HAROLD FORD MEMORIAL LECTURE*
"No body to be kicked or soul to be damned": The limits of a legal fiction

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It is a great honour to be asked to deliver this lecture in honour of Professor Harold Ford. Professor Ford was, for many years, Australia's pre-eminent academic authority on company law. Unlike some who are here today, I did not have the privilege of being taught by him. But his authority in his field was such that I made a point of buying the first edition of his text-book, *Principles of Company Law*, as soon as it was published in 1974. I still have it.

Professor Ford said in his preface to the first edition that it was "written with the needs of students primarily in mind"[2]; but his book, and the 16 editions that followed it, became the gold standard of guidance for practising lawyers as to the development of company law through the myriad legislative reforms of the best part of four decades. By reason both of their elucidation of matters of principle and insights into the leading cases, his books proved to be an indispensable guide to an understanding of the corporation as an idea of central importance to modern life.

The idea of the corporation

In the history of ideas, the idea of the corporation has been a point of intersection in our thinking about economics, politics and law. Corporations are now the principal vehicles of the global economy; they have carried the world's capitalist economies from one generation to the next over the two and a half centuries since the beginning of the Industrial Revolution.

The creation of corporations by Royal Charter was recognised as an exercise of the Royal Prerogative long before the enactment of general laws about companies, such as the *Corporations Act 2001* (Cth). From these early times, the corporation became the preferred vehicle of capitalist enterprise. The East India Company, created in the 17th century, is the most important example of a corporation created by Royal Charter. The East India Company functioned for many generations, not only as a champion of British mercantilist policy, but also as the principal instrument of British government of the Indian subcontinent.

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[1] Justice of the High Court of Australia. I gratefully acknowledge the assistance of my Associate, Ms Anna Kretowicz in the preparation of this paper.

[2] Ford, *Principles of Company Law* (1974) at v.

Other corporations were created specifically by statute, and some still are, for example, Australia Post; but now most corporations are created under general incorporation laws, the first of which was the *Joint Stock Companies Act 1844* (UK). The world-changing advantage of these general incorporation laws for those engaged in trade and commerce was the principle of limited liability of shareholders, first introduced into English law in 1855[3].

In Australia, the ubiquity of the corporation as the vehicle of choice for the conduct of business contributed substantially to the shift in the balance of power within the Australian federation from the States to the Commonwealth in favour of a national economy, by enabling the Commonwealth Parliament to impose national standards in industrial relations and consumer affairs. At federation, the power of the Commonwealth Parliament under s 51(xx) of the *Constitution* to make laws with respect, relevantly, to trading corporations was of relatively little practical account; but by the time of the High Court's decisions in the *Concrete Pipes Case*[4] and later, in the *WorkChoices Case*[5], the exercise by the Commonwealth Parliament of this power was, as a matter of practical reality, determinative of standards of conduct in industrial relations and consumer rights in Australia. The meaning of s 51(xx) had not changed since federation, but the proliferation of corporations as the vehicle of choice for trade and commerce meant that the practical significance of the Commonwealth's power over the nation's economy had grown to be vastly greater than the founders could ever have imagined.

The corporate fiction

For all their vital practical significance, corporations are, of course, legal fictions[6]; they are works of the human imagination that exist only because the law says that they do. The legal fiction of the corporation is given substantive effect by the power of the nation State.

In introducing the legal concept of the corporation, Professor Ford, in his first edition, cited Kyd's late 18th century *Treatise on the Law of Corporations*[7] to make the point that the notion of "body corporate" has been in use for centuries in Anglophone legal systems to identify[8]:

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[3] *Ooregum Gold Mining Co of India Ltd v Roper* [1892] AC 125 at 144.
[4] *Strickland v Rocla Concrete Pipes Pty Ltd* ("the *Concrete Pipes Case*") (1971) 124 CLR 468.
[5] *New South Wales v The Commonwealth* ("the *WorkChoices Case*") (2006) 229 CLR 1.
[6] cf Shmilovits, *Legal Fictions in Private Law* (2022) at 50-53, 68-71.
[7] (1793) vol 1 at 13.
[8] Ford, *Principles of Company Law* (1974) at 3.

> "a collection of many individuals, united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law, with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence."

