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 Australian Securities and Investments Commission v Rich (2009) 75 ACSR 1. First, it argues s 180(2) was introduced to clarify and confirm the courts’ existing approach to reviewing managerial decisions, not to lower the standard of care expected of directors. Second, it argues the provision should operate as a rebuttable presumption with the plaintiff bearing the onus of proof, 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 that assume that possibility. It also proposes an additional nuance to Austin J’s interpretation of s 180(2)(c). Finally it argues its proposed alternative interpretation has the potential to address the most significant policy concerns regarding the rule’s current operation.

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

I Introduction

The statutory business judgment rule (‘the rule’) in s 180(2) of the Corporations Act 2001 (Cth) has been part of Australian corporate law since March 2000. It 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

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exercise that authority with appropriate care and diligence.\(^1\) Whether s 180(2) appropriately balances these competing objectives is controversial. Some commentators criticise it for failing to offer any additional protection to directors who make business judgments in good faith, noting 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.\(^2\) Others have expressed concern that the rule tips the scales too far in favour of director autonomy, at the expense of their accountability. Most of the rule’s critics have called on Parliament to amend or replace it.\(^3\) 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.\(^4\) While there is no doubt s 180(2) could have been more precisely drafted, this article focuses instead on the scope for an appellate court to reinterpret the provision.

The most detailed and influential judicial analysis of the rule to date was provided by Justice Austin in Australian Securities and Investments Commission v Rich (‘Rich’).\(^5\) 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, one other aspect of his Honour’s analysis. First, whereas Austin J assumed the rule must have been introduced to reduce the standard of care to be applied to directors’ business judgments, this article argues instead that the rule was introduced to clarify and confirm the established judicial practice of deferring to managerial decisions except in cases of gross negligence or breach of a fiduciary duty.

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 that 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

\(^1\) Unless otherwise stated, all references to ‘directors’ should be read as ‘directors and other officers’ and all references to statutory provisions are to provisions of the Corporations Act 2001 (Cth).


\(^4\) AICD, n 3.

\(^5\) (2009) 75 ACSR 1, [7248]–[7295].
Hooper argues that s 180(2)(d) should therefore be interpreted in light of the Wednesbury unreasonableness test in administrative law,6 this article instead interprets s 180(2)(d) in light of corporate case law that also assumes the possibility of degrees of reasonableness.

Further, while the article agrees with Austin J’s interpretation of s 180(2)(c), there is a need to clarify what standard of reasonableness should be applied in assessing whether a director has appropriately informed him or herself before making a business judgment. This article proposes a ‘reasonable director’ test, rather than the ‘gross negligence’ test that has been applied by US courts.

Of course, an appellate court would be appropriately circumspect of displacing an interpretation that had become established in lower courts and Austin J’s construction of s 180(2) in Rich has been followed in most subsequent cases. However, most of Austin J’s observations on s 180(2) in that case were obiter dicta, subsequent cases have assumed Austin J’s observations without examining his reasoning and no appellate court has endorsed those observations as part of the rationes decidendi of a case. Therefore, given the significant weaknesses in the reasoning underlying many of those observations, there is scope for an appellate court to reinterpret the rule.7

Finally the article considers the policy implications of this alternative interpretation. While it is unlikely any formulation will please all stakeholders, our proposed interpretation has the potential to address some of the most serious policy concerns raised by the rule’s critics. That is, it would increase the comfort the rule provides to directors who are nervous about taking entrepreneurial risks but it would do so without significantly reducing the standard of care expected of directors.

II Background: Enacting a Statutory Business Judgment Rule

Our first contention is that s 180(2) was not introduced to reduce directors’ standard of care but rather to clarify and confirm the established judicial practice of deferring to directors’ managerial decisions. This claim is based on analysis of legal and political developments in the period leading up to the rule’s introduction and, in particular, on a policy paper recommending the rule’s introduction that was released by the then Howard Government as part of its Corporate Law Economic Reform Program (CLERP

7 While there is strong case authority that superior courts should be reluctant to overturn long-standing rulings by lower courts on matters of statutory interpretation, arguably the seven years since Rich was decided is not long enough to invoke that doctrine. In any case a majority of the High Court has clarified that even long-standing interpretations should not be allowed to stand if they are ‘plainly erroneous’, see Babanaris v Lutony Fashions Pty Ltd (1987) 71 ALR 225, 231-3, 240, Cl 246-7. In Part III of this article we argue the only part of Austin J’s interpretation of s 180(2) that formed part of the rationes decidendi in Rich—his decision that the defendant should bear the onus of proof—was plainly in error.
Before describing and analysing the immediate background to the rule’s enactment, 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 CLERP Paper No. 3: clarifying and confirming the common law position

CLERP Paper No. 3 was released in 1997. The form of words it proposed for a statutory business judgment rule was very close to the eventual wording of s 180(2) extracted above.\(^8\) In suggesting that particular wording the authors of the CLERP


\(^{9}\) CLERP Paper No. 3, n 8, 22-9; the only substantive difference between the text of the rule proposed in CLERP Paper No. 3 and s 180(2) is that the latter adds text explaining that: ‘The director's or officer's
paper were in turn heavily influenced by the business judgment rule developed by US courts and particularly by the American Law Institute’s (ALI) model provision, although the CLERP proposal is not identical to that provision.\(^{10}\) It is clear from CLERP Paper No. 3 that a key catalyst for the interest in adopting such a rule was the majority judgment of Clarke and Sheller JJA in the NSW Court of Appeal case of Daniels v Anderson (‘Daniels’).\(^ {11}\) 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’.\(^ {12}\) Instead the court established certain minimum objective expectations that apply to all directors.\(^ {13}\) Importantly, the specific expectations articulated in Daniels relate to directors’ oversight duties, not their business judgments. As discussed below, it is not entirely clear from the majority judgment in Daniels what test should be applied in assessing whether a director’s business judgments have been negligent.

