



Still a sleepy hollow? Directors' liability and the business judgment rule

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*The statutory business judgment rule was introduced in Australia in 2000 after a lengthy process of consultation and debate. The rule was aimed at alleviating fears that directors may have that their commercial decisions made in good faith and for the benefit of the company would be subject to second guessing by the courts through litigation alleging a breach of the duty of care and diligence. Since 2000 there have been only a few decisions that have discussed the rule, giving credence to the prediction that it would be a sleepy hollow rather than a safe harbour. Fifteen years on, the rule was recently successfully relied upon for the first time in **ASIC v Mariner (2015)** but in circumstances where a breach of duty of care was not proven. Significantly, the rule remains a hot topic for public debate with the AICD and Dr Robert Austin proposing amended business judgment rules. This article reflects on the past 15 years of the statutory business judgment rule and assesses the case for law reform advanced by the private sector.*

I Introduction

The statutory business judgment rule was introduced in s 180(2) of the Corporations Law (now Corporations Act 2001 (Cth)) in 2000 after a lengthy process of consultation and debate.¹ The rule was aimed at alleviating fears that directors may have that their commercial decisions made in good faith and for the benefit of the company would be subject to second guessing by the courts through litigation alleging a breach of the duty of care and diligence.

The introduction of the statutory business judgment rule was a controversial measure that had given rise to intense debate and scrutiny from academic

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¹ See Companies and Securities Law Review Committee, *Company Directors and Officers: Indemnification, Relief and Insurance*, April 1989; Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties — Report on the Social and Fiduciary Duties and Obligations of Company Directors*, Cooney Report, Parliament of Australia, Canberra, 1989; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders*, Parliament of Australia, Canberra, 1991. For subsequent law reform discussion, see Treasury, *Directors' Duties and Corporate Governance: Facilitating innovation and protecting investors*, Corporate Law Economic Reform Program, Proposals for Reform Paper No 3, Australian Government, Canberra, 1997; Treasury, *Review of Sanctions in Corporate Law*, Roundtable Paper 1, Australian Government, Canberra, 2007; Treasury, *Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, Australia Government, Canberra, 2010.

commentators,² legal practitioners³ and business lobby groups.⁴ Advocates of the rule pointed to the need to address concerns about directors personal liability and the dampening effect that this had on entrepreneurial risk taking. Opponents rallied against the perceived watering down of the requirements of the duty of care and diligence. Clear lines of argument were drawn with trenchant positions taken on both sides. Professor Paul Redmond published an often-cited paper which argued that the statutory business judgment was unnecessary given the nature of cases on the duty of care and diligence.⁵ Professor Redmond argued that directors who acted reasonably had nothing to fear from the (then) current laws and thus the new defence would be superfluous. The learned professor predicted that the statutory business judgment rule would languish as a sleepy hollow rather than constitute the safe harbor promised by its advocates.

As discussed below, this prophetic view reflects the Australian experience. The statutory business judgment rule, as noted by practitioners,⁶ has proven to be of little practical use to directors until the recent decision in *Australian Securities Investments Commission v Mariner Corporation Ltd*⁷ where the directors satisfied the rule and were entitled to its exculpatory operation. This decision, together with detailed analysis of the statutory business judgment rule in *Australian Securities Investments Commission v Rich*,⁸ shows potential for the rule to be more than a sleepy hollow or 'mere window dressing'.⁹ The obiter judgments in *Rich* and *Mariner*, however, should not be seen as the panacea to criticisms of the statutory business judgment rule for reasons discussed below. Prior to *Mariner*, new life was injected into issues concerning the utility of the, albeit imperfect, statutory business judgment rule. Should the government respond to the current calls of law reform made by the marketplace, there remains the prospect of significant change on the horizon due to the separate law reform proposals advanced by the Australian Institute of Company Directors (AICD)¹⁰ and Dr Robert Austin¹¹ to overhaul the statutory business judgment rule. These competing models, discussed

2 See, eg, R Baxt, 'Do We Need a Business Judgment Rule for Company Directors?' (1995) 69 *ALJ* 571; R Baxt, 'The Duty of Care of Directors: Does it Depend on the Swing of the Pendulum?' in *Corporate Governance and Duties of Company Directors*, I Ramsay (Ed), Centre for Corporate Law and Securities Regulation, University of Melbourne, 1997.

3 See, eg, Submission by the Law Council of Australia to the Commonwealth Department of Treasury, 3 April 1997.

4 See, eg, Submission by the Australian Institute of Company Directors to the Commonwealth Department of Treasury, June 1997, at <<http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions/1997/Duty-of-Care-and-the-Business-Judgment-Rule>> (accessed 17 February 2017).

5 P Redmond, 'Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule?' in Ramsay, above n 2.

6 L Pelling and N McGuire, 'Court Finds Directors Fulfil the Requirements of the Statutory Business Judgment Rule' (2015) 67 *Governance Directions* 533.

7 (2015) 241 FCR 502; 106 ACSR 343; [2015] FCA 589; BC201505423 (*Mariner*).

8 (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 (*Rich*).

9 N Young, 'Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required of Directors under Sections 180–184 of the Corporations Act' (2008) 26 *CSLJ* 216.

10 See Australian Institute of Company Directors, *The Honest and Reasonable Director Defence: A Proposal for Law Reform*, August 2014, at <www.companydirectors.com.au> (accessed 17 February 2017).

below, are underpinned by fundamentally different philosophical considerations, with the potential to either emasculate the statutory business judgment rule or to clarify and strengthen its operation.

This article examines of the nature of the statutory business judgment rule and addresses the question as to whether it has achieved its stated purpose. After 15 years since its introduction, we can make a reasonably informed assessment of the role and utility (if any) of the statutory business judgment rule. Part II discusses the place of the business judgment rule in the framework of corporate regulation. Part III examines the judicial consideration of the statutory business judgment rule since its introduction in 2000, particularly the important analysis in the One.Tel litigation in *Rich*¹² and the rare success in *Mariner*. Part IV provides a critical assessment of the recent independent law reform proposals put forward by the AICD and Dr Robert Austin. Part V concludes with an assessment on what future role the statutory business judgment rule may have in corporate governance in Australia.

II The business judgment rule

A The scope and content of the rule

The statutory business judgment in s 180(2) applies to a director's and officer's breach of duty of care and diligence. This duty arises from four potential sources. First, under the express or implied terms of a contract.¹³ Second, the common law imposes a tortious duty of care on directors and officers.¹⁴ Third, a duty of care arises in equity because of the business the director or officer holds themselves out as being capable of performing. The duties of care that arises from tort law and the law of equity are both based on assessing whether the individual defendant acted as a reasonable person would in the circumstances.¹⁵ The nature of the duty is shaped by the role and responsibilities that the person has within the company's circumstances.¹⁶ Fourth, the law imposes a statutory duty of care and diligence on directors and officers¹⁷ under s 180(1) of the Corporations Act 2001 (Cth) (the Act). The statutory duty in s 180(1) is expressed to be one of due care and diligence without the mention of skill, however the courts have held that a duty to exercise reasonable skill for the position is implied.¹⁸ The duty will hereafter be referred to as the 'duty of care'.

11 See B Austin, 'Boards that Lead Need Better Protection', *Australian Financial Review* (online), 21 March 2013.

12 (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410.

13 *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555; [1957] 1 All ER 125.

14 *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607; BC9504558.

15 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; 14 ACSR 109; BC9406797; *Australian Securities Commission v Gallagher* (1993) 11 WAR 105; 10 ACSR 43; BC9301114; *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451; 62 ACSR 1; [2007] NSWCA 75; BC200702341.

16 *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607; BC9504558.

17 The definition of officer in s 9 of the Act includes directors as well as company secretaries and external administrators (such as liquidators who sell the company's assets). The definition of director in s 9 of the Act includes formally appointed directors as well as those who act in the role without being properly appointed (de facto directors) and those with significant influence over the board (shadow directors).

