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“TO REPAY OR NOT TO REPAY”: DIRECTORS’ DUTIES AND THE JOBKEEPER WAGE SUBSIDY SCHEME

The JobKeeper wage subsidy scheme (JobKeeper) was the federal government’s flagship economic policy response to the pandemic.¹ Running initially from March to September 2020,² it was designed to assist businesses affected by the pandemic to cover their wages by providing a subsidy of \$1,500 per eligible employee per fortnight. Under the first iteration, an entity would qualify if it passed a basic decline in turnover test, calculated by comparing “projected” turnover for a relevant period in 2020 with the corresponding period in 2019.³ There was no requirement to reassess the projection during the first six months of the scheme. That the decline in turnover might not eventuate, or that an entity might remain profitable, or increase profits during the period of support, was irrelevant once the test was met.

Widely supported and praised for contributing to the country’s economic recovery, JobKeeper and its perceived undeserving beneficiaries were also criticised when public funds ended up subsidising the wages bills of profitable – even booming – companies. Due to their transparency, publicly listed companies bore the brunt. JobKeeper “profiteers” were called upon to repay the unnecessary corporate welfare. Few did. It has been reported that at least \$38 billion under the scheme went to companies whose turnover did not fall below applicable thresholds; while \$2.6 billion went to companies whose turnovers doubled or tripled during quarters for which they claimed JobKeeper.⁴ While there is no reliable public record of the total amount repaid, based on disclosures to the ASX the amount repaid by listed entities as of July 2022 is just over \$242 million.⁵ JobKeeper provides a contemporary case study to consider corporate responsibilities and the trajectory of the law regarding directors’ duties to act in companies’ best interests.⁶

Australia has been described as a shareholder primacy jurisdiction.⁷ This is supported by a strong line of case law authority which equates the best interests of the company with the interests of shareholders, generally interpreted as their financial wellbeing.⁸ Thus, at first blush, one might conclude that directors have an obligation to keep legally obtained subsidies and distribute as much profits as possible to shareholders. Any perceived social responsibility, or the interests of the public, would be irrelevant.

¹ *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth); *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth).

² Then extended to March 2021.

³ Different thresholds applied for charities and businesses with an aggregated turnover exceeding \$1 billion: *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) s 8(1)–(4).

⁴ Dan Conifer, “At Least \$38b in JobKeeper Went to Companies Where Turnover Did Not Fall below Thresholds, Data Finds”, *ABC News*, 2 November 2021 <<https://www.abc.net.au/news/2021-11-02/38b-in-jobkeeper-went-to-companies-where-turnover-did-not-fall-100586310>>.

⁵ Australian Securities and Investments Commission, *JobKeeper Notice* (JobKeeper Consolidated Report, Excel File, 15 July 2022) <<https://asic.gov.au/regulatory-resources/corporate-governance/jobkeeper-notice/>>.

⁶ *Corporations Act 2001* (Cth) s 181.

⁷ Pamela Hanrahan, “Companies, Corporate Officers and Public Interests: Are We at a Legal Tipping Point?” (2019) 36 C&SLJ 665; Jean J du Plessis, Anil Hargovan and Jason Harris, *Principles of Contemporary Corporate Governance* (CUP, 4th ed, 2018) 9; Malcolm Anderson et al, “Shareholder Primacy and Directors’ Duties: An Australian Perspective” (2008) 8(2) *The Journal of Corporate Law Studies* 161, 162.

⁸ See James Edelman, “The Future of the Australian Business Corporation: A Legal Perspective” (2020) 14(3) *Judicial Review* (Sydney, NSW) 199, 210, referring to *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199; *Peters’ American Delicacy Co Ltd v Heath* (1939) 61 CLR 457; *Greenhalgh v Arderne Cinemas Ltd* [1950] 2 All ER 1120. See also Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (2006) 84, 96 (CAMAC).

Of course, it is incorrect to say that directors must take *only* shareholders' interests into account, or that shareholders' interests extend *only* to short-term financial gain. There is ample judicial authority that directors can consider a variety of factors when making decisions,⁹ though perhaps only as a means to the end of long-term shareholder wealth creation.¹⁰ The Corporations and Markets Advisory Committee report in 2006 concluded that this "enlightened shareholder value" approach represented the current state of the law.¹¹

Adopting this approach, the decision to return JobKeeper *because* it aligns with community expectations or serves the public interest might be in shareholders' interests, for example by protecting/enhancing the corporate reputation or maintaining public goodwill. This is arguably the best explanation for many companies' decisions to repay. However, as noted in several key judgments, the extent to which the interests of various stakeholders need to be considered will depend on context.¹² The argument that repaying JobKeeper is in the best interests of companies might be more persuasive for those operating retail or public-facing businesses where a loss of reputation or loss of public goodwill might be more immediately and tangibly felt, and less so for companies in other industries. Of course, even for less public-facing companies, all corporations have interests in their reputations, independent of any financial concerns.¹³ That being said, many of the JobKeeper profiteers derided in the media for not repaying their subsidies *were* retail businesses.

There is a perception that the law on directors' duties is moving towards an increasingly stakeholder-oriented position. Jean du Plessis argues that the history of reliance on key cases like *Greenhalgh v Arderne Cinemas Ltd*¹⁴ and *Ngurli Ltd v McCann*¹⁵ to support a shareholder-centric conception of corporations' interests has been influenced by untenable perceptions undergirding shareholder primacy.¹⁶ These perceptions have in recent years been challenged – even exposed as "myths" – by a modern corporate law theory, which (re)emphasises the separate legal status of the corporation and acknowledges that 'in the corporation' a variety of stakeholder interests might be represented.¹⁷ Under this approach, a broader variety of stakeholders – eg government, taxpayers, the public – might factor into directors' decisions to keep or return JobKeeper.

