Another Way Forward? The Scope for an Appellate Court to Reinterpret the Statutory Business Judgment Rule

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Abstract
The statutory business judgment rule in s 180(2) of the Corporations Act 2001 (Cth) is controversial. Some critics argue it does nothing to enhance directors’ authority; others that it does too much. Whereas previous commentary has encouraged Parliament to amend or replace the rule, this article considers the scope for an appellate court to reinterpret it. The article takes issue with three aspects of Justice Austin’s seminal interpretation of the rule in ASIC v Rich [2009] 75 ACSR 1 (‘Rich’). First, the article argues s 180(2) was introduced to codify the general law business judgment rule, not to lower the standard of care expected of directors’ decisions. Second, it argues the provision should apply as a presumption, not as a defence. Third, it disputes his Honour’s argument that there can be no ‘degrees of reasonableness’ and interprets s 180(2)(d) in light of corporate law cases which assume that possibility. It also proposes additional nuances to Austin J’s interpretations of s 180(2)(c) and of the term ‘business judgment’. Finally it argues this alternative interpretation not only complies with the principles of statutory construction, it also has the potential to address some of the most important policy concerns regarding the rule’s current operation.

Keywords: Directors’ Duties; Corporate Governance; Statutory Business Judgment Rule.

I Introduction
The statutory business judgment rule in s 180(2) of the Corporations Act 2001 (Cth) represents an attempt by policymakers to strike an appropriate balance between the need to respect directors’ authority and the need to hold them accountable when they fail to exercise that authority with appropriate care and diligence. Whether s 180(2) appropriately balances these competing objectives is controversial. Some commentators argue it fails to offer any additional protection to directors who make business judgments in good faith, and that it has never been successfully invoked by a director in order to avoid liability after they have been found to have contravened their duty of care and diligence. Others have expressed concern that

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1 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.1], [6.3]. See Stephen Bainbridge, ‘The Business Judgment Rule as Abstention Doctrine’ (Research Paper No 03-18, University of California, Los Angeles, School of Law, 2003) 4-5, 49. Note that, unless otherwise stated, all references to ‘directors’ in this article should be read as ‘directors and other officers’. Unless otherwise stated, all references to statutory provisions are to provisions of the Corporations Act 2001 (Cth).

the rule tips the scales too far in favour of director autonomy, at the expense of their accountability.

Most commentators who are critical of the rule’s operation have called on Parliament to intervene by amending or replacing it. The Australian Institute of Company Directors (AICD), for example, has campaigned for the rule to be supplanted by a new ‘honest and reasonable director defence’ which would considerably enhance directors’ protection from liability.

While there is no doubt s 180(2) could have been more precisely drafted, this article focuses not on the possibility of parliamentary intervention but rather on the scope for an appellate court to change the provision’s interpretation.

The most detailed and influential judicial analysis of the rule to date was provided by Justice Austin in ASIC v Rich. This article proposes an interpretation of s 180(2) that differs from his Honour’s approach in three main ways and approves, but further develops, two other aspects of his Honour’s analysis. First, whereas Austin J assumed the rule must have been introduced with the goal of changing the standard of care to be applied to directors’ business judgments, this article argues instead that the rule’s primary purpose was to codify the existing common law business judgment rule.

Second, the article considers whether s 180(2) was intended to operate as a defence or a presumption and the related question of which party should bear the onus of proof. While some scholars have expressed misgivings about Austin J’s decision to treat s 180(2) as a defence, the reasoning which led him to that conclusion has not been systematically examined. This article provides a detailed analysis of this reasoning and concludes that the better view is that s 180(2) should operate as a presumption in favour of directors, with the onus of proof lying with the plaintiff.

Third, the article considers Austin J’s interpretation of s 180(2)(d). His approach here assumes there cannot be degrees of reasonableness, something is either reasonable or it is not. Drawing on the existing commentary, the article notes that courts have long been comfortable with the concept of degrees of reasonableness. However, whereas Hooper argues that s 180(2)(d) should therefore be interpreted in

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4 AICD, Honest and Reasonable Director Defence, above n 3.
5 [2009] 75 ACSR 1, 626-637 [7248]–[7295].
light of the *Wednesbury* unreasonableness test in administrative law,\(^6\) this article instead interprets s 180(2)(d) in light of corporate case law which also assumes that degrees of reasonableness are possible.

The article agrees with Austin J’s interpretations of s 180(2)(c) and of the term ‘business judgment’ but in relation to both it proposes additional nuances. For s 180(2)(c) there is a need to clarify what standard of reasonableness should be applied in assessing the process a director follows to inform him or herself before making a business judgment. This article proposes a ‘reasonable director’ test, rather than the ‘gross negligence’ test which has been applied by US courts. In relation to the term ‘business judgment’, the article proposes that the scope of the term ‘business judgment’ in s 180 should be limited so as to exclude decisions to knowingly cause a company to break the law.\(^7\)

Of course, an appellate court would be rightly wary of displacing an interpretation of a statutory provision that had become well established in lower courts.\(^8\) And it is true that most subsequent cases have followed the construction of s 180(2) which Austin J provided in *Rich*. However, Austin J’s observations in relation to s 180(2) in that case were obiter dicta and no appellate court has endorsed those observations as part of the rationes decidendi of a case. Given that there are significant weaknesses in the reasoning underlying those observations—and given that it is only seven years since *Rich* was decided—it remains open to an appellate court to adopt the alternative interpretation advocated here.\(^9\)

Finally the article argues that the proposed alternative interpretation has the potential to address some of the most serious policy concerns raised by the rule’s critics. That is, the proposed interpretation has the potential to both increase the comfort the rule provides to directors who are nervous about taking entrepreneurial risks and to limit the extent to which that comfort undermines important progress in enhancing directors’ accountability.

### II Background: Enacting a Statutory Business Judgment Rule

In the decade leading up to the statutory rule’s introduction a number of official law reform committees considered whether such a rule was needed. Such reports and certain other extrinsic materials are admissible to help interpret a provision where, inter alia, the text of the provision is ‘ambiguous’—which is the case for several aspects of s 180(2).\(^10\) In particular where such ambiguity exists extrinsic materials associated with the introduction of the relevant Bill are admissible to help clarify the

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\(^9\) Ibid.

\(^10\) See *Acts Interpretation Act 1901* (Cth) s 15AB(1)(b)(i).
purpose underlying the Act,\textsuperscript{11} which is of course important because courts are required to prefer interpretations which best achieve that purpose.\textsuperscript{12}

In the three years from 1989 to 1991 no less than three law reform committees recommended to Parliament that such a rule be introduced.\textsuperscript{13} The committees’ specific proposals were influenced by the business judgment rule developed by US courts and particularly by the American Law Institute’s (ALI) then draft model provision.\textsuperscript{14} Elements of the ALI model provision (which was subsequently further developed and finalised in 1992) are considered in detail later in this article. In broad terms it holds that if directors appropriately inform themselves and are personally disinterested then their honest business judgments cannot breach the duty of care unless, in the process of making such judgements, they breach their fiduciary duty to act in the company’s interest.\textsuperscript{15}

Despite these three committees’ enthusiasm for a statutory rule, in 1991 the Keating government accepted and applied the advice of a fourth committee which recommended against introducing such a rule because the courts were already demonstrating sufficient reluctance to review directors’ informed and disinterested business judgments.\textsuperscript{16} At the time Farrar characterised this as providing ‘reinforcement’ for the common law ‘business judgment doctrine’.\textsuperscript{17}

The content, scope and even existence of this common law doctrine are the subject of some debate. Inter alia, advocates for the doctrine usually cite the following passage from the High Court case of \textit{Harlowe’s Nominees Pty Ltd v Woodside}:

\begin{quote}
Directors in whom are vested the right and duty of deciding where the company’s interests lie and how they are to be served may be concerned with a wide range of
\end{quote}

\begin{footnotes}
\item[12] Acts Interpretation Act 1901 (Cth) s 15AA.
\item[14] See, eg, Senate Standing Committee on Legal and Constitutional Affairs, above n 13, 29-30 [3.30]; Companies and Securities Law Review Committee, above n 13, [36]-[37], [109]-[113].
\item[16] Companies and Securities Advisory Committee, \textit{Directors’ Duty of Care and Consequences of Breaches of Directors’ Duties} (1991) quoted in CLERP Paper No. 3, above n 15, 81; Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [87]-[89].
\end{footnotes}
practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.\footnote{18}

Du Plessis is critical of scholars who characterise such judicial statements as constituting an Australian business judgment doctrine. He describes the ‘so-called “common law business judgment rule”’ as ‘a very poorly developed rule, derived from the courts' reluctance to interfere with internal company decisions’.\footnote{19} Du Plessis’ analysis is supported by Varzaly’s review of Australian court decisions regarding the duty of care and diligence. She found that before the statutory business judgment rule was introduced very few cases referred to the existence of a common law business judgment doctrine, and those which did described it in ‘rather amorphous terms’.\footnote{20}

Nonetheless, while Australia may lack a clearly defined common law business judgment doctrine, Du Plessis is too quick to condemn those scholars who draw parallels between the business judgment rule in the US and the approach taken by Australian courts. As Redmond has noted, the circumstances in which Australian courts have been willing to review directors’ informed business judgments have generally been limited to those cases in which directors have breached their duties of good faith, such that these duties ‘mark out the boundaries of the judicial role in reviewing directors' discretions and intervening in their decision making’\footnote{21}. Hence there are clear similarities between the elements of the US business judgment rule and the circumstances in which Australian courts have been willing to review directors’ business decisions. Arguably these similarities justify reference to a common law business judgment doctrine in Australia.

