



## Directors to hide from a sea of liabilities in a new safe harbour

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*The current business judgment rule provides a possible safe harbour to protect officers from claims they have acted without the appropriate level of care and diligence. Under consideration for some time has been a proposal to introduce a broader and more generic type of rule to provide protection against actions based upon any of the 'core' duties. It would extend immunity from liability to cover s 181 (Duties of Good Faith), s 182 (Use of Position), s 183 (Use of Information) and s 588G (Insolvent Trading). This proposal was part of a Treasury Department review of corporate law sanctions. Although there has since been a change in government, early indications would suggest the Minister would be supportive of such an approach and the new government has already taken steps to review directors' liabilities and consider the merits of a broader business judgment rule. The purpose of this article is to identify the risks and inherent difficulties that must come from this type of safe harbour. While the proposal may appear to be a simple extension of the existing rule, the reality is that it must be quite different. In the form it is likely to take there is the potential for it to be too generic and weak. It is argued that it fails to take into account the nature of the extra duties affected and the principles that underpin them. Further, in attempting to overcome some practical concerns of directors, a new set of risks will be created that could undermine the legal cornerstones of good corporate governance.*

### 1 Introduction

#### 1.1 The current proposals regarding the new safe harbour and its rationale

The Treasury released a discussion paper in 2007 which was intended to form the basis of a review of civil and criminal sanctions in the Corporations Act: 'Review of Sanctions in Corporate Law'.<sup>1</sup> That paper considered a new form of safe harbour for directors designed to protect against liability from all of the core duties including:

- s 181 Duties of Good Faith;
- s 182 Use of Position;
- s 183 Use of Information; and
- s 588G Insolvent Trading.

It may, at first, appear as though it is a simple question of whether the current business judgment rule should be extended beyond its application in s 180 of the Corporations Act (and the equivalent common law duty) to cover

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<sup>1</sup> The Treasury, 'Review of Sanctions in Corporate Law', 2007, at <http://www.treasury.gov.au>.

the risk of liability from these other duties. Closer analysis however reveals that this new type of safe harbour must be quite different. The current business judgment rule preserves the duties of good faith and then focuses on the essence of the duty of care and diligence in the decision-making process. Because the proposed new rule seeks to offer protection against breaches of all core duties it has necessarily employed much broader terminology. This may mean the links with the duties themselves will be lost or weakened.

The rule as it had been originally proposed would invoke general protection for directors where they act:

- in a bone fide manner;
- within the scope of the corporation's business;
- reasonably and incidentally to the corporation's business; and
- for the corporation's benefit.<sup>2</sup>

The underlying rationale for a general and consistent defence for directors that will apply across all core duties is to 'alleviate concerns that some sanctions are adversely affecting directors' willingness to engage in responsible risk taking . . .'.<sup>3</sup>

It is argued it will strike a better balance between the need for sanctions against undesirable behaviour and the taking of appropriate commercial risks. With respect, this has always been behind the push for a safe harbour since the inception of the current business judgment rule. While so difficult to quantify, the question has always revolved around the issue of the extent to which the threat of personal liability for directors hampers their ability or desire to engage in appropriate and commercial risk taking. The company is held out as being the very vehicle that is meant to support entrepreneurial activity rather than create risk aversion.

It is this issue which seems to have struck a cord with the Minister for Superannuation and Corporate Law, Nick Sherry. Early indications would suggest support for the argument that the current law on corporate governance matters could be causing inappropriate risk aversion in our directors. In February 2008, in a paper delivered on the minister's behalf by the Secretary to the Treasury, Dr Ken Henry, the minister made the following interesting comments:

Australia's corporate governance framework is highly regarded, both domestically and internationally.

However, in recent years a cross-section of the business and legal community has suggested that the law could do more for corporate governance, such as making the standards required of our corporate leaders more precise. The specific concern is that our corporate regime is causing directors to be overly cautious when making decisions, particularly in fast-moving and complex business situations.

The decisions that directors make are central to the efficient operation of companies and the wellbeing of our economy. Therefore, it is vital that directors' duties and the associated sanctions provide the right incentives to create value.

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<sup>2</sup> Ibid, p 29.

<sup>3</sup> Ibid.

To this end, Treasury is examining these issues to improve and clarify the corporate governance regime and will consult widely with industry and the regulators to this end.<sup>4</sup>

This consultation by the government has already begun. It has been:

surveying 600 company directors to clarify the standards expected of them, with a view to preparing a submission to Federal Treasury on potential legal changes. Directors are calling for the government to extend the business judgment rule, which offers limited protection for breaches of directors' duties, arguing that liability curbs risk-taking.<sup>5</sup>

So while there may still be further consultation, the current review of sanctions and proposals such as the broader safe harbour would appear to still be well and truly on the table. It is worth noting that this recommendation for reform is one of many still awaiting the attention of the government. In a recent article in the *Australian Financial Review* there was the suggestion that corporate law reform was at a standstill.<sup>6</sup> It highlights seven major corporate law reviews, including the one dealing with the issue in this article, that are still awaiting review and action.<sup>7</sup> Even in this environment the article emphasised the following comment from Mr Douglas Gratton, a director of Clarendon Lawyers, on the review of directors' duties:

the key outstanding reform required in this area is an extension of the business judgment rule to all directors duties.

Though we must wait to see what the government will propose, it is likely this particular proposal will find the necessary support, politically and through the efforts of relevant stakeholders, to again put it prominently on the agenda for legislative reform. At that time it is hoped that the comments in this article are considered. As will be shown in later analysis, it will be argued that the claim at the heart of the proposal that the current legal regime causes serious risk aversion in directors is to greatly overstate the matter. Rather, theory would support an argument that directors may, on the whole, be considered risk averse in any event because of a number of factors inherent in the corporate structure. To suggest this is fundamentally the result of the relevant liability provisions and that the problem can be overcome by a broader and

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4 K Henry on behalf of Senator, The Honourable Nick Sherry, Minister for Superannuation and Corporate Law, 'Keynote Address to ASIC Summer School', 19 February 2008, Melbourne, at <[http://www.treasury.gov.au/documents/1346/HTML/docshell.asp?URL=Ministers\\_Speech\\_to\\_ASIC\\_Summer\\_School.htm](http://www.treasury.gov.au/documents/1346/HTML/docshell.asp?URL=Ministers_Speech_to_ASIC_Summer_School.htm)>.