Business groups had responded to Daniels by reviving their lobbying for a statutory business judgment rule, arguing such a rule was needed to ensure directors were not discouraged from taking entrepreneurial risks.\(^ {14}\) CLERP Paper No. 3 took these concerns seriously, noting that ‘the Court of Appeal decision in Daniels v Anderson has extended and made more uncertain the accountability and liability of directors’. It was the increased uncertainty associated with the decision in Daniels—rather than those aspects of the judgment that had clearly and unequivocally extended directors’ accountability—that particularly bothered the authors of the CLERP paper:

In particular, 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 … is causing directors to be conservative and risk-averse in their approach to carrying out their functions.\(^ {15}\)

The CLERP paper suggested this uncertainty was linked to the fact that directors’ duty of care had been codified ‘without a complementary codification of the business judgment doctrine’ and argued that such a codification was needed.\(^ {16}\) Hence the CLERP paper argued 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

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\(^{10}\) American Law Institute (ALI), \textit{Principles of Corporate Governance, Analysis and Recommendations, Vol 1} (American Law Institute Publishers, 1994), 133-4. Most obviously the CLERP proposal includes a requirement, replicated in s 180(2), that the director has made the judgement in good faith and for a proper purpose.

\(^{11}\) (1995) 37 NSWLR 438; CLERP Paper No. 3, n 8, 9-10, 18-9, 22-3.


\(^{13}\) Daniels (1995) 37 NSWLR 438, 503-5.


\(^{15}\) CLERP Paper No. 3, n 8, 22-23.

\(^{16}\) CLERP Paper No. 3, n 8, 24-28.
and confirm the position reached at common law that Courts will rarely review bona
fide business decisions'.

The latter statement was replicated in the explanatory memorandum (EM) to the Bill
that introduced s 180(2). The second reading speech also echoed the CLERP paper,
arguing the rule would not reduce the standards of directorial accountability
established by the general law but rather would remove 'legal uncertainty' as to the
circumstances in which directors’ decisions could result in liability for breaching their
duties as directors. The CLERP Paper’s assumption regarding its proposed rule—
that it would clarify the law rather than change it—was therefore reflected in the
explanatory materials associated with the rule’s actual introduction. This assumption
was colourfully captured in a public comment made at the time by one of the members
of the Business Regulation Advisory Group which advised the Howard Government
on the CLERP reforms, who stated that the proposed statutory rule:

> 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.

In this regard it is also worth noting that the Keating Government had considered
introducing a statutory business judgment rule but had decided against doing so on
the grounds that the courts were already demonstrating sufficient reluctance to review
directors' informed and disinterested business judgments.

B The common law position
What then is the content and scope of the ‘business judgment doctrine’ that s 180(2)
was introduced to ‘codify’? Writing in the early 1990s, Farrar observed that although
Australian courts have not developed a ‘Business Judgment Rule in the American
sense’ they do ‘pay some attention to what might be described as the business
judgement doctrine’ such that the US ‘Business Judgment Rule is therefore compatible
with existing company law’. Farrar explained this ‘doctrine’ thus:

> [The courts] demonstrate an unwillingness to second guess bona fide business
judgement in the absence of gross negligence or self-interest. This has been recognised

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17 CLERP Paper No. 3, n 8, 24-28.
18 The EM also made it clear that the Bill aimed to implement the proposals contained in the CLERP
policy paper, see Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth),
1 [1.2], 5 [2.4], 17 [6.4].
19 Commonwealth, Parliamentary Debates, House of Representatives, 3 June 1999, 5970 (Joe
Hockey).
and Securities Law Journal 141, 151.
21 See Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [87]-[89].
August 1992, 13, 17-18; see also Paul Redmond, ‘The Reform of Directors' Duties’ (1992) 15 University
… for example, by the House of Lords in Overend and Gurney Co v Gibb23 ['Overend and Gurney'] and by the High Court of Australia in Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL ['Harlowe’s Nominees'].24

The following statement by the High Court in Harlowe’s Nominees is commonly cited in support of the business judgment doctrine, as is a similar statement from the 1974 Privy Council case of Howard Smith v Ampol Petroleum ('Howard Smith').25

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 practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.

While these statements indicate courts should avoid reviewing a management decision unless that decision involves bad faith or action beyond the directors’ power, the extent to which they correspond with the US Business Judgment Rule and with s 180(2) should not be overstated. For one thing, these two judicial statements are far less nuanced than either the US rule or s 180(2). Further, although these judicial statements are worded broadly enough to suggest they should have general application to judicial review of directors’ decisions, they were made in the context of discussing duties of good faith, not the duty of care. We have been unable to identify any cases before the introduction of s 180(2) that cited these judicial statements in the context of discussing the latter duty.26

The gross negligence test from Overend and Gurney, on the other hand, had been regularly cited with approval in duty of care cases up until, but not including, the NSW Court of Appeal decision in Daniels. When the CLERP paper commented on the uncertainty created by differences between Daniels and other recent cases, inter alia it cited two decisions of the WA Court of Appeal, handed down in the two years prior to Daniels: namely Permanent Building Society (in liq) v Wheeler ('Wheeler');27 and