Taking a small sample of the listed companies which publicly gave reasons for their decisions, a variety of positions are discernible. Many which opted to retain JobKeeper simply noted their legal entitlement and made assurances that the support prevented job losses, as intended. This was the position of Eagers Automotive, which refused to repay any of the \$131 million it received, despite profiting more than \$465 million for the 2020 and 2021 calendar years.¹⁸ The CEO of insurance brokers, Steadfast Group, simply said that he was an "entrepreneur, not a philanthropist".¹⁹ Other companies described a range

⁹ See Jason Harris, "Risk Management: Revisiting the Legal Basis of Shareholder Primacy" (2019) 71(2) *Governance Directions* 76, 83, referring to *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 305; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co* (1968) 121 CLR 483, 493.

¹⁰ Shelley Marshall and Ian Ramsay, "Stakeholders and Directors' Duties: Law, Theory and Evidence" (2012) 35(1) *University of New South Wales Law Journal* 291, 298–299.

¹¹ CAMAC, n 8, 96.

¹² *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 10)* (2008) 39 WAR 1, 534; *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, 308.

¹³ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, 301.

¹⁴ *Greenhalgh v Arderne Cinemas Ltd* [1950] 2 All ER 1120.

¹⁵ *Ngurli Ltd v McCann* (1953) 90 CLR 425.

¹⁶ Jean J du Plessis, "Directors' Duty to Act in the Best Interests of the Corporation: 'Hard Cases Make Bad Law'" (2019) 34(1) *Australian Journal of Corporate Law* 3.

¹⁷ du Plessis, n 16, 25–26.

¹⁸ Ben Butler, "Car Dealer AP Eagers to Give Shareholders \$64m in Dividends after Receiving \$130m in Jobkeeper Subsidies", *The Guardian*, 24 February 2021 <<https://www.theguardian.com/australia-news/2021/feb/24/car-dealer-ap-eagers-to-give-shareholders-64m-in-dividends-after-receiving-130m-in-jobkeeper-subsidies>>; Eagers Automotive Ltd, *Annual Report* (2021).

¹⁹ Matthew Elmas, "The New Daily Reveals the Companies that Kept JobKeeper – Despite Huge Profits", *The New Daily*, 3 March 2021 <<https://thenewdaily.com.au/finance/finance-news/2021/03/03/jobkeeper-company-profits/>>.

of stakeholder interests and a sense of social responsibility which influenced their decisions. Toyota Australia, which repaid \$18.2 million, cited its policy of “contributing to the local economy” and a desire to “minimise the cost imposition [on] Australian taxpayer[s]”. It said it “wanted to do the right thing” and “avoid any unnecessary reputational risk”.²⁰ Similarly, Domino’s Pizza said that its board had considered the intention behind JobKeeper and “community expectations” regarding the “prudent use of public funds”.²¹ Whatever its practical impact, the perceived trajectory of law on directors’ duties seems reflected in the decisions of at least some companies – if we take them at their word. But as noted, Australia still represents a shareholder primacy jurisdiction, where the interests of non-shareholder stakeholders, as a general proposition, are only peripheral.²²

The reality is: whether (unneeded) JobKeeper is kept or repaid, either decision can be argued to be in the best interests of the company. Further, it is unlikely that any decision to repay will be challenged by shareholders. At the same time, any decision to *not* repay is not challengeable by other (potential) stakeholders.

If, as has often been debated, the *Corporations Act 2001* (Cth) were amended to expressly permit (or compel) directors to have regard to broader stakeholders’ interests, might more directors have turned their minds to those interests? It is tempting to hope so, though evidence suggests *the law* on directors’ duties has only limited influence on the actual decision-making of directors.²³ The simplest solution to JobKeeper profiteering would have been to incorporate measures in the rules themselves dealing with that eventuality. Of course, the role of directors’ duties in encouraging/compelling *better* corporate behaviour is of perennial interest because “the rules of the game” will rarely be perfect.

The idea of statutorily guiding or compelling directors to have regard to a range of stakeholder interests is not new and there are limitations to such approaches. The limited effectiveness of the United Kingdom’s model led to the addition of obligations compelling directors to report on *how* they have had regard to the interests of stakeholders under s 172 of the *Companies Act 2006* (UK).²⁴ That the majority of JobKeeper repaid has come from publicly listed companies is undoubtedly due in no small part to the increased disclosure requirements on these companies and a lack of transparency has been a steady feature in the criticism of the JobKeeper scheme. Whatever its trajectory or whatever changes might be made to the law on directors’ duties, JobKeeper is a reminder that transparency and disclosure – the facilitation of conditions for public scrutiny and pressure – are critical to achieving more conscientious corporate behaviour.

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²⁰ Toyota Corporation Australia Ltd, *Submission to Senate Economics Legislation Committee* (2021).

²¹ Domino’s Pizza Enterprises Ltd, *Submission to Senate Economics Legislation Committee* (2021).

²² Marshall and Ramsay, n 10.

²³ Marshall and Ramsay, n 10, 315.

²⁴ Financial Reporting Council, *UK Corporate Governance Code* (2018) 5. See also Rosemary Teele Langford, “Social Licence to Operate and Directors’ Duties: Is There a Need for Change?” (2019) 37(3) C&SLJ 200.

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