

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
SUPREME COURT ANNUAL CORPORATE LAW CONFERENCE
OPENING REMARKS
‘DOES THE MODERN CORPORATION HAVE A FUTURE?’
TUESDAY 29 OCTOBER 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. They have cared for this land for many generations, long prior to settlement by Europeans. We must always recognise, remember and respect the unique connection which they have with this land under their ancient laws and customs.
2. In recent times, there has been a lively public debate about the place of the corporation in modern society. In Australia, it was the Hayne Royal Commission which brought this issue into sharp focus, although similar concerns had been the subject of less prominent discussion for some time prior. The Interim and Final Reports highlighted several issues about the incentives, structure and culture of our finance and banking industry. These debates and discussions have raised important questions about the responsibilities which corporations have to the community and the purpose or purposes which they ought to serve.
3. These issues are not merely academic. Last month, the proper role of business in promoting or supporting contentious social causes attracted comment from our political leaders at the highest level,¹ and indeed,

¹ See Michelle Grattan, ‘View from The Hill: Morrison’s Right Hand Man Dispenses with Niceties in Lecturing Big Business’, *The Conversation* (Article, 13 September 2019) < <https://bit.ly/2Nept7m>>; Anthony Albanese, ‘Partnerships in the National Interest’ (Speech, Business Council of Australia, 18 September 2019) < <https://bit.ly/2Nk6LeS>>.

similar attention formed the impetus for the establishment of the Hayne Royal Commission in the first place. Nor is this phenomenon limited to Australia. For example, earlier in the year, the Business Roundtable, a body consisting of the Chief Executives of over 200 leading United States corporations, endorsed a “Statement on the Purpose of a Corporation” which, for the first time in 45 years, moved away from its previous unqualified focus on shareholder primacy by including a statement recognising that every corporation has “a fundamental commitment to all of [its] stakeholders”.² And, of course, in the United Kingdom, the British Academy has been leading this discussion with its research project on “The Future of the Corporation”,³ led by Professor Colin Mayer, which has inspired the topic for today’s conference.

4. With the amount of discussion this issue has received, reform has been in the air for some time. However, some might say that its odour has grown stale. They might think that there has been too much debate and discussion which has only resulted in inconclusive action. They might say that the fact that ideas about “corporate social responsibility” and “corporate culture” have been current and fairly widespread for at least a decade, if not more, with little obvious effect. They might point to the fact that, despite the adoption of fashionable rhetorical flourishes where convenient, shareholder primacy still overwhelmingly remains the central principle which guides the decision-making of the largest and most powerful corporations in Australia, the United States, and to a lesser but still significant degree, the United Kingdom.⁴

² Business Roundtable, ‘Statement on the Purpose of a Corporation’ (Statement, 19 August 2019) <<https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf>>.

³ The British Academy, *Future of the Corporation* (Web Page) <<https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation>>. Research papers from the first phase of the programme were published in 6(s1) *Journal of the British Academy*.

⁴ Ian Ramsay and Belinda Sandonato, ‘An Analysis of the Business Objectives of the Largest Listed Companies in Australia, the United Kingdom and the United States’ (2018) 36 *Company & Securities Law Journal* 98, 102 ff.

5. Now, I think that it should be accepted that there is at least a grain of truth in these criticisms. It could once have been thought that simply raising awareness about these issues would be enough to bring about a shift in thinking. Although there has been some change, it must be acknowledged that the results which might have been hoped for have not materialised. But this does not mean, as sceptics might say, that any further efforts are futile. In an article which draws together the results from the first phase of the British Academy research project on “The Future of the Corporation”, Professor Mayer responds to this criticism by pointing out that it is the very fact of the modest success of the prevailing approach which is the strongest argument that there needs to be more work and research in this area, not less.⁵ He and his colleagues argue that, rather than being abandoned, ideas about “corporate social responsibility”, “corporate culture” and, most importantly, purpose, need to be integrated more closely with a deeper reconceptualisation of the corporate form.⁶
6. This is an interesting idea, and one well worth investigating. It is certainly true that we cannot simply address arguments for change to a corporation as if it behaved like an individual. Any corporation, and more particularly, any company, is a network of relationships between customers, employees, managers, directors, and of course, shareholders.⁷ Ultimately, it is these relationships which govern how a corporation behaves, despite its technical legal personhood,⁸ and not the sentiment, sensibilities, and sympathies of a single, living mind. Thus, if we are to accept that the behaviour of corporations has been

⁵ Colin Mayer, ‘The Future of the Corporation: Towards Humane Business’ (2018) 6(s1) *Journal of the British Academy* 1, 13.

⁶ Ibid.