18 *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607; BC9504558. For a historical

The duty of care sits within a complex framework of duties and obligations that are imposed on company directors and officers.¹⁹ Directors and officers are, for example, subject to personal liabilities under a range of circumstances under the Act including:

- administrative filing obligations;²⁰
- disclosure obligations;²¹ and
- insolvent trading (directors only).²²

Notwithstanding the diverse and complex range of personal liabilities and duties that are imposed on them, it is instructive to note that the statutory business judgment rule does not extend protection to such situations.²³ However, it should be noted that in 2007 the Commonwealth Treasury raised the possibility of extending the business judgment rule to cover a broader range of liabilities, although to date no progress has been made on that and given the time lapse it would appear that no further action will be taken to implement such a change.²⁴ The Federal Government also raised the possibility of extending a business judgment style defence to insolvent trading in 2010,²⁵ but this was ultimately rejected by the government in 2011 and recently substituted with a new set of reform proposals in this area. This article does not address the recent proposed reforms to insolvent trading defences, which raise separate policy issues.²⁶

The statutory business judgment rule was introduced into the Corporations Law (now Corporations Act 2001 (Cth)) s 180(2) in 1999 as part of the Corporate Law Economic Reform Program (CLERP) and came into operation in 2000. The rule provides:

review of the statutory duty of care and diligence, see the judgments of Austin J in *Australian Securities and Investments Commission v Vines* (2003) 48 ACSR 322; [2003] NSWSC 1116; BC200308116 and in *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 341; [2003] NSWSC 85; BC200300433.

19 See further R Austin, H Ford and I Ramsay, *Company Directors: Principles of Law and Corporate Governance*, 16th ed, LexisNexis Butterworths, 2005.

20 Corporations Act 2001 (Cth) s 188 (where there is no company secretary).

21 *Ibid*, ss 674(2A) and 729. See further, A Zandstra, J Harris and A Hargovan, 'Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions' (2008) 22 *Aust Jnl Corp Law* 51.

22 *Ibid*, s 588G. See further, J Harris, 'Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?' (2009) 23 *Aust Jnl Corp Law* 266; A MacFarlane, 'Safe Harbour Reforms — Should Insolvent Trading Provisions be Reformed?' (2010) 18 *Insolv LJ* 138; T Howes, 'Must the Captain Go Down With the Ship? The Avenues Available to Directors to Protect Themselves from Liability for Insolvent Trading' (2012) 30 *CSLJ* 7. For consideration of recent reform proposals see: J Harris, 'Reforming Insolvent Trading to Encourage Restructuring: Safe Harbour or Sleepy Hollows?' (2016) 27 *JBFL&P* 294.

23 See Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, Australian Government, Canberra, September 2006; B Baxt, 'Future Directions for Corporate Law: Where Are We Now and Where Do We Go From Here? The Dilemmas of the Modern Company Director' (2011) 25 *Aust Jnl Corp Law* 213.

24 Treasury, *Review of Sanctions in Corporate Law*, above n 1. See further M Byrne, 'Directors to Hide from a Sea of Liabilities in a New Safe Harbour' (2008) 22 *Aust Jnl Corp Law* 255.

25 Treasury, *Insolvent trading*, above n 1.

26 Australian Government and National Innovation Science Agenda, *Improving bankruptcy and insolvency laws*, Proposals Paper, April 2016, at <www.innovation.gov.au> (accessed 17 February 2017). For discussion see A Hargovan, 'Corporate Governance in Financially Troubled Companies: Australian Law Reform Proposals (2016) 34 *CSLJ* 483; Harris, above n 22.

Business judgment rule

180(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

- (a) make the judgment in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgment; and
- (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
- (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence) – it does not operate in relation to duties under any other provision of this Act or under any other laws.

180(3) In this section:

'business judgment' means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

The individual elements of this provision are examined in Part III. The rule was based on the business judgment rule utilised in the United States.²⁷ The American Law Institute (ALI) recommended a business judgment rule in its reformulation of corporate governance principles.²⁸ While some states have adopted this formulation, many important corporate law states (including Delaware) have continued to rely upon a common law formulation of the rule.²⁹ While the Australian statutory business judgment rule is based in part on the US formulation of the rule, there are many significant differences.³⁰ The most important difference is that the US rule operates as a presumption against liability that must be overcome by the plaintiff before an action can be taken against directors for a breach of the duty of care.³¹ In Australia, the rule operates as a defence that the defendant directors or officers have the onus of establishing if the duty of care is contravened.³²

The statutory business judgment rule may be contrasted with the so-called

27 For a review of the United States law see S Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, 6th ed, Aspen Publishers, 2009; J Macey, *Macey on Corporation Laws*, Aspen Publishers, 2002 (looseleaf).

28 American Law Institute, *Principles of Corporate Governance*, 1994. For a summary see M Legg and D Jordan, 'The Australian Business Judgment Rule After *ASIC v Rich*: Balancing Director Authority and Accountability' (2013) 34 *Adel LR* 403.

29 *Aronson v Lewis* (1984) 473 A 2d 805.

30 See D DeMott, 'Legislating Business Judgment — A Comment from the United States' (1998) 16 *CSLJ* 575; J Du Plessis, 'Open Sea or Safe Harbour? American, Australian and South African Business Judgment Rules' (2011) 32 *Comp L* 347.

31 The leading decision in the United States is *Aronson v Lewis* (1984) 473 A 2d 805. See also the detailed policy discussion in *Cuker v Mikalauskas* (1997) 692 A 2d 1042.

32 *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7269]–[7270]. See further Legg and Jordan, above n 28, at 415–18.

general law business judgment rule. This is not so much a rule, as rather a general reluctance by the judiciary to interfere with bona fide commercial decisions, particularly where there is no conflict of interest or abuse of power. This was expressed by the High Court of Australia as follows (footnotes omitted):

Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts. The general law business judgment rule was developed to give directors greater certainty when making commercial decisions so as to promote entrepreneurial risk taking, as noted by a commentator.³³ However, another reason for its development may be that the courts are simply ill-equipped to review genuine matters of commercial judgment. This is demonstrated in cases involving applications for directions by insolvency practitioners, who are officers of the companies they manage, where the courts have steadfastly refused to give directions on matters of genuine commercial judgment. While the court's focus may be drawn by decisions tainted with an abuse of power or improper motive, the commercial merits of decisions are not reviewable by the courts.³⁴

It has also been argued that the general law business judgment rule is better conceived of as a doctrine of judicial non-intervention which stands in contrast to a business judgment rule that provides a safe harbor that 'immunizes individual directors from liability for damages stemming from particular decisions'.³⁵ Professor Du Plessis cogently argues that the general law business judgment rule is more of an academic construct used to explain the approach taken by the courts than a common law rule. This is consistent with the explanation given to the general law business judgment rule in the recent important *Rich* case (discussed below).

The reluctance of courts to interfere in matters of commercial decision making where decisions are not tainted by an improper purpose or abuse of power led many opponents to question why the statutory business judgment rule was necessary. If directors' commercial decisions were already protected by the general law business judgment rule, why was a statutory rule also necessary? However, the general law business judgment rule has recently been explained in the *Rich* case as constituting only a relevant consideration for assessing whether a breach of the duty of care has occurred rather than as creating a bright line standard of judicial review.³⁶

³³ Young, above n 9, at 219.

³⁴ *Harlowe's Nominees Pty Ltd v Woodside (Lake's Entrance) Oil Co NL* (1968) 121 CLR 483 at 493; BC6800800. Similar comments were made by the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832. See also, W Bainbridge and T Connor, 'Another Way Forward? The Scope for an Appellate Court to Reinterpret the Statutory Business Judgment Rule' (2016) 34 *CSLJ* 415 at 419–21.

³⁵ J Farrar, 'Towards a Statutory Business Judgment Rule in Australia' (1998) 8 *Aust Jnl Corp Law* 237; L Law, 'The Business Judgment Rule in Australia: A Reappraisal Since the AWA Case' (1997) 15 *CSLJ* 174; Du Plessis, above n 30.

³⁶ *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7253].