5 J Eyers and C O'Toole, 'Directors face higher premiums', *The Australian Financial Review*, 20 May 2008, p 1.

6 R Nickless, 'Corporate Law Reform at Standstill', *The Australian Financial Review*, 25 March 2008, p 6.

7 Ibid. The seven reviews considering corporate law reform that were listed are: Treasury paper on directors' duties and defences released 2007; Treasury paper on sanctions in corporate law released 2007; Corporations and Markets Advisory Committee report on personal liability for corporate fault released September 2006; Treasury review of infringement notice regime, started 2006 but not yet completed; Corporations and Markets Advisory Committee report on duties below board level, released April 2006; Corporations and Markets Advisory Committee report on insider trading, released in November 2003 and related Treasury discussion paper; and Corporations and Markets Advisory Committee report on corporate groups, released May 2000.

new type of safe harbour is unsupported. Further, it will be demonstrated that the new safe harbour will bring with it particular risks that have the potential to damage the effectiveness of the current duties of good faith and the duty to prevent insolvent trading.

## 1.2 The development of the safe harbour concept in Australia

The whole question of safe harbours has been canvassed in Australia since the late 80s and early 90s. The business judgment rule first appeared as a recommendation from the Senate Standing Committee on Legal and Constitutional Affairs in 1989<sup>8</sup> and gained momentum in the few years that followed. It became a recommendation from the Companies and Securities Law Review Committee in 1990<sup>9</sup> and the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1991.<sup>10</sup> There were of course academic and other institutional champions for the cause, including the Business Council of Australia and the Australian Institute of Company Directors (AICD).<sup>11</sup> The government when considering this issue at the time of the Corporate Law Reform Bill of 1992, decided to leave the matter to be developed by the courts, as had been the case in the United States where the concept originated.<sup>12</sup> There was a view that the ability of the courts to provide relief against liability through s 1318 of the Corporations Act allowed scope for this development.<sup>13</sup> Relief in that sense of course could not equate to a true safe harbour and the presumption of having no liability in the first place,<sup>14</sup> but nevertheless the wind went out of the sails of the proposition.

Although not appearing in the legislation, the proponents of the business judgment rule may not have been too concerned about leaving the matter to the courts in the year 1992 when Chief Justice Rogers handed down his judgment in *AWA Ltd v Daniels*.<sup>15</sup> As explained by Robert Baxt, the AICD campaign, among others, for the business judgment rule was “snuffed out” (or rather thought of to be unnecessary) as a result of that decision.<sup>16</sup> When this judgment was criticised on appeal<sup>17</sup> an increasing lack of confidence in the ability of the courts to deliver the appropriate and consistent principles

8 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, para 335.

9 Companies and Securities Law Reform Committee, *Company Directors and Officers: Indemnification, Relief and Insurance*, Report No 10, May 1990, at [68]–[92].

10 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders*, November 1991, para 5.4.30.

11 For a brief history of the attitude and campaigns of the AICD at this time refer to R Baxt, ‘The Business Judgment Rule: Have we reached a safe and sensible landing?’ (2006) 2(2) *Baxt Report* 3 at 3.

12 For a discussion of this early history of the business judgment rule refer to R P Austin, H A J Ford and I Ramsay, *Company Directors; Principles of Law and Corporate Governance*, LexisNexis Butterworths, 2005, pp 240–2.

13 Explanatory Memorandum to the Corporate Law Reform Bill 1992, paras 88–89.

14 J H Farrar, ‘Towards a Statutory Business Judgment Rule in Australia’ (1998) 8 *Aust Jnl Corp Law* 237 at 241.

15 (1992) 7 ACSR 759.

16 Baxt, above n 11, at 3.

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

developed. This led to a new campaign<sup>18</sup> that was ultimately successful in seating the rule within the statutory duty of care and diligence (but with its application extending also to the common law equivalent of that duty).<sup>19</sup>

It would have been expected that in putting forward a broader safe harbour that there would have been a particular focus on any new terminology and its effects on the duties of good faith and the duty to prevent insolvent trading. With respect, these issues have not been well canvassed. Perhaps this has to do in part with understanding the nature of the operation of the new rule. If it is to operate as a true safe harbour, that is, as a presumption of no liability rather than some defence to the duty itself, then perhaps there may be an attempt to argue it can stand on its own merits as a matter of policy. If its terms are not met, then the question of potential breaches of any of the possible specific duties will come afterwards. However, these matters cannot be so easily separated. Whether as a safe harbour or defence the new rule could protect directors from liability under all major duties and the relationship with each therefore must be appreciated. Against this background however the review largely revisited the existing generic arguments in support of a business judgment rule with only limited attention to these specific matters. That limited attention only comes in the form of some debate regarding the effect on the duty to prevent insolvent trading and without any regard to the duties of good faith.

The government did ask for submissions on the current proposal in its consultation paper, *Corporate and Financial Services Regulations Review*.<sup>20</sup> Submissions received in support touched on the following:

- There would be additional certainty about the legality of directors' actions that would allow for less constrained decision-making;
- The broader rule would help to focus a director's attentions on the interests of the company;
- Protection should specifically extend to insolvent trading provisions to save those directors who genuinely take appropriate decisions to try and trade out of difficulties.

Apparently only a small number of submissions opposed any extension of the existing rule. Possible specific negative consequences put forward included the following:

- It could add to the complexity and cost in prosecuting potential breaches;
- Allowing it to extend to the insolvent trading provisions would only weaken their operation on the basis that it may be easier to take advantage of this new defence than existing protections.

The purpose of this article is not to review the merits of having a safe

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18 Baxt, above n 11, at 4; Farrar, above n 14, at 238 in reference to the following evidence of support: Submission to Treasury by the Corporations Law Committee of the Australian Institute of Company Directors on Duty of Care and the Business Judgment Rule, June 1997; D Tan, 'Delivering the Judgment on a Statutory Business Judgment Rule in Australia' (1995) 5 *Aust Jnl Corp Law* 442; R Baxt, 'Do We Need a Business Judgment Rule for Company Directors?' (1995) 69 *Aust Law Jnl* 571; L Law, 'The Business Judgment Rule in Australia: A Reappraisal Since the AWA Case' (1997) 15 *C&SLJ* 174.

