate framework for the evaluation of the complex question of the legitimate use of the corporate form due to the basic axis of the metaphor around which it is focussed. It has thus produced the impression of random or unprincipled results. Such a process needs to take place contextually and (if necessary) adopt a conception of the company which best fulfils regulatory objectives in that area. The concept of the company as a separate legal person, a metaphor of limited use like all legal fictions, can only be justified by and assessed to the extent that it serves the law's social and economic aims.<sup>5</sup> The pervasive influence of the concept, the effect of its contextual application, and the way in which it represents the 'reality' through which the common law accesses the complex nature of the corporation, all point to the need for its re-examination.

### Separate legal personality

The concept of the corporation as a separate legal personality is, as Farrar describes 'essentially a metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person'.<sup>7</sup> While obviously a fiction, the choice of metaphor or analogy is not entirely arbitrary and must respond to organisational realities of the corporation as well as conforming with and making intelligible the treatment of organisations as legal actors.<sup>8</sup> In this sense the conception of a corporation is both analytical and ideological, descriptive and prescriptive. It is not enough to dismiss the debate over the nature of corporate personality as Dewey did in 1920 by emphasising that corporate rights and liabilities were the product of the law and that the legal implications or meanings of the corporation was 'whatever the law makes it mean'.<sup>9</sup> The problem, as Blumberg points out, is far more complex: 'in the law concepts have a life of their own because of

5 Contrast this with the 'realist' theory of the corporation of which Gierke is the principal exponent. The realist theory asserts that juristic persons enjoy a real existence as a group and that a group tends to become a unit or 'organism' and functions as such. An important aspect of this theory is its rejection of 'concession' theory, whose main feature is that it regards the dignity of being a juristic person as having to be conceded by the state. According to the realists this quality exists as reality without such concession. For our purposes it is important to note that the effect of the separate entity doctrine cannot be simply placed within the debate of the legitimacy of state intervention as it has been used to both justify and repel the courts' intervention. See Dias RWM, *Jurisprudence*, 5th ed Butterworths London, (1985) at 264-9.

6 As early as 1927 Bijur J wrote that 'the law in dealing with a corporation has no need of defining it as a person or as an entity, or even as an embodiment of functions, rights and duties, but may treat it as a name for a useful and usual collection of jural relations each one of which must in every instance be ascertained, analysed and assigned to its appropriate place according to the circumstances of the particular case, having due regard to the purposes to be achieved' in *Farmers Loan & Trust Co v Pierson*, 130 Misc 110, 119, 222 NYS 532, 543-4 (Sup Ct 1927).

7 Above n 4 at 72.

8 Dan-Cohen M, *Rights, Persons and Organisations: A Legal Theory For Bureaucratic Society*, University of California Press, Berkeley, (1987) at 44.

9 Dewey, 'The Historical Background of Corporate Legal Personality' 35 *Yale Law Journal* (1926) 655 at 656.

their ability *ex ante* to influence the thinking of judges and *ex post* to be invoked by judges to justify their conclusions'.<sup>10</sup> The use of particular language thus has its own cultural force.

The law's conception that the 'company is at law a different person'<sup>11</sup> in some ways seems proper and satisfying, as Dan-Cohen writes, 'it at once provides a unifying familiar image of the organisation and expresses those features in virtue of which treating the organisation as a legal actor makes sense'.<sup>12</sup> The corporation as a complex organisation requiring regulation in many different situations presents a special problem as Dan-Cohen writes:

The cognitive need for 'epistemic access' through a unifying metaphor is felt most urgently with respect to organisations because of their 'ontological elusiveness': hovering between the abstract and the concrete, they evade our grasp by constantly invoking the opposing fears of reductionism and reification.<sup>13</sup>

The metaphor of personality is useful in conceptually facilitating and describing many of the corporation's traditional and modern corporate attributes.<sup>14</sup> Placing these attributes under the head of separate legal personality selects for attention 'a few salient features from what would otherwise be an overwhelmingly complex reality'.<sup>15</sup> The point of the metaphor is however to describe and not to dictate the reality of the corporation.

