DIRECTORS' DUTIES, CSR AND THE JOBKEEPER WAGE SUBSIDY SCHEME

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This article contributes to the ongoing debate regarding the construction of directors' duties to act in the best interests of the corporation and their relationship to corporate social responsibility ('CSR') and related concepts. It begins by revisiting the neoliberal ideas underpinning the nexus of contracts theory of the corporation as the root of shareholder primacy in Anglo-American corporate governance. Asking whether these theorisations are appropriate in the Australian context and canvassing the evolving interpretation of directors' duties, this article argues that Australia can still reasonably be said to be a shareholder primacy jurisdiction. Stakeholders' interests and CSR considerations might be permissible factors in directors' decision-making, but only derivatively to the interests of shareholders. Using corporate profiteering from the JobKeeper wage subsidy scheme as a case study, this article argues that the outcomes for which the scheme was criticised, and the response of directors to demands to repay unneeded subsidies, are consistent with and legitimated by theory, law and governance principles which maintain shareholder primacy and which might permit but neither compel nor meaningfully encourage socially responsible corporate behaviour. This analysis highlights not only the importance of designing 'the rules of the game' to prevent their (lawful) exploitation by corporations, but also the limited effectiveness of our current voluntaristic CSR regime in delivering more conscientious corporate behaviour beyond mere compliance with law.

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I Introduction

There is a persistent debate in legal scholarship regarding the construction of directors' duties to act in the best interests of the corporation. At its crux are questions of the meaning and purpose of the corporation. In practical terms, it is predominantly concerned with the extent to which directors should be guided solely or primarily by the goal of maximising value for shareholders, or whether the interests of a broader group of stakeholders, or concepts such as corporate social responsibility ('CSR') or the social licence, can or should be taken into account.[1] This debate raises related questions of the appropriate level of corporate regulation and the reach of state intervention in corporate governance.[2] At times in Australian scholarship, and more often in the United States ('US') and United Kingdom ('UK'), the issues of directors' duties and CSR are situated in the broader context of the politico-economic project of neoliberalism and the associated financialisation of the corporation.[3] This account, underpinned by ideas about individual economic and political freedom, has played an important role in shaping the debate around the purpose and responsibilities of the corporation.

This article seeks to contribute to this ongoing debate in two ways. First, by revisiting the neoliberal ideas underpinning the nexus of contracts theory of the corporation. Connections can and have been made between

[1] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *University of New South Wales Law Journal* 291, 294–5.

[2] See, eg, Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1, 6–11.

[3] See, eg, Paddy Ireland, 'Financialization and Corporate Governance' (2009) 60(1) *Northern Ireland Legal Quarterly* 1, 19; David Ciepley, 'The Neoliberal Corporation' in Thomas Clarke, Justin O'Brien and Charles RT O'Kelley (eds), *The Oxford Handbook of the Corporation* (Oxford University Press, 2019) 274, 278–89; Daniel Attenborough, 'The Neoliberal (Il)legitimacy of the Duty of Loyalty' (2014) 65(4) *Northern Ireland Legal Quarterly* 405, 408–9 ('The Neoliberal (Il)legitimacy'); Andrew Johnston, 'Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility' (2011) 20(1) *Griffith Law Review* 221, 221–7; Pamela Hanrahan, 'Companies, Corporate Officers and Public Interests: Are We at a Legal Tipping Point?' (2019) 36(8) *Company and Securities Law Journal* 665, 668–9.

neoliberalism — as an ideology which valorises individual interactions in free markets, champions deregulation, and is generally hostile to the social welfare state[4] — and contractarian theory, which views the corporation as a fiction; a nexus or a market for individuals to meet and voluntarily contract in their own interest.[5] The contractarian theory has been described as both an attempt to re-privatise the modern corporation, and the root of shareholder primacy in laws and structures of corporate governance.[6] This article explores the analytical usefulness of these theorisations in the Australian context by considering whether shareholder primacy is reflected in our corporate governance regime, focusing particularly on directors' duties to act in the best interests of the corporation, and governance principles and recommendations for listed entities.

The second contribution this article makes is in examining the widely reported corporate 'profiteering'[7] from the JobKeeper wage subsidy scheme — the Australian government's flagship economic policy response to the COVID-19 pandemic.[8] A popular policy and praised for contributing to the country's economic recovery,[9] the scheme and certain beneficiaries were subsequently criticised when it became apparent that billions of dollars in public funds had been distributed to large companies operating profitable businesses, while record profits were dispersed to shareholders and executives as dividends and bonuses.[10] Many publicly listed companies subsequently faced media and public

[4] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2004) 2.

[5] Olivier Weinstein, 'Understanding the Roots of Shareholder Primacy: The Meaning of Agency Theory and the Conditions of Its Contagion' in Thomas Clarke, Justin O'Brien and Charles RT O'Kelley (eds), *The Oxford Handbook of the Corporation* (Oxford University Press, 2019) 139, 149.

[6] Ibid 139–40, 146–7.

[7] The expression is used in the following Bill sponsored by Senator Nick McKim: Coronavirus Economic Response Package Amendment (Ending JobKeeper Profiteering) Bill 2021 (Cth) ('JobKeeper Profiteering Bill 2021'). See also Explanatory Memorandum, Coronavirus Economic Response Package Amendment (Ending JobKeeper Profiteering) Bill 2021 (Cth).

[8] Vincent Goding, 'COVID, Crisis, and *Un*ordinary Order: A Critical Analysis of Australia's JobKeeper Wage Subsidy Scheme as an Exceptional Measure' (2022) 13(1) *Jindal Global Law Review* 39, 45.

[9] Ibid 59.

[10] Dan Conifer, 'At Least $38b in JobKeeper Went to Companies Where Turnover Did Not Fall below Thresholds, Data Finds', *ABC News* (online, 3 November 2021) <https://www.abc.net.au/news/2021-11-02/38b-in-jobkeeper-went-to-companies-where-turnover-did-not-fall-/100586310>, archived at <https://perma.cc/F5KM-9KCW> ('$38bn in JobKeeper to Companies'); Ben Butler, 'Billionaries Receive Tens of Millions in Dividends from

pressure to repay apparently unneeded and undeserved support.[11] Some made full or partial repayments.[12] Most chose not to.[13] As to whether directors' understandings of the interests of the corporation might be said to reflect the shareholder primacy paradigm or whether CSR and community expectations are a significant influence, JobKeeper makes for an ideal case study. This is precisely because a significant portion of responsibility for the scheme's unpopular outcomes can be attributed to the legislation and rules which gave it effect. Indeed, the response from many corporations that opted to retain JobKeeper payments was based simply on their entitlement at law.[14] This goes to the heart of the matter. To expect corporations to repay subsidies to which they were lawfully — but perhaps not morally — entitled is to expect corporations to act in a socially responsible way, above and beyond mere compliance with the law. Moreover, it is to expect directors to make decisions which may be socially responsible or in accord with community expectations, but which may be financially detrimental to the corporation and its shareholders.

Examining a scheme which sought to save jobs by directing support through the corporation, together with the directors' responses to demands to repay JobKeeper subsidies, this article argues that the profiteering itself and the

Companies on Jobkeeper', *The Guardian* (online, 17 February 2021) <https://www.theguardian.com/australia-news/2021/feb/17/billionaires-receive-tens-of-millions-in-dividends-from-companies-on-jobkeeper>, archived at <https://perma.cc/XQ3Y-ES3H> ('Billionaires Receive Millions in Dividends').

11 Melissa Clarke, 'Companies That Received JobKeeper during COVID-19 Pandemic To Remain Secret after Federal Government Rejects Bill', *ABC News* (online, 9 August 2021) <https://www.abc.net.au/news/2021-08-09/companies-which-received-jobkeeper-to-remain-secret/100360512>, archived at <https://perma.cc/2XKS-DVAM>; Ticky Fullerton, 'The Covid Winning Strategy of Solomon Lew and Mark McInness', *The Australian* (online, 26 March 2021) <https://www.theaustralian.com.au/business/retail/the-covid-winning-strategy-of-solomon-lew-and-mark-mcinnes/news-story/5fd7ccfab50d55e3b6806e1b7eb3cacd>.

12 See, eg, Paul Karp, 'Super Retail Group Returns $1.7m from JobKeeper Amid Calls for Harvey Norman To Follow Suit', *The Guardian* (online, 18 January 2021) <https://www.theguardian.com/australia-news/2021/jan/18/super-retail-group-returns-17m-from-jobkeeper-amid-calls-for-harvey-norman-to-follow-suit>, archived at <https://perma.cc/N4US-4R4P>.

13 See, eg, Charlotte Grieve, 'The ASX-Listed Companies Keeping JobKeeper Despite Making Profits', *The Sunday Morning Herald* (online, 3 September 2021) <https://www.smh.com.au/business/companies/the-asx-listed-companies-keeping-jobkeeper-despite-making-profits-20210902-p58ob7.html>, archived at <https://perma.cc/SC8E-URD2>.

14 See, eg, ibid; Dominic Powell, '"Not a Good Look": Push Grows for JobKeeper Payments To Be Returned as Profits, Dividends Boom', *The Sydney Morning Herald* (online, 2 March 2021) <https://www.smh.com.au/business/companies/not-a-good-look-push-grows-for-jobkeeper-payments-to-be-returned-as-profits-dividends-boom-20210302-p576zn.html5>, archived at <https://perma.cc/JTM2-S39M> ('Not a Good Look').

response to the backlash are consistent with and legitimated by theory, law and governance principles which prioritise the interests of shareholders over other stakeholders and which might permit, but neither compel nor meaningfully encourage, socially responsible corporate behaviour where there is a clear financial detriment in doing so. This conclusion suggests that a voluntary approach to CSR and the optimistically permissive interpretation of the law on directors' duties in our latest governmental reviews are unlikely to encourage more morally conscientious corporate decision-making.[15]

II The Neoliberal Theorisation of the Corporation

In 'The Neoliberal Corporation', David Ciepley describes the eponymous subject of his book chapter as

> a novel theoretical and organizational construct that treats the pecuniary interests of shareholders as the sole end of the corporation and gears corporate governance toward maximizing shareholder returns against the assumed opportunism of managers and workers.[16]

It is a beguilingly concise summary. To consider the subject it describes in detail often involves a trip through the history of the corporation, from at least the medieval period (if not before) to the present day, and attempts to theorise it across centuries. In this Part, I will discuss a particular theorisation of the corporation, namely as '*a nexus for a set of contracting relationships among individuals*',[17] which is said to be the root of shareholder primacy as the dominant paradigm of Anglo-American corporate governance.[18] This theorisation has been both shaped by neoliberal champions and has been a key ingredient in the establishment of financialised corporate capitalism.[19]

[15] See generally Corporations and Markets Advisory Committee, Parliament of Australia, *The Social Responsibility of Corporations* (Report, December 2006) ('*CAMAC Report*'); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, June 2006) ('*PJC Report*').

[16] Ciepley, 'The Neoliberal Corporation' (n 3) 274.

[17] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 310 (emphasis in original).

[18] Weinstein (n 5) 139, 149; Charles RT O'Kelley, 'From Berle to the Present: The Shifting Primacies of Corporation Theory' in Thomas Clarke, Justin O'Brien and Charles RT O'Kelley (eds), *The Oxford Handbook of the Corporation* (Oxford University Press, 2019) 119, 134.

[19] Weinstein (n 5) 139.

The corporation is a source of complexity and contradiction for neoliberalism. The two are, at first glance, not easily reconcilable.[20] Although a notoriously loose label, attempts to define neoliberalism regularly bring together ideas of individual liberty, and political and economic policy. Neoliberalism is said to advocate *individual* interactions in *free markets* as essential to the advancement of human wellbeing.[21] For neoliberals, economic freedom is both a means and an end: an essential aspect of individual freedom itself, but also 'an indispensable means toward the achievement of political freedom'.[22] As such, the idea of individual liberty ultimately underlies the policies and processes with which neoliberalism is commonly associated, such as privatisation, deregulation, marketisation and free trade.[23] As to the corporation, the point of contradiction is that neoliberalism has promoted the interests of corporations as part of its agenda for 'economic liberalization', despite corporations traditionally being considered antithetical to markets.[24] Early liberals, such as Adam Smith, were critical of corporations as 'aristocratic institutions' through which the Crown interfered in the economy.[25] The corporation undermined the individual and the freedom at the heart of the free market idea. This was because the corporate form was seen as a state-sponsored 'bundle of privileges' and a kind of collective; therefore, it was a distortion to markets and a limitation on the maximum capacity for individual market exchanges.[26] Indeed, the question of

[20] Kean Birch, *A Research Agenda for Neoliberalism* (Edward Elgar Publishing, 2017) 103–4 ('*A Research Agenda*').

[21] Harvey (n 4) 2; Kean Birch, *We Have Never Been Neoliberal: A Manifesto for a Doomed Youth* (Zero Books, 2015) 11 ('*A Manifesto*'); ibid 2, 4. See also Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40th ed, 2002) 8, 14–15.

[22] Friedman, *Capitalism and Freedom* (n 21) 8.

[23] Damien Cahill, '"Actually Existing Neoliberalism" and the Global Economic Crisis' (2010) 20(3) *Labour and Industry* 298, 298; Birch, *A Manifesto* (n 21) 9.

[24] Joshua Barkan, 'Corporate Power and Neoliberalism' in Damien Cahill et al (eds), *The SAGE Handbook of Neoliberalism* (SAGE, 2018) 446, 466.

[25] Joshua Barkan, 'Roberto Esposito's Political Biology and Corporate Forms of Life' (2012) 8(1) *Law, Culture and the Humanities* 84, 96.

[26] Ciepley, 'The Neoliberal Corporation' (n 3) 275; Barkan, 'Corporate Power and Neoliberalism' (n 24) 446. See also Rob Van Horn, 'Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2015) 204, 210–11.

the corporation marks one of the points where neoliberalism strongly diverges from classical liberalism.[27]

For early neoliberals, especially the members of the Mont Pèlerin Society,[28] the corporation and corporate monopoly was a problem which needed solving if liberalism was to be reinvigorated in the face of (perceived) looming totalitarianism following World War II.[29] However, the solution to that problem, as Ciepley traces in detail, continued to change over the decades.[30] Initially, the neoliberals were 'vociferous opponents of monopoly, in all its forms', including corporate.[31] The threat of corporate monopoly was one of the impetuses for the neoliberal conception of the strong, interventionist state — albeit for the limited purpose of creating and maintaining competitive markets — as opposed to the general rolling back or hollowing out of the state with which neoliberalism is often simplistically equated.[32] However, as scholars have noted, the neoliberal attitude to corporate monopolies underwent not only a transformation, but a complete reversal during the 1950s and 1960s.[33] Prominent neoliberals, including Milton Friedman, not only abandoned their earlier opposition to corporate monopolies, but came to be their theoretical supporters.[34] In short, they concluded that: even where it existed, monopoly was not immune to the power of competition; the effects of monopoly were relatively sanguine and certainly

[27] Philip Mirowski, 'Postface: Defining Neoliberalism' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2015) 417, 438–9.

[28] The founding members included Friedrich Hayek, Ludwig Von Mises and Milton Friedman: Dieter Plehwe, 'Introduction' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2015) 1, 13, 18; Van Horn (n 26) 205.

[29] Van Horn (n 26) 204–5.

[30] Ciepley, 'The Neoliberal Corporation' (n 3) 279–92.

[31] Birch, *A Manifesto* (n 21) 34; Kean Birch, 'Market vs Contract? The Implications of Contractual Theories of Corporate Governance to the Analysis of Neoliberalism' (2016) 16(1) *Ephemera* 107, 113–14 ('Market vs Contract?'); Ciepley, 'The Neoliberal Corporation' (n 3) 279–80.