We should note that Kyd spoke of the corporation as being invested "with the capacity of acting in *several respects* as an individual" (emphasis added). Kyd's description of a corporation states the reasons for which the "collection of many individuals" may usefully and legitimately be "united in one body" in terms of means to an end, the end being that of the designer of the institution.

Kyd's description foreshadowed two important points: first, the corporation is separate from its human designers, and, secondly, it is equal to them in its potential to be the bearer of legal rights and obligations. The dual proposition that the rights and liabilities of a company are seen by the eye of the law as separate from, but equivalent in effect to, the rights and liabilities of the individuals who ordained its "institutional design" or who are "united in" it was firmly established at the end of the 19th century by the House of Lords in the great case of *Salomon v A Salomon & Co Ltd*[9]. The dual proposition for which *Salomon's Case* stands is now deeply rooted in our law; but attention is usually focussed only upon the first aspect, especially in private law. This evening, I wish to focus more upon the second aspect of the legal fiction, and to discuss some of the limits of the fiction. Before doing so, it is worth taking a moment to remind ourselves of what *Salomon's Case* actually decided.

Salomon's Case

Mr Salomon had been a sole trader as a leather merchant and wholesale boot manufacturer before he transferred his business to a company in which he was managing director and sole shareholder apart from his wife, daughter and four sons (who held their shares for him). Mr Salomon had earlier entered into a provisional agreement with the trustee for the future company, which provided for the purchase and transfer of his business. Part of the purchase price – which was an

[9] [1897] AC 22.

overvalue – was paid by the issue of debentures. The company, once incorporated, adopted and executed that agreement. About a year later, the company went into liquidation, and the case concerned whether Mr Salomon could be made personally responsible for the company's remaining debts to unsecured creditors. The Court of Appeal accepted that the company was an entity separate from Mr Salomon, but held that it took the transfer of the business, not in its own right but as trustee for Mr Salomon, who as beneficiary was bound in equity to indemnify it for the trading losses it incurred on his behalf. The Court of Appeal held that the *Companies Act 1862* (UK) did not provide for a person who was a sole trader to acquire limited liability by the simple expedient of forming a company the shares in which are beneficially owned by him or her.

The House of Lords dealt with two issues on appeal. The first issue concerned the validity of the agreement adopted by the company. The company's liquidator's claim in relation to this first issue was that these transactions should be set aside as a fraud on the company by Mr Salomon because they had not been agreed to by a validly constituted board of directors. This claim failed in the House of Lords because, in fact, no-one had actually been misled in entering upon and executing the agreement: creditors of Mr Salomon might have been adversely affected by the adoption of the agreement, but they were in no sense misled by it. The company was capable in law of adopting the agreement, and it did not lose its capacity to do so because the bulk of its capital was issued to, and held by, Mr Salomon[10].

The second issue had arisen, not on the liquidator's claim, but in the Court of Appeal[11]. It was said that there had been no sale of the business in the eye of the law because there had been a sale by Mr Salomon to his own agent for his own profit. The House of Lords rejected the Court of Appeal's reasoning in this regard[12] on the basis that the effect of s 18 of the *Companies Act 1862* was that the company was to be treated, in Lord Halsbury's words, as "a real thing"[13], and not the mere alter ego of Mr Salomon. That section, the then equivalent of s 119 of the *Corporations Act 2001* (Cth), provided that upon certification of registration of a company, the corporation became "a body corporate ... capable ... of exercising all the functions of an incorporated company".

So *Salomon's Case* established, not only that the corporation created under the *Companies Act* is a person separate and distinct from its human incorporators or

[10] *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 33, 35-39, 43, 45-46, 47, 51-54, 57.
[11] *Broderip v Salomon* [1895] 2 Ch 323 at 330-331.
[12] *Broderip v Salomon* [1895] 2 Ch 323 at 338-339, 341, 345-347.
[13] *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 33.

shareholders, but also that it is "a real thing", as real as the bearer of rights and obligations as those humans.

The anthropomorphic analogy

In speaking of the second aspect of the fiction of the corporation, namely, that because the corporation is a "real" legal person, it is equal in its potential to enjoy rights and be bound by obligations to human beings within the community in which it operates, we might note immediately that neither the legislation considered in *Salomon's Case* nor the *Corporations Act* deems the corporation to be, for all purposes, the same as an individual. That was not an omission by way of a slip of the pen.