The metaphor was used in *Salomon* to express the fact that Salomon's incorporation was legitimate according to legislation and therefore he should be allowed to benefit from limited liability. The creation of the separate legal person analogy/metaphor was useful in particular to assert this point against the first instance judge and court of appeal who held respectively that the company was Salomon's agent and that Salomon was trustee for the company.<sup>16</sup> The language used however, does not add anything to our understanding of the real issues involved and in particular, the analogy with, or metaphor of, person creates some problems which exhibit the typical dangers of metaphorical thinking as Dan-Cohen writes:

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- 10 Blumberg P, 'The Corporate Entity in an Era of Multi-National Corporations,' 15 *Delaware Journal of Corporate Law* at 324.
- 11 Lord MacNaughten in *Salomon* at 51.
- 12 Above n 6 at 44
- 13 Ibid at 43.
- 14 There are six attributes as described by Farrar: perpetual succession, ability to own property, ability to be sued and sue in its own name, ability to create a floating charge, limited liability, and compliance with the formalities of the Companies Act above n 4 at 81-2.
- 15 Schon D, 'Generative Metaphor: A Perspective on Problem Setting in Social Problem Solving' in Ortony (ed), *Metaphor and Thought*, Cambridge, (1979) at 254-283, 264-5.
- 16 Per Vaughan Williams J [1895] 2 Ch at 323, and Lindley LJ at 336.

By inducing misplaced analogies between individuals and organisations, the metaphor of person easily leads to anthropomorphism: the attribution to organisations of traits and the adoption toward them of attitudes that properly pertain to individuals only.<sup>17</sup>

The conception of the company as a person in particular has contributed towards two tendencies: firstly the tendency to treat the normative status of corporations with similar considerations that ground and determine the legal rights of individual human beings,<sup>18</sup> and secondly, the diversion of judicial attention from the distinctive features of organisations (many of which obviously do not correspond to the idea of 'person') and from the normative implications of these features.<sup>19</sup>

Probably the most important aspect of these tendencies is the law's general focus of the corporation as a legal entity which in itself commands a measure of inviolability, rather than as a thematically random collection of state granted rights and attributes or as a 'means to achieve an economic purpose'.<sup>20</sup> The traditional reluctance of the courts to 'pierce' the 'veil' in whatever situation despite its wildly different consequences seem to imply that there is some worth or integrity within the principle independent of its regulatory function. Similarly the idea of the principle as a 'whole' and its application in totally conceptually different situations only makes sense if describing an organic 'person-like' attribute or a reality of the corporation which requires protection. When viewed simply as a metaphor however, it becomes clear that there is no reason to uphold *Salomon* beyond the extent that the concept merely indicates certain positive rights and attributes of the corporation as a body created by, or under, legislation and to facilitate their comprehension - or that the purpose of the incorporation would be served by its application.

These ideas can be found throughout the whole legal discourse on corporations, for example, many writers write of limited liability as not being 'a logically necessary attribute of a legal personality'.<sup>21</sup> There are to this extent however, no logical necessary attributes of legal personality, there are only perhaps necessary properties for their efficient operation. The so-called logical consistency is merely the consistency of appropriate metaphorical usage. The logical fulfilment of the separate legal entity metaphor is precisely the danger we are describing. As Dan-Cohen writes, 'metaphors do not contain a self-limiting or guiding principle...consequently [they] can easily lead us astray by inducing false analogies'.<sup>22</sup> There is a sense in which

17 Above n 6 at 44.

18 Ibid at 200. (See also Blumberg's analysis of corporations' constitutional 'rights' in America, above n 10 at 338-345.)

19 This is the central feature of Dan-Cohen's essay.

20 Above n 10 at 296. See also Whincup M, 'Inequitable Incorporation - The Abuse of a privilege' (1981) 2 *The Company Lawyer* 155.

21 For example see above n 4 at 81.

22 Above n 6 at 42.

'personality' seems to create this need for consistency. It is important to stress however that nothing is being violated when the courts 'pierce' the veil. For example, the desirable aspects of the concept of limited liability are still preserved despite the fact that directors are personally liable in Australia for insolvent trading under section 588G of the Corporations Law. Similarly, *there is no connection between all the necessary and positive aspects of the concept of the company as a separate legal personality and the situations in which the veil is pierced*. It is only really the power of the metaphor which demands this almost organic consistency. Bryant Smith makes this point clearly:

It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes... is to make of... corporate personality... a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiring into their merits. Issues do not properly turn on a name.<sup>23</sup>

