Australian Institute of Company Directors

Advice regarding the business judgment rule

1 Executive summary

1 The Australian Institute of Company Directors (***AICD***) is exploring possible reforms to Australia's corporations law to improve Australia's director liability framework, including to the business judgment rule (***BJR***).

2 In this context, the AICD has asked Allens to review the scope, operation and effectiveness of Australia's BJR, as compared with those of the key comparator jurisdictions of Canada, Delaware, South Africa and the United Kingdom (the ***Comparator Jurisdictions***).

3 Allens has conducted its review by:

(a) identifying the policy objectives of Australia's and the Comparator Jurisdictions' BJRs;

(b) surveying the operation and application of the BJRs; and

(c) reviewing commentary on the effectiveness of the BJRs.

4 We find that Australia's and the Comparator Jurisdictions' BJRs share common policy objectives. Each is intended to:

(a) protect the authority of directors to make bona fide commercial decisions;

(b) acknowledge that directors make decisions with imperfect information; and

(c) avoid an unreasonable level of risk aversion and encourage sensible commercial risk-taking,

without insulating directors from liability in relation to decisions that are made negligently or otherwise contravene fiduciary standards.

5 Despite these common policy objectives, Australia's BJR operates differently, has a narrower application and provides less protection to directors than the Comparator Jurisdictions' BJRs. This is primarily so for the following reasons.

(a) Australia's BJR functions as a defence that must be made out by a defendant director, whereas the Comparator Jurisdictions' BJRs function as standards of review that must be overcome by the plaintiff.

(b) Australia's BJR attaches only to the duty of reasonable care, skill and diligence, whereas the Comparator Jurisdictions' BJRs have varying degrees of relevance to other duties.

(c) Australia's BJR does not modify the level of director culpability required to establish a breach of the duty of care, whereas the important and influential Delaware BJR requires a showing of gross negligence to establish a breach of that duty.

Key differences in the operation and application of Australia's and the Comparator Jurisdictions' BJRs are summarised in Table 1 on on page 4.

6 Australia's BJR has never been successfully pleaded by a defendant director, and has been the subject of more critical commentary than the Comparator Jurisdictions' BJRs. Key themes emerging from the Australian commentary are that the Australian BJR:

(a) places too high an onus on directors;

(b) applies to too few duties;

(c) protects too narrow a range of activities;

(d) has an unclear application in a context where corporate governance expectations are expanding rapidly; and

(e) does not provide a degree of protection that is actually felt by directors.

7 We have not observed similar themes in the foreign commentary, and consider that this likely indicates that the Australian BJR is fulfilling its policy objectives less effectively than the Comparator Jurisdictions' BJRs.

8 We note that a significant point of difference between Australia's and the Comparator Jurisdictions' director liability environment is that directors' duties primarily are enforced by a public enforcement agency in Australia, whereas they are enforced through private litigation in the Comparator Jurisdictions. We do not consider this to justify a less protective BJR in Australia, as the chilling effect a narrower BJR could have on commercial decision-making and risk-taking is unlikely to be offset by the fact that a public agency, rather than private shareholders, is primarily responsible for directors' duties enforcement.

9 We also note that current developments in the Australian director liability environment may accentuate perceived shortcomings of the Australian BJR. For example, if the doctrine of 'stepping stone' liability continues to expand, a broader range of corporate decision-making may be reviewable as a potential contravention of the directors' duty of care. In this context, the Australian BJR may take on an increasingly significant role in protecting directors' capacities to define and balance the interests of the corporation.

10 Overall, our review suggests that the time may be ripe to reconsider the Australian formulation of the BJR.

Table 1: Comparison of scope and operation of BJRs

	AUSTRALIA	CANADA	DELAWARE	SOUTH AFRICA	UNITED KINGDOM
What is the directors' duties litigation environment like?	**Internationally unique and relatively active** Primarily enforced by public regulators; secondarily enforced by shareholders through private actions. Moderate but increasing level of directors' duties litigation.	**Relatively active** Enforced by shareholders and other stakeholders through private actions. Moderate level of directors' duties litigation.	**Highly active** Enforced by shareholders through private actions. Very high level of directors' duties litigation.	**Relatively inactive** Enforced by shareholders through private actions. Low level of directors' duties litigation.	**Relatively inactive** Enforced by shareholders through private actions. Low level of directors' duties litigation.
In relation to which directors' duties does the BJR apply?	**Relatively narrow coverage** Duty to act with reasonable care, skill and diligence.	**Relatively broad coverage** Duty to act with reasonable care, skill and diligence. Duty to act in the best interests of the company.	**Relatively broad coverage** Duty to act with reasonable care, skill and diligence. Duty of loyalty (which encompasses a duty to act in the best interests of the company).	**Relatively broad coverage** Duty to act with reasonable care, skill and diligence. Duty to act in the best interests of the company.	**Broadest coverage** Manifests as a soft doctrine of judicial abstention that has been applied in a wide range of cases, rather than a formally-defined BJR.
To whom is the BJR available?	**All persons subject to relevant duties** (i.e., directors and officers)	**All persons subject to relevant duties** (i.e., directors and officers)	**Potentially not all persons covered by relevant duties** Clearly available to directors, however application to officers is unsettled.	**All persons subject to relevant duties** (i.e., directors and officers)	**All persons subject to relevant duties** (i.e., directors and officers)
To what activities does the BJR apply?	**Business judgments only** Generally excludes failures to make decisions, and abdication of managerial responsibilities. (i.e., intentional dereliction or conscious disregard of such responsibilities). Also excludes matters of legal obligation (e.g., compliance with disclosure obligations).	**Business judgments only** Generally excludes failures to make decisions, and abdication of managerial responsibilities. Also excludes matters of legal obligation (e.g., compliance with disclosure obligations).	**Business judgments only** Generally excludes failures to make decisions, and abdication of managerial responsibilities. Specific rules apply in relation to sales of companies and defences of hostile takeovers.	**All matters arising in the exercise of the powers or the performance of the functions of a director**	**Flexible application** No formally defined parameters.
How is the BJR raised in proceedings?	**As a defence** A defendant director must raise and establish the application of the BJR.	**Standard of review** A plaintiff must displace the presumption that the BJR applies.	**Standard of review** A plaintiff must displace the presumption that the BJR applies.	**Probably a standard of review** Untested, but likely that a plaintiff must displace the presumption that the BJR applies.	**Standard of review** A plaintiff must displace the presumption that the doctrine of abstention applies.
How is the BJR applied by courts in proceedings?	**Burdensome for defendant director** Defendant director must show that they: • made a business judgment in good faith for a proper purpose; • did not have a material personal interest; • informed themselves about the subject matter to the extent they reasonably believed to be appropriate; and • rationally believed that the judgment was in the best interests of the corporation. No defendant director has successfully invoked the BJR.	**Burdensome for plaintiff** • Plaintiff must plead facts casting doubt as to whether a director complied with their duties of care and good faith. • If plaintiff fails, a court will not review the impugned business judgment. • If plaintiff succeeds, the burden remains with the plaintiff, but the court applies enhanced scrutiny to the business judgment.	**Burdensome for plaintiff** • Plaintiff must plead facts demonstrating a contravention of the duty of care or loyalty to a gross negligence standard. • If plaintiff fails, a court will not review the impugned business judgment. • If plaintiff succeeds, the burden shifts to the director to prove their action was entirely fair to the company.	**Probably burdensome for plaintiff** Untested, but may be applied similarly to the Canadian or Delaware BJR.	**Burdensome for plaintiff** No formally defined method.

