

A right to privacy for corporations? *Lenah* in an international context

[Published in *Privacy Law & Policy Reporter*, 2001, volume 8, pp 130–134]

Lee A Bygrave

Arguably the most challenging issue broached by the High Court in *ABC v Lenah Game Meats Pty Ltd*¹ is whether, under Australian law, a corporation may enjoy a right to privacy as such. The issue is challenging because, at a high level of abstraction, it concerns the extent to which corporate (and, to some extent, collective) entities may be integrated into a legal system with a conceptual apparatus based primarily on the needs and interests of individual, natural/physical persons (hereinafter termed simply ‘individuals’). The manner of that integration process has been frequently vexing. The legal boundary lines marking out the extent to which corporations are accorded the rights of individuals appear often to have been set down in a rather haphazard, arbitrary way. This is largely due to the propensity of many law makers to decide whether or not to give corporations certain rights without providing detailed reasons for their decisions.

Perhaps the most famous case in point is the judgment of the US Supreme Court in *Santa Clara Co v Southern Pacific Railroad*² which decided for the first time that corporations are ‘persons’ under the US Constitution and therefore entitled to the benefits of the equal protection clause therein. In a terse judgment, Chief Justice Morrison Waite stated:

‘The Court does not want to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person ... the equal protection of the laws, applies to ... corporations. We are all of the opinion that it does’.³

Fortunately, in its decision in the *Lenah Game Meats* case, the High Court approached the issue of a putative right to privacy for corporations in a considerably less summary manner.⁴ The Court’s treatment of the issue, though, was still quite superficial. This superficiality is partly due to the fact that three of the judges (Gleeson CJ, Kirby and Callinan JJ) found it unnecessary to conclusively resolve the issue for the purposes of determining the respondent’s claim to interlocutory relief. Thus, their analysis of corporate claims to a right to privacy took the form of relatively short and tentative *obiter dicta*. Yet even the rulings of the other judges failed to take express account of several factors that ought to have a bearing on determination of the issue. These factors are described further below.

The majority of the judges were sceptical of the argument put by the respondent that the company had a cause of action for invasion of its privacy. This scepticism was most strongly expressed in the joint judgment of Gummow and Hayne JJ which also Gaudron J embraced. While the three judges were careful to point out that the decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*⁵ did not preclude subsequent recognition of a tort for

¹ (2001) 185 ALR 1.

² 118 US 394 (1886).

³ *Ibid*, 396.

⁴ The issue was not broached in the litigation of the case preceding the appeal to the High Court.

⁵ (1937) 58 CLR 479.

unjustified invasion of privacy under Australian law,⁶ they were unable to find any solid legal authority in Australia suggesting that a corporation in itself may bring an action based on such a tort. They were also unable to find any clear support for the proposition that a corporation may enjoy a right to privacy as such in other major common law jurisdictions (though they did not specifically canvass the relevant ‘state of play’ in public international law nor in other major jurisdictions).

In terms of Australian authority, the three judges intimated that the very fact that the decision in *Victoria Park* concerned a corporation seeking protection for the alleged ‘privacy’ of its business operations, weakened the argument that Lenah had a valid cause of action based on invasion of its privacy.⁷ The protection sought by the plaintiff in the *Victoria Park* case, the judges pointed out, was essentially of a commercial character; the plaintiff’s sensitivity was ‘pocket book’ sensitivity.⁸ Lenah’s sensitivity in the present case was regarded similarly.⁹

The three judges further held that such sensitivity is peripheral to the proper concern of privacy claims. In their view, as a ‘*persona ficta* created by law’, a corporation necessarily ‘lacks the sensibilities, offence and injury to which provide a staple for any developing law of privacy’.¹⁰ Moreover, a corporation ‘does not want privacy for its own sake’, only as ‘an intermediate good’.¹¹

The three judges rounded off their treatment of the issue with remarks about the way in which the common law in Australia will and ought to develop with respect to corporate privacy claims. That development, in their view, ‘should not depart from the course which has been worked out over a century in the United States’¹² – a course portrayed by the judges as refusing a corporation a cause of action in tort for breach of its privacy.¹³ To do otherwise, they wrote, would conflict with the High Court’s laudable scepticism of attempts to develop generalised causes of action revolving around broad, nebulous concepts.¹⁴ Concomitantly, they concluded, ‘[w]hatever development may take place’ in connection with an emergent tort of invasion of privacy ‘will be to the benefit of natural, not artificial persons’.¹⁵