19 Corporations Act s 180(2).

20 Australian Government, April 2006.

harbour like the current business judgment rule as a process. Rather, it is to question whether such a broader protective rule should operate at all to provide immunity against the duty to prevent insolvent trading and potential breaches of the duties of good faith. The first step in this process is to give consideration to its possible terms.

## 2 The current business judgment rule and the proposed terms of the new 'generic' rule

The current business judgment rule has the following four requirements which must be met before the protection is provided:

- (a) the judgment must be made in good faith and for a proper purpose;
- (b) the officer must not have a material personal interest in the subject matter of the judgment;
- (c) the officer must be informed about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
- (d) the officer must rationally believe that the judgment is in the best interests of the corporation.<sup>21</sup>

The first thing to note about the current wording is that it preserves the duties of good faith within it. It is no accident that the business judgment rule requires the officer to have otherwise acted in a manner consistent with the same duties of good faith contained in s 181 of the Corporations Act before it can be invoked. Indeed it seems clear that there is an evidentiary onus on the officer to demonstrate an appropriate level of conduct in relation to these duties before being able to take advantage of the rule.<sup>22</sup>

One of the fundamental problems with extending the rule to cover the duties of good faith in s 181 of the Corporations Act is that retaining this first requirement becomes a nonsense. It would be absurd to require evidence of having met the duties of good faith in order to get protection from liability for not having met the duties of good faith. Of necessity therefore, to introduce a safe harbour across all of the core duties, you must apply a different generic rule. This generic rule must logically be new in terminology to give it broader application and this will bring with it all the potential problems of interpretation.

As already indicated it would seem the proposed new generic rule would require directors to meet quite different criteria. Directors would apparently gain protection where they act:

- in a bone fide manner;
- within the scope of the corporation's business;
- reasonably and incidentally to the corporation's business; and
- for the corporation's benefit.<sup>23</sup>

Before analysing the terms of the new safe harbour it is worth reflecting on the nature of such a rule. Should this safe harbour stand on its own and be independent of the duties, to reflect the more general expectations on officers,

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<sup>21</sup> Corporations Act s 180(2).

<sup>22</sup> *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq)*; *ASIC v Adler* (2002) 41 ACSR 72; BC200200827 at [407]–[410].

<sup>23</sup> The Treasury, above n 1, p 29.

or is its purpose to provide more certain guidance on the essence of the duties themselves to allow officers to act with more confidence and certainty? An examination of the current business judgment rule would suggest it is the latter. An examination of this new safe harbour would suggest we are dealing with a completely new animal.

The current business judgment rule has built into it the essence of the duty of care and diligence itself. The first two elements endorse the significance of matters of good faith and integrity and the last two focus on the process and objectivity of good decision-making. The need to be appropriately informed on the subject matter has been at the heart of the development of the law on this duty. Further, the need to make a rational judgment in the interests of the company reflects the law's development towards requirements of objectivity both in the decision and in acting in accordance with a standard to be expected of someone in that position.

The proposed new safe harbour bears little resemblance to the elements of the duties from which it will provide protection. The first criticism is simply that it lacks that connection. I suspect there could be an argument that a generic safe harbour should have a different purpose. Perhaps it should be seen as standing on its own, independent of the duties, to reflect and promote more general expectations of officers and certainty of decision-making. With respect, this is inherently hard to accept given that it would guarantee protection against all of the core duties themselves. But in any case, it must be doubted whether these specific words do actually reflect generic expectations and certainty.

Of all the four elements, the first would seem most troublesome, at least in terms of providing certainty. How would the requirement that a director act with 'bona fides' be interpreted? It would seem most closely connected to older common law terminology used when expressing the directors' duty to act in the interests of the company.<sup>24</sup> To act bona fide in this sense was to exercise the director's power honestly,<sup>25</sup> for the purpose conferred and in the interests of the shareholders as a whole.<sup>26</sup> If this element was meant to pick up on this older notion of acting honestly then it would theoretically also include the principles of good faith but then obviously there will be doubts about the extent.<sup>27</sup> In any event there will be concerns about the sense of having to prove one acted honestly to gain protection from the breach of a

24 *Chew v R* (1991) 5 ACSR 473 at 499; 4 WAR 21.

25 Note that in D Greenberg, *Stroud's Judicial Dictionary of Words and Phrases*, 7th ed, Vol 1, Sweet & Maxwell, London, 2006, pp 296–8 the term 'bona fide' is defined with great difficulty given its use in many different contexts. It does settle however on a fundamental meaning along the lines of 'honestly' in reference to *R v Holl* (1881) 7 QBD 575.

26 *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306; [1942] 1 All ER 542; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 137; [1942] 1 All ER 378; *Re Southern Resources Ltd; Residues Treatment and Trading Co Ltd v Southern Resources Ltd; sub nom Residues Treatment and Trading Co Ltd v Southern Resources Ltd (No 2)* (1989) 7 ACLC 1130 at 1147; 15 ACLR 770. For a detailed discussion on the authorities and the difficulties of defining acts that are in the best interests of the company refer to R Langton and L Trotman, 'Defining The Best Interests of the Corporation: Some Australian Reform Proposals' (1999) 3 *Flinders Jnl of Law Reform* 163.

27 *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199 at 206 per Knox CJ, 217 per Isaacs J; 30 ALR 53; BC2300005.

duty of good faith. Further, there will be other questions about how to test the levels of bona fides? In the context of the common law duty, whether the director did so act in a bona fide manner for a proper purpose was determined subjectively.<sup>28</sup> How does this then sit with the other more objective notions of honesty and, more importantly, to what extent does the use of bona fides support the broader and more stringent principles of law that better reflect the current standards of expectations regarding good corporate governance?

The second and third elements seem to have their attention on the same issue, which on the face of it, is whether the directors are acting *intra vires*. Surely this does not have to be part of a generic defence. It is a sad indictment of officers that we would need to flag this issue with such emphasis as being a key expectation in terms of behaviour. It falls naturally out of an understanding of the sources of power within the company for directors and boards as a whole rather than needing to be integrated with each decision-making process.