[32] Birch, *A Manifesto* (n 21) 34–6, 157–8. See also Cahill (n 23) 299–303; Attenborough, 'The Neoliberal (Il)legitimacy' (n 3) 410–11.

[33] Birch, *A Manifesto* (n 21) 39–40; Birch, *A Research Agenda* (n 20) 110–13; Damien Cahill and Martijn Konings, *Neoliberalism* (Polity Press, 2017) 101. This transformation is discussed predominantly in the context of Chicago School neoliberals and was not embraced by German ordoliberals: Van Horn (n 26) 206, 228–9.

[34] Birch, *A Manifesto* (n 21) 39–40; Birch, *A Research Agenda* (n 20) 110–13.

preferable to unwanted government regulation; and consumers benefited from these large and efficient market actors thanks to downward price pressure.[35]

Each of these conclusions concerned the empirical effects of the existence of large and monopolistic corporations. To overcome the in principle objections of the classical liberals required a 'reconceptualization of the corporation, its form, and its governance'.[36] Taking up this task, the neoliberals theorised the corporation as a nexus of private contracting individuals.[37] As an idea, it sits well with the neoliberal conception of markets as — while not naturally occurring — *naturalised* extensions or constructions of liberal rights, and especially freedom of contract.[38] This theorisation was facilitated by the history of the corporation itself, in which the 'grosser delegations' of sovereign power and jurisdiction ended and incorporation became widely accessible by following a statutorily prescribed process.[39] But while the advent of general incorporation statutes might have made the role of the state less conspicuous, as Susan Mary Watson argues, it 'was a change only in process' and could not alter the reality that the existence of the modern company, with its defining characteristics in separate legal entity status and limited liability, cannot be divorced from the state or explained away as a result of contracting.[40] The neoliberals who championed contractarian theory were unperturbed. As Lorraine Talbot summarises,

> [c]ontractarianism [asserted] that the corporation was nothing more than the amalgamation of voluntarily assumed legal arrangements between real people seeking to promote their own self-interest as rational wealth maximising individuals.[41]

[35] Van Horn (n 26) 228–30; Birch, *A Manifesto* (n 21) 40–1; Ciepley, 'The Neoliberal Corporation' (n 3) 280–1.

[36] Birch, *A Research Agenda* (n 20) 112.

[37] Ciepley, 'The Neoliberal Corporation' (n 3) 282; ibid 115–16.

[38] Birch, *A Research Agenda* (n 20) 109, 115–16. See also Birch, 'Market vs Contract?' (n 31) 116.

[39] Ciepley, 'The Neoliberal Corporation' (n 3) 277. See also Susan Mary Watson, 'The Corporate Legal Person' (2019) 19(1) *Journal of Corporate Law Studies* 137, 139.

[40] Watson, 'The Corporate Legal Person' (n 39) 165–6.

[41] Lorraine Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge, 2013) 118 ('*Progressive Corporate Governance*').

The corporation was thus reframed: no longer a distortion to the revered market, but rather a nexus of contracting individuals and, itself, part of the 'spectrum of market(-like) relations'.[42]

This theorisation was a pushback against the earlier 'managerialist' perspective of the corporation, strongly associated with Adolf A Berle Jr and Gardiner C Means' *The Modern Corporation and Private Property*.[43] That work, in itself, was a modern departure from still earlier conceptions of the corporation in which, applying the 'traditional logic of property', shareholders were seen as the owners of the corporation and its assets.[44] For Berle Jr and Means, this conception of the corporation was inappropriate for the modern corporation, due to the separation of an increasingly large and dispersed group of individual investors from the managers in whose hands investors' aggregate wealth had become concentrated.[45] This separation, together with shareholders' limited liability, 'downgraded their claims to the goals of the company' with the consequence that '[c]orporate governance could be non-shareholder oriented and corporations could operate in the interests of the community'.[46] As Olivier Weinstein argues, one of the 'key propositions' in Berle Jr's theorisation was that the corporation itself was a '*real entity*' and further — due to its size, power and functions within society — a '*public institution*'.[47] In their conclusion, Berle Jr and Means highlighted a dilemma for corporate governance raised by the separation of ownership and control which continues as a topic of scholarly debate to this day: the questions of whose interests corporations should serve — primarily shareholders or other, wider groups — and whether social and legal pressures should be applied to ensure corporations operate in the service of those interests.[48]

It was these ideas about the corporation — as a real entity or organisation, public or quasi-public in nature, and capable of owing duties to the welfare of broader society — which were antithetical to neoliberalism's veneration of the individual, private property rights, and the market; and which the

[42] Birch, *A Research Agenda* (n 20) 116.

[43] Adolf A Berle Jr and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan, 1933) 333. See also Talbot, *Progressive Corporate Governance* (n 41) 104–8; Weinstein (n 5) 140.

[44] Berle Jr and Means (n 43) 333.

[45] Ibid 333–5.

[46] Talbot, *Progressive Corporate Governance* (n 41) 117.

[47] Weinstein (n 5) 145 (emphasis in original).

[48] Berle Jr and Means (n 43) 333.

contractarians sought to oppose.[49] The nexus of contracts theory provided a way of 'de-entifying'[50] and reprivatising[51] the corporation. It provided a way to 'side-ste[p]' claims to any social responsibility by explaining away the corporate entity as a fiction and by justifying corporate privileges (principally, limited liability) as necessary contractual terms in the bargain between shareholders and directors.[52] An exemplar of this perspective is Friedman's famous assertion that the business corporation (or more particularly, its directors), as part of a 'free-enterprise, private-property system', cannot owe responsibilities except to the 'owners of the business' whose desires 'generally will be to make as much money as possible while conforming to the basic rules of society … embodied in law and … ethical custom'.[53]

In this language of contract and responsibility as between shareholders (owners) and directors (employees), underpinned by the idea of corporations as a natural extension of a private property rights-based economic system, we can discern how contractarian theory also served as the 'essential point of departure' for another closely related theory which carried the implications of this theorisation into the realm of corporate governance: agency theory.[54] For Ciepley, this agency relationship, inextricably linked to the work of Michael Jensen and William Meckling, became 'the underlying assumption of all subsequent neoliberal treatments of the corporation'.[55]

Jensen and Meckling, like Friedman, accepted that: (1) the corporation is a legal fiction, a nexus in which the divergent or competing interests of individuals are 'brought into equilibrium within a framework of contractual

[49] Talbot, *Progressive Corporate Governance* (n 41) 130–1.

[50] Ibid 130, citing William W Bratton Jr, 'Nexus of Contracts Corporation: A Critical Appraisal' (1989) 74(3) *Cornell Law Review* 407, 441.

[51] Weinstein (n 5) 146–7. See also Paddy Ireland, 'Defending the *Rentier*: Corporate Theory and the Reprivatization of the Public Company' in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Hart Publishing, 2001) 141, 163 ('Defending the *Rentier*').

[52] Talbot, *Progressive Corporate Governance* (n 41) 131. See also at 122–3.

[53] Milton Friedman, 'A Friedman Doctrine: The Social Responsibility of Business Is To Increase Its Profits', *The New York Times* (New York, 13 September 1970) 33 ('A Friedman Doctrine'). See also Friedman, *Capitalism and Freedom* (n 21) 133.

[54] Weinstein (n 5) 149; Talbot, *Progressive Corporate Governance* (n 41) 130–1.

[55] Ciepley, 'The Neoliberal Corporation' (n 3) 282; David Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107(1) *American Political Science Review* 139, 147 ('Beyond Public and Private').

relations';[56] and (2) the relationship between shareholders (as the owners of the corporation) and directors is one of 'pure agency'.[57] Their focus was the general problem of agency; namely, how to ensure the agent maximises the principal's interest, in the specific context of the shareholder-director relationship.[58] This theory treats directors as self-interested individuals who will not always work in the best interests of their principal employer, thereby creating an agency cost.[59] But that cost — or the 'administrative dilemma' of the separation of ownership and control[60] — can be reduced by monitoring and measuring directors' performance; the most reliable and measurable metric for which is the maximisation of wealth for shareholders.[61] Lynn A Stout argues that the 'need to measure and monitor agent performance provides the foundation for the best' (or least bad) 'of the standard arguments for shareholder primacy'.[62] Whereas classical liberals saw the agency problem as a weakness of the corporation,[63] neoliberals, accepting the corporation 'as a natural and desirable feature of a market economy', sought ways to overcome it.[64] The frequently cited techniques for aligning the interests of directors with shareholders from the 1980s onwards include: tying the remuneration of directors and executive management to share price performance; the inclusion of stock and stock options as part of salary packaging and bonus structures; and generally providing greater accountability of boards to shareholders.[65]

The nexus of contracts theory of the corporation and the framing of the agency relationship between shareholders and directors as the crux of corporate governance 'set the stage for the ascendancy of the shareholder primacy

[56] Jensen and Meckling (n 17) 311.

[57] Ibid 309.

[58] Ibid.

[59] Ibid 312.

[60] Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) *Modern Law Review* 32, 50 ('The Myth of Shareholder Ownership').

[61] Lynn A Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75(5) *Southern California Law Review* 1189, 1199–200.

[62] Ibid 1200.

[63] This is in contrast to other business structures, such as sole traders and partnerships: see Ciepley, 'Beyond Public and Private' (n 55) 143.

[64] Ibid 147. On neoliberalism as a contract- rather than market-based concept and social order, see Birch, 'Market vs Contract?' (n 31) 120–6.

[65] See, eg, Ciepley, 'The Neoliberal Corporation' (n 3) 287; Andrew Johnston and Lorraine Talbot, 'Why Is Modern Capitalism Irresponsible and What Would Make It More Responsible? A Company Law Perspective' (2018) 29(1) *King's Law Journal* 111, 116, 120–5.

norm'.[66] That shareholders' interests should be the paramount consideration can be justified as the natural consequence flowing from theoretical foundations which cast shareholders as the rights-bearing (albeit passive) 'owners' of the corporate capital, in a contractual relationship with directors who actively control it.[67] Relatedly, shareholder primacy is justified on efficiency grounds.[68] That is, proceeding on the basis that the corporation is a nexus of contracts, were shareholders and directors left to negotiate every aspect of their agential relationship, shareholders would 'almost always' negotiate terms compelling directors to act in their best interests.[69] According to this model, agency costs can be reduced if corporate law itself, serving like a default 'standard form contract', imposes on directors the duty to act in shareholders' interests.[70]

But as numerous scholars have pointed out, the theoretical foundations used to justify shareholder primacy are, at least as a matter of law, 'inaccurate, incorrect, and unpersuasive'.[71] The corporation has long been recognised as a separate legal entity capable of owning property and of contracting, suing and being

[66] O'Kelley (n 18) 134.

[67] Ireland, 'Financialization and Corporate Governance' (n 3) 2; Ireland, 'The Myth of Shareholder Ownership' (n 60) 32–3.

[68] On the 'broadly distinct but interdependent approaches' of the neoliberal reconceptualisation of the company (transaction costs, contractarianism and efficiency), see Talbot, *Progressive Corporate Governance* (n 41) 117–19. See also Ireland, 'Defending the *Rentier*' (n 51) on contractarian theory's different justifications in contract and efficiency versus private property rights: at 163, 168.

[69] Tim Connor and Andrew O'Beid, 'Clarifying Terms in the Debate regarding "Shareholder Primacy"' (2020) 35(3) *Australian Journal of Corporate Law* 276, 286.

[70] Ibid. See also Stephen M Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford University Press, 2008) 30–2.

[71] Stout (n 61) 1190. See also Ireland, 'The Myth of Shareholder Ownership' (n 60) 47–50; David Ciepley, 'The Anglo-American Misconception of Stockholders as "Owners" and "Members": Its Origins and Consequences' (2020) 16(5) *Journal of Institutional Economics* 623, 627–32, 640; Ciepley, 'The Neoliberal Corporation' (n 3) 282–3; Simon Deakin, 'The Evolution of Corporate Form: From Shareholders' Property to the Corporation as Commons' in Thomas Clarke, Justin O'Brien and Charles RT O'Kelley (eds), *The Oxford Handbook of the Corporation* (Oxford University Press, 2019) 687, 687–8 ('The Evolution of Corporate Form'); 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, 17–20 ('Directors' Duty To Act'); Watson, 'The Corporate Legal Person' (n 39) 159–61; Susan Watson, 'The Tension in Corporate Governance: Keeping Tabs on Company Health' (2012) 15(1) *University of Auckland Business Review* 38, 43.

sued in its own name.[72] Shareholders own neither the corporation nor the share capital (or any other corporate assets). Rather, shareholders own shares in the corporation to which certain rights are attached.[73] Directors do not contract with and are not the agents or employees of shareholders. Rather, directors are employed by the corporation itself and it is the corporation to which directors' duties are owed.[74] Legal pedantry aside, it would be difficult to overstate the theoretical and practical influence of the neoliberal theorisations of the corporation. The contractarian conception shaped analyses of the corporation, while the agency relationship between shareholders and directors provided 'the intellectual framework … [of] the question of corporate governance … since the 1980s'.[75] As Paddy Ireland summarises:

> [T]he 'mistaken analogy' of shareholder ownership, whether of the company itself or of 'the capital', continues to cast a long shadow over the governance debate, serving as the main justification for the anachronistic retention by shareholders of exclusive governance rights and for the claim that public companies should be run predominantly, if not exclusively, in … [shareholders'] interests.[76]

The role and purpose of corporations law and corporate governance structures, according to these theories, is 'to maximize shareholder wealth' by giving effect to shareholders' rights and to monitor and discipline directors.[77] But to what extent do they fulfill that theorised purpose?

[72] Most famously confirmed in the case of *Salomon v Salomon & Co Ltd* [1897] AC 22, 30, 33–4 (Lord Halsbury LC, Lord Morris agreeing at 54), 42–3 (Lord Herschell, Lord Morris agreeing at 54), 51 (Lord Macnaghten, Lord Morris agreeing at 54), 56 (Lord Davey, Lord Morris agreeing at 54) and statutorily enshrined in s 124 of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). For a discussion of the earlier origins of the corporate legal personality, see Watson, 'The Corporate Legal Person' (n 39) 142–7.

[73] du Plessis, 'Directors' Duty To Act' (n 71) 17–18.

[74] Ibid 20.

[75] Weinstein (n 5) 140.

[76] Ireland, 'The Myth of Shareholder Ownership' (n 60) 49–50, quoting John Kay, 'The Stakeholder Corporation' in Gavin Kelly, Dominic Kelly and Andrew Gamble (eds), *Stakeholder Capitalism* (Macmillan Press, 1997) 125, 131.

[77] O'Kelley (n 18) 134. See also Judith Fox, 'Shareholder Primacy: Is There a Need for Change?' (Discussion Paper, Governance Institute of Australia, 2014) 10–12.

III Shareholder Primacy and Corporations Law and Governance

Ciepley's definition of the neoliberal corporation describes both a theoretical and organisational construct which prioritises the financial interests of shareholders.[78] The theoretical side of that construct, as discussed, is anchored in the contractarian conception of the corporation which sanctifies the proprietary interests of shareholders and frames the central issue of corporate governance as the agency dilemma. To understand the organisational or applied side of that description requires an examination of corporations law itself and corporate governance structures which give shareholder primacy legal substance and effect. In the US context, Ciepley argues that the most noteworthy influence of these theorisations has been on the understanding of directors' duties to the company.[79] Similarly, in the UK, Talbot has argued that modern corporate governance, in substance and form, 'deliver[s] neoliberal goals' by entrenching shareholder primacy in company law, primarily via directors' duties to promote the success of the company and the *UK Corporate Governance Code*.[80] In this Part, I consider whether and to what extent shareholder primacy, undergirded by contractarian theory, is given effect in Australian law and corporate governance by focusing on directors' duties to act in the best interests of the corporation under general law and s 181 of the *Corporations Act 2001* (Cth) ('*Corporations Act*'), as well as aspects of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.[81]

[78] Ciepley, 'The Neoliberal Corporation' (n 3) 274.