B The justification for the statutory rule

The statutory business judgment rule recognises that directors and other officers are often required to make decisions with incomplete information due to time constraints and limited information available at the time of the decision. Problems with a decision-making process may be clear in hindsight but are difficult to assess at the time of making the decision, particularly in real-life situations with time pressures and incomplete information. Takeovers provide a good example of the difficulties associated with complying with the duty of care in a pressured environment. Takeover situations involve inherent limitations on the supply of appropriate and accurate information in a timely manner where a company is required to respond to a takeover by releasing information that must be compiled and released during a short timeframe.³⁷ Market conditions tend to fluctuate significantly during a takeover period, which can make forecasting share values and overall enterprise value difficult. The directors and officers must usually make the best of what information they are reasonably able to provide during the statutory timeframes. In such cases, it is difficult to impose a universal objective standard on directors and officers because each situation, and each company, are different. Continuous disclosure obligations, which require disclosing entities (such as ASX listed companies) to disclose material information to the market immediately, are another example of situations where incomplete information and time pressure make optimal decision making difficult.

As noted above, the duty of care under both general law and s 180(1) is molded to shape the circumstances, which should mean that the pressures that directors and officers are under will be taken into account when determining whether a breach of duty has occurred. However, directors and officers were concerned that the courts had failed to provide clear guidance as to what conduct will or would not satisfy the duty of care.³⁸ The nature of the duty of care is different to other duties imposed on directors and officers. Unlike fiduciary duties, such as the obligation to avoid actual or potential conflicts of interest or the obligation to act in the best interests of the company, it is difficult to determine *ex ante* what conduct will satisfy the duty of care.³⁹ This uncertainty can lead directors and managers to over-comply by adopting excessive due diligence and maintaining a greater degree of risk aversion than they would otherwise adopt if the risk of a lawsuit were less.⁴⁰ The law must balance the value of entrepreneurial risk-taking with the need for appropriate standards of corporate governance and stewardship.

The statutory business judgment rule had been recommended for several years prior to its introduction in 2000.⁴¹ Advocates of the rule argue that the courts had failed to provide a clear and consistent standard for the duty of care

³⁷ Corporations Act 2001 (Cth) ss 633 and 635.

³⁸ Farrar, above n 35.

³⁹ K Scott, 'Corporation Law and the American Law Institute Corporate Governance Project' (1983) 35 *SLR* 927.

⁴⁰ Explanatory Memorandum, Corporate Law Economic Review Program Bill 1998 (Cth), at [6.3].

⁴¹ Farrar, above n 35; F Carrigan 'The Role of Capital in Regulating the Duty of Care and Business Judgment Rule' (2002) 14 *Aust Jnl Corp Law* 215; Legg and Jordan, above n 28; Bainbridge and Connor, above n 34.

which caused confusion in corporate boardrooms that could hinder efficient decision making.⁴² The rule was seen as necessary to provide directors and officers with some comfort that their bona fide decisions, made on information reasonably available to them at the time, and which they rationally believed was in the company's interests, would not be overturned by a duty of care action after the fact.⁴³

The Explanatory Memorandum to the Corporate Law Economic Review Program Bill 1998 (Cth), which introduced the statutory business judgment rule, explained the need for the rule as giving directors and officers greater certainty in making business decisions which would 'remove the uncertainty for directors and should lead to better management processes within companies for the taking of decisions'.⁴⁴ The statutory business judgment rule was designed to provide 'a clear presumption in favour of a director's judgment' so that their decisions could not be challenged under the duty of care, while not changing the substantive duties of directors.⁴⁵ This was intended to give directors and officers 'an explicit safe harbor, being effectively shielded from liability for any breach of their duty of care and diligence'.⁴⁶

The statutory business judgment rule has long had numerous critics. Opponents argue that the general law business judgment rule already protects directors and officers from ex post hindsight review.⁴⁷ Indeed, one of the stated goals of the statutory rule was to 'clarify and confirm the common law position that courts will rarely review bona fide business decisions'.⁴⁸ Furthermore, critics argue that the terms of the statutory rule are uncertain and will fail to provide the reassurance regarding business decisions desired by directors and officers.⁴⁹ Critics also argue that there were so few court decisions involving the duty of care against company directors and officers that the likelihood of having commercial decisions overturned by the court under the duty of care was extremely low.⁵⁰ However, it should be noted that recent trends in public enforcement demonstrate that directors and officers are becoming subject to much more litigation and liability based on the duty of care.⁵¹ This is illustrated further below under Part III.

Opponents stress that the duty of care should not be watered down by the

42 Farrar, above n 35; A Greenhow 'The Statutory Business Judgment Rule: Putting the Wind into Director's Sails' (1999) 11 *Bond LR* 33.

43 Farrar, above n 35; J Bird, 'Duty of Care and the CLERP Reforms' (1999) 17 *CSLJ* 141.

44 Explanatory Memorandum, above n 40, at [2.4].

45 Ibid, at [6.4].

46 Ibid, at [6.9].

47 Redmond, above n 5, p 203.

48 Explanatory Memorandum, above n 40, at [6.4].

49 B Keller 'Australia's Proposed Statutory Business Judgment Rule: A Reversal of a Rising Standard in Corporate Governance?' (1999) 4 *Deakin LR* 125; A Clarke 'The Business Judgment Rule — Good Corporate Governance or Not?' (2000) 12 *AJCL* 85.

50 Redmond, above n 5, p 203. Keller, *ibid*, at 146.

51 For discussion, see A Herzberg and H Anderson, 'Stepping Stones — From Corporate Fault to Directors' Personal Civil Liability' (2012) *FLR* 40 at 181; T Bednall and P Hanrahan, 'Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?' (2013) 31 *CSLJ* 474.

statutory business judgment rule defence.⁵² The importance of robust corporate governance practices to the Australian economy, as well as to individual shareholders and indirect shareholders through superannuation, could be weakened by sending legislative signals that negligence is acceptable provided the directors and officers thought they were benefiting the company.

Critics of the statutory business judgment rule also challenge the empirical evidence to support statements that directors and officers are more reluctant to make decisions because of fears about liability.⁵³ However, it should be noted that since most of these criticisms were published a number of surveys have been conducted among directors to gauge their views on liability which suggest that boards are being more cautious and are finding it harder to attract the best people to become directors, because of concerns about liability.⁵⁴ Critics of the statutory business judgment rule counter this point by relegating the surveys to self-serving statements without independent empirical support.

Lastly, critics have pointed to ss 1317S and 1318 of the Corporations Act 2001 (Cth), which allow the court to grant relief from liability (including liability in respect of the duty of care) where the conduct was honest and the person ought fairly to be excused from liability. However, this provision has been rarely used successfully. In recent years, none of the successful applications relate to the duty of care.⁵⁵

III Operation of the statutory business judgment rule

A Initial decisions

In the 15 years since its introduction there have been very few cases that have applied the statutory business judgment rule to confer on the defendant directors or officers a defence to what is otherwise a breach of the duty of care. Indeed, apart from the *Rich*⁵⁶ and *Mariner*⁵⁷ cases, only a small number of cases have considered the rule in any detail whatsoever.⁵⁸ The following discussion reviews the operation of the rule, with reference to some of the earlier cases before focusing on the significance of obiter comments in *Rich* and *Mariner*.

⁵² Keller, above n 49.

⁵³ Redmond, above n 5; Keller, *ibid.*, at 141.

⁵⁴ Treasury and the Australian Institute of Company Directors, *Survey of Company Directors*, 2008; Australian Institute of Company Directors, *Director Sentiment Index Research*, November 2011; Australian Institute of Company Directors, *A Proposal for Law Reform: The Honest and Reasonable Director Defence*, August 2014, at <<http://aicd.companydirectors.com.au/>> (accessed 17 February 2017).

⁵⁵ *Hall v Poolman* (2007) 65 ACSR 123; [2007] NSWSC 1330; BC200710202; *McLellan v Carroll* (2009) 76 ACSR 67; [2009] FCA 1415; BC200910792. See further, A Hargovan, 'Director's Liability for Insolvent Trading, Statutory Forgiveness and Law Reform' (2010) 18 *Insolv LJ* 96; P Lewis, 'Insolvent Trading Defences after *Hall v Poolman*' (2010) 28 *CSLJ* 396; Howes, above n 22.

⁵⁶ (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410. As will be discussed below, there was no finding of a breach of duty of care in *Rich* and hence the (detailed) discussion of the business judgment rule was obiter.

⁵⁷ (2015) 241 FCR 502; 106 ACSR 343; [2015] FCA 589.