The title of this paper, "No body to be kicked or soul to be damned", is drawn from an observation made by Lord Denning MR in 1981 in *British Steel Corporation v Granada Television Ltd*[14]; but Lord Denning took this particularly vivid encapsulation of the fundamental difference between human beings and their corporate artefact from Edward Thurlow, Lord Chancellor from 1778-1783 and again from 1783-1792. Lord Thurlow was not a fan of the corporate fiction. He thought it to be too open to abuse. His Lordship said[15]:

> "Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like."

He is said to have followed this observation with a whispered:

> "By God, it ought to have both."

Even earlier, in *The Case of Sutton's Hospital*[16], Sir Edward Coke noted that there were limits to the corporate fiction and the anthropomorphic analogy so far as the civic life of the community is concerned. Coke said:

> "They [corporations] cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls."

In *Gorton v Federal Commissioner of Taxation*[17], Windeyer J famously complained of the "unreality and formalism" into which the legal fiction

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[14] [1981] AC 1096 at 1127.
[15] Poynder, *Literary Extracts* (1844) vol 1 at 268.
[16] (1612) 10 Co Rep 23a at 32b [77 ER 960 at 973].

recognised in *Salomon's Case* had led the law. In the realm of private law, resistance by the courts to the logic of the corporate fiction in relation to the separate existence of the corporation has often been expressed in metaphors about piercing or lifting the corporate veil. I will say something very briefly about that, before moving to discuss the limits of the anthropomorphic aspect of the fiction.

Any legal argument expressed only in metaphors is of limited utility[18]. Metaphor has certainly been stretched too far when it acquires a life of its own, as when judges seek to distinguish between "piercing" and "lifting" the corporate veil, as Staughton LJ did in 1991 in *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) [No 1]*[19]. His Lordship said:

> "To *pierce* the corporate veil is an expression that I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose." (emphasis in original)

I don't want to say any more about piercing or lifting the corporate veil, which is concerned with the separateness aspect of the corporate fiction. My focus is upon the anthropomorphic fiction that the corporation is a legal person equal to a human person. This latter aspect of the fiction is constrained by a notion that has its roots in the idea, insisted on by Immanuel Kant and others, that human beings are ends in themselves in contrast to their artefacts. In this conception, the corporation, like other human artefacts, is a tool, useful as a means to an end, but a tool nonetheless. And the ends to which it is put are a matter of human choice. Humans have a dignity which their tools do not. In Ford, Austin and Ramsay's *Principles of Corporations Law*, it is said that[20]:

> "It is not logically necessary to think of a corporation by analogy with an individual. It could be thought of simply as a legal entity which is the object of certain legal rights, duties, powers and privileges."

This distinction between corporations and humans is so obvious, and the comment by Ford and his co-authors, so obviously right, that even judges are, on occasion,

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[17] (1965) 113 CLR 604 at 627.
[18] See, eg, *Theosophical Foundation Pty Ltd v Commissioner of Land Tax* (1966) 67 SR (NSW) 70 at 75; *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 at 264.
[19] [1991] 4 All ER 769 at 779.
[20] Ford, Austin and Ramsay, *Principles of Corporations Law*, 17th ed (2018) at 131 [4.10.3].

able to appreciate it. It is in the realm of public law that we tend to find the limits placed upon the anthropomorphic fiction by the courts. It is in public law that the courts have found compelling the simple truth that corporations, being legal fictions, have no scope for the kinds of civic engagement that human beings enjoy. Corporations cannot feel joy or sorrow, or embarrassment, or maintain a relationship of human intimacy, or consume goods. Nor can they have an abode as a resident of a State, or engage in acts of citizenship, such as voting. In the Australian cases, the stronger the public law context, the more compelling have been the reasons to reject the anthropomorphic analogy. As we will see, the contrast with some recent jurisprudence of the Supreme Court of the United States in this regard is instructive.

The privilege against self-incrimination

In *Environment Protection Authority v Caltex Refining Co Pty Ltd*[21], the High Court divided over the question whether corporations should enjoy the common law privilege against self-incrimination. To understand the issue that confronted the Court, we must begin with a little history.

The changes in the system of criminal procedure that took place in England from the end of the 17th century to the end of the 19th century, including the development of the privilege against self-incrimination, led ultimately to the now familiar understanding that our system of criminal justice is adversarial rather than inquisitorial, and that a criminal trial is accusatorial in character. These changes were driven by the concern of the lawyers who were the foot soldiers of the Whig project in the United Kingdom to defend the liberty of the individual against the power of the State[22]. The broad understanding that it is for the prosecution to prove its case without any assistance from the accused, now referred to as "the companion principle" or a broad right to silence, also emerged in the course of these developments as a corollary of the accusatorial character of the criminal trial[23].