[79] Ibid 289–92.

[80] Talbot, *Progressive Corporate Governance* (n 41) 153. See also at 154, 167, 170, discussing Financial Reporting Council Limited, *UK Corporate Governance Code* (Report, January 2024).

[81] ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (March 2003) ('*ASX Principles and Recommendations (First Edition)*'); ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (2nd ed, August 2007) ('*ASX Principles and Recommendations (Second Edition)*'); ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd ed, March 2014) ('*ASX Principles and Recommendations (Third Edition)*'); ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019) ('*ASX Principles and Recommendations (Fourth Edition)*').

A *Shareholder Primacy and Directors' Duties To Act in the Best Interests of the Corporation*

Section 181(1)(a) of the *Corporations Act* requires that directors and other officers exercise their powers and discharge their duties in good faith in the best interests of the corporation. An equivalent duty exists under the general law, with minor variations between various judicial statements expressing the duty.[82] This duty is a subject of perennial interest for Australian corporate law scholars but unsurprisingly tends to receive the most interest following corporate collapses and scandals in which corporate conduct is identified as a contributing factor. The periods following the collapse of HIH Insurance Group and the Global Financial Crisis are examples.[83] In more recent years, directors' duties have received renewed focus following the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* ('*Banking Royal Commission*') and natural disasters driven by climate change.[84] Yet despite sustained academic interest and a significant number of judicial decisions, it is not easy to conclusively answer whether Australian law on directors' duties to act in the best interests of the corporation embodies the shareholder primacy central to the neoliberal conception of the corporation. Opinions diverge as to the current state of the law, in particular the meaning and scope of 'the best interests of the corporation'. This is complexified by perceptions among some commentators that the law on this issue is in a process of change.

In a genealogical analysis of case law on directors' duties to act in the best interests of the corporation, Jean J du Plessis concludes that in the past, courts

[82] See Jason Harris, 'Risk Management: Revisiting the Legal Basis of Shareholder Primacy' (2019) 71(2) *Governance Directions* 76, 78–9 ('Risk Management').

[83] See, eg, *Royal Commission into the Failure of HIH Insurance: A Corporate Collapse and Its Lessons* (Report, April 2003) vol 1; Jean J du Plessis, 'Reverberations after the HIH and Other Recent Australian Corporate Collapses: The Role of ASIC' (2003) 15(3) *Australian Journal of Corporate Law* 225, 225–6; Margaret M Blair, 'In the Best Interest of the Corporation: Directors' Duties in the Wake of the Global Financial Crisis' in Thomas Clarke and Douglas Branson (eds), *The SAGE Handbook of Corporate Governance* (SAGE Publications, 2012) 62, 62. See Nada K Kakabadse et al, 'Rethinking the Ontology of the Shareholder Model of the Corporation' (2013) 8(1) *Society and Business Review* 55, 55.

[84] See, eg, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) vol 1 ('*Banking Royal Commission*'), discussed in Harris, 'Risk Management' (n 82) 76–7; Connor and O'Beid (n 69) 276–7, 300–1; Jessica Baker, 'Australia Is Burning: Aligning Corporate Social Responsibility and Community Expectations Following the Black Summer' (2021) 36(2) *Australian Journal of Corporate Law* 113, 123–4.

and commentators were influenced by 'deeply embedded' yet untenable perceptions.[85] The perceptions he refers to are those associated with neoliberal corporate theory: perceptions of shareholders as owners (of the corporation or capital), of an agential relationship between shareholders and directors, and of shareholders as embodying the corporation itself.[86] du Plessis's starting point is *Greenhalgh v Arderne Cinemas Ltd* ('*Greenhalgh*').[87] Considered the most frequently cited authority on the meaning of the phrase 'in the best interests of the corporation',[88] *Greenhalgh* is also described as the decision from which 'stems' the perception that the interests of the corporation '(at general law and under section 181), are equated with those of shareholders'.[89] Master of the Rolls Evershed famously said: 'the phrase, "the company as a whole", does not … mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body'.[90] In adopting this interpretation, Evershed MR did not deny the existence of the corporation as a separate legal entity, but, consistent with neoliberal theorisations, conflated the interests of the corporation with the interests of shareholders.

Though *Greenhalgh* concerned shareholders' voting rights,[91] Evershed MR's statement was extrapolated to the powers and duties of company directors.[92]

[85] du Plessis, 'Directors' Duty To Act' (n 71) 25. See also at 26.

[86] Ibid. As to the last of these perceptions, recall that the nexus of contracts theory of the corporation rejects the concept of the corporation as a real entity and sees it only as legal fiction or convenience for contracting individuals: see, eg, Talbot, *Progressive Corporate Governance* (n 41) 130; Birch, *A Research Agenda* (n 20) 118.

[87] [1951] Ch 286 ('*Greenhalgh*'), discussed in du Plessis, 'Directors' Duty To Act' (n 71) 7–9.

[88] Harris, 'Risk Management' (n 82) 78–9, discussing *Greenhalgh* (n 87) 291 (Evershed MR, Asquith LJ agreeing at 294, Jenkins LJ agreeing at 294).

[89] Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954, 974 ('Purpose-Based Governance'), discussing *Greenhalgh* (n 87) 291 (Evershed MR, Asquith LJ agreeing at 294, Jenkins LJ agreeing at 294). See also Harris, 'Risk Management' (n 82) 78–9.

[90] *Greenhalgh* (n 87) 291 (Asquith LJ agreeing at 294, Jenkins LJ agreeing at 294).

[91] Ibid 291–2 (Evershed MR, Asquith LJ agreeing at 294, Jenkins LJ agreeing at 294); du Plessis, 'Directors' Duty To Act' (n 71) 7.

[92] du Plessis, 'Directors' Duty To Act' (n 71) 10, discussing *Parke v Daily News Ltd* [1962] Ch 927, 963 (Plowman J). See also Justice James Edelman, 'The Future of the Australian Business Corporation: A Legal Perspective' (2020) 14(3) *Judicial Review* 199, 210. For a comprehensive discussion of how various authorities presumed to provide the precedential foundation for a shareholder-centric interpretation of directors' duties of good faith under the general law in the UK have been misread, see Daniel Attenborough, 'Misreading the Directors' Fiduciary Duty of Good Faith' (2020) 20(1) *Journal of Corporate Law Studies* 73, 81–91 ('Misreading the Directors' Fiduciary Duty').

Most notably, in Australia, the High Court in *Ngurli Ltd v McCann* ('*Ngurli*') stated that '[v]oting powers conferred on shareholders and powers conferred on directors by the articles of association of companies must be used bona fide for the benefit of the company as a whole',[93] before quoting Evershed MR in an endorsement of the Master of Rolls's shareholder-centric conception of the corporation.[94] The precedential force of these decisions was affirmed in *Winthrop Investments Ltd v Winns Ltd*, where Mahoney JA said that 'the relationship between the powers of directors and the powers of the company in general meeting … [was] determined authoritatively … in *Ngurli*'.[95] Justice of Appeal Mahoney emphasised that the High Court of Australia had cited Evershed MR's determination and 'pointed out' that there was no distinction between the company and its shareholders as a general body in the context of the exercise of power in the best interests of the company as a whole.[96] Four Justices of the High Court of Australia in *Pilmer v Duke Group Ltd (in liq)* identified certain 'basic propositions', including 'that the directors and other officers of a company must act in the interests of the company as a whole', expressly noting its separate legal status, but then adding that 'shareholders, as a group, can be said to own the company'.[97] As has been noted by commentators in the academy and the judiciary, there is ample evidence of shareholder primacy in the context of directors' duties under Australian law.[98]

However, Jason Harris argues 'there are an equally weighty line of legal precedents' which challenge shareholder primacy and 'clearly envisage that the interests of the company can be more than the interests of the shareholder'.[99]

[93] (1953) 90 CLR 425, 438 (Williams ACJ, Fullagar and Kitto JJ) ('*Ngurli*').

[94] Ibid, quoting *Greenhalgh* (n 87) 291 (Evershed MR, Asquith LJ agreeing at 294, Jenkins LJ agreeing at 294).

[95] [1975] 2 NSWLR 666, 701 ('*Winthrop*'), citing *Ngurli* (n 93) 438 (Williams ACJ, Fullagar and Kitto JJ).

[96] *Winthrop* (n 95) 70, citing *Ngurli* (n 93) 438–9 (Williams ACJ, Fullagar and Kitto JJ).

[97] (2001) 207 CLR 165 ('*Pilmer*') 178 [18] (McHugh, Gummow, Hayne and Callinan JJ). Note that du Plessis discusses this majority judgment as an example of 'the influence of past perspectives' and points out that the question of whether shareholders can be considered the owners of the corporation was not the Court's central focus, ultimately arguing that *Pilmer* (n 97) should not continue to be relied upon as it has been: du Plessis, 'Directors' Duty To Act' (n 71) 18.

[98] See, eg, the various authorities cited in Edelman (n 92) 210 n 48, and discussed in Harris, 'Risk Management' (n 82) 78–9.

[99] Harris, 'Risk Management' (n 82) 79–83. For a detailed doctrinal analysis, see generally Jason Harris, 'Shareholder Primacy in Changing Times' (Conference Paper, Supreme Court of New South Wales Corporate and Commercial Law Conference, 2018).

The point of emphasis is that, according to the general law duty and the clear wording of s 181 of the *Corporations Act*, a director's duty is to serve the best interests of *the corporation*; that is, the corporation as a separate legal entity, distinct from its shareholders and other members of the corporate firm. Ostensibly, this permits or even requires directors to have regard to non-shareholder interests — or stakeholders' interests — which might be said to be represented in the interests of the company.[100] Two frequently cited decisions come from *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* ('*Bell Group [No 9]*') and *Australian Securities and Investments Commission v Cassimatis [No 8]* ('*Cassimatis [No 8]*').[101] In *Bell Group [No 9]*, after referring to Evershed MR's judgment, Owen J went on to say that it did not mean 'that the general body of shareholders is always and for all purposes the embodiment of "the company as a whole"'.[102] Rather, his Honour said, '[i]t will depend on the context, including the type of company and the nature of the impugned activity or decision.'[103] To equate the best interests of the company with the best interests of shareholders

> is to misconceive the true nature of the fiduciary relationship between a director and the company [and ignore] … the range of other interests that might (again, depending on the circumstances of the company and the nature of the power to be exercised) legitimately be considered.[104]

Justice Owen's comments were subsequently referred to with approval by Edelman J in *Cassimatis [No 8]*, where his Honour said, after noting the importance of the words chosen by Owen J, that '[t]he interests of shareholders "may" be correlative because those interests "intersect"', however, '[t]he interests are not necessarily identical. Much will depend on context.'[105]

That the *Corporations Act* refers only to the interests of the corporation and not the interests of shareholders, or any other stakeholders for that matter, is a feature which distinguishes Australian law from UK company law, where

[100] du Plessis, 'Directors' Duty To Act' (n 71) 5–6.

[101] (2008) 39 WAR 1 ('*Bell Group [No 9]*'); (2016) 336 ALR 209 ('*Cassimatis [No 8]*').

[102] *Bell Group [No 9]* (n 101) 534 [4393], quoting *Greenhalgh* (n 87) 291 (Evershed MR, Asquith LJ agreeing at 294, Jenkins LJ agreeing at 294).

[103] *Bell Group [No 9]* (n 101) 534 [4393].

[104] Ibid 534 [4395] (Owen J).

[105] *Cassimatis [No 8]* (n 101) 308 [516]. This case concerned alleged breaches of the duty of care and diligence under s 180 of the *Corporations Act* (n 72): *Cassimatis [No 8]* (n 101) 217 [2] (Edelman J). However, Edelman J's comments are applicable to the best interests duty.

shareholder primacy has been statutorily enshrined. Section 172(1) of the *Companies Act 2006* (UK) ('*Companies Act UK*') requires that a 'director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company', but with two important differences. First, the duty to promote the success of the company is explicitly qualified by the inclusion of 'for the benefit of its members as a whole'.[106] Second, the provision adds various interests to which a director should have regard in discharging their duty, including reputational concerns, the company's impact on the community and environment, and the interests of stakeholders including employees, suppliers and customers.[107] Though the provision appears to create a stakeholder-oriented duty, on proper construction s 172 'does not mean that directors owe a duty to stakeholders, or to the long-term consequences of their decision making',[108] but rather unequivocally 'asserts the bald shareholder primacy norm'.[109] It enshrines the 'enlightened shareholder value' approach to directors' duties in which directors may have regard to non-shareholder interests but only derivatively to their paramount duty to shareholders.[110]

In Australia in recent years, a number of scholars have described a change or movement in perceptions of the best interests of the corporation — culturally and legally — with implications for directors' duties to serve those interests.[111] du Plessis speaks of a 'modern corporate law theory' (re)emphasising the separate legal entity status of the corporation, in which a variety of

[106] *Companies Act 2006* (UK) s 172(1).

[107] Ibid.

[108] Lorraine Talbot, 'Trying To Save the World with Company Law? Some Problems' (2016) 36(3) *Legal Studies* 513, 529 ('Trying To Save the World with Company Law?').

[109] Ibid 515. Attenborough, 'The Neoliberal (Il)legitimacy' (n 3) 422; Attenborough, 'Misreading the Directors' Fiduciary Duty' (n 92) 78–9.

[110] Talbot, 'Trying To Save the World with Company Law?' (n 108) 528–9; Rosemary Teele Langford, 'Social Licence To Operate and Directors' Duties: Is There a Need for Change?' (2019) 37(3) *Company and Securities Law Journal* 200, 208–9 ('Social Licence To Operate').

[111] See, eg, du Plessis, 'Directors' Duty To Act' (n 71) 25–6; Jean J du Plessis, 'Shareholder Primacy and Other Stakeholder Interests' (2016) 34(3) *Company and Securities Law Journal* 238, 241–2 ('Shareholder Primacy'); Langford, 'Social Licence To Operate' (n 110) 206; Rosemary Teele Langford, 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law' (2020) 43(3) *University of New South Wales Law Journal* 977, 983, 990 ('Use of the Corporate Form'); Vivienne Brand and Rosemary Teele Langford, '"Doing the Job That's Required"?: Social Licence To Operate and Directors' Duties' (2022) 44(1) *Sydney Law Review* 111, 113, 121–2.

stakeholder interests might be represented.[112] This modern theory[113] is said to be reflected in decisions such as *Cassimatis [No 8]* and *Bell Group [No 9]*,[114] as well as in extrajudicial commentary, including as recently as former High Court Justice Kenneth Hayne's observations as Commissioner for the *Banking Royal Commission*.[115] Such a conception of the corporation harks back to Berle Jr and Means' notions of a real entity, with obligations to a range of stakeholders, even the broader public[116] — notions which were so objectionable to neoliberalism. It has also been said that a reactive kind of pragmatism is the main driver of corporate regulation in Australia, rather than the neoliberal ideas which have greater influence in other jurisdictions such as the US and UK.[117] The existence of Australia's public regulator, the Australian Securities and Investments Commission ('ASIC'), and our civil penalty regime,[118] which allow the state to enforce laws regulating corporate governance in the public interest — including directors' duties of good faith — have been held up as examples of the 'publicisation' of our corporate law.[119] On the other hand, in the context of the recent *Banking Royal Commission*, the public regulator was strongly criticised for being too reluctant to take action and too lenient when it did, and of adopting as its starting point a preference for negotiation and agreement, a position

[112] du Plessis, 'Directors' Duty To Act' (n 71) 26.

