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LEGAL PERSONS AND THE RIGHT TO PRIVACY

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ABSTRACT. *This article examines what the state of the law regarding the tortious protection of the privacy of corporations tells us about the concept of a legal person. Given that non-human persons are capable of having an interest in at least their informational privacy, logic would seem to dictate that they should be recognised such a right protecting their personality. In reality, the law is most hesitant to concede the right to privacy to non-natural persons (the same being true of reputation). This suggests that, for the dominant strand of the law at least, despite the rhetoric, legal persons do not really have rights of personality; in other words, that they are not really persons.*

KEYWORDS: privacy, corporations, legal persons, rights of personality, reputation, defamation.

I. INTRODUCTION

Do, or should, legal persons – companies, public authorities and the like – have a right to privacy and, accordingly, can they or should they be able to sue for damages (or any other remedies) when that right is wrongfully interfered with? The question, foundational though it would seem to be, has attracted very little attention in Anglo-Commonwealth law: there is almost no case law and academic discussion, and whatever authorities may exist pull in different directions. What seems obvious is that the law of privacy has been fashioned with "natural", namely human, persons in mind and that whatever application might be made of the resulting rules or principles to other persons is regarded as entering into murky waters, something perhaps best avoided unless one is obliged to. In one sense, this is unsurprising: it is almost the entirety of private law that has been designed in that way, if only because, chronologically, juridical persons were brought into the picture very late in the day, when the rules or principles, or indeed concepts, of the law had already been fashioned with reference to natural persons. However, one specificity of the law of privacy is that (even if some of the building blocks are much older) it is

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a very recent development in Anglo-Commonwealth law. The fact that it did not consider from the outset the existence of legal persons – their massive presence in the field of private law and among litigants generally – if only to clarify that they were not concerned by these developments, is therefore surprising. This makes the topic worthy of closer attention.

The ambition of this article is twofold. First, to provide some order into the law pertaining to the question of whether juristic persons[1] – or, conceivably, a subset of them – do in fact have a right to privacy – if, again, conceivably, one of different scope than natural persons. This will be done by examining relevant authorities in England and Australia.[2] Second, not to ask in a general fashion whether, based on first principles, they should have such a right (which likely would necessitate a fully-fledged theory of both personality and privacy), but rather, more pointedly, to ask what the recognition or non-recognition of such a privacy right for the benefit of non-natural persons tells us about the concept of a legal person. Here, the argument put forward is that the state of the law concerning the right to privacy of juristic persons, or indeed the lack thereof, exposes the fact that the personality-at-law of non-natural persons is not really, in the main, taken seriously. The idea that a legal person, being, precisely, a person, should in principle hold rights *of personality* – at least those it is capable of holding – turns out to be a minoritarian paradigm; what in fact dominates the law is another paradigm, whereby legal persons might be called "persons" but are not *really* regarded as having personhood. These two points will correspond to Sections III and IV of the article; first, however, a few preliminary considerations must be offered to set the scene of the enquiry.

II. Setting the Scene: Privacy, Rights of Personality and Legal Persons

Before we examine the case law concerning the privacy of legal persons and analyse its significance in terms of the "personality" of juridical persons, a working definition of these terms must be provided, as well as a preliminary hurdle jumped, namely the question of whether legal persons are in fact analytically capable of holding a right to privacy.

[1] The terms "legal", "juridical" and "juristic" are used interchangeably to refer to non-natural persons, understood as bearers of rights and duties that are not human. This reflects the fluctuating usage in the literature, itself perhaps a symptom of the lack of clarity surrounding the notion. "Persons-at-law", on the other hand, indicates all persons recognised by the law, whether natural or non-natural.

[2] There do not appear to have been specific developments in other parts of the Commonwealth. There do exist cases and literature coming out of the US concerning the privacy of legal persons; but these developments have been mostly left aside on the basis of the US context being too different, legally and intellectually, from that of the Anglo-Commonwealth to be useful here.

A. Some Terms Defined

This study resorts to concepts that are complex, multi-faceted and disputed, in particular "privacy", (rights of) "personality" and "legal persons". While there is, thankfully, no need to take a definitive stance in respect of these disputes for the purpose of this article, it is nonetheless important to provide a working explanation of what they will be taken to mean.

1. Privacy

First, "privacy". Privacy has proved notoriously difficult to pin down, both generally (outside of the law) and as a legal concept. However, while there is no commonly agreed upon definition, the proposition that "Anglo-Commonwealth privacy rights are about restricting access to private information and to the physical self"[3] would be a fairly uncontroversial starting point. This definition also helpfully bypasses the question of what privacy *is* (per se) to focus instead on its legal protection, as a private law right, through the law of civil wrongs.

In the context of Anglo-Commonwealth law, this protection has always been understood as comprising one main tort,[4] the wrongful disclosure to third parties of information in respect of which there exists a reasonable expectation of privacy (tort known as "misuse of private information" (MOPI), which is now firmly established in England but has yet to be legally recognised in Australia).[5] It also comprises a second tort, understood as more tentative, at least insofar as it came second chronologically – even though it might arguably be conceptually more central – namely, the invasion of spatial privacy (tort known as "intrusion upon seclusion", recognised formally in New Zealand and in some inchoate way in England as well,[6] albeit again not in Australia). Beyond this, and following a taxonomy of privacy interests first developed in the United States, it is commonly accepted that there exist two further aspects of the privacy interest that can be protected in law, namely putting a person in a "false light" and "misappropriating the likeness" of the plaintiff. These having never become significant outside of the US context, this article will focus on the core area of privacy as judicially recognised, namely the wrongful

[3] N.A. Moreham and M. Warby (eds.), *Tugendhat and Christie: The Law of Privacy and the Media*, 3rd ed. (Oxford 2016), [2.04].

[4] Whether misuse of private information is a tort in the technical of the term, as opposed to, for example, an equitable wrong (like breach of confidentiality), was unclear for a time; but a positive answer now seems undoubted. Courts, as well as scholars, routinely – and rightly – use the word "tort" in respect of MOPI.

[5] We can, however, still say that it "exists" in Australia in the sense that it is being openly discussed by courts and scholars, if only *de lege ferenda*. This is all the more true because it is ordinarily assumed that legal recognition (whether by courts or Parliament) is only a matter of time.

[6] Moreham and Warby (eds.), *Tugendhat and Christie*, [2.34]–[2.37]; N.A. Moreham, "Privacy in Public Places" [2006] C.L.J. 606, 617ff.

invasion of *informational* privacy, with some references being also made to spatial privacy.