Finally, to simply require that directors' act for the corporation's benefit, would ignite again questions about subjectivity and objectivity. Would it be adequate that the director hold this intention without any benefit being realised? Would it be adequate if the particular director saw the benefit even though they were not acting or making decisions to the objective standard that would be expected of someone in that position? Even if there was a role for a stand alone safe harbour to emphasise generic expectations of directors this could not fit the bill.

The rest of this article leaves aside the obvious difficulty with terminology. It has as its focus the broader question of whether, in any event, it is appropriate to extend the operation of a safe harbour to the specific duties in relation to the prevention of insolvent trading and acting in good faith.

### **3 The consequences of the new safe harbour for the specific core duties**

#### **3.1 A new safe harbour to protect against the duty to prevent insolvent trading?**

The original consultation paper from the Treasury, containing the proposals to extend the operation of a business judgment rule to the duties of good faith and insolvent trading, was released on 16 April 2006.<sup>29</sup> Not long after that Robert Baxt came out strongly in favour of this move and supplied further arguments to help push along the proposition.<sup>30</sup> It was suggested in that article that this was 'a sensible and important development in corporate law reform'.<sup>31</sup> Further, it was said to display 'a more mature approach by our principal policy makers in dealing with the obligations of company officers'.<sup>32</sup> While the article generally considered why a broader business judgment rule

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<sup>28</sup> *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483; 42 ALJR 123; BC6800800.

<sup>29</sup> The Treasury, 'Corporate and Financial Services Regulation Review', 2006.

<sup>30</sup> Baxt, above n 11.

<sup>31</sup> *Ibid*, at 3.

<sup>32</sup> *Ibid*.



was appropriate and should not be feared, there was considerable focus specifically on the question of extending its operation to protect against possible insolvent trading actions. This attention reflected the author's own assessment that this was the 'most controversial proposal'.<sup>33</sup>

The arguments canvassed the following key issues:

- That the case law on the current business judgment rule confirms how difficult it is to take advantage of the safe harbour. The standard being applied and the level of evidence necessary should be a comfort to those who may see this as some form of easier escape from the duties themselves;<sup>34</sup>
- That this standard is also evidenced in the cases that considered the defences to insolvent trading. The courts' reluctance to forgive breaches is claimed to provide further evidence that a business judgment rule extended to this duty would not open the floodgates and be applied more generously;<sup>35</sup> and
- That there is an underlying imperative that the law should better encourage the entrepreneurial activity of the directors. 'The role of company directors in the context of the insolvent trading provisions, should, in my view, be considered against a persistent judicial "concern" that we should not snuff out the entrepreneurial spirit of directors.'<sup>36</sup>

The first two issues above touch upon a fundamental and practical reality. Any new and improved version of the business judgment rule will still be subject to the interpretation and values of the courts. It is unlikely that the standards expected of company officers that have been painstakingly developed and honed over many years will abruptly be lost. Those expectations have changed with the times and will no doubt continue to do so in a manner consistent with developing business practices. However as a matter of policy it is difficult to place too much emphasis on judicial attitudes which may be hampered by the final drafting of a new rule.

The final issue mentioned above, and the driving force behind the safe harbour concept, is this notion that directors must take risks. It is argued the law should, provided the directors act honestly, reasonably and without conflicts, support appropriate risk taking and entrepreneurial activity. Baxt put this very eloquently:

There will still be a reluctance on the part of directors to take risks notwithstanding the existence of the (business judgment rule), however at least there will be that window of opportunity given to directors in some cases to take the necessary risks that are commensurate with the existence of a entrepreneurial spirit which may lead to greater success and fewer company collapses rather than more cases which have to be taken to the courts to assess the alleged breach of directors' duties.<sup>37</sup>

The Treasury paper itself, in reference to another Baxt paper, put the matter more bluntly:

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33 Ibid, at 6.

34 Ibid.

35 Ibid, at 8–11.

36 Ibid, at 6.

37 Ibid, at 12.

One viewpoint is that many directors who take risks when their company is close to financial insolvency do so in the genuine belief that by taking the appropriate investment or other decision, the company may be able to trade out of its financial difficulties and should therefore have the benefit of additional legal protections.<sup>38</sup>

With respect, this proposition evidences in itself the very reason why it cannot be accepted.

The real issue here is the timing of the risk taking. In its current form the business judgment rule provides a safe harbour against claims that the director did not exercise the appropriate care and diligence in their decision-making (s 180 of the Corporations Act). If they were adequately informed and acted rationally in the interests of the company they can take appropriate risks and not be the subject of further action.<sup>39</sup> To extend this rule to cover the situation where the company is on the brink of insolvency is to give support to risk taking which must inherently be different and much more dangerous. Although possibly acting with the best of intentions, directors may at this time take an 'all or nothing' approach which would lead them to take much riskier decisions than may have ever been contemplated when the company had better prospects. One cannot equate the rational risks contemplated by the current rule because of its application to s 180 of the Corporations Act and the possible 'save at all cost' risk when it is known the company may not survive.

A recurrent theme in the Robert Baxt article is that there is a general reluctance by directors to take risks and that this is not going to change following a broadening of the business judgment rule. While risk-averse behaviour may generally be evident when the company is a going concern, economic theory has long recognised the dangers in the performance of directors as the company approaches insolvency, due to the changing nature of their incentives. It indeed may become rational for them, depending on their circumstances, to disregard risk given that those who will bear the cost of that risk will be the creditors and not the company.

Economic analysis of the role of the director in the corporate structure would confirm that shareholders could actually have reason to worry that the structure itself causes directors to be risk averse in the usual running of the entity.<sup>40</sup> This would be particularly true for the larger public companies.<sup>41</sup> The incentives and benefits for the directors are usually in line with and in proportion to the success of the company. There is only a limited market for directors and they make significant investments in their own positions in these companies. They personally have a lot at stake and this naturally affects their

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<sup>38</sup> The Treasury, above n 1, para 3.15.

<sup>39</sup> Assuming of course they acted in good faith, for a proper purpose and without a material personal interest in the matter: Corporations Act s 180(2).