### The courts' treatment of separate legal personality

The doctrine of 'piercing the veil' has been the primary method through which the courts have mitigated the strenuous demands of the logical fulfilment of the separate legal personality concept. The problems with finding some thread of principle through all the decisions basically stem from the false unity of the cases which, while involving vastly different underlying issues, are still linked under the metaphor of the 'veil'. As Blumberg writes 'the conceptual standards of entity law are frequently regarded as universal principles and applied indiscriminately across the entire range of the law'.<sup>24</sup> In this way while it is possible, as some writers have done, to analytically organise the cases in this area in various ways, what is needed is a more diagnostic approach which examines *why* rather than how the area is a problem. The point is not to simply rationalise the disparate cases under some principle, but to point to their essential dissimilarity and criticise the framework around which they are organised. The function of much of the courts' work in this area is to delineate the legitimate uses of the corporate form. It is obvious that the existing framework, organised as it is around reluctant departure from the demands of a metaphor, is inadequate for the proper articulation of such varied and complex questions.

23 Smith, 'Legal Personality,' 37 *Yale Law Journal* 283, 298.

24 Above n 10 at 328, see also Hamilton, 'The Corporate Entity,' (1971) 49 *Texas Law Review* 979, 985, where he describes the failure of the courts to distinguish contracts from torts cases as 'astonishing'. The 'categories' approach with its thematic categories broaching many areas of law can be similarly criticised for these tendencies. See, however, *Briggs v James Hardie & Co Pty Ltd* (1989) 7 *ACLR* 84, where Rogers AJA suggested that different considerations should apply in deciding whether to lift the corporate veil in actions in tort from the criteria applied to actions in contract, taxation, or compensation cases.

The primary weakness of most attempts to rationalise the cases in this area is their tacit acceptance and reliance on the veil metaphor. A more obvious example of this can be seen in an article by Ottolenghi whose self appointed task is to propose suggestions for some inroads into this jungle of judgments. Ottolenghi commences his analysis with the popular warning of Cardozo J that 'metaphors in law are to be narrowly watched, for starting as devices to liberate thought they end often by enslaving it.'<sup>25</sup> However, his analysis is divided and organised around four categories: 'peeping behind the veil', 'penetrating the veil', 'extending the veil', and 'ignoring the veil'. Each of these categories he argues 'has its own appropriate set of considerations and justifications.'<sup>26</sup> Such an approach is flawed in its reliance for a legal principled analysis on the concept of the 'veil'. While obviously compromised by the fact that it is 'result-driven' its assertion that there are considerations appropriate to categories referable to the 'veil' allies itself to perpetuating the very source of confusion in this area. Any framework that would align *Lee v Lee's Air Farming Ltd*<sup>27</sup> (a case about whether the director of a single member family business could legally be allowed to employ himself for the purposes of workers compensation) and *Walker v Wimborne*<sup>28</sup> (a case on directors' duties within corporate groups) on the basis of their similar treatment of the corporate veil can only blur any understanding of the area.

The 'categories analysis' adopted by most writers identifying particular legal categories which have been used to justify piercing the corporate veil<sup>29</sup> has similarly been criticised for being 'result oriented' and 'rarely assist[ing] as a guide to predicting when and under what conditions another court will be prepared to lift the veil'.<sup>30</sup> More importantly as a basis for legal principles it has been criticised for

mechanistically particularising certain types of wrongful conduct without dealing with the fundamental issues of shaping the doctrine of the corporate entity to serve the underlying objective of the law in the particular area and context in which the case arises.<sup>31</sup>

25 *Berkeley v Third Avenue Ry* 224 NY 84 at 94. Ottolenghi, 'From Peeping Behind the Veil to Ignoring it Completely,' (1990) 53 *Modern Law Review* at 338.

26 *Ibid* at 340 and 353.

27 [1961] AC 12.

28 (1976) 137 CLR 1.

29 This approach has been adopted by Gower, *Modern Company Law* 4th Edition (1979), Ford H, *Principles of Company Law* 4th Edition, (1986) and also by Farrar above n 4 who describes the difficulties with this approach and problems with them as a basis for legal principle in the area. His analytical categories are broadly based: agency, fraud, group enterprises, trusts, tort, equity, tax, companies legislation, and other legislation. As a rule as Beck writes (below n 33) the courts have not bound themselves to any list of categories. Although see *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 11 ACLR 108 for a notable exception.

30 Sargent N, 'Corporate Groups and the Corporate Veil in Canada: A Penetrating look at Parent Subsidiary Relations in the Modern Corporate Enterprise' (1988) *Manitoba Law Journal* 136 at 156.