Following the change of government, in 1997 the Howard government released a policy paper as part of its Corporate Law Economic Reform Program (CLERP) that recommended introducing a statutory business judgment rule.\footnote{22} It is clear from the policy paper (CLERP Paper No. 3)\footnote{23} that the catalyst for the renewed push for such a rule was the decision of the NSW Court of Appeal in Daniels v Anderson.\footnote{24} In that case the court clarified that a ‘director’s duty of care [is] not merely subjective, limited by the director’s knowledge and experience or ignorance or inaction’.\footnote{25} Instead the

\begin{itemize}
  \item \footnote{18}{(1968) 121 CLR 483, 493, quoted in Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [87]; see also Howard Smith Ltd v Ampol Petroleum Ltd and Others [1974] 1 NSWLR 68, 74.}
  \item \footnote{19}{Jean J Du Plessis, ‘Open sea or safe harbor? American, Australian and South African business judgment rules compared (Part 1)’ (2011) 32(11) Company Lawyer 347.}
  \item \footnote{20}{Varzaly, above n 2, 451.}
  \item \footnote{22}{CLERP Paper No. 3, above n 15, 5.}
  \item \footnote{23}{Ibid, 9-10, 18-19, 22-23.}
  \item \footnote{24}{(1995) 37 NSWLR 438.}
  \item \footnote{25}{Ibid 503.}
\end{itemize}
court established certain minimum objective expectations that apply to all directors. These minimum expectations include: gaining a basic understanding of the company’s business; regularly reviewing the company’s financial statements and investigating any concerns or discrepancies; and generally monitoring the company’s affairs and policies by, among other things, attending board meetings. Importantly, these expectations relate to directors’ oversight duties, not their business judgments, and the court in Daniels affirmed that ‘directors must be allowed to make business judgments and business decisions in a spirit of enterprise untrammelled by the concerns of a conservative investment trustee’.  

Despite this, business groups responded to Daniels by reviving their lobbying for a statutory business judgment rule, arguing that such a rule was needed to ensure directors were not discouraged from taking entrepreneurial risks. Although CLERP Paper No. 3 took directors’ concerns seriously, it did not suggest that these concerns had been caused by the courts abandoning their traditional deference to directors’ business decisions. Instead the paper focused on the ‘uncertainty’ created by recent court decisions:

> In particular, the Court of Appeal decision in Daniels v Anderson has extended and made more uncertain the accountability and liability of directors. This uncertainty has been heightened in light of Court decisions, both before and after Daniels, that are apparently inconsistent with the Court of Appeal decision and with each other … this lack of certainty regarding the limits of directors’ duties is causing directors to be conservative and risk-averse in their approach to carrying out their functions.  

The paper suggested that this uncertainty was linked to the fact that the directors’ duty of care had been codified ‘without a complimentary codification of the business judgement doctrine’ and argued that a codification of the latter was needed. Hence the paper made clear that its proposed statutory business judgment rule would not change the content of director’s duty of care at common law in Australia—in fact, ‘the substantive duties of directors would remain unchanged’—but rather it would ‘clarify and confirm the position reached at common law that Courts will rarely review bona fide business decisions’. As one of the members of the Business Regulation Advisory Group which advised the Howard Government on the CLERP reforms colourfully noted, the proposed statutory rule:

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26 Ibid 503-5.
27 Ibid 503-4.
28 Ibid 501.
30 CLERP Paper No 3, above n 15, 22-23.
32 Ibid.
does no more than codify what the law is at the moment … But you do need something to stop directors spending 95% of their time making sure their backsides are covered. It is a shocking waste.\(^{33}\)

However, the CLERP paper did advocate for one important difference between a statutory business judgment rule and the common law position.\(^{34}\) The CLERP paper argued that the rule should operate ‘as a rebuttable presumption in favour of directors which, if rebutted by a plaintiff, would mean that the plaintiff would then still have to establish that the officer had breached their duty of care and diligence’.\(^{35}\)

There are sound reasons for concluding that the rationale expounded in CLERP Paper No. 3 was also the rationale underlying the enactment of what became s 180(2). The text of the business judgement rule set out in that Bill was very similar to the text proposed in the CLERP paper, and that text has not subsequently been amended.\(^{36}\) The Explanatory Memorandum (EM) to the Corporate Law Economic Reform Program Bill 1999 made it clear that the Bill aimed to implement the proposals contained in the CLERP proposals, noting that the provisions of the Bill had only been ‘slightly modified’ from the CLERP proposals in response to public comment.\(^{37}\) The EM also specifically referenced the CLERP paper’s rationale for a statutory business judgment rule.\(^{38}\) Like the CLERP paper, the EM claimed that the ‘statutory formulation’ of the rule would ‘clarify and confirm the common law position’. As in the CLERP paper the EM noted that the statutory rule would differ from the common law in that it would operate as a rebuttable presumption in favour of directors. The EM also replicated the text in the CLERP paper that stated that it would be up to the plaintiff to rebut that presumption and that, if the plaintiff did so successfully, the plaintiff would then still have to establish that the director had breached their duty of care and diligence. The second reading speech also echoed CLERP Paper No. 3, arguing that the rule would not reduce directors’ accountability but rather would remove ‘legal uncertainty’ as to the circumstances in which directors’ decisions could result in liability for breaching their duties as directors.\(^{39}\)

These extrinsic materials therefore suggest two things about the purpose underlying s 180(2). First, the purpose was to codify rather than to go beyond the common law business judgment doctrine. Second, to the extent that the statutory rule seeks to change the common law position it does so by turning what has been called the common law business judgment doctrine into a presumption which must be rebutted

\(^{33}\) Leigh Hall, quoted in Bird, above n 21,153.
\(^{34}\) CLERP Paper No 3, above n 15, 24-8.
\(^{35}\) Ibid 28-29.
\(^{36}\) The only substantive difference was that what has become s 180(2) adds text explaining that: ‘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’. As discussed later in this paper, if anything this addition brings the provision closer to the common law position.
\(^{37}\) Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 5 [1.2].
\(^{38}\) Ibid [2.4].
\(^{39}\) Commonwealth, Parliamentary Debates, House of Representatives, 3 June 1999, 5970 (Joe Hockey).
by the plaintiff before other aspects of the duty of care can be considered, thus foregrounding the principle that the Courts should only rarely review *bona fide* business decisions. In the next section these insights from the extrinsic materials will inform an analysis of the way Austin J interprets the provision in *Rich*.

**III ASIC v Rich – Construing the Contours of Section 180(2)**

Austin J’s judgment in *Rich* remains the most detailed and comprehensive judicial analysis of s 180(2). Before analysing the way his Honour construed the provision it is helpful to extract s 180 in full:

‘180 Care and diligence—civil obligation only

_Care and diligence—directors and other officers_

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation’s circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

_Business judgment rule_

(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.

(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.’

**A Who Bears the Onus of Proof?**

The first question Austin J addressed in interpreting s 180(2) was whether the rule operates as a defence to s 180(1), in which case the defendant bears the onus of
proving the elements of s 180(2); or as a rebuttable presumption, in which case the elements of the rule and consequently the duty of care are presumed to be satisfied and the plaintiff bears the onus of disproving an element of s 180(2) before the possibility of a breach of s 180(1) can even be considered.

1 Austin J’s finding and its significance in the context of subsequent case-law

For reasons discussed below, his Honour decided that s 180(2) operates as a defence, with the onus of proof falling on the defendant. Importantly, before reaching this conclusion his Honour stated that the conclusion had been reached with some hesitation and expressed the need for appellate authority to resolve the issue.41 It is also important to note that, like other aspects of Austin J’s interpretation of the statutory business judgment rule in Rich, his decision to treat the rule as a defence did not form part of the rationes decidendi of the case. At the end of his consideration of this provision his Honour appeared to make a pitch for it to be regarded as part of the rationes decidendi when he declared ‘My analysis of the business judgment rule … is applied throughout these reasons for judgment in supporting the conclusions I have reached’.42 If this was indeed his Honour’s intention then it cannot be sustained. Austin J considered s 180(1) before he considered s 180(2) and he concluded that s 180(1) had not been breached. His Honour’s subsequent consideration of s 180(2) was therefore unnecessary in order to determine the outcome of the case at hand.43

Although Austin J’s decision to treat s 180(2) as a defence was obiter, it is supported by the other cases that have considered the question. Varzaly’s review of all Australian cases which considered s 180(2) in the period between March 2000 and December 2011 found no case in which it was treated as a presumption.44 Our review of subsequent cases—as well as our review of cases in the period which Varzaly considered—is largely consistent with her finding.45 On its face this would suggest this interpretation is well established and that appellate courts should be reluctant to overturn it. However, close examination of the cases reveals that, while this interpretation has been applied relatively consistently, no case has yet established this interpretation as a binding or even a highly persuasive precedent.

