

Jetair Ltd. and contemporary companies and securities law

Law



Introduction In acting as advisors for the Pilot's Association Australia and Airlines Union Australia, we seek to explore the legality of the various actions of the Jetair Ltd. 's Board of Directors which ultimately lead to the hiring of a new staff body in New Zealand by JetairNZ Ltd at a lowered salary and the subsequent redundancy of Jetair Ltd. 's Australian-based senior managers and pilots. The outcomes sought by the various employee associations seek for firstly, the imposition of the Australian-based wage of Jetair Ltd. s former senior managers and pilots upon the New Zealand-based staff of JetairNZ Ltd. The second outcome sought by the employee associations seeks for the retrenchment of the senior managers and pilots made redundant by Jetair Ltd. The third concern is with regards to ' excessive' remuneration of Jetair Ltd. 's board. In examining these concerns, there are a number of legal areas that must be examined: firstly the relationship between Jetair Ltd. and JetairNZ Ltd. s a related body corporate and the various duties owed to both companies by their Board of Directors; the duties owed by the Board of Directors to both companies and the body corporate as a whole and the possibility of conflict of interest; the duty of care owed by the Board of Directors to their employees and the company as a whole; and finally the exploration of the remuneration of Jetair Ltd. 's Board of Directors as a reflection of the current financial situation of the company.

The argument for and against the pursuit of legal action will be based solely upon relevant legislation and case law; therefore the conclusions drawn will be the recommendation for the employee associations in regards to the pursuit of legal action. Related Bodies Corporate - Holding and Subsidiary Companies Given that conducting business with an Australian-based

workforce operations, business proved to be cash-flow effective, but unprofitable - Jetair Ltd. has sought to pursue a differentiated corporate structure. In order to achieve this, Jetair Ltd. established a subsidiary, JetairNZ, in order to gain advantages that were previously unavailable. Incentives for the formation of a subsidiary, foreign or local, are provided for through both the rule of separate entity and limited liability. In the case of Jetair Ltd. the rules listed above provide for the existence of JetairNZ as a separate legal entity (although also functioning as part of the body corporate) with all of the same rights and obligations as any other registered company independent of its parent organization.

The provision of limited liability as an individual company allows for the pursuit of extensive operations by the body corporate whilst remaining wary of liability in the case of insolvency of the subsidiary. Therefore, Jetair Ltd may be defined as the holding company whilst JetairNZ may be defined as a wholly-owned subsidiary. As the majority of the Board, three out of five directors, are controlled by Jetair Ltd. we can establish that the Board of Directors of JetairNZ is controlled by Jetair Ltd.

From this we can assume that whilst JetairNZ enjoys the status of a separate entity and the overall corporate group is protected through the principle of limited liability; JetairNZ is in effect controlled by Jetair Ltd. Even though it is plausible to assume that Jetair Ltd. is in effect controlling the mind and will of JetairNZ the likelihood of piercing or lifting the corporate veil in order to determine without a doubt the timing, origin and motivation of JetairNZ's decision to employ new personnel in conjunction with Jetair Ltd. 's decision to effect a mass lay-off is highly unlikely.

Indeed a concise summation of this principle may be credited to Rogers J in *Briggs v James Hardie & Co Pty Ltd* (1989) ' Even the complete domination or control exercised by a parent over the subsidiary is not a sufficient basis for lifting the corporate veil '1. Given precedence, the Courts would be unwilling to lift the corporate veil given the application of the entity doctrine by the High Court. An encompassing remark made in the case of *Varangian Pty Ltd v OFM Capital Ltd* [2003] by Dodds-Streeton, that may be relied upon in *Jetair Ltd.* s case is ' The underlying unity of economic purpose, common personnel, common membership and control have not been held to justify the lifting the corporate veil'2. 1*Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 588 2 *Varangian Pty Ltd v OFM Capital Ltd* [2003] VSC 444 at [142] Interestingly, although the issue of redundancy payments is not being questioned by the employee associations - the case of *Stanborough v Woolworths Ltd* [2005] NSEADT 203 at [44]3, which illustrates a disparity in redundancy payments within a corporate group, illustrates the further application of the doctrine of separate entity which may be applied to

Jetair Ltd. and *JetairNZ* in terms of the variance of remuneration offered and the retrenchment of redundant staff. To argue that the same remuneration be offered to both previous *Jetair Ltd.* and new *JetairNZ* employees would prove to be futile given that although they exist within the same corporate group, *Jetair Ltd.* and *JetairNZ* are in the eyes of the law separate entities.