2. Rights of personality

Privacy is commonly categorised as a "right of personality". That phrase too is in search of a stable definition, especially in a common law context where it features rather less prominently than in the civilian tradition. However, even if it does not map neatly onto existing causes of action, Anglo-Commonwealth law observably knows a divide similar to that of the Roman-civilian tradition between two "halves" of the law of civil wrongs, one that protects property rights and the other, non-proprietary interests – that is, precisely, rights of personality.[7]

The modern distinction between two types of protected interests maps onto the old Roman division between the delicts – torts – of *damnum iniuria datum* (loss wrongfully caused) and *iniuria* (insult, contempt); it also maps onto the distinction between wealth and personhood; between patrimony and non-patrimonial interests; and, again, between property and personality. While all these lines are complex and subtly different from one another, the rough dichotomy that stands behind them is, for its part, well established. Rights of personality are, in that sense, rights that protect the plaintiff's *being* rather than their *having*; their selfhood rather their external possessions. Being inherently tied to their holder, they are not capable of changing hands the way proprietary rights normally are. The list of such personality rights is unsettled but, following Ulpian's massively influential threefold division of the interests protected by the delict of *iniuria* – namely *corpus*, *fama* and *dignitas* – it can be said to include physical integrity, reputation and various other dignitary interests, of which privacy is the main one to have been recognised, in the modern law, as a self-standing right.[8]

[7] E. Descheemaeker and H. Scott, "*Iniuria* and the Common Law" in E. Descheemaeker and H. Scott (eds.), Iniuria *and the Common Law* (Oxford 2013), 1, 14ff.; D. Ibbetson, "*Iniuria*, Roman and English" in Descheemaeker and Scott (eds.), Iniuria *and the Common Law*, 33, 36; P. Birks, "Harassment and Hubris: The Right to an Equality of Respect" (1997) 32 Irish Jurist 1, 4, 15–16. The distinction features more prominently in the mixed Anglo-Roman systems of Scotland and South Africa: see e.g. J. Neethling, J.M. Potgieter and A. Roos, *Neethling on Personality Rights*, 3rd ed. (Durban 2019); N.R. Whitty and R. Zimmermann (eds.), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee 2009). The term "rights of personality" is well established in European tort law scholarship as well: G. Brüggemeier, A. Colombi Ciacchi and P. O'Callaghan (eds.), *Personality Rights in European Tort Law* (Cambridge 2010).

[8] Descheemaeker and Scott, "*Iniuria* and the Common Law", 16. Paradoxically, the foremost right of personality, namely bodily integrity (*corpus*), tends to be left out of the category. There is an historical reason for this: because property rights were better protected in Roman law than personality rights, liability being based on negligence (*culpa*) rather than malice (*dolus*), *corpus* came to be protected as a quasi-proprietary right under the *actio legis Aquiliae* (the slave, whose body was someone else's property, acting as the bridge between *iniuria* and *damnum iniuria*). It was, in that sense, transferred over from the personality to the property side of the law. The extended property action, in turn, gave birth to general principles of liability like Article 1382 (now 1240) of the French Civil Code, which was understood to protect both body and property. It is unlikely to be a coincidence that the same is

3. Legal persons

Finally, the concept of legal persons. *Who* is a legal person might be a contested question (think of animal rights or, in New Zealand, the recognition of the Whanganui river as a "legal person"), but *what* it is seems rather unproblematic – perhaps, as this article will suggest, less than it should be. Persons-at-law (legal persons in the broader sense of the term) are understood today to be all the entities regarded by the law as capable of holding rights and duties of their own and, accordingly, of suing and being sued in their own right (appearing in court, if necessary, through a representative). On that reading, non-natural persons (legal persons in the narrower sense of the term) are simply those entities that are not human.[9] Disputes, as mentioned, start when it comes to determining who those legal (non-natural) persons are. By and large, in the Western legal tradition, they have always been restricted to groupings of natural persons which, for reasons of convenience, were turned into "persons" of their own, behind which the members could fade. Thus, the body of towners became, in Roman law, the town or city as a legal person (*civitas*); the associates working towards a common purpose became the *collegium* which could sue, hold property, enter into contracts, etc. for itself; and so on.[10]

In modern Anglo-Commonwealth law, many groupings of people acting collectively, like companies and public authorities, have similarly been incorporated into legal persons of their own. While it has been suggested that entities other than groupings of individuals are, or should be, recognised as legal persons – animals, parts of nature, ships, Hindu idols, etc. – this has, apart from very few (and arguably unworkable) exceptions, remained suggestions *de lege ferenda*. For the most part, are persons-at-law natural persons, all of them, and additionally some groupings of natural persons, those that have been incorporated following one of the recognised procedures of the law. This article will limit itself to corporations (groupings of – human – corporators); it will ignore the

true of the Anglo-Commonwealth tort of negligence, which is typically understood as protecting against negligent physical injury and negligent damage to property (but not, for instance, negligent defamation or negligent invasion of privacy).

[9] All humans are, for their part, regarded as right- and duty-holders, although most people would probably add that this is a policy decision, not a matter of necessity (as the example of slavery shows).

[10] See generally P.W. Duff, *Personality in Roman Private Law* (Cambridge 1938). In that sense, Roman law did already know of legal persons, both private and public. But it is noticeable that it did not use the term in their respect. *Collegia*, *civitates*, etc., did not (contrary to slaves) feature in the *personae* part of the *Institutes*. The use of the phrase "*persona ficta*" in respect of such entities is typically traced back to Pope Innocent IV, during the second life of Roman law. In England, the concept features within institutional writings from at least the beginning of the eighteenth century. Thus, the following sources all refer to the King and to corporations as "persons": M. Hale, *The History and Analysis of the Common Law of England* (London 1713), sections ii, xxii; T. Wood, *An Institute of the Laws of England; or The Laws of England in their Natural Order, According to Common Use*, vol. 1 (London 1720), bk. 1, chs. 2, 8; W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford 1765), bk. 1, chs. 3, 18.

question of the privacy that, say, a river to which legal personality would have been granted enjoys or should enjoy.

B. A Preliminary Hurdle

As mentioned, the focus of this article is not on whether legal persons (corporations in a broad sense of the term) should enjoy a right of privacy as a matter of principle or policy (i.e. whether it would be a "good idea", all things considered, for them to have it); it is on whether they do as a matter of law and *what this tells us about legal persons*. Given that, as anticipated in the introduction, the answers will turn out to be, "by and large no" and "this suggests that they are not really regarded as legal *persons*", a possible counter-argument must be put out of the way first. This counter-argument is that corporations do not have a right to privacy because they are analytically incapable of holding such a right; accordingly, its non-existence does not tell us much, if anything, about their status as legal persons. This, however, is misplaced.

1. No possible right?

As explained, the privacy interest, though hard to define in its generality, is typically understood as having two main components: informational privacy and spatial privacy (the bits beyond these raise no further issue and can be set aside).

Spatial privacy. Whether a corporation is in principle capable of enjoying spatial privacy is not a straightforward question. It would not be difficult to argue (and the author would agree) that spatial privacy concerns access to the right-holder's person in a sense that necessitates the existence of a corporeal self – in other words, a (human) body. On this view, there is no relevant sense in which a corporation can be *accessed* in that way – at all, whether "rightfully" or "wrongfully". Entering the boardroom of a company or the office of the town mayor does not in any meaningful sense amount to an intrusion upon the seclusion of the company or city council, though it would in some circumstances amount to a wrong against one or more officeholders. The opposite view, however, would be to analogise certain aspects of natural and legal persons and hold, for instance, that an intrusion into the headquarters of a company or a town hall would be a prima facie intrusion into their protected "personal" space. This view could be said to find some support in the jurisprudence of the European Court of Human Rights (ECtHR) in respect of Article 8 of the European Convention on Human Rights (ECHR).[11] However it does seem very difficult to uphold. Definitionally, a corporation is an

[11] See below, Section III(A)(3) ("The European Court of Human Rights"). The court has accepted, for instance, that a corporation could have a "home".