In so far as appellate cases are concerned, two cases are worthy of comment. In the first of these cases, ASIC v Fortescue Metals Group Ltd, the Full Federal Court

41 Ibid 631 [7269].
42 Ibid [7295].
44 Varzaly, above n 2, 453. Varzaly did find one case in which the judge (Branson J) considered s 180(2) before coming to a conclusion as to whether or not s 180(1) had been breached. However in that case Branson J did not express a view as to whether the plaintiff or the defendant bore the onus of proof. See Deangrove Pty Ltd v Buckby and Another (2006) 56 ACSR 630 [68] cited in Varzaly, above n 2, 453.
45 The LexisNexis AU and Australasian Legal Information Institute databases were searched using the terms “180(2) w/p corporations act” and “business judgment rule” and all results were reviewed.
assumed that s 180(2) operated as a defence to be proven by the director. 46 However this failed to establish a binding precedent, both because the court did not provide any reasons for making this assumption,47 and because the decision was subsequently overturned by the High Court.48 Interestingly, although the High Court decision did not mention s 180(2), the transcript of proceedings suggests at least one of the judges had reservations about the way the subsection had been interpreted:

GUMMOW J: The business rule was invented in the United States, as it were, to assist directors?  
MR MYERS: Yes, to assist directors. ...  
GUMMOW J: Yes, as an expansion of the qualification of what otherwise might be over rigid fiduciary ideas. But here in 180 it has been turned into some offence if you do not comply with it. It seems to have taken the US situation and turned it upside down somehow. (emphasis added)

The second appellate case is unusual in that it bypassed the question of whether the provision operates as a presumption or a defence and instead assumed that s 180(2) directly changes the content of the duty of care. In Westpac Banking Corporation v Bell Group ltd (in liq) (No 3), Lee AJA of the Western Australian Court of Appeal described s 180(1) as being ‘subject to’ s 180(2).49 His Honour then went on to state that s 180(2) modified the duty of care and diligence in equity such that each element of s 180(2) has effectively become an element of the equitable duty and ‘these requirements are cumulative and not independent alternatives’.50 Arguably Lee AJA misread the statute: the text of s 180(2) explicitly establishes a set of circumstances in which a director or officer will be ‘taken’ to have satisfied s 180(1) and the corresponding duties at general law, it is not expressed as directly modifying the elements of those duties. In any case Lee AJA’s assumption that s 180(2) directly modifies the content of the duty of care did not create a binding precedent, both because Lee AJA neglected to provide reasons for this assumption and because interpreting s 180 was not central to the issues being considered by the court.51 His observations do, however, suggest that the interpretation of s 180(2) is not settled.

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46 ASIC v Fortescue Metals, above n 7.  
47 Ibid; Note that when a court assumes a proposition to be true without discussion that proposition does not become a binding precedent, see R (Kadhim) v Brent London BC Housing Benefit Review Board [2001] QB 955, 962–966, cited in Westlaw AU, above n 56, [25.4.170].  
48 See Fortescue Metals Group Ltd v ASIC (2012) 247 CLR 486; Note that overruled cases are not binding, even if overruled on a separate point of law, see Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336, 410, cited in Westlaw AU, above n 56, [25.4.350].  
49 Westpac Banking Corporation v Bell Group ltd (in liq) (No 3) (2012) 89 ACSR 1, 139 [866].  
50 Ibid 139 [869].  
51 The respondents in the case had not claimed that the directors had breached their duty of care and diligence. However Lee AJA decided it was ‘necessary to examine the nature and character of such a duty in determining what constitutes the fiduciary duties of a director and whether the duties said by the respondents to have been breached by the directors in this case are within that class’. Ibid 134 [839]. Neither of the other two judges in the case refer to the duty of care and diligence or to Lee AJA’s findings in relation to that duty.
In so far as relevant decisions in lesser courts are concerned, almost all have assumed the defendant has the onus of proving the elements of s 180(2). However in each case the judge either treats s 180(2) as a defence without providing any reason for doing so, or the judge’s observations in relation to s 180(2) are obiter dicta (or both). We have been unable to identify a case in which the judge both gives reasons for treating s 180(2) as a defence and those reasons form part of the rationes decidendi of the case. These points notwithstanding, given the relative consistency with which the courts have tended to treat s 180(2) as a defence, an appellate court would need to be convinced that this approach is wrong before it would be willing to displace it. Nonetheless, the weaknesses in the reasoning which led Austin J to conclude it is a defence are so manifest that there is a strong case for an appellate court to take this course.

2 Austin J’s reasons for concluding that s 180(2) is a defence

Austin J acknowledged that the ALI formulation of the US business judgment rule had influenced the formulation of s 180(2) and that in Delaware, the US state in which corporate law doctrine has been most extensively developed, the rule operates as a presumption. However he noted that s 180(2) is ‘not necessarily a complete reflection of the US position’ and hence, while the ‘wealth of US case law on the subject’ provides a ‘useful resource’, his task was to ‘construe and apply the statute’. His honour therefore carefully considered the text of s 180(2). US academic Professor Deborah de Mott had previously argued that the way s 180(2) is expressed—stating that directors are only ‘taken to’ have satisfied their duty of care ‘if’ the elements set out in s 180(2)(a)-(d) are satisfied—is ‘more apt to place the onus on the director’. Austin J respectfully disagreed, concluding that the text did not expressly resolve the question of onus; indeed, he described the statutory language as ‘profoundly ambiguous’ on this point and noted that Parliament could have easily resolved the issue by using different language.

Seeking to resolve this ambiguity Austin J turned to the explanatory materials but also concluded that these were of ‘no real assistance’. His Honour began by extracting part of the EM and proceeded to dismiss its usefulness on two grounds. First, although the word ‘presumption’ is used several times it could not be held to invoke a US-style rebuttable presumption because the EM also ‘makes clear that the

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52 A possible exception is the judgment of Bergin CJ in Cassegrain v Gerard Cassegrain & Co Pty Ltd (2012) 88 ACSR 358 [224]. Like Lee AJA in Westpac v Bell (above n 49) Bergin CJ assumes that s 180(2), or more specifically s 180(2)(b), directly modifies s 180(1). Like Lee AJA, Bergin CJ does not provide any reasons for making this assumption.

53 See for example ASIC v Macdonald (2009) 230 FLR 1, 94 [542]-[545].

54 See for example ASIC v Adler [2002] NSWSC 171 [409]-[410], [412].

55 See Pearce and Geddes, above n 8, 9-10.

56 Rich, above n 5, 629 [7261].


58 Rich, above n 5, 629-30 [7262]-[7264].

59 Ibid 630 [7265].
presumption applies only when certain requirements are satisfied’. 60 Secondly, while the EM contained statements regarding legislative policy considerations, these statements were of no real assistance as they express the competing policy objectives of preserving director accountability and encouraging director discretion. 61 His Honour therefore concluded it was implausible to draw from these statements any indication either way on the question of onus. While requiring directors to establish the elements set out in subparagraphs (a)-(d) would dampen the policy objective of encouraging responsible risk-taking, 62 requiring plaintiffs to disprove one of the four criteria would add additional elements to the burden of proof of contravention and compromise the policy objective of holding boards to a high level of accountability. 63

Austin J found that this confusion only intensified in the second reading speech. 64 In the extracted part of the speech Mr Hockey, the responsible minister at the time, states that the object of the rule is to protect director authority but proceeds to declare that the rule will not insulate directors from liability for negligent decisions nor lead to any reduction in director accountability. 65 Austin J found these comments unhelpful. In his words: ‘… unless the business judgment rule provides a safe harbour for directors from what would otherwise be, at least potentially, negligence or breach of their statutory duty of care, it is pointless.’ 66

Having determined that the extrinsic materials were unhelpful, Austin J gave two reasons for hesitantly reaching the conclusion that s 180(2) operates as a defence to be established by the defendant. 67 First, if the plaintiff bore the onus, the effect of enacting s 180(2) would be that the plaintiff has to prove additional elements in order to establish a contravention despite ‘the clear intention expressed in the explanatory memorandum and the second reading speech that there was to be no reduction in the statutory requirement’. 68 Second, if plaintiffs bore the onus of proof they might find themselves in the unusual position whereby in disproving one of the four criteria in s 180(2) as part of establishing a contravention of the statutory duty of care and diligence they might be required to prove a more serious contravention of law, namely a breach of either ss 181, 182 or 183. 69 Austin J also said that it was appropriate for the s 180(2) to operate as a defence given the matters pertaining to s 180(2) are ‘principally within the knowledge of the director’. 70

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60 Ibid [7266].
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid 631 [7267].
65 Ibid.
66 Ibid.
67 Ibid [7268].
68 Ibid [7269].
69 Ibid. On this point, Austin J was expressing agreement with comments to the same effect by Santow J in ASIC v Adler [2002] NSWSC 171, [410].
70 Rich, above n 5, 631 [7269].
3 Analysis of Austin J's reasons for concluding that s 180(2) is a defence

Most of the textbooks and journal articles which consider Rich have recorded Austin J's decision to treat s 180(2) as a defence without demur.\(^{71}\) In contrast, several scholars have expressed concern that treating this sub-section as a defence may run contrary to the policy which lay behind the rule's introduction and have called on Parliament to amend s 180(2) in order to confirm its intended operation.\(^{72}\) However to the best of our knowledge no previous text has directly argued that Justice Austin's reasons for deciding that s 180(2) is a defence were faulty and hence that the decision should be displaced by an appellate court.

The significant weaknesses in Austin J's interpretation can be expressed under the following broadly stated and interrelated grounds. First, it accorded insufficient weight to an express statement in the EM that the provision was to operate as a presumption with the plaintiff bearing the onus of proof; second, the provision was not construed so as to 'best achieve' the driving purpose behind the provision's enactment; and third, the two reasons on which the decision was based, concerning plaintiffs having to prove additional elements and more serious contraventions of law, were also based on a failure to grasp the purpose the provision was designed to achieve.

\(i\) Ground 1: Clear statement in the explanatory memorandum

In Austin J's assessment neither the text of s 180(2) nor the explanatory material provide a clear indication of whether the provision should operate as a presumption or a defence. While this assessment is accurate in relation to the text of the provision, in relation to the explanatory material it cannot be sustained. Crucially, paragraph [6.10] of the EM reads as follows:

> Proposed subsection 180(2) acts as a rebuttable presumption in favour of directors which, if rebutted by a plaintiff, would mean the plaintiff would then still have to establish that the officer had breached their duty of care and diligence.\(^{73}\)

This statement would seem to clearly expel any confusion concerning the intended operation of s 180(2). That is to say, it was clearly intended to operate as a presumption that needed to be rebutted by the plaintiff before s 180(1) could be considered and not as a defence which was to be considered only after s 180(1) was

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\(^{73}\) Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.10].
established. In spite of this, paragraph [6.10] was (curiously) neither extracted nor specifically addressed in *Rich*.74

Instead Austin J focuses on statements in the EM to the effect that s 180(2) will apply ‘if’ certain requirements are satisfied.75 For example paragraph [6.5] says that directors will be taken to have complied with the duty of care ‘if they fulfil’ all of the requirements of s 180(2). This language does, in isolation, sit awkwardly with the notion that all of the elements of s 180(2) are presumed to be satisfied until the plaintiff disproves one of them. However, given how clearly paragraph [6.10] specifies that the Plaintiff should bear the onus of proof, these other statements are best understood as explaining the law’s logical consequences: if a director’s judgments satisfy all of the elements in s 180(2), then a plaintiff will not be able to disprove any of those elements and hence the defendant will be taken to have fulfilled their duty of care and diligence. That is to say, the statements about requirements needing to be satisfied are simply meant to express the reality that if a director has not satisfied the requirements of s 180(2) it is likely a plaintiff will be able to rebut the presumption.