⁵⁸ A search of Austlii case law databases and Austlii's Corporations Act noteup on s 180 and a search of the LexisNexis Australia unreported decisions on 29 June 2016 reveals no decision that has considered the elements of s 180(2) after *Mariner*, *ibid.*

Aside from *Mariner* (discussed below), the only case where the statutory business judgment rule was successfully applied was in *Deangrove Pty Ltd (recs and mgrs apptd) v Buckby*.⁵⁹ That case concerned the conduct of bank-appointed receivers in exercising the power of sale whereby the receivers sold the secured property for less than they were offered by a competing bidder. The case was argued on several grounds under the Corporations Act 2001 (Cth), including ss 420A (the receiver's duty of care during a sale) and 180(1). The court held that s 180(2) applied to protect the receivers as officers, but this is not a strong precedent on the application of the statutory business judgment rule, because the court gave no consideration to the elements of s 180(1) and had already dismissed the reliance on s 420A on the basis that the conduct was not unreasonable.

There have been a small number of cases that have considered the application of s 180(2) in some detail, albeit in circumstances where the rule has been held not to apply. In *Re HIH Insurance Ltd (in prov liq); ASIC v Adler*,⁶⁰ which concerned undocumented company loans provided by a HIH subsidiary to Adler which Adler then used to buy securities in associated entities and to purchase shares in HIH. The court found that Adler had breached his duty of care to the company by causing the company to lend him and associated entities money in exchange for little or no value. The court then held that Adler was unable to rely upon the protection of the statutory business judgment rule because he had participated in transactions where he had a material personal interest and had not made any good faith business judgment. Adler deliberately misused his position as a non-executive director to gain personal advantages, which was not in good faith and for a proper purpose. The CEO of HIH, Ray Williams, also failed in his attempt to rely upon s 180(2) because he failed to turn his mind to the company's interests or how to protect them which was held not to be a business judgment made in good faith.

In *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers*,⁶¹ the Queensland Court of Appeal rejected an argument that s 180(2) could apply where the director deliberately refrained from participating in board decisions because he did not want to 'rock the boat'. Such a dereliction of responsibility could not be classified as a business judgment.

In *Resource Equities Ltd v Carr*,⁶² the court rejected reliance on the business judgment rule by several directors who had engaged in a transaction to obtain private benefits and to the detriment of the company. The transaction involved using the company's only funds to invest in a speculative technology company in which the directors had personal interests in circumstances where accounting advice warned against the transaction and the technology company was otherwise insolvent and likely to provide no benefit to the company. The court held that s 180(2) did not apply as the directors did not act in good faith

59 (2006) 56 ACSR 630; [2006] FCA 212; BC200601192.

60 (2002) 41 ACSR 72; [2002] NSWSC 171; BC200200827 (*Adler*).

61 [2006] QCA 335; BC200606852 (*Gold Ribbon*).

62 [2009] NSWSC 1385; BC200911514.

and had personal interests in the transaction.⁶³ Indeed, one of the directors purported to execute the transaction on behalf of both of the parties as he was both a director of Resource Equities and an agent for the counterparty (and was receiving a substantial commission from the transaction).

The *James Hardie*⁶⁴ litigation held at first instance that the non-executive directors had approved a misleading press release which made unequivocal statements about matters that were intrinsically uncertain (that is, the future value of asbestos litigation liabilities). The trial judge held that the board had contravened s 180(1) by approving the press release, which no reasonable person would have allowed to have been released.⁶⁵ The statutory business judgment rule was not relied upon by the non-executive directors because they argued that they did not approve the release of the document. The company's CEO Peter Macdonald sought to rely on the rule but gave no evidence which meant that the court could not be satisfied that a business judgment had been made or that the statutory terms of the rule applied. Mr Macdonald did not appeal this decision.

In *Australian Securities and Investments Commission v Fortescue Metals Group Ltd*,⁶⁶ the Full Federal Court briefly considered the statutory rule which, regrettably, was not commented upon in the subsequent High Court decision.⁶⁷ That case concerned conduct by the CEO of Fortescue Metals Group (Forrest) in allowing the company to provide misleading information to the market and fail to correct it under the company's continuous disclosure obligations. This resulted in the company suffering substantial damage to its reputation and financial penalties imposed by the court. The Australian Securities and Investment Commission (ASIC) took action against the company and against Mr Forrest under the accessorial liability provisions in ss 674(2A), 1041H and 1041I of the Corporations Act 2001 (Cth). ASIC also argued that Mr Forrest had failed to act as a reasonable person would in the circumstances by allowing the company to contravene the continuous disclosure and misleading conduct. The court held that Mr Forrest had failed

63 The discussion of the business judgment rule was not challenged on appeal (appeal dismissed: *Carr v Resource Equities Ltd* (2010) 275 ALR 366; 80 ACSR 247; [2010] NSWCA 286; BC201008170).

64 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; 71 ACSR 368; [2009] NSWSC 287; BC200903649 (appeal allowed in part: *Morley v ASIC* (2010) 274 ALR 205; 81 ACSR 285; [2010] NSWCA 331; BC201009833); *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345; 88 ACSR 246; [2012] HCA 17; BC201202609 (*ASIC v Hellicar*); *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; 88 ACSR 126; [2012] HCA 18; BC201202608. See further A Herzberg, 'James Hardie's Asbestos Liability Legacy in Australia: Disclosure, Corporate Social Responsibility and the Power of Persuasion' (2011) 26 *Aust Jnl Corp Law* 55; A Hargovan, 'Australian Securities and Investments Commission v Macdonald (No 11): Corporate Governance Lessons from James Hardie' (2009) 33 *MULR* 984.

65 Decision affirmed on appeal by the High Court in *ASIC v Hellicar* (2012) 247 CLR 345; 88 ACSR 246; [2012] HCA 17; BC201202609. For a similar finding in a less high profile case, see *Australian Securities and Investments Commission v Citrofresh International Ltd* (2010) 77 ACSR 69; [2010] FCA 27; BC201000263.

66 (2011) 1 190 FCR 364; 81 ACSR 563; [2011] FCAFC 19; BC201100543.

67 *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; 91 ACSR 128; [2012] HCA 39; BC201207489.

to provide any evidence that would satisfy the business judgment rule. More relevantly, Keane CJ held that a decision concerning whether or not to comply with a legal requirement (such as whether and how to disclose material information to the public as required by law) could not be considered a business judgment because it was not 'a decision related to the business operations of the corporation.'⁶⁸ Rather it is a decision related to compliance with the requirements of the Act'. The Chief Justice went further and stated:

A separate but related answer to Forrest's attempt to rely upon the business judgment rule is that s 180(2) cannot be construed as affording a ground of exculpation for a breach of s 180(1) where the director's want of diligence results in a contravention of another provision of the Act and where that other provision contains specific exculpatory provisions enacted for the benefit of the director.⁶⁹

In that case, Mr Forrest's liability under the continuous disclosure provisions was subject to a due diligence defence which was not satisfied on the evidence.⁷⁰ The High Court, however, overturned the Full Federal Court decision on the basis that ASIC, inter alia, had not proved that the company's statements were misleading. Thus, the High Court did not see reason to consider any aspect of the business judgment rule.

B The *Rich* case

The most detailed judicial consideration of the statutory business judgment rule came in the One.Tel litigation (the *Rich* case).⁷¹ In that case, ASIC commenced proceedings in 2001 against the joint managing directors of One.Tel (Rich and Keeling), the Chair (Greaves) and the finance director (Silbermann). ASIC's action was based on a failure of the defendants to advise the board that the company was insolvent and should be put into formal insolvency proceedings. The company had collapsed spectacularly the year before because its internal billing system was defective which led to severe cash flow problems and eventual insolvency. While Keeling and Greaves ultimately accepted liability and entered into enforcement agreements with ASIC, Rich and Silbermann continued to defend the action. In 2009, the case against Rich and Silbermann was dismissed for a lack of evidence to support ASIC's claim that the officers acted in contravention of s 180(1) by failing to advise the board that the company was insolvent at particular points in time and should be placed into external administration.⁷²

Despite this result, in an obiter decision, Austin J focused on the nature of the duty of care and stressed that the duty of care is not concerned with mere mistakes. This is important for the present issue because it is relevant to the discussion of the need for a statutory business judgment rule. The duty of care

⁶⁸ Ibid, at [197].