abstraction that cannot be touched or seen or perceived in any way through the senses (the way a human, or indeed an animal, or even a river, could be). These spaces can be owned or possessed by them and protected as their property (e.g. through the law of trespass), but they are not an extension of their person. Even if we accept that a corporation has a "home", there is *no one* (no person) living there, which is the only basis on which entry into it could be regarded as an invasion of privacy on top of being a trespass to land.[12]

Informational privacy. The above argument does not, however, need to be pressed further because, when it comes to the core of privacy as recognised in Anglo-Commonwealth law, namely informational privacy, it seems indisputable that legal persons (in the sense considered here) are capable of holding it. There is no need to analogise anything, attribute information that is private to some natural persons to the corporation, or have recourse to any other artificial device, in order to accept that some information can be *about* that legal person and, in some cases at least, private in the sense of a reasonable expectation of privacy (i.e. information that the person concerned, in this case the corporation, would have a socially accepted reason to want to keep to itself and not be known by others). This was recognised by Lord Woolf and Lady Hale in *R. v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* ("*British Broadcasting Corporation*")[13] and Gleeson C.J. in *Australian Broadcasting Corp. v Lenah Game Meats Pty Ltd.* ("*Lenah Game Meats*"), the two leading cases on the privacy of corporations in Anglo-Commonwealth law.[14] It should not, in any event, be controversial; it is simply what our common use of language dictates. We might discuss the meaning of a reasonable expectation of privacy when it comes to them; but it seems impossible to deny that at least *some* information about them will be private. It is simply in the nature of their being persons that some things are personal to them.[15] Accordingly,

[12] Note, however, the statement by Lady Hale that "companies may … wish to keep private … their property": *R. v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2000] EWCA Civ 116, [2000] 3 W.L.R. 1327 (hereafter, *Broadcasting Standards Commission*), at [42]. If property is distinct from information – documents, files, etc. – then it is not clear what Lady Hale had in mind and why this would be correct. If, on the other hand, by property she meant "information", then we are back to informational privacy (where there is judicial support for the view that liability need not involve disclosure to a third party beyond the acquisition of the private information: Moreham and Warby (eds.), *Tugendhat and Christie*, [10.75]ff.).

[13] *Broadcasting Standards Commission* [2000] EWCA Civ 116; see below, Section III(A)(2) ("Broadcasting Standards Commission").

[14] *Australian Broadcasting Corp. v Lenah Game Meats Pty Ltd.* [2001] HCA 63, (2001) 185 A.L.R. 1 (hereafter, *Lenah Game Meats*), at [43] ("Some forms of corporate activity are private. For example, neither members of the public, nor even shareholders, are ordinarily entitled to attend directors' meetings. And, as at present advised, I see no reason why some internal corporate communications are any less private than those of a partnership or an individual").

[15] The argument is not easy. It could be replied that "personal" is typically understood in this context as meaning intimate and nothing can be "intimate" about abstract entities. It is true that the categories of information most readily regarded as private by nature – health, relationships of a sexual nature, diaries, etc. – do not readily find application in the context of legal persons. However, it seems hard

while it is possible to say that legal persons should not have a right to informational privacy, it seems impossible, according to the ordinary meaning of words, to say that they *cannot* analytically have such a right.

2. No possible remedy?

At this point, the impossibility argument might morph into a different one: no longer arguing that the right is incoherent in itself, but (which effectively amounts to the same) that there exists no meaningful remedy for its breach, because the remedy would be compensatory damages; yet, in the absence of financial loss, all that the legal person could obtain is damages for its emotional harm. But then, not being capable of emotions, of *feeling* distress or anything else, this would be zero; accordingly, the corporation could not receive anything by way of remedy. This, the reasoning continues, is tantamount to saying that it holds no corresponding right.[16]

However, this argument too is misplaced for at least three different reasons. First, it is not true that the only possible remedy for breach of informational privacy is compensatory damages; there could be injunctive relief or other forms of money awards available, to which this argument would not apply.[17] Second, even though it is true that, very often, a breach of privacy will not cause pecuniary loss, it is entirely possible that it would for a legal as much as a natural person. Third, even if no loss, either pecuniary or non-pecuniary (i.e. emotional), was caused, a judgment for the claimant, alongside nominal damages, would not be meaningless – certainly no less meaningful than the myriad circumstances in which such awards have been granted, for hundreds of years, in Anglo-Commonwealth law. (To this threefold argument could be added a fourth, namely that, if a corporation is regarded as being capable of having an intention, a will, etc., by attributing to it – either individually or in combination – that of relevant natural persons, to the effect that a legal person can (be said to) sign a contract, commit a tort or, perhaps, even a crime, etc., then it is not obvious at all that it could not also be regarded, following the same attributive logic, as being capable of experiencing distress, for which it could in turn be compensated. This argument does not appear to have ever been pressed seriously, but that does not mean that it can be dismissed out of hand.)

to deny that at least some information that concerns them can be private even in this most basic sense, e.g. financial affairs, relationships with other persons (natural or legal), etc. Besides, it is likely that the reason why categories of private information for legal persons (which might be significantly different from those for natural persons) have not been clearly identified is because there have been so few relevant cases. For an interesting attempt to map what he calls "organisational privacy", see A.F. Westin, *Privacy and Freedom* (New York 1967), 42ff., who includes such matters as trade secrets, membership of the organisation, internal disputes, etc.

[16] For examples of the argument surfacing in the case law, see text to note 32 below.

[17] J.N.E. Varuhas and N.A. Moreham, "Remedies for Breach of Privacy" in J.N.E. Varuhas and N.A. Moreham (eds.), *Remedies for Breach of Privacy* (Oxford 2018), ch. 1.

It appears, then, that legal persons are in principle capable of holding a right at least to informational privacy and, if it is violated, to claim and obtain a remedy under the tort of misuse of private information. There is no logical impossibility involved; if such a right is rejected as a matter of positive law, it will accordingly have to be as a matter of *policy* (or principles other than logical impossibility).[18]

III. Case Law Tilting Towards "No"

Having established the possibility of a right (if only a limited one) of privacy for the benefit of legal persons, we can now turn to the relevant case law and examine what it says about the privacy of non-natural persons and why. The first thing to note is how sparce judgments are. This suggests that either corporations do not think they would prevail if they sued, or they feel adequately protected by other causes of action, in particular breach of confidence which, in both England and Australia, (1) avails to legal persons; and (2) has had its scope considerably widened through the idea that information can be confidential if it has an intrinsically confidential character, regardless of whether or not it was acquired "in confidence".[19] If confidentiality is triggered by the nature of the information and not by the way in which it was acquired, then its meaning is bound to overlap to a large extent with privacy: information concerning matters that prevailing social mores consider ought not to be published without consent.

A. Authorities in Favour

Leaving aside for now the jurisprudence of the ECtHR (indirectly relevant at least in an English context), there have in fact only been two significant cases dealing with the question under examination: one in 2000 in the English Court of Appeal (*British Broadcasting Corporation*) and the other, the year after, in the High Court of Australia (*Lenah Game Meats*).

[18] This opens the – vast – normative question of whether non-natural persons ought to have privacy rights, a question that (as indicated) lies beyond the scope of this article. Most of the literature on this question has concerned trading corporations and has come from the US: see for instance, in support, A.L. Allen, "Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law" (1987) 20 John Marshall Law Review 607 and, in opposition, E. Pollman, "A Corporate Right to Privacy" (2014) 99 Minnesota Law Review 27, 54ff. (*adde*, for Australia, Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (Final Report) (Canberra 2008), ch. 7). S.R. Sanders, "The Corporate Privacy Proxy" (2019) 105 Cornell Law Review 1171, 1194ff. explains how the debate about corporate privacy was, from the start, bound up with the political question of whether the gruesome treatment of animals in meatpacking factories, or indeed of human beings in mental hospitals, could legitimately be exposed. Interestingly, the seminal Australian case of *Lenah Game Meats* [2001] HCA 63 also concerned a meatpacking factory: see text to note 20 below.

