

SUPREME COURT OF NEW SOUTH WALES

ANNUAL CORPORATE LAW CONFERENCE

What is the Future of the Australian Business Corporation?

2019 Conference

Tuesday, 29 October 2019 at 1.20pm

Banco Court, Supreme Court of New South Wales,
Level 13, Queen's Square, Sydney

11 CHIEF JUSTICE BATHURST:

12

13 I would like to begin by also acknowledging the
14 traditional custodians, the land on which we meet, the
15 Gadigal people of the Eora nation, and pay my respects to
16 elders past, present and emerging. They have cared for
17 this land for many generations long prior to settlement by
18 Europeans. We must also recognise, remember and respect
19 the unique connection which they have with this land under
20 their ancient laws and customs.

21

22 In recent times, there has been, and is continuing, a
23 lively public debate about the place of the corporation in
24 modern society. In Australia it was the Hayne Royal
25 Commission which brought this issue into sharp focus,
26 although, of course, similar concerns have been the subject
27 of less prominent discussions for some time prior.

28

29 The interim and final reports of the Commission
30 highlighted several issues about the incentive, structure
31 and culture of our finance and banking industry. These
32 debates and discussions have raised, I think, important
33 questions about the responsibilities which corporations
34 have to the community and the purpose or purposes which
35 they ought to serve.

36

37 These issues are not merely academic. Last month the
38 proper role of business in promoting or supporting
39 contentious social courses attracted comment from our
40 political leaders at the highest level and, indeed, similar
41 attention formed the impetus for the establishment of the
42 Hayne Royal Commission in the first place.

43

44 This phenomenon is not limited to Australia. For
45 example, earlier in the year, the Business Roundtable, a
46 body consisting of the chief executives of over 200 leading
47 US corporations, endorsed a statement on the purpose of a
1 corporation which, for the first time in 45 years, moved
2 away from its previously unqualified focus on shareholder
3 primacy, including a statement recognising that every
4 corporation has a fundamental commitment to all - emphasis
5 added - of its stakeholders. Of course, in the United
6 Kingdom, the British Academy has been leading this
7 discussion with its research project on the future of the
8 corporation, led by Professor Colin Mayer, which has
9 inspired the topic for today's conference and who we are
10 very honoured to have here to talk to us today.

11

12 With the amount of discussion this issue has received,
13 reform has been in the area for some time. However, some

14 might say that its odour has grown stale. They might think
15 there has been too much debate and discussion which has
16 resulted in little conclusive action. They might say that
17 the ideas about corporate social responsibility, or CSRs,
18 as it was at one stage called, and corporate culture have
19 been current and fairly widespread for at least a decade,
20 if not more, with little obvious effect.

21

22 They might point to the fact that despite the adoption
23 of fashionable rhetorical flourishes where convenient,
24 shareholder primacy still overwhelmingly remains the
25 central principle which guides the decision-making of the
26 largest and most powerful corporations in Australia, the
27 United States and, to a lesser but still significant
28 degree, the United Kingdom.

29

30 I think it should be accepted that there is at least a
31 grain of truth in those criticisms. It could once have
32 been thought that simply raising awareness about these
33 issues would be enough to bring about a shift in thinking.
34 Although there has been some change, it must be
35 acknowledged that the results which might have been hoped
36 for have not materialised. But this does not mean, as
37 sceptics might say, that any future efforts are futile.

38

39 In an article which draws together the results from
40 the first stage of the British Academy research project on
41 the future of the corporation, Professor Mayer responds
42 directly to this criticism by pointing out that it is the
43 very fact of the modest success of the prevailing approach
44 which is the strongest argument that there needs to be more
45 work and research in this area, not less.

46

47 He argues that rather than being abandoned, ideas
1 about corporate social responsibility, corporate culture
2 and, most importantly, purpose needs to be integrated more
3 closely with a deeper reconceptualisation of the corporate
4 form.

5

6 It is an interesting and important idea and one well
7 worth investigating. It is certainly true that we cannot
8 simply address arguments for change to a corporation as if
9 it behaved like an individual. Any corporation and, more
10 particularly, any company is a network of relationships
11 between customers, employees, managers, directors and, of
12 course, shareholders. Ultimately it is these relationships
13 which govern how a corporation behaves, despite its
14 technical legal parenthood, and not the sensibilities and
15 sympathies of a single living mind.

16

17 Thus, if we are to accept that the behaviour of
18 corporations has been failing to meet community
19 expectations, then we need to look at these relationships
20 to understand why this happens and how to fix it, possibly
21 as it might require a reconceptualisation of the corporate
22 form, the kind proposed by Professor Mayer and his
23 colleagues.

