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BRIEFING PAPERS

Re-assessment of the Statutory Business Judgment Rule in Australia - The Case for Law Reform

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Abstract

The perennial issue of directors' concern for exposure to personal liability has, once again, arisen in the Australian marketplace. The private sector has seized the law reform agenda and produced a set of law reform proposals to address such concerns. This briefing paper recognises that a key defence currently available to directors, the business judgment rule under s 180(2) of the *Corporations Act 2001* (Cth) is defective in many respects. Unsurprisingly, it forms the centrepiece of the law reform proposals advanced by the Australian Institute of Company Directors (AICD) and by Dr Bob Austin (former Supreme Court judge)/Minter Ellison. This briefing paper validates criticisms of the current operation of the statutory business judgement rules and calls for legislative reform.

INTRODUCTION

Over the past decades, there have been calls for,[1] and repeated government enquiries into[2], the need for greater protection to directors from personal liabilities in corporate law. Such concerns have arisen from the view that corporate sanctions, and exposure to personal liability, are adversely affecting the directors' willingness to engage in responsible risk taking[3] or to voluntarily participate in other aspects of decision making. Recent observations of the latter, for example, 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.[4]

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[1] See, for example, Baxt, R 'Do we Need a Business Judgment Rule for Company Directors?' (1995) 69 *Australian Law Journal* 571; 'The Duty of Care of Directors: Does it Depend on the Swing of the Pendulum?' in I Ramsay (ed), *Corporate Governance and Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1997); Dr Austin, B 'Boards that Lead Need Better Protection' *Australian Financial Review* (21 March 2013).

[2] Senate Standing Committee on Legal and Constitutional Affairs, Company Directors' Duties , *Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989); House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (1991); *Directors' Duties and Corporate Governance: Facilitating innovation and protecting investors*, Corporate Law Economic Reform Program, Proposals for Reform: Paper No. 3, (1997); *Review of Sanctions in Corporate Law* - Roundtable Paper 1 (2007), The Treasury, Commonwealth of Australia; *Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration* (2010), The Treasury, Commonwealth of Australia.

[3] See *Review of Sanctions in Corporate Law* - Roundtable Paper 1 (2007), The Treasury, Commonwealth of Australia.

[4] Drummond S, 'Integrated Reporting Brings Legal Worries', *Australian Financial Review* (17 April 2013) http://www.afr.com/f/free/markets/capital/cfo/integrated_reporting_brings_legal_RvN24L7rPruGI4M90qe4dI

The Treasury Paper (2007) explicitly recognised a 'fundamental issue'[5] of long standing within the area of corporate governance - namely the need to assess 'whether the current corporate regulatory framework strikes an appropriate balance between promoting good behaviour and ensuring directors are willing to take sensible commercial risks.'[6]

On this critical issue of balance, the Treasury Paper (2007) recognised the risks in failing to getting the balance right. Its observations bear repeating:[7]

> 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.

Regrettably, there has been no follow up action to both sets of enquiries launched into by previous governments.

Recently, the void in the contest of ideas for striking the appropriate balance in corporate governance has been filled by two law reform proposals released by the private sector. Both sets of reform proposals address the need for a broader based general defence against breach of director duties,[8] considered and analysed below in Parts 2 and 3 of this briefing paper.

Viewed holistically, this briefing paper touches on the delicate question whether Australian corporate law has struck the right balance between discouraging undesirable director conduct and promoting responsible risk taking – a recurring theme in earlier government inquiries.

For purposes of this briefing paper, this base question, however, is examined in the specific context of the role played by the statutory business judgment rule defence in s 180(2) of the *Corporations Act 2001* (Cth) which operates upon the director's duty of care.