[113] It is arguable whether this theory is 'modern', considering the long history of the corporation as a separate legal entity: Watson, 'The Corporate Legal Person' (n 39) 145, 154–5.

[114] See above nn 101–5 and accompanying text.

[115] *Banking Royal Commission* (n 84) 401–3. See also Justice Kenneth KM Hayne, 'Directors' Duties and a Company's Creditors' (2014) 38(2) *Melbourne University Law Review* 795, 808–9.

[116] Berle Jr and Means (n 43) 17. See also Adolf A Berle Jr, 'The Theory of Enterprise Entity' (1947) 47(3) *Columbia Law Review* 343, 344.

[117] Peta Spender, 'Gender Quotas on Boards: Is it Time for Australia To Lean In?' (2015) 20(1) *Deakin Law Review* 95, 103–4.

[118] *Corporations Act* (n 72) pt 9.4B.

[119] Michael J Whincop and Mary E Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law' (1997) 25(1) *Federal Law Review* 51, 88. See also Michelle Welsh et al, 'The End of the "End of History for Corporate Law"?' (2014) 29(2) *Australian Journal of Corporate Law* 147, 163–7; Renee M Jones and Michelle Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45(2) *Vanderbilt Journal of Transnational Law* 343, 349, 377–8.

fundamentally inappropriate for a conduct regulator tasked with enforcing compliance with law in the public interest.[120]

Where does this leave the duty of directors to act in the corporation's best interests in Australian law and what is the influence of shareholder primacy today? Leading corporate law scholars continue to describe Australia as a shareholder primacy jurisdiction,[121] noting that, 'as a general proposition, acting in the best interests of the company generally means acting in the [best] interests of shareholders as a general body'[122] and that the company is seen as 'embodied by … current and future shareholders'.[123] This conclusion is strengthened given that the only situation where Australian courts have 'clearly identified' that the interests of stakeholders may be considered without there being a derivative benefit to shareholders (or where stakeholders' interests may be prioritised over shareholders' interests) is when a company is insolvent or approaching insolvency.[124] That exception aside, it is said that 'there is no authoritative pronouncement at the appellate level' on the question of whether directors may or must take non-shareholder interests into account.[125] As such, notwithstanding

[120] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1, xix, 277.

[121] Hanrahan (n 3) 668; Jean Jacques du Plessis, Anil Hargovan and Jason Harris, *Principles of Contemporary Corporate Governance* (Cambridge University Press, 4th ed, 2018) 9.

[122] Marshall and Ramsay (n 1) 298. The authors also describe the general law duty to act in the best interests of the corporation as 'an equivalent' to the statutory duty under s 181(1)(a) of the *Corporations Act* (n 72): Marshall and Ramsay (n 1) 295–6.

[123] du Plessis, 'Shareholder Primacy' (n 111) 238. See also Malcolm Anderson et al, 'Shareholder Primacy and Directors' Duties: An Australian Perspective' (2008) 8(2) *Journal of Corporate Law Studies* 161, 162–3. In their recent advice to the Australian Institute of Company Directors regarding the content of directors' best interest duty, Bret Walker and Gerald Ng included the point that the oppression remedy under ss 232–3 of the *Corporations Act* (n 72), which is enlivened by conduct contrary to the interests of the members as a whole or which is oppressive, unfairly prejudicial or discriminatory to a member or members, 'leaves little scope for directors to contend that they are acting in good faith in the best interests of a corporation when, at the same time, they are acting contrary to the interests of its members as a whole': Bret Walker and Gerald Ng, 'The Content of Directors' "Best Interest" Duty' (Memorandum of Advice, Australian Institute of Company Directors, 24 February 2022) 7 [19].

[124] Marshall and Ramsay (n 1) 299. See also at 298.

[125] du Plessis, Hargovan and Harris (n 121) 69 (citations omitted). In 2020, Thawley J, sitting as a member of the Full Court of the Federal Court of Australia in a decision concerning directors' duties of care and diligence under s 180(1) of the *Corporations Act* (n 72), did at least strongly reject the suggestion that a company's interests were simply those of its shareholders (even where directors and shareholders are identical): 'The cases recognise that the interests of the company to which the duty is owed include the interests of the corporate entity itself, the

the perceived trajectory towards an increasing stakeholderism in academic commentary and even judicial decisions acknowledging that a variety of interests might be represented in the corporate entity, except in the case of insolvency, it can still be argued that Australian law is yet to meaningfully recognise stakeholders' interests or CSR considerations in the context of directors' duties to the company.

The pervasiveness of the shareholder-centric interpretation is demonstrated in the descriptions of the law adopted in our most recent significant reviews into the question of corporate responsibility. For instance, after examining the general law and *Corporations Act*, the Corporations and Markets Advisory Committee ('CAMAC') in its 2006 report concluded that

> directors have considerable discretion concerning the interests they may take into account in corporate decision-making, provided their purpose is to act in the interests of the company as a whole, interpreted as the financial well-being of shareholders as a general body.[126]

The CAMAC's description of the law on directors' duties represents an enlightened shareholder value perspective: directors may have regard to other interests, but only insofar as they serve the financial wellbeing of shareholders. Similarly, in its 2014 discussion paper, the Governance Institute of Australia said that '[a]s it stands, the law generally links the corporate interests to those of the shareholders'.[127] Although s 181(1)(a) of the *Corporations Act* refers only to the best interests of the corporation, they note that 'case law has tended to grant primacy to shareholders' interests'.[128] The Australian Institute of Company Directors ('AICD') endorsed this view, adding that its decision to comment on the discussion paper was motivated by a desire to forestall the potential erosion

shareholders and, at least where the financial position of the company is precarious, the creditors of the company': *Cassimatis v Australia Securities and Investments Commission* (2020) 275 FCR 533, 640 [453] (citations omitted).

[126] *CAMAC Report* (n 15) 96. See also at 81, 84, for a description of the common law duties of directors. The terms of reference for the review demonstrated a similar shareholder-centric interpretation and drew unequivocal links between the law and agency theory: at 3.

> Under both the *Corporations Act* and the common law, directors have a duty to act in the best interests of the corporation. In this regard, they are required to consider the interests of shareholders and, in some limited circumstances, creditors. This position reflects the long-standing view of the corporate officer as an agent of shareholders.

[127] Fox (n 77) 1.

[128] Ibid 3. See also at 5.

of 'an area of law that is clear' and a 'fundamental premise of Australia's directors' duties', namely '*to whom* the duty is owed'.[129]

While the CAMAC's summary of the law on directors' duties was paradigmatic of a shareholder primacy interpretation, it must be acknowledged that the other significant governmental review which reported in the same year offered a different interpretation.[130] The Parliamentary Joint Committee on Corporations and Financial Services ('PJC') rejected various different shades of shareholder primacy interpretations of the current legislative framework.[131] Instead, the PJC endorsed an 'enlightened self-interest' interpretation,[132] emphasising the corporate entity itself and the viability of the corporate enterprise several times throughout its analysis, and concluding: 'There is nothing in the current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders'.[133] However, it should also be noted that the PJC report discussed only interpretations of the current legislative framework, specifically ss 180–1 of the *Corporations Act*, reflected in submissions to the PJC and did not consider the general law duty or the weight of judicial decisions on the issue.[134] Both the CAMAC and the PJC concluded that the law in its current form did not constrain directors from taking into account non-shareholder stakeholder interests and both reviews recommended against any change to the law on directors' duties.[135] However, that both committees should contemporaneously consider the law — both with a contextual

[129] Letter from Australian Institute of Company Directors to Judith Fox, 2 December 2014, 1 (emphasis in original) <https://www.aicd.com.au/content/dam/aicd/pdf/news-media/policy/2014/subm-2014-gia-shareholder-primacy-2-december-2014.pdf>, archived at <https://perma.cc/5CSF-QUX3>. See also AICD's most recent practice statement which provides that the best interests duty 'requires directors to consider what is in the best interests of shareholders/members, as a whole' but that 'the law does not assume that shareholder/member interests are best served by having no regard to other stakeholders, particularly over the longer-term': Australian Institute of Company Directors, 'Directors' "Best Interests" Duty in Practice' (Practice Statement, July 2022) 2.

[130] See, eg, Langford, 'Social Licence To Operate' (n 110) 208.

[131] *PJC Report* (n 15) 46–53 [4.11]–[4.39].

[132] Ibid 63 [4.76].

[133] Ibid. The PJC stated it 'does not agree that acting in the best interests of the *corporation* and acting in the best interests of the *shareholders* inevitably amounts to the same thing': at 52 [4.31] (emphasis in original). See also at 44 [4.6], 52–3 [4.32]–[4.39] (emphasis in original).

[134] Ibid 43–6 [4.2]–[4.11], discussing *Corporations Act* (n 72) ss 180–1.

[135] *CAMAC Report* (n 15) 81; *PJC Report* (n 15) 63 [4.77].

focus on CSR — and yet affirm different interpretations (ie, entity primacy vs (enlightened) shareholder primacy positions) in itself indicates a certain level of indeterminacy in the law at present.[136]

B *Shareholder Primacy and Good Corporate Governance*

When the first edition of what is now called the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* was introduced in 2003,[137] it was relied upon by some as evidence that shareholder primacy was not ingrained in corporate governance and in support of arguments against amending the law on directors' duties to clarify the extent to which stakeholders' interests could or should be taken into account. For example, principle 10, which required that companies should '[r]ecognise the legitimate interests of stakeholders',[138] was used to support the conclusion that it was 'quite clear that contemporary corporate governance, as well as the law generally, demands that directors recognise and protect stakeholder interests'.[139] While it was perhaps a stretch to say corporate governance (let alone law) demands that stakeholders' interests be protected by reference to a general principle contained within a set of 'guidelines' ('not prescriptions'),[140] principle 10 did on its face challenge shareholder primacy. It recognised the 'legal and other obligations' of companies to non-shareholder stakeholders including employees, customers and the broader community.[141] However, by the second edition, principle 10 was removed.[142] In all later editions, stakeholders were only mentioned peripherally.[143] For instance, in the current edition, principle 3 recommends that companies '[i]nstil a culture of acting lawfully, ethically and responsibly'.[144] The relevant commentary provides:

136 *CAMAC Report* (n 15) 111–12; *PJC Report* (n 15) 53 [4.38]–[4.39].

137 *ASX Principles and Recommendations (First Edition)* (n 81).

138 Ibid 59.

139 James McConvill, 'Directors' Duties to Stakeholders: A Reform Proposal Based on Three False Assumptions' (2005) 18(1) *Australian Journal of Corporate Law* 88, 94.

140 *ASX Principles and Recommendations (First Edition)* (n 81) 5.

141 Ibid 59.

142 *ASX Principles and Recommendations (Second Edition)* (n 81) 44. See also *ASX Principles and Recommendations (Third Edition)* (n 81) 1; *ASX Principles and Recommendations (Fourth Edition)* (n 81) 2.

143 du Plessis, Hargovan and Harris (n 121) 43.

144 *ASX Principles and Recommendations (Fourth Edition)* (n 81) 16.

> [A] listed entity should consider what behaviours are needed from its officers and employees to build long term sustainable value *for its security holders*. This includes the need for the entity to preserve and protect its reputation and standing in the community *and with key stakeholders*, such as customers, employees, suppliers, creditors, law makers and regulators.[145]

Consistent with the obiter of Edelman J in *Cassimatis [No 8]*,[146] the commentary alludes to the value of the corporation's reputation and, relatedly, its standing with stakeholders. However, as with the generally shareholder-centric understanding of Australian law on directors' duties (and similarly to s 172 of the *Companies Act UK*), the commentary also makes it clear that shareholders' interests remain the paramount consideration. This approach appears to consider that stakeholders' interests are only a means to the end of creating value for shareholders, not an end in itself.

A comparison between the original and current edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* reveal both a move away from originally strong(er) stakeholder-oriented positions and opposition to concepts such as broader social accountability.[147] For example, the first edition recommended a code of conduct to guide compliance with legal and other obligations to stakeholders in order to facilitate corporate '[p]ublic or social accountability … based on notions of legitimacy, fairness and ethics'.[148] Not only were such notions of public accountability left out of later editions, but attempts at introducing similar concepts, like the social licence to operate, were met with hostility.[149] The idea of the social licence to operate was included as part of the commentary to principle 3 in the consultation draft of the fourth edition in 2019.[150] Described as 'unquestionably the most polarising issue' in the feedback, it was opposed due to the uncertainty of its meaning but also (puzzlingly) the perception that its impact and reach would 'vary over time'.[151] The social licence to operate was also opposed because — reaffirming the general perception of the law described

[145] Ibid (emphasis added).

[146] *Cassimatis [No 8]* (n 101) 301 [482].

[147] du Plessis, Hargovan and Harris (n 121) 43–4; Langford, 'Social Licence To Operate' (n 110).

[148] *ASX Principles and Recommendations (First Edition)* (n 81) 59.

[149] Langford, 'Social Licence To Operate' (n 110) 200; Brand and Langford (n 111) 116–18.

[150] ASX Corporate Governance Council, *Fourth Edition of the Corporate Governance Principles and Recommendations* (Consultation Paper, 27 February 2019).

[151] Ibid 4.

above — its inherent 'notion of broader stakeholder accountability … might actually conflict with the duties of directors, as they have been espoused by the courts and are traditionally understood in Australia'.[152]

Of course, the stated purpose of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* is, after all, to recommend governance practices which should meet the 'reasonable expectations of most investors'.[153] The protection of investors' interests rightly undergirds a number of prudent principles and recommendations, including safeguarding integrity in financial reporting, making timely and balanced disclosure, and 'respect[ing] the rights of shareholders'.[154] But while these have been a steady feature across each edition, other principles concerned with broader stakeholder accountability, as noted, either fell away or were opposed. The principle of respecting the rights of investors includes a recommendation that companies adopt an 'investor relations program' to facilitate two-way communication with investors.[155] The commentary includes the somewhat tepid suggestion that such a program 'may also run in tandem with a wider stakeholder engagement program',[156] but without the weight of an actual recommendation, demonstrating the greater significance attached to the interests of shareholders vis-a-vis other stakeholders. The agential relationship between directors and shareholders, and the concern with agency costs and the bonding of potentially unaligned interests, is reinforced in the principle to remunerate fairly and responsibly, especially in more recent editions which expressly advise companies to design

[152] Ibid. For an analysis of the relationship between the social licence to operate and the 'evolving legal position' on directors' duties, as well as empirically informed research on the relevance of the social licence to directors' decision-making, see Brand and Langford (n 111) 135.

[153] *ASX Principles and Recommendations (Fourth Edition)* (n 81) 1.

[154] *ASX Principles and Recommendations (First Edition)* (n 81) 11. See principles 4, 5 and 6 in each edition: at 29, 35, 39; *ASX Principles and Recommendations (Second Edition)* (n 81) 25, 28, 30; *ASX Principles and Recommendations (Third Edition)* (n 81) 21, 24, 25; ibid 19, 21, 23.