⁶⁹ Ibid, at [199]. Compare the approach adopted by Beach J in *Mariner* (2015) 241 FCR 502; 106 ACSR 343; [2015] FCA 589; BC201505423.

⁷⁰ See Corporations Act 2001 (Cth) s 674(2B).

⁷¹ *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410. Austin J in *Rich* gave a detailed examination of the duty of care and the business judgment rule in ch 23 of his Honour's judgment, which runs for 55 pages. The first 33 pages were concerned with the operation of the duty of care.

⁷² ASIC's expert financial and accounting evidence was largely ruled inadmissible by the court which fundamentally undermined its case.

is not concerned with decisions that lead to poor results, but rather with defective decision making processes that do not properly balance the potential risks and benefits that the choice presents the company with.⁷³ The role of the statutory business judgment rule then is to provide 'a defence in a case where the impugned conduct goes beyond a mere error of judgment, and would contravene the statutory standard but for the defence'.⁷⁴ His Honour held that the statutory business judgment rule may apply where there is a finding of a failure to act with due care and diligence even after considerations relevant under the general law business judgment rule have been taken into account by the court (that is, the conduct complained of is more than merely a mistake).⁷⁵

The scope of the concept of a 'business judgment' had been the subject of several previous cases, discussed earlier, where the applicability of the statutory business judgment rule was rejected.⁷⁶ Austin J held that a 'business judgment' includes steps involved in making business decisions such as matters of planning, budgeting and forecasting.⁷⁷ A decision not to take action may still be a business decision, even where it leads to substantial losses.⁷⁸ His Honour agreed with submissions by the defendants that the concept of a business judgment is to be interpreted broadly.⁷⁹ Justice Austin agreed with the determinations in the *Adler* and *Gold Ribbon* cases (see above) that a business judgment must involve an actual decision rather than a general neglect of duties.⁸⁰ Thus, the business judgment rule is not available as a defence against a failure to monitor the company's financial performance.⁸¹ As Austin J noted:

Monitoring the company's affairs and maintaining familiarity with its financial position are not in themselves matters that involve a 'decision to take or not to take action' in respect of a matter relevant to the company's business operations.⁸²

The most significant aspects of the *Rich* decision for our understanding of the statutory business judgment rule are those that explain the operation and scope of s 180(2)(c) and (d), which had not previously been subject to extensive judicial consideration.⁸³

Subsection 180(2)(c) provides that the director or officer must have been

73 *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7193], [7238]. See also *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052; BC200608176 at [102] (*Maxwell*).

74 *Rich*, *ibid.*, at [7242]. For a detailed doctrinal critique against this finding see Bainbridge and Connor, above n 34.

75 *Rich*, *ibid.*, at [7253]–[7255].

76 *Adler* (2002) 41 ACSR 72; [2002] NSWSC 171; BC200200827; *Gold Ribbon* [2006] QCA 335; BC200606852.

77 *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7274].

78 *Ibid.*, at [7281].

79 *Ibid.*, at [7276].

80 *Ibid.*, at [7277]–[7278]. For and application of this, see *Great Southern Finance Pty Ltd (in liq) v Rhodes* (2014) 103 ACSR 137; [2014] WASC 431; BC201409727.

81 The statutory business judgment rule was not discussed in the important recent decision on this issue: *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; 83 ACSR 484; [2011] FCA 717; BC201104526 (the *Centro* case).

82 *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7278].

83 Compare Corporations Act 2001 (Cth) s 180(2)(a) and (b), which use phrases well-known to company lawyers as they appear in other provisions, namely ss 181 (good faith and proper purpose) and 191 (material personal interests).

informed about the subject matter of the judgment ‘to the extent they reasonably believe to be appropriate’. ASIC argued that this imposed an objective standard of reasonableness akin to the duty itself in s 180(1). Such a view would render the statutory business judgment rule with little scope as recourse to it could only be made if the conduct was ‘reasonable’ which would not breach s 180(1). Justice Austin held that the reasonableness of the level of information relied upon by the defendant director or officer is to be assessed according to:

- the importance of the business judgment to be made;
- the time available for obtaining information;
- the costs related to obtaining information;
- the director or officer’s confidence in those exploring the matter;
- the state of the company’s business at that time and the nature of competing demands on the board’s attention; and
- whether or not material information is reasonably available to the director.⁸⁴

Furthermore, his Honour clarified that the requirement of reasonableness in s 180(2)(c) is not objectively assessed so as to include information that a reasonable person would have taken into account which means that:

protection may be available even if the director was not aware of available information material to the decision, if he reasonably believed he had taken appropriate steps on the decision-making occasion to inform himself about the subject matter.⁸⁵

Subsection 180(2)(d), which requires that the director or officer to rationally believe that the decision is in the interests of the company. The law has long required directors and officers to exercise their powers in the interests of the company.⁸⁶ Prior to this case it had been an open question as to the scope of the rational requirement, specifically whether this was similar to or lesser than the standard of objective reasonableness in s 180(1). His Honour held that the rational requirement is not the same as a reasonableness requirement as the latter would import the objective standard that exists in s 180(1) into the defence.⁸⁷ His Honour explained the scope of s 180(2)(d) as follows:

subparagraph (d) is satisfied if the evidence shows that the defendant believed that his or her judgment was in the best interests of the corporation, and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief, as defined, whether or not the reasoning process is objectively a convincing one. Consequently the Australian position on this matter is very close to the US position and s 180(2) has some protective work to do in cases where in its absence, there would or would arguably be a contravention of s 180(1).

The director or officer’s belief about the best interests of the corporation is to be formed, and its rationality assessed, on the basis of the information obtained through

⁸⁴ *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7283].

⁸⁵ *Ibid*, at [7284]. For application, see *Mariner* (2015) 241 FCR 502; 106 ACSR 343; [2015] FCA 589; BC201505423 at [490]–[492].

⁸⁶ *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306; Corporations Act 2001 (Cth) s 181(1)(a).

⁸⁷ *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7288]. For application, see *Mariner* (2015) 241 FCR 502; 106 ACSR 343; [2015] FCA 589; BC201505423 at [493]–[495]. For a contrary view see Bainbridge and Connor, above n 34.

compliance with subpara (c). It is not to be assumed, for the purpose of applying subpara (d), that the director or officer knew everything that he or she ought to have known, but only the things that he or she reasonably believed to be appropriate to find out.⁸⁸

The decision in the *Rich* case provides helpful guidance as to the operation of the statutory business judgment rule and is likely to influence future cases that seek to use s 180(2) given the eminence of its author and the detail of his reasons.⁸⁹ Importantly for present purposes, the *Rich* case clearly sees the statutory business judgment rule as more than a sleepy hollow or 'window dressing'.⁹⁰ Subject to a future appellate court ruling, it can be viewed as a safe harbor that operates as a defence even where the defendant's conduct has been held to be unreasonable.

The operation of the business judgment rule was most recently considered in detail in the *Mariner* case, which expresses the potential promise and practical utility of the rule.

C The *Mariner* case

ASIC alleged that the directors of Mariner Corporation Ltd were reckless and acted in breach of their duty of care and diligence under s 180(1) when they made a takeover bid on behalf of the company without securing funding. The proposed takeover involved far more money than what the company had, but the company was engaged in negotiations to obtain further funding and had a plan in place to sell a part of the target company's business to generate further funding. The company also announced the proposed takeover at a price below what it had already paid for the target company's shares in the prior 4 months in breach of the 'minimum price rule' in s 621(3). ASIC also argued that the company had breached rules relating to announcing takeover bids in s 631 and had engaged in misleading or deceptive conduct under s 1041H in announcing a bid that it should have known it could not pay for. The court rejected ASIC's claims.

ASIC also argued that s 180(1) was contravened by the directors conduct in relation to the takeover announcement even if there was no breach of the takeover rules or misleading conduct. A central issue was the extent to which a director should be taken to have contravened s 180(1) by reason of being involved in a contravention by the company of another provision of the Act. In this case, it was not enough that the conduct of the directors might have caused the company to engage in conduct that could have broken the law,⁹¹ provided that the directors properly balanced the interests of the company and the potential risks of the transaction.