These developments in the processes of the criminal trial occurred without any awareness on the part of those involved of even the possibility of a corporate accused. Once corporations became amenable to prosecution for alleged criminal activity, the question arose as to whether corporations should be able to insist upon

[21] (1993) 178 CLR 477.
[22] *Environment Protection Authority v Caltex Refining Co Pty Ltd* ("*Caltex*") (1993) 178 CLR 477 at 497-498.
[23] See Langbein, *The Origins of Adversary Criminal Trial* (2003).

all the procedural advantages which had been developed for the protection of individual accused persons.

In some common law jurisdictions, the question was resolved on the basis that the protections developed as safeguards for the individual, including the privilege against self-incrimination, were not to be extended to corporations. The view was that a corporation, which enjoys a legal personality separate from that of the natural persons by or through whom it acts, should be fully and unreservedly accountable to the State whose laws gave it life. That was the view taken, at the beginning of the 20th century, by the Supreme Court of the United States in *Hale v Henkel*[24], where the Supreme Court said[25]:

> "[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter ... Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand production of the corporate books and papers for that purpose."

On the other hand, in England, the courts initially conceded the privilege against self-incrimination to corporations. This concession was made on the footing that some notion of equality before the law required that any person legally capable of committing, and incurring the penalties of, a crime should not be compelled by process of law to admit its offence[26]. This rather eccentric view of the claim of equality before the law, contrary to the view taken in *Hale v Henkel*, involved what was essentially an appeal to notions of symmetry. I speak here of symmetry – that Greek word meaning "the same measure" – advisedly, because one cannot sensibly describe this approach as an appeal to the value of equality before the law. It may make sense to say that different things may be measured as having the same "fit"

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[24] (1906) 201 US 43. See also Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992) at 76.

[25] (1906) 201 US 43 at 74-75.

[26] *Webster v Solloway, Mills & Co* [1931] 1 DLR 831; *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 at 409; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547.

for certain purposes, but to speak of a human artefact as the equal of a human being would have caused the ancient Greeks to laugh like drains.

To extend the privilege of self-incrimination to a corporation is not ensuring equality of treatment before the law but compounding an existing inequality in that the corporation cannot, in the nature of things, be physically oppressed by the agents of the State, in the ways that an individual might be oppressed. With a corporate defendant, the concerns of the common lawyers which drove the evolution of the privilege against self-incrimination simply did not arise because a corporation had "no body to be kicked".

In *Caltex*, the High Court of Australia held[27], by a majority, that corporations do not enjoy the privilege against self-incrimination. Deane, Dawson and Gaudron JJ dissented[28].

Of the majority, Mason CJ and Toohey J said that the privilege against self-incrimination is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them[29]. And Brennan J said, "[t]he privilege is designed to protect human dignity"[30], and went on to explain that it is the anthropocentric purpose of the privilege, created to "protect against the pains of conviction 'to which a real person is subject'", that denies its application to corporations[31].

Caltex has stood for more than 20 years as the authoritative solution to the problem which it addressed. It has not been disapproved in any subsequent decision of the Court.

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[27] *Caltex* (1993) 178 CLR 477 at 507-508, 516, 556.
[28] *Caltex* (1993) 178 CLR 477 at 534-535.
[29] *Caltex* (1993) 178 CLR 477 at 498-499.
[30] *Caltex* (1993) 178 CLR 477 at 514.
[31] *Caltex* (1993) 178 CLR 477 at 515-516.

CFMEU v Boral Resources

In *Caltex*, Deane, Dawson and Gaudron JJ had said of the right of an accused to avoid answering incriminating questions[32]:

> "The … right is by no means wholly explained by reference to the maxim *nemo tenetur seipsum prodere*. Rather it is to be explained by the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way."

Their Honours were there focussed upon the accusatory character of the criminal trial and the companion principle that was said to be its corollary.

In the *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*[33], the High Court was concerned with proceedings for contempt of the Supreme Court of Victoria brought initially against the CFMEU under r 75.06 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) ("the Rules") for disobeying orders previously made by a Court. The contempt proceedings were brought by a number of construction companies adversely affected by the CFMEU's blockade of a construction site.