[155] *ASX Principles and Recommendations (Third Edition)* (n 81) 26 (recommendation 6.2); *ASX Principles and Recommendations (Fourth Edition)* (n 81) 24 (recommendation 6.2). See also earlier versions of this recommendation in the first and second editions: *ASX Principles and Recommendations (First Edition)* (n 81) 40; *ASX Principles and Recommendations (Second Edition)* (n 81) 31.

[156] *ASX Principles and Recommendations (Third Edition)* (n 81) 26; *ASX Principles and Recommendations (Fourth Edition)* (n 81) 24.

remuneration policies 'to align [senior executives'] … interests with the creation of value for security holders'.[157]

The relationship between shareholders and stakeholders, and particularly the broader public as a stakeholder, is demonstrated in another mainstay principle of good governance, namely to recognise and manage risk.[158] The accompanying recommendation advises companies to disclose any exposure to (and, if exposed, plans to manage) *risk*, including 'environmental risk' and 'social' or 'social sustainability risk'.[159] The third edition acknowledges that how a company conducts its activities may impact a range of stakeholders, adding that whether a company operates sustainably 'can impact in the longer term on society and the environment'.[160] However, the next paragraph emphasises the increasing demand from investors for transparency around such issues 'so that they can properly assess investment risk'.[161] Reasserting the centrality of the shareholder, the commentary to the same recommendation in the fourth edition omits the references to stakeholders and attaches importance to these risks only insofar as they affect a company's 'ability to create long-term value for security holders'.[162] The change in definition of *social risk* is also interesting. The third edition refers to 'social sustainability' risk,[163] defining the term using the language of the social licence; namely, a company's ability 'to continue operating in a manner that meets accepted social norms and needs over the long term'.[164] By contrast, the current edition uses 'social risks', but leaves out the language implying broad social accountability.[165] Neither edition defines

[157] *ASX Principles and Recommendations (Third Edition)* (n 81) 31 (principle 8); *ASX Principles and Recommendations (Fourth Edition)* (n 81) 29 (principle 8). See also *ASX Principles and Recommendations (First Edition)* (n 81) 51 (principle 9); *ASX Principles and Recommendations (Second Edition)* (n 81) 35–6 (principle 8).

[158] *ASX Principles and Recommendations (First Edition)* (n 81) 43–5 (principle 7); *ASX Principles and Recommendations (Second Edition)* (n 81) 32 (principle 7); *ASX Principles and Recommendations (Third Edition)* (n 81) 28–30 (principle 7); *ASX Principles and Recommendations (Fourth Edition)* (n 81) 26–8 (principle 7).

[159] *ASX Principles and Recommendations (Second Edition)* (n 81) 32 (recommendation 7.1); *ASX Principles and Recommendations (Third Edition)* (n 81) 30 (recommendation 7.4); *ASX Principles and Recommendations (Fourth Edition)* (n 81) 27 (recommendation 7.4).

[160] *ASX Principles and Recommendations (Third Edition)* (n 81) 30.

[161] Ibid.

[162] *ASX Principles and Recommendations (Fourth Edition)* (n 81) 27. Security holders are defined in the glossary as shareholders in the context of a listed company: at 35.

[163] *ASX Principles and Recommendations (Third Edition)* (n 81) 30.

[164] Ibid 38.

[165] *ASX Principles and Recommendations (Fourth Edition)* (n 81) 27.

social risks by reference to the harm caused or the impact on affected groups (as one might have expected), but the fourth edition gives prominent place to the risk of unwanted regulatory interference — reminiscent of the neoliberals' justification for their reconciliation with corporate monopoly.[166] Social risks are now 'the potential negative consequences (including systemic risks and the risk of consequential regulatory responses) to a listed entity if its activities adversely affect human society or if its activities are adversely affected by changes in human society'.[167] Aside from clearly enshrining shareholder primacy, by making social or environmental stakeholder considerations relevant only insofar as they serve or impact upon shareholder value, these principles also capture the de-regulatory or anti-regulatory predilections and advocacy of maximum business autonomy associated with neoliberalism.

Using the JobKeeper wage subsidy scheme as a case study in Part IV, I examine the unintended and seemingly unexpected consequences of directing a job saving wage subsidy scheme through the corporation and the corporate response to demands from media and the public that unneeded support be repaid. In doing so, I consider to what extent the neoliberal corporate legalities discussed above were evidenced by, legitimated or facilitated the outcomes for which JobKeeper was criticised. More generally, JobKeeper provides an opportunity to consider whether directors' understandings of the interests of the corporation might be said to reflect the shareholder primacy paradigm or whether CSR and community expectations are a significant influence.

IV JobKeeper and the Neoliberal Corporation

JobKeeper was announced on 30 March 2020 as part of the Australian government's response to the economic impact of the COVID-19 pandemic.[168] It was described as a 'historic wage subsidy to around 6 million workers' who would receive a flat payment of $1,500 per fortnight before tax, through their employer.[169] The legislative framework giving effect to the scheme was

[166] Ibid 36. The term 'environmental risks' is also defined by reference to consequential regulatory responses: at 35.

[167] Ibid 36.

[168] Scott Morrison and Josh Frydenberg, '$130 Billion JobKeeper Payment To Keep Australians in a Job' (Joint Media Release, 30 March 2020) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7269587%22>, archived at <https://perma.cc/N734-XV9R>.

[169] Ibid.

comprised mainly of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) ('*JobKeeper Act*') and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth). Under the original version, an entity would qualify if it passed a basic decline in turnover test, calculated by comparing 'projected' goods and services tax turnover for a relevant period in 2020 with the corresponding period in 2019.[170] As at 15 August 2021, the Australian Taxation Office ('ATO') calculated net payments (factoring in repayments) under the JobKeeper scheme at $88.82 billion, with more than one million entities making applications and approximately 5.4 million individuals receiving payments.[171]

At one level, JobKeeper can be considered exceptional. It was one of the 'largest fiscal and labour market interventions' in Australian history.[172] It was also a significant departure from neoliberal political orthodoxy. The threat of COVID-19 legitimated an extraordinary governmental intervention in the economy, reorganising it in line with the political and social goal of suppressing the virus.[173] The ordinarily dominant logic of budgetary balance and minimisation of state welfare expenditure (as has been practiced by governments made up of either of Australia's leading parties) was suspended in the face of crisis.[174] Such was acknowledged by the Prime Minister on the day JobKeeper became law, when he said that in the 'extreme times' we were facing, ideologies had been 'checked … at the door'.[175] While JobKeeper was widely supported and praised

[170] *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) s 8(1). The decline in turnover thresholds were 15% for registered charities and non-government schools, 50% for businesses with an aggregated turnover exceeding $1 billion, and 30% for all other businesses: at ss 8(2)–(4). The relevant period for comparison was a month or quarter between 30 March 2020 and 1 January 2021, compared with the corresponding month or quarter in 2019: at s 8(7). Under the extended version of the scheme (which ran from 28 September 2020 to 28 March 2021) an entity was required to meet an actual (rather than projected) decline in turnover test for the quarters ending 30 September and 31 December 2020: at ss 8B(1)–(2).

[171] Australian National Audit Office, *Administration of the JobKeeper Scheme* (Report No 22, 4 April 2022) 15.

[172] Australian Government, *Budget 2020–21: Economic Recovery Plan for Australia* (Overview, 2020) 38.

[173] Ben Spies-Butcher, 'The Temporary Welfare State: The Political Economy of Job Keeper, Job Seeker and "Snap Back"' (2020) 8(5) *Journal of Australian Political Economy* 155, 156.

[174] Ibid. See also Jane Andrew et al, 'Australia's COVID-19 Public Budgeting Response: The Straitjacket of Neoliberalism' (2020) 32(5) *Journal of Public Budgeting, Accounting and Financial Management* 759, 761–5.

[175] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 2020, 2909 (Scott Morrison) ('*Parliamentary Debates*'). On the political narrative and constitutional basis for JobKeeper, see Goding (n 8) 49–59.

for contributing to Australia's economic recovery, the scheme was subsequently criticised for delivering tens of billions of dollars in public monies to employers whose businesses (despite projections) did not suffer the threshold declines in turnover, or received JobKeeper assistance for months after the impact of the initial downturn had abated.[176] Due to the visibility afforded by their reporting obligations, public companies whose profits were boosted by the wage subsidy bore most of the criticism, along with several high-profile investors.

A *JobKeeper as Corporate Welfare*

As was clear from its name, JobKeeper was about keeping workers in jobs. The subsidy was explicitly intended to provide financial 'support' for businesses that were 'significantly impacted' by the pandemic.[177] The purpose of the support was to 'help businesses to keep people in their jobs and re-start' when the crisis had passed.[178] While claiming that ideology had been put aside, the government also maintained that its economic interventions — guided by its principles — would still be 'temporary, targeted, proportionate and scalable to the challenges' faced.[179] Succinctly capturing the spirit of the scheme, the Prime Minister and Treasurer respectively described JobKeeper support as an 'economic lifeline'[180] and a 'rescue package'.[181] Although the targeted beneficiaries of JobKeeper were businesses struggling to keep workers employed under the impact of the COVID-19 pandemic, broader stakeholders in the scheme were also clearly recognised. They were also unequivocally public in nature. JobKeeper was the government acting decisively in the 'national interest', in response to a 'national emergency'.[182] The Prime Minister, on the day the *JobKeeper Act* was passed, reminded us that '[p]rotecting our sovereignty has always come at great cost, regardless of what form [the] … threat takes'.[183]

[176] See below nn 190–9 and accompanying text.

[177] *Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth)* s 3 ('*JobKeeper Act*'); Explanatory Memorandum, Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (Cth) 34 [2.8] ('Coronavirus Economic Response Package Explanatory Memorandum').

[178] 'Coronavirus Economic Response Package Explanatory Memorandum' (n 177) 34 [2.8].

[179] *Parliamentary Debates* (n 175) 2918 (Josh Frydenberg).

[180] Ibid 2911 (Scott Morrison).

[181] Ibid 2919 (Josh Frydenberg).

[182] 'Coronavirus Economic Response Package Explanatory Memorandum' (n 177) 4.

[183] *Parliamentary Debate* (n 175) 2909–10 (Scott Morrison).

Seemingly acknowledging that the historic cost of the scheme would be borne by the public collectively, the Prime Minister added '[s]o today we will agree to pay that price through the important measures we will legislate.'[184] The support itself might have been intended for workers in significantly impacted businesses, but the stakeholders in the scheme could be said to include the nation itself or the Australian public, taxpayers, and the government — not least because each could be said to bear the historic cost of the scheme and the potentially long-lasting impact of that cost.

Juxtaposed against the narrative of JobKeeper as a nation-saving policy was the subsequent perception that large and profitable corporations became the unintended and undeserving beneficiaries.[185] This outcome was made possible by the fact that an entity's entitlement to JobKeeper was based, initially, on projected (rather than actual) declines in turnover and because once an entity qualified it was entitled to subsidies for the entire first six months of the scheme.[186] Indeed, in the Treasury's three-month review of the scheme, it flagged the possibility of modifying the turnover test to require a demonstrated decline in turnover, to ensure the subsidy was targeted at businesses actually in need of support.[187] Ultimately, the Treasury recommended against any changes within the first six months to maximise the macro-economic benefits during a continuing period of uncertainty, especially in terms of maintaining business confidence.[188] That position was taken knowing the risk that public money would end up going to companies no longer in need of support and after the Treasurer had been advised that some businesses receiving JobKeeper were reporting increases in turnover as early as April 2020.[189]

[184] Ibid 2910.

[185] See, eg, Terry McCrann, 'We Wasted $30bn on JobKeeper To Get Beaten by NZ', *Herald Sun* (online, 12 October 2021) <https://www.heraldsun.com.au/business/terry-mccrann/we-wasted-30bn-on-jobkeeper-to-get-beaten-by-nz/news-story/5db436d54d2893efa9dad9a28d57b155>.

[186] Ibid.

[187] Treasury (Cth), *The JobKeeper Payment: Three Month Review* (Report, June 2020) 36.

[188] Ibid.

[189] Dan Conifer, 'Josh Frydenberg Warned Less than Three Months into JobKeeper that Millions Were Going to Firms with Rising Turnovers', *ABC News* (online, 3 November 2021) <www.abc.net.au/news/2021-11-03/josh-frydenberg-jobkeeper/100589318>, archived at <https://perma.cc/S4RS-M2Q8>; Nassim Khadem, 'Treasury Confirms It Knew Government Was Paying Out Billions in JobKeeper to Firms That "May Not Need Support"', *ABC News* (online, 11 October 2021) <www.abc.net.au/news/2021-10-11/jobkeeper-treasury-report-firms-revenue-stimulus-josh-frydenberg/100529436>, archived at <https://perma.cc/UY6S-L448> ('Government Paying Out Billions in JobKeeper').

The extent of JobKeeper 'profiteering' became clearer with increased media interest in the second half of 2021. Analysis from the Parliamentary Budget Office revealed that approximately $38 billion (of the total of almost $89 billion) in JobKeeper subsidies went to employers whose turnover did not fall below applicable thresholds, while almost $20 billion went to businesses that enjoyed an increase in turnover.[190] Although 90% of JobKeeper recipients were classified by the ATO as 'micro' entities (with a total business income of less than $2 million), the net payment received by these entities (though still the largest single group) was significantly less at 44.1% of the total cost.[191] Small entities ($2 million to less than $20 million) comprised 6.2% of recipients but received 17.2% of total subsidies, while medium, large and very large entities ($10 million to over $250 million) made up only 2% of recipients, but shared in 27.8% of JobKeeper funding.[192]

Media reports focused particularly on publicly listed companies which posted large profits, or paid dividends or executive bonuses, portraying these outcomes as something unexpected and perverse. News articles framed JobKeeper as being 'diverted' to pay dividends and bonuses,[193] increasing the wealth of already wealthy investors who were reaping millions as dividends 'boom[ed]' and 'JobKeeper turned into profit maker'.[194] The scheme was

[190] Dan Conifer, '$38bn in JobKeeper to Companies' (n 10); Tom McIlroy, 'Big Business Hands Back $267m in JobKeeper Cash', *Australian Financial Review* (online, 7 December 2021) <www.afr.com/politics/federal/big-business-hands-back-267m-in-jobkeeper-cash-20211207-p59fj1>, archived at <https://perma.cc/2GSA-YHND>.

[191] 'JobKeeper', *Australian Taxation Office* (Web Page, 26 May 2023) <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/taxation-statistics/taxation-statistics-previous-editions/taxation-statistics-2019-20/statistics/jobkeeper?anchor=JobKeeper#JK3_chart>, archived at <https://perma.cc/ZZS7-PKWP>.

[192] Ibid.

[193] Paul Karp, 'Australia's Biggest Companies Pocketed Hundreds of Millions in JobKeeper Despite Positive Earnings', *The Guardian* (online, 18 March 2021) <www.theguardian.com/australia-news/2021/mar/18/australias-biggest-companies-pocketed-hundreds-of-millions-in-jobkeeper-despite-positive-earnings>, archived at <https://perma.cc/3R73-CM8C> ('Australia's Biggest Companies Pocketed Millions').