[19] *Attorney General v Guardian Newspapers and others (No. 2)* [1988] 3 All E.R. 545, 658 – a view accepted in Australia as well. It is not doubted in either jurisdiction that the law of confidentiality also protects corporations (e.g. *Broadcasting Standards Commission* [2000] EWCA Civ 116, at [49]; *Lenah Game Meats* [2001] HCA 63, at [39]), independently, of course, of whether the breach of confidentiality also amounts to an infringement of privacy.

Neither has conclusively answered the question in respect of their own jurisdiction; but both contains arguments in favour of an affirmative answer (as indeed – in fact much more so, as will be seen – in favour of a negative one).

1. Lenah Game Meats

Starting with the later, Australian case, the question in *Lenah Game Meats* was whether a possum meat factory could be granted an injunction to restrain the broadcasting by a television channel of a film taken surreptitiously on their premises by a third party, which showed the rather gruesome way in which animals were processed into meat in their factory. In order to obtain one, they had to show that at least one right of theirs had been injured or else was being threatened. Given that it was difficult to maintain that either trespass to land or defamation had been (or would be) committed by the Australian Broadcasting Corporation (ABC) and that they had conceded that the information was "not confidential", the claimants added a further contention, namely that they had a right to privacy – as yet unrecognised in Australian law – and that this right would be violated if the broadcast were allowed to go ahead.

In the end, *Lenah Game Meats* did not obtain an injunction and the claim that the common law of Australia recognised a right to privacy in its favour was also rejected. What made the case easy for the court is also what makes it difficult for the commentator, namely that there were two cumulative hurdles to be jumped – (1) that there should be recognised as existing in Australian law a right to privacy generally; and (2) that this right should benefit legal as well as natural persons – and, although we know that the claimant lost, it is not clear whether it fell on the first or the second hurdle. To put the same point differently, although we know that, as the law stands, corporations do not hold a right to privacy in Australia, we do not know whether that is because they are legal persons or because, more generally, no one does. In any event, there was one – but only one – judge who, out of the six, suggested that corporations should have such a right. Said Callinan J.:

> For my own part, I would not rule out the possibility 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 .... Nor would I rule out the possibility that a government or a governmental agency may enjoy a similar right to privacy over and above a right to confidentiality.[20]

No argument was offered by His Honour beyond the assertion that the "non-naturalness" of the claimant did not necessarily stand in the way of its

[20] *Lenah Game Meats* [2001] HCA 63, at [328].

holding a privacy right – in other words, that rights of privacy availed, at least in some way, to persons generally and not just to persons natural.

2. Broadcasting Standards Commission

Turning back the clock, the English case of *Broadcasting Standards Commission* is typically regarded as the leading authority in support of the view that corporations do have a – statutory – right to privacy, at least in the UK; indeed, this is how it was interpreted in *Lenah Game Meats*.[21] The question, in *Broadcasting Standards Commission*, was whether a corporation (Dixons, a retailer of consumer electronics) could, pursuant to the Broadcasting Act 1996, make a complaint that, by covertly filming in its shops, the BBC had infringed its privacy. The statute relevantly stated, in section 110(1), that "it shall be the duty of the BSC to consider and adjudicate on complaints which … relate (a) to unjust or unfair treatment … or (b) to unwarranted infringement of privacy"; and, in the next, that a "fairness complaint may be made by an individual or by a body of persons, whether incorporated or not, but … shall not be entertained by the BSC unless made by the person affected or by a person authorised by him to make the complaint for him" (section 111(1)).[22]

On a close reading of the statute, it is difficult to argue that it grants (or assumes the existence of) a corporate right to privacy, regardless of what this right would consist of. The language of the text makes it clear that a corporation (or, for that matter, an unincorporated "body of persons") may lodge a complaint relating to an infringement of privacy; but at no point does it require that the privacy be theirs, as opposed to that of some person or persons who "authorised [it] to make the complaint". Indeed, the latter reading seems more natural, especially given that, if the Act is read as entailing that an incorporated body of persons holds such a right, the same would logically have to be true of an unincorporated body, which (obviously) would be a novel development.

Be that as it may, it is the reading that was favoured by Lord Woolf and Lady Hale. The then Master of the Rolls opined: "a company can also make a complaint about the infringement of its privacy. I can see nothing in the language of the Act which would prevent a company complaining of unfairness."[23] He went on to add that "a company does have activities of a private nature which need protection from unwarranted intrusion. It would be a departure from proper standards if, for example, the B.B.C. without any justification attempted to listen clandestinely to the activities

[21] Ibid., at [43] (Gleeson C.J.).
[22] *Broadcasting Standards Commission* [2000] EWCA Civ 116. The Broadcasting Standards Commission is now Ofcom.
[23] Ibid., at [32] (Lord Woolf M.R.).

of a board meeting".[24] Lady Hale concurred: "There are many things which companies may (legitimately or illegitimately) wish to keep private, including their property, their meetings and their correspondence."[25]

However, it seems reasonably clear that, even if we accept that the "privacy" contemplated in section 110(1) of the Act does benefit legal as well as natural persons (i.e. it is properly *theirs*), it is not the same privacy as that which came to be recognised as a matter of English tort law in the wake of *Campbell v MGN Ltd*.[26] This much should be obvious from the fact that the Act predates by almost a decade what is regarded as the breakthrough English case in which the right to privacy, in the sense used in this article, finally morphed out of the action for breach of confidence (which is how Campbell had originally framed her claim). It is also apparent in the opinions of both aforementioned judges that the concept of privacy as it appears in the Act referred not to "legal rights but [to] broadcasting standards",[27] thereby justifying "a wider view of the ambit of privacy".[28] Lord Woolf concurred that "[t]he meaning of privacy can be influenced by the context in which it appears"; as is clear from the previous extract, he too considered that respect for privacy was envisioned by the Act in the sense of a standard of conduct (a form of "fairness"), not in the sense that it came to assume in English tort law over the following decade – that is, that of the legal right we now have in mind when we speak of the "right to privacy".

Accordingly, *Broadcasting Standards Commission* is not a good authority to the effect that a legal person – or, for that matter, *any* person – enjoys a statutory "right to privacy" (and it is notable that this aspect of the case has not been referred to in any subsequent judgment of English courts). However, it also accepts in a very clear way that it *is* in fact meaningful to speak of "privacy", if in a looser sense, in respect of a non-natural entity. This is all the more noteworthy because, as explained, it could certainly have interpreted the language of the Act in a different way.