24
25 The central premise for this proposed
26 reconceptualisation is that there has been a growing
27 divergence between the purpose which society expects a
28 corporation to pursue - that is, public or social
29 purpose - and the purpose which it does pursue, or its
30 corporate purpose. In their contribution to the
31 British Academy research project, Leonardo Davoudi,
32 Christopher McKenna and Rowena Olegario situate the point
33 of divergence in the mid 19th century as a consequence of
34 the enactment of legislation enabling any person to obtain
35 the privilege of incorporation in the United Kingdom and
36 the United States based on laissez faire principles of
37 economics.

38
39 They argue that prior to this time, public purpose had
40 been a defining characteristic of a corporation, justifying
41 their position with a detailed examination of a variety of
42 corporate forms from across the globe throughout history.

43
44 It is true that the mid-19th century legislation
45 certainly marked the break with this conception of the
46 corporation. While powers of the corporation continue to
47 be limited by reference to purpose under the doctrine of
1 ultra vires, this purpose was chosen by the original
2 incorporators and no longer needed to have any connection
3 with the public purpose.

4
5 Further, after much debate, a decision was made to
6 provide for limited liability of the shareholders and, for
7 that matter, the directors of those companies, by giving
8 every person the freedom to incorporate a limited liability
9 company for any purpose they chose. The legislation laid
10 the foundations for a fundamental change in the manner
11 which corporations operated. A corporation could now be
12 used to carry on a business for the sole benefit of its
13 owners without them assuming any risk for the undertaking.

14
15 At least in the United Kingdom, it is also true that
16 advocates of the legislation, led by Robert Lowe, supported
17 a laissez faire approach to regulations and the virtues of
18 economic freedom. However, I think it is going too far to
19 portray these objectives as having been uncontested and

20 wholly accepted at the time. The legislation had been
21 subject to strong criticism from the established business
22 community and others upon the grounds of what might be
23 called commercial morality relating to the introduction of
24 limited liability.

25
26 Moreover, the evidence suggests that the uptake of the
27 new corporate form after its introduction was slow,
28 particularly in the key industry sectors of the British
29 economy. It was only towards the end of the 19th century
30 that at first small businesses and then later larger
31 enterprises began to incorporate and for a variety of
32 different motives.

33
34 It is interesting to note that these motives have less
35 to do with the commitment to the underlying philosophy of
36 the legislation and more to do with considerations of
37 practical expediency in response to changing economic
38 conditions. Many firms, such as the infamous Overend,
39 Gurney & Company, incorporated at or near the brink of
40 collapse in an attempt to stave off the consequences of
41 personal liability for the directors and shareholders.

42
43 Similar firms, smaller firms, in less imminently dire
44 circumstances simply decided to incorporate as a result of
45 the recommendations of their professional advisers. Later,
46 other firms incorporated for easier access to funding
47 through initial capital raising in order to finance the
1 investment required to keep up with the pace of
2 technological change.

3
4 Importantly, I do not think that firms which
5 incorporated for any of those reasons would have thought
6 that they were fundamentally altering the nature of their
7 businesses by doing so. To be sure, they were taking
8 advantage of what was at the time a novel legal innovation,
9 but their character as enterprises run for the benefit of
10 their owners was one they retained from their
11 unincorporated form. The new legal vehicle was simply a
12 different means of obtaining that same goal. It did not
13 change the nature of the businesses or, relevantly for
14 present discussions, the purposes or objects to which the
15 businesses were conducted.

16
17 On this view, the corporate purpose to be pursued by a
18 new company was simply the purpose of the underlying
19 business. Thus, the real change brought about by the
20 legislation was largely facultative rather than
21 revolutionary. The limited liability company made it
22 easier to commence a business or carry on an old one in a

23 new form with additional protection against risk, but it
24 did not change the motive of the owners of the business
25 which was, to put it crudely, profit or, perhaps less
26 crudely, to earn their living.

27
28 Even in relation to an enterprise commenced or carried
29 on through a public company, there are grounds to say that
30 investors are in an equivalent position to the owners of
31 private company and generally have similar motives. A
32 person makes an investment, be it an individual or a
33 superannuation fund, with a view to profit. If the law
34 vests them with sufficient control over the management of a
35 corporation for there to be an incentive for those in
36 management to secure that profit for the investor, then I
37 have difficulty in seeing how that is not for practical
38 purposes ownership.