Although there 'is no single conception of what is meant by a business judgment rule,'[9] a learned commentator offers the following view which accords with its origins and application in the United States:[10]

> 'on the simplest level, the business judgment rule is an aspect of judicial doctrine that states that courts will not substitute their own opinion of the wisdom of a business

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viewed 9 October 2014; Drummond S and King A, 'Confusion just one of the Hurdles for Integrated Reporting', *Australian Financial Review* (27 November 2013); See further, Huggins, A, Simnett, R and Hargovan, A, 'Integrated Reporting and Directors' Concerns about Personal Liability Exposure: Law Reform Options' (2014) *Company and Securities Law Journal* (forthcoming); Du Plessis, J and Ruhmkorf, A 'New Trends Regarding Sustainability and Integrated Reporting for Companies: What Protections do Directors have? (2014) *The Company Lawyer*) (forthcoming).

[5] *Review of Sanctions in Corporate Law* - Roundtable Paper 1 (2007), The Treasury, Commonwealth of Australia, [1.4].

[6] Ibid.

[7] Ibid.

[8] See Australian Institute of Company Directors - A Proposal for Law Reform: *The Honest and Reasonable Director Defence* (AICD, Sydney, August 2014) - available at www.companydirectors.com.au ; See Dr Austin, B 'Boards that Lead Need Better Protection' Australian Financial Review (21 March 2013).

[9] Redmond, P 'Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule' in Ian Ramsay (Ed), *Corporate Governance and the Duties of Company Directors* (1997) 185 at 190.

[10] Ibid, 191.

> decision for that of the director who originally made it [subject to limited caveats]. Judges are not directors, should not try to be. At a more practical level, the rule is said to operate as a presumption, or a burden of proof issue.

This briefing paper arises from the legal tension that currently exists in this area of Australian corporate law. The tension can be attributed to the divergent manner in which the statutory judgment rule is applied in Australia, as compared to the original premise under which it was founded, described further in Part 2 of this briefing paper.

Moreover, the resultant tension is exacerbated by the divergent views expressed on the practical utility of the statutory business judgment rule in s 180(2) as an effective defence to allay director personal liability concerns.
A senior barrister has dismissed s 180(2) as mere window dressing.[11] A judge of the New South Wales Supreme Court, noting the 'profoundly ambiguous'[12] statutory language in s 180(2), nonetheless found (in a thousand page judgment) that that the statutory business judgement rule, in part, has some protective work to do.[13]

The polarising views, and critical judicial comment on major aspects of the statutory business judgment rule by Justice Austin in *ASIC v Rich*, arises from the fact that the law in s 180(2) represents a difficult transplant from the law in the United States.

Unsurprisingly, modification proposals to the current operation of the statutory business judgment rule lies at the heart of the twin reform proposals advanced by the private sector, discussed below in Parts 2 and 3.

This briefing paper is in four parts. The first looks at the operation of the current statutory business judgment rule. The second part provides an overview of recent law reform proposals designed, in part, to redress the shortcomings of the statutory business judgment rule. The third presents law reform options for parliament to reconsider. The paper concludes by offering a suggestion on the way forward.

Before commenting on these law reform proposals, it pays to first review the nature, scope and operation of the current statutory business judgment rule in Australia.

1. THE CURRENT STATUTORY BUSINESS JUDGEMENT RULE

The policy arguments and debates for and against the introduction of the statutory business judgment rule were ventilated[14] in the lead up to its introduction into the Corporations Act in 2000 as part of the *CLERP Act 1999* (Cth).[15]

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[11] Young, N, "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 *Company and Securities Law Journal* 216.
[12] Austin J in *ASIC v Rich* (2009) 75 ACSR 1at [7264].
[13] Ibid at [7290].
[14] For collection of references, see *Review of Sanctions in Corporate Law* - Roundtable Paper 1 (2007), The Treasury, Commonwealth of Australia at [2.19]. See, in particular, Farrar, J 'Corporate Governance, Business Judgment and the Professionalism of Directors' (1993) 6 *Corporate and Business Law Journal* 1; Redmond, P 'Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule' in Ian Ramsay (Ed), *Corporate Governance and the Duties of Company Directors* (1997).
[15] For a summary of the various proposals preceding the introduction of the business judgment rule in 2000, see Du Plessis, J, 'Open Sea or Safe Harbour? American, Australian and South African Business Judgment Rules

It was designed as a safe harbor against breach of the directors duty of care and diligence (statutory, common law and in equity). It was intended to provide a powerful rebuttable presumption, in favour of directors, that they exercised their duty of care and diligence when making a business judgment. Academic commentary[16] and judicial authority[17] suggests this favourable interpretation of s 180(2) does not appear to be the case.[18]

Statutory Content: 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.