Austin J particularly focuses on paragraph [6.4] of the EM, which he quotes in full. That paragraph says in part:

> The business judgment rule will allow directors the benefit of a presumption that, in making business decisions, if they have acted on an informal basis, in good faith, and in the honest belief that the decision was taken in the best interests of the company, they will not be challenged regarding the fulfilment of their duty of care and diligence.

His honour then states:

> The use of the word “presumption” could be taken to invoke the US approach [where the plaintiff carries the onus of proof], except that the explanatory memorandum makes clear that the presumption applies only when certain requirements are satisfied.76

That is, his Honour observes that in paragraph [6.4] the word ‘presumption’ is directly linked to conditionalities: the presumption only applies if directors have done certain things. Since it makes no sense to say that it is only if you do certain things that the other party will have the onus of proving that you have not done those things, his Honour concludes that when the word ‘presumption’ is used in the EM it cannot possibly be referring to who bears the onus of proof.

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74 As noted earlier, CLERP Paper No. 3 also proposed that the business judgment rule should operate as a rebuttable presumption, with the onus of proof falling on the plaintiff: CLERP Paper No 3, above n 15, 25, 27-28; see also Companies and Securities Law Review Committee, above n 13, [91]-[92].

75 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.4], [6.5], [6.9].

76 *Rich*, above n 5, 630 [7266]
There are several answers to this. Paragraph [6.4] of the EM does not say that the presumption only ‘applies’ if the director does certain things; it says that the director will get ‘the benefit of’ the presumption if they do those things. As noted above, this could be interpreted to mean that if the director has not satisfied all of the requirements of s 180(2) the Plaintiff will likely be able to discharge their onus and hence the director will not get ‘the benefit of’ the presumption. In any case, in paragraph [6.4] the word ‘presumption’ is being used in a different context and carries a different meaning to the phrase ‘rebuttable presumption’ in [6.10]. Paragraph [6.4] is referring to ‘a presumption that … they will not be challenged regarding the fulfilment of their duty of care and diligence’. That is, the ‘presumption’ in [6.4] is a presumption that the directors’ judgment has not breached s 180(1). In contrast, the ‘rebuttable presumption’ in [6.10] is a presumption that the director has satisfied the elements of s 180(2). Therefore, while his Honour is right that the use of the word ‘presumption’ in paragraph [6.4] does not necessarily establish who bears the onus of proof, this does not take away from the fact that in paragraph [6.10] the phrase ‘rebuttable presumption’ clearly does do so.

ii Ground 2: The Purpose Underlying the Enactment

In determining the meaning to be given to s 180(2) Austin J was of course obliged to prefer ‘the interpretation that would best achieve the purpose or object of the Act’.  Even if the EM did not contain paragraph [6.10], there would be good reason to conclude that the object of s 180(2) is best served by construing it to be a presumption rather than a defence.

In Austin J’s analysis the extrinsic material reveals multiple competing purposes. On the one hand it says that ‘the rule will not lead to any reduction in the level of director accountability’. On the other, the importance of encouraging ‘directors to take advantage of opportunities that involve responsible risk taking’ is emphasised. As Gummow J has noted, “purposivism” cannot provide determinative answers where different purposes ... are apparent”. Hence, because he believed the explanatory material contained competing purposes, Austin J deemed that material to be of ‘no real assistance’. However, in spite of this, his Honour proceeded to reach a conclusion that was evidently premised on favouring one of the purposes—not reducing director accountability—over the other. This was achieved by pointing to two perceived consequences of s 180(2) operating as a presumption that were seen to reduce director accountability. Specifically, that additional elements would be added to the plaintiff’s burden of establishing a contravention and that the plaintiff may have to substantiate a more serious contravention of the law in a s 180(1) suit.

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77 Acts Interpretation Act 1901 (Cth) s 15AA.
78 Commonwealth, Parliamentary Debates, House of Representatives, 3 December 1998, 1285 (Joe Hockey); Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.3].
79 Ibid.
81 Rich, above n 5, 630 [7265].
However, even if it is accepted that the two purposes are in conflict, a careful reading of the explanatory materials strongly indicates that the primary purpose of the section is to encourage responsible risk-taking by directors. As a result, in favouring the purpose of director accountability Austin J sacrificed an interpretation that would ‘best achieve’ the purpose of the Act. The explanatory materials make this clear, for at the outset they express that ‘the fundamental purpose’ and ‘the objective of the rule’ ‘is to protect the authority of directors in the exercise of their duties’.  

In the same vein, according to CLERP Paper No. 3 the ‘underlying policy’ of the business judgment rule is to prevent courts from reviewing directors’ *bona fide* business decisions. The rule’s justifications are premised on limiting judicial scrutiny of directors’ business decisions owing to the inherent risks involved in business, the dangers of hindsight bias and the fact that judges are not business experts. The EM therefore declares that when the business judgment rule is applied directors ‘will not be challenged regarding the fulfilment of their duty of care and diligence’; and that ‘the merits of directors’ business judgments are not subject to review by the courts’. Interpreting the rule as a defence inappropriately ignores such statements and, as Legg and Jordan note, is ‘contrary to the very purpose of a business judgment rule’.

Further, if the analysis of the extrinsic material provided in Part II of this article above is accepted then the two purposes espoused in that material are not in conflict at all. On this analysis, Parliament did not believe the reason directors were wary of taking risks was that the courts were, in reality, holding directors to an overly onerous standard of care. Instead the mischief the rule sought to address was uncertainty among directors as to whether various court decisions and statutory reforms in the 1990s had undermined the common law business judgment doctrine. Hence, since the problem was perceived to be uncertainty rather than excessive accountability, it was held to be possible to increase directors’ confidence without reducing their accountability. The Legislature hoped that s 180(2) would address this uncertainty by codifying the common law doctrine and clarifying the circumstances in which it would be applied. Given that at common law this doctrine is a key consideration in determining whether the duty of care has been breached, and that it is the plaintiff who bears the onus of establishing such a breach, if the purpose underlying s 180(2) is to codify this doctrine then this also suggests that the plaintiff should bear the onus of proof in relation to s 180(2).

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83 CLERP Paper No 3, above n 15, 26.
84 Varzaly, above n 2, 453.
85 CLERP Paper No 3, above n 15, 24.
86 Ibid; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.4].
87 In *Rich* Justice Austin held that, while there is no ‘bright line’ business judgment rule at general law, the common law tradition of judicial deference to management decisions is an integral consideration...
iii Ground 3: Deficiencies in the ‘additional elements’ and ‘more serious contravention’ arguments

Austin J ultimately concluded that the defendant should bear the onus of proof because he believed that requiring the plaintiff to prove ‘additional elements’ in order to establish a breach of the duty of care would be inconsistent with statements in the explanatory materials concerning the maintenance of board accountability. His Honour noted in particular that a number of the elements of s 180(2) correlate with the duties of good faith set out in ss 181, 182 and 183,\(^88\) and he noted that breaching one of these latter duties is a more serious matter than negligence. He endorsed Justice Santow’s observation in *ASIC v Adler* that it would be anomalous if a plaintiff had to establish one of these more serious contraventions of the law in order to establish a breach of the duty of care.\(^89\) However, as discussed in Part II above, Australian courts have always been extremely reluctant to second guess a business judgment unless that judgment has involved a breach of one the director’s duties of good faith.\(^90\) Hence putting the onus of proof on the plaintiff to disprove at least one of the elements of s 180(2) would not impose an onerous new obligation on the plaintiff. Instead it would confirm and further solidify what, in practice, is already the case: that if a director has made an informed business judgment then the plaintiff will have very little chance of establishing a breach of the duty of care unless the plaintiff can also establish that, in making that judgment, the director has breached one of the duties of good faith.

Further, as Redmond has pointed out, it might be considered ‘equally or even more anomalous to put the director to proof’ in relation to all of other elements contained in s 180(2) before the rule can be applied.\(^91\) This is particularly so because whereas if s 180(2) operates as a presumption the plaintiff need only disprove one element to render it ineffective, if it operates as a defence the director must prove all of the elements in order to benefit from it. While it is true that, as Austin J argues, matters pertaining to the elements of s 180(2) are ‘principally within the knowledge of the director or officer’, to put such an evidentiary burden on the director is at odds with the driving purpose behind the sub-section’s enactment.

