

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 3.45pm

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

40 CHIEF JUSTICE BATHURST: Thank you, everybody. I think
41 one of the best things about this conference is the
42 different perspectives of people who come here to talk
43 about this very important issue. You could say I was the
44 old cynic; we heard Professor Mayer, who I might say, with
45 respect, was outstanding; Justice Edelman was just as good
46 as we expected; and now we are lucky enough to have someone
47 from what might be described as the other side of
1 a somewhat spiky fence these days, Catherine Livingstone.

2
3 Many of you know Catherine and know of her
4 achievements, which have been many and varied. She is
5 currently, of course, the chairman of the CBA, a director
6 of WorleyParsons, Saluda Medical Pty Limited, and perhaps
7 most importantly for the public good, the Australian
8 Ballet. She is also Chancellor of UTS and a member of the
9 Industry Growth Centres Advisory Committee. She has been
10 part of many government reviews over the past 10 years,
11 a member of the Prime Minister's Business Advisory Council
12 and the Advisory Panel for the Australia in the Asian
13 Century White Paper. She was President of the Australian
14 Museum, chairman of Telstra Corporation - imagine going
15 from Telstra to the CBA - CSIRO and the Australian Business
16 Foundation. Importantly, she was President of Chief
17 Executive Women, she has served on the boards of Macquarie
18 Group, Goodman Fielder, Rural Press, and a member of the
19 New South Wales Government Innovation and Productivity
20 Council. Importantly, of course, she was CEO for a number
21 of years of one of our most successful organisations,
22 Cochlear.

23
24 Without exaggeration, Catherine is one of the most
25 outstanding directors that this country has produced in the
26 past 20 to 30 years. We are lucky to have her and we look
27 forward to hearing from her.

28 [MS LIVINGSTONE presented her paper (see separate attachment).]

42 CHIEF JUSTICE BATHURST: Thank you, Catherine.

43

44 I think many of us as lawyers tend to look at things
45 from a relatively very narrow perspective. Although we
46 talk quite often about policy and the like, we are doing it
47 from what might be said, with respect, perhaps a somewhat
1 blinkered view.

2

3 What Catherine has done for us this afternoon is give
4 us an insight into what I might describe as the real world
5 of corporate activity and corporate governance, and the
6 challenges that face directors, particularly chairs of
7 large corporations in implementing a purpose while being
8 sufficiently agile to cope with the rapidly changing
9 technical environment, corporate environment and, for that
10 matter, regulatory environment.

11

12 She made, I think, when one thinks of it, a
13 startlingly obvious point that reputation is vital and if
14 you don't please your customers, you don't get money in,
15 you don't make a profit. In one sense, all of those
16 matters are entirely inter-related.

17

18 She focused on the question of purpose, which
19 Justice Edelman also focused on from a somewhat different
20 perspective. It would be difficult, I would have thought,
21 to have a class action against a company for failing to
22 comply with its purpose. I hope I'm not a judge when the
23 first one comes to this court.

24

25 It was fascinating, and thank you for it. I wonder if
26 Professor Mayer has anything to say in light of what has
27 just been suggested?

28

29 PROFESSOR MAYER: Thank you very much, and thank you,

30 Catherine, for a really helpful set of observations and
31 questions.

32

33 I think the point that you're really trying to
34 emphasise is that the way in which the notion of purpose is
35 incorporated in companies is, in many respects, already
36 reflecting what we are saying in the report. You talked
37 about it in relation to, for example, investors as having
38 adopted ESG measures, in terms of the way in which
39 companies define their purpose and the fact that the
40 governance really relates to its implementation to the
41 culture of the organisations.

42

43 I think all of those points are exactly ones that we

44 are emphasising in the report as well. So I think in most
45 respects there is no disagreement between what you are
46 suggesting and what we are suggesting.

47

1 What we are really trying to do is to say how can one
2 think of a framework in which that emphasis on companies
3 innovating and promoting a broad range of objectives can
4 most effectively be done.

5

6 If one comes to the starting point about the law and
7 the extent to which law needs to be reformed to do that,
8 then your observation that the law itself is not a
9 mechanism for achieving that I think depends on the
10 circumstances. You ended up I think by suggesting that the
11 proposals that had been put forward are really going to
12 layer an additional element of complexity on companies
13 which would be unwelcome.

14

15 Really, the objective of what we are talking about
16 here is exactly the opposite. It is to think about how the
17 law can be used as a way to enable companies to do things
18 that within the current context may be restricted.

19

20 A lot of mention has been made about the emphasis
21 under Australian law in terms of the focus on success of a
22 company against the success in relation to shareholders.
23 We heard in the previous presentation from Justice Edelman
24 that while in principle that may be the case, in practice
25 the question is about the way in which that is interpreted.

26

27 If one looks at the way in which it is formulated in
28 other jurisdictions - and I will refer now to the case of
29 the UK - what the UK Companies Act of 2006 says is that the
30 director of a company must act in the way that he considers
31 in good faith most likely to promote the success of a
32 company for the benefit of its members as a whole and, in
33 doing so, have regard to, amongst other matters, the likely
34 consequences of any decision on the long-term and the
35 interests of - and then it lists a whole series of other
36 parties, including the customers, the employees, the
37 suppliers, the communities and the environment and
38 reputation.

39

40 If you look at what that is actually saying, it is
41 saying that the company can indeed take account of
42 interests of other parties insofar as it is beneficial to
43 the shareholders - that is to say, that in pursuing the
44 success of the company for the benefit of its members,
45 namely, its shareholders, it can have regard to those other
46 interests and it should take account of the long-term

47 performance.