2 Scope of review

11 In relation to the Australian Law Reform Commission's (***ALRC***) inquiry into Australia's corporate criminal responsibility regime, the AICD asked Allens to review the director liability environment in Australia, as compared with Canada, Hong Kong, New Zealand, the United Kingdom and the United States. Allens' research demonstrated that the liability environment for directors in Australia stands out as unique, and in many regards, uniquely burdensome.

12 In August 2020, the Attorney General of Australia tabled the final report from the inquiry in Parliament. Regarding director and senior officer liability for corporate misconduct, the ALRC concluded that 'the time is not yet ripe for rationalisation of individual liability', but recommended a 'wide-ranging review of individual accountability mechanisms … within the next six years'.[1]

13 In this context, the AICD is considering possible reforms to Australia's corporations law to improve Australia's director liability framework, including to its BJR. In general, BJRs are rules intended to provide protection to directors against claims that they were acting without skill, care or diligence when making legitimate business decisions.

14 To inform its efforts, the AICD has asked Allens to review:

(a) the scope and operation of Australia's BJR, as compared with the BJRs (or comparable doctrines or defences) of key comparator jurisdictions; and

(b) the effectiveness of the BJR as a mechanism for shielding directors from liability in relation to reasonable and informed commercial decisions in Australia, as compared with the Comparator Jurisdictions.

15 The AICD and Allens have selected the Comparator Jurisdictions for this exercise for the following reasons.[2]

(a) Delaware, United States: the jurisdiction's corporations law is of high global commercial significance, and its BJR has informed the development and evolution of several other American and foreign jurisdictions' laws on the subject.

(b) United Kingdom: the jurisdiction's corporations law is of high global commercial significance, and its doctrine of judicial abstention has informed the development and evolution of Australia's and other Commonwealth jurisdictions' BJRs.

(c) Canada: the jurisdiction's corporations law is of high regional commercial significance, and its BJR is clearly articulated and long-standing.

(d) South Africa: the jurisdiction's corporations law is of high regional commercial significance, and its statutory BJR was relatively recently enacted and was informed by Australia's.

16 Allens has conducted its review by surveying the policy objectives for and legal operation of Australia's and the Comparator Jurisdictions' BJRs, with reference to key academic, judicial, legislative and policy sources – a necessarily qualitative exercise. Our analysis of Comparator Jurisdiction laws is based on desktop research by Australian lawyers.

[1] ALRC, *Final Report: Corporate Criminal Responsibility* (April 2020) [9.194]–[9.195] <https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf>.
[2] The AICD and Allens considered using Hong Kong, New Zealand and Singapore as comparator jurisdictions, because we did so for our previous advice. However, our preliminary research suggested that these jurisdictions' positions likely are similar to (and influenced by) the United Kingdom's, so we have omitted them from this exercise.

17 This paper summaries our key findings.

(a) Part 3 identifies the policy objective for Australia's and the Comparator Jurisdictions' BJRs, to establish a baseline against which the effectiveness of BJRs can be measured.

(b) Part 4 describes the scope and operation of Australia's and the Comparator Jurisdictions' BJRs.

(c) Part 5 synopsizes key commentary on the effectiveness of Australia's and the Comparator Jurisdictions' BJRs.

(d) Part 6 provides our overall observations on the scope of operation and effectiveness of Australia's BJR, as compared with those of the Comparator Jurisdictions.

3 Policy objectives of business judgment rules

18 To understand and asses the operation of the Australian BJR, as compared with the Comparator Jurisdictions' BJRs, it is useful to identify the policy objectives of the BJR in each jurisdiction.

19 In this section, we summarise the policy objectives of Australia's and the Comparator Jurisdictions' BJRs, based on a review of key academic, judicial, legislative and policy materials.

20 We find that, though Australia's and the Comparator Jurisdictions' BJRs take different legal forms, they share common policy objectives. This finding is set out in more detail in Part 3.4 below, and our overall conclusions and observations are presented in Part 6 below.

3.1 Policy objectives in Australia

21 Australia has a codified BJR, which is contained in s 180(2) of the *Corporations Act 2001* (Cth). In legislating a BJR in 1999, the Commonwealth Parliament was adopting a key recommendation arising from Treasury's Corporate Law Economic Reform Program (***CLERP***).[3] CLERP was a 'comprehensive initiative to improve Australia's business and company regulation as part of the … Government's drive to promote business, economic development and employment'.[4]

22 Treasury's stated reasons for recommending a BJR are very clearly set out in its summary of its proposed policy reforms.[5]

> *Effective corporate decision-making is hampered by legal uncertainties arising from the potential liabilities of directors for their actions. A business judgment rule will be introduced to provide directors with a safe harbour from personal liability in relation to honest, informed and rational business judgments …*
>
> *The objective of the rule is to protect the authority of directors in the exercise of their duties of management. It is not designed to, and will not, insulate them from liability for negligent, ill-informed or fraudulent decisions. The rule will not lead to any reduction in the level of accountability of directors, but will ensure that they are not liable for decisions made in good faith and with due care.*
>
> *Directors will benefit from the certainty that the rule provides in terms of their liability as they will be encouraged to take advantage of business opportunities and not behave in an unnecessarily risk averse manner.*

23 The Government's stated reasons for adopting Treasury's recommendation and legislating a BJR are also very clearly set out in the Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998*.[6]

> *The fundamental purpose of the business judgment rule is to protect the authority of directors in the exercise of their duties, not to insulate directors from liability. While it is accepted that directors should be subject to a high level of accountability, a failure to expressly acknowledge that directors should not be liable for decisions made in good faith and with due care, may lead to failure by the company and its directors to take advantage of opportunities that involve responsible risk taking.*

[3] *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1.
[4] Commonwealth of Australia, *Corporate Law Economic Reform Program: Policy Reforms* (1998) 2–3 <https://treasury.gov.au/sites/default/files/2019-03/clerp.pdf>.
[5] Ibid.
[6] Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth) [6.3]–[6.4].