**B What Constitutes a ‘Business Judgment’?**

Justice Austin next considered the scope of the term ‘business judgment’, defined in s 180(3) as a ‘decision to take or not take action in respect of a matter relevant to the business operations of the corporation’. His Honour held that the definition of

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88 In relation to the latter two sections, in the sense that the existence of a material personal interest can lead to the misuse of position or information. Ibid, 631 [7269].
89 Ibid, citing *Adler* [2002] NSWSC 171, [410].
“business judgment” encompasses matters of planning, budgeting and forecasting because these matters ‘provide a financial framework within which business operations are conducted’ and therefore satisfy the requirement of being relevant to the business operations of the corporation.92 Further, Austin J opined that decisions relating to the following matters fell within the scope of the ‘business judgment’ definition: ‘corporate personnel’; ‘the termination of litigation’; ‘setting of policy goals’; and ‘the apportionment of responsibilities between the board and senior management’.93

Austin J also made two more general observations about the statutory language in s 180(3). First, he noted the breadth of the statutory language, observing that the formulation ‘in respect of a matter relevant to the business operations of the corporation’ enables matters not explicitly part of business operations to form the basis of a ‘business judgment’.94 Second, his Honour stated that the text of the provision contained an ‘important limitation’.95 Specifically, it required that a judgment must actually be made; that is, there must actually be a conscious ‘decision to take or not take action’.96 Therefore, the crux of this requirement is that a director must have actually turned their mind to the matter.97 The effect of this limitation is that the defence will not be available to a director who simply neglects to deal with an issue without turning their mind to it.98 Further, the rule will not protect directors who fail to discharge their oversight duties, including monitoring the company’s affairs and maintaining familiarity with its financial position, because these duties do not involve a decision to take or not take action.99 Although the policy implications of limiting s 180(2)’s protection to business judgments defined in this way have been criticised,100 as a matter of statutory interpretation the above observations cannot be faulted. and they have routinely been followed in subsequent cases.101

There is a further aspect of the interpretation of the term ‘business judgment’ which deserves consideration. In Fortescue Metals the Full Court of the Federal Court held that a decision by a director that a company should not comply with a requirement of the Corporations Act could not constitute a ‘business judgment’ for the purposes of s 180 because such a decision related to compliance rather than to the ‘business

92 Rich, above n 5, 632 [7274], 634 [7280].
93 Ibid 632 [7273]-[7274], citing Paul Redmond, ‘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 (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1997), 195.
94 Ibid.
95 Ibid [7277].
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid [7278].
100 See Part IV of this article below.
101 See, eg, Great Southern Finance Pty Ltd (in liq) v Rhodes (2014) 103 ACSR 137, [46].
operations’ of the company. As noted earlier, this case was subsequently overruled by the High Court on unrelated grounds, so this interpretation did not establish a binding precedent.

Nonetheless, there are good reasons for believing this interpretation should be followed. In the lead judgment in the Federal Court, Keane CJ questioned whether the legislature could have intended to provide the protection of s 180(2) to a director who had made a ‘business judgment’ that a corporation should not comply with the Act. His Honour also quoted an extract from paragraph [6.8] of the EM which suggests that decisions to comply, or not comply, with a law do not count as ‘business decisions for the purposes of s 180(2). Given that the US jurisprudence influenced the drafting of s 180(2), it is important to note that there is strong US authority for the proposition that the US business judgment rule will not protect decisions by directors to knowingly cause or permit companies under their supervision to break the law. Of course, as Austin J pointed out in Rich, ‘the primary task of an Australian court is to construe and apply the statute, which is not necessarily a complete reflection of the US position’. Nonetheless Justice Austin recognised the US case law regarding the business judgment rule provides a useful resource for Australian courts and he reached the conclusion that s 180(2) operates as a defence ‘with some hesitation in light of the US approach’. Given that there are no strong reasons to discount Keane CJ’s interpretation of paragraph [6.8] of the EM, the US position adds further weight to the view that the scope of the term ‘business judgment’ in s 180 should not extend to decisions to knowingly cause a company to break the law.

C In Good Faith, for a Proper Purpose and Without Material Person Interest
The elements contained in paragraphs (a) and (b) of s 180(2) require that the director ‘make the judgment in good faith for a proper purpose’ and without ‘material personal interest in the subject matter of the judgment’. In Rich Justice Austin did not comment directly on the scope of these elements. The references to ‘good

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102 ASIC v Fortescue Metals, above n 7, 620 [197]-[198]. In the following paragraph [199], Keane CJ also held 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’. His Honour did not provide any reasons for this assertion and, as a matter of statutory construction, it is not clear how it could be justified. As a matter of policy it could perhaps be justified if his Honour is assuming that the exculpatory provisions to which he refers exculpate the director in relation to s 180(1) as well as the other provision of the Act.

103 See n 48 above.

104 ASIC v Fortescue Metals, above n 7, 620 [197]-[198], quoting Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 18 [6.8].


106 Rich, above n 5, [7257].

107 Ibid [7269].

108 Corporations Act 2001 (Cth) s 180(2)(a),(b).

109 Drawing on US case law, ASIC had questioned whether a director could be held to have acted in good faith if that director had, through inaction, failed to discharge his or her responsibility to
faith’ and ‘proper purpose’ echo the language of s 181(1) and the reference to ‘material personal interest’ echoes the language of s 191. Although the meaning to be ascribed to these terms is not necessarily settled,¹¹⁰ there is a substantial history of case law interpreting their meaning in relation to those other statutory duties and to the equivalent duties at general law.¹¹¹ As such, this article will focus on contributing to the interpretation of those terms and phrases which were introduced to Australian corporate law by s 180(2).

D Informing Oneself about the Subject Matter

The element contained in subparagraph (c) of s 180(2) requires directors to ‘inform themselves about the subject matter of the judgment to the extent they reasonably believe is appropriate’.¹¹² Austin J endorsed ASIC’s submission that the reasonableness of a director’s belief that they have informed themselves to an appropriate extent should be assessed by reference to, inter alia: the importance of the business judgment to be made; the time available for, and the costs related to, obtaining information; and the state of the company’s business.¹¹³

However his Honour rejected ASIC’s submission that the statutory language suggested ‘regard must be had not only to what the director or officer actually knew, but what he or she should have known’.¹¹⁴ Austin J believed this would distort the statutory language which ‘relates to the decision-making occasion, rather than the general state of knowledge of the director’.¹¹⁵ Accordingly, if a director reasonably believes they have taken appropriate steps on the decision-making occasion to inform themselves about the subject matter of the judgment then the rule’s protection may be available even if they ‘were not aware of available information material to the decision’.¹¹⁶

Legg and Jordan believe this interpretation focuses too much on the subjective state of mind of the director, at the expense of an objective assessment of the reasonableness of the process the director followed in informing themselves. They express uncertainty as to what work the word ‘reasonably’ performs in Austin J’s formulation and question whether ‘the protection of which his Honour speaks [would] be available if the directors' enquiries, although sufficient in their minds, were objectively inadequate?’¹¹⁷

¹¹⁰ Bird, above n 21, 152.
¹¹² Corporations Act 2001 (Cth) s 180(2)(c).
¹¹³ Rich, above n 5, 634 [7283].
¹¹⁴ Ibid.
¹¹⁵ Ibid.
¹¹⁶ Ibid 635 [7284].
¹¹⁷ Legg and Jordan, above n 3, 421. Harris also takes Austin J to be saying there is no need for an 'objective assessment' of whether the director has considered 'information which a reasonable person
This criticism is misplaced as it is clear from Justice Austin’s reasoning that he would answer this question in the affirmative. The distinction his Honour draws is not between an objective and a subjective assessment of the directors’ belief, rather he is identifying the time-period in relation to which the objective assessment should be made. He holds that s 180(2)(c) requires a court to objectively assess the process which directors take to inform themselves in the lead up to the particular judgment, rather than objectively assess the extent to which directors have kept themselves generally informed as to the company’s business. Hence his Honour’s point is that if a director should have discovered relevant information well before the decision-making occasion but it was reasonable for that director to miss that information in the lead up to making the judgment in question then, for the purposes of s 180(2)(c), it may still be reasonable for the director to believe he or she was appropriately informed. As a matter of statutory construction this is appropriate, as the entire text of s 180(2) focuses on particular business judgments rather than on the directors’ general oversight responsibilities.

It is less clear what standard of reasonableness should be required under s 180(2)(c). This question was not addressed in Rich, nor in any of the other Australian cases we reviewed. In Delaware it is now settled that a business judgment is properly informed unless the process which the board took to inform themselves was grossly negligent. This was confirmed in the famous case of Smith v Van Gorkom. In that case the board was found to have inadequately informed itself when it approved a merger of the company on the basis of a twenty minute presentation by the company officer who had arranged the merger, against the advice of senior company officers that the price being offered for the company’s shares was too low. In the US the application of the gross negligence standard means that it is extremely rare for courts to find that the process a board has taken to inform itself before making a business judgment is unreasonable. Indeed, according to Griffith the majority of US commentators believe that Van Gorkom itself was wrongly
decided and that the board’s decision in that case should have passed a gross negligence test.121

In so far as s 180(2)(c) is concerned, in our view ‘gross negligence’ is too lax a standard and Australian courts should interpret ‘reasonably’ along the lines of the reasonable director test set out in s 180(1). That is, courts should ask whether, in relation to a particular business judgment, the process which the defendant director followed in order to inform him or herself in the lead up to making the judgment was a process which a reasonable person in the director’s position would regard as appropriate. This is how the word ‘reasonably’ is usually interpreted when it appears in Australian statutes: by applying the standard of a hypothetical reasonable person in the relevant circumstances.122 There is nothing in the immediate context to suggest that it should be interpreted otherwise. Indeed, as discussed below, the ‘no reasonable person’ formulation in relation to s 180(2)(d) indicates that, for that paragraph, the term ‘reasonable’ is intended to carry a somewhat different meaning to the usual hypothetical reasonable person test. This formulation was not used in relation to s 180(2)(c), suggesting that for s 180(2)(c) the legislature intended the word ‘reasonably’ to carry its usual legal meaning.123

In circumstances like this, where there is no ambiguity in the statutory text, it is unclear whether a court can consider extrinsic material when interpreting that text.124 However, even if the explanatory materials were to be considered, there is nothing in them which clearly indicates that the legislature intended that in s 180(2)(c) the word ‘reasonably’ should carry something other than its usual legal meaning in Australia. It is true that the text of s 180(2)(c) was taken directly from the ALI model provision but there is no express indication in the explanatory material that the word ‘reasonably’ was not to be given its usual legal meaning in Australia.