[194] Ian Verrender, 'How JobKeeper Turned into Profit Maker', *ABC News* (online, 22 March 2022) <www.abc.net.au/news/2021-03-22/how-jobkeeper-turned-into-profit-maker-ian-verrender/100020236>, archived at <https://perma.cc/7QD6-UDND>. See also Butler, 'Billionaires Receive Millions in Dividends' (n 10); Madeleine Morris, 'Shareholders Reap Millions from Top Companies Pocketing JobKeeper, New Analysis Finds', *ABC News* (online, 26 March 2021) <https://www.abc.net.au/news/2021-03-26/top-companies-pocketing-jobkeeper-new-analysis-finds/100030274>, archived at <https://perma.cc/NUR7-LY2Q>; Powell, 'Not a Good Look' (n 14).

discussed as something that was being 'exploited',[195] 'rorted'[196] and 'abused'[197] by corporations which — legal entitlement notwithstanding — were somehow avoiding the 'repercussions' they ought to have faced.[198] A widely reported analysis by governance advisory firm, Ownership Matters, revealed that in the second half of the 2020 calendar year, 58 out of 66 ASX 300 listed companies that shared in more than $1 billion in JobKeeper reported either positive earnings metrics or an increase in earnings compared with pre-pandemic levels.[199] An analysis published in March 2021 (towards the end of the scheme's operation) found that $8.6 billion in JobKeeper and other subsidies went to more than 60 publicly listed companies, which subsequently distributed over $3.6 billion in dividends and more than $20 million in executive bonuses — while committing to repay only $72 million of the subsidies received.[200]

[195] Gareth Hutchens, 'Businesses Pay Dividends and Bonuses from the Profits Generated by JobKeeper', *ABC News* (online, 6 September 2020) <www.abc.net.au/news/2020-09-06/coronavirus-businesses-using-jobkeeper-profits-for-ceo-bonuses/12634164>, archived at <https://perma.cc/JJD5-4FR5>.

[196] Ben Butler and Paul Karp, 'Labor's Andrew Leigh Accuses Companies of Misusing JobKeeper To Pay Executive Bonuses', *The Guardian* (online, 1 September 2020) <https://www.theguardian.com/australia-news/2020/sep/01/labors-andrew-leigh-accuses-companies-of-misusing-jobkeeper-to-pay-executive-bonuses>, archived at <https://perma.cc/W2BN-T4N4>.

[197] Dominic Powell, '"Hit by a Rainbow": Fears Millions Wasted on JobKeeper Payments to Profitable Companies', *The Sydney Morning Herald* (online, 18 March 2021) <https://www.smh.com.au/business/companies/hit-by-a-rainbow-fears-millions-wasted-on-jobkeeper-payments-to-profitable-companies-20210317-p57blx.html>, archived at <https://perma.cc/2CVG-SK6N> ('Hit by a Rainbow').

[198] Nassim Khadem, 'JobKeeper a $6.2b "Sugar Hit" for Larger Businesses That Didn't Take a Big Revenue Hit during the Pandemic', *ABC News* (online, 21 September 2021) <https://www.abc.net.au/news/2021-09-21/jobkeeper-subsidy-turnover-small-business-covid-pandemic-pbo/100477492>, archived at <https://perma.cc/3RKB-CKP2>.

[199] Ownership Matters, *Update on JobKeeper & Other Government Subsidies in ASX300* (Report, 17 March 2021) 1. See also Powell, 'Hit by a Rainbow' (n 197); Karp, 'Australia's Biggest Companies Pocketed Millions' (n 193); Gareth Hutchens, 'Dozens of Companies Report Large Boost in Profits after Receiving JobKeeper Subsidy', *ABC News* (online, 18 March 2021) <www.abc.net.au/news/2021-03-18/companies-report-large-boost-profits-after-receiving-jobkeeper/13256210>, archived at <https://perma.cc/H2YH-R696>.

[200] Matthew Elmas, 'Updated: The New Daily Reveals the Companies That Kept JobKeeper — Despite Huge Profits', *The New Daily* (online, 3 March 2021) <www.thenewdaily.com.au/finance/finance-news/2021/03/03/jobkeeper-company-profits/>, archived at <https://perma.cc/ERZ4-FAWH>.

Despite increasing public pressure, the government firmly opposed suggestions for recouping subsidies, such as through forced repayments[201] or a public 'outing' of JobKeeper profiteers.[202] Its unwillingness to exert pressure of this kind arguably reveals something of the limits of the government's reactive preparedness to intervene — which preparedness has been said to distinguish Australia's approach to corporate law and governance — as well as the enduring influence of neoliberal assumptions regarding the general undesirability of state interference in private enterprises.[203] Eventually, in September 2021 amendments were made to the *Corporations Act* obligating publicly listed companies to provide to the ASX a 'JobKeeper notice'[204] specifying how much in JobKeeper was received, the number of employees for whom the entity received the subsidy and the sum of any voluntary repayments, to be published by ASIC in a JobKeeper consolidated report, *Section 323DC Consolidated Report* ('*JobKeeper Consolidated Report*').[205] Drawing on the *JobKeeper Consolidated Report* and publicly available annual reports, Table 1 below lists the 30 largest

[201] Australian Greens Senator Nick McKim sponsored the unsuccessful 'JobKeeper Profiteering Bill 2021' (n 7), which sought to retrospectively recover JobKeeper payments from companies with a turnover of $50 million or more and which declared profits, paid dividends or executive bonuses: at sch 1 item 2.

[202] Khadem, 'Government Paying Out Billions in JobKeeper' (n 189). See also Department of the Prime Minister and Cabinet, 'Q&A, National Press Club: Barton, ACT', *PM Transcripts* (Transcript, 1 February 2021) <https://pmtranscripts.pmc.gov.au/release/transcript-43215>, archived at <https://perma.cc/PQ6H-92DG> ('Q&A National Press Club').

[203] Spender (n 117) 103–4. See also Jennifer G Hill, 'Regulatory Show and Tell: Lessons from International Statutory Regimes' (2008) 33(3) *Delaware Journal of Corporate Law* 819, 829–34.

[204] *Corporations Act* (n 72) s 323DB(1), as inserted by *Treasury Laws Amendment (2021 Measures No 2) Act 2021* (Cth) sch 3 item 1.

[205] *Corporations Act* (n 72) s 323DC(1); 'JobKeeper Notice', *Australian Securities and Investments Commission* (Web Page, 19 August 2022) <https://asic.gov.au/regulatory-resources/corporate-governance/jobkeeper-notice/>, archived at <https://perma.cc/M77A-6SVL>; Australian Securities and Investment Commission, *Section 323DC Consolidated Report* (Report, 19 August 2022) <https://download.asic.gov.au/media/tsnfa3so/section-323dc-consolidated-report-published-19-august-2022.xlsx>, archived at <https://perma.cc/Q4NE-AXP4> ('*JobKeeper Consolidated Report*'). Independent Senator Rex Patrick previously put forward an unsuccessful Bill which would have compelled the ATO Commissioner to table a list of 'all employers' with an annual turnover of more than $10 million detailing essentially the same information: Parliament of Australia, *Journals of the Senate* (Senate Journal No 108, 4 August 2021) 3835. See also David Crowe, 'Australians Want To Name 10,000 Biggest Companies That Got JobKeeper', *The Sydney Morning Herald* (online, 24 September 2021) <https://www.smh.com.au/politics/federal/australians-want-to-name-10-000-biggest-companies-that-got-jobkeeper-20210923-p58u4j.html>, archived at <https://perma.cc/62W7-HZYV>.

recipients of JobKeeper subsidies, together with any repayments, reported net profit after tax ('NPAT'), and dividends paid for the combined FY2019–20 and FY2020–21 (being the two financial years during which JobKeeper operated).[206] Fourteen of those 30 companies reported net losses, ostensibly placing them in the category of the 'struggling' businesses expressly targeted by the scheme. Some of these operated businesses in the worst impacted industries, such as aviation, travel and entertainment. The remaining 16 companies reported NPAT, despite the pandemic, while 22 companies (profitable and unprofitable) also paid dividends in either or both financial years. Six companies repaid a portion of the wage subsidies received, totalling just over $102 million — a figure representing: 28.2% of the JobKeeper received by the six companies which made any repayment at all; 13.8% of the JobKeeper received by the 16 companies which posted NPAT; and just 3.6% of the combined value of dividends paid by the 24 companies that made distributions. As of April 2023, of the more than $4.3 billion in JobKeeper received by the 601 publicly listed companies appearing on ASIC's *JobKeeper Consolidated Report*, approximately $242.1 million (or 5.6%) had been voluntarily repaid.[207]

[206] In addition to NPAT (or statutory NPAT), most of the listed companies examined also publish financial results using non-standard accounting measures, described variously as *underlying* or *normalised* results, as well as earnings before interest and tax ('EBIT') and earnings before interest, tax, depreciation and amortisation ('EBITDA'): see Vesna Poljak and Edmund Tadros, 'How To See through the "Adjusted" Earnings Numbers Confusing Investors', *Australian Financial Review* (online, 3 March 2017) <https://afr.com/companies/how-to-see-through-the-adjusted-earnings-numbers-confusing-investors-20170302-guoqq4>. In almost every case the reported profit using such measures was significantly more than NPAT. In line with accounting standards, have used NPAT as the reported results.

[207] *JobKeeper Consolidated Report* (n 205); 'JobKeeper Notice' (n 205). There is no reliable public disclosure of the total amount of all subsidies repaid by all entities. However, in July 2021, it was estimated of the (then) $225 million repaid or pledged to be repaid, 90% was attributable to publicly listed companies: Gareth Hutchens, 'Here Are the 20 Companies on the ASX300 That Have Pledged To Return JobKeeper Payments: Was Public Pressure the Key?', *ABC News* (online, 14 July 2021) <www.abc.net.au/news/2021-07-14/jobkeeper-repaid-comes-from-public-companies/100288376>, archived at <https://perma.cc/Y9NH-ZZYJ> ('Public Pressure and JobKeeper Repayments').

Table 1: Top 30 Largest Recipients of JobKeeper Subsidies

Listed entity[208]	JobKeeper received	JobKeeper repaid	Combined FY2019–20 & FY2020–21 statutory profit/(loss)	Combined FY2019–20 & FY2020–21 dividends paid
Qantas Airways Ltd[209]	856,041,500	0	(3,656,000,000)	0
Crown Resorts Ltd[210]	291,207,900	0	(182,100,000)	406,200,000
Flight Centre Travel Group Ltd[211]	248,450,600	0	(1,095,700,000)	0
The Star Entertainment Group Ltd[212]	157,394,850	0	(36,700,000)	85,600,000
Myer Holdings Ltd[213]	144,013,500	0	(126,000,000)	0
Eagers Automotive Ltd[214]	131,072,700	0	489,900,000	166,107,000
Mosaic Brands Ltd[215]	125,017,800	2,115,450	(167,581,000)	5,243,000

[208] The data are obtained from *JobKeeper Consolidated Report* (n 205) and publicly available annual reports for each of the listed companies. The combined results of both financial years 2020 and 2021 were presented because these were the two years during which the JobKeeper scheme operated and to facilitate a simple comparison with the total amount received in wage subsidies under the scheme. All results are in AUD unless otherwise indicated.

[209] Qantas, *Qantas Annual Report 2022* (Report, 2022) 3.

[210] Crown Resorts, *Annual Report 2021* (Report, 2021) 105, 108.

[211] Flight Centre Travel Group, *FLT 2022 Annual Report* (Report, 2022) 5.

[212] Star Entertainment Group, *Annual* Report *2021* (Report, 2021) 68, 77.

[213] Myer, *Annual Report 2021* (Report, 2021) 4, 80.

[214] Eagers Automative, *Annual Report 2021* (Report, 2021) 44, 63.

[215] Mosaic Brands, *2021 Annual Report* (Report, 2021) 49, 52.

Listed entity[208]	JobKeeper received	JobKeeper repaid	Combined FY2019–20 & FY2020–21 statutory profit/(loss)	Combined FY2019–20 & FY2020–21 dividends paid
G8 Education Ltd[216]	103,248,000	0	(143,289,000)	19,057,000
Event Hospitality & Entertainment Ltd[217]	89,844,000	0	(105,023,000)	83,822,000
Premier Investments Ltd[218]	86,994,907	15,600,000	409,593,000	223,807,000
AMA Group Ltd[219]	63,649,500	0	(170,600,000)	9,310,000
Australian Clinical Labs Ltd[220]	58,147,500	31,281,000	100,700,000	42,000,000
Southern Cross Media Group Ltd[221]	47,420,699	0	73,200,000	30,761,000
Seven West Media Ltd[222]	47,028,000	0	116,941,000	0
Millennium Services Group Ltd[223]	46,459,500	0	33,943,000	0

216 G8 Education, *2021 Annual Report* (Report, 2021) 65, 69.

217 Event Hospitality & Entertainment, *Annual Report 2021* (Report, 2021) 37, 40.

218 Premier Investments, *Annual Report 2021* (Report, 2021) 36, 38.

219 AMA Group, *Annual Report: For the Year Ended 30 June 2021* (Report, 2021) 28, 44.

220 Australian Clinic Labs, *Annual Report 2021* (Report, 2021) 25, 69.

221 Southern Cross Austereo, *2021 Annual Report* (Report, 2021) 25, 56.

222 Seven West Media, *Annual Report 2021* (Report, 2021) 49, 66.

223 Millenium, *Annual Report 2021* (Report, 2021) 25, 45.

Listed entity[208]	JobKeeper received	JobKeeper repaid	Combined FY2019–20 & FY2020–21 statutory profit/(loss)	Combined FY2019–20 & FY2020–21 dividends paid
Accent Group Ltd[224]	44,986,000	0	132,400,000	113,758,000
Kathmandu Holdings Ltd[225]	41,146,300	0	72,297,000	41,389,000
Cochlear Ltd[226]	33,484,500	23,100,000	88,200,000	269,300,000
IVE Group Ltd[227]	33,059,000	0	59,200,000	21,694,000
Helloworld Travel Ltd[228]	32,800,050	0	(105,870,000)	26,335,000
Qube Holdings Ltd[229]	30,469,500	16,914,000	246,700,000	158,400,000
Vita Group Ltd[230]	29,728,450	0	48,745,000	19,647,000
Regional Express Holdings Ltd[231]	29,443,800	0	(23,256,000)	8,725,000

[224] Accent Group, *2021 Annual Report* (Report, 2021) 9, 47.

[225] Kathmandu Holdings, *Annual Report 2021* (Report, 2021) 25, 62. The figures for the combined statutory profit/(loss) and dividends paid are in New Zealand dollars.

[226] Cochlear Limited, *Annual Report 2021* (Report, 2021) 42, 64.

[227] IVE Group, *Annual Report 2021* (Report, 2021) 33, 77.

[228] Helloworld Travel, *Annual Report 2021* (Report, 2021) 28, 67.

[229] Qube, *Annual Report 2021* (Report, 2021) 33, 65.

[230] Vita, *Annual Report: Financial Year 2021* (Report, 2021) 23, 26.

[231] Regional Express Holdings, *Annual Report* (Report, 2021) 46, 49.