As noted above, the other judges refrained from conclusively determining whether or not a corporation may enjoy a right to privacy. Gleeson CJ broached the issue by stating that corporations can have ‘private’ spheres of activity.¹⁶ He intimated that some such spheres are as equally worthy of protection as the private activities of individuals. He also cited UK legislation – the *Broadcasting Act 1996* – allowing corporations to complain of unwarranted interference with their privacy by broadcasters. Nevertheless, he regarded privacy rights as

⁶ Judgment of Gummow and Hayne JJ (Gaudron J concurring), paras 107–108.

⁷ *Ibid*, para 111.

⁸ *Ibid*, para 108 (quoting with approval remarks by WL Morison in his *Report on the Law of Privacy to the Standing Committee of Commonwealth and State Attorneys-General*, Report No 170/1973 (1974), para 12).

⁹ *Ibid*, para 126.

¹⁰ *Ibid*, para 126.

¹¹ *Ibid*, para 128 (quoting with approval remarks of D’Amato in ‘Comment: Professor Posner’s Lecture on Privacy (1978) 12 *Georgia Law Review*, 497, 499–500.)

¹² *Ibid*, para 129.

¹³ See further *ibid*, paras 120–128.

¹⁴ *Ibid*, para 130 (referring with approval to the reasoning of the Court in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, which refused to recognise existence of a general tort of unfair competition in Australian law).

¹⁵ *Ibid*, para 132.

¹⁶ Judgment of Gleeson CJ, para 43.

founded on concern for human dignity and, in light of this foundation, stated that it ‘may be incongruous’ to apply such rights to a corporation.¹⁷

Kirby J noted the existence of doubt about whether corporations are apt to enjoy any privacy rights under common law.¹⁸ He further noted that the right to privacy pursuant to Art 17 of the 1966 International Covenant on Civil and Political Rights (ICCPR) ‘does not appear to apply to a corporation or agency of government’ – a view he found reinforced by the line of development of the right to privacy in the USA.¹⁹ Additionally, in his opinion, ‘[i]t appears artificial to describe the affront to the respondent as an invasion of its privacy’; the real affront, he wrote, is the unconscionable and unimpeded use of a videotape procured by improper means.²⁰

The least sceptical of corporate claims to privacy was Callinan J who envisaged that

‘in some circumstances, despite its existence as a non-natural statutory creature, a corporation might be able to enjoy the same or similar rights to privacy as a natural person, not inconsistent with its accountability, and obligations of disclosure, reporting and otherwise’.²¹

Indeed, Callinan J went so far as to envisage the possibility of a government agency enjoying a right to privacy.²² He did not, though, pursue the issue of corporate privacy any further.

Much of the judges’ treatment of the issue in question is sensible. With respect, however, their analysis falls short of doing complete justice to the complexities of the matter. The judges tend to underplay the range of interests served by privacy, plus the diverse nature of corporate entities. They additionally tend to underplay the dynamic and open-ended nature of legal development, particularly in other jurisdictions and in public international law. These weaknesses pertain primarily to the judgment of Gummow, Hayne and Gaudron JJ as that judgment is the most intentionally conclusive in its analysis of the issue.

Turning first to the nature of privacy, the judges appear to overlook that the most common definitions of privacy tend to be ‘personality-neutral’ in the sense that they are capable of applying to corporate entities as well as individuals. These define privacy in terms of seclusion, limited accessibility or the ability to control information flow.²³ The only definitions of privacy that are not personality-neutral are those solely embracing ‘intimate’ aspects of persons’ lives.²⁴ The use of an adjective like ‘intimate’ gives the definitions a distinctly emotive, personal connotation that is difficult to apply to corporate bodies. However, intimacy-focused definitions of privacy appear to lack the popularity of their more personality-neutral counterparts and are afflicted by several conceptual weaknesses.²⁵

¹⁷ *Id.*

¹⁸ Judgment of Kirby J, para 190.

¹⁹ *Id.*

²⁰ *Ibid*, para 191.

²¹ Judgment of Callinan J, para 328.

²² *Id.*

²³ See further the overview in LA Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (2002), chapter 7 (section 7.2.1).