23 (1872) LR 5 HL 480, 495.
24 Farrar n 22, 17; Redmond also discusses the same cases in the context of commenting on the similarities between Australian case law and the US business judgment rule: see Redmond, n 22, 113.
25 Harlowes Nominees (1968) 121 CLR 483, 493; Howard Smith [1974] AC 821, 832: ‘There is no appeal on the merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at’; see also Rich (2009) 75 ACSR 1, [7251] and Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) (2008) 70 ACSR 1 ['Bell v Westpac'], [4594]-[4595].
26 In particular, we found no such citations in the sixteen reported cases on the duty of care, skill and diligence decided between 1990 and 1999 and identified in Golding’s case review: see Greg Golding, ‘Tightening the screws on directors: Care, delegation and reliance’ (2012) 35(1) University of New South Wales Law Journal 266, 287. After s 180(2) was introduced, in obiter dicta in the 2009 case of Rich, Austin J expressed the view that while the considerations discussed in the cited passages from Howard Smith and Hartowe’s Nominees did not constitute a ‘bright line’ business judgment rule at general law, they are ‘integral’ to consideration of the duty of care: Rich (2009) 75 ACSR 1, [7253].
Vrisakis v Australian Securities Commission (‘Vrisakis’).\textsuperscript{28} In both cases Ipp J, with the support of fellow judges,\textsuperscript{29} cited Overend and Gurney in the following terms:

The proper test to be applied in determining whether directors have exercised a reasonable degree of care and diligence in accordance with the requisite standard is that laid down … in Overend & Gurney Co v Gibb (1872) … namely whether: 
``... they (ie the directors) were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into?''\textsuperscript{30}

The quoted passage from Overend and Gurney would appear to have two important features, which are arguably separable. First, it indicates the court should focus on what the director knew, rather than on what the director should have known. The majority in Daniels explicitly rejected this first point, finding that it no longer accurately stated the law.\textsuperscript{31} Second, rather than asking whether a reasonable person with that knowledge would have entered into the transaction, the passage from Overend and Gurney is arguably more generous to directors by requiring that no ordinarily prudent person could have done so.\textsuperscript{32} It is unclear whether the majority in Daniels intended to reject this second aspect.\textsuperscript{33} Clarke and Sheller JJA did affirm 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' and suggested that the concept of negligence is flexible enough to accommodate this.\textsuperscript{34} This is reminiscent of another oft-cited passage in Overend and Gurney, which indicates that the reasonableness of a directors' actions need to be measured against what a person of business, accustomed to taking entrepreneurial risks, might regard as appropriate.\textsuperscript{35} But it is not entirely clear from the judgment in Daniels that this is precisely what the court had in mind. In Part III of this article we argue that the 'no reasonable person' wording in relation to s 180(2)(d) may have been introduced to assert the continuing applicability of this second aspect of the above-quoted passage from Overend and Gurney, at least in relation to business judgments.\textsuperscript{36}

In any case it is true that, in practice, the circumstances in which courts have been willing to intervene in directors' business judgments have generally been limited to

\begin{footnotes}
\item[31] Daniels (1995) 37 NSWLR 438, 502E.
\item[32] The distinction between these two formulations is discussed further below in the context of discussing s 180(2)(d).
\item[33] The discussion of Overend and Gurney in Daniels is specifically focused on the extent to which a director can legitimately rely on the advice of others, rather than on the kind of transactions into which a director can legitimately enter: Daniels (1995) 37 NSWLR 438, 502E.
\item[34] Daniels (1995) 37 NSWLR 438, 501.
\item[35] Overend and Gurney (1872) LR 5 HL 480, 495.
\item[36] See n 129 and associated text.
\end{footnotes}
those cases in which directors have breached one or more of their duties of good faith, such that (to quote Redmond) these duties 'mark out the boundaries of the judicial role in reviewing directors' discretions and intervening in their decision making'. Given that most of the elements of s 180(2) correspond in some way with duties of good faith, in this loose sense s 180(2) is broadly consistent with the way Australian courts have dealt with requests that they review directors’ business judgments.

However, while the oft-quoted statements from Harlowe’s Nominees, Howard Smith and Overend and Gurney lend some judicial authority to this comparison, there are no Australian cases where the circumstances in which a director’s business judgment can escape being tested for negligence is set out with anything like the specificity contained in s 180(2). Although Australian courts have frequently both expressed and exhibited considerable reluctance to review directors’ management decisions, different cases have provided different accounts of what would justify such intervention and no clear ‘rule’ emerges from the cases. As such, while it was legitimate for the explanatory materials to claim s 180(2) would ‘clarify and confirm’ the common law position, that clarification necessarily involved some gap-filling. It was therefore a step too far for the CLERP Paper to suggest that the sub-section was merely codifying existing law. Nonetheless, it is important to note that clarification, rather than a reduction in accountability, was the express purpose underlying the introduction of the provision. In the next section this insight 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, comprehensive and influential judicial analysis of s 180(2). This article focuses on those aspects of his Honour’s


38 The two exceptions are first, the requirement that a director reasonably inform herself before making a judgment and, second, the definition of ‘business judgment’ itself.


40 In fact, Du Plessis argues the US business judgment rule has been articulated so much more clearly in case law than the Australian common law principles with which it has been compared that it is not helpful to speak of the existence of a common law business judgment doctrine in Australia, 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. Farrar has also recognised that speaking of a business judgment doctrine ‘may be an exaggeration’, going on to note that ‘what we have is a general judicial attitude or philosophy of leaving business decisions to business people in the absence of abuse or self-interest’, Farrar, quoted in Norman O’Bryan, ‘Interview: Back to basics, Farrar on corporate law reform’, Company Director November 1992, 19, 20. Irrespective of whether the relevant common law position is described as a ‘general judicial philosophy’ or a ‘doctrine’, the wider point stands: s 180(2) was introduced to clarify and confirm this position rather than to lower the standard of care expected of directors.