39
40 Being perfectly honest, it would be naive of me to
41 continue in this sceptical vein for much longer. I accept,
42 of course, the widespread adoption of the limited liability
43 company has been responsible for great changes in our
44 economy and our society, and although many of these changes
45 help create the highest standard of living that at least
46 the developed world enjoys today, they have been associated
47 with what some might euphemistically describe as less than
1 desirable consequences. I do think it is perhaps a little
2 misleading to say that these consequences have resulted
3 only, or even largely, from the purposes of the modern
4 corporation having diverged from the respectable public
5 purposes pursued by purer uncorrupted and more ancient
6 corporate form.

7
8 This is certainly one interpretation of what happened
9 in the mid-19th century. However, I think there is another
10 equally open on the evidence, and which is implicit in the
11 rather different view of history I set out earlier. This
12 interpretation sees the modern corporation developing not
13 as a deficient version of an older corporate form, but as a
14 means of facilitating the business activities of an
15 individual, partnership or other unincorporated
16 association, formally carried on under the general law in
17 the name of greater economic freedom.

18
19 Therefore, we should not be surprised that modern
20 corporations lack the public purpose, since they were a
21 legal vehicle developed to cater to the needs of private
22 enterprise initially by imposing a greater transparency and
23 more stringent reporting obligations on the management of
24 the business to aid prudent investors, and later by
25 introducing limited liability to protect owners from risk

26 directly.

27

28 I think that this interpretation is a little different
29 to that proposed by Professor Mayer and his colleagues. It
30 places the focus on the fact that a corporation has
31 generally not been seen as an entity in itself, but as
32 a means of carrying on a business, and ultimately that the
33 decision to adopt the corporate form is dictated by
34 considerations relating to the nature and circumstances of
35 the business, rather than the other way around.

36

37 This is not an insignificant change in perspective.
38 It suggests that if we believe that corporate behaviour has
39 contributed to the current economic malaise, if that be the
40 correct term, then we should at least be prepared to accept
41 that this behaviour might be driven by what are perceived
42 as the ordinary dictates of business, just as much or
43 perhaps more than might be attributed to a deficiency of
44 the modern corporate form.

45

46 Now, in itself, that does not say anything about the
47 desirability of reconceptualising the modern corporation by
1 reference to the notion of purpose as one possible
2 solution. However, it does mean, I think, that we should
3 be cautious about accepting it as an inevitable or
4 exclusive solution. We might equally find some solutions
5 in updating or changing the laws which govern and regulate
6 how business in a particular industry or sector should be
7 conducted, and in some circumstances it is not too hard to
8 see that these solutions might be more appropriate.

9

10 In my mind, any alternative based on embedding
11 a notion of purpose within the modern corporation must be
12 able to demonstrate that it has advantages that other kinds
13 of solutions do not possess. To that end, I raise what
14 I consider to be three salient questions about the
15 proposal.

16

17 First, what, if any, will be the legal consequences of
18 requiring a corporation to state a purpose in the manner
19 envisaged? As I have mentioned, for a long time the powers
20 of a corporation were constrained by a statement of its
21 purpose in its memorandum of association. Naturally, this
22 created an incentive to define the purposes of the
23 corporation as widely as possible to avoid its actions
24 being held ultra vires. Whilst I understand that
25 Professor Mayer and his colleagues do not intend to
26 resurrect the doctrine in this form, I think there is
27 a danger that similar problems could arise under
28 a different guise, at least to the extent that it is

29 perceived that statements of purpose are to be anything
30 more than aspirational, and I don't underestimate the
31 desirability of aspirational statements.

32
33 For example, if a failure to act in accordance with a
34 statement of purpose could open a corporation or a director
35 to liability for a penalty, or, even more drastically,
36 could be a ground for winding up the company, there will be
37 the same temptation to draft statements of purpose broadly
38 and without meaningful content. Indeed, I must say,
39 looking at some statements of purpose - and none from the
40 people in this room, I hasten to add - they look to me like
41 they have been drafted by advertising agencies rather than
42 lawyers or responsible directors.

43
44 Conversely, if the requirement to state a purpose is
45 intended to be aspirational in effect, then this is not
46 much different from the present position. In Australia
47 a corporation may, and many have done so, choose to state
1 a purpose in its constitution if it wishes. I have some
2 difficulty in seeing how requiring a corporation to state
3 a purpose, without further consequences, will help change
4 its behaviour if it does not already regard it in its
5 interests to do so.

6
7 Second, how will the requirement to state a purpose
8 apply to different types of businesses? There is a wide
9 range in the characteristics of businesses which decide to
10 incorporate, and they do not do so for the same reasons.
11 For the owner of a small business, such as a local
12 newsagent or greengrocer, the decision may simply be to
13 gain the benefits of limited liability. For the owner of
14 a mid-range business, such as an established successful
15 services company with a broad and well-developed client
16 base, there might also be the added taxation benefits. For
17 the largest businesses, such as banks, primary industry and
18 institutional investors, incorporation will usually
19 be a means of public capital raising.