With regard to the breach of s 180(1) claim, Justice Beach of the Federal Court held that this provision does not 'impose a wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance

88 *Rich*, *ibid*, at [7290]–[7291]. See further M Hooper, 'The Business Judgment Rule: *ASIC v Rich* and the Reasonable-Rational Divide' (2010) 28 *CSLJ* 423; Legg and Jordan, *above* n 28.

89 See further A Lumsden, 'The Business Judgment Defence: Insights from *ASIC v Rich*' (2010) 28 *CSLJ* 164.

90 Young, *above* n 9.

91 *Mariner* (2015) 241 FCR 502; 106 ACSR 343; [2015] FCA 589; BC201505423 at [455].

with law'.⁹² His Honour stated (at [447]) that '[i]t is wrong to assert that if a director causes a company to contravene a provision of the Act, then necessarily the director has contravened s 180'.

His Honour took into account the directors' extensive backgrounds in corporate law, commercial finance and mergers and acquisitions as well as their expertise and knowledge at the relevant time of the bid which showed potential for Mariner to make a significant profit. His Honour held that a retrospective analysis should not be undertaken:

in looking at the transaction in question, it is important to adopt an ex ante perspective where one is not just looking at potential risks and downsides but also the potential benefits. That was the directors' framework at the relevant time. And that is necessarily the framework within which s 180 must be analysed. A retrospective analysis of a transaction which did not proceed has the tendency to overlook that latter dimension.⁹³

The case by ASIC was dismissed on the basis that the benefits to Mariner of pursuing the proposed takeover bid were significant and outweighed the risks. In adopting this balancing approach between the foreseeable risk of harm and potential benefit to the company, His Honour observed:

one expects management including the directors to take *calculated* risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180. Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of s 180.⁹⁴

His Honour held that the directors had properly balanced the potential risks and rewards for the company in engaging in the transaction:

I accept that the alleged risks identified by ASIC were a reasonably foreseeable consequence of a failure to take reasonable care and exercise diligence in connection with the Austock takeover resolution. That is to say that these were potential theoretical risks; I, of course, cannot say that they were likely or probable to occur. But any risk of harm from these matters did not give rise to the risk of significant jeopardy to Mariner's interests. Moreover, the countervailing benefits well outweighed any such risk.⁹⁵

His Honour held that none of the directors had breached s 180(1) and, even if they had, the elements of the statutory business judgment rule would have been satisfied. The decision to initiate a takeover bid was a 'business judgment' under s 180(3) and, importantly, the directors satisfied all the elements of the statutory business judgment rule in that they had no personal interest in the decision, acted to benefit the company (which stood to make a large profit on the transaction) and were informed regarding the subject matter of the decision. The proper level of information was based on the extensive discussions that the directors had with potential funding parties prior to the announcement of the takeover. His Honour held:

⁹² Ibid, at [444] (citing *Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052; BC200608176).

⁹³ *Mariner*, *ibid*, at [13].

⁹⁴ Ibid, at [452].

⁹⁵ Ibid, at [461].

Mr Olney-Fraser [the CEO] held the requisite belief. It was not a belief that no reasonable person in Mr Olney-Fraser's position would have held. Accordingly, the belief was a rational one. Alternatively, as a matter of substance and in any event, Mr Olney-Fraser's process of reasoning was rational.⁹⁶

The other directors were informed of the discussions by the CEO and discussed this information and how firm the funding support was likely to be. These actions complied with s 180(2)(c). The other directors were found to have acted properly and in the absence of any material interest and in the rational belief that the decision was in the interests of the company. These actions supported a finding of compliance with s 180(2) if the directors had been found to have contravened s 180(1) (which they had not for reasons including obtaining the benefit of the reasonable reliance defence in s 189).

These conclusions were reached through reliance on, and application of, the judicial analysis of s 180(2) by Austin J in *Rich* (see above).

The analysis in *Rich* and the decision in *Mariner* gives the statutory business judgment rule a relatively broad scope for operation in situations where the conduct would otherwise give rise to a contravention of the duty of care. This will give some assistance to directors in making business decisions because they will know that if their conduct fits within the scope of s 180(2) then it cannot be successfully challenged under the duty of care. Furthermore, the defendant's only have to establish the elements of s 180(2) once a breach of duty has been established. Even cases where the rule has not applied are helpful for directors and officers to understand what standards of conduct are expected and what practices will and will not satisfy the statutory rule.

However, the potential utility of the statutory business judgment rule seen in *Rich*, and subsequently in *Mariner*, has not dramatically reduced the levels of concern in the boardrooms of Australian companies about potential liability. This is because the duty of care is only one element in the complex web of liability provisions that may be imposed on company directors and officers.⁹⁷ Many of these laws impose criminal liability, sometimes by default and in some cases with a reverse onus of proof. The statutory business judgment provides no assistance in such cases, but neither was it intended to.⁹⁸ It was introduced because of the particular danger of hindsight bias involved in assessing ex post whether conduct was reasonable. The explanation of the statutory business judgment rule in the *Rich* case gives the rule a role that goes beyond the elements of the underlying duty in s 180(1). As one leading corporate law practitioner notes:

⁹⁶ Ibid, at [494].

⁹⁷ For example, recent observations suggest that the voluntary uptake on the practice of integrated reporting in Australia is being hampered by directors' concerns about personal liability exposure, particularly for forward-looking statements that subsequently prove to be unfounded. See further, A Huggins, R Simnett and A Hargovan, 'Integrated Reporting and Directors' Concerns about Personal Liability Exposure: Law Reform Options' (2015) 33 *CSLJ* 176; J Du Plessis, and A Ruhmkorf, 'New Trends Regarding Sustainability and Integrated Reporting for Companies: What Protections do Directors have?' (2015) 36 *Comp L* 51.

⁹⁸ Redmond, above n 5, p 202.

The existence of an effective business judgment defence may only be cold comfort, but a defence that is well understood and whose very existence bears on their duty goes some way towards predictability and certainty in a manager's decision-making process and its legal consequences.⁹⁹

Furthermore, it could be argued that the clarity brought about by the *Rich* case may have a deterrent effect on potential litigation against directors and officers, at least in cases where there are reasonable prospects for the defence to be applied. This could explain why there are so few cases on the issue (either applying or not applying the rule). However, it is difficult (if not impossible) to generalise as to why litigation is either brought or not brought.

Notwithstanding such developments and potential prospects arising from the analysis in *Rich*, however, there has been public disquiet on the scope and operation of the statutory rule. In light of the paucity of judicial authorities, the limited scope of the statutory business judgment rule and the critical remarks on its operation by Austin J in *Rich*,¹⁰⁰ there has recently been a concerted push for law reform.

IV Law reform proposals

A Overview

With the demise of CAMAC, and the seeming glacial pace of COAG reform, the private sector has seized the law reform agenda from the government and has proposed reforms to director liability. The AICD, in late 2014, proposed the 'honest and reasonable director defence'.¹⁰¹ Prior to this initiative in early 2013, the former leading corporate law judge, Dr Robert Austin and Minter Ellison, proposed a new statutory business rule. This section critically examines both proposals and concludes with an assessment of the future role the statutory business judgment rule may play in corporate governance.¹⁰²

B The AICD proposal

The AICD recently proposed a new broad based 'honest and reasonable director' defence that would be included into Ch 9 of the Corporations Act 2001 (Cth). Chapter 9 contains provisions dealing with enforcement, remedies and court powers. The proposed defence is as follows:

Honest and reasonable director defence

Notwithstanding any other provision of this Act or the ASIC Act, if a director acts (or does not act) and does so honestly, for a proper purpose and with the degree of care and diligence that the director rationally believes to be reasonable in all the circumstances, then the director will not be liable under or in connection with any provision (including any strict liability offence) of the Corporations Act or the ASIC

⁹⁹ Lumsden, above n 89, at 179.

¹⁰⁰ (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7262]–[7269].

¹⁰¹ Available at <www.companydirectors.com.au> (accessed 17 February 2017).

¹⁰² The following discussion and analysis of the law reform proposals builds on J Harris and A Hargovan, 'Revisiting the Business Judgment Rule' (2014) 66 *Governance Directions* 634.