E ‘Rational Belief’ about the Corporation’s Best Interests
The final element of the rule contained in subparagraph (d) requires directors ‘rationally believe that the judgment is in the best interests of the corporation’.125 The section subsequently explains that a belief ‘is a rational one unless the belief is one that no reasonable person in their position would hold’.126

The phrase ‘rationally believe’ was taken from the ALI model provision, and Austin J noted that the ALI Principles make it clear that in that context it is intended to permit a much wider range of director conduct than the term ‘reasonable’ would allow, such

122 See for example Catch The Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 [93], [95], [197].
123 Westlaw AU, above n 56, [25.1.1010].
124 Ibid, [25.1.2490].
125 Corporations Act 2001 (Cth) s 180(2)(d).
126 Ibid.
that a director’s decision can be unreasonable but still qualify as rational. This accords with the way the business judgment rule operates in Delaware, where courts will only deny a director the rule’s protection on this ground if the relevant decision evinces ‘gross negligence’ or is ‘egregious or irrational’.128

His Honour then turned to the statutory phrase ‘no reasonable person’, which does not appear in ALI model provision, and considered whether this differs in meaning from the term ‘reasonable’ per se.129 His Honour declared that:

[T]here are no degrees or levels of reasonableness. A belief is either reasonable or not reasonable. A “reasonable person” is a person who holds beliefs that are reasonable, and if a person holds beliefs that are not reasonable, the person is not a reasonable person in the eyes of the law.130

If this is true then it would appear to follow that, in so far as s 180(2)(d) is concerned, a belief is ‘rational’ only if it is objectively ‘reasonable’. However, Austin J rejected this on the grounds that ‘some unfortunate consequences’ would flow from such a conclusion.131 Firstly, this element would only be satisfied when the duty of care and diligence as set out in s 180(1) had not been breached, rendering the business judgment rule unnecessary.132 Secondly, the elaborate drafting used in the provision would have failed to achieve its ‘evident purpose of setting the standard at a level lower than objective reasonableness’.133 This purpose was said to be evident because directors could have quite easily been required to hold a reasonable belief.134 Thirdly, the Australia business judgment rule would adopt an approach contrary to US jurisprudence.135

In light of this, Austin J proposed ‘an alternative and preferable construction’ that was said to ‘avoid these consequences and give the Australian business judgment rule a justifiable field of operation’.136 His Honour stated that the drafters’ intention was to enliven the meaning of ‘rationally believe’ in the US business judgment rule;137 and, that, while according to the Shorter Oxford English Dictionary one meaning of the word “rational” is “reasonable”, another meaning is “based on, derived from, reason

127 Rich, above n 5, 635 [7286].
129 Corporations Act 2001 (Cth) s 180(2)(d).
130 Rich, above n 5, 635 [7288].
131 Ibid.
132 Ibid. His Honour’s argument here is premised on the assumption that s 180(2) must have been introduced with the intention of creating additional circumstances in which directors could escape liability for breaching their duty of care. The analysis presented in Part II of this article calls that assumption into question. See also Hooper, above n 6, 427-428.
133 Ibid.
134 Ibid.
135 Ibid.
136 Ibid 636 [7289].
137 Ibid.
or reasoning”, and that it was this latter idea that the drafters intended to capture. Therefore, Austin J expressed the view that a director’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. The drafters articulated the latter idea by using the words “no reasonable person in their position would hold”.

As a result, subparagraph (d) was said to require both that directors believe their judgment was in the corporation’s best interests, and that this 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’. To the extent which subsequent cases have considered s 180(2)(d) they have tended to apply Austin J’s interpretation of it.

Legg and Jordan suggest that by adopting this construction of s 180(2)(d) Austin J ‘arguably sets the bar even lower in Australia’ than the ‘gross negligence’ test which applies in Delaware. While it is clear his Honour intended to set the bar below a ‘reasonable person’ test, it is far from clear whether he intended to set it above or below ‘gross negligence’. Indeed his construction of this paragraph begs more questions than it answers. He proposes that a reasoning process needs to be ‘arguable’ in order to qualify as ‘rational’ for the purposes of s 180(2)(d), but he fails to identify what characteristics a reasoning process must possess in order to qualify as ‘arguable’. If a director’s conclusions followed logically from his or her assumptions, would that make the reasoning process ‘arguable’, no matter how absurd the assumptions? If the assumptions must also be defensible, what standard of reasonableness will be applied? These questions are not answered. Nor is it clear from his Honour’s analysis why the legislature would have used the words ‘no reasonable person’ if they did not have some kind of standard of reasonableness in mind.

Arguably, Justice Austin’s strained interpretation of the phrase ‘no reasonable person’ derives from his refusal to countenance the possibility of degrees of reasonableness. Hooper observes that there is in fact support for this notion in the case law, noting that it is implicitly accepted in the ‘Wednesbury unreasonableness’ ground of judicial review in administrative law. In the classic formulation of this doctrine, Lord Greene MR held that unreasonableness could constitute a ground of review if a decision ‘is so unreasonable that no reasonable authority could have

\[138\] Ibid.
\[139\] Ibid.
\[140\] Ibid [7290].
\[141\] See, eg, Mariner, above n 118, [493]-[494].
\[142\] Legg and Jordan, above n 3, 425.
\[143\] Ibid 424.
\[144\] Hooper, above n 6, 425-426.
come to it'; \(^\text{145}\) and, this language has been replicated in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In light of this, Hooper suggests the phrase 'no reasonable person ... would hold' in s 180(2) should be interpreted through the lens of the case law on *Wednesbury* unreasonableness in administrative law.

While Hooper’s wider point regarding the notion of ‘degrees of reasonableness’ is well made, it is doubtful that the Legislature intended s 180(2)(d) be interpreted in light of the doctrine of *Wednesbury* unreasonableness. That doctrine is applied against the backdrop of preserving the legality/merits dichotomy which sits at the heart of administrative law, \(^\text{146}\) and there are important differences between the balance which needs to be struck in relation to these administrative law concerns and the directorial authority/directorial accountability tension in corporate law. Further, statements in the case law to the effect that *Wednesbury* unreasonableness requires ‘something overwhelming’ and is confined to ‘demonstrably absurd decisions’ mean that applying the *Wednesbury* approach in the context of s 180(2)(d) would arguably set the bar at an inappropriately low level. \(^\text{147}\)

Nor is it necessary to look beyond corporate law to find examples of the ‘no reasonable person’ formulation, or close approximations of it. In *Wayde v New South Wales Rugby League Ltd* the High Court held that for a decision to be ‘oppressive or unfairly prejudicial or discriminatory’ for the purposes of s 232 of the *Corporations Act* the decision needs to be one ‘that no Board acting reasonably could have made’. \(^\text{148}\) Read in context, it is hard to avoid the conclusion that the use of this formulation rather than a standard ‘reasonable board’ test was deliberate. Shortly before espousing this test, the Court emphasised ‘the caution which a court must exercise in determining an application under s 233 in order to avoid an unwarranted assumption of the responsibility for management of the company’. \(^\text{149}\) The Court’s subsequent adoption of the ‘no Board acting reasonably’ test appears to assume there are degrees of reasonableness, such that even if applying a ‘reasonable board’ test might have resulted in a finding that a decision was oppressive, it may not qualify as oppressive under a ‘no board acting reasonably’ test. \(^\text{150}\)

\(^{145}\) *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.


\(^{148}\) (1985) 61 ALR 225 at 231.

\(^{149}\) Ibid.

\(^{150}\) Although the point is not developed, in a footnote Redmond appears to provide a similar analysis of this test in *Wayde* when he describes it as applying a ‘realm of reasonableness test’. Redmond, *Corporations and Financial Markets Law*, above n 21, 462, n 120.
would have entered into it.\textsuperscript{151} The implication is that if the test had been whether ‘no reasonable person’ would have entered into the transaction, then that would have permitted a wider range of behaviours than the reasonable person test which applies to that particular provision.

Drawing on these and comparable corporate law cases,\textsuperscript{152} it follows that the phrase ‘no reasonable person in their position would hold’ in s 180(2)(d) should be interpreted as implying the possibility of degrees of reasonableness such that, rather than applying a ‘reasonable person’ test, judges should take as wide a view as possible of what a reasonable person could possibly consider to be for the benefit of the company. Only judgments which fall outside the scope of this broad test would fail to satisfy s 180(2)(d). Arguably this would result in a similar test to the ‘gross negligence’ standard which applies in Delaware.