²⁴ See, eg, the definition by Morison, *supra* n 8, para 1 (privacy is ‘the condition of an individual when he is free from interference with his intimate personal interests by others’).

²⁵ See further Bygrave, *supra* n 23, chapter 7 (section 7.2.1).

Even if personality-neutral definitions of privacy abound, it is scarcely to be denied that privacy is most commonly used in relation to the needs and interests of individuals. Indeed, much of the literature on the value of privacy is almost exclusively concerned with individuals' emotional needs. Yet it is possible to take a broader view of the value of privacy and, concomitantly, the range of interests it potentially serves.

That privacy may serve a broad range of interests many of which are held by corporations, is perhaps best demonstrated in the pioneering analysis of 'organizational privacy' undertaken by Alan Westin.²⁶ According to Westin, privacy – defined primarily as 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'²⁷ – serves four main functions: it provides for 'personal autonomy', 'emotional release', 'self-evaluation', and 'limited and protected communication'.²⁸ Westin convincingly argues these functions are not just of relevance to individuals, they are also important for organisations (including, of course, corporate bodies). The two principal functions are 'autonomy' and 'release'. In relation to 'autonomy', Westin points out that organisations, like individuals, must retain certain secrets or zones of privacy in order to avoid manipulation or domination by others. He claims, for example, that if a business group is to remain commercially viable and independent then its trade secrets and business decisions must be kept confidential.²⁹ Regarding 'release', Westin argues that organisations require the possibility of conducting their affairs without having to keep up a 'public face'.³⁰ In his view, such a possibility essentially enables organisations to be run efficiently.³¹ More generally, Westin points out that respecting the privacy of organisations is not only of value for the organisations themselves or for the individuals who constitute them; such respect is also of value to pluralistic, democratic society because it helps maintain relatively independent centres of power.³²

Summing up, then, a convincing case can be made for showing that privacy does not simply protect human sensibilities. Its principal function is to help preserve the ability of both individuals and organisations to function autonomously and efficiently.

Even if one accepts, nevertheless, that the *fundamental* value of privacy is inextricably located at the level of the individual human psyche, does not thereby mean that privacy as a concept, interest and legal right cannot be applied subsequently to corporate persons. Legal doctrine, for example, is full of concepts and rules that arose initially to service the needs of individuals but later have come to service also the needs of corporations. An example is defamation which is closely related to privacy. In many jurisdictions (both common law and otherwise), corporations have been given a right to sue for defamation, though the exact extent of this right varies.³³ The extension to corporations of this right is founded on recognition that defamation need not always cause only emotional harm; it can also damage other interests of value for corporate bodies.³⁴

²⁶ See AF Westin, *Privacy and Freedom* (1970).

²⁷ *Ibid*, 7.

²⁸ *Ibid*, 32–39.

²⁹ *Ibid*, 43.

³⁰ *Ibid*, 44.

³¹ *Ibid*, 45.

³² *Ibid*, 42, 51, 368.

³³ See generally JH Mæland, *Ærekrenkelsen* [Defamation] (1986), 98–105.

³⁴ At the same time, the nature of a corporate entity means that, under Anglo-Australian common law, such an entity is unable to sue for disparagement of 'personal' reputation, only for disparagement of its business operations, including, for instance, allegations that it is in financial difficulties or that its services are a sham.

Turning to the nature of corporate entities, missing from all of the judgments is explicit recognition of the basic duality of corporate entities. By ‘duality’, I mean the fact that such entities can be regarded either as independent of, and greater than, the sum of their individual parts, or can be reduced to the particular constellation of individual persons who make up these parts. Because of this duality, consideration must be given to the possibility and desirability of protecting corporate entities in order to provide better protection for the individuals who constitute or are otherwise linked with them, *and* in order to safeguard possible interests of their own.

Also missing from the judgments, is express recognition of the diversity of corporate entities, particularly the fact that a great many corporations are ‘non-profit’ organisations. This fact is particularly significant when we consider the judgment of Gummow, Hayne and Gaudron JJ. In their analysis of the implications of the outcome of the decision in *Victoria Park*, they seem to treat corporations as exclusively business entities. Yet must all corporate actions for breach of privacy be based upon ‘pocket book’ sensitivity? Indeed, what does ‘pocket book’ sensitivity precisely mean? Does it always mean the ability of the corporation ‘to sell the rights to a particular kind of publicity’?³⁵ I doubt that all corporate claims to privacy are only concerned with this sort of sensibility, particularly in the case of non-profit organisations. If that doubt is valid, then the decision in *Victoria Park* should not be treated as effectively killing all future corporate actions based on a putative right to privacy under Australian law.