> **(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.

Operation

The statutory business judgment rule has not been considered in many cases, [19] although it received detailed examination by the New South Wales Supreme Court in *ASIC v Rich*[20]. In that case Justice Austin defined a 'business judgment' as involving a decision to take or not to take action in respect of

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Compared (Part 1)' (2011) 32 *Company Lawyer* 347 at 351; 'Open Sea or Safe Harbour? American, Australian and South African Business Judgment Rules Compared (Part 2)' (2011) 32 *Company Lawyer* 377 at 377-380.

[16] DeMott, D, 'Legislating Business Judgment - A Comment from the United States' (1998) 16 *Company and Securities Law Journal* 575, commented on by Austin, R and I Ramsay, I *Ford's Principles of Corporations Law* (LexisNexis, 15th ed , 2013) at p.485[.8.310].

[17] *ASIC v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229.

[18] See also Santow G.F.K, 'Codification of Directors' Duties' (1999) 73 *The Australian Law Journal* 336, 348-349 and 350.

[19] *Review of Sanctions in Corporate Law* - Roundtable Paper 1 (2007), The Treasury, Commonwealth of Australia at [2.19] observed that the rule has received little judicial attention.

[20] (2009) 75 ACSR 1; [2009] NSWSC 1229. For a critical assessment of the business judgment rule, see Lumsden, A 'The Business Judgment Defence: Insights from *ASIC v Rich*' (2010) 28 *Company and Securities Law Journal* 164.

matters relevant to the business operations of the corporation (including matters of planning, budgeting and forecasting). His Honour also considered that the degree of information required by a director to satisfy (2)(c) would be influenced by:

- the importance of the business judgment to be made
- the time available for obtaining information
- the costs related to obtaining information
- the director's 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
- whether or not material information is reasonably available to the director.

Justice Austin explained that '[t]he qualifying words, "to the extent they reasonably believe to be appropriate", convey the idea 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.'

His Honour also explained the meaning of the term 'rational belief' in s 180(2)(d) as follows: 'the director's or officer's belief would be a rational one if it was based on reason or reasoning (whether or not the reasoning was convincing to the judge and therefore "reasonable" in an objective sense) but it would not be a rational belief if there was no arguable reasoning process to support it.'

Noting the paucity of judicial authorities, the limited scope of the statutory business judgment rule and critical remarks on its operation by Justice Austin in *ASIC v Rich*,[21] there has recently been a concerted push for law reform.

2. CURRENT LAW REFORM PROPOSALS[22]

Two law reform proposals on director liability have been announced recently:

1. The AICD honest and reasonable director defence[23]
2. The proposed new statutory business judgment rule recommended by former corporate law judge Robert Austin and Minter Ellison

THE AICD PROPOSAL

The AICD has 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

[21] (2009) 75 ACSR 1; [2009] NSWSC 1229 at [7262]-[7269].
[22] The following discussion and analysis of the law reform proposals draws from Harris J and Hargovan A, 'Business Judgment Rule Revisited' 2014 *Governance Directions* (forthcoming).
[23] See Australian Institute of Company Directors - A Proposal for Law Reform: *The Honest and Reasonable Director Defence* (AICD, Sydney, August 2014); available at www.companydirectors.com.au

> 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 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.

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

Comment

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 requirement to act with the degree of care and diligence warrants further attention.

The current s 180(1) of the Corporations Act (the duty of care) 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. For example, as was illustrated by the *Centro* case,[24] 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 able to monitor the financial performance of the company.

The AICD proposal 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 Co* [1925] Ch 407, 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 based on community expectations.

Viewed in this context, this proposed defence, if adopted by parliament, would be a radical departure from the existing law for the following reasons.