24 In summary, and as recognised in subsequent academic and judicial commentary, the primary policy objectives of Australia's BJR are to:

(a) protect the authority of directors to make bona fide commercial decisions;

(b) acknowledge that directors make decisions with imperfect information;[7] and

(c) avoid an unreasonable level of risk aversion and encourage sensible commercial risk-taking.[8]

3.2 Policy objectives in the Comparator Jurisdictions

25 Australia's and the Comparator Jurisdictions' BJRs share common origins.

(a) Canada and Delaware have uncodified common law BJRs. Canadian courts have looked to Delaware courts in considering the application of their country's BJR, such that the Canadian BJR has 'evolved in tandem' with the Delaware BJR.[9] Australia's BJR has also been influenced by Delaware's BJR, in that it draws heavily on the American Law Institute's draft model BJR,[10] which in turn draws on the Delaware rule.[11]

(b) The UK retains a common law doctrine of judicial abstention, and has never adopted a statutory BJR. Australia's BJR has been heavily influenced by the UK doctrine, because a comparable judicial approach prevailed in Australia until the early 1990s, and informed the codification of Australia's BJR.[12]

(c) South Africa has a codified BJR, which it adopted in 2008. South Africa's BJR has been influenced by the UK's doctrine of judicial abstention, because a South African doctrine of judicial abstention prevailed until the mid-2000s, and was an outgrowth of the UK doctrine. South Africa's BJR also has been influenced by Australia's and particularly Delaware's BJRs, because the South African legislature looked to these sources in formulating the country's own BJR.[13]

26 Unsurprisingly given their common origins, the policy objectives for the BJRs of Australia and the Comparator Jurisdictions are entirely consistent, although they sometimes are stated in different terms.

27 As in Australia, Comparator Jurisdiction courts and commentators regularly observe that policy objectives of their BJRs are to:

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[7] Jason Harris and Anil Hargovan, 'Still a Sleepy Hollow? Directors' Liability and the Business Judgment Rule' (2016) 31 *Australian Journal of Corporate Law* 319, 325.
[8] Ibid. See also *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 236 FLR 1, [7270] (***Rich***); *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640, [72]; *Termite Resources NL (in liq) v Meadows* (2019) 370 ALR 191, [184].
[9] See *Maple Leaf Foods Inc. v Schneider Corp.* [1998] 42 OR (3d) 177 (***Maple Leaf Foods***).
[10] The American Law Institute is a non-governmental organisation that promotes clarification and simplification of United States common law by publishing 'Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education': American Law Institute, *About ALI* <https://www.ali.org/about-ali/>.
[11] Jennifer Hill and Matthew Conaglen, 'Directors' Duties and Legal Safe Harbours: A Comparative Analysis' in Dean Gordon Smith and Andrew Gold (eds), *Research Handbook on Fiduciary Law* (2017) 13, 28–29.
[12] Ibid 28.
[13] Brighton Mupangavanhu, 'Standard of Conduct or Standard of Review? Examination of an African Business Judgment Rule under South Africa's Companies Act 71 of 2008' (2019) 63(1) *Journal of African Law* 127, 129.

(a) protect the authority of directors to make bona fide commercial decisions,[14] including by acknowledging that courts lack the expertise and information necessary to interfere in business judgments;[15]

(b) acknowledge that directors make decisions with imperfect information,[16] including by avoiding hindsight bias;[17]

(c) avoid an unreasonable level of risk aversion and encourage sensible commercial risk-taking,[18] including by avoiding discouraging qualified persons from developing unreasonable aversions to becoming a director.[19]

28 At the same time, as in Australia, Comparator Jurisdiction courts and commentators commonly acknowledge that their BJRs are not intended to insulate directors from liability in relation to decisions that are made negligently or would otherwise contravene fiduciary standards.

3.3 Reasons for codification in Australia and South Africa

29 As noted, Australia and South Africa have codified BJRs, whereas Canada and Delaware have common law BJRs and the UK recognises a common law doctrine of judicial abstention. In assessing the policy objective for Australia's and the Comparator Jurisdictions' BJRs, it is worth considering the reasons for codification in Australia and South Africa, given that each jurisdiction's courts abstained from intervening in some business judgments prior to codification.

30 The legislative context to codification in Australia suggests that Australia adopted a statutory BJR to address a deficiency of the prevailing corporations law.

(a) From the late 1960s to the early 1990s, Australian courts refrained from reviewing the business decisions of a director, so long as the director acted within power for a proper purpose and with such care as was reasonably to be expected of them, having regard to their skill and experience.[20] The approach was based on the precept that a director necessarily must engage in speculative decision-making.[21]

(b) In the early 1990s, the legal status of this approach was called into question as a consequence of legislative changes to the *Corporations Law*. Against a backdrop of