⁷ See, eg, Margaret M Blair and Lynn A Stout, ‘A Team Production Theory of Corporate Law?’ (1999) 85 *Virginia Law Review* 247, discussed in the Australian context by R P Austin and I M Ramsay, LexisNexis, *Ford Austin & Ramsay’s Principles of Corporations Law* (online at August 2019) [1.390.9].

⁸ *Corporations Act 2001* (Cth) s 124; see also *Salomon v A Salomon & Co Ltd* [1897] AC 22.

failing to meet community expectations, then we need to look at these relationships to understand why this happens and how to fix it. Possibly, this might require a reconceptualisation of the corporate form of the kind proposed by Professor Mayer and his colleagues.

7. The central premise for this proposed reconceptualisation is that there has been a growing divergence between the purpose which society expects a corporation to pursue, that is, a public or “social” purpose, and the purpose which it does pursue, or its “corporate purpose”.⁹ In their contribution to the British Academy research project, Leonard Davoudi, Christopher McKenna, and Rowena Olegario situate the point of divergence in the mid-19th century, as a consequence of the enactment of legislation in the United Kingdom and the United States based on *laissez-faire* principles of economics, which enabled any person to obtain the privilege of incorporation.¹⁰ They argue that, prior to this time, public purpose had been a defining characteristic of a corporation, justifying their position with a detailed examination of a variety of corporate forms from across the globe throughout history.¹¹
8. It is true that the mid-19th century legislation certainly marked a break with this conception of the corporation. While powers of the corporation continued to be restricted by reference to purpose under the doctrine of *ultra vires*,¹² this purpose was chosen by the original incorporators and no longer needed to have any connection with a public purpose. Further, after much debate, a decision was made to provide for the

⁹ Mayer (n 5) 3; Nien-Hê Hsieh et al, ‘The Social Purpose of Corporations’ (2018) 6(s1) *Journal of the British Academy* 49, 53–5.

¹⁰ Leonardo Davoudi, Christopher McKenna and Rowena Olegario, ‘The Historical Role of the Corporation in Society’ (2018) 6(s1) *Journal of the British Academy* 17, 33–4.

¹¹ *Ibid* 17–18.

¹² See *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653, discussed in R P Austin and I M Ramsay, LexisNexis, *Ford Austin & Ramsay’s Principles of Corporations Law* (online at August 2019) [12.100.3]. The doctrine has been abolished by *Corporations Act 2001* (Cth) s 124, which was first introduced in 1984: see *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth) s 34.

limited liability of the shareholders and directors of these companies.¹³ By giving every person the freedom to incorporate a limited liability company for any purpose they chose, the legislation laid the foundations for a fundamental change in the manner in which corporations operated.¹⁴ A corporation could now be used to carry on a business for the sole benefit of its owners without them assuming any risk for the undertaking.

9. At least in the United Kingdom, it is also true that advocates of the legislation, led by Robert Lowe, supported a *laissez-faire* approach to regulation and the virtues of economic freedom.¹⁵ However, I think that it is going too far to portray these objectives as having been uncontested and wholly accepted at the time. The legislation had been subject to strong criticism from the established business community and others upon grounds of what might be called “commercial morality” relating to the introduction of limited liability.¹⁶ Moreover, the evidence suggests that uptake of the new corporate form after its introduction was slow, particularly in the key industrial sectors of the British economy.¹⁷ It was only towards the end of the 19th century that, at first, small businesses, and then later, larger enterprises, began to incorporate, and for a variety of different motives.¹⁸
10. It is interesting to note that these motives had less to do with a commitment to the underlying philosophy of the legislation and more to do with considerations of practical expediency in response to changing

¹³ See T F Bathurst, ‘The Historical Development of Corporations Law’ (2013) 37 *Australian Bar Review* 217, 223–5.

¹⁴ Davoudi, McKenna and Olegario (n 10) 39–40.

¹⁵ *Ibid* 34; cf Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009) 82–4.

¹⁶ McQueen (n 15) 314–17 (‘It was envisaged that limited liability would encourage speculation and fraud and substantially undermine individual enterprise’).

¹⁷ *Ibid* 140–5.