In the course of the contempt proceedings, the companies applied for an order pursuant to r 29.07(2) of the Rules requiring the CFMEU to make discovery of particular documents. Initially, the companies' application for discovery was dismissed on the ground that the contempt proceedings were criminal proceedings to which the Rules did not apply. The Court of Appeal of the Supreme Court of Victoria reversed that decision.

In the High Court, the CFMEU invoked the companion principle. Because the companion principle was distinct from, and broader than, the recognised privilege against self-incrimination, it was said that it operated in favour of the party charged even where the privilege against self-incrimination was not available to that party. It was argued that, in the absence of clear words in the Rules, the companion

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[32] *Caltex* (1993) 178 CLR 477 at 527.
[33] (2015) 256 CLR 375.

principle meant that the general words should not be construed so to apply in proceedings for contempt of court.

French CJ, Kiefel, Bell, Gageler JJ and I upheld the submission by the companies that the proceedings for contempt brought under the Rules were not criminal proceedings. On that footing, the companion principle had no application in relation to an order for discovery made under the Rules. The plurality did not go on to consider the further argument put for the companies to the effect that the companion principle is not engaged, even in a criminal proceeding, when an order is sought to compel the production of a document by a corporation[34].

Nettle J, however, went on to deal with that argument, concluding that[35]:

> "it is not a fundamental aspect of the accusatorial criminal justice system that a corporation should be entitled to resist a requirement for compulsory production of documents ... It follows that, in the case of a corporate defendant, there is no need for any specific statutory abrogation of the fundamental principle or companion rule in order to render the corporate defendant susceptible to an order compelling the production of documents."

In my respectful opinion, Nettle J was quite correct to limit the operation of the companion principle in this way. That limit reflects the historical concern with the protection of those persons with a body to be kicked. That view was consistent with the observations in *Caltex* of Mason CJ and Toohey J, who said[36]:

> "To speak in this context of a violation of the 'right to silence' serves … only to confuse the issue. As Lord Mustill demonstrated in his speech in *Reg. v Director of Serious Fraud Office; Ex parte Smith*[37], a number of separate and distinct immunities are generally clustered together under the label the 'right to silence', thereby leading to the misconception that 'they are all different ways of expressing the same principle, whereas in fact they are not' …

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[34] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 378.
[35] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 401 [81].
[36] *Caltex* (1993) 178 CLR 477 at 503-504.
[37] [1993] AC 1 at 30-31.

> [T]he shield of privilege as applied to corporations is a formidable obstacle to the ascertainment of the true facts in the realm of corporate activities.
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> Indeed, the extent to which statute has interfered with the privilege [against self-incrimination] in relation to corporations indicates that the privilege, at least in so far as it relates to production of corporate documents, is not a fundamental aspect of the accusatorial justice system." (citation omitted)

Further, in this regard, McHugh J said[38]:

> "It is difficult to see how the administration of justice, even under the adversary system of criminal justice can be advanced by allowing a corporation to refuse to produce documents on subpoena simply because the documents tend to incriminate the corporation. If a corporation can refuse to produce documents, the public interest in detecting and punishing crime is diminished so that the integrity of the adversary system can be maintained for the benefit of an artificial entity. This is much too high a price to pay for allowing corporations to claim the privilege."

Legal Professional Privilege

On the other hand, it is not disputed in Australian law that legal professional privilege is available to a corporation[39]. That makes perfect sense. To recognise the availability of legal professional privilege to a corporation is to recognise that any bearer of legal rights and duties needs legal advice in order to exercise those rights and to perform its duties. Only with legal advice can a corporation safely acquire and conserve its assets and venture them in any enterprise in which it may be committed by its designers[40].

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[38] *Caltex* (1993) 178 CLR 477 at 556.
[39] See, eg, *Grant v Downs* (1976) 135 CLR 674; *Leader Westernport Printing Pty Ltd (t/a Waverley Offset Publishing Group) v IPD Instant & Duplicating Pty Ltd* (1988) 5 ANZ Ins CAS 75,364 (60-856); *Electricity Trust (SA) v Mitsubishi Australia Ltd* (1991) 57 SASR 48.
[40] See *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161.

The corporation and the right to privacy

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[41], several of the Justices of the High Court expressed themselves to be open to the development of the common law to accept "a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life ... 'free from the prying eyes, ears and publications of others'"[42].