[14] Regarding the UK position, see Andrew Keay, *Directors' Duties* (2014) 128. Regarding the Delaware position, see *Smith v Van Gorkom* 488 A.2d 858 (Del 1985) 872 (***Van Gorkom***). Regarding Ontario, see *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461, 491–492 [64] (***Wise***). Regarding South Africa, see *Companies Act No. 71 of 2008* s 7(e); King Report on Corporate Governance (2002) (***King Report II***).
[15] Regarding the UK position, see Davies, Gower and Davies, *Principles of Modern Company Law* (2008) 512.
[16] Regarding the UK position, see *Re City Equitable Fire and Insurance Co Ltd* [1925] Ch 407, 408 (per Romer J); Demetra Arsalidou, 'Objectivity vs Flexibility in Civil Law Jurisdictions and the Possible Introduction of the Business Judgement Rule in English Law' (2003) 24(8) *Company Lawyer* 228, 232. Regarding Ontario, see *Wise* (n 14), 491–492 [64].
[17] Regarding the UK position, see John Quinn, 'The Duty of Good Faith in Light of the Business Judgment Rule' (2016) 27(4) *International Company and Commercial Law Review* 120, 122. Regarding the Delaware position, see Philip Rutledge, 'The Limits of Delaware's Business Judgement Rule' (2019) 40(5) *Comp Law* 158, 159. Regarding the Ontario position, see *Wise* (n 14), 491–492 [64] and *CW Shareholdings Inc v WIC Western International Communications Ltd* (1998) 39 OR (3d) 755 (General Division), [60] (per Blair J) (***CW Shareholdings Inc***).
[18] Regarding the UK position, see Andre Tunc, 'The Judge and the Businessman' (1986) 102 *Law Quarterly Review* 549, 554. Regarding the Delaware position, see Mohammed Hemraj, 'Company Directors: The Defence of Business Judgement Rule' (2003) 24(7) *Comp Law* 218, 219. Regarding South Africa, see King Report II (n 14), 132.
[19] Regarding the UK and Delaware position, see Mohammed Hemraj, 'The Business Judgment Rule in Corporate Law' (2004) 15 *International Company and Commercial Law Review* 192, 195. Regarding Ontario, see Stéphane Rousseau, 'Directors' Duties of Care After Peoples: Would it be Wise to Start Worrying About Liability?' (2005) 41 *Canadian Business Law Journal* 224.
[20] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832.
[21] Geoffrey Nettle, 'The Changing Positions and Duties of Company Directors' (2018) 41 *Melbourne University Law Review* 1402, 1404.

judicial and political uncertainty as to whether the directors' duty to act with care and diligence encompassed a subjective or objective standard of care,[22] the Commonwealth Parliament enacted s 232(4) of the *Corporations Law* to make it plain that an objective standard applied.[23] However, contrary to various recommendations,[24] Parliament did not enshrine a BJR in statute.[25] Resultantly, 'during the 1990s courts became not at all hesitant in second-guessing business judgments holding directors liable for decisions with which those courts disagreed'.[26]

(c) In this context, CLERP advocated for a statutory BJR to address agency costs created by the Commonwealth Parliament's earlier failure to adopt a BJR.[27]

> *In a corporate context, particularly in the case of large publicly listed companies, there may be a divergence of interests between directors and shareholders which can give rise to costs to the company sometimes referred to as agency costs …*
>
> *Agency costs can arise because of the disparity between shareholders' desire for the company's directors to maximise company wealth and the directors' lesser incentive to maximise shareholder wealth in circumstances where decision-making may give rise to unquantifiable personal liability …*
>
> *A statutory formulation of the business judgement rule would clarify and confirm the position reached at common law that Courts will rarely review bona fide business decisions. However, unlike the common law, it would provide a clear presumption in favour of a director's judgement thereby creating much more certainty for directors.*

31 Whereas the Commonwealth Parliament legislated a BJR for pragmatic purposes, South African sources indicate that the country adopted a statutory BJR for purely principled purposes. In the context of South Africa's reintegration into the community of nations and global economy following the fall of apartheid, the country's Parliament adopted a BJR as part of a broad-based effort to modernise corporate governance standards.[28]

3.4 Finding

32 Australia's and the Comparator Jurisdictions' BJRs share consistent policy objectives, which are to:

(a) protect the authority of directors to make bona fide commercial decisions, including by acknowledging that courts lack the expertise and information necessary to interfere in business judgments;

(b) acknowledge that directors make decisions with imperfect information, including by avoiding hindsight bias; and

(c) avoid an unreasonable level of risk aversion and encourage sensible commercial risk-taking, including by avoiding discouraging qualified persons from becoming director.

[22] Ibid 1406.
[23] Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth) 25 [82].
[24] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Report, November 1989) 31 [3.35]; Companies and Securities Law Review Committee, *Company Directors and Officers: Indemnification, Relief and Insurance* (Report No 10, May 1990) [68]–[92] <https://www.takeovers.gov.au/content/Resources/cslrc/cslrc_report_no_10.aspx>.
[25] Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth) 26 [89].
[26] Nettle (n 21) 1413. See, eg, *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.
[27] CLERP, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors* (Proposals for Reform: Paper No 3, 1997) 23–25.
[28] King Report II (n 14), Introduction.

33 At the same time, Australia's and the Comparator Jurisdictions' BJRs commonly are not intended to insulate directors from liability in relation to decisions that are made negligently or would otherwise contravene fiduciary standards.

34 As set out in Part 4.3 below, these factors have been more readily balanced in the Comparator Jurisdictions, where the BJR functions as a standard of review, than in Australia, where it functions as a defence.

4 Operation and application of business judgment rules

4.1 Background

35 In this section, we compare the operation and application of Australia's BJR, as compared with those of the Comparator Jurisdictions.

36 Given the consistency we have observed in policy objectives of Australia's and the Comparator Jurisdictions' BJRs, we consider that the key variables relevant to this exercise to be:

(a) the manner in which the BJR operates;

(b) the directors' duties to which the BJR applies;

(c) the steps courts take and the matters they consider in assessing whether the BJR applies; and

(d) the extent to which the BJR modifies the level of director culpability required to establish a breach of the duty of care.

37 Regarding the manner in which BJRs operate, they potentially may function as either:

(a) a 'standard or review' or 'doctrine of judicial abstention' – that is, as a rebuttable presumption that a court will not review business judgments, unless a plaintiff establishes that certain preconditions are met;

(b) a 'standard of conduct' – that is, as rule relaxing the behavioural expectations directors must meet in making business judgments; or

(c) a defence, which if established by a defendant director, allows them to limit or avoid liability associated with a business judgment.

38 In general, we consider that BJRs that operate as doctrines of judicial abstention / standards of review are likely to provide comparatively higher levels of protection to directors, and BJRs that operate as defences provide comparatively lower levels of protection.

39 Regarding the duties to which BJRs apply, as set out in our previous paper, Australia, Delaware, Canada and the UK each impose a suite of core directors' duties that are of similar scope and substance,[29] and incorporate duties to:[30]

(a) act with skill, care and diligence or similar;

(b) act in good faith in the best interests of the company or similar;

(c) exercise powers for a proper purpose or similar;

(d) avoid conflicts of interest or similar; and

(e) not misuse information or position or similar.

40 South Africa, which was not addressed in our previous paper, also imposes a comparable suite of directors' duties,[31] although, in contrast to Australia, it frames the duty to act in the best interests of the company as a standalone duty, and the duties to act in good faith and to exercise power for a proper purpose as a combined duty.