31 Above n 10 at 262.

Both of these shortcomings could be partially explained by the fact that there is some indication that it is judicial policy and practice to 'not let interposition of corporate entity or action prevent a judgment otherwise required.'<sup>32</sup> There was a series of articles written in the wake of the Louisiana Supreme Court's remarks in *Glazer v Commissioner on Ethics for Public Employees* which argued that the test for piercing could be described within a 'principles approach'<sup>33</sup> or 'balancing test'<sup>34</sup> that in determining whether to pierce the veil the courts in effect (as Beck writes) 'balance the policies behind recognition of a separate corporate existence against the policies justifying piercing.'<sup>35</sup> In the light of what we have examined, such an approach is obviously commendable, notable also in the court's conclusion that recognising separate corporate entity in this case would 'further none of its proper functions and objectives.'<sup>36</sup> Despite its obvious value as a model there are however problems with Beck's argument that the *Glazer* test provides a 'key' in outlining a basis for unifying the decisions of the courts in the British and Commonwealth jurisdictions. For example, (despite his assertion that some 'wrong' decisions and the fact that the courts have been quicker to recognise these policy issues in some areas than others), it appears that the whole subject can be viewed in this light.<sup>37</sup> In using a rather revolutionary judgment from the far more progressive American jurisdiction<sup>38</sup> unproblematically as a basis for describing the decisions of the Commonwealth courts his analysis is distorted both in its readings of past cases and in its ability to lay down the groundwork for future law. There is no attempt to diagnose or evaluate the problems in the area and most importantly to come to terms with the primary conceptual obstructions to the implementation of his idealised analysis and solutions.

An expansion of this criticism of Beck's analysis can be directed to the essential limitations of piercing the veil jurisprudence in general both as a conceptual barrier to many of the positive approaches which Beck outlines, but also more importantly as an improper forum for the evaluation of the legitimate functions of the corporation for which it has been made responsible. Gallagher and Zeigler in a comprehensive analysis of the piercing the veil cases in Australia, Britain and America argue that all the categories traditionally proposed for lifting the veil 'can be subsumed into

32 Stone J, in *Re Clarke's Will* 204 Minn 574 at 578 (1939).

33 Beck A, 'The Two Sides of the Corporate Veil' in Farrar (ed) *Contemporary Issues in Company Law* (1987), 71 at 75.

34 Carteaux, (1984) 58 *Tulane Law Review* 1089. See also Demanski A, 'Piercing the Corporate Veil - A New Direction' (1986) 103 *South African Law Journal* 224.

35 Above n 33 at 91.

36 *Ibid* at 89.

37 *Ibid* at 91.

38 Whincup M, above n 20 cites *US Milwaukee v Refrigerator Transit Company* 142 Fed 247 (1905) as a 'broad statement of principled law which signalled a great divide between English and American law... accepting the theory as one of commercial convenience and no more.' See Blumberg above n 10 for a general criticism of this assertion. Also see below n 40.

one category viz the prevention of injustice.'<sup>39</sup> Such a policy, while providing relief from abuses of the separate entity concept is limited as a regulative regime due to its general prejudice towards the concept in the absence of 'injustice.'<sup>40</sup> While injustice is obviously an important objective of the law it is not its sole criteria. The limitations of the concept of separate legal personality and the framework within which its excesses are occasionally regulated are inadequate to properly assess without prejudice the issues integral to the creation of good law which, to adopt a useful definition,

should be primarily concerned with the interests and values represented by the parties in the particular controversy and should evaluate whether one approach or the other will more effectively implement the underlying objectives in the particular area in question.<sup>41</sup>

The law, as it is now, tied to the logical fulfilment of the separate personality metaphor despite its varying consequences except in 'exceptional' circumstances, is not able adequately to fulfil this function.

### **An illustration of conceptual problems: group enterprises**

The weaknesses of the law's commitment to the application of the separate entity metaphor in situations removed from its genesis and justification, and of 'piercing the veil' jurisprudence as a regulative framework are well illustrated by the law's current treatment of corporate groups. The doctrine of lifting the veil in exceptional circumstances as Blumberg outlines first emerged in cases of controlled corporations and controlling individual shareholders. It 'subsequently was lifted bodily and applied to cases involving corporate groups as well without any awareness that very different social and economic problems were involved.'<sup>42</sup> As he writes in another article 'limited liability for corporate groups, one of the most important legal rules in

39 Gallagher and Zeigler, 'Lifting the Corporate Veil in the Pursuit of Justice' (1990) *Journal of Business Law* 292 at 292.