Given the tenor of some of the reasons in *Lenah Game Meats*, it would not be surprising were the High Court now to accept a tort of invasion of privacy, along the lines of the US *Restatement*. But dicta in *Lenah Game Meats* suggest that such a cause of action would probably be confined to cases of intentional intrusion, physically or otherwise, upon the solitude or seclusion of an individual or his or her private affairs[43]. In the case of the publicising of material concerning the private life of an individual, the conduct would be actionable if the matter publicised is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public[44].

In the United States, a cause of action along the lines adumbrated in the US *Restatement* is not available to a corporation because the cause of action is concerned to protect human dignity, not the opportunity to exploit information of value as an asset, or as enhancing the value of an asset, of a business.

Privacy has two aspects that are relevant for present purposes. There is the interest in quiet possession of one's property that sustains the ancient remedy of trespass; and there is the interest in being left alone by the rest of the community. In terms of Kyd's description of the corporation, one can readily accept that corporations share the first of these interests with natural persons: if the fictional body uniting many individuals in one is to enjoy its rights to property "according to the design of its institution", it must be able to take steps to conserve those rights. But after a thousand years of common law, financial and property interests are already sufficiently protected. The notion of a cause of action to protect privacy would address a different kind of interest.

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[41] (2001) 208 CLR 199 at 230-231 [53]-[55], 231 [58], 258 [132].
[42] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 258 [132], citing *Restatement (Second) of Torts* § 652A, Comment *b*.
[43] *Restatement (Second) of Torts* § 652B.
[44] *Restatement (Second) of Torts* § 652C.

In the seminal article on privacy by Brandeis and Warren[45], which is the *fons et origo* of the modern debate about privacy, property rights are put to one side. The preservation of individual privacy is presented as an aspect of human dignity in relation to which the community as a whole has an interest that is separate and distinct from the enjoyment of property rights protected by rights of action such as trespass. That was the central concern of the article. The unlawful publication of the intimate moments of individuals strips them of their dignity and degrades the audience as well.

The point for present purposes is that whatever claim to protection privacy may have, as distinct from the vindication of property rights, it is not a claim that corporations can make. Just as they have no soul to be damned; so they have no claim to human dignity.

A constitutional setting

Residence

In *Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe*[46], the High Court was required to decide whether a corporation could be a "resident" of a State for the purposes of s 75(iv) of the *Constitution* which confers original jurisdiction on the High Court in matters "between States, or between residents of different States, or between a State and a resident of another State". This provision was taken from the *Constitution* of the United States, where it was adopted to assuage the concern that a resident of one State might not receive justice in the courts (including the juries) of another State[47].

In *Howe's Case*, the High Court divided over the issue, with the majority holding that the ordinary meaning of the word "resident" involves a living person[48].

Isaacs J, who with Starke J dissented, observed[49]:

> "Once admit, as the cases cited unmistakably force us to admit, that it is proper to say, in legal terms, of a corporation that 'it is here', that it has a 'local habitation', that it has a 'residence', say in Victoria, and that it 'resides',

[45] Warren and Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.
[46] (1922) 31 CLR 290.
[47] See Article III, Section 2, *Constitution of the United States*.
[48] *Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 295, 330-331, 335.
[49] *Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 321.

> say in New South Wales, and that it is 'resident', and that all this is by force of common law principles recognized by the Courts, and at times recognized by the Legislature, facing the facts of life; what frontier line of legal or practical thought can separate the two phrases 'the corporation is resident' and 'the corporation is a resident'?" (citation omitted)

Two members of the majority, Knox CJ and Gavan Duffy J, focussed upon the constitutional text itself, rejecting the broader purposive approach of the minority. Their Honours said[50]:

> "Counsel for the plaintiff company ... urged that the object of the section was to give the High Court jurisdiction over litigation, and that it should therefore be read as including all persons whether natural or artificial who might become parties to a litigation. This is no more than to say that we should first attribute an intention to Parliament, and then construe its language so as to carry out that intention."