<sup>40</sup> M J Whincop, 'Taking the Corporate Contract More Seriously: The Economic Cases against, and a Transaction Cost Rationale for, the Insolvent Trading Provisions' (1996) 5 *Griffith L Rev* 1 at 28; M Byrne, 'An Economic Analysis of Directors' Duties in Favour of Creditors' (1994) 4 *Aust Jnl Corp Law* 275 at 277, 279; K Arrow, 'The Economics of Agency' in J Pratt and R Zeckhauser (Eds), *Principals and Agents: The Structure of Business*, reprint ed, Harvard University Press, 1991, pp 37, 44-5; R Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *Yale LJ* 857 at 858-67; J Coffee, 'Shareholders Versus Managers: the Strain in the Corporate Web' (1986) 85 *Michigan L Rev* 1.

<sup>41</sup> Whincop, *ibid*, at 28; Byrne, *ibid*, at 279; Coffee, *ibid*.

risk profile.<sup>42</sup> However, most significantly for this analysis, that profile, may change as the company moves towards insolvency. At that point in time the assessment of risk from the perspective of the director is made in a different environment.<sup>43</sup> Any potential venture, even the very risky, that may turn a profit could be all that lies between them and the failure of the company. Given that their own benefits and utility is so closely linked to the company, the element of risk may almost become irrelevant. It is not as though the directors can diversify their investment in the company. What is the likelihood of the director finding another such position when the company fails? So there is a distorted payoff in favour of directors at the expense of creditors.<sup>44</sup> After all, at the point when the company approaches insolvency it is only the creditors' money with which the directors are playing. Arguably the matter is considerably worse where the relevant company is closely held. The degree of risk that creditors bear in this situation increases in proportion to the interests the directors hold in the company. The greater the director's own stake in the smaller entity the greater the incentive they will have to look after their own interests at the expense of the creditors.<sup>45</sup>

Ultimately therefore it becomes clear that the risk environment for directors when the company is clearly a going concern and when it may be approaching insolvency is quite different. It is inappropriate therefore to apply the same rules to these two positions and to suggest that a general safe harbour could be and should be applied in the same way.

At the time when the current business judgment rule appeared in the Corporate Law Economic Reform Bill 1998 a comprehensive review was undertaken to answer the very question of whether that rule should have been extended to the duty to prevent insolvent trading.<sup>46</sup> As indicated previously there was support for a wider rule and lobbying for such an extension of principle was as relevant then as it is now. The paper largely engaged in an analysis of the rationales behind the business judgment rule and how these sit against the case law in this area. The paper specifically addressed the argument analysed above that the rule should extend to insolvent trading to 'encourage entrepreneurial, rather than risk-averse, behaviour on the part of the directors'.<sup>47</sup> The point is made that the cases themselves do not evidence much emphasis on this as a matter of concern at all because the real emphasis in the cases is the need to protect creditors. 'It is submitted that in cases where a company is insolvent or facing insolvency it is reasonable that courts should have less regard to whether their decision will encourage risk-averse behaviour than in cases where the solvency of the company is not at issue.'<sup>48</sup>

There is also the reality that the insolvent trading cases usually are dealing

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42 Independent directors would of course have less at stake although their reputation is inextricably linked to the performance of the company.

43 Whincop, above n 40, at 28; Byrne, above n 40, at 277.

44 Whincop, above n 40, at 28.

45 Byrne, above n 40, at 277 in reference to P Halpern, M Trebilcock and S Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *Uni of Toronto LJ* 117 at 135, 141.

46 R Langford, 'The New Statutory Business Judgment Rule: Should it Apply to the Duty to Prevent Insolvent Trading?' (1998) 16 *C&SLJ* 533.

47 *Ibid.*, at 539.

48 *Ibid.*

with instances where the directors' actions were far too late:

Indeed, it also appears that most, if not all, of the reported cases on the insolvent trading duty in which directors have been held liable have involved situations where the company has been well beyond the point where it could trade out of its debts. The need to balance the desire to encourage risk-taking behaviour is therefore not so relevant.<sup>49</sup>

Even if it could be said that risk aversion was a problem for directors when the company is heading towards insolvency, any window of opportunity for 'appropriate' risk taking is likely to be very small indeed. Compared to the demonstrable risk to creditors, it is suggested that on practical grounds it is hard to defend any relaxation on expectations of directors at this time.

Other rationales and arguments in support of extending the business judgment rule were also canvassed in the paper and met with similar practical analyses. On the face of it there is a very strong relationship between the duty of care and diligence and the duty to prevent insolvent trading but it was argued this should not automatically support the proposition that a business judgment rule should apply to both. Despite various points of overlap it was demonstrated how they are nevertheless separate and distinct duties that developed independently with different purposes. The stricter and more specific duty to prevent insolvent trading is fundamentally about creditor protection and acting as a strong deterrent to directors. There is no doubt that the potential cost of insolvent trading is high. The funding needed to support the national insolvent trading program of the Australian Securities and Investment Commission and their crackdown on phoenix companies is evidence of this.<sup>50</sup> To relax aspects of this liability may only serve to externalise the costs of this conduct and the fallout from the corporate failures to such government agencies including the Australian Tax Office.<sup>51</sup>

Another point of contention is that uncertainties regarding director accountability, liability and possible defences in the context of insolvent trading could be overcome by the application of the business judgment rule. The paper suggested the case law had already reached a point where any such uncertainty was overstated and that sufficiently clear guidance was already apparent.<sup>52</sup> With respect, that argument has only been strengthened in the years since the publication of that paper.

Finally, some recognition should be given to the options available to directors when the solvency of the company has the potential to become an issue. If there is a genuine desire by directors to seek to trade out of any

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49 Ibid.

50 As to the national insolvent trading program, see <<http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC%27s+National+Insolvent+Trading+Program?openDocument>>; and for an example of the crackdown on the conduct, see <<http://www.asic.gov.au/asic/asic.nsf/byheadline/07-05+Phoenix+crackdown+reaps+results?openDocument>>.

51 For recent views of the Australian Tax Office on the importance of good corporate governance and potential liability of directors see the following speeches in 2008 by the Commissioner of Taxation, <<http://www.ato.gov.au/corporate/content.asp?doc=/Content/00163767.htm>>, <<http://www.ato.gov.au/corporate/content.asp?doc=/Content/00153731.htm>>.

52 Ibid, pp 558–9.

difficulty then reliance on a business judgment rule should not be preferred to the other strategies available designed to protect all stakeholders. Voluntary administration with a view to executing a deed of company arrangement<sup>53</sup> would facilitate a proper assessment of solvency, protection from personal liability for the directors and recognition of the rights of creditors.