3. The European Court of Human Rights

Finally, some support for a positive reply to the question whether corporations have a right to privacy could be derived from the jurisprudence of the ECtHR. In the context of Article 8 of the ECHR, which protects the right to respect for "private and family life", "home" and "correspondence", the Strasbourg court has accepted that a legal

[24] Ibid., at [33].
[25] Ibid., at [42] (Lady Hale).
[26] *Campbell v MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457. *Broadcasting Standards Commission* was referenced at [75] by Lord Hoffmann, but only Lord Mustill's remark, which concerned the right to privacy in the sense of tort law, not the "privacy" of section 110 of the Broadcasting Act 1996.
[27] *Broadcasting Standards Commission* [2000] EWCA Civ 116, at [42] (Lady Hale).
[28] Ibid., at [44].

person could avail itself of at least the second and third limbs of that right.[29] This has indirect significance for English tort law insofar as courts are required, under the Human Rights Act 1998, to develop the domestic common law – including in respect of the right to privacy – in such a way as to give effect to Convention rights.[30] However, this significance is limited given that (1) privacy, as understood in the context of English tort law, is undoubtedly narrower than the Article 8 right (if anything, it is subsumed under the first limb, not the second or third); and (2) to the extent that the other two limbs must be given effect as a matter of English domestic law, this need not be through the tort of breach of privacy: it could, for instance, be under the law of trespass or breach of confidence, or through non-tortious actions.

Accordingly, here too, it is difficult to read into these cases the recognition of a right to privacy to the benefit, even partial, of legal persons. However, it is, again, noteworthy that the Strasbourg court did not, in respect of Article 8 (as indeed of a number of other provisions), find it problematic that a legal person could avail itself of a right explicitly described as a "human right".

B. Authorities Against

As mentioned, paradoxically in a sense if unsurprisingly given the paucity of case law, the case for a negative answer has come from the same authorities (still obiter, given that neither in *Broadcasting Standards Commission* nor in *Lenah Game Meats* was the question directly at stake). In short, in terms of the volume of argument deployed by judges, there was significantly more of it rejecting than supporting the idea that legal persons should be recognised a right to privacy. The relevant discussion will be mentioned in this part; some of the analysis, however, will be held off until the next.

1. Broadcasting Standards Commission

In *Broadcasting Standards Commission*, although the court was unanimous in its judgment that a legal person could bring a "fairness complaint" regarding privacy, indeed its own privacy, two of the judges strongly signalled that this was not to be read as the recognition, in their favour, of a right to privacy in the sense of the law of torts (the post-*Campbell* sense). Lady Hale indicated, briefly, that "[t]here may well be contexts in which the concept should be limited to human beings", considering that this was a "debate … for another day".[31] Mostly, however, it was Lord Mustill's opinion which made the strongest case against it – here,

[29] Moreham and Warby (eds.), *Tugendhat and Christie*, [13.36]–[13.37] and references cited.
[30] The statutory basis for this duty is section 6 of the Human Rights Act 1998, which mandates that a court, as a public authority, should not act in a way that contravenes Convention rights unless it is statutorily obliged to do so.
[31] *Broadcasting Standards Commission* [2000] EWCA Civ 116, at [44] (Lady Hale).

paradoxically, the fact that it was so clearly obiter can be seen to reinforce its weight, his Lordship having gone out of his way to prevent a false inference from being drawn from the outcome of the case.

Said Lord Mustill:

> Can a company say that it is aggrieved by an invasion of its own privacy? As a matter of ordinary language I would not have thought so. The context in which the question must be asked for present purposes is … special … I can therefore accept an expanded reading of privacy for this special purpose … I do, however, wish to emphasise the degree to which this conclusion is dependent on the language and purpose of this particular statute, for in general I find the concept of a company's privacy hard to grasp. To my mind the privacy of a human being denotes at the same time the personal "space" in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate. The concept is hard indeed to define, but if this gives something of its flavour I do not see how it can apply to an impersonal corporate body, which has no sensitivities to wound, and no selfhood to protect.[32]

As can be seen, his Lordship made three points to rebut the idea. The first is that privacy is a form of seclusion and breach of privacy, accordingly, an intrusion into it. As explained earlier, this is not in fact the core of the right to privacy: rightly or wrongly, it has, from its very beginnings, focused on informational privacy – a point that Lord Mustill did not address and in respect of which his argument would not be equally applicable. The second point is that breach of privacy leads to "wounded sensitivities", something that corporate bodies are incapable of. The argument that this prevents the recognition of a right to privacy for the benefit of legal persons was already rebutted.[33] Finally, the third (and probably most significant) point, which has been quoted numerous times in subsequent case law, is that "an infringement of privacy is an affront to the personality", the flipside of this being that privacy protects "selfhood"; not being endowed with any selfhood, legal persons cannot have a right to privacy "applied" to them. This point is essential and will be attended to in the next part.

2. Lenah Game Meats

Lenah Game Meats was equally discouraging for non-human persons in terms of the prospect of their ever being recognised such a right (which, in an Australian context, would of course require that the right should be

[32] Ibid., at [46]–[48].
[33] See text to notes 16–18 above.

recognised at all in private law).[34] As mentioned, only Callinan J. expressed support in principle; the other five judges were sceptical, indeed highly so, of the idea.

Gummow and Hayne JJ. mentioned, as in *Broadcasting Standards Commission*, the issues of affront and wounded feelings; but they also added an idea of personal autonomy, albeit without defining it:

> However, Lenah can invoke no fundamental value of personal autonomy ... Lenah is endowed with legal personality only as a consequence of the statute law providing for its incorporation. It is "a statutory person, a *persona ficta* created by law" which renders it a legal entity "as distinct from the personalities of the natural persons who constitute it". Lenah's activities provide it with a goodwill which no doubt has a commercial value. It is that interest for which, as indicated earlier in these reasons, it seeks protection in this litigation. But, of necessity, this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy.[35]

The point about autonomy will be returned to in the next section. As to the one about goodwill, interestingly, it could be read as suggesting that the issue of privacy was in fact moot in that particular case, it not really being concerned with privacy. This point would have deserved further elucidation, in particular because (1) it raises the difficult issue of the relationship between economic loss consequential – contingently – upon a right-violation and rights designed to protect economic interests only; and because (2) the same argument has in fact been raised in respect of physical persons, who too have at times been suspected of instrumentalising an interest in privacy exclusively to protect their financial interests.[36] Therefore, valid or invalid, the argument cuts across the distinction between legal and natural persons. However, it was interpreted by their Honours as meaning that such instrumentalisation was intrinsic in the recognition of a privacy right for corporations (seemingly for all corporations but only for corporations, which as indicated seems demonstrably incorrect): "For these reasons, Lenah's

[34] In Australia too, "privacy" is a word that exists outside the context of the rights protected in tort law. There is, for instance, a Privacy Act 1988 (Cth), which was reviewed recently by the Attorney General's Department. But, again, the word means something very different here, being more akin to data protection and the way in which these data should be collected and treated by public entities.

[35] *Lenah Game Meats* [2001] HCA 63, at [126], footnote omitted. The reference is to an earlier High Court of Australia case from 1947.

[36] Most notably perhaps regarding the *Douglas v Hello! Ltd.* series of cases, where claims for breach of privacy were brought alongside breach of confidentiality (see *OBG v Allan, Mainstream Properties Ltd. v Young, Douglas v Hello! Ltd.* [2007] UKHL 21, [2008] 1 A.C. 1). The argument is that the Douglas–Zeta-Jones couple could not have cared about the publication of photographs of their wedding by one magazine, given that they were prepared to have other photographs of the same event published by a rival publication. Their only concern, the argument goes, was the loss of the fee they could have charged in return for consenting to their publication. Accordingly, Gummow and Hayne JJ.'s point about instrumentalisation is one that deserves a satisfactory answer, but across the board, not just in respect of corporations.

reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons."[37]

Finally, Gleeson C.J. made a reference to "human dignity": "However, the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity. This may be incongruous when applied to a corporation."[38]

Again, the argument will be returned to in the next part. Suffice it, for now, to note that it is not clear whether Gleeson C.J.'s "may be incongruous" was meant ironically or not. On one reading, of course, the non-humanness of the legal person would immediately dispose of the argument that they could hold a right grounded in *human* dignity, making his phrase a euphemism for "would be absurd". However, it is a fact that the qualificative of "human" attributed to a number of rights has not stopped courts, in particular in the context of the ECHR, from holding that these rights applied to legal persons as well.