[29] Allens, *Criminal and Civil Frameworks for Imposing Liability on Directors* (2019) <http://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2020/aicd--advice-for-publication-including-organagrams.ashx>.
[30] Ibid 17.
[31] *Companies Act No 71 of 2008* s 76(3).

41 Based on our comparison of Australia's and the Comparator Jurisdictions' BJRs, we consider that Australia's BJR has a narrower scope and operation than any of the Comparator Jurisdictions' BJRs. This finding is set out in more detail in Part 4.4 below, and our overall conclusions and observations are presented in Part 6 below.

4.2 Analysis: Australia

42 Australia's statutory BJR applies in relation to the duty of reasonable care, skill and diligence under s 180(1) of the *Corporations Act 2001* (Cth), but does not apply in relation to other directors' duties.[32]

43 Australia's BJR functions as a defence, rather than a standard of review.

(a) When Australia first adopted its BJR, there was a period of uncertainty as to whether the plaintiff bore an onus to displace a presumption that the rule applied, or defendant directors bore an onus to establish that it applied. On the one hand, the Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998* stated that the statutory formulation provided a presumption in favour of a director.[33] On the other hand, the structure of the statutory rule is such that protection applies only 'if' a director meets the four stated criteria, which is more apt to place the onus on the director than the plaintiff.[34]

(b) Subsequent court decisions have held that Australia's BJR functions as a defence to a claim, which must be made out by a defendant director. In *Australian Securities and Investments Commission v Rich,*[35] Austin J acknowledged that the statutory language was 'profoundly ambiguous',[36] but decided 'with some hesitation in light of the US approach' that the defendant director bears the burden of proof.[37] His Honour reasoned that, if the onus were on the plaintiff, the BJR would have the effect of adding to the elements to be proven by the plaintiff.[38] His Honour further reasoned that the four elements contained within the BJR are matters on which the defendant director typically has the relevant knowledge, and so it is appropriate to have them present evidence concerning these matters.[39] His Honour also appears to have been influenced by Australia's public enforcement regime.[40]

44 A director may raise the BJR in relation to most alleged contraventions of the duty of reasonable care, skill and diligence. However, some exceptions apply, and a director cannot use the BJR as a shield against liability arising in relation to administrative filing obligations,[41] disclosure obligations[42] and insolvent trading.[43]

45 To establish that the BJR applies, a defendant director must make out each of the following elements.[44]

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[32] *Corporations Act 2001* (Cth) Note to s 180(2).
[33] Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth) [6.4].
[34] *Rich* (n 8) [7263]. See Deborah DeMott, 'Legislating Business Judgment – A Comment from the United States' (1998) 16 *Company and Securities Law Journal* 575, 576.
[35] *Rich* (n 8). The Full Federal Court affirmed Austin J's decision in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 (***Fortescue Metals***).
[36] *Rich* (n 8) [7264].
[37] Ibid [7269].
[38] Ibid.
[39] Ibid.
[40] Ibid. Hill and Conaglen (n 11) 30.
[41] *Corporations Act 2001* (Cth) s 188.
[42] Ibid ss 674(2A), 729.
[43] Ibid s 588G.
[44] Ibid s 180(2).

(a) The director must have made a business judgment. 'Business judgments' are decisions to take or not to take action in respect of a matter relevant to the business operations of the corporation.[45] Rather than limiting business judgments to 'decisions to enter into transactions for financial purposes', Australian courts have adopted a broad approach, extending the definition of business judgment to matters preparatory to the making of final decisions (including planning, budgeting and forecasting activities).[46] Furthermore, decisions relating to corporate personnel, the termination of litigation, the setting of policy goals and the apportionment of responsibilities between the Board and senior management are all covered by the BJR.[47] However, business judgments do not encompass failures to turn one's mind to a specific matter or a general neglect of duties.[48]

(b) The business judgment must have been made in good faith and for a proper purpose.

(c) The director must not have a material personal interest in the subject matter of the judgment.

(d) The director must have informed themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate. This is assessed with reference to a subjective standard. It may be that the director was not aware of available information but nonetheless took active steps to become informed about the subject matter of the decision and reasonably believed themselves to be informed.[49]

(e) The director must have rationally believed that the judgment is in the best interests of the corporation. This is assessed with reference to an objective standard. In essence, this requirement 'is satisfied if the evidence shows that the defendant believed that his or her judgment was in the best interests of the corporation, and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief, as defined, whether or not the reasoning process is objectively a convincing one'.[50]

46 If a defendant director makes out the defence, they will be absolved of liability for a contravention of their duty of reasonable care, skill and diligence – though in practice, no defendant director has ever avoided liability on the basis of the BJR.[51] If a defendant director fails to make out the defence, they will be liable for the contravention.

47 In summary, the key features of Australia's BJR are as follows.

(a) It attaches only in relation to the duty of reasonable care, skill and diligence.

(b) It functions as a defence, rather than a standard of review.

(c) A defendant director bears an onus to establish that it applies, and must make out several elements to do so.

[45] Ibid s 180(3).
[46] *Rich* (n 8) [7274].
[47] Ibid [7273]–[7274]; Paul Redmond, 'Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule?' in Ian Ramsay (ed), *Corporate Governance and the Duties of Company Directors* (University of Melbourne, 1997) 195.
[48] *Rich* (n 8) [7277].
[49] Ibid [7283].
[50] Ibid [7289]–[7290].
[51] In *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 (***Mariner***), Beach J held that two defendant directors had 'satisfied the elements of the business judgment rule and [were] entitled to its exculpatory effect, if [they] need[ed] to rely on it'. [495], see also [450]. However, this holding merely 'fortified' an earlier holding that the defendant directors had not contravened their duties of care and diligence, which '[could] stand without [the BJR]'. [482], see also [550].