41 Rich (2009) 75 ACSR 1, 626-637 [7248]–[7295].
observations that have proved most controversial: the question of who should bear the onus of proof and the interpretation to be given to each of s 180(2)(c) and s 180(2)(d).

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. The latter possibility would reflect how the rule operates in the US.

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. Unlike other aspects of Austin J’s consideration of s 180(2), this decision arguably formed part of the rationes decidendi of the case. While there are conflicting definitions of ‘ratio decidendi’ in the case law, the most widely accepted definition appears to be that provided by Cross and Harris:

any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him.

As a matter of logic it was inherently necessary for Austin J to decide whether the rule operated as a rebuttable presumption or a defence in order to determine which of s 180’s subsections he should first apply in deciding the case. In point of fact, his Honour did not consider the presumption/defence issue until very late in the judgment and he did so after having spent much of the judgment applying the ‘reasonableness’ test in s 180(1) to the facts. Therefore, on its face, his Honour’s reasoning on the presumption/defence issue seems more an afterthought than a starting point. However, his Honour made several statements in the judgment that could be interpreted as impliedly treating the need to resolve the presumption/defence question as a necessary step in reaching his conclusion. For example at several points, including very early in the judgment, his Honour emphasised that his interpretation of s 180(2) had informed his findings throughout. There is also a passage in which his Honour appears to implicitly acknowledge that the reason he was able to consider the application of s 180(1) to the facts before applying s 180(2) was that he had decided that s 180(2) operates as a defence to s 180(1). On the basis of these passages it is

42 See Klewer v New South Wales [2010] NSWCA 219, [18]-[22]
44 Rich (2009) 75 ACSR 1, [17], [7295].
45 ‘If the impugned conduct is found to be a mere error of judgment, then the statutory standard under s 180(1) is not contravened and it is unnecessary to advert to the special business judgment rule in s 180(2). In the view that I have taken of it, explained below, s 180(2) provides a defence in a case where the impugned conduct goes beyond a mere error of judgment, and would contravene the statutory standard but for the defence’, Rich (2009) 75 ACSR 1, [7242].
arguable Austin J implicitly treated his resolution of the presumption/defence question as a necessary step in the reasoning which led to his conclusion, thus satisfying Cross and Harris’ definition of ratio decidendi. Ultimately, the question of whether this aspect of his Honour’s judgment formed part of the rationes decidendi needs to be clarified by an appellate court. However, even if this aspect of his Honour’s judgment is held to form part of the rationes decidendi, there is scope for an appellate court to overrule it. This is particularly so since Austin J stated in the judgment that his conclusion on this point had been reached with some hesitation and expressed the need for appellate authority to resolve the issue.  

Admittedly, Austin J’s decision to treat s 180(2) as a defence has been supported by subsequent cases. Varzaly’s review of all Australian cases that considered s 180(2) in the period between March 2000 and December 2011 found no case in which the plaintiff was held to bear the onus of proof. Our review of subsequent cases—as well as our review of cases in the period Varzaly considered—is consistent with her finding. However, no appellate case has yet established this interpretation as a binding or even a highly persuasive precedent. Two such cases are worthy of comment. In the first, Australian Securities and Investments Commission v Fortescue Metals Group Ltd, the Full Federal Court assumed that s 180(2) operated as a defence to be proven by the director. However this failed to establish a binding precedent, both because the court did not provide any reasons for making this assumption, and because the decision was subsequently overturned by the High Court. 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.

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46 Rich (2009) 75 ACSR 1, [7269].
47 Varzaly, n 2, 453.
48 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.
49 (2011) 81 ACSR 563, [197]-[198], [218], [217].
50 Fortescue Metals (2011) 81 ACSR 563, [197]-[198], [218], [217]. 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, 962–6.
51 See Fortescue Metals Group Ltd v Australian Securities and Investments Commission (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.
52 Transcript of Proceedings, Forrest v Australian Securities and Investments Commission (High Court, Gummow J / Mr Myers, 1 March 2012) (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) (‘Westpac v Bell’), Lee AJA of the Western Australian
Court of Appeal described s 180(1) as being ‘subject to’ s 180(2).53 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’.54 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.55
His observations do, however, suggest that the interpretation of s 180(2) is not settled.

These points notwithstanding, given the relative consistency with which the courts
have treated 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.56 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 with the plaintiff bearing the onus of proof. However he noted that s
180(2) is ‘not necessarily a complete reflection of the US position’ and, that while the
‘wealth of US case law on the subject’ provides a ‘useful resource’, his task was to
‘construe and apply the statute’.57 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’.58 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.59

53 (2012) 89 ACSR 1, [866].
54 Westpac v Bell (2012) 89 ACSR 1, [869].
55 Westpac v Bell (2012) 89 ACSR 1, [839].
56 See n 7.
57 Rich (2009) 75 ACSR 1, 629 [7261].
59 Rich (2009) 75 ACSR 1, 629-30 [7262]-[7264].
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 presumption applies only when certain requirements are satisfied’. 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. 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, 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.

According to Austin J this confusion only intensified in the second reading speech. 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. 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.’

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. 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’. 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

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60 Rich (2009) 75 ACSR 1, [7265].
61 Rich (2009) 75 ACSR 1, [7266].
62 Rich (2009) 75 ACSR 1, [7266].
63 Rich (2009) 75 ACSR 1, [7266].
64 Rich (2009) 75 ACSR 1, [7266].
65 Rich (2009) 75 ACSR 1, [7267].
66 Rich (2009) 75 ACSR 1, [7267].
67 Rich (2009) 75 ACSR 1, [7267].
68 Rich (2009) 75 ACSR 1, [7268].
69 Rich (2009) 75 ACSR 1, [7269].
of either ss 181, 182 or 183. 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’.  