This might well be wrong, but it is hard to argue that it is downright absurd. For one thing, "human" is simply a label; replace it with "fundamental", for example, and the issue disappears. For another thing, corporations have always been regarded as related *in some way* to natural persons. Indeed, it is entirely undeniable that, both as a matter of historical development and in terms of their rationalisation, corporate rights were regarded as rights held or exercised in common by natural persons (the nature of this commonality morphing, but not disappearing, when the grouping is recognised as a separate person of its own – i.e. when the "they" becomes an "it").[39] On that reading, it is not self-evident that natural persons' right to dignity could not, like their property rights, be exercised *in common* at times.

3. A parallel with defamation

It is useful, before returning to the analysis of "corporate privacy", to draw a parallel with the law of defamation. The right to reputation, which it protects, is similar in a number of respects to the right to privacy – at least informational privacy, on which this article is focused. First, it is also a right of "personality", as sketched out above. Second, in the sense of the interest a person has in what others think of them, it is clearly capable – without any need for anthropomorphism or attribution – to be

[37] *Lenah Game Meats* [2001] HCA 63, at [132] (Gummow and Hayne JJ.).

[38] Ibid., at [43]. Kirby J. also expressed doubt but without specifying his reasons: "The fact that the respondent is a corporation is a further reason for delaying a response to this question. This is because doubt exists as to whether a corporation is apt to enjoy any common law right to privacy" (at [190]).

[39] In that sense, a company or public authority is very different from, say, an animal when it comes to the debate about the scope of legal personality.

held by legal as much as by natural persons. Third, this is true despite all of the above arguments suggesting that the right (to privacy) should be reserved to human beings – dignity, autonomy, wounded feelings, ulterior financial interests, etc. – being straightforwardly applicable to reputation as well.

What makes the parallel interesting is that exactly the same phenomenon can be observed with defamation (and its much older and more sizeable body of case law) as with privacy. In other words, even though the law *could* straightforwardly treat legal persons in the same way as physical persons and subject them to the same rules and principles, it is visibly unable to bring itself to do so – but then, neither does the law of defamation refuse standing to legal persons altogether. Rather, similarly to privacy (though, again, in a much more definite way), what it does is to and fro between the two polarly opposite positions of, on the one hand, treating juridical persons like natural persons and, on the other, withholding the right from them. While these two opposite views are both easy to ground in principle, the "in-between" that the law has reached is, for its part, much harder, if indeed at all possible, to make sense of.

In England, as indeed in Australia, the starting point is clearly that legal persons do have a right to reputation and are able to sue for loss consequential upon its breach. This can be seen easily from the fact that the law understands itself to have, for a number of reasons, eroded (negatively) that right rather than to have positively extended it to corporations. To the extent that differences exist, they are understood as restrictions imposed on non-physical persons. Yet these restrictions are in fact many.

English law. In England, a company (trading corporation) may sue "in defamation" but only in respect of an injury to what is often referred to as its "business reputation".[40] In one sense, of course (leaving aside the complication of damages granted for the plaintiff's reputation "as such", whatever exactly this might mean), if we accept that a legal person cannot suffer wounded feelings, then it follows logically that compensatory damages will be limited to financial loss. It is, however, noteworthy that this has had the tendency of being read back into the definition (or scope) of the reputational interest, as if a trading

[40] *Derbyshire County Council v Times Newspapers Ltd. and Others* [1993] A.C. 534, 537 (H.L.) (Lord Keith). Following section 1 of the Defamation Act 2013, a statement that refers to "a body that trades for profit" will only be defamatory where "serious financial loss" was caused or was likely to be caused by the words complained of. For the interesting legislative history behind that provision, reached as a compromise with those who wanted to follow the Australian lead, see M. Collins, *Collins on Defamation* (Oxford 2014), [2.10]–[2.13]; and, for details on English law, see R. Parkes and G. Busuttil (eds.), *Gatley on Libel and Slander*, 13th ed. (London 2022), [8.16]. The position in New Zealand is similar to that in England: Defamation Act 1992 (NZ), s. 6; contrast the Irish position, which does not restrict the right of corporations to sue based on the nature of the loss they are likely to suffer: Defamation Act 2009 (Ireland), cl. 11.

corporation did not have, or was not capable of having, a reputation beyond its "business reputation":[41] a clear imprint of the long-standing, if highly confusing, idea that reputation is not just but also – and in the case of trading corporations, perhaps exclusively – a financial asset that can be regarded as a form of property right.

More significantly, governmental bodies cannot sue at all in England. This is not because they are not capable of suffering loss (they are in the same position in this respect as a private non-trading corporation), but is rather because the opposite position would be regarded as having an unwarranted chilling effect on free speech. As recognised in *Derbyshire County Council v Times Newspapers Ltd. and Others*, "it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country".[42] (Of course, such chilling effect, actual or potential, is not limited to public authorities. It is simply a consequence of the imbalance of power between the parties, which might be equally true with, in particular, large-scale companies.)

Australian law. In Australia, the law has gone much further since the (quasi-)uniform Defamation Acts of 2005. It is now the case in all states and territories that corporations, private or public, have no cause of action in defamation, with only two exceptions: (1) private corporations that do not trade for profit (e.g. charities);[43] and (2) private corporations employing "fewer than 10 employees".[44] This excludes all governmental authorities and all companies except smaller ones (where arguably defamation of the whole amounts to defamation of all the employees, to the effect that the exception might be more apparent than real). The point here is not to sketch the law in its details nor to investigate the rationale,[45] but simply to point out, again, this judicial and statutory *pas de deux*. Do legal persons have a right to reputation or not? The short

[41] It is all the more noticeable because it is not just unnecessary, but also has problematic implications when it comes to non-trading corporations. On the same logic, they should presumably have no "business reputation"; not being able to be wounded in their feelings either, they would as a result have no right of action at all. In their case, however, the law falls back on ordinary principles and holds that they can sue for pecuniary losses: Parkes and Busuttil (eds.), *Gatley on Libel and Slander*, [8.19].

[42] *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 A.D. 999, 1012–13 (Schreiner J.A.), cited in *Derbyshire CC v Times Newspapers* [1993] A.C. 534, 549 (Lord Keith). Although *Derbyshire CC v Times Newspapers* concerned a local authority, it is not doubted that the same principle applies to the Crown or central government: ibid., at [8.20].

[43] E.g. Defamation Act 2005 (NSW), s. 9(2)(a).

[44] E.g. ibid., s. 9(2)(b). In New South Wales at least, following the Defamation Amendment Act 2020 (NSW), the "financial loss" must, like in England, be "serious": ibid., s. 10A(2).