This article has argued that s 180(2) was introduced to affirm courts’ traditional reluctance to overrule informed business judgments unless those judgments breach one of the duties of loyalty. When interpreting s 180(2)(d) it is therefore also appropriate to consider how the courts have interpreted the corresponding duty of loyalty in s 181(1)(a), which states that directors should act ‘in good faith in the best interests of the corporation’. While it is relatively well accepted that the test for s 180(1)(a) has an objective element, that objective element is tempered by the courts’ reluctance to interfere in directors’ business decisions. In \textit{Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)} Owen J undertook a careful examination of the relevant authorities and, drawing on \textit{Wayde},\textsuperscript{153} concluded that the test for s 181(1)(a) is largely (but not solely) subjective and that any objective enquiry is:

\begin{quote}
done to assist the court in deciding whether to accept or discount the assertions that the directors make about their subjective intentions and beliefs … In that event a court may intervene if the decision is such that no reasonable board of directors could think the decision to be in the interests of the company. (emphasis added)\textsuperscript{154}
\end{quote}

On appeal, Carr AJA agreed with Owen J’s summary of the relevant law; Drummond AJA held that, whereas the test for determining whether a director has acted for a proper purpose is objective, the test in relation to the duty to act in the company’s best interests is purely subjective; and Lee AJA held that even if a director subjectively believes they are acting in the company’s best interests the duty can be breached if, assessed objectively, the conduct is ‘plainly unreasonable or irrational’.\textsuperscript{155} These various formulations indicate that the interpretation of s 181(1)(a)

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\textsuperscript{151} [2007] NSWCA 167, [1], [54], [72].
\textsuperscript{152} See also \textit{Shuttleworth v Cox Bros & Co (Maidenhead) Ltd} [1927] 2 KB 9, 18 (Bankes LJ), quoted in Redmond, \textit{Corporations and Financial Markets Law}, above n 21, 628: ‘The alteration may be so oppressive as to cast suspicion on the honesty of the persons responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company’.
\textsuperscript{153} (2008) 70 ACSR 1, [4619].
\textsuperscript{154} Ibid [4619].
\textsuperscript{155} \textit{Westpac v Bell}, above n 49, [923], [2736], [1988].
\end{flushright}
is not yet settled. However, the two judges in the appellate case who found that the test involves an objective element both describe that objective element in terms which make it significantly more respectful of directorial authority than would be the case if a ‘reasonable person’ test was applied. This accords with our reading of the relevant case law in relation to s 181(1)(a) and the corresponding general law duty and is consistent with our proposed interpretation of s 180(2)(d).

IV Policy criticisms of s 180(2)(d)
Justice Chernov has characterised corporate governance as being concerned with striking an appropriate balance between directors’ ‘freedom to drive their company forward’ and ‘the need to ensure that this is achieved within a framework of effective accountability’.\(^{156}\) Whereas some of its critics claim s 180(2) has pushed the balance too far towards protecting directors’ freedom at the expense of ensuring accountability, others argue the opposite: that it is failing to do enough to protect directors’ authority. The latter criticism has been the focus of recent public debate regarding the rule, largely as a result of two proposals for legislative reform which emerged in 2014—one released by the AICD and one by the Hon Robert Austin with the law firm Minter Ellison.\(^{157}\) While assessing the relative merits of these proposed reforms is beyond the scope of this article,\(^{158}\) the perceived limitations in the rule’s current operation which they seek to cure is of direct interest. This section argues that our proposed reinterpretation of the statutory business judgment rule could make significant progress in addressing some of the most important policy criticisms of the way the rule has operated in practice.

**A The claim the rule is not doing enough to promote entrepreneurial risk-taking**
As noted in Part II above, the Legislature introduced the statutory rule to reduce directors’ fear of attracting personal liability so that directors would become more innovative and entrepreneurial and less conservative and risk-averse. Among others, the AICD claims the rule has failed to achieve this goal. The AICD has conducted several surveys of its members that suggest directors’ concerns about attracting personal liability continue to be a major impediment to innovative risk-taking. For example a 2010 AICD survey of 623 directors found that 73.9% believed there was a medium to high risk of directors having personal liability imposed on them for business decisions which they had made in good faith and 65.3% indicated a fear of personal liability was making them overly cautious in relation to business decisions.\(^{159}\) As further evidence of s 180(2)’s ineffectiveness, the AICD points out

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\(^{157}\) AICD, Honest and Reasonable Director Defence, above n 3; Austin, ‘Boards that Lead Need Better Protection’, above n 3; See Harris, above n 21, 422-3.

\(^{158}\) For such an assessment see Jason Harris and Anil Hargovan, ‘Revisiting the business judgment rule’ (2014) 66(10) Governance Directions 634; Judith Fox, ‘Honest and reasonable director defence’ (2015) 67(4) Governance Directions, 218.

that no director has successfully relied on s 180(2) to escape liability after having been found to have breached their duty of care.160

Regarding the latter point, the Legislature did not necessarily intend that s 180(2) would create circumstances in which a director could escape liability for what would otherwise have amounted to a breach of their duty of care.161 As discussed in Part II above, the Howard Government’s CLERP Policy Paper No 3 did not, in general, disagree with the previous (Keating) government’s assessment that the common law business judgment doctrine was providing informed and disinterested business judgments with appropriate protection. However the CLERP paper noted that, on occasion, courts had not applied that doctrine in a consistent manner and argued this inconsistency was creating uncertainty among directors and undermining their confidence that such judgments would be protected.162 Hence s 180(2) was introduced to clarify and confirm the common law business judgment doctrine rather than to significantly change the way in which, in general, that doctrine had been being applied.

Of course, rather than a well-defined doctrine, the general law business judgment rule could be more accurately described as a strong tradition of judicial deference to directors’ informed business decisions except where those decisions have breached one of the duties of loyalty.163 Codifying this deference into a statutory provision not only has the potential to provide greater consistency, in particular cases it could also lead a judge to make a different decision than they might have made in the absence of the statutory rule. Be that as it may, s 180(2) was not introduced to create additional circumstances in which directors could escape liability for breaching their duty of care and hence, judged on its own terms, the absence of cases in which directors have been able to successfully rely on s 180(2) as a ‘defence’ does not necessarily prove that the provision has failed.

The AICD’s surveys potentially provide stronger evidence that the provision is not fulfilling its purpose, although it is difficult to judge how much weight to accord them. Harris has noted that the validity of the relevant claims is ‘yet to be empirically established outside of the surveys conducted by the AICD’ and Varzaly has described the methodology for the 2010 AICD survey as ‘problematic’.164 It is beyond the scope of this article to investigate whether directors may be filling out these surveys strategically rather than honestly, or whether some other aspect of the AICD’s methodology may be inappropriately influencing the survey results. However it is worth noting that a similar survey of Australian company secretaries also

160 AICD, Honest and Reasonable Director Defence, above n 3, 6.
161 Bird, above n 21, 152.
163 Redmond, Corporations and Financial Markets Law, above n 21, 488; Harris, above n 21, 415; Bird, above n 21, 151.
164 Harris, above n 21, 423; Varzaly, above n 2, 431; see also Greg Golding, ‘Tightening the screws on directors: Care, delegation and reliance’ (2012) 35(1) University of New South Wales Law Journal 266, 268.
suggested directors’ fear of liability is making them excessively risk averse, and in 2008 one of the AICD surveys was conducted in collaboration with Federal Treasury and that survey came up with very similar findings. Assuming these surveys are accurate, they indicate fear of personal liability is having a significant impact on directors’ appetite for risk. Of course, the extent to which managerial risk-taking is desirable is open to debate and the general community may not share directors’ view that their current level of caution is inappropriately high. Sernia and Barkoczy have argued that, in light of the role which risky managerial decisions played in causing the Global Financial Crisis, it is perhaps appropriate that fear of personal liability should have a conservatising influence on directors’ decisions. While this is an important point, the challenge is in working out how to get the balance right. If almost 74% of directors believe there is a medium to high risk that good faith decisions could attract personal liability then arguably that belief is likely to be excessively, rather than appropriately, restraining entrepreneurial risk-taking.

Yet the directors who hold this belief are clearly mistaken. Varzaly conducted an extensive search and could find only 30 cases in the period between March 2000 to December 2011 in which directors were found liable for breaching their duty of care—roughly three per year. Although our case review focused on cases that specifically refer to s 180(2), rather than on all duty of care cases, our research generally bears out Varzaly’s findings. Given that there are more than 2 million companies registered in Australia, it is hard to disagree with Golding’s observation that there has only been a relatively small amount of litigation in relation to this duty and hence directors’ fears in this regard are ‘overblown’. That is not to say that these fears are not genuinely held. As Fox has noted, in relation to this issue ‘perception can drive reality’ and an ill-informed belief regarding potential liability can just as powerfully limit directors’ risk-taking as a well-informed one.

Hence those critics who claim that the similarities between s 180(2) and the general law business judgment doctrine mean that s 180(2) is nothing but ‘window dressing’ or ‘a sleepy hollow’ are arguably missing the point. Section 180(2) was introduced to reduce directors’ fears of liability, and if those fears are based on an exaggerated view of the risk of liability then, at least in theory, it should be possible to alleviate those fears by clarifying the law rather than reducing the likelihood of directors being found liable.

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166 AICD, Impact of Legislation on Directors, above n 159, 44.
167 Sernia and Barkoczy, above n 165, 136.
168 Varzaly, above n 2, 451-2; see also Golding, above n 164, 273, 287-8.
169 Golding, above n 164, 273.
170 Fox, above n 158, 221.
172 See Bird, above n 21, 152.
However, if the AICD’s surveys are accurate, in practice the statutory rule has thus far failed to alleviate directors’ fears. To some extent this can be attributed to the potentially confusing language used in the sub-section and the paucity of judicial interpretation of it. Bird, who recognised that s 180(2) was introduced to undertake a ‘psychological’ function rather than to change the current state of the law, noted in 1999 that the provision included language which was ‘untested in Australian courts and, thus, it will be some time before lawyers can confidently advise directors on its meaning’. Unfortunately, aside from Austin J’s observations in Rich, the courts have given little more than cursory consideration to how to interpret the provision. Further, while many of his observations are illuminating, Austin J’s failure to recognise that the provision should be interpreted as a presumption and his confusing interpretation of s 180(2)(d) have undermined the sub-section’s capacity to comfort directors.

The decision to treat s 180(2)(d) as a defence is particularly problematic in this regard. Consider a lawyer advising a director. If s 180(2) operates as a rebuttable presumption in favour of directors then the lawyer can say: ‘If you make a reasonably informed business judgment you won’t be liable for breaching your duty of care unless the plaintiff can prove that you had a material person interest, or that you were not acting for a proper purpose, or that no reasonable person could have regarded your decision as in the company’s interest’. This would be much more likely to give a director confidence than the current situation, in which the lawyer has to say: ‘If you are found to have breached your duty of care then, if you can prove all of the elements of s 180(2) you will escape liability, but no director has ever been able to do so’. Arguably the other aspects of our proposed interpretation of s 180(2), including our proposed interpretation of s 180(2)(d), would also provide directors with greater certainty as to the circumstances in which they are likely to receive (or be denied) the protection of the rule.