### 3.2 A new safe harbour to protect against the duties of good faith?

The issue of whether there should be this additional protection for directors in respect of the duties of good faith seems to have been absorbed into the debate about the need for a generic rule. There appears to be an assumption that if the rule was necessary, for the reasons already canvassed, then it should naturally protect against all of the core duties including ss 181–183 of the Corporations Act. The review itself gives particular attention to the application of a general defence to the insolvent trading provisions as analysed above,<sup>54</sup> however there is no such treatment of the possible effects upon the duties of good faith. Similarly, Baxt, in his article, considers the implications for insolvent trading at length, as the more controversial matter, but does not consider the relationship to the duties of good faith in any substantial way. It was only in his conclusion where he specifically referred to the matter as follows:

The BJR (Business Judgment Rule) should of course be extended to the other statutory duties — the duties in ss 180–183 of the Act referred to briefly above. We will not see a massive outbreak of applications for the use of the BJR.<sup>55</sup>

With respect, the fact that the new rule may not be often invoked is not evidence of itself that it is needed and appropriate.

As already discussed the current proposal is, of necessity, more than a mere extension of the current business judgment rule. It needs to be housed within more generic language to have the proposed effect. However, it would be a shame to lose the appropriate connections with the duties in the new terminology.

The current business judgment rule has, as its first criteria, the requirement that a director must have made the relevant judgment in good faith and for a proper purpose. While perhaps not requiring proof that s 181 of the Corporations Act would have otherwise been satisfied, directors nevertheless bear the evidentiary onus of establishing this element. The question of potential conflicts is then dealt with as the second criteria. So even where the relevant judgment could have been considered appropriate in the circumstances of the company, if the director did not meet the personal expectations of good faith, protection would be lost. The good faith element is not part of the judgment itself but has been incorporated as a prerequisite to protection. It gives recognition to the underlying fiduciary principles that are at the heart of any directors' role. These principles apply to every act of the director. They deliver expectations that are personal to the directors themselves and should make them review their particular circumstances.

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<sup>53</sup> Corporations Act Pt 5.3A.

<sup>54</sup> The Treasury, above n 1, p 31.

<sup>55</sup> Baxt, above n 11, at 12.

These requirements come from the relationship itself and are therefore inherent in the position. Duties of good faith are not questions of business judgments. It is simply impossible for example to make a decision that overcomes the need to act honestly or without regard to one's personal interests. Any new generic rule should not have the effect of watering down the effects of ss 181 to 183 of the Corporations Act. Yet as a matter of logic it must.

The professed purpose of the new rule is to provide greater certainty so directors can feel more confident, if they meet certain requirements, that their decisions will not be scrutinised after the fact. This may come at the cost of a deeper appreciation of the duties of good faith. Rather than existing terminology, the new rule must seek to describe or capture something simpler and weaker. The proposed wording in the Treasury paper is evidence of this.

The only possible reference to matters of good faith in the proposed safe harbour seems to be the first requirement that directors would have to act in a bona fide manner. As already argued, this could result in interpretations that would be anything but certain.

## 4 Inadequate justification to broaden the statutory rule

### 4.1 Existing common law protection

At the time when the current business judgment rule was proposed, it had been argued that this statutory intervention was not necessary because the essence of the rule had already been embodied in the case law that had been developing on the duties of directors.<sup>56</sup> There was already recognition in the common law, that the quality of directors' judgments should not be a matter for ex post revision by courts with a critical eye and the benefit of hindsight.<sup>57</sup> Of course those judgments needed to be made in good faith and for a proper purpose.<sup>58</sup> *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL*<sup>59</sup> and *Howard Smith Ltd v Ampol Petroleum Ltd*<sup>60</sup> were the basis for this original proposition. Further support could then be found in cases dealing with directors' duty of care where there was 'judicial reluctance to "second guess" business judgments taken without suggestion of bad faith and, indeed, a judicial deference to such judgments'.<sup>61</sup> Nothing has changed in this regard. This is evidenced in more recent judgments of the Federal Court of Australia

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56 P Redmond, 'Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule?' in I Ramsay (Ed), *Corporate Governance and the Duties of Company Directors*, The Centre for Corporate Law and Securities Regulation, Melbourne, 1997, p 185.

57 Ibid, p 198.

58 Ibid.

59 (1968) 121 CLR 483 at 493; BC6800800.

60 [1974] AC 821 at 835; [1974] 1 All ER 1126; (1974) 3 ALR 448.

61 Redmond, above n 56, at 198.

where reference is still made to these original authorities and the concept of the common law business judgment rule.<sup>62</sup>

There is a well-known line of authority to the general effect that it is the province of directors, not the courts, to identify where the interests of the company lie, and that the courts do not exercise a supervisory function over the business judgments of directors.<sup>63</sup>

Our presumption in favour of directors is indeed fundamentally consistent with what is referred to in other jurisdictions as the business judgment rule. We have received this recognition internationally. Despite the use of the term 'rule', as a matter of practice the application of these principles in the other key jurisdictions takes the form of a like presumption by the courts that the corporate managers have made appropriate judgments.<sup>64</sup> In Canada the Supreme Court has equated our common law principles to their 'business judgment rule' and found a consistent approach with the United States, the United Kingdom and New Zealand:

Canadian Courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the 'business judgment rule', adopting the American name for the rule.<sup>65</sup>

It is interesting that we felt the need to embellish the common law position with a statutory rule. As discussed earlier in the article, the core underlying argument by the proponents of the statutory rule is that it will better support entrepreneurialism and the concerns about how directors deal with risk. This same issue is behind the latest push to expand upon the current level of statutory protection. It would seem however that this has been considered elsewhere with the conclusion that the courts may still be the best place to deal with this question. Consider the rationale provided in defence of the way the courts applied the rule in the United States. Three clear principles were given in support of their judicial process:

- (1) The rule allows the court to recognise that 'shareholders to a very real degree voluntarily undertake the risk of bad business

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62 *Idameneo (No 123) Pty Ltd v Symbion Health Ltd* (2007) 165 FCR 19; 64 ACSR 680; 25 ACLC 1847 at [114] and *Downey v Crawford* (2004) 51 ACSR 182; (2005) 23 ACLC 104; [2004] FCA 1264; BC200406389 at [175].