JetairNZ Board of Directors - Appointment & Control In the formation of *JetairNZ*, the board of directors appointed by *Jetair Ltd.* consists of several representatives of *Jetair Ltd.* and two representatives from the airline industry in New Zealand.

As a holding company, Jetair Ltd. is well within the law to appoint its own nominees to the Board of Directors of a subsidiary such as JetairNZ. In fact, this proves to be common practice, with the frequent alignment of interests amongst the company as a whole. Although there is an alignment of interests between both the holding company and subsidiary, in case there is any situation in which a conflict of interests arises the directors of a subsidiary such as JetairNZ are required to act in the best interests of the subsidiary, not the company as a whole.

In this case, the appointees of Jetair Ltd. currently serving as directors for JetairNZ are obligated to act in the best interests of JetairNZ at all times, precedence is given in the case *Walker v Wimbore* (1976) 137 CLR 14. Given the question of the enforcement of the previous Australian-wage for all JetairNZ senior managers and pilots, this would have to be in the best interests of JetairNZ alone to be passed by the JetairNZ board. Given that maintaining employees based in New Zealand is relatively less expensive ³ *Stanborough v Woolworths Ltd* [2005] NSEADT 203 at [44] *Walker v Wimbore* (1976) 137 CLR 1 in terms of remuneration for JetairNZ, employing an inflated level of remuneration would not be in the best interests of JetairNZ. Should the Board of Directors pursue such an action, they would not be acting in the best interests of the company and they would be in breach of duty. *Director's Duty of Care - Company vs. Employees* In examining the duty of care owed by the Board of Directors of Jetair Ltd. there exists an inequality of that which is owed to employees and to the company.

The first priority of the directors' is to maximize the value of the company, in order to maximize the earnings of the shareholders in the short- and long-
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term. However, directors also owe a duty of care to their employees and other various stakeholders in the company - often termed Corporate Social Responsibility. In the case of Jetair Ltd. and the potential action from employees and their relevant associations there exist arguments both for and against Jetair Ltd.'s redundancy scheme. The arguments against Jetair Ltd.'s action stem from the consideration for corporate social responsibility of companies - specifically for their employees.

However, an examination of CMAC Report - The Social Responsibility of Corporations (2006)⁵ addresses many of the issues arising in the course of companies conducting business - whereby various stakeholders in companies concerns are unaddressed or unsupported by current company law. Whilst the report allows for recognition of the conflicts between companies and various stakeholders it also considered the current company law to be sufficient in granting persons such as the directors of Jetair Ltd. the appropriate powers and obligations to take into account their corporate social responsibility.

The report also concluded that any amendment to the Corporations Act 2001⁶ was unsubstantiated. Whilst it is possible to cite 5 Corporations and Markets Advisory Committee (2006) The Social Responsibilities of Corporations⁶ The Corporations Act 2001 (Cth) Corporate Social Responsibility as an argument for the retrenchment of the former senior managers and pilots of Jetair Ltd., The Social Responsibility of Corporations (2006)⁷ has found that the consideration of stakeholders such as employees may prove to be detrimental to corporate decision-makers primary consideration - the shareholders.

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There exists a significant argument against the sublimation of the interests of shareholders to pursue the interests of company employees. Simply put, directors of a company should not place the interests of employees before the interests of shareholders as is illustrated in *Parke v Daily News Ltd* [1962]; whereby we may assume that the fiduciary duties of the directors lie with the shareholders alone. The redundancy payments previously received by former employees are indeed a necessary compensation as they were incidental to Jetair Ltd. carrying on their business, having been a previously agreed contractual obligation.

Redundancy payments may also be viewed as a facet of Corporate Social Responsibility, as they frequently appease the employee unions and ease the continuance of business. Jetair Ltd. differentiated their corporate structure, through the creation of a subsidiary and a shift in staffing location and remuneration, in order to achieve lowered operational costs - thereby maximizing shareholder's value. Jetair Ltd. also upon making the represented employees redundant paid all entitlements, and has not breached the Corporations Act 2001 regarding employee entitlements.