[45] In particular, it is difficult to understand why financial loss would be unactionable for those corporations whose purpose it is to make financial gain, but not for those for whom it is not.

answer seems to be, "Yes but no". The halfway house nature of the result reached by the law is certainly striking.

IV. Privacy and Personality: Some Reflections

As explained, this article is not concerned, at least not directly, with the broader normative question of whether legal persons (or some of them) should have a right, full or partial, to privacy. Rather it is concerned with a narrower yet important question, namely, what does the stance of the law *as it stands* concerning the privacy of legal persons (or indeed other rights of personality like reputation) tell us about the concept of legal persons?

The answer seems to be that the law does not in fact take their "personality" very seriously. If we consider the three main rights of personality (from the ancient triad of *corpus*, *fama* and (residual) *dignitas*, out of which privacy arose), it appears that the law is most hesitant to grant them to legal persons even when it would be entirely possible to do so.[46] We are told that companies, public authorities, etc., are (juridical) "persons"; yet, in the next breath, they will be denied, at least to a very significant extent, the ordinary attributes of personhood-at-law – that is, precisely, rights *of personality*. Accordingly, it is very difficult to understand in what meaningful sense corporations can be held to be "persons": they are – according to at least the dominant strand of the law – persons without a personality; persons to which at least some attributes of personality have been deliberately denied, not because they could not, but because they should not, have them.

A. Two Models of Corporate Personality

There are two separate difficulties coming together here. One is that, as indicated, there clearly exists in the law a (strong, indeed dominant) line of thinking that denies, concretely speaking, personality to legal persons even as it affirms its principle in the abstract, thereby causing terminological and conceptual confusion. The second difficulty, coming on top of the first, is that the law does not speak with one voice on this issue. If rights of personality were denied to legal persons altogether, the law would at least be clear and the confusion could be easily resolved,

[46] The issue of rights that are incapable, or so it seems, of being held by non-natural persons (like physical integrity or spatial privacy) also raises interesting questions. The concept of a right of personality that makes sense for some persons but not others does, on the face of it, challenge the concept of person-at-law. At least three arguments would deserve further consideration: (1) that it betrays the incoherence of the category of persons-at-law (which should not pretend not to be rooted in humanity or corporeality when the reality is that it is); (2) that rights like *corpus* that are not capable of being held by all persons-at-law should not be regarded as rights *of personality*; (3) that, on the other hand, if they are so considered, then all "persons" should be held to have them, even if that involves anthropomorphist analogies.

either by adapting the terminology (i.e. stop using the word "person" in respect of non-natural right-holding entities) or, at the very least, by emphasising that there exists a clear line between two categories of "persons"-at-law, only one of which has a personality and the rights attached to it. But this is not the case. There is observably another voice speaking, which would, for its part, take seriously the idea that persons juridical as well as natural do, at least in principle, have rights of personality. This second model of corporate personality is especially visible in the law of defamation where the initial stance of the law, beginning in the nineteenth century,[47] and until it was gradually rolled back, was to treat legal persons like natural ones (even if, for instance, their non-corporeality, hence inability to experience distress, would have consequences at the damages stage *in application of ordinary principles*). It also comes through in the judgment of Callinan J. in *Lenah Game Meats*.[48]

As a result of the co-existence of these two voices, or models, within the law, what we observe is muddle. When it comes to the law of defamation, the law is clear in terms of where it draws the line between the two conflicting principles at work (i.e. when legal persons may or may not sue in defamation). What is not clear at all, on the other hand, is how this "halfway house", evidently the product of a compromise between two incompatible approaches, can be justified in a principled way (as illustrated by the fact that the line can be moved fairly radically overnight, which indeed it was in Australia in 2005). When it comes to the much less developed law of privacy, we have no clear line but the same observation avails, namely that the law seems to be erring somewhere between two coherent positions, refusing to choose and, as a result, appearing to want one thing and its opposite at the same time. This adds a further layer of confusion to an area of the law that is already replete with it.

An almost perfect example of this refusal on the part of the law to choose between two logics – namely, that legal persons are persons with a personality (and rights attached to it); and that they do not have a personality and therefore have no right of privacy (even though they might be *called* "persons") – can be seen in Lord Mustill's precited argument in *Broadcasting Standards Commission*:

> An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate. The concept is hard indeed to define, but if this gives something of its flavour I do not see how it can apply to an impersonal corporate body, which has no sensitivities to wound, and no selfhood to protect.

[47] P. Mitchell, *The Making of the Modern Law of Defamation* (Oxford and Portland, OR 2005), 43ff.
[48] See text to note 20 above.

Lord Mustill's recourse to the word "selfhood" is especially telling. Selfhood is not a term of art in the law; indeed, a search on databases reveals that no other reported English case has ever used it. Logically, given the immediately prior qualificative of "impersonal" applied to a corporation, combined with the earlier idea of an "affront to the personality", we would have expected the sentence to end with the word "personality" (or perhaps, to avoid repetition, its synonym "personhood"): "an impersonal corporate body has no personality [personhood] to protect", which, in his Lordship's view, is the reason why it cannot be "affronted" by an "infringement of privacy". But, of course, saying that a corporation has no personality to protect would be enormously problematic when the law explicitly – and indeed uncontroversially – declares it to be a "person". A person who has no rights attaching to its personality is already a stretch; a *person without personality* is a downright contradiction in terms. So, a different term is resorted to, "selfhood", which Lord Mustill implicitly reserves for natural persons (albeit without explaining why). Yet, this is simply a sleight of hand, which allows his Lordship to deny rights of personality to "corporate bodies" even as the law affirms that they are persons. The underlying tension remains, still unresolved: either corporations are persons and they must have rights attaching to that status, including (informational) privacy, or they are not and there is no reason why they should. But saying that they are persons without rights of personality, or that they have "personhood" but not "selfhood", is hopelessly muddled.

B. Dignity, Autonomy and the Right to Privacy

This observation leads to a broader point. As mentioned earlier, the argument is often made (in case law and legal literature alike)[49] that the right to privacy is rooted in the anterior principles or values of dignity and/or autonomy, which would justify that the right could only avail to the benefit of natural persons. Without opening the broader question of whether this is correct, nor indeed seeking to unpack the concepts of dignity and autonomy (both of which are obviously complex and contested), a few comments can be offered here on the implications of the idea.

The main point is that appealing to these underlying values does not solve any difficulties when it comes to the personality rights (including privacy) of legal persons: it simply pushes them one step back. For, if dignity and/or

[49] See text to notes 35, 38 above; *Campbell v MGN* [2004] UKHL 22, at [50] (Lord Hoffmann) ("something worth protecting as an aspect of human autonomy and dignity"); Moreham and Warby (eds.), *Tugendhat and Christie*, [2.55]–[2.69] and references cited; N.A. Moreham, "Why Is Privacy Important? Privacy, Dignity and the Development of the New Zealand Breach of Privacy Tort" in J. Finn and S. Todd (eds.), *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (Wellington 2008), 231, 232ff.

autonomy are the foundation – whatever exactly this might mean – of privacy, then presumably they are the foundation of other rights of personality as well; it is difficult to see in what relevant way dignity or autonomy would play out differently in the context of, say, reputation or bodily integrity. But then we have a twofold alternative. Either (which the argument appears to presume) corporations do not have dignity or autonomy, in which case they do not have personality or personality rights, or they do.