3 Analysis of Austin J’s Reasons for Concluding that s 180(2) is a Defence

Most of the textbooks and journal articles that consider Rich have recorded Austin J’s decision to treat s 180(2) as a defence without demur. 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. 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 that the decision should therefore 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.

(a) Ground 1: Clear Statement in the EM

In Austin J’s assessment neither the text of s 180(2) nor the explanatory materials 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 materials 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.

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

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70 Rich (2009) 75 ACSR 1, [7269]. 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].

71 Rich (2009) 75 ACSR 1, [7269].


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

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 the defendant will be taken to have fulfilled their duty of care and diligence.

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 informed 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 conditions: 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 be referring to who bears the onus of proof.

But 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

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

\(^{76}\) *Rich* (2009) 75 ACSR 1, 630 [7266]
presumption that the director’s 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), with the onus on the plaintiff to try and rebut that presumption. Therefore, while his Honour is right that the use of the word ‘presumption’ in paragraph [6.4] does not 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.

(b) 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 and is therefore of ‘no real assistance’. 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. 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: 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.

Part II of this article argues that the mischief s 180(2) was introduced to address was uncertainty as to the state of the law, rather than excessive accountability. On this analysis, the two purposes in the explanatory materials are not in conflict at all, since it is possible to clarify the law without necessarily reducing directors’ accountability. 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

77 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.4], [6.10].
78 Acts Interpretation Act 1901 (Cth) s 15AA.
79 Rich (2009) 75 ACSR 1, 630 [7265].
80 Commonwealth, Parliamentary Debates, House of Representatives, 3 December 1998, 1285 (Joe Hockey);
81 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.3].
protect the authority of directors in the exercise of their duties’.\textsuperscript{82} In the same vein, according to CLERP Paper No. 3 the ‘underlying policy’ of the rule is to prevent courts from reviewing directors’ \textit{bona fide} business decisions.\textsuperscript{83} 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 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’.\textsuperscript{84} Interpreting the rule as a defence inappropriately ignores such statements.

\textbf{(c) 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,\textsuperscript{85} and that breaching one of these latter duties is a more serious matter than negligence. He endorsed Justice Santow’s observation in \textit{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.\textsuperscript{86} However, as discussed in Part II above, Australian courts have commonly exhibited reluctance to second guess a business judgment unless that judgment has involved a breach of one the director’s duties of good faith.\textsuperscript{87} Therefore, in practice, 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 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 the other elements contained


\textsuperscript{83} CLERP Paper No. 3, n 8, 26.

\textsuperscript{84} Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.4], [6.9].

\textsuperscript{85} In relation to the latter two sections, this is true in the broad sense that the existence of a material personal interest can lead to the misuse of position or information, \textit{Rich} (2009) 75 ACSR 1, [7269].

\textsuperscript{86} \textit{Rich} (2009) 75 ACSR 1, [7269], citing \textit{ASIC v Adler} [2002] NSWSC 171, [410].

\textsuperscript{87} Redmond, \textit{Corporations and Financial Markets Law}, n 37, 488; Harris, n 37, 415; Bird, n 20, 151.
in s 180(2) before the rule can be applied.\textsuperscript{88} 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’, it does not necessarily follow that the person best placed to prove something should have the burden of doing so and to put such an evidentiary burden on the director is at odds with the driving purpose behind the sub-section’s enactment.

**B 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’.\textsuperscript{89} Like all aspects of his consideration of s 180(2) in \textit{Rich}—other than his decision to treat it as a defence—Austin J’s observations in relation to s 180(2)(c) were obiter dicta. This is because his Honour found that the defendant director had not breached s 180(1) and therefore, since he had decided s 180(2) operated as a defence to s 180(1), it was not necessary to establish whether or not the elements of s 180(2) were satisfied in order to decide the case.

In relation to s 180(2)(c), 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, \textit{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.\textsuperscript{90} 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’.\textsuperscript{91} 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’.\textsuperscript{92} 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’.\textsuperscript{93}

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?  

This criticism is misplaced: it is clear from Justice Austin’s reasoning that he would answer this question in the negative. 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 directors take to inform themselves in the lead up to the particular judgment, rather than the extent to which directors have kept themselves generally informed as to the company’s business. 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 context of making the judgment in question, 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 that 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 (‘Van Gorkom’), in which 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. In Delaware 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.

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94 Legg and Jordan, 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 would have taken into account’, Harris, n 37, 421.

95 Legg and Jordan acknowledge that, in a later passage in Rich, Austin J makes it clear an objective assessment of the reasonableness of the director’s belief is required. However they argue the later passage ‘sits uncomfortably with his Honour’s earlier analysis’: Legg and Jordan, n 3, 421 citing Rich (2009) 75 ACSR 1, [7294]. Arguably Legg and Jordan’s criticism would be more appropriately directed to a more recent judgment. In Australian Securities and Investments Commission v Mariner [2015] FCA 589 ('Mariner') [492], [547], Beach J held that s 180(2)(c) was satisfied because the defendants had informed themselves to the extent they believed appropriate but his Honour did not express a view as to whether or not that belief was reasonable. Beach J did not provide any reasons for neglecting to consider the reasonableness of the defendants’ beliefs (in fact he affirmed the relevant sections in Rich that refer to the reasonableness requirement).

