



Commentary – Business Purpose and Benefit Corporations

Day 1: Responsible Enterprise

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Business and the 'Legitimacy Problem'

- 'Business has a legitimacy problem' (John Plender, 2008).
- Business purpose and benefit corporations are contemporary responses to this legitimacy problem.

What is the Purpose of Business Purpose (and where does it fit within corporate law theory and history)?

- Berle and Means, *The Modern Corporation and Private Property* (1932) – saw the corporation as an ambiguous body, straddling both private and public law.
- Cf the law and economics theory of the firm – financial underperformance as *the* central problem of corporate law.
- Corporate rights eg *Citizens United* (2010) and *Hobby Lobby* (2014).
- Cf British Academy's conception of business purpose is a major course correction:-
 - Public versus private entity
 - Corporate responsibilities versus rights
 - Recognition that there are multiple problems in corporate law
 - Business purpose = aspirational tool + guardrail against negative externalities.

What are the Implications of Business Purpose?

- It's not just about making profits, it's *how* you make profits.
- Business purpose ties in with contemporary debates about eg ESG, corporate culture, stakeholder protection and voice, corporate reputation and sustainability.
- The corporation becomes creator of positive, not negative, externalities.
- 'The most sustainable way is to not make things. The second most sustainable way is to make something very useful, to solve a problem that hasn't been solved'.

Thomas Sigsgaard

- Business purpose is not just a matter of corporate theory! Eg UK Corporate Governance Code (2018) and UK Stewardship Code (2020).

What Does Irresponsible Capitalism Look Like?

- Incentives designed to address corporate underperformance can exacerbate negative externalities, resulting in ‘irresponsible capitalism’.
- Two recent Australian examples of irresponsible capitalism:

Example No 1 - CBA Banking Scandal and the APRA Report (2018)

- Defective corporate culture.
- Perverse remuneration incentives.
- Financial success ‘dulled the senses’ of the bank to non-financial risks.
- The question ‘Should we?’ needs to be injected into an organisation’s DNA.

The Rio Tinto Juukan Gorge Blasting Scandal – ‘Should We?’



Challenges to the Effectiveness of Business Purpose

Can business purpose control irresponsible capitalism? Perhaps, but there are definite challenges. Eg:

- Different interpretations of its meaning (eg Rock (2020: Davies (2022)).
- Sidelining of pro-social activities into benefit corporations (Lund & Pollman 2021).
- Managerial control of business purpose.
- Spectre of organisational hypocrisy – eg non-credible commitments and greenwashing.
- Accountability mechanisms – eg ESG shareholder activism?
- But most institutional investors are value investors, not ethical investors.
- Anti-ESG resolutions + political pushback.
- ESG integration in executive pay of limited use + metrics issue.

‘The only thing of real importance that leaders do is to create and manage culture’.

Edgar Schein (2004)