Act (or any equivalent grounds of liability in common law or in equity) applying to the director in his or her capacity as a director.

The elements of this proposed defence are thus:

- (a) A director has acted or refrained from acting;
- (b) The conduct was honest;
- (c) The conduct was for a proper purpose;
- (d) The conduct was undertaken (or not undertaken) with the degree of care and diligence that the director rationally believed to be reasonable in all the circumstances

Where these elements are satisfied, the director will not be liable under or in connection with any provision of the:

- Corporations Act
- ASIC Act
- Any equivalent grounds under common law or equity

insofar as the liability applies to the person's capacity as a director.

It is significant to note that the proposed defence contains a mix of subjective and objective assessments. The requirement to act honestly is a subjective assessment (which is consistent with the current s 181(1)(a)). The requirement to act properly has traditionally been assessed objectively under s 181(1)(b).

The standard required to act with the degree of care and diligence under this proposal is, in our view, more problematic. The current s 180(1) requires a standard of conduct that a reasonable person would exercise in the same circumstances, which is an objective assessment. This has been interpreted by the courts as meaning that directors have minimum standards of conduct, which are not changed by the actual knowledge or competency of the individual director.¹⁰³ For example, a non-executive director cannot argue that they were not negligent for failing to read financial statements on the basis that they were not trained as an accountant. All directors must be financially literate and be able to monitor the financial performance of the company.

The proposed defence would mean that directors would only need to perform at a standard of care and diligence that they rationally believed to be reasonable. This turns the current s 180(1) on its head and renders it a subjective assessment. This would take the law back to the time of *Re City Equitable Fire Insurance Company Ltd*,¹⁰⁴ where directors (particularly non-executive directors) were recognised as owing only intermittent obligations to the company. The AWA litigation in the early 1990s and the insolvent trading cases in the late 80s/early 90s fundamentally reset the assessment of director conduct in Australia.¹⁰⁵ This proposed defence would

¹⁰³ *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607; BC9504558.

¹⁰⁴ [1925] Ch 407; [1924] All ER Rep 485.

¹⁰⁵ For discussion on developments in the law of duty of care, see A Hargovan, 'Corporate Law's New Love: s 232(2) and the Director's Duty of Care' (1994) 3 *Asia Pacific Law Review* 20; S Sievers, 'Directors' Duty of Care: What is the New Standard?' (1997) 15 *CSLJ* 392.

be a radical departure from existing law in *Daniels v Anderson*¹⁰⁶ and, in the opinion of the authors, a retrograde step for corporate governance for the following reasons.

First, unlike the current statutory business judgment rule, the defence proposed by the AICD is not limited to business judgments. Therefore, a decision not to participate at all in the oversight of management of the company (which has been held not to be a business judgment and therefore not amenable to the statutory business judgment rule)¹⁰⁷ could be protected as long as the director was honest and the director rationally believed that the conduct was reasonable in the circumstances. It could be argued that such a decision would not be carried out for a proper purpose.

Second, the defence proposed seeks to override all existing obligations that give rise to liabilities, even if these existing provisions already have defences. For example, directors may be liable for defective disclosure in relation to prospectus offerings or in respect of continuous disclosure obligations, but both of these liabilities come with due diligence defences.¹⁰⁸ It is questionable whether the new defence is needed where there is already a due diligence defence. It could be argued that certain conduct in relation to disclosure was not undertaken for a proper purpose (see for example the conduct of the James Hardie board in relation to the disclosure of the sufficiency of the asbestos compensation fund), but then the question must be asked as to what utility the defence will provide if compliance with existing legal obligations (such as appropriate disclosure obligations) will be needed to demonstrate a proper purpose. There is also authority to suggest that acting so as to cause the company to breach its obligations under the law is not sufficient on its own to demonstrate an improper purpose.¹⁰⁹

C The new statutory BJR proposal

The proposal for a new statutory business judgment rule by Dr Robert Austin, discussed below, provides for a broad based defence that is intended to operate well beyond traditional corporate law statutes.¹¹⁰

Dr Austin's proposal addresses long-standing concerns about derivative liability where company directors are often made liable for the corporation's conduct by default. The proposed defence would be inserted into the interpretation statutes that operate federally and in each state and territory and therefore would be applicable to all statutes, not just the Corporations Act and the ASIC Act. The proposed defence is as follows:

Section XXX Protection for Directors of a Corporation where a Business Judgment is Made

106 (1995) 37 NSWLR 438; 16 ACSR 607; BC9504558. For a collection and discussion of modern judicial authorities on the statutory and general law duties of care, see Austin, Ford and Ramsay, above n 19, at [8.305].

107 *Gold Ribbon* [2006] QCA 335; *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7277]–[7278].

108 See Corporations Act 2001 (Cth) ss 728, 729 and 731 (prospectus liability); s 674(2A) and (2B) (continuous disclosure).

109 *Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052; BC200608176.

110 See Austin, above n 11. The authors gratefully acknowledge the permission of Dr Austin to extract this draft provision for academic critique.

- (1) In this section, an *exposure to liability* includes exposure to:
 - (a) criminal or civil liability under any Act or the general law;
 - (b) a penalty of any kind; and
 - (c) contravention of a provision of an Act.
- (2) This section applies where:
 - (a) a section of an Act (the *Affected Section*):
 - (i) imposes a duty on a director of a corporation, or on a class (such as officers of the corporation) which includes a director of a corporation; or
 - (ii) exposes a director of a corporation, or a class which includes a director of a corporation, to liability (whether the exposure to liability arises only out of that section or out of that section together with some other provision or provisions to which that section is related); and
 - (b) a question arises as to the application of the Affected Section to an alleged act, conduct or omission by a director of a corporation, whether occurring in this jurisdiction or elsewhere.
- (3) A director of a corporation, when acting in the capacity of director of that corporation, does not breach a duty imposed by an Affected Section, and is not exposed to liability by an Affected Section, unless it is proved by the party alleging the breach of duty or exposure to liability that:
 - (a) the act, conduct or omission that is alleged to constitute the breach of duty or exposure to liability was not, and did not arise out of, a business judgment made by the director in the capacity of director; or
 - (b) in respect of any act, conduct or omission that is, or arises out of, a business judgment made by the director in the capacity of director:
 - (i) the director was dishonest; or
 - (ii) the director had a material personal interest in the subject matter of the business judgment which has not been disclosed to the board; or
 - (iii) the business judgment made by the director was one that no reasonable person in that director's position could have made.
- (4) In this section:
 - (a) *business judgment* means an exercise of judgment relating to taking or not taking action in connection with any business of the corporation;
 - (b) words and phrases used in this section that are given general definition in the *Corporations Act 2001* (Cth) have the meaning given to them by that Act; and
 - (c) *Act* includes a regulation or instrument made under an Act.

This proposal moves beyond a mere defence by setting up a presumption of no liability for business judgments. This is similar to the way the business judgment rule operates in some parts of the United States, particularly in the leading corporate law State of Delaware (where the majority of Fortune 500 companies are registered). In that state the business judgment rule involves a judicial presumption that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company'.¹¹¹ As the Delaware Supreme Court said the 'board of directors enjoys presumption of sound business judgment; its decisions will not be disturbed by court if they can be attributed to any rational business purpose; and court will not substitute

111 *Aronson v Lewis* (1984) 473 A 2d 805 at 812.

its own notions of sound business judgment'.¹¹² The presumption must be overcome by plaintiffs alleging breach of directors' duties, although it does not apply to decisions that are tainted by bad faith, self-interest or gross negligence.¹¹³

The proposed reform by Dr Austin is consistent with what the courts have been saying for more than a century — that it is not the role of the courts to pass judgment on honest business decisions.¹¹⁴ Indeed, the *Rich* case in 2009,¹¹⁵ the then Austin J (who has since retired from the bench) held that directors and officers are not liable under the duty of care for mere mistakes.¹¹⁶ The courts have consistently held that it is up to the directors to determine what is in the interests of the company, not the courts. If a business decision turns out to be the wrong decision and the company suffers loss, then unless the decision is affected by a negligent decision making process (to trigger the duty of care under s 180(1)), or the decision was tainted by bad faith or impropriety (see ss 181–183) then it is not reviewable by the courts. The proposed reform would enshrine the common law business judgment rule into statutes across the country.