96 See also ALI, n 10, 171.

97 488 A 2d 858 (Del, 1985).
and that the board’s decision in that case should have passed a gross negligence test.98

In so far as s 180(2)(c) is concerned, in our view ‘gross negligence’ is not the appropriate standard to apply 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 the defendant director followed in order to inform him or herself in the lead up to making the judgment was a process that 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.99 There is nothing in the immediate context to suggest it should be interpreted otherwise.

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.100 However, even if the explanatory materials were to be considered, there is nothing in them that clearly indicates Parliament intended the word ‘reasonably’ in s 180(2)(c) to carry something other than its usual legal meaning. It is true that the text of s 180(2)(c) was taken directly from the ALI model provision. However, while the ALI’s commentary on the relevant part of its model provision mentions the ‘gross negligence’ test applied in Van Gorkom, it does not specifically endorse that test. The same part of the ALI commentary also cites other authorities that contend that it is ‘reasonable diligence’ that is required and it is not clear from the commentary whether the ALI intended that this standard, or a gross negligence test, should be applied in assessing whether directors have adequately informed themselves.101 Therefore, in the absence of clear evidence of a contrary intention, the term ‘reasonably’ in s 180(2)(c) should be given its usual legal meaning.

C ‘Rational Belief’ about the Corporation’s Best Interests
The final element of the rule contained in subparagraph (d) requires that directors ‘rationally believe that the judgment is in the best interests of the corporation’.102 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’.103

99 See, eg, Catch The Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 [93], [95], [197].
101 ALI, n 10, 170.
102 Corporations Act 2001 (Cth) s 180(2)(d).
103 Corporations Act 2001 (Cth) s 180(2).
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 a reasonableness standard would allow.104 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’.105

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.106 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.107

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.108 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 180(2)(d) unnecessary.109 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’.110 This purpose was said to be evident because directors could have quite easily been required to hold a reasonable belief.111 Thirdly, the Australian rule would thereby adopt an approach contrary to US jurisprudence.112

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’.113 His Honour stated that the drafters’ intention was to enliven the meaning of ‘rationally believe’ in the US business judgment rule;114 and,

104 Rich (2009) 75 ACSR 1, [7286].
106 Corporations Act 2001 (Cth) s 180(2)(d).
107 Rich (2009) 75 ACSR 1, [7288].
108 Rich (2009) 75 ACSR 1, [7288].
109 Rich (2009) 75 ACSR 1, [7288]. 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 questions that assumption. See also Hooper, n 6, 427-428.
110 Rich (2009) 75 ACSR 1, [7288].
111 Rich (2009) 75 ACSR 1, [7288].
112 Rich (2009) 75 ACSR 1, [7288].
113 Rich (2009) 75 ACSR 1, [7289].
114 Rich (2009) 75 ACSR 1, [7289].
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 or reasoning', and that it was this latter idea that the drafters intended to capture.\textsuperscript{115} 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”.\textsuperscript{116}

To the extent that subsequent cases have considered s 180(2)(d) they have tended to apply Austin J’s interpretation of it.\textsuperscript{117}

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 that applies in Delaware.\textsuperscript{118} 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 in order to make the reasoning ‘arguable’, what standard of reasonableness will be applied to the assumptions? These questions are not answered. Nor is it clear from his Honour’s analysis why Parliament would have used the words ‘no reasonable person’ if they did not have some kind of standard of reasonableness in mind.\textsuperscript{119}

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 unreasonable’ ground of judicial review in administrative law.\textsuperscript{120} 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 come to it’;\textsuperscript{121} 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

\textsuperscript{115} Rich (2009) 75 ACSR 1, [7289].
\textsuperscript{116} Rich (2009) 75 ACSR 1, [7289].
\textsuperscript{117} See, eg, Mariner [2015] FCA 589, [493]-[494].
\textsuperscript{118} Legg and Jordan, n 3, 425.
\textsuperscript{119} Legg and Jordan, n 3, 424.
\textsuperscript{120} Hooper, n 6, 425-426.
\textsuperscript{121} Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
person … would hold’ in s 180(2) should be interpreted through the lens of the case law on Wednesbury unreasonableness.

While Hooper’s wider point regarding the notion of ‘degrees of reasonableness’ is well made, it is doubtful that Parliament 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 that sits at the heart of administrative law.122 There are important differences between the balance that 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.123

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 (‘Wayde’) 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’.124 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’.125 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.126 In a similar vein, in Welcome Homes Real Estate v Ziade Investments the NSW Court of Appeal noted that the ‘reasonable person’ test in s 588FB of the Corporations Act did not require proof that a transaction was so unreasonable that no reasonable person would have entered into it.127 The implication being 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 that applies to that particular provision.

123 Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council (2010) 174 LGERA 67, 94-95 [105]-[109] (Tobias JA).
125 Wayde (1985) 61 ALR 225, 231.
126 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, n 37, 462, n 120.
127 [2007] NSWCA 167, [1], [54], [72].
Specifically in the context of cases on directors’ duty of care, there are also parallels between the ‘no reasonable person’ wording and the ‘no men with any ordinary degree of prudence’ formulation that formed part of the ‘gross negligence’ test from Overend and Gurney: a test that was frequently cited in corporate duty of care cases up until the NSW Court of Appeal decision in Daniels. As discussed earlier in this article, while Daniels clearly rejected Overend and Gurney’s focus on what the director subjectively knew about a company’s operations, it is unclear whether the majority in Daniels also intended to reject the way the above-quoted phrase from Overend and Gurney (and other passages in that case) set the standard of care below the more usual ‘reasonable person’ test. Arguably s 180(2)(d) was introduced to clarify this uncertainty by reasserting a ‘no reasonable person’ formulation, at least in relation to a director’s assessment as to whether a decision is in the corporation’s best interests.