From this we may reason that Jetair Ltd. has fulfilled their legal obligation to act in the best interests of the shareholders before their employees; and has also fulfilled their legal obligations regarding employee entitlements whilst also pursuing a measure of Corporate Social Responsibility through the provision of redundancy payments to facilitate their employment transition and ease tension with relevant employee associations. 7 Corporations and Markets Advisory Committee (2006) *The Social Responsibilities of Corporations* 8 *Parke v Daily News Ltd* [1962] Ch 927 *Corporations Act 2001*
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(Cth) Jetair Board of Directors Remuneration When addressing the issue of dissention of former employees and their associations with the level of remuneration of the board of directors of Jetair Ltd. , it is necessary to explain the procedures regarding director's remuneration to ascertain if there has been any illegal action. There are several key discussion points as follow: the company constitution, the corporate governance principles, and lastly current opinion regarding high levels of director's remuneration.

Firstly, a director is not permitted to receive any remuneration from their company unless approved by either the company's constitution (replaceable rules included) or the shareholders. If we assume that Jetair Ltd. 's constitution provides for the ability of the board to decide their own remuneration; this, although in direct conflict with corporate governance, is not in fact illegal. The assignation of large bonuses in addition to the usual remuneration was awarded at the AGM in November 2011, and therefore was disclosed to shareholders and passed by a vote either by the shareholders or the board of directors.

According to the Corporate Governance Principles and Recommendations¹⁰, Jetair Ltd. must pursue a directors' remuneration policy of remunerating fairly and responsibly. In order to prove any wrongdoing by the board of Jetair Ltd. the following must be proved: excessive remuneration leading to oppressive or unfair conduct leading to no/reduced shareholder dividends; deviation from company policies regarding the company's performance and its effect upon director's remuneration; or a lack of disclosure of the remuneration of each individual director. 0 ASX Corporate Governance Council(2010) Corporate Governance Principles and Recommendations In <https://assignbuster.com/jetair-ltd-and-contemporary-companies-and-securities-law/>

recent years there has been a shift in public perceptions regarding level of executive and non-executive director's remuneration; largely due to the poor performance of many companies throughout the Global Financial Crisis. This has led to a strengthening of the framework relating company performance to director's remuneration through the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 (Cth)¹¹.

Pursuing action regarding the 'excessive' remuneration or bonuses of the directors of Jetair Ltd. , in the case that any of the above was substantiated would lead to the return of the 'excessive' remuneration to Jetair Ltd. The pursuit of such an action would prove to return value to the company, but would in no way assist in the retrenchment of former employees. Conclusion & Recommendations To conclude it is not recommended for the Commercial Airlines Union and the Pilots Association to pursue legal action against either Jetair Ltd. or JetairNZ. This report has sought to outline any potential courses of action available to the employee associations representing the recently terminated Australian-based senior managers and pilots of Jetair Ltd. The arguments against pursuing legal action are based in case or legislative law; and provide legal reasoning for the actions of Jetair Ltd. Although the employees and their associations may at this time feel that the situation is unfair there exists, at this time, no apparent legal wrongdoing on the part of Jetair Ltd. in their establishment of a subsidiary company, termination of current employees, the imposition of a lesser wage for employees of JetairNZ or the recent award of large bonuses in addition to remuneration of the Board of Directors of Jetair Ltd. Word Count: 2, 164 ¹¹ Corporations

Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 (Cth) Sources Cited oASX Corporate Governance Council (2010), Corporate Governance Principles and Recommendations oBriggs v James Hardie & Co Pty Ltd (1989) 16 NSWLR 549, 588 oCorporations Act 2001 (Cth) Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 (Cth) oCorporations and Markets Advisory Committee (2006) The Social Responsibilities of Corporations oParke v Daily News Ltd [1962] Ch 927 oLipton, P. Herzberg, A. & Welsch, Michelle (2012), ' Understanding Company Law' (16th Ed.), CorporateEducationServices Pty Ltd. oStanborough v Woolworths Ltd [2005] NSEADT 203 at [44] oWalker v Wimbore (1976) 137 CLR 1 oVarangian Pty Ltd v OFM Capital Ltd [2003] VSC 444 at [142]