Australian case study: no business judgment

In *Australian Securities and Investments Commission v Fortescue Metals Group Ltd*,[52] the Australian Securities and Investments Commission (***ASIC***) argued that the CEO of Fortescue Metals Group, Mr Forrest, breached s 180(1) by allowing the company to provide misleading information to the market and failing to correct it in accordance with the company's continuous disclosure obligations under the *Corporations Act 2001* (Cth). This resulted in the company suffering substantial damage to its reputation and financial penalties imposed by the court. Mr Forrest was denied relief under the statutory BJR defence.[53] The Federal Court held that there was no relevant 'business judgment' made by Mr Forrest because a 'decision not to make accurate disclosure … is not a decision related to the "business operations" of the corporation. Rather, it is a decision related to compliance with the requirements of the Act.'[54]

Australian case study: no business judgment and material personal interest

In *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler*,[55] the New South Wales Supreme Court found that a non-executive director of HIH, Mr Adler, breached s 180(1) by causing the company to lend him and associated entities money in exchange for little or no value. Mr Adler was denied relief under the statutory BJR. Mr Adler had a material personal interest in the transactions and had deliberately misused his position to gain personal advantages, which was not in good faith or for a proper purpose.[56]

The CEO of HIH, Mr Williams, also failed in his attempt to rely upon s 180(2) because he 'simply neglected' to turn his mind to the company's interests or how to protect them. Therefore, Mr Williams had not made a 'business judgment'.[57] Furthermore, Mr Williams chose not to give evidence beyond reliance upon the factual circumstances, which the court held could not satisfy the onus of the statutory BJR in the circumstances.[58]

Australian case study: BJR requirements established

In *Australian Securities and Investments Commission v Mariner Corporation Limited*,[59] ASIC alleged that the directors of Mariner Corporation Ltd – including the CEO, Mr Olney-Fraser – acted in breach of their duty of care and diligence under s 180(1) when they made a takeover bid on behalf of the company without securing funding. In the Federal Court, Justice Beech held that a retrospective analysis is not appropriate when assessing a director's conduct because '[t]he very nature of commercial activity necessarily involves uncertainty and risk taking',[60] and, in this instance, the benefits to Mariner of commencing a takeover bid were significant and outweighed the risks.[61] Importantly, Justice Beech also considered that even if there had been a breach of s 180(1), the elements of the statutory

[52] *Fortescue Metals* (n 35).
[53] The High Court overturned the Full Federal Court's decision on the basis that ASIC, inter alia, had not proved that the company's statements were misleading. However, the High Court did not see reason to consider any aspect of the BJR.
[54] *Fortescue Metals* (n 35) [197].
[55] (2002) 168 FLR 253 (***Adler***).
[56] Ibid [513]–[578], [587]–[681].
[57] Ibid [453].
[58] Ibid [409].
[59] (2015) 241 FCR 502.
[60] Ibid [452].
[61] Ibid [457], [461].

BJR would have been satisfied.[62] His Honour said that the decision to support the takeover bid was a conscious exercise of 'business judgment' under s 180(3).[63] Further, Mr Olney-Fraser had no personal interest in the decision, acted to benefit the company (which stood to make a large profit on the transaction) and was informed regarding the subject matter of the decision (there had been extensive discussions with potential funding parties prior to the announcement of the takeover and therefore, Mr Olney-Fraser's process of reasoning was rational).[64]

4.3 Analysis: Comparator Jurisdictions

48 Australia's BJR has a markedly different operation and application than the Comparator Jurisdictions' BJRs.

(a) Delaware

49 Delaware's common law BJR operates as a doctrine of judicial abstention that must be displaced by a plaintiff, rather than as a defence that must be established by the defendant director.[65]

50 It applies to a broader range of director conduct than Australia's BJR. While it is particularly relevant to alleged breaches of the directors' duty of care, it has secondary relevance to the duty of loyalty.

51 Pursuant to Delaware's BJR, the state's courts apply a presumption that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company'.[66] The presumption does not apply if no business judgment involving the business affairs of a corporation was made; for example because 'the directors fail to act without making a decision or abdicate their managerial responsibilities'.[67]

52 Limited exceptions to Delaware's BJR exist, and, most significantly, the ordinary presumption does not apply in relation to:

(a) sales of companies, where courts apply a heightened standard of review, assessing whether a director obtained the best price reasonably available;[68] and

(b) defences of hostile takeovers, where directors must prove that defensive measures were reasonable in light of the threat to the company and its objectives, and were not simply measures to retain control of the company.[69]

53 Defendant directors seek to rely on the BJR in almost all cases in which their conduct is challenged. They need not plead any particular facts to do so.

54 A plaintiff can readily displace the BJR if the facts of a case justify such a rebuttal.[70] To do so, they must plead facts demonstrating that a defendant director contravened their directors' duty

[62] Ibid [495].
[63] Ibid [486]–[487].
[64] Ibid [488]–[495].
[65] Regarding Delaware, see, eg, *Aronson v Lewis*, 472 A.2d 805 (Del. 1984) 812 (***Aronson***). Regarding Ontario, see, eg, *Maple Leaf Foods* (n 9) 192 (per Weiler JA); cited in *Wise* (n 14) [65].
[66] *Aronson* (n 65) 812.
[67] Craig Palm and Mark Kearney, 'A Primer on the Basics of Directors' Duties in Delaware: the Rules of the Game (Part 1)' (1995) 40 *Villanova Law Review* 1297, 1304.
[68] *Revlon, Inc. v McAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986).
[69] *Unocal Corp. v Mesa Petroleum Co.* 493 A.2d 946 (Del. 1985).
[70] *Morrison v Berry* 191 A.3d 268 (Del. 2018).

of good faith or loyalty – the fact that a defendant director made an objectively poor business decision alone is insufficient to rebut the presumption of the BJR.[71]

55 Importantly, and in contrast to Australia, the standard for proving a contravention of the duty of care is one of gross negligence,[72] which exists where a defendant director has 'drastically departed from what would be expected of a careful fiduciary'.[73] '[T]o support an inference of gross negligence, the decision has to be so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion',[74] and a plaintiff must lead evidence showing 'a wide disparity between the process the directors used and a process which would have been rational'.[75] The types of conduct that demonstrate gross negligence and will result in the displacement of the presumption include a director:

(a) unreasonably failing to review and consider all relevant available information, in contravention of the duty of care; and

(b) acting with an improper motive or personal interest, or without good faith or independence, in contravention of the duty of loyalty.

56 If a plaintiff fails to displace the presumption, a court will not review the impugned business judgment. If the plaintiff successfully pleads facts rebutting the presumption, the burden shifts to the director to prove their action was entirely fair to the company.[76]

Delaware case study: application to sale of company

In *In re PLX Technology Inc Stockholders Litigation*, a derivative action, the plaintiffs alleged that the directors of PLX Technology breached their duty of loyalty by succumbing to an activist stockholder's pressure to effect a quick sale of the company to Avago Technologies Wireless USA.[77]

The Court identified numerous problematic factors in the sale process, but stated that the sale would have been in the range of reasonableness but for one critical fact: the lead negotiating director for PLX was the co-managing partner of the activist stockholder (and had been appointed to the board by the activist stockholder). The impugned director had knowledge of material information about the intention of the purchasing company to make an acquisition proposal for PLX, but withheld this information from the rest of the board. The conflict of interest was key – if the divergent interest had been disclosed, the BJR would have allowed dismissal of the matter at the early proceeding stage.