It may be said that this narrow view of the constitutional text does not sit well with the accepted approach to statutory or constitutional interpretation under which one does not read down a conferral of jurisdiction upon a court. Further, to the extent that the purpose of a constitutional provision may be discernible from historical context, one might readily concede that the mischief at which s 75(iv) was aimed is the notorious risk of a verdict by a "home town jury", and that this risk is borne alike by all persons who are outsiders, whether their legal personality is natural or artificial. Indeed, it might even be said that a corporation organised under the laws of one State may stand in even greater peril of a "home town verdict" in another State, than a natural person. And to the extent that it might be said that the mischief at which the American analogue of s 75(iv) was aimed was not of such concern in Australia because of the high regard in which the courts of each of the federating States was held, the obvious response is that, if that were so, there is no reason for the inclusion of s 75(iv) at all.

All that being said, however, one can only applaud the Court's insistence that "residence" in the *Constitution* is an attribute characteristic of persons who are actually capable of living in a State who are also capable, as real persons, of participating in the civic life of that State, rather than of cultural artefacts referred

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[50] *Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 295-296.

to as such in s 51(xx) of the *Constitution*, and there designated by reference to their functions. As Higgins J, the other member of the majority, said[51]:

> "[T]he expressions in sec. 75 of the Constitution, 'residents of different States' and 'a resident of another State,' refer to residence in the ordinary popular sense, usually involving sleep, shelter and home, and not to carrying on business. A merchant is a resident of his [or her] suburb, although all his [or her] business is carried on in the city. A corporation, being an artificial incorporeal entity, 'without body to be kicked,' has no residence in the ordinary sense."

The decision in *Howes Case* had the salutary effect that the operation of the constitutional provision cannot be altered by a State exercising its power to make a fictional person as Isaacs and Starke JJ were willing to accept. The majority view may now be described as well-settled. In the later cases of *Cox v Journeaux*[52] and *Crouch v Commissioner for Railways (Qld)*[53], the High Court refused to reconsider the decision in *Howe's Case*.

Citizenship

In contrast to the approach in *Howe's Case*, the tendency of American courts has been to apply the corporate fiction rigorously so as to treat corporations on the same footing as individuals[54]. This tendency has long been present, but it has gathered greater force in recent years.

Early in the 20th century, in *Ramsey v Tacoma Land Co*[55], a state corporation was held to be a citizen of the United States within the meaning of a statute, 43 USCA § 898 (Rights of purchasers from railroads of coterminous lands not within grants), that conferred upon "citizens", who were bona fide purchasers from a railway company of land excepted from its grant, the right to purchase that land from the government.

The Court proceeded on the basis that "[o]bviously, in a remedial statute like this, the term 'citizens' is to be considered as including state corporations, unless there

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[51] *Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 334.
[52] (1934) 52 CLR 282 at 285.
[53] (1985) 159 CLR 22 at 28.
[54] *Red Star Express Lines v DeStefano* (1968) 248 A 2d 697.
[55] (1905) 196 US 360.

be something beyond the mere use of the word to indicate an intent on the part of Congress to exclude them"[56].

One may say, with some confidence, that the courts in Australia would never acquiesce in a suggestion that would have the effect of frittering away the obvious distinction between citizens and their artefacts.

In *Citizens United v Federal Election Commission*[57], the appellant, a non-profit corporation, had released a film in January 2008 titled "Hillary: The Movie", which was highly critical of then presidential candidate, Hillary Clinton. Citizens United wanted to make the film available on video-on-demand services, and to promote the film by running ads on broadcast and cable television. Congress, by the Bipartisan Campaign Reform Act had prohibited corporations or unions from using their general treasury funds to make independent expenditure for "electioneering communications", meaning speech expressly advocating the election or defeat of a political candidate within 30 days of a primary or 60 days of a general election.

Citizens United challenged the constitutionality of the law on First Amendment grounds. The Supreme Court, by 5-4 majority, upheld the argument and rejected a distinction sought to be drawn between corporate and non-corporate speech for the purposes of the First Amendment. Justice Anthony Kennedy, writing for the majority, held that the statute regulated political speech, the kind of speech which should be most protected by the First Amendment. And as a content-based restriction, the law attracted "strict scrutiny". Strict scrutiny spelt its doom, in that the law could not be justified as a measure to ameliorate the power of corporate money to dominate debate and to drown out the speech of others in an election campaign.

Relevantly, for our purposes, Kennedy J said that "[t]he Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each"[58].