40 These criticisms similarly apply to America where as Gallagher and Zeigler write at 307 'it has been decided that the corporate form will be disregarded whenever its recognition extends the principle of incorporation beyond its legitimate purpose'. In *Krevo Industrial Supply Company v National Distillery & Chemical Corporation* 483 F2d 1098 (1973) the purpose was considered legitimate provided it does not produce 'injustices or inequitable consequences' (at 1106).

41 Blumberg PI, 'Limited Liability in Corporate Groups' (1986) *Journal of Corporation Law* 573.

42 Blumberg, 'The Corporate Entity' above n 10 at 321. For example, he explains that in a single corporation the insulation of the shareholder as investor from liability of the enterprise was accomplished by limited liability for the investor. In corporate groups the extension of limited liability was not necessary to achieve this result. The parent's shareholders already benefited from limited liability and insulation created another layer of protection. 'The courts, dazzled by the concept of the corporation as a separate entity, the same rule was applied apparently unthinkingly and automatically to the parent corporation, achieving a different unanticipated end'. Blumberg *ibid* at 607.



economic society appears to have emerged as an historical accident.<sup>43</sup> Sargent similarly argues that the traditional corporate entity doctrine provides an inadequate model for dealing with many of the jurisprudential issues imposed by the creation of complex corporate groups which are often 'conceptually different from the problems which tend to arise within a single independent corporate entity.'<sup>44</sup> As Hadden writes in a recent review of the Australian Corporations Law, the law, focussed almost exclusively on the individual company, is becoming increasingly difficult to apply in practice.

The traditional rules or the duties of the directors and officers of individual companies make little sense within corporate groups. There are no clear rules on the liability of the group for the obligations of its constituent companies. And [sic] there is virtually no legal control at all on the complexity of the group structures which may be established with a view to concealing the true state of affairs within a corporate group.<sup>45</sup>

While it is clear that there is a need for substantial reform in this area, it must be said that the solutions are not to be found in merely 'disregarding the veil' in certain situations. As Blumberg writes:

... to establish a more satisfactory level of social control over... groups and their constituent companies, enterprise law would have to reach the normal, not the exceptional, aspects of... conduct. It would have to rest on the economic reality of the integrated operations of the constituents of the controlled group without regard to the existence of particular occasions of 'inequitable' or other 'morally culpable' conduct.<sup>46</sup>

The courts' treatment of corporate groups in Australia, while making sense in an ad hoc or contextual way, underlines far more substantial problems. For example in *Walker v Winborne*<sup>47</sup> Mason J rejected the argument that where companies are associated in groups, directors could disregard their duties to the individual companies in the group provided that the action was for the benefit of the whole. He based his reasoning on the fact that

the creditor of a company whether it be a member of a group of companies in the accepted sense of that term or not must look to that company for payment. His interest may be prejudiced by the movements of funds between companies in the event that they will become insolvent.<sup>48</sup>

43 Ibid at 605.

44 Above n 30 at 157.

45 Hadden T, 'The Regulation of Corporate Groups in Australia' (1992) 15 *University of NSW Law Journal* 61-3.

46 Above n 10 at 363.

47 Above n 28.

48 Quoted in Lipton P and Herzberg A, *Understanding Company Law* (4th ed), Law Book Company (1991) 26.

Similarly, in *Quintex Australia Finance Ltd. v Schroders Australia Ltd.*,<sup>49</sup> Rogers CJ held (despite his calls for reform) that creditors must look to the specific company within a group with whom they made a contract for its enforcement despite the practice of the companies acting as a group for business purposes.