However, ultimately, the Court held that no damages flowed from the breach, as the arm's length merger price likely was the best indication of the company's value.

[71] Ibid.
[72] *Van Gorkom* (n 14) 873.
[73] Government Information Centre, *The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, Delaware.gov <https://corplaw.delaware.gov/delaware-way-business-judgment/>.
[74] *In re Zale Corporation Stockholders Litigation* CA 9388-VCP (Del. Ch. 2015) (***Re Zale***); *Solash v Telex Corp* 1988 WL 3587 (Del. Ch. 1988).
[75] *Re Zale* (n 74).
[76] *Cede & Co. v Technicolor, Inc.,* 634 A.2d 345 (Del. 1993) 361; Nadelle Grossman, 'Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform' (2007) 12 *Fordham Journal of Corporate and Financial Law* 393, 401.
[77] *In re PLX Technology Inc Stockholders Litigation* CA No. 9880-VCL, 2018 WL 5018535 (Del. Ch 2018).

Delaware case study: gross negligence demonstrated as a result of a defective decision-making process

In *Smith v Van Gorkom*, a shareholder class action, which became a key gross negligence decision, the plaintiffs challenged Trans Union Corporation board approval of a cash-out merger proposal. The merger proposal involved Trans Union shareholders cashing out their shares and the company being acquired by New T Company. The proposal was largely agreed between Jerome Van Gorkom (the Chairman and CEO of Trans Union) and Jay Pritzker (owner of New T Company's parent company, Marmon Group Inc). The Delaware Supreme Court overturned the first instance decision on appeal and found the directors breached the gross negligence standard in approving the merger.[78] Trans Union directors failed to adequately inform themselves of Van Gorkom's role in compelling the sale of the Company and setting the $55 per share buyout price, were uninformed regarding the value of Trans Union, and approved sale of the company on two hours' notice despite the fact that there was no prior notice and no emergency that would necessitate such a hasty sale.

The majority of the Delaware Supreme Court held that, in light of these factors, the directors' approval of the sale was at a minimum, grossly negligent.[79]

Delaware case study: gross negligence not demonstrated

In *In re Walt Disney Co Derivative Litigation*, another derivative action, the plaintiffs alleged various fiduciary duty breaches in relation to the hiring and firing of Michael Ovitz, Disney's short-lived Executive President and Director. Michael Eisner, Disney's CEO, selected Mr Ovitz and agreed to a large compensation package despite Mr Ovitz's lack of public company management experience. Disney's compensation committee approved Mr Ovitz' hiring and compensation package with very limited oversight. Mr Eisner lost confidence in Mr Ovitz within a year and the parties negotiated a very large severance package.

The Delaware Court of Chancery held that, while Mr Eisner's actions were far from best practice, he had made an informed decision to terminate based on the advice of counsel and what he thought was in Disney's best interests, meaning there was no 'gross negligence'.

(b) Canada

57 Unsurprisingly given that its BJR has developed in tandem with Delaware's, Canada's BJR also operates as a doctrine of judicial abstention that must be overcome by a plaintiff,[80] rather than as a defence that must be established by the defendant director.

58 Like Delaware's, Canada's BJR applies in relation to a broader range of director conduct than does Australia's. While it chiefly attaches to the duty to act with care, skill and diligence,[81] the Supreme Court of Canada has held that this duty governs what is required from directors in determining what is in the best interests of a corporation.[82] Consequently, the BJR has a role

[78] *Van Gorkom* (n 14).
[79] Ibid 872.
[80] Nickolas Sopow, 'Directors and Standards: The Problem of Insufficient Guidance' (2016) *Electronic Thesis and Dissertation Repository* 4073, 24 <https://core.ac.uk/download/pdf/61691892.pdf>. Rousseau (n 19) 233.
[81] *Canada Business Corporations Act* (Can) s 122(1)(b).
[82] *BCE Inc v 1976 Debenture holders* (2008) 3 SCR 560, 585 [40], [112] (***BCE***).

to play in assessing whether a director fulfilled their duty to act honestly and in good faith with a view to the best interests of the corporation.[83]

59 Pursuant to Canada's BJR, directors are required to:

> *act reasonably and fairly – not perfectly. The 'business judgment rule' accords deference to a business decision, so long as the decision lies within a range of reasonable alternatives. A director's actions may be protected by the business judgment rule, on the presumption that the director acted on an informed basis, in good faith, and in the best interest of the corporation. Courts will defer to business decisions honestly made.*[84]

60 While Canada's BJR has broad application, the 'principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions'.[85] Therefore, 'directors are only protected to the extent that their actions actually evidence their business judgment', and they are not protected if they brought little evidence to bear on an issue.[86] As such, the BJR does not apply to matters of legal obligation, such as disclosure obligations under security laws,[87] despite the inbuilt business judgments in such decisions regarding what is market sensitive information.

61 As in Delaware, defendant directors often seek to rely on the BJR, and need not plead any particular facts to do so.

62 However, the standard to rebut the presumption may be lower in Canada than in Delaware. While a Delaware plaintiff must plead facts demonstrating a contravention of the duty of good faith or loyalty, a Canadian plaintiff need only cast doubt on 'the rule's [assumed] preconditions [that the defendant director acted with] honesty, prudence, good faith, and a reasonable belief that his actions were in the best interests of the company'.[88]

63 Again, the presumption is readily displaced if the facts of a case justify such a rebuttal. The Ontario Court of Appeal has commented that courts 'will defer to business decisions honestly made, but they will not sit idly by when it is clear that a board is engaged in conduct that has no legitimate business purpose and that is in breach of its fiduciary duties'.[89]

64 If the plaintiff fails to displace the presumption that a business decision is entitled to judicial deference, a court will not review an impugned business judgment. If a plaintiff does displace the presumption, unlike in Delaware, the evidentiary burden does not shift to a defendant director. Rather, the court applies an 'enhanced scrutiny standard', on the basis that 'to impose an evidentiary burden on the directors … goes too far', 'places the initial burden in the wrong place' and would create 'the potential for diluting [the BJR] to a very weak potion'.[90]

65 In applying this standard, the court will likely consider whether the process by which the director made the business judgment was prudent and properly informed, and whether a director's business judgment was reasonable in light of the circumstances that ought to have been known to them.[91]