Firstly, unlike the current statutory business judgment rule, this defence 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

[24] *ASIC v Healey* (2011) 83 ACSR 484. See Du Plessis, J and Meaney, I, 'Directors' liability for approving financial statements containing blatant incorrect items: Lessons from Australia for all directors in all jurisdictions' (2012) 33 *Company Lawyer* 273 ff.

statutory business judgment rule)[25] 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, however, that such a decision would not be carried out for a proper purpose.

Secondly, the defence 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 are accompanied by due diligence defences.[26] It is questionable whether the new defence is needed where there is already a due diligence defence.

THE AUSTIN/MINTER ELLISON PROPOSAL

While the AICD proposal represents a change to the Corporations Act that will limit liability under that Act, the ASIC Act and equivalent common law and equitable liabilities, the proposal for a new statutory business judgment rule by Dr Robert Austin from Minter Ellison provides for a broader based defence that operates well beyond traditional corporate law statutes.[27]

This 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

(1) In this section, an **exposure to liability** includes exposure to:

criminal or civil liability under any Act or the general law;

a penalty of any kind; and

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.

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[25] *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2006] QCA 335.
[26] See *Corporations Act 2001* (Cth) ss 728, 729, 731 (prospectus liability); s 674(2A), (2B) (continuous disclosure).
[27] See Dr Austin, B 'Boards that Lead Need Better Protection' *Australian Financial Review* (21 March 2013).

(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.

Comment

In contrast to the AICD proposal, 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 the leading corporate law state of Delaware (where the majority of Fortune 500 companies are registered).

In Delaware, 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'.[28] It should again be pointed out that the American business judgment rule provides considerable protection to directors. As Steinberg explains: [29]

> To attack successfully a board's decision made under the rubric of the business judgment rule, a plaintiff must establish a culpable level of at least gross negligence. Ordinary negligence

[28] *Aronson v Lewis* (1984) 473 A 2d 805, 812 (Delaware Supreme Court).
[29] See Steinberg, M "The Corporate Law Reform Act 1992: A View from Abroad" (1993) 3 *Australian Journal of Corporate Law* 153, 161. Also see Priskich, V "A Statutory Business Judgment Rule in Australia: Proposals and Policy" (1999) 27 *ABLR* 38 at 39.

> which is the standard in a duty of care is not sufficient to impose liability when the board's decision comes within the scope of the business judgment rule.

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 its own notions of sound business judgment.'[30] 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.[31]

The Austin / Minter Ellison Proposal 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.[32]

Indeed, the *ASIC v Rich* case in 2009,[33] the then Justice Austin (who has since retired from the bench) held that directors and officers are not liable under the duty of care for mere mistakes. 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.

This proposed reform would enshrine that principle (known as the common law business judgment rule) into statutes across the country and, unlike the current s 180(2), will clarify that the onus of proof is on the party challenging the presumption.

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 s180(2)(d) which requires a rational belief that the judgment was in the best interests of the corporations.

3. OPTIONS

Both reform proposals strike at core corporate governance issues and raise basic questions - namely, what is the role of the board and what degree of latitude should the board be given to discourage an overly conservative approach to business decision making?

The two proposed defences, highlighted above, offer contrasting visions of how directors' actions should be regulated, and what they should be accountable for. This is an issue worthy of further discussion.

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[30] *Sinclair Oil Corp v Levien* (1971) 280 A 2d 717 (Delaware Supreme Court).
[31] See *Aronson v Lewis* (1984) 473 A 2d 805; *Smith v Van Gorkom* (1985) 88 A.2d 858 (Delaware Supreme Court). See further Schipani, C, "Defining Corporate Director's Duty of Care Standard in the United States and Australia" (1994) 4 *Australian Journal of Corporate Law* 152, 167.
[32] See for example, *Re Suburban Hotel Co* (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. See further, Hargovan A and Harris J, 'For Whom the Bell Tolls: Directors' Duties to Creditors after Bell' (2013) 35 *Sydney Law Review* 433 at 448-449.
[33] *ASIC v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229.