1
2 What a strict interpretation of that would be is what
3 is the measure of a long-term. The long term is, I think
4 many people would argue, essentially reflected in what the
5 value of the company is. So, in essence, what that is
6 saying is that a company can and should take account of the
7 interests of those other parties to the extent that it
8 promotes the share value of the firm. I think in that
9 regard, you are absolutely right to say that the statement
10 by the business run by the council of institutional
11 investors is being negative about the Business Roundtable
12 statement, is quite surprising, because in essence both
13 parties are saying that the company should be pursuing the
14 interests of other parties to the extent that it promotes
15 the benefits to shareholders. So there isn't really a
16 conflict, and that's basically what people mean when they
17 talk about enlightened shareholder interest, that there is
18 what is sometimes termed the notion of doing well by doing
19 good.

20
21 The issue that arises is if one thinks that that in
22 itself may not be a sufficiently broad measure of what the
23 purpose of a company should be - namely, if we think about
24 the notion of, for example, addressing the problems of
25 climate change to say that the company should promote
26 solutions to climate change only insofar as it is
27 associated with an increase in the value of the company,
28 may be deemed to be a limiting description of what the
29 company can and should be doing.

30
31 That is really why the US has in many states gone
32 beyond that to say, well, there may be companies that wish
33 to have a different set of purposes that do indeed go
34 beyond that, and that is precisely what the public benefit
35 corporation is seeking to do. What we are saying in the
36 report, then, in terms of the legal basis, is not that the
37 notion of enlightened shareholder interest is not a good
38 basis for thinking about the nature of the corporation, but
39 that to limit it to that is restrictive of what may be
40 deemed to be perfectly valid objectives of companies.

41
42 It may well be possible in the context of Australian
43 law, because of the emphasis on the company, not on the
44 shareholders, the companies are able to define their
45 objectives in that way without there being a change in the
46 law. But in many cases, and the US I think is really
47 demonstrating this, that in itself is not sufficient.

1
2 The reason why then we are putting emphasis on this is

3 in the report is to say in thinking about this in a generic
4 context, and the whole objective behind the British Academy
5 program is that it should be entirely international in
6 nature and provide a basis on which people in any
7 jurisdiction can think about the formulation of law, that
8 one wants to think about what in terms of the overall
9 nature of obligations of companies one wants to encourage
10 business to be able to do.

11

12 In some respects, the notion of thinking about it in
13 terms of a shareholder view, even in an enlightened
14 shareholder context, can be really quite restrictive. So
15 far from it imposing greater obligations on companies, the
16 primary purpose of this is to be enabling in allowing
17 companies to essentially identify what their appropriate
18 purposes are.

19

20 Following on from that, the notion of ownership which
21 is critically important in that regard is to recognise the
22 benefit plurality of variety, to encourage as many
23 different forms. That observation that I made about the
24 nature of many of the most successful companies in the
25 world having foundations as their ownership structure is, I
26 think, indicative of the way in which what the report is
27 trying to do is to say think about the corporation as
28 potentially a vehicle for achieving more than it has been
29 able to do to date and ensure that it, as far as possible,
30 internalises the externalities that it creates through
31 defining the performance of the company and its profit
32 appropriately.

33

34 I do not think that there is actually any divergence
35 of view between what we are saying, and that really what we
36 are trying to set out in the report is something that is
37 facilitating the types of objectives that you have in mind
38 in terms of the way in which you see companies operating
39 and the way in which the financial reporting council in the
40 UK has interpreted it. In terms of the corporate
41 governance code it has introduced, it is doing exactly what
42 you are describing, thinking about the purpose as being
43 essentially a high-level statement for which the culture
44 and the implementation in terms of the funding of the
45 business are the manifestations of that.

47 MS LIVINGSTONE: I think absolutely I would agree with
1 you. I think what I'm saying as a director in Australia,
2 and under the Australian law, directors are able to have
3 that wider interpretation, they are able to take into
4 account externalities, they are able to take other
5 stakeholders in account, and do, within the construct of
6 the law.

7
8 I think I'm also saying that to focus on the purpose
9 as a singular element might be to the exclusion of
10 recognising how important it is that you include the
11 purpose in your broader governance structure and that you
12 actually understand what you mean by "culture". The risk
13 is that people talk about purpose and then they don't think
14 deeply enough about how you actually deliver governance or
15 how you think about culture, where you would make the
16 interventions.

17
18 For example, saying that you have good governance and
19 good culture is like saying you should have good health.
20 It is true, but you don't know what to do next. If you
21 said you need a better diet and should get more exercise
22 and sleep, then you know where to intervene to get the
23 outcome of good health. Similarly with culture and with
24 governance, you need to understand where you intervene to
25 get the outcomes.

26
27 It is a complex system in the sort of true sense where
28 purpose is one element of that, but not the only element,
29 and to focus attention on purpose and particularly through
30 a legal frame would be, as I said, to the detriment of the
31 other elements, and then you might not actually get the
32 impact that you're looking for because the interventions
33 are at the purpose level, not at the more detailed level of
34 elements of culture and governance.

35
36 I think I am also saying that in terms of the
37 proposition that corporations will be the driving force for
38 all solutions, they will be one of three, and the others
39 are government and regulators. I'm looking at that bigger
40 solution set rather than just relying on corporations, for
41 the reasons that I laid out. Anyway, we can debate further
42 in the panel session.

43
44 CHIEF JUSTICE BATHURST: I have to unfortunately call this
45 session to an end. It has been absolutely fascinating.
46 Can I ask you all again to thank Catherine.