Listed entity[208]	JobKeeper received	JobKeeper repaid	Combined FY2019–20 & FY2020–21 statutory profit/(loss)	Combined FY2019–20 & FY2020–21 dividends paid
K&S Corporation Ltd[232]	28,609,500	0	29,251,000	10,272,000
Ovato Ltd[233]	28,013,300	0	(175,836,000)	0
Peter Warren Automotive Holdings Ltd[234]	28,001,000	13,150,000	46,454,000	66,267,000
Viva Energy Group Ltd[235]	27,999,500	0	196,700,000	246,200,000
Autosports Group Ltd[236]	24,459,000	0	(59,900,000)	10,050,000
Michael Hill International Ltd[237]	23,637,600	0	48,387,000	17,453,000
Vicinity Ltd[238]	23,229,000	0	(2,059,000,000)	744,000,000

As has already been noted, a significant portion of the blame for the deficiencies of JobKeeper can be attributed to the scheme's design (and to government as its designer); particularly, the use of projected (rather than actual) declines in turnover, the length of support under the original model and the absence of any public record of recipients or a mechanism to clawback subsidies if required. When faced with criticism for the profiteering and perceived

232 K&S Corporation, *Annual Report 2021* (Report, 2021) 9, 42.

233 Ovato, *Annual Report 2021* (Report, 2021) 33, 65.

234 Peter Warren Automative, *Annual Report 2021* (Report, 2021) 16.

235 Viva Energy Australia, *Annual Report 2021* (Report, 2021) 17, 23.

236 Autosports Group, *Annual Report 2021* (Report, 2021) 25, 39.

237 Michael Hill International, *Annual Report 2021* (Report, 2021) 14.

238 Vicinity, *Annual Report 2021* (Report, 2021) 22, 85.

waste, the Prime Minister and Treasurer respectively stressed that JobKeeper was 'more than just a wage subsidy'[239] and reminded critics that the scheme was designed and implemented during a crisis — when the nation was 'staring into the abyss'.[240] These are legitimate points. The generous six-month period of initial support and the efficiency gained by using turnover projections rather than actual figures undoubtedly contributed to Australia's 'economic bounce back'.[241] That said, governments in various other jurisdictions which implemented broadly similar programs proved capable of turning their minds to those issues in relation to which our scheme was criticised. For example, the New Zealand government developed a substantially similar scheme, but with a shorter initial period of support and a two-tier payment system (for full-time and part-time workers) from the outset.[242] The UK's program was ostensibly more targeted by restricting eligibility to employers with 'furloughed' workers (ie workers on unpaid leave).[243] Both New Zealand and the UK included searchable public records of employers that received subsidies,[244] facilitating greater transparency and public scrutiny. In Europe, various countries prohibited corporations that received support from paying dividends or bonuses, or conducting share buy-backs.[245] The attempt to deflect criticism of JobKeeper because of the uncertain environment in which it was developed is also

239 Josh Frydenberg, 'JobKeeper Did the Job It Was Meant To Do, and Quickly', *The Australian* (online, 10 September 2021) <https://theaustralian.com.au/commentary/jobkeeper-did-the-job-it-was-meant-to-do-and-quickly/news-story/300ead2179c9e0ee1f47c9df9f6354f7>.

240 'Q&A, National Press Club' (n 202).

241 Frydenberg (n 239).

242 '2020 COVID-19 Wage Subsidy', *Work and Income* (Web Page) <https://workandincome.govt.nz/covid-19/previous-payments/2020-wage-subsidy.html>, archived at <https://perma.cc/9JM2-BCDP>; McCrann (n 185) 2.

243 *The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction* (UK) para 2.1.

244 'COVID-19 Wage Subsidies: Employer Search', *Ministry of Social Development (NZ)* (Web Page) <https://www.msd.govt.nz/about-msd-and-our-work/newsroom/2020/covid-19/covid-19-wage-subsidy-employer-search.html>, archived at <https://perma.cc/C99E-BC6G>; 'View Subsidies Awarded by UK Public Authorities', *Gov.UK* (Web Page) <https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government>, archived at <https://perma.cc/T4RC-W84K>.

245 Torsten Müller, Thorsten Schulten and Jan Drahokoupil, 'Job Retention Schemes in Europe during the COVID-19 Pandemic: Different Shapes and Sizes and the Role of Collective Bargaining' (2022) 28(2) *Transfer* 247, 257. See also OECD, *Job Retention Schemes During the COVID-19 Lockdown and Beyond* (Report, 12 October 2020) 22 <https://read.oecd-ilibrary.org/view/?ref=135_135415-6bardplc5q&title=Job-retention-schemes-during-the-COVID-19-lockdown-and-beyond>, archived at <https://perma.cc/83WY-858R>.

undermined in that there were at least some commentators who warned, before the scheme became law, that it had the capacity to become 'corporate welfare' and 'indistinguishable from a straight-out subsidy to businesses'.[246] That said, it is precisely because the scheme was imperfect and liable to be exploited that it is relevant to the debate on directors' duties and CSR more broadly — which looks to the question of corporations' responsibilities *beyond* mere compliance with the law. It is pertinent to note that when asked what action the government would take in response to JobKeeper profiteering, the Prime Minister (while congratulating those that repaid) defended the profiteers on the basis of their legal entitlement, saying simply 'the law is the law'.[247] The following analysis, which shows that various directors and CEOs seemed to be guided by the same logic in reckoning whether to keep or repay JobKeeper subsidies, reveals something of the limits to CSR as a prophylactic against legally permissible but perhaps socially irresponsible behaviour, especially where the ethical choice carries a clear financial detriment.

B *Repaying JobKeeper and the Best Interests of the Corporation*

Information such as the amount of JobKeeper repaid, relative to profits and distributions to investors, permits blunt or generalised conclusions about the extent to which the financial interests of the theorised 'owners' of the corporation were prioritised by directors. Greater insights, however, can be gleaned by: attempting to understand the reasons *why* corporations opted to either retain or repay JobKeeper; discerning whose interests were contemplated and ultimately served in that decision; and assessing whether those decisions align with the theories, laws and corporate governance structures discussed above in Parts II and III.

Of the sample in Table 1, those which stand out are the companies which posted significant NPAT, declared dividends, and still chose to retain all the JobKeeper support they received. For example, Eagers Automotive Ltd

[246] See, eg, June Ma, Rohan Pitchford and Rabee Tourky, 'Wage Subsidies during COVID-19 Are a Bad Idea', *Australian National University: College of Business and Economics* (Web Page, 29 March 2020) <https://cbe.anu.edu.au/news/2020/wage-subsidies-during-covid-19-are-bad-idea-0>, archived at <https://perma.cc/89X6-NHH2>; Rabee Tourky and Rohan Pitchford, 'Secure Worker Entitlements before Passing the JobKeeper Corporate Subsidy Scheme', *Australian National University: College of Business and Economics* (Web Page, 6 April 2020) <https://cbe.anu.edu.au/news/2020/secure-worker-entitlements-jobkeeper>, archived at <https://perma.cc/L8JY-XKXM>.

[247] 'Q&A National Press Club' (n 202).

('Eagers') opted to repay nothing of the $131 million in JobKeeper it received, despite posting profits in excess of $465 million and declaring dividends worth more than $166 million.[248] Eagers was one of the companies specifically targeted in the media, with reports noting its billionaire investor, Nick Politis, would personally receive a dividend worth $17 million.[249] Defending the decision to keep JobKeeper, Eagers' CEO said the support 'was used exactly as it was intended to be by the government'.[250] Similar comments going to simple legal eligibility for JobKeeper and it being applied as intended were made by the chairs and CEOs of Southern Cross Media Group Ltd ('Southern Cross Media') and Accent Group Ltd ('Accent'); the latter of which said, vaguely, JobKeeper had been 'fully deployed' — presumably meaning it had been fully offset against the company's wage bill.[251]

Such justifications highlight the question of corporate responsibility beyond legal obligations and the role, if any, of directors' duties and corporate governance principles in encouraging or compelling more conscientious corporate behaviour. Insofar as the scheme was intended to subsidise wages, it was (as far as can be seen) used as intended and in accordance with the enabling legislation and rules. But that proposition becomes more tenuous if we look beyond legal entitlement and recall that the scheme was also intended as an 'economic lifeline' and 'rescue package' for businesses which suffered 'a significant financial hit' from the pandemic — and that a broad group of stakeholders held interests in the scheme.[252]

The Business Council of Australia ('BCA') clearly had such considerations in mind when it said that companies simply 'should not' pay executive bonuses if they received JobKeeper, because the scheme 'wasn't designed for that, it was

[248] See above n 214.

[249] Ben Butler, 'Car Dealer AP Eagers To Give Shareholders $64m in Dividends after Receiving $130m in JobKeeper Subsidies', *The Guardian* (online, 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>, archived at <https://perma.cc/KX77-9K2S> ('Eagers To Give Shareholders Dividends').

[250] Simon Evans, 'Eagers Automotive Won't Repay Any of $130m in JobKeeper', *Australian Financial Review* (online, 24 February 2021) <www.afr.com/companies/transport/eagers-automotive-won-t-repay-any-of-130m-in-jobkeeper-20210223-p57553>.

[251] Accent Group, *2021 Annual Report* (n 224) 8; Southern Cross Austereo, *2021 Annual Report* (n 221) 3.

[252] *Parliamentary Debates* (n 175) 2911–12 (Scott Morrison), 2919 (Josh Frydenberg); Morrison and Frydenberg (n 168).

designed to keep people working'.[253] Interestingly, the BCA — whose mission statement describes the role of business as delivering for shareholders while being 'good corporate citizens' and balancing a range of stakeholder interests[254] — felt more conflicted on the question of dividends. The BCA advised companies to 'exercise some very careful judgement', without explaining why dividends were any more reconcilable than bonuses in the context of a scheme which, as acknowledged, was fundamentally about keeping workers employed.[255] Alluding, in general, to directors' legal obligations to act in the interests of the company, Eagers also noted that while it was a 'grateful' recipient of JobKeeper, it also 'had to consider all of its stakeholders, including shareholders when making decisions'.[256] It is plain enough to see how Eagers' shareholders benefited from the board's decision with respect to JobKeeper, but who the company's (non-shareholder) stakeholders were or the extent to which their interests were genuinely considered is unclear. If those stakeholders included, say, the public, taxpayers or the government, one might at least conclude that their interests (in seeing JobKeeper repaid) were subordinated to the interests of shareholders. Whether Eagers in fact only had regard to shareholders' interests, or considered stakeholders' interests before subordinating them to those of investors, either outcome is consistent with a theorisation of the corporation and a framework of corporate law and governance which makes shareholders' interests paramount and which neither compels, nor meaningfully encourages, genuine consideration of broader stakeholders in corporate decision-making.

Turning to consider the reasoning of directors who did determine to repay JobKeeper also reveals, counterintuitively, a shareholder primacy that accords with that same hierarchy of interests. After initially resisting calls to make repayments,[257] some of the companies that received the most media attention,

[253] 'Jennifer Westacott Interview with David Speers, Insiders, ABC', *Business Council of Australia* (Transcripts, 6 September 2020) <https://www.bca.com.au/jennifer_westacott_interview_with_david_speers_insiders_abc> ('Jennifer Westacott Interview').

[254] 'About', *Business Council of Australia* (Web Page) <https://www.bca.com.au/about>, archived at <https://perma.cc/GV9Y-3772>.

[255] 'Jennifer Westacott Interview' (n 253). See also ibid.

[256] Butler, 'Eagers To Give Shareholders Dividends' (n 249); Evans (n 250).

[257] Dominic Powell, 'Solomon Lew's Premier To Consider Repaying JobKeeper after Pandemic', *The Sydney Morning Herald* (online, 24 March 2021) <www.smh.com.au/business/companies/premier-holds-on-to-jobkeeper-after-almost-doubling-its-profits-20210324-p57di8.html>; Dominic Powell, 'Gerry Harvey Won't Follow Lew's Lead on Returning JobKeeper

such as retail business operators Harvey Norman Holdings Ltd ('Harvey Norman') and Premier Investments Ltd ('Premier'), eventually made full or partial repayments.[258] Premier repaid just $15.6 million, out of almost $87 million received, despite posting an NPAT of $137.8 million for FY2019–20 (an increase of 29% on the pre-pandemic FY2018–19) and $271.8 million for FY2020–21 (an increase of 97.3% on its FY2019–20 results).[259] In a release to the ASX, Premier said it was repaying the 'net benefit' received under the first stage of JobKeeper (without elaborating further).[260] The decision was made after having earlier resisted calls to repay anything, with its CEO citing the risk of future lockdowns and asking 'who' would pay staff that might be unable to work in the future.[261] The question was rhetorical, but given the FY2019–20 results published just a few months earlier, the answer might have been: the company. Indeed, in announcing its decision to make the repayment, Premier's board said that it was precisely because its increased trading had 'fully offset the cost of supporting our teams through … lockdowns', together with the increasingly stable environment, that it determined 'it [was] now appropriate to refund the net JobKeeper benefit' — as if internalising the cost of supporting 'our teams' without that cost being fully offset by increased profitability would otherwise have been inappropriate.[262] Apart from being indicative of the weight attributed to the interests of employee stakeholders vis-a-vis investors, it implies that the decision to repay was only appropriate if shareholders were not (net) worse off — which suggests that the government's subsidy, in the

Funds', *The Sydney Morning Herald* (online, 3 May 2021) <www.smh.com.au/business/companies/gerry-harvey-won-t-follow-lew-s-lead-on-returning-jobkeeper-funds-20210503-p57oal.html>.

258 Dominic Powell and Jennifer Duke, '"Insult to Injury": Harvey Norman's JobKeeper Refund Reignites Calls for Review of $70b Scheme', *The Sydney Morning Herald* (online, 1 September 2021) <www.smh.com.au/politics/federal/insult-to-injury-harvey-norman-s-jobkeeper-refund-reignites-calls-for-review-of-70b-scheme-20210830-p58n1z.html>, archived at <https://perma.cc/HP22-Y4G3>; Ben Butler, 'Corporate Watchdog Considers Complaint about Premier Investments Not Revealing Jobkeeper Payments', *The Guardian* (online, 19 May 2021) <https://www.theguardian.com/australia-news/2021/may/19/corporate-watchdog-considers-complaint-about-premier-investments-not-revealing-jobkeeper-payments>, archived at <https://perma.cc/2R4H-WBBZ>.

259 McIlroy (n 190); Premier Investments, *Annual Report 2020* (Report, 2020) 1; Premier Investments, *Annual Report 2021* (n 218) 1.

260 Premier Investments, 'Premier To Repay $15.6 Million of JobKeeper Funds' (ASX Release, 3 May 2021) ('Premier To Repay JobKeeper Funds').

261 Fullerton (n 11).

262 Premier Investments, 'Premier To Repay JobKeeper Funds' (n 260).

end, sustained shareholder returns as much as it supported the continued employment of workers.

A further example comes from logistics and infrastructure company, Qube Holdings Ltd ('Qube'), which repaid a little over half of the almost $30.5 million it received in JobKeeper, after making NPAT of over $371 million and declaring dividends of more than $204 million.[263] The board stated plainly that had JobKeeper not been available, then management would have implemented 'cost-saving initiatives … to mitigate the impact on … [Qube's] financial performance'; adding that the decision to repay the JobKeeper subsidies received in FY2020–21 was taken only 'when it was clear that Qube's financial performance would enable it to maintain the majority of its workforce … and absorb the additional operating costs without … Government financial support'.[264] While Qube's reasoning suggests the interests of its employees were a relevant consideration, it also highlights the overriding importance of the company's financial performance and, moreover, its importance to shareholders. Indeed, Qube's discussion of its decision to repay JobKeeper is the contextual prelude to its explanation to investors regarding which measures of financial performance are the most appropriate. Qube provided no explanation for its decision to retain all of the JobKeeper received in FY2019–20, despite posting a larger NPAT in FY2019–20 than in FY2020–21.[265] But the clearest demonstration that the decision to repay anything was related solely to the financial performance of the company in the interests of shareholders — and, indeed, executive management through the agential relationship and related bonding strategies — is revealed in its report to investors on remuneration and short-term incentive outcomes.[266] While the company claimed it did not 'benefit materially' from the JobKeeper scheme,[267] were that not the case then the decision to repay might be seen as an example of the divergent interests of management and investors as the central concern of agency theory: that is, management returning (legally obtained) funds out of some misplaced sense of social responsibility, or duty to stakeholders, and against the interests of shareholders. The decision to repay might have been said to be *not* in the best interests of the company. Qube, however, after noting that the repayment was included as an 'expense' when

263 See above n 229.

264 Qube, *Annual Report 2021* (n 229) 15.

265 Qube's NPAT was $87.5 million in FY2019–20 and $156.6 million in FY2020–21: ibid 14; Qube, *Annual Report 2020* (Report, 2020) 12.