¹⁸ *Ibid* 193–4, 270–4.

economic conditions. Many firms, such as, for example, the infamous Overend & Gurney Company, incorporated at or near the brink of collapse in an attempt to stave off the consequences of personal liability for their directors and shareholders.¹⁹ Smaller firms, in less imminently dire circumstances, simply decided to incorporate as a result of the recommendation of their professional advisors.²⁰ Later, other firms incorporated for easier access to funding through debt or capital raising in order to finance the investment required to keep up with the pace of technological change.²¹

11. Importantly, I do not think that firms which incorporated for any of these reasons would have thought they were fundamentally altering the nature of their businesses by doing so. To be sure, they were taking advantage of what was at the time a novel legal innovation, but their character as enterprises run for the benefit of their owners was one that they *retained* from their unincorporated form.²² The new legal vehicle was simply a different means of attaining that same goal. It did not change the nature of the businesses, or relevantly for the present discussion, the *purposes* or objects for which the businesses were conducted. On this view, the “corporate purpose” to be pursued by a new company was simply the purpose of the underlying business.
12. Thus, the change brought about the legislation was largely facilitative, rather than revolutionary. The limited liability company made it easier to commence a business, or carry on an old one in a new form, with additional protection against risk, but it did not change the motive of the owners of the business, which was, to put it crudely, profit, or perhaps less crudely, to earn their living. Even in relation to an enterprise commenced or carried on through a public company, there are grounds

¹⁹ Ibid 162–74; see also *Overend & Gurney Co v Gibb* (1872) LR 5 HL 480.

²⁰ McQueen (n 15) 146–8, 238–44, 318.

²¹ Ibid 193, 218; cf Assaf Hamdani et al, ‘Technological Progress and the Future of the Corporation’ (2018) 6(s1) *Journal of the British Academy* 215.

²² See McQueen (n 15) 233–4.

to say that investors were in an equivalent position to the owners of a private company and generally had similar motives. A person makes an investment with a view to profit, and if the law vests them with sufficient control over the managers of a corporation for there to be an incentive for those managers to secure that profit for the investor, then I have difficulty in seeing how that is not, for practical purposes, “ownership”.

13. Now, it would be naïve of me to continue in this mischievously sceptical vein for much longer. I accept, of course, that the widespread adoption of the limited liability company has been responsible for great changes in our economy and our society, and that, although many of those changes helped create the high standard of living we enjoy today, they have been associated with some less than desirable consequences. But, I think that it is perhaps somewhat misleading to say that these consequences have resulted only, or even largely, from the purposes of the modern corporation having “diverged” from the respectable public purposes pursued by a purer, uncorrupted, and more ancient corporate form.
14. This is certainly one interpretation of what happened in the mid-19th century. However, I think there is another equally open on the evidence, which is implicit in the rather different view of the history I set out earlier. This interpretation sees the modern corporation developing, not as a neutered or deficient version of an older corporate form, but as a means of facilitating the business activities of an individual, partnership, or other unincorporated association formerly carried on under the general law, in the name of greater economic freedom.²³ On this view, we should not be surprised that modern corporations lack a “public” purpose, since they were a legal vehicle developed to cater to the needs of private enterprise, initially, by imposing greater transparency and more stringent reporting obligations on the managers of the business to aid prudent investment, and later, by introducing limited liability to protect owners or investors from risk directly.

²³ Ibid 39–46, 51–4.

15. I think that this interpretation is subtly different to that proposed by Professor Mayer and his colleagues. It places the focus on the fact that a corporation has generally not been seen as an end in itself, but as a means of carrying on a business, and that, ultimately, the decision to adopt the corporate form is dictated by considerations relating to the nature and circumstances of the business, rather than the other way around. This is a not insignificant change of perspective. It suggests that, if we believe that corporate behaviour has contributed to the current economic “malaise”,²⁴ if that be the correct term, then we should at least be prepared to accept that this behaviour might be driven by the ordinary dictates of business just as much as, or perhaps more than, it might be attributed to a deficiency of the modern corporate form.
16. Now, in itself, this does not say anything about the desirability of reconceptualising the modern corporation by reference to the notion of “purpose” as a solution. However, it does mean that we should be cautious about accepting it as an inevitable or exclusive solution. We might equally find some solutions in updating or changing the laws which govern and regulate how business in a particular industry or sector should be conducted, and, in some circumstances, it is not too hard to see that these kinds of solutions might be more appropriate. In my mind, any proposed solution based on embedding a notion of “purpose” within the modern corporation must be able to demonstrate that it has advantages that these other solutions do not possess. To that end, I raise what I consider to be three salient questions about what has been proposed by Professor Mayer and his colleagues.
17. First, what will be the legal consequences of requiring a corporation to state a “purpose” in the manner envisaged? As I have mentioned, for a long time, the powers of a corporation were constrained by a statement of its purpose in its memorandum of association. Naturally, this created an incentive to define the purposes of the corporation as widely as

²⁴ Cf Jeffrey N Gordon, ‘Is Corporate Governance a First-Order Cause of the Current Malaise?’ (2018) 6(s1) *Journal of the British Academy* 405.

possible to avoid its actions being held *ultra vires*.²⁵ While I understand that Professor Mayer and his colleagues do not intend to resurrect the doctrine in this form, I think that there is a danger that the similar problems could arise under a different guise.