I turn now to the relevant state of law in other jurisdictions. With respect to UK law, the strongest judicial authority for the proposition that corporations may enjoy a right to privacy is a recent decision of the UK Court of Appeal³⁶ – a decision noted by several of the judges (Gleeson CJ, Kirby and Callinan JJ) in *Lenah Game Meats*. The Court of Appeal unanimously held that a corporate entity may bring a complaint for unwarranted infringement of its privacy by a broadcaster pursuant to ss 110(1) and 111(1) of the *Broadcasting Act 1996* (UK). However, as duly noted by Callinan J in *Lenah Game Meats*,³⁷ that decision centres upon and is largely limited to particular statutory provisions that *prima facie* provide for the possibility of corporate privacy complaints. All three judges in the case emphasised the special statutory context of their decision. Indeed, one judge cast considerable doubt on whether corporations may otherwise enjoy a more general right to privacy.³⁸ Nevertheless, both the decision and the statute are concrete signs that considerable potential exists for further development of a corporate right to privacy in UK law.

As for US law, the bulk of US judicial authority as it currently stands is against permitting corporations to bring legal actions based on breach of their privacy. This point was duly noted in the judgments of Gummow, Hayne, Gaudron and Kirby JJ. What does not come through sufficiently in their judgments, however, is that privacy law in the USA is notoriously volatile and that it would not be surprising to see in the future an increasing number of judges there extending certain rights to corporations under the rubric of ‘privacy’ protection. Judicial precedent for such a development already exists, with some state courts recognising the

See, eg, *Bargold Pty Ltd v Mirror Newspapers Ltd* [1981] 1 NSWLR 9 (investment company sued newspaper for printing an article which imputed that the company was financially unsound and likely to collapse).

³⁵ Para 108 of their judgment (citing remarks by Morison, *supra* n 8).

³⁶ *R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2000] 3 All ER 989, 998–999.

³⁷ See para 326 of his judgment.

³⁸ *Ibid*, 1002 (per Lord Mustill).

possibility of corporations successfully asserting privacy actions.³⁹ The US Federal Court has also held that certain forms of industrial espionage are actionable as violating ‘commercial privacy’.⁴⁰

It is sometimes claimed, using the decision of the US Supreme Court in *United States v Morton Salt*⁴¹ as authority, that corporations cannot have privacy rights under the US Constitution.⁴² The decision in *Morton Salt*, however, does not hold that corporations cannot enjoy any right to privacy; it holds that corporations cannot ‘plead an *unqualified* right to conduct their affairs in secret’ and that corporations ‘can claim *no equality with individuals* in the enjoyment of a right to privacy’.⁴³ The better view is that, far from being denied privacy protection because they lack legitimate privacy interests, corporations are granted privacy rights under the Constitution as long as these are ‘consistent with the governmental right to police corporate behaviour, and, to a lesser extent, with the reduced expectation of privacy in a publicly-created entity’.⁴⁴ There is, for instance, solid judicial authority for the proposition that corporations are protected from unreasonable searches and seizures under the Fourth Amendment to the Constitution.⁴⁵ However, corporations do not have a right against self-incrimination under the Fifth Amendment.⁴⁶

As for corporate rights under international human rights treaties, the bulk of authority on the ICCPR holds that the rights contained therein are for the protection of individuals only – as noted by Kirby J. The situation is more open with respect to the European Convention on Human Rights and Fundamental Freedoms (1950) (ECHR). Corporations have been accorded several of the rights therein, notably the right to freedom of expression in Art 10 and the rights to ‘freedom of peaceful assembly and to freedom of association’ pursuant to Art 11. As for Art 8 which sets out the right to respect for private and family life, home and correspondence, no final decision has been made by the European Court of Human Rights (ECtHR) as to whether this applies to a corporation.