266 Qube, *Annual Report 2021* (n 229) 25, 30, 35.

267 Ibid 42.

calculating the achievement of financial key performance indicators for the managing director and key management personnel, went on to assure investors that 'had management understood JobKeeper would ultimately be voluntarily repaid, they would have planned further cost reductions thus increasing the financial outcomes relative to Targets'.[268] What this evidences is an ethos — backed by theory, law and principles of good corporate governance — of maintaining returns on equity at certain rates expected by shareholders over and above the interests of other stakeholders. That is, shareholder returns must be sustained first and foremost and, where there is anything likely to impact those returns, cost measures should be undertaken to prevent that outcome.

As noted, the director's duty to act in the best interests of the company has been judicially interpreted (and is broadly perceived) according to an enlightened shareholder value perspective, where stakeholder interests might be considered, but only derivatively to the interests of shareholders.[269] This conception is arguably reflected in cases where the decision to repay JobKeeper was a capitulation after sustained scrutiny, as was the case for Harvey Norman and Premier among others. The decisions were reported as the companies bowing to public pressure, rather than choices made in the interests of any broader stakeholder group.[270] That is not to say the decision could not still be said to be in the interests of the corporation itself, for instance in protecting the corporate reputation (a legitimate motivation, as acknowledged by several of the judgments discussed).[271] However, the reactive response tends to diminish any suggestion that broader stakeholder interests were 'represented in the interests of the company' or drove directors' decisions. It colours the decision as a response to social risk as envisaged by the current edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.[272] That is, a decision taken to avoid lasting reputational damage to shareholders' long-term financial interests, which remain paramount.[273] It does not appear to be a decision taken by reference to the expectations of the stakeholder group itself (eg customers, the community, taxpayers) whose opinions might ultimately

[268] Ibid.

[269] See above nn 99–109 and accompanying text.

[270] See, eg, McIlroy (n 190); Hutchens, 'Public Pressure and JobKeeper Repayments' (n 207).

[271] See, eg, *Cassimatis [No 8]* (n 101) 301 [482] (Edelman J).

[272] *ASX Principles and Recommendations (Fourth Edition)* (n 81).

[273] Ibid 16, 29.

determine that reputational risk, or in consideration of the harms (or benefits) those stakeholders might experience depending on the action taken.

It must be said that there were instances in which companies' decisions to repay JobKeeper and their reasoning for doing so appeared to challenge that shareholder primacy which distinguishes neoliberal corporate legality. For a small number of companies which opted to repay, a range of stakeholder interests and a sense of social responsibility seemed to be relevant factors. Toyota Motor Corporation Australia Ltd ('Toyota') was one of the earliest to announce its decision to repay the entirety of its $18.2 million in JobKeeper support.[274] Toyota cited its policy of 'contributing to the local economy' and a desire to 'minimise the cost imposition [on] Australian taxpayer[s]', adding that it 'wanted to do the right thing as well as avoid any unnecessary reputational risk'.[275] Similarly, Domino's Pizza Enterprises Ltd ('Domino's'), in repaying the entire $1.7 million it received, said that its board had considered the intention behind JobKeeper and 'community expectations' regarding the 'prudent use of public funds'.[276] It also claimed to be guided by 'straightforward principles' including 'to put people first (both customers and team members)' and 'to avoid relying on unnecessary government assistance'.[277] Taking these companies at their word, their decisions seem consistent with the perceived trajectory of law on directors' duties towards a broader stakeholder interest orientation and some weight appears to have been given to the interests of taxpayers, the government, and the expectations of the wider community. However, the subsidies received and repaid by these companies were also small relative to NPAT and when compared with the major recipients in Table 1. For example, the JobKeeper subsidies received and repaid by Domino's represent approximately 0.5% of its NPAT of $322.5 million for the combined FY2019–20 and

[274] Toyota Motor Corporation Australia, Submission No 7 to Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Coronavirus Economic Response Package Amendment (Ending JobKeeper Profiteering) Bill 2021* (16 July 2021) 1; Lois Maskiell, '"Very Positive": Toyota Wins Praise as It Pays Back $18 Million in JobKeeper Subsidies', *SmartCompany* (online, 13 January 2021) <www.smartcompany.com.au/coronavirus/toyota-pay-back-18-million-jobkeeper-subsidies/>, archived at <https://perma.cc/94GX-C4QU>.

[275] Toyota Motor Corporation Australia (n 274) 1.

[276] Domino's Pizza Enterprises, Submission No 4 to Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Coronavirus Economic Response Package Amendment (Ending JobKeeper Profiteering) Bill 2021* (2021) 2.

[277] Ibid.

FY2020–21.[278] By comparison, for Eagers,[279] Southern Cross Media[280] and Accent,[281] the amount received in JobKeeper represented, respectively, 27%, 65% and 34% of reported NPAT. It is also worth noting that for Domino's, the NPAT for FY2019–20 ($138.5 million) was 119% of (or $22.9 million more than) its result in FY2018–19 ($115.9 million).[282] Compared with the largest beneficiaries of JobKeeper, Domino's and Toyota were the exception in terms of their ostensibly stakeholder-oriented position, but also in the insignificance of the support received (and repaid) relative to financial performance. The reasoning from directors who kept and repaid JobKeeper tends to suggest both the dominance of the shareholder primacy norm and the limited effectiveness of concepts such as CSR or the social licence, at least when confronted with decisions which may be socially responsible or in line with community expectations, but financially detrimental to the corporation and its shareholders.

V Conclusion

This article has sought to contribute to an ongoing discussion regarding the construction of directors' duties to the corporation and the extent to which its interests can be equated with the financial interests of shareholders, or whether corporate decision-making can or should be influenced by broader stakeholders and CSR. Revisiting the theorisation of the corporation as a nexus of contracts and its implications for corporate governance and regulation, I have argued that — while acknowledging the differences of opinion and the sense of ongoing change — it can reasonably be said that Australian corporations law and governance principles currently continue to reflect the shareholder primacy norm paradigmatic of the neoliberal corporation.[283] An analysis of the profiteering from JobKeeper and directors' justifications for keeping or repaying subsidies reveals, in general, an understanding of the corporation and its interests consistent with a conception of the corporation which centralises shareholder value and which is validated by law and related structures which make the financial interests of shareholders the paramount consideration.

[278] *JobKeeper Consolidated Report* (n 205); Domino's Pizza Enterprises, *Annual Report 2020* (Report, 2020); Domino's Pizza Enterprises, *Annual Report 2021* (Report, 2021) 75.

[279] See above n 214.

[280] See above n 221.

[281] See above n 224.

[282] Domino's Pizza Enterprises, *Annual Report 2020* (n 278) 172.

[283] Ciepley, 'The Neoliberal Corporation' (n 3) 274–5, 289.

This is not to suggest that shareholder primacy and its reflection in directors' duties or governance principles is the sole reason for or explains of itself why so much JobKeeper ended up as corporate welfare. A variety of factors might have contributed to decisions to keep or repay JobKeeper, including various board-level characteristics which have been previously examined in terms of their influence on CSR outcomes.[284] Further, it must be acknowledged that surveys of company directors suggest that *law* has only a limited influence on the actual decision-making of directors.[285] Despite this, we can reasonably conclude that the law and corporate governance structures discussed did not prevent or challenge the outcomes for which JobKeeper (and its beneficiaries) were criticised. Rather, they facilitated and legitimated those outcomes. This conclusion invites us to (re)consider the relationship of corporate law and governance to CSR and community expectations of corporate behaviour — though a detailed examination is beyond the scope of this article.

A commonly discussed option is to amend s 181 of the *Corporations Act* to permit or compel directors to have regard to the interests of non-shareholder stakeholders when determining what is in the best interests of the company.[286] Section 172 of the *Companies Act UK* provides an example. However, the UK model is arguably not better than current Australian law. Despite recognition that a variety of interests might be represented in the company,[287] as a general proposition, directors in Australia may only take into account stakeholder interests 'provided their purpose is to act in the interests of the company as a whole, interpreted as the financial well-being of shareholders as a general body'.[288] This existing enlightened shareholder value interpretation legitimates the decisions of companies which claimed to have at least considered stakeholder interests, before proceeding in a way which clearly prioritised the financial interests of shareholders. In any event, as noted, the UK position arguably

[284] See, eg, Soudabeh Bolourian, Andrew Angus and Leila Alinaghian, 'The Impact of Corporate Governance on Corporate Social Responsibility at the Board-Level: A Critical Assessment' (2021) 291 *Journal of Cleaner Production* 125752:1–19, 8–9; Kathyayini Rao and Carol Tilt, 'Board Diversity and CSR Reporting: An Australian Study' (2016) 24(2) *Meditari Accountancy Research* 182, 199–200; Jan Endrikat et al, 'Board Characteristics and Corporate Social Responsibility: A Meta-Analytic Investigation' (2021) 60(8) *Business and Society* 2099, 2103–9, 2125.

[285] Marshall and Ramsay (n 1) 315. See Brand and Langford (n 111) 132–3.

[286] See, eg, *CAMAC Report* (n 15) 107–13; *PJC Report* (n 15) 56–9 [4.50]–[4.59].

[287] du Plessis, 'Directors' Duty To Act' (n 71) 6.

[288] *CAMAC Report* (n 15) 96.

does nothing more than statutorily enshrine shareholder primacy[289] and there are increasing calls for further reform to s 172 of the *Companies Act UK* to remove the concept of shareholder primacy and broaden the scope of the purpose of the company to include operating in such a way as to reduce harm to — and indeed deliver benefits for — wider society and the environment.[290]

Another option, proposed recently in the context of climate change, is to amend the *Corporations Act* to expressly allow directors to have regard to stakeholder and non-financial interests and even grant 'special standing' to stakeholder groups to provide an enforcement mechanism through which companies can be held accountable.[291] As for alternatives without the need for legislative reform, Rosemary Teele Langford has recently written about 'purpose-based governance' as a potential model for refocusing corporate governance to 'help solve the conundrum' of directors' duties and the extent to which stakeholders' interests may be considered and promoted.[292] Stakeholder interests could of course also be re-recognised and strengthened in recommendations for good governance, such as the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*; reversing the trend of whittling down and delegitimising such interests. More radical reform proposals include a reduction in the control rights of shareholders under corporations legislation and devolving rights to a new 'stakeholder board', in which the interests of employees, the community or other groups might be represented.[293] The need to decouple executive performance and remuneration systems from shareholders' financial interests has also been recognised.[294]

[289] Talbot, 'Trying To Save the World with Company Law?' (n 108) 528–9; Baker (n 84) 126; Langford, 'Use of the Corporate Form' (n 111) 988–9; Attenborough, 'The Neoliberal (Il)legitimacy' (n 3) 422.

[290] See, eg, Better Business Act, 'The World Needs Business at Its Best' (Web Document) <https://betterbusinessact.org/wp-content/uploads/2022/04/Better-Business-Act-Campaign-Overview.pdf>, archived at <https://perma.cc/UC8R-2LPT>; Better Business Act, 'The Better Business Act' (Draft Amendments) <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf>, archived at <https://perma.cc/8LUQ-96E9>.

[291] Baker (n 84) 126–8.

[292] Langford, 'Purpose-Based Governance' (n 89) 955.

[293] See, eg, Johnston and Talbot (n 65) 129–33. On some of the limitations of these and other corporate law reforms, see Michael Galanis, 'Growth and the Lost Legitimacy of Business Organisation: Time To Abandon Corporate Law Reform' (2020) 20(2) *Journal of Corporate Law Studies* 291, 318–22.

[294] Johnston and Talbot (n 65) 131–3.

As to theoretical understandings of the corporation, du Plessis has suggested that an anatomy of corporate law 'based on modern corporate law theory' re-emphasises the status of the corporation as a separate legal entity and, as such, its capacity to represent the interests of a variety of stakeholders.[295] Similarly, Watson has proposed an 'entity-based' understanding of the modern company,[296] reminiscent of Berle Jr and Means' conception of corporations as 'real' and 'public' entities,[297] but emphasising the centrality of the capital fund.[298] Once the company is understood this way, Watson argues, decisions of boards favouring non-shareholder constituents of the corporate firm become legitimate and necessary 'so long as the objective is to sustain and grow the capital fund'.[299] However, by subordinating those constituent interests to the growth of the capital fund, it is arguable that such an approach extends but is still partially aligned with existing enlightened shareholder value positions, at least in the sense that the consideration of stakeholder interests are valid only insofar as they are derivative of or instrumentally serve some other purpose. This criticism is perhaps ameliorated to an extent where entity primacy approaches emphasise not only that stakeholders' interests might be reflected in the interests of the corporate entity, but that the object of sustaining and growing the *value* of the capital fund itself should be understood broadly: going beyond financial value to include social and environmental value and good corporate citizenship also.[300]

Clearly the simplest way to avoid JobKeeper profiteering would have been to design the scheme to prevent that outcome in the first place or with a mechanism dealing with that eventuality.[301] Corporations applied for and (mostly) retained JobKeeper subsidies on the basis they were legally entitled to do so.

[295] du Plessis, 'Directors' Duty To Act' (n 71) 26.

[296] Watson, 'The Corporate Legal Person' (n 39) 140.

[297] Berle Jr and Means (n 43) 17. See also Weinstein (n 5) 144–6.

[298] Susan Watson, 'How the Company Became an Entity: A New Understanding of Corporate Law' [2015] (2) *Journal of Business Law* 120, 120, 141.

[299] Ibid 141.

[300] Susan Watson, *The Making of the Modern Company* (Hart Publishing, 2022) 270–5. See also Lynn Buckley, 'The Foundations of Governance: Implications of Entity Theory for Directors' Duties and Corporate Sustainability' (2022) 26(1) *Journal of Management and Governance* 29, 46–8.

[301] A recent independent review into Australia's response to the COVID-19 pandemic made this point as part of a general recommendation that economic support should have been provided more fairly and equitably: Peter Shergold et al, *Fault Lines: An Independent Review into Australia's Response to COVID-19* (Report, 20 October 2022) 35, 39.

The profiteering occurred where corporations were (to borrow from Friedman) playing according to the 'rules of the society … embodied in law' — and arguably 'custom' too, though perhaps not an *ethical* custom.[302] The 'rules' embodied in law were important at two levels. First, the scheme's design enabled profitable companies to legally claim billions, even if such was not the intention of the scheme and was at odds with community expectations. Second, (hard) law on directors' duties and (soft) corporate governance principles, undergirded by neoliberal theory, which make the interests of shareholders paramount, facilitated and legitimated the decision to keep lawfully obtained (if unneeded and undeserved) subsidies, without regard for community expectations of CSR. JobKeeper thus highlights the importance of appropriately designing, structuring, and implementing 'the rules' precisely because loopholes and opportunities will potentially be 'exploited' and 'abused' by corporations. But it also forces us to recognise that even if the law *might* permit directors to consider various stakeholder interests and concepts like CSR and the social licence,[303] our current regime is only partially effective. The work of actually getting corporations to act conscientiously, *beyond* minimum legal requirements, continues.

[302] Friedman, 'A Friedman Doctrine' (n 53) 33.

[303] As our most recent governmental reviews concluded: see *CAMAC Report* (n 15) 15; *PJC Report* (n 15) 63 [4.76]–[4.77].