It is of course possible to argue that in order to facilitate entrepreneurial risk-taking it is necessary to offer directors’ additional legal protection, beyond the protection provided by the general law business judgment rule. To some extent such an argument underlies the two proposals for legislative reform which emerged in 2014. Both would extend protection beyond directors’ fiduciary duties to other potential sources of directorial liability to which the general law business judgment rule does not apply, and the AICD proposal would extend protection beyond business judgments, to include directors’ oversight responsibilities. The Austin/Minter Ellison proposal would still limit protection to business judgments but would allow directors with a material personal interest the benefit of the presumption as long as that interest had been disclosed to the board. Beyond these examples, it is not clear to what extent, if at all, the proposals would lower directors’ accountability as compared with our proposed interpretation of s 180(2), since the reform proposals tend to

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173 Ibid 152.
174 Ibid.
replace specific language with more general formulations. For example both proposals lack any specific reference to a requirement that directors’ decisions be reasonably informed but such a requirement is, at least potentially, inherent in the proposals’ general requirements regarding the reasonableness and rationality of directors’ conduct.\(^{175}\)

The AICD’s contention that the term ‘business judgment’ is too restricting will be considered in the next sub-section. The proposal to extend protection beyond the duty of care is also worthy of consideration, since it is possible that it is fear of other sources of liability—rather than fear of liability for breaching their duty of care—which is causing directors’ to be risk-averse. However this issue falls outside the scope of this article, which is focused on the rule’s role in relation to the duty of care. Specifically in relation to the duty of care, we believe the significant discrepancy between directors’ perceptions of the risk they face and the reality of that risk suggest that the ‘psychological’ strategy underlying the introduction of s 180(2) deserves an opportunity to be properly tested (with a clearer and more appropriate interpretation) before serious consideration is given to reducing directors’ accountability.

**B Claims that s 180(2) limits protection too narrowly to ‘business judgments’**

Rather than a ‘business judgment rule’, the AICD propose an ‘honest and reasonable director defence’. They provide two reasons for eschewing the term ‘business judgment’. First, the AICD expresses disappointment that s 180(2) does not protect a director who has failed to consider a particular issue, with the consequence that the rule generally does not protect directors’ monitoring and oversight duties.\(^{176}\) Extending the rule’s protection beyond business judgments would have no direct impact on entrepreneurial risk-taking, since entrepreneurialism necessarily involves making business judgments. However the AICD argues that it is unfair to exclude oversight duties from the rule’s protection since directors, and non-executive directors in particular, cannot be across every aspect of a company’s operations and must make strategic decisions regarding where to direct their attention.\(^{177}\) The AICD’s surveys also indicate that fear of liability—which presumably includes fear or liability for failing to properly oversee company’s operations—is dissuading qualified people from becoming directors and thus reducing the pool of talent available to companies. Interestingly, this is one point on which the survey of company secretaries came up with a different finding, with 87% of company secretaries reporting they had never come across a situation where a suitably qualified director had declined to take up a position on a board as a result of fear of liability.\(^{178}\)

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\(^{175}\) See Harris, above n 21, 422-3.

\(^{176}\) AICD, *Honest and Reasonable Director Defence*, above n 3, 6-7.

\(^{177}\) Ibid 25.

\(^{178}\) Sernia and Barkoczy, above n 165, 136.
The danger with extending the rule’s protection to directors’ oversight duties is that it could undermine important advances in directorial accountability associated with *Daniels v Anderson* and subsequent cases, resulting in a return to the situation where non-executive directors could legally pay minimal attention to the affairs of companies which they were purportedly responsible for overseeing. Although a detailed consideration of the relevant case law is beyond the scope of this paper, arguably the minimum oversight expectations set out *Daniels* are not overly onerous and it would be better to leave it to the courts to develop and refine these expectations as they consider cases relating to the duty of care, rather than introducing legislative amendments which would give blanket protection to well-intentioned failures in oversight.

The AICD’s second concern with limiting protection to ‘business judgements’, is that the courts have excluded decisions regarding compliance from the definition of that term. The AICD notes that in a number of cases courts have used what it calls a ‘stepping stone’ approach, whereby directors can be found to have breached their duty of care if they have failed to prevent the company from breaching the law.179 The AICD expresses disappointment that the business judgement rule does not protect a director in such a situation. They argue that judgements in relation to compliance are often difficult and complex and hence deserve protection, citing as an example a situation where directors with incomplete information have to weigh the possibility of causing the company to engage in misleading and deceptive conduct (if they disclose that information and it turns out to be false) against the possibility of falling foul of the continuous disclosure regime (by failing to disclose relevant information in a timely manner).180

This article has argued that, as a matter of statutory construction, the definition of ‘business judgement’ should not extend to deliberate decisions to cause the company to break the law. Nor would it amount to a ‘business judgement’ if a director neglected to make him or herself familiar with a legal requirement which either the general law or statute expects directors to be personally across. Arguably this is also appropriate as a matter of policy. It is true that a number of cases have used this so-called ‘stepping stone’ approach.181 But there is also a strong line of authority which, at least potentially, contradicts these cases by suggesting that a director’s decision to cause their company to break the law would only breach the director’s duty of care if the potential detriment to the company outweighed the potential benefit.182

179 AICD, *Honest and Reasonable Director Defence*, above n 3, 8-10.
180 Ibid 9-10.
Section 180(2) is not the most appropriate instrument to resolve this tension, since including decisions as to whether or not to comply with the law in the definition of ‘business judgement’ would have the unfortunate consequence that a director who had deliberately caused a company to break the law might escape liability unless no reasonable person could possibly believe that decision was in the interests of the company. Whether, as a matter of policy, directors should be able to deliberately cause a company to break the law without breaching their duty of care (provided that doing so is in the company’s interest) is a question which goes beyond the scope of this article. However, if that is to be the law, then it would send a more appropriate signal regarding respect for the law if the relevant decision is assessed based on the ‘reasonable person’ test in s 180(1). As for circumstances where directors are potentially caught between two conflicting legal responsibilities, it is arguably better for the legislature to specifically amend the relevant legal provisions to better take this into account, rather than to treat all compliance decisions as ‘business judgments’ for the purposes of s 180(2). Hence, for example, AICD’s concern about the continuous disclosure obligations (cited above) is addressed to some degree by ASX Listing Rule 3.1A, which makes an exception to the usual obligation to disclose information if that information is ‘insufficiently definite’.

C Claims that s 180(2) goes too far in protecting directors’ authority

Writing in 1999, Keller opposed the introduction of the statutory rule on the basis that, inter alia, it had the potential to lower the standard of care and diligence required of directors.\(^\text{183}\) His concern stemmed from observing the US experience where the rule provides such a high level of protection for directors that, according to at least one commentator, the rule is, ‘absent fraud or a conflict of interest, nearly insurmountable in America’ and, as a result, corporate law in the US ‘does little, or nothing, to directly reduce shirking, mistakes, and bad business decisions’.\(^\text{184}\) In practice the fact that, interpreted as a defence, the rule has never been successfully invoked by a director has tended to take the heat out of this criticism.

Our proposed interpretation should not reignite these concerns. Although interpreting s 180(2) as a presumption would bring it into line with the US approach, our proposed interpretation is based on the belief that s 180(2) was introduced to codify the Australian common law business judgment rule. Hence, given that in the great majority of cases this rule was being applied relatively consistently by Australian courts, our proposed interpretation would not reduce the standard of care. In particular, whereas courts in the US state of Delaware have applied a ‘gross negligence’ standard when assessing whether a business judgement is adequately ‘informed’, our interpretation would apply a stricter ‘reasonable person’ test to the interpretation of s 180(2)(c). Further, whereas (at least in the ALI formulation) the US


\(^{184}\) Mark Roe, cited in Griffith, above n 121, 14.
rule does not require that the director’s judgment be for a proper purpose, that is one of the requirements in s 180(2). In Australia whether a director has acted for a proper purpose is assessed objectively, in the sense that once the court has determined the main (subjective) purpose underlying the director’s decision, the court will then objectively assess whether or not that purpose was proper. The inclusion of this element in s 180(2) thus also ensure that the Australian rule will provide directors with more moderate protection than its US counterpart.

V Conclusion
The AICD’s ongoing advocacy has ensured that the future of the statutory business judgment rule has continued to be a matter for public debate. Whether or not they agree with the AICD’s criticisms of the rule, most commentators have argued that some form of legislative reform is desirable and have variously recommended amending or replacing the rule. This article has instead considered the scope for an appellate court to reinterpret the rule and has proposed and defended an interpretation which differs from the current judicial approach in a number of important ways. Our proposed reinterpretation is guided by what we have argued is the rule’s primary purpose: codifying the common law business judgment rule, not lowering the standard of care required of directors. If our reinterpretation was accepted, the statutory business judgment rule would operate as a rebuttable presumption, not as a defence; s180(2)(d) would be applied in a way which accepts the possibility of degrees of reasonableness; and s180(2)(c) and the term business judgment would be subject to additional nuances to ensure the rule does not overstep its purpose by reducing the standard of care expected of directors’ decisions.

Directors’ duties is a contentious area and it is unlikely any intervention will ever satisfy all stakeholders. Nonetheless, our proposed reinterpretation of s 180(2) is not only defensible as an exercise in statutory construction, it would also likely help address some of the most important policy criticisms of the rule’s operation to date. That is, it would likely facilitate more entrepreneurial risk-taking without reducing the standard of care expected of directors and officers.

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