The elements of (3)(b) are consistent with the current s 181(1)(a) (the requirement to act in good faith) and s 191 (disclosure of material personal interests). The elements of (3)(b)(ii) are less stringent than the current statutory business judgment rule (s 180(2)(b)) which does not allow for any material personal interests, including those disclosed to the board. The elements of (3)(b)(iii) overlap with the current statutory business judgment rule in s 180(2), although the element of being reasonably informed (s 180(2)(c)) is absent. The proposed standard of reasonableness is tougher than the current s 180(2)(d) which requires a rational belief that the judgment was in the best interests of the corporations.

The AICD proposal, in our view, fundamentally alters the current enforcement and accountability framework underpinning the Corporations Act and the ASIC Act. It significantly dilutes the standard of conduct currently expected of directors in Australia.¹¹⁷ In the context of corporate law, as noted by the Treasury Paper (2007),¹¹⁸ the standard of conduct states how directors should conduct a given activity or make a decision. It is highly questionable whether the proposed lowering of standards by the AICD proposal would be in line with current community expectations and meet contemporary standards of corporate governance.

112 *Sinclair Oil Corporation v Levien* (1971) 280 A 2d 717.

113 See *Aronson v Lewis* (1984) 473 A 2d 805; *Smith v Van Gorkom* (1985) 488 A 2d 858.

114 See, eg, *Re Suburban Hotel Company* (1867) LR 2 Ch App 737; *Re Smith and Fawcett Ltd* [1942] Ch 304; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483; BC6800800.

115 *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410.

116 See further, *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640; [2012] VSC 332; BC201205854 at [72].

117 Corporations Act 2001 (Cth) s 180(1); *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607; BC9504558. The statutory duty of care and diligence imposes a standard essentially the same as that under common law: *Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410.

118 Treasury, *Review of Sanctions in Corporate Law*, above n 1, at [2.2].

IV Conclusion: The future of the statutory business judgment rule

During the period from 2000–2009, as discussed earlier under Part III, there were numerous major corporate law cases concerning the duty of care, including major litigation brought by ASIC in the much-publicised cases involving GIO,¹¹⁹ James Hardie,¹²⁰ Fortescue Metals Group (FMG)¹²¹ and Centro.¹²² These cases demonstrate that decisions by directors and officers about internal and external information flows are being increasingly subject to regulatory action by ASIC based on breaches of the duty of care. In none of these cases has the statutory business judgment rule protected directors, but this is not necessarily indicative of a flaw in the rule itself.¹²³

The judicial analysis in *Rich* demonstrates that the statutory business judgment rule is more than simply an echo of the underlying duty. It can serve a function that recognises that there is a social utility in not rendering all instances of negligence capable of civil enforcement. This is reminiscent of the distinction made by Professor Melvin Eisenberg in an often-cited article,¹²⁴ which is that the law appropriately sets two standards with respect to the duty of care. One standard is the standard of director conduct expected by the community which in Australia is reflected in the terms of s 180(1). The other standard is the standard of review that the courts will use to assess the actual conduct undertaken by corporate boards. This standard is more flexible because the law needs to encourage entrepreneurial risk taking. The statutory

119 *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451; 62 ACSR 1; [2007] NSWCA 75; BC200702341.

120 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; 71 ACSR 368; [2009] NSWSC 287; BC200903649 (appeal allowed in part: *Morley v ASIC* (2010) 274 ALR 205; 81 ACSR 285; [2010] NSWCA 331; BC201009833); *ASIC v Hellicar* (2012) 247 CLR 345; 88 ACSR 246; [2012] HCA 17; BC201202609; *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; 88 ACSR 126; [2012] HCA 18; BC201202608.

121 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364; 81 ACSR 563; [2011] FCAFC 19; BC201100543. Decision overturned in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; 91 ACSR 128; [2012] HCA 39; BC201207489.

122 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; 83 ACSR 484; [2011] FCA 717; BC201104526. Centro may perhaps be put to one side as it involved directors who failed to properly monitor the company's financial operations by failing to detect that the company was reporting no short-term liabilities despite having themselves approved major short term loans shortly before. The directors said that they felt overwhelmed with information but they were found to have breached their duty of care by failing to properly read the documents that they were given and that they signed as having agreed with. See further P Crutchfield and C Button, 'Men over board: The burden of directors' duties in the wake of the Centro case' (2012) 30 *CSLJ* 83.

123 As noted earlier in Part III, the rule was inapplicable in *GIO* due to the timing of the facts and could not have applied in *Centro* as that case concerned the duty to monitor. The non-application of the rule in the *James Hardie* case was a function of the evidence and the way the defences were run. This is similar to the *FMG* case, but that case is more significant as it suggests the rule is inapplicable to decisions regarding compliance.

124 M Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law' (1993) 62 *Ford LR* 437. See also J Cassidy, 'Standards of Conduct and Standards of Review: Divergence of the Duty of Care in the United States and Australia' (2000) 28 *ABLR* 180.

business judgment rule embodies this second standard identified by Eisenberg, just as the business judgment rule does in the United States.

Opponents of the statutory business judgment rule at the time of its introduction argued that the rule would offer little actual protection for directors and officers. The stated need for certainty would be unrealised because the rule offered little more than the terms of the duty itself. The statutory business judgment rule, as noted earlier, has been criticised as offering nothing but mere window dressing.¹²⁵ The first 9 years of the operation of the statutory rule provides support for the view that the rule had become the sleepy hollow predicted because it had only been established once during that time. However, the absence of case law does not necessarily mean that the statutory rule is a complete failure. It is possible that the absence of case law indicates that the statutory rule is operating as intended by discouraging actions that would have sought to use the duty of care to review bona fide business decisions made by directors and officers. It may also be that the prospect of the defence operating discouraged such actions.

Notwithstanding the status quo, the statutory business judgment rule, however, would not appear to be moribund. In assessing the future role of the statutory business judgment rule, the critical issues raised in the Treasury papers above (2007; 2010), in the *Rich* judgment (2009) and *Mariner* (2015), and the law reform proposal put forward by Dr Austin (2013), offers encouragement for the rule to play a more meaningful role to protect against director liabilities for breach of duties. In particular, if Dr Austin's law reform model is adopted, the reversal of the current onus of proof and the emphasis on the operation of the statutory business judgment rule as a presumption will ensure that the rule has an even greater potential to become more than simply a sleepy hollow in the future.

In any future recalibration of the statutory business judgment rule, it is important to strike the right balance between director authority and accountability. On this critical issue of balance,¹²⁶ the Treasury paper (2007) recognised the risks in failing to getting the balance right. Its observations bear repeating:

If corporate law is engendering an overly conservative approach to business decision making, this could discourage decisions that would advance the interests of the company. Risk-averse behaviour can increase agency costs and diminish return to shareholders. It may also reduce efficiency, productivity and economic growth.¹²⁷

In getting the balance right, the current formulation of the statutory business judgment rule has proven to be a difficult transplant from the United States, as evidenced in the *Rich* judgment.

In light thereof, and the competing law reform models presented by the private sector with its differing emphasis on director accountability, parliament is urged to consider a reassessment of the operation of the statutory business judgment rule. The Austin law reform model, in our view, offers a better template for the resurrection of the statutory business judgment rule. It promotes superior director accountability while striking an appropriate

125 Young, above n 9, at 222.

126 See further, Legg and Jordan, above n 28.

127 Treasury, *Review of Sanctions in Corporate Law*, above n 1, at [1.4].

balance between promoting good behaviour and ensuring directors are willing to take sensible commercial risks.

However, in our view the case for fundamental reform is yet to be comprehensively made. With the recent demise of CAMAC, we recommend pursuing an ALRC reference, or failing that a Productivity Commission reference, to examine the claims that the current system of director liability is producing poor economic outcomes. While the AICD and others continue to point to surveys of directors about their views on liability, these views are only one part of the debate. The current dilemma is that there appears to be only one loud voice in this debate. We need a mature and well-rounded examination of the current liability framework to ensure that our corporate laws appropriately balance liability and accountability with promoting entrepreneurial risk taking.