63 *Idameneo (No 123) Pty Ltd v Symbion Health Ltd* (2007) 165 FCR 19; 64 ACSR 680; 25 ACLC 1847 at [114].

64 D M Branson, 'The Rule That Isn't a Rule — The Business Judgment Rule' (2002) 36 *Valparaiso Uni L Rev* 631

65 *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461; (2004) 244 DLR (4th) 564; 4 CBR (5th) 215 at [64].

- judgment'.<sup>66</sup> Because shareholders take management of the company into account in their decision to invest they need to assume some of the risk of bad decisions by that management;
- (2) The 'courts recognize that after-the-fact litigation is a most imperfect device to evaluate corporate business decisions'. There is an understanding that the 'entrepreneur's function is to encounter risks and to confront uncertainty';<sup>67</sup>
  - (3) 'because potential profit often corresponds to the potential risk, it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions'. Shareholders can diversify their holdings and minimise their risk. In that environment they may want the directors to choose the riskier decisions on the basis that across their portfolio, despite individual losses, they may be better off.<sup>68</sup>

It is worth noting that these comments were made in 1981. As suggested earlier, this whole question of the impact of potential liability on the attitude of directors toward risk is not new. The issues have been understood for some time and the clear message is that there is confidence that the courts can recognise and take account of the questions of risk that are perennially raised. The question still needs to be asked then whether an expanded statutory version is needed to take account of such matters when this need is not appreciated elsewhere?

### 4.3 Why do we need to go further than other jurisdictions?

It should be recognised that our current statutory business judgment rule was a long time in the making. As already outlined, it had been recommended on numerous occasions and debate surrounding its appropriateness within the legislation itself had been significant. Having modified the proposal after that debate why do we now need to substantially alter it and take it further than any other jurisdiction? In particular, why is there a new imperative to provide insulation from the fundamental duties of good faith?

As with other advocates of the introduction of the statutory rule, Annette Greenhow welcomed and embraced the current rule in 1999 with the suggestion it would put the wind into directors' sails.<sup>69</sup> She, like others, was concerned about the level of certainty in the judgments in the 1990s regarding the expectations for directors.<sup>70</sup> The introduction of the statutory rule came with provisions that defended delegation and reliance on others and allowed the statutory derivative action. Annette Greenhow recognised this package of reform was 'intended to find the balance between the freedom and flexibility of directors on the one hand, and the interests of the shareholder on the

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<sup>66</sup> *Joy v North* 692 F 2d 880 (1982), per R K Winter J, with Oakes, Cardamone and Winter J agreeing.

<sup>67</sup> *Ibid.*, at 887.

<sup>68</sup> *Ibid.*

<sup>69</sup> A Greenhow, 'The Statutory Business Judgment Rule: Putting the Wind Into Directors' Sails' (1999) 11 *Bond L Rev* 33.

<sup>70</sup> *Ibid.*, at 35.



other'.<sup>71</sup> In describing the rule she seemed to endorse the need for directors to otherwise act with the appropriate good faith, proper purpose and without a conflict of interest. The benefits that were meant to flow from the current rule were expressed as follows:

1. Providing an enhancement and clarification of the path to be followed in making decisions.
2. Providing and awareness of the duties owed.
3. Encouraging responsible risk taking with the comfort of knowing that decisions will not be second-guessed by the court if the four requirements are met.
4. Attracting a high calibre of directors and officer to the positions knowing that the duty of care is no higher than that expected of a reasonable person.<sup>72</sup>

It is now being claimed however that all these benefits have not been achieved and that at least the last two factors are being raised again as the reason to expand the rule to cover all of the core duties. Did the legislative package get the balance so wrong that we have to revisit the issue?

Some answers to this question are proffered in a more recent review of the business judgment rule by the AICD.<sup>73</sup> The suggestion is that the rule has not been successful because the Australian Securities and Investments Commission have been able to make strongly negotiated settlements with directors who may have been the subject of action and thus whittled down the potential effect of the rule. Further there is the view that those few cases that have made it to court have been poor examples of director conduct where protection by the rule would have been unlikely in any event.<sup>74</sup> Again in this article, the lack of success for the rule is claimed to lead to the view that directors will act in a risk-averse manner and that good people will not take on the role. With respect, the fact that the rule has only been the subject of few cases and that it has not been successfully raised because of the particularly poor conduct by those directors, does not mean the rule needs to be enhanced and provide greater protection. Rather, it could be argued, it is yet to be appropriately tested and that concerns are anecdotal and based upon perceptions not yet founded.

No other jurisdiction is proposing such a broadening of protection for directors. Of particular concern will be the attempt to protect against the duties of good faith. It is interesting to note that in the United States the duty of good faith has grown in stature and is receiving greater recognition as an independent basis on which to take action.<sup>75</sup> This means, in the context of the business judgment rule in that jurisdiction, that a potential breach of good faith could be a less demanding means of overcoming the presumption of the

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<sup>71</sup> Ibid, at 37.

<sup>72</sup> Ibid, at 54.

<sup>73</sup> A Cromie, 'Is the Business Judgment Rule Being Whittled Away? [AICD Review]' (2005) *Company Director Journal*, at <<http://www.companydirectors.com.au/Media/Company+Director+Journal/2005/May/Is+the+Business+Judgment+Rule+being+whittled+away+AICD+Review.htm>>.

<sup>74</sup> Ibid.