18. For example, if a failure to act in accordance with a statement of purpose could open a corporation or a director to liability for a penalty, or, even more drastically, could be a ground for winding up the company,²⁶ there will be the same temptation to draft broad statements of purpose without meaningful content. Conversely, if the requirement to state a purpose is intended to only be “aspirational” in effect, then this is not much different from the present position. In Australia, a corporation may already choose to state a purpose in its constitution if it wishes.²⁷ I have some difficulty seeing how requiring a corporation to state a purpose without further consequences will help change its behaviour if it does not already regard it as in its interests to do so.
19. Second, how will the requirement to state a “purpose” apply to different types of business? There is a wide range in the characteristics of businesses which decide to incorporate, and they do not do so for the same reasons. For the owner of a small business, such as a local newsagent or convenience store, the reason may simply be to gain the benefits of limited liability. For the owner of a mid-range business, such as an established, successful services company with a broad and well-developed client base, there might also be added taxation benefits. For the largest businesses, such as banks, primary industry, and institutional investors, incorporation will usually be a means of public capital raising.
20. At a practical level, the concerns which motivate a reconceptualisation of the corporate form based on the idea of “purpose” appear to apply differently in each of these categories. For example, I do not think it can

²⁵ R P Austin and I M Ramsay, LexisNexis, *Ford Austin & Ramsay's Principles of Corporations Law* (online at August 2019) [12.100.3].

²⁶ See, eg, *Re Tivoli Freeholds Ltd* [1972] VR 445.

²⁷ *Corporations Act 2001* (Cth) s 125.

be seriously suggested that the business practices of small firms are responsible, in any systemic way, for the current economic “malaise”. In many ways, they are the backbone of the Australian economy.²⁸ What, then, is hoped to be gained by requiring them to state a purpose? Acting individually, their capacity to effect real change in business practices is limited, particularly when they make many of their decisions at the mercy of their clients and suppliers, and they must ultimately be able to sustain their livelihood of their owners.

21. It seems to me that the real targets of the present proposal are the businesses who are large enough that their ongoing operation has become almost indispensable to the proper functioning of the economy. I speak here, of course, of the banks, technology and telecommunications companies, energy companies, and perhaps primary industry as well, including mining companies and related infrastructure. Commonly, the decisions which they make about how they carry on their businesses have a significant impact on a large proportion of the population and the environment, or alternatively, the services or products which they provide have become, as a matter of fact, if not strict definition, essential products or services which otherwise would be provided by public utilities. These circumstances, I think, are a strong argument for reforming how these businesses are conducted, but I am not so sure that this has much to do with their corporate form.
22. This leads me to my final question, which is, how will this proposal affect the underlying assumptions of our capitalist system? We rely on the initiative and innovation of private entrepreneurs to make decisions which contribute to our economy, and the modern corporation is the primary vehicle through which we allow that to happen. Thus, we should be careful when making changes to the corporate form which might

²⁸ See Geoff Gilfillan, ‘Small Business Sector Contribution to the Australian Economy’ (Research Paper, Parliamentary Library, Parliament of Australia, 15 October 2018).

discourage innovative business activity, particularly when it might be that the real target of the reforms is much narrower.

23. As I have said, there is a case for change to be made in relation to the largest businesses which I have just described. But the fact that this case depends upon features specific to those businesses and the industries in which they operate suggests that it is not something inherent in the corporate form which is at fault. Rather, it seems to indicate that the underlying cause of the problems lies elsewhere. If we attempt to fix these problems through a global change to the modern corporation, then we might undermine its utility as a vehicle for entrepreneurial activity without any significant compensating benefit. Again, this is a risk which I think we should be sure to avoid.
24. Now, I want to reassure you all that I am not a dyed-in-the-wool libertarian who thinks that any intervention in the divine sanctity of the free market is abhorrent. I don't have a secret shrine to Milton Friedman hidden in my chambers. I think that real issues have arisen in recent times about how large businesses are conducted, and I think that, in appropriate circumstances, some reforms to the corporate governance of these businesses might be useful. In this respect, the proposal put forward by Professor Mayer and his colleagues is innovative, well-researched, and thought-provoking, and it has certainly made me reflect deeply on some of the conceptual foundations of the modern corporation.
25. In the same spirit, I have raised three salient questions, not as criticism, but as possible avenues for further investigation and consideration. They are not intended to be, and I do not think any of them are, unanswerable or insurmountable. I do look forward to hearing the ideas proposed by Professor Mayer and his colleagues being discussed further at this conference, and I congratulate them on their efforts.