20
21 At a practical level, the concerns which motivate the
22 reconceptualisation of the corporate form based on the idea
23 of purpose appear to me to apply differently in each of
24 these categories. For example, I do not think it can be
25 seriously suggested that the business practices of small
26 firms are responsible in any systemic way for the current
27 economic problem. In many ways, they are the backbone of
28 the Australian economy. Put simply, a greengrocer might
29 make their statement of purpose to sell fruit. Does it
30 really help any more to say the statement of purpose is to
31 sell fruit, but to sell good fruit and thereby better for

32 the general public? It might, but I do not think so.
33 Because acting individually their capacity to effect real
34 change is limited, particularly when they make many of
35 their decisions at the mercy of their clients and
36 suppliers.

37
38 It seems to me that the real targets of the present
39 proposals are the businesses which are large enough that
40 their ongoing operation has become almost indispensable to
41 the proper functioning of the economy. I speak here, of
42 course, of the banks, technology and telecommunications
43 companies, energy companies and perhaps primary industry,
44 including, of course, mining companies and perhaps related
45 infrastructure. Commonly, the decisions which they make
46 about how they carry on their business have a significant
47 impact on a large sector of the population and the
1 environment, or the services or products which they provide
2 have become, as a matter of fact if not strict definition,
3 essential products or services which would otherwise be
4 provided by public utilities. These circumstances I think
5 are strong arguments for reforming how those businesses are
6 conducted, but I am not so sure that this has much to do
7 with their corporate form.

8
9 That leads me to my final question, which is, how
10 would this proposal affect the underlying assumptions of
11 our capitalist system? We rely on the initiative and
12 innovation of private entrepreneurs to make decisions which
13 contribute to our economy, and the modern corporation is
14 the primary vehicle through which we allow this to happen.
15 Thus, we should be careful when making changes to the
16 corporate form which might discourage innovative business
17 activity, particularly when it might be that the real
18 target of the reforms is much narrower.

19
20 As I have said, there is a case for change to be made
21 in relation to the largest businesses which I have just
22 described, but the fact that this case depends on features
23 specific to those businesses and the industries in which
24 they operate suggests that it is not something inherent in
25 the corporate form which is at fault. Rather, it seems to
26 indicate that the underlying cause of the problem lies
27 elsewhere. If we attempt to fix those problems through
28 a global change to the modern corporation, then we might
29 undermine its utility as a vehicle for entrepreneurial
30 activity without any significant compensating benefit.
31 Again, this is a risk which I think we should be sure to
32 avoid.

33
34 For those of you who are thinking to the contrary,

35 I want to reassure you that I am not a dyed in the wool
36 libertarian who thinks that any intervention into the
37 divine sanctity of the free market is abhorrent. I don't
38 have a secret shrine to Milton Friedman hidden in my
39 chambers. I think that real issues have arisen in recent
40 times about how large businesses are conducted, and I think
41 that in appropriate circumstances some reform to the
42 corporate governance of those businesses is useful.

43
44 In this respect, the proposal put forward by
45 Professor Mayer and his colleagues is innovative, well
46 researched and thought provoking, and it certainly made me
47 reflect deeply on some of the conceptual foundations of the
1 modern corporation.

2
3 In the same spirit, I have raised three salient
4 questions, not as criticism, but as possible avenues for
5 further investigation, consideration and discussion. They
6 are not intended to be, and I do not think any of them are,
7 unanswerable or insurmountable. I do look forward to
8 hearing the ideas proposed by Professor Mayer and his
9 colleagues being discussed further at this conference, and
10 I congratulate them sincerely on their efforts.

11
12 Now, before handing over to commence our first session
13 with Professor Mayer, I would also like to thank
14 Dr Austin and the Law Society of New South Wales for
15 their hard work in helping to organise this annual
16 conference and for putting together this marvellous
17 program.

18
19 In addition to hearing from Professor Mayer himself,
20 we are privileged to be hearing from Justice James Edelman
21 from the High Court of Australia, Ms Catherine Livingstone
22 from the Commonwealth Bank of Australia, and
23 Mr Daniel Crennan QC from ASIC. Each will bring their own
24 perspective to the ideas proposed by Professor Mayer and
25 his colleagues, and you will hear more about them when they
26 are introduced for their respective sessions.

27
28 For now, I will get out of the way and allow
29 Her Excellency the Governor of New South Wales, the
30 Honourable Margaret Beazley AO QC, a former President of
31 the Court of Appeal of this court, to introduce
32 Professor Mayer and the first session of this conference.
33 Thank you.