The ECtHR has stated that the ‘essential’ object of Art 8 is ‘to protect the individual against arbitrary interference by the public authorities in his private or family life’.⁴⁷ In stating this, it is doubtful the Court has thereby shut off all possibility of Art 8 also being used to protect corporate entities from such interference, particularly if protection of the corporate entity is viewed as providing fuller protection of the individuals who make up the body. Whether or not corporate entities may invoke the protection of Art 8 will depend largely on how the ECtHR interprets the notions of ‘private life’, ‘home’ and ‘correspondence’. Relevant case

³⁹ See, eg, *Midwest Glass v Stanford Dev Co*, 339 NE2d 274, 278 (1975); *Dayton Newspapers, Inc v City of Dayton*, 259 NE2d 522, 534 (1970); *Belth v Bennett*, 740 P2d 638 (1987).

⁴⁰ *EI Dupont de Nemours & Co v Christopher*, 431 F2d 1012 (5th Cir 1970).

⁴¹ 338 US 632 (1950).

⁴² See, eg, *Oasis Nite Club, Inc v Diebold, Inc*, 261 F Supp 173, 175–76 (1966).

⁴³ 338 US 632, 652 (emphasis added).

⁴⁴ WC Lindsay, ‘When Uncle Sam Calls does Ma Bell Have to Answer? Recognizing a Constitutional Right to Corporate Informational Privacy’ (1985) 18 *John Marshall Law Review*, 915, 926.

⁴⁵ *Hale v Henkel*, 201 US 43, 76 (1906); *GM Leasing v United States*, 429 US 338, 353 (1977); *Civil Aeronautics Board v United Airlines*, 542 F2d 394, 399 (7th Cir 1976); *Dow Chemical Co v United States*, 749 F2d 307, 314 (6th Cir 1984).

⁴⁶ *Hale v Henkel*, 201 US 43, 75–76 (1906); *United States v White*, 322 US 694, 698–700 (1944); *Bellis v United States*, 417 US 85, 90–92 (1974).

⁴⁷ *Case ‘Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium’* (1968) Series A 6, para 7.

law shows the Court to be wary of exhaustively and narrowly defining these notions.⁴⁸ In particular, the Court has made clear that these notions should not be viewed as strictly relating to the domestic sphere but capable of embracing some business activities as well.⁴⁹ Further, the Court has stated that '[r]espect for private life must ... comprise to a certain degree the right to establish and develop relationships with other human beings'.⁵⁰ Insofar as corporations are a manifestation of individuals establishing and developing 'relationships with other human beings', it can be strongly argued that these entities should be given protection under Art 8. At the same time, were such protection to be given, state parties would probably be accorded greater scope for interference pursuant to Art 8(2). This is foreshadowed by the ECtHR in *Niemitz* when it commented that entitlement to interfere under Art 8(2) 'might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case'.⁵¹

To conclude, the way in which the High Court treated the issue of corporate privacy should not come as a surprise. It would be unrealistic to expect the Court in the course of one case not only to have recognised the existence of a tort of privacy invasion in Australian law but also to have found that such a cause of action may directly benefit corporate plaintiffs. This is particularly so in the wake of the Court's decision in *Victoria Park*, the long- and widely-held (mis)perception in the legal community about what that decision stands for regarding the validity of legal claims to privacy as such, together with the lack of strong authority in other jurisdictions and in international law supporting the notion that a corporation may enjoy a right to privacy. Nevertheless, it would be wrong to conclude from the Court's decision in *Lenah Game Meats* that the issue of a putative right to privacy for corporations under Australian law has now been settled definitively. We can only hope that when the issue is next revisited, full account will be taken of the complexities of the matter.

⁴⁸ See generally LA Bygrave, 'Data Protection Pursuant to the Right to Privacy in Human Rights Treaties' (1998) 6 *International Journal of Law and Information Technology*, 247, 255ff.

⁴⁹ See, eg, *Niemitz v Germany* (1992) Series A 251-B, paras 29–33. See also *Chappell v United Kingdom* (1989) Series A 152-A, in which the Court accepted the applicability of Art 8 to a police search-and-seizure operation directed exclusively against the applicant's business. The latter business was in fact organised as a company operation, though the company as such appears to have consisted of little more than the applicant himself. Note too the statement of the UN Human Rights Committee that 'home' in Art 17(1) of the ICCPR refers to 'the place where a person resides or carries out his usual occupation': General Comment 16 of 23.3.1988 (UN Doc CCPR/C/21/Add.6), para 5 (emphasis added).

⁵⁰ *Niemitz*, *supra* n 49, para 29.

⁵¹ *Ibid*, para 31.