It is also illuminating to consider how courts have interpreted the fiduciary duty that corresponds most closely with s 180(2)(d): the duty to act in good faith in the best interests of the corporation, codified in s 181(1)(a). While it is relatively well accepted that the latter duty has an objective element, that objective element is tempered by the courts’ reluctance to interfere in directors’ business decisions. Commenting on UK cases regarding this duty, Kershaw notes that:

> To convey the idea that the standard is below one of reasonableness the courts sometimes express it in the following terms: that no reasonable director could have taken the decision in question … In summary, in theory a director complies with the duty to act in good faith in the best interests of the company if she actually believes the action is in the company’s interests … In practice, however, the evidentiary difficulties of assessing a director’s state of mind at the time of the decision lead the courts to look not only at what she actually believed, but also at what a director could have plausibly believed.

Similarly, in the 2008 Australian case of Bell v Westpac Owen J undertook a careful examination of the relevant authorities and, drawing on Wayde, concluded that the test for s 181(1)(a) is largely (but not solely) subjective and that any objective enquiry is 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.

On appeal, Carr AJA agreed with Owen J’s summary of the relevant law; Drummond AJA held that the test for the duty to act in the company’s best interests is purely

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128 Overend and Gurney (1872) LR 5 HL 480, 486-487.
130 (2008) 70 ACSR 1, [4583]-[4619].
131 Bell v Westpac (2008) 70 ACSR 1, [4619] (emphasis added).
subjective; and Lee AJA held that even if a director subjectively believes they are acting in the company’s best interests the duty can still be breached if, assessed objectively, the conduct is ‘plainly unreasonable or irrational’.132 These various formulations indicate that the interpretation of s 181(1)(a) 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 that make it significantly more deferential to directorial authority than would be the case if a ‘reasonable person’ test was applied.

Drawing on these and comparable corporate law cases,133 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. That is, rather than applying a standard ‘reasonable director’ test, judges should take as wide a view as possible of what a reasonable director could possibly consider to be for the benefit of the company. Only judgments that 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 that applies in Delaware.

While in many cases this interpretation of s 180(2)(d) would generate similar outcomes to the test that Austin J proposes in Rich, our interpretation would clarify that relying on one or more completely unreasonable assumptions would be sufficient to deny a director the protection of s 180(2), no matter how logical the director’s reasoning process in relying on such assumptions to make a business judgment. An added advantage of our proposed interpretation is that it does not require the court to determine, as an evidentiary matter, the director’s state of mind at the time the decision was made. Even if the director’s reasoning process in making the decision is unclear on the evidence, the court can still determine whether no reasonable person in the director’s position could have made the decision.

IV Policy Criticisms of s 180(2)

Corporate governance’s central concern is striking an appropriate balance between protecting directors’ authority to freely make decisions and ensuring that those decisions are made within an effective accountability framework.134 Whereas some of s 180(2)’s critics claim it has pushed the balance too far towards protecting directors’ authority 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

132 Westpac v Bell (2012) 89 ACSR 1, [923], [1988], [2736].
133 See also Shuttleworth v Cox Bros & Co (Maidenhead) Ltd [1927] 2 KB 9, 18 (Bankes LJ), quoted in Redmond, Corporations and Financial Markets Law, n 37, 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’.
focus of recent public debate regarding the rule, largely as a result of two proposals for legislative reform that emerged in 2014—one released by the AICD and one by the Hon Robert Austin.\footnote{AICD, *Honest and Reasonable Director Defence*, n 3; the Austin proposal is extracted in full in Harris, n 37, 422-3.} While assessing the relative merits of these proposed reforms is beyond the scope of this article,\footnote{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.} the perceived limitations in the rule’s current operation that they seek to cure is of direct interest. This section argues that our proposed reinterpretation of the rule could make significant progress in addressing the most important policy criticism underlying these proposals, and that it could do so without adding force to the concerns of those critics who believe s 180(2) is inappropriately generous to directors.

**A Claims that the Rule is Not Doing Enough to Promote Entrepreneurial Risk-Taking**

Parliament introduced the rule to reduce directors’ fear of attracting personal liability so that they would become more entrepreneurial and less risk-averse. The AICD’s central criticism of the rule is that it has failed to achieve this goal. The organisation 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 good faith business decisions and that 65.3% indicated a fear of personal liability was making them overly cautious in relation to business decisions.\footnote{Australian Institute of Company Directors (AICD), *Impact of Legislation on Directors* (November 2010) <http://www.companydirectors.com.au>, 44.} As further evidence of s 180(2)’s ineffectiveness, the AICD points out that no director has successfully relied on s 180(2) to escape liability after having been found to have breached their duty of care.\footnote{AICD, *Honest and Reasonable Director Defence*, n 3, 6.}

Regarding the latter point, Parliament 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.\footnote{Bird, n 20, 152.} As discussed in Part II above, CLERP Paper No. 3 did not claim that, in general, the courts were failing to treat informed and disinterested business judgments with appropriate deference. However the CLERP paper did argue the courts had not applied what it described as the general law ‘business judgment doctrine’ in a consistent manner and claimed this inconsistency was creating uncertainty among directors as to the circumstances in which their business judgments would be protected.\footnote{CLERP Paper No. 3, n 8, 22, 24.} Accordingly s 180(2) was introduced to clarify and confirm this ‘doctrine’ rather than to significantly change the way in which, in general, the courts had approached this issue.
Of course, rather than a well-defined rule, this ‘doctrine’ could be more accurately described as a strong tradition of judicial deference to directors’ informed business decisions except where those decisions indicate gross negligence or have breached one of the duties of loyalty.\textsuperscript{141} Turning this tradition of deference into a statutory provision with separate elements required considerable gap-filling and in particular cases it has the potential to lead a judge to make a different decision to that which they might have made in the absence of the rule. Be that as it may, s 180(2) was not introduced for the direct purpose of creating additional circumstances in which directors could escape liability for breaching their duty of care and therefore, 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.