The AICD proposal appears to fundamentally alter the current enforcement and accountability framework underpinning the Corporations Act and the ASIC Act. It appears to significantly dilute the standard of conduct currently expected of directors in Australia.[34] In the context of corporate law, as noted by the Treasury Paper (2007),[35] the standard of conduct states how directors should conduct a given activity or make a decision. However, whether such a lowering of standards would be in line with community expectations and in the best interests of good and modern corporate governance principles, is questionable.

The Austin/Minter Ellison proposal, though broader because it would apply to all statutory obligations imposed on directors, appears to be relatively more modest in its impact on existing law.

Overall, it represents a slight watering down of the existing law but is an improvement on the current statutory business judgment rule by removing the current onus of proof on directors. In addition, it aims to overcome the issue of not only limiting the protection to 'business judgments', a concept that can hardly be defined with precision.

The fact that it applies to all statutory duties of directors may adequately address the concerns that have been circulating for the past 20 years regarding an overreaching of liability rules.

Both sets of proposals, however, have this much in common - they both advocate an expansion of the statutory judgment rule from its current limited sphere of operation which is confined to duty of care issues and the restrictive meaning of 'business judgments'.

Based on the discussions in the Treasury Papers (2007; 2010) and in light of the market led initiatives for law reform on directors' liabilities, we think it is appropriate for parliament to explore 2 main law reform options:

- reform of the limited operation of the business judgment rule in its current form under s 180;
- the introduction of a general defence applicable to all aspects of director liabilities under statute law.[36]

The necessity arises from the need to strike a balance between keeping directors accountable and allowing them to make risky decisions, which plainly the AICD believes is lacking. The competing models discussed above illustrate the challenges presented for law reform but these are not, in our view, insurmountable.

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

[35] *Review of Sanctions in Corporate Law* - Roundtable Paper 1 (2007), The Treasury, Commonwealth of Australia at [2.2].

[36] For examples of the wide exposure faced by directors for the companies breaches of law, based on derivative liability, see Bednall T and Hanrahan P, 'Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?' (2013) 31 *Company & Securities Law Journal* 474; Herzberg A and Anderson H, 'Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability' (2012) *Federal Law Review* 40, 181. For collection of judicial authorities adopting the stepping stone approach to director liability, see Australian Institute of Company Directors - A Proposal for Law Reform: *The Honest and Reasonable Director Defence* (AICD, Sydney, August 2014) at p 8. See references in note 4 for additional reasons in support of consideration for a general defence.

4. CONCLUSION

The critical issues raised in the Treasury Papers (2007; 2010), and in the law reform proposals highlighted above, provides compelling reasons for a closer look on the necessity, nature and scope of any reform in the area' of protection against director liabilities for breach of duties.

The necessity to do so has already been strongly signaled by the market in taking the lead to advance law reform proposals based on director liability concerns. Should this premise be accepted, it is reasonable to conclude that the debate has moved on and the focus should now lie on the nature and scope of reform.

At the least, Parliament is urged to consider a reassessment of the operation of the statutory business judgment rule. This task, ideally, should be undertaken as part of a broader consideration on the need for a general statutory defence to protect against director liability. It is trite to observe that such a move will not only potentially benefits those at the coalface, but the nation as well by discouraging risk-averse behaviour and stimulating economic growth.

CAMAC, with its body of expertise and excellent track record in delivery of influential and significant law reforms of benefit to the Australian economy, would be the ideal reference -except that the government, regrettably, has taken action to abolish it.[37] There is a valid and compelling case to be made for the government to rethink its proposed abolition.[38]

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[37] See Exposure Draft Bill, *Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014* - available at http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2014/CAMAC/Key%20Documents/PDF/Exposure_Draft_CAMAC_Abolition.ashx

[38] See Georgia Wilkens, 'Abolishing of Corporations and Markets Advisory Committee' *Sydney Morning Herald* (14 June 2014) – available at http://www.smh.com.au/business/abolishing-of-corporations-and-markets-advisory-committee-20140613-3a2uc.html