From a certain perspective both of these decisions make some sense. It seems clear that creditors' rights must be protected on one hand and that contractors should correctly identify the party with whom a contract was concluded.<sup>50</sup> Both of these decisions are thus in harmony in the context of the law's treatment of corporations as separate legal entities but are, as such, also limited in their approach. This approach is summed up by Fridman who, in his article on the *Quintex Case*, disapproving of Rodgers CJ's calls for parliamentary reform into the 'distinction between the law and commercial practice'<sup>51</sup> in this area argued that 'the problem [of] identifying which member of a corporate group should be responsible for a given obligation should not be resolved by destroying the notion of the corporate personality that has been enshrined in the law since *Salomon v Salomon*.'<sup>52</sup> Hampered by commitment to *Salomon's* for its own sake, and a tendency to view group problems through the lens of the separate entity principle, the Australian law's current approach to group entities fails to correspond to the actuality of group organisations and thus the implementation of agreed regulatory objectives. In both these cases, by applying solutions appropriate to the separate entity paradigm, the courts failed to deal adequately with the important and central issues which both cases present. The reality and problems of corporate groups and the need for different conceptual corporate paradigms to regulate them adequately were not addressed in either case. The law's commitment to 'single entity' solutions in these cases was geared more towards rationalising the situations with *Salomon* in mind rather than effectively implementing the policies and objectives of the law in the area. The fact is realities and issues entirely different from those which gave rise to the traditional company law are involved. The fiction of *Salomon* and the limitations of the analogy of corporations with 'persons' (or even entities) with their specific and unique purpose and reality is perhaps most starkly revealed where it reacts with corporate groups.

## Conclusions

The English Cork Committee proposal of a more comprehensive review of groups by a committee charged with reform of company law in general would necessitate, as Farrar writes:

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49 [1991] 3 ACLC 109.

50 This is argued persuasively by Saul Fridman in 'Removal of the Corporate Veil: Suggestions for Law Reform in *Quintex Australia Finance Ltd v Schroders Australia Ltd*' [1991] *Australian Business Law Review* 211.

51 Above n 49 at 269.

52 Fridman above n 50 at 215.

[going] back to basics and to ask what are the underlying economic purposes of limited liability and to what extent do they require the doctrine to apply to groups of companies. Also, what restrictions on control and group behaviour are justified in the interests of minority and general creditors.

These are exactly the type of specific contextual questions that the courts and legislature must ask in every situation in which the separate legal entity concept is now unthinkingly applied.<sup>53</sup>

The meaning of the concept of separate legal personality is a comprehensible depiction of reality. It makes sense in some ways to talk about the corporation in this way. However it should not be used beyond merely *describing* aspects of the corporation which are useful and deemed appropriate for legal, economic or social reasons. In particular the concept is a useful way of describing a number of these aspects (for example: limited liability, perpetual succession, the ability to sue and be sued etc). These rights, however, can be conceptually understood independently and do not 'logically' or necessarily constitute 'separate legal personality'. As Thomas Ross writes 'we cannot translate our metaphors because the particular reality seen through the metaphor is a new reality.'<sup>54</sup> This 'new reality' is the reality of much of the current law's treatment of the corporation in Australia. It is the product of deciding law according to the conception of the corporation as a separate legal personality a practice which creates unexamined and unexpected consequences made meaningful only by reference to the original metaphor. There is, however, no need to use separate legal personality to create law beyond the concept's specific utility. As stated above, there is no connection between all the necessary and positive aspects of viewing the corporation as a separate legal personality and the situations in which the 'veil is pierced'. The corporation is not a person nor (as our analysis of group enterprises showed) is it necessarily most usefully seen as an 'entity'. Once we realise that any single conception of the corporation necessarily represents merely an aspect rather than *the* reality of the corporation, we realise that our conception involves a choice, and it follows therefore that we are responsible for that choice and in this way become concerned with its efficiency and effects. Cases where questions of the legitimate uses of the corporation are brought into question (ie those cases where piercing the veil is at issue) are better solved through an analysis of the particular issue or function of the corporation which is at stake. These cases should not be analytically characterised within the framework of the issue of whether the court should or should not pierce the veil but rather in terms of the objective of the law in the particular area and context within which the case arises.

While an appreciation of the limitations of the concept of separate legal personality as it is currently applied in our law through an analysis of its origins, utility, effects and functions serve to place the metaphor in

53 Farrar above n 4 at 545.

54 Ross T, 'Metaphor and Paradox' 23 *Georgia Law Review* 1053 at 1072.

perspective, it obviously does not properly address the problem of realistic practical reform. It does, however, serve as a starting point for any 'unified approach' on the many issues raised by the law in this area. For, as we have seen, the problems lie deeper than even the more 'flexible approach' taken by the American courts. The primary question of the law's commitment to the axis of separate legal entity increasingly becoming a self-fulfilling fiction remains. 'The corporation' as Bijur J wrote 'is more nearly a method than a thing'<sup>35</sup>, an idea which should serve as a warning to those who would shift the focus of the law's treatment as catering to any static conception of the corporation rather than responding to complex new realities and situations.