Kennedy J went on to say[59]:

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[56] *Ramsey v Tacoma Land Co* (1905) 196 US 360 at 362.
[57] (2010) 558 US 310.
[58] *Citizens United v Federal Election Commission* (2010) 558 US 310 at 341.
[59] *Citizens United v Federal Election Commission* (2010) 558 US 310 at 341, 347. See also at 376 per Roberts CJ and Alito J.

> "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers ... the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."

One might reply that a corporation is on no view a "disfavoured speaker", in the context of the councils of the citizenry exercising their franchise. In those councils, it cannot speak at all.

Justice Paul Stevens dissented, joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor. Justice Stevens preferred an approach which eschewed "strict scrutiny" in this context, and so was more effective to preserve the integrity of the electoral process. Justice Stevens wrote, sensibly enough one would think, that the majority ruling "threatens to undermine the integrity of elected institutions across the Nation"[60] by greatly increasing the power and influence of corporations in determining the winner of elections.

The Supreme Court's decision was subject to public criticism by then President Barack Obama; and in retirement, Justice Stevens advocated for a constitutional amendment to overrule the decision, calling the majority view a "giant step in the wrong direction"[61]. The proposed amendment would have overridden the First Amendment and allowed Congress and the States to impose "reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns". But that, of course, did not happen.

In *Burwell v Hobby Lobby Stores, Inc*[62], the issue was whether the Religious Freedom Restoration Act of 1993 ("the RFRA") permitted the Department of Health and Human Services to require that three closely held corporations including Hobby Lobby provide coverage under regulations promulgated pursuant to the Patient Protection and Affordable Care Act ("the ACA") for forms of contraception that violated the corporations' owners' beliefs against the use of abortion-inducing drugs.

The RFRA prohibited the government from substantially burdening an individual's exercise of religion unless it could show that the burden furthered a compelling

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[60] *Citizens United v Federal Election Commission* (2010) 558 US 310 at 396.
[61] Adam Liptak, "Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction'", *The New York Times*, 21 April 2014, available at <https://www.nytimes.com/2014/04/22/us/politics/justice-stevenss-prescription-for-giant-step-in-wrong-direction.html>.
[62] (2014) 573 US 682.

state interest and used the least restrictive means in so doing. However, the ACA required businesses to provide contraception coverage for methods, including IUDs and morning-after pills, that the defendant corporations considered to be abortifacients. If a business did provide health insurance, as the defendants did, the ACA required that they supply the full range of covered services.

The Supreme Court struck down the regulations, holding that they substantially burdened the religious freedom of the business owners. Justice Alito, writing for the majority, said that closely held corporations were included in the RFRA's reference to "individuals", because corporations are persons under the law and the legal fiction of the corporation was designed to protect the rights of individuals. Justice Ginsburg wrote a dissenting opinion, joined by Justices Sotomayor, Breyer and Kagan.

For the majority, Alito J wrote that[63]:

> "A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby ... protects the religious liberty of the humans who own and control those companies." (emphasis in original)

Unlike the individuals behind Hobby Lobby, the corporation itself had no soul to save; it was in business to make money from the provision of services for reward in accordance with the designs of those individuals and in accordance with the law of the land.

The majority view suggests that, under the *Constitution* of the United States, it is possible to serve both God and Mammon; and, indeed, to do so at the same time. Somewhat remarkably, the Court achieved that result, not simply by applying the

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[63] *Burwell v Hobby Lobby Stores, Inc* (2014) 573 US 682 at 706-707.

anthropomorphic analogy, but by identifying the fictional corporation precisely with its incorporators to give them the best of both worlds, spiritual and temporal.

A striking aspect of the reasoning of the majority is its focus upon the individuals associated within the corporation and the protection of their interests as individuals. The interests of other individuals, and more importantly the civic interests of the community as a whole, who may be affected by the activities of the corporation, are not even in the frame. In particular, there is no recognition of the notion that religion serves an essentially human need for worship of things not of this world as distinct from the worldly concerns of business and profit. Most importantly, the reasoning of the majority proceeds, not so much by an unprincipled extension of the anthropomorphic fiction, but by an extraordinary and unprincipled reversal of *Salomon's Case* itself.

One would like to think that no Australian court would feel free to reason in this way.

Conclusion

I conclude by returning to Kyd's description of the corporation as an institution designed to serve the ends of its designer. Judges should not confuse the human dignity of the designers with the product of their design, and the courts should be astute to acknowledge the limits of the claims of the product to affect other persons whose dignity is equal to that of the designer.