If they do – for there is nothing intrinsically impossible about ascribing to legal persons dignity, in the sense of a status worthy of respect, and even less so autonomy, which simply means, at its core, the capacity to choose for oneself (already implicit, it would seem, in the recognition that corporations can have a "will" of their own) – then the argument has failed to explain the differential treatment between natural and juridical persons. On that reading, as per the second model of corporate personality sketched out above, legal persons, having dignity and/or autonomy, can straightforwardly be recognised personality, hence (among other rights deriving from it) privacy.

If they do not, on the other hand, then there is a further alternative. We can either say that corporations are legal persons but legal persons without dignity or autonomy (hence rights of personality); or we can say that they are not legal persons precisely *because* they do not have dignity or autonomy (which in turn would explain why they do not have rights attached to personality). The implication of accepting the former view is that we are left with two very different types of persons-at-law: persons natural, with a full set of personality rights; and persons non-natural, which have (presumably) none, either because they cannot (e.g. *corpus*) or because they could but are refused them on the basis of their lack of dignity and autonomy (e.g. privacy, but the same reasoning would logically apply to reputation). The word "person", on that reading, no longer corresponds to a whole that is united in an intelligible way. It is *one* word used to refer to *two* radically different realities: natural persons, endowed with dignity/autonomy and (therefore) rights of personality; and non-natural persons, which have neither dignity/autonomy nor (for that reason) rights of personality. This means two things, both of which are highly problematic: (1) the word "person", originally (and still traditionally, outside of the law) associated with humans, has now been emptied of its substance, to the effect that we probably need to find a new one; and (2) we face the apparent absurdity that a person can exist but not have rights of "personality" – in which case we probably need a new term to designate these as well (rights *of humanity*?). Hence, by elimination, if we refuse to recognise dignity and/or autonomy, and therefore personality, to corporations, then the second branch of the (second) alternative should be preferred: *they are not in fact persons*. They might exist, but as something else.

C. Privacy, Legal Persons and Subjects of Rights

The argument developed in this article is simply one of logic. It is that, if we take seriously the idea that legal persons are persons(-at-law), then the implication is that they should – as per the minority approach sketched above – be endowed with a right to privacy; on the other hand, if we do not think that they ought to, then we give away that we do not really believe that they are persons. We cannot just keep saying, as per the majority approach, that they are persons but refuse to grant them the rights meant to flow from this.

It is interesting to explore briefly some implications of both approaches. The first one is undeniably internally coherent. It relies on the idea that legal persons have all the rights of personality that they are capable of having. In terms of privacy, as explained, this applies straightforwardly to informational privacy; but it probably does not include spatial privacy, which really is access to the person in the sense of their body (*corpus*). There is no equivalent logical contradiction in holding that a corporation is a legal person yet does not have a right – spatial privacy – that a natural (human) person would have, insofar as that right is grounded in the latter's "naturality" (humanity).[50] As was seen, that approach, namely treating juridical persons like natural ones to the extent that this is possible, is a minority viewpoint in the law, although it does have some support in the cases (and academic literature as well).[51]

The second approach – which does not appear to be currently defended by anyone but is, for the reasons explained, *the logical implication of the dominant model* – is rather more radical. Exploring more fully the idea that legal "persons" are not in fact persons would naturally deserve a study of its own. Suffice here to say that its implications are not as far-reaching as it might seem. It would not, as mentioned, amount to saying that legal persons do not exist in some sense, nor that they are not capable of bearing rights and duties (the very reason why they came into existence in the first place). It simply means that they should not be called persons (a term to be reserved to entities to which we do mean to attach the consequences, in terms of rights, of their recognised personhood) and also, precisely because they are not persons, that they

[50] However, there is no denying that, as suggested in note 46 above, this ushers a tension into the category of persons-at-law.

[51] *Lenah Game Meats* [2001] HCA 63, at [328] (Callinan J.); G. Taylor and D. Wright, "Privacy, Injunctions and Possums: An Analysis of the High Court's Decision in *Australian Broadcasting Corporation v Lenah Game Meats*" (2002) 26 Melbourne University Law Review 707, 720 ("it should be recognised that it is contradictory for the legal system to create fictitious persons and then to use their very fictitiousness as a reason for denying them legal rights"); S. McCorquodale, "Corporations' Right to Privacy in Canada and Australia: A Comparative Analysis" (2003) 15 Bond Law Review 102, 113. See also L.A. Bygrave, "A Right to Privacy for Corporations? *Lenah* in an International Context" (2001) 8 Privacy Law and Policy Reporter 130.

should not be given – certainly not as a matter of principle, and probably not at all – rights described and understood as rights "of personality".

What they would retain, but not under the current terminology, is the historical core of legal personality (as already recognised, but not under that name, by Roman law): an existence separate from human beings as legal "units" that can sue and be sued in their own right and also hold assets and enter into contracts in their own name (perhaps other things as well, like being vicariously liable for the acts of certain natural persons). But they would not have rights of personality, such as *corpus* (which is understood to be an analytical necessity already), reputation or privacy. Whatever we think of the merits of this idea, it seems impossible to deny that it is a view that is logically possible, and indeed practically possible as well (as evidenced by their having done without a right of privacy up until the present day, and also the fact that reputation being taken away from many of them, as it was in Australia in 2005, did not have any discernible negative consequences either for them or for the broader society).

V. Conclusion

There are two things that this article has tried to do and one that it has not. What it has not tried to do, even though the question unavoidably kept popping its head, is take a general stance, based on first principles and considerations of public policy, as to whether legal persons (or some of them) should have a right to privacy, whether full or partial. The reason for this is neither that it is uninteresting nor that it is unimportant; first and foremost, it is because it is probably impossible to answer it without having a general theory of personhood, both natural and – if indeed there is such a thing – non-natural, and also a general theory of privacy.

Rather the article has examined two narrower questions, much easier to answer and which in turn inform the more general debate of principle and policy. The first is, what does the posited law say? Here, the answer is that it does not say much, either in England or Australia (or indeed elsewhere in the Anglo-Commonwealth tradition); but, to the extent that it does say something, it seems incapable of making up its mind. Once we accept that at least informational privacy can straightforwardly be held by juristic persons, the basic, binary question would appear simply to be whether it *should* benefit all persons or just natural ones. Yet – and the same, as was seen, is true of the much longer-established right to reputation – answering this seems to be more than the law is able to do. Part of it wants to say yes; the other part, no.

The second question is, what does this tell us about the nature of legal personality? Here, the answer suggested is that the reason why the law does not have a clear answer is because it oscillates between two models of corporate personality, refusing to choose between them. One model,

reflected in Callinan J.'s judgment in *Lenah Game Meats*, is that legal persons, being persons, should have rights of personality – including, at the very least, those like (informational) privacy and reputation which they are capable of having. (This was also the dominant strand of the law of defamation, until the abrupt change brought about by the Uniform Defamation Acts in Australia in 2005). The other model, which dominates the law of privacy – as indeed, now at least, the law of defamation – is that these rights should only, on proper analysis, benefit natural persons. This, the article argued, is perfectly coherent (and might well be the "right" answer as well); but then, the argument concluded, if that is the reality then it is very hard to see how a person that does not have rights *of personality* could have personhood-at-law and, accordingly, be a person. If we consider that companies, public authorities etc., do not – or should not – have rights of privacy (or indeed of reputation), then the logical implication is that they do not have personality. That does not mean that they cannot exist, even as bearers of rights, but it does have the fundamental implication that legal "persons" *are not in fact persons*.