

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.