<sup>75</sup> A S Gold, 'A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty' (2007) 66 *Maryland L Rev* 398; S J Griffith, 'Good faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence' (2005) 55 *Duke LJ* 1.

rule and enabling the courts to look more closely at the conduct of the directors.<sup>76</sup> Good faith has always been an integral part of the business judgment rule in the United States and its influence is obviously getting stronger.<sup>77</sup> It is curious that when we adopted our current statutory business judgment rule, largely based upon the American Law Institute's Corporate Governance Project there was a view the American version was too permissive and we sought to further enhance the good faith element and extended it to provide protection only where judgments were exercised with a proper purpose.<sup>78</sup> Yet, a broader safe harbour in our country may only serve to weaken the role of good faith and the proper purpose test here.<sup>79</sup>

In the United Kingdom substantial research was undertaken on the question of whether a statutory rule should be introduced there.<sup>80</sup> A review of the approach in Australia<sup>81</sup> and elsewhere was considered at this time. There was considered no need to move beyond their common law approach which, like ours, prevents directors being judged with the wisdom of hindsight or second guessed on the quality of commercial decisions. In fact there is a suggestion that statutory intervention runs the risk of narrowing the principle or making it too rigid.<sup>82</sup>

The question of whether a business judgment rule, at least in relation to takeover law, could be usefully applied across Europe was also considered at around the same time.<sup>83</sup> There was an analysis of the difficulty in taking common law standards and approaches into civil law countries. Although for some countries the common law principles of the business judgment rule may have proved difficult it was thought Germany may be well placed to interpret and apply them because of their extensive case law around their Civil Code requirement that all obligations be performed in a manner consistent with good faith and common usage.<sup>84</sup> These underlying principles were seen as an important framework to any business judgment rule. Indeed, the principles of good faith there have been judicially interpreted to become a 'super control norm' and a principle of legal ethics which dominates the entire legal system.<sup>85</sup>

Although there have been some concerns over recent decisions in Canada

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76 Gold, *ibid*, at 434.

77 *Ibid*.

78 J Farrar, *Corporate Governance: Theories, Principles, and Practice*, 2nd ed, Oxford University Press, Victoria, 2005, pp 142–3. See also a discussion of this in: D M Branson and L C Keong, 'Balancing the Scales: A Statutory Business Judgment Rule for Hong Kong?' (2004) 34 *Hong Kong LJ* 303.

79 Note that the proper purpose requirement may have been included in our version of the statutory business judgment rule as a means of avoiding its application to takeover defences: Farrar, *ibid*, at 142–3.

80 The Law Commission and The Scottish Law Commission, 'Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties', 1999, at <[http://www.lawcom.gov.uk/docs/lc261\(1\).pdf](http://www.lawcom.gov.uk/docs/lc261(1).pdf)>.

81 At the time, our statutory version of the rule was being proposed: *ibid*, at [5.23].

82 Above n 70, at [5.29].

83 C Kirchner and R W Painter, 'Towards a European Modified Business Judgment Rule for Takeover Law' (2000) 1 *European Business Organisation L Rev* 353–400.

84 *Ibid*, at 392–3, in reference to s 242 of Germany's Civil Code. See in particular n 139 as to the judicial interpretation given to the requirements of good faith.

85 *Ibid*.

affecting the interpretation of their business judgment rule,<sup>86</sup> there is no suggestion they would consider taking the sort of dramatic steps we may intend.<sup>87</sup> In fact those recent cases have been interpreted as confirmation from the judiciary that they will set the bar to any review of board decisions at a great height.<sup>88</sup>

The whole question of the appropriateness of a statutory business judgment rule has been analysed in the context of considering this possibility for Hong Kong.<sup>89</sup> It was recommended that the American Law Institute version be adopted<sup>90</sup> but there was certainly no consideration given to broadening its application to matters of insolvent trading or duties of good faith. The research demonstrated the significance of the umbrella requirement of good faith and its utility in being able to appropriately bring down any shroud of protection otherwise afforded to directors.<sup>91</sup>

Similarly while the New Zealand version reflects the American rule, the good faith requirements remain.<sup>92</sup>

## 5 Conclusions

The analysis undertaken in this article raises a number of concerns regarding the potential outcomes of the proposed generic safe harbour. Those outcomes fall loosely into two categories.

Firstly, there is the inherent difficulty in manufacturing appropriate protection for conduct that may otherwise run the risk of being in breach of any of the many different core liabilities. There is a natural hurdle in formulating a rule that purports to deal with the key issues relevant to all of the duties. Instead of the certainty and clarity which is sought by directors, it is much more likely, as is evidenced in the proposed terms, that we will be left with generic elements that have the potential to undermine and weaken the functions of the duties themselves and lead to new problems of interpretation.

Secondly, it has been demonstrated that there are particular risks relevant to the specific duties against which the new safe harbour will provide refuge. Of those raised in the paper, it is the following two that stand out most prominently:

- (1) There is the potential that the duties of good faith could be seen as just an element of a business judgment rather than inherent obligations arising out of the fiduciary relationship.
- (2) The strongest rationale underlying the push for a generic safe harbour is the claim that the current liability provisions make directors act in a manner that

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86 *Peoples Department Stores Inc (trustee of) v Wise* (2004) 244 DLR (4th) 564; [2004] SCJ No 64 (QL); [2004] 3 SCR 461; *UPM-Kymmene Corp v UPM-Kymmene Miranichi Inc* (2004) 42 BLR (3d) 34; 250 DLR (4th) 526.

87 For a discussion of the fallout of these decisions on the business judgment rule in Canada, see S Rousseau, 'Directors' Duty of Care After *Peoples*: Would it be Wise to Start Worrying About Liability?' (2005) 41 *Canadian Business L Jnl* 223–35; W D Gray, 'Repap: A Study in Judicial Review of Business Judgments' (2006) 44 *Canadian Business LJ* 279–305.

88 Gray, *ibid.*, at 304–5.

89 D M Branson and L C Keong, 'Balancing the Scales: A Statutory Business Judgment Rule for Hong Kong?' (2004) 34 *Hong Kong LJ* 303.

90 *Ibid.*

91 *Ibid.*

92 Companies Act 1993 (NZ) ss 137–138

is too risk averse. However theory suggests the new rule, in protecting against the duty to prevent insolvent trading, could actually encourage inappropriate risk taking at the other end of the spectrum.

In addition to the specifics of the proposal, the article reviewed the nature of the business judgment rule more broadly. It is suggested that we may be losing sight of the existence of these principles in the common law and the flexibility that they provide in dealing with the modern challenges of directors. This is recognised in many other jurisdictions. No other jurisdiction however would seem to be prepared to provide a statutory safe harbour against potential breaches of good faith. In fact, this principle is not only seen as an independent fiduciary duty that should be protected but as a necessary means through which the presumption of the business judgment rule can be appropriately overcome. The arguments in favour of the proposed new version of the rule are inadequate to justify such a dramatic step that is so out of line with other jurisdictions.