However the AICD’s surveys potentially provide stronger evidence that the provision is not fulfilling its purpose. Assuming these surveys are accurate,\textsuperscript{142} they indicate fear of personal liability is having a significant impact on directors’ appetite for risk. The extent to which managerial risk-taking is desirable is, of course, open to debate.\textsuperscript{143} However, 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 excessively, rather than appropriately, restraining entrepreneurial risk-taking.

But the directors who hold this belief are clearly mistaken. Varzaly could find only 30 reported cases in the period between March 2000 and December 2011 in which directors were found liable for breaching their duty of care—roughly three per year.\textsuperscript{144} And while our case review focused on cases that specifically refer to s 180(2) rather than on all duty of care cases, our research bears out Varzaly’s findings. Given 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 that directors’ fears in this regard are ‘overblown’.\textsuperscript{145} That is not to say that these fears are not genuinely held. As Fox has noted, ‘perception can drive reality’ in relation to this issue and an ill-informed belief regarding potential liability can just as powerfully limit directors’ risk-taking as a well-informed one.\textsuperscript{146} Therefore those critics who claim s 180(2) is nothing but ‘window dressing’ or ‘a sleepy hollow’ because of the similarities between s 180(2) and the common law position are

\textsuperscript{141} Redmond, Corporations and Financial Markets Law, n 37, 488; Harris, n 37, 415; Bird, n 20, 151.

\textsuperscript{142} Some commentators have questioned the extent to which the AICD’s surveys should be relied upon, as the organisation clearly has a particular agenda: Harris, n 37, 423; Varzaly, n 2, 431; Golding, n 26, 268. However the 2010 AICD survey (cited above) was conducted in collaboration with the Department of Treasury and a comparable survey conducted by Chartered Secretaries Australia in 2006 also came up with very similar findings: Chartered Secretaries Australia, Submission to the Treasury on the Review of Sanctions for Breaches of Corporate Law (2007), cited in Antoinette Sernia and Mei-Ling Barkocz, ‘Directors beware: Corporate sanctions and defences, a matter for review?’ (2009) 16(1) Murdoch University Electronic Journal of Law 134, 136; AICD, n 140, 44.

\textsuperscript{143} See, eg, Sernia and Barkocz, n 142, 136.

\textsuperscript{144} Varzaly, n 2, 451-2; see also Golding, n 26, 273, 287-8.

\textsuperscript{145} Golding, n 26, 273.

\textsuperscript{146} Fox, n 136, 221.
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.

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 standard of care expected of directors, 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 mistaken decision to interpret the provision as a defence 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) 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 put to the test for breaching your duty of care in relation to that judgment unless the plaintiff can prove that you had a material personal 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 clarifying the operation of s 180(2) will not be enough to persuade directors to become more entrepreneurial and that directors in fact need additional protection from potential liability. To some extent such an argument underlies the two proposals for legislative reform that emerged in 2014. Both would extend protection beyond directors’ duty of care and the AICD proposal would extend protection beyond business judgments, to include directors’ oversight.


148 See Bird, n 20, 152.

149 See Bird, n 20, 152.

150 See Bird, n 20, 152.
The Austin 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 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.¹⁵¹

The proposal to extend protection beyond the duty of care is at least worthy of consideration, since it is possible it is fear of other sources of liability—rather than fear of liability for breaching their duty of care—that 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, the significant discrepancy between directors’ perceptions of the risk they face and the reality of that risk suggest 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) 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.¹⁵² 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’.¹⁵³ In practice the fact that, interpreted as a defence, s 180(2) 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 rebuttable presumption would bring it closer to the US approach, our proposed interpretation is based on the belief that s 180(2) was introduced to clarify and confirm the common law position and therefore we have avoided interpretations that would reduce the standard of care expected of directors. For example, 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

¹⁵¹ See Harris, n 37, 422-3.
would apply a stricter ‘reasonable person’ test for s 180(2)(c). Further, whereas the US rule does not require that the director’s judgment be for a proper purpose, this 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 primary subjective purpose underlying the director’s decision the court will then objectively assess whether or not that purpose was proper.\(^{154}\) The inclusion of this element in s 180(2) will 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 s 180(2) has continued to be a matter for public debate. Whether or not they agree with the AICD’s criticisms, most commentators have argued some form of legislative reform is desirable and have variously recommended amending or replacing the rule.\(^{155}\) This article has instead considered the scope for an appellate court to reinterpret the rule and has proposed and defended an interpretation that differs from the current judicial approach in a number of important ways. This proposed reinterpretation is guided by what we have argued is the rule’s primary purpose: not to lower the standard of care required of directors but rather to clarify and confirm what Farrar calls the ‘general judicial attitude … of leaving business decisions to business people in the absence of abuse or self-interest’.\(^{156}\) If our reinterpretation was accepted, the rule would operate as a rebuttable presumption, not as a defence; s180(2)(d) would be applied in a way that accepts the possibility of degrees of reasonableness; and the interpretation of s180(2)(c) would be further clarified to ensure the rule does not overstep its purpose by reducing the standard of care expected of directors in informing themselves before they take 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. Fundamentally, the rule would be given the chance to perform the psychological function for which it was introduced.

\(^{154}\) *Howard Smith* [1974] AC 821, 832.

\(^{155}\) See n 3.

\(^{156}\) Farrar, quoted in O’Bryan, n 40.