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[83] Rousseau (n 19) 233.
[84] *Extreme Venture Partners Fund I LP v. Varma* (2019) ONSC 2907, [127].
[85] *UPM-Kymmene Corp. v UPM-Kymmene Miramichi Inc* [2002] OJ No 2412 (SCJ), affirmed [2004] OJ No.636 (CA), [156] (***UPM-Kymmene Corp.***).
[86] Ibid. *Ford Motor Co. of Canada v Ontario Municipal Employees Retirement Board* [2006] OJ No. 27 (C.A.), [55]–[56] (per Rosenberg JA).
[87] *Kerr v Danier Leather Inc* [2007] 3 SCR 331.
[88] *Corporacion Americana de Equipamientos Urbanos S.L. v. Olifas Marketing Group Inc.* (2003) 66 OR (3d) 352, [14]; *Unique Broadband Systems, Inc* (Re) (2014) ONCA 538, [71] (***Unique Broadband Systems, Inc***).
[89] *Unique Broadband Systems, Inc.* (n 88) [72].
[90] *CW Shareholdings Inc* (n 17) [63] (per Blair J).
[91] *Wise* (n 14) 491–492, [67].

Canadian case study: application to duty to act in the best interests of the company

In *BCE Inc. v 1976 Debenture holders*,[92] the company's creditors pursued an oppression remedy against a corporate policy that would see the company take on an additional debt of over $38 billion dollars. The creditors sought an injunction on the basis that incurring the additional debt seriously affected their interests. While the Supreme Court of Canada accepted that the best interests of the corporation included the interests of all stakeholders, it applied the BJR on the grounds that the court would not interfere with the directors' assessment of which stakeholders' interests best aligned with the interests of the corporation, and thus which interests required protection.[93]

Case study: successful displacement of BJR

In *UPM-Kymmene Corp. v UPM-Kymmene Miramichi Inc*.,[94] a committee of the board approved a compensation package for a director after it had been scrutinised by an expert consultant. However, the consultant had acted without adequate information and the board committee had spent only five to seven minutes deliberating the package. The Ontario Court of Appeal found that there was a breach of the duty of care and that the BJR could not apply. Justice Lax said:

> *The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. … Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.*[95]

(c) South Africa

66 South Africa's BJR applies in relation to a broader range of director conduct than does Australia's. It explicitly attaches to the duty to act in the best interests of the company, as well as the duty of reasonable care, skill and diligence.[96]

67 The operation of South Africa's statutory BJR has been the subject of limited judicial consideration.[97] Though it is framed in similar terms to Australia's BJR, the commentary we have reviewed suggests that it likely will function as a doctrine of judicial abstention that must be overcome by a plaintiff, rather than a defence that must be raised by the defendant director.[98]

68 Pursuant to the relevant statutory provision, a director is taken to have satisfied their duties to act in the best interests of the company and to exercise reasonable care, skill and diligence in relation to a matter if they:

[92] *BCE* (n 82).
[93] Ibid [56], [66], [71], [87], [104].
[94] *UPM-Kymmene Corp.* (n 85).
[95] Ibid [153].
[96] *Companies Act No. 71 of 2008* s 76(4)(a).
[97] We have identified only one judicial decision considering the application of the South African BJR. That decision provides little insight as to whether the South African BJR operates as a defence or a standard of review. In that decision, Rogers J merely noted that the courts should be wary of substituting their own judgement for that of the director, and the duty to act in the best interests of the company is not an objective one: 'what is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the best interests of the company and this belief must have had a rational basis': *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* [2014] ZAWCHC 95, [74] (***Visser Sitrus***).
[98] Mupangavanhu (n 13) 133.

(a) took reasonably diligent steps to become informed about the matter;

(b) did not have a personal financial interest in the matter, or disclosed their personal financial interest in accordance with the requirements of the *Companies Act of 2008* (RSA); and

(c) believed, on a rational basis, that their decision in relation to a matter was in the best interests of the company.[99]

69 Notably, the relevant statutory provision relates to 'any particular matter arising in the exercise of the powers or the performance of the functions of director'.[100] Its application is yet to be considered, but this implies that the South African BJR is intended to protect director conduct that extends beyond business judgements, since the drafters did not adopt the Australian statutory wording of 'makes a business judgement'.[101]

70 There are no statutory exceptions to the South African BJR.

71 If the expectation in the academic commentary that the provision operates as a standard of review is correct, as in Canada and Delaware a defendant director will not need to plead any particular facts to avail themselves of the BJR, and a plaintiff will need to lead evidence indicating a defendant director failed to comply with the requirements set out in paragraph 68 above to displace the BJR. On the other hand, if the provision operates as a defence, as in Australia, a defendant director will need to establish their compliance with each of those requirements to avail themselves of the BJR.

(d) United Kingdom

72 The UK does not have a formal common law or statutory BJR, however its courts recognise a 'soft' doctrine of judicial abstention whereby they will 'not interfere with the business judgment of directors in the absence of allegations of mala fides',[102] which 'arguably operates as a functional equivalent of Delaware's' BJR'.[103] A significant onus rests on the plaintiff to demonstrate that a particular business judgment be subject to judicial scrutiny.[104]

73 The doctrine primarily applies to the duty to act with care, skill and diligence,[105] but it has been adopted in a broad range of cases, and is not confined to that duty in the way Australia's statutory BJR is.[106]

74 Commentators have noted that UK courts generally identify business judgments as those that are entrepreneurial in nature, which are informed by, and advance the interests of the corporate enterprise.[107]

75 Given the nature of the doctrine, a defendant director need not plead any particular facts to avail themselves of such judicial deference. Rather, provided the impugned decision is a business judgment and has been made in good faith, then it will not likely be subject to judicial scrutiny.[108]

[99] *Companies Act No. 71 of 2008* s 76(4).
[100] Ibid.
[101] Mupangavanhu (n 13) 142.
[102] *Devlin v Slough Estates Ltd* [1983] BCLC 497, 503-504. See generally Quinn (n 17) 122.
[103] Hill and Conaglen (n 11) 28.
[104] Commentators have noted that this is generally an arduous task. Andrew Keay and Joan Loughrey, 'The Concept of Business Judgment' (2019) 39(1) *Journal of Legal Studies* 36, 38.
[105] See *Companies Act 2006* s 174.
[106] Keay and Loughrey (n 104) 39.
[107] Ibid 41.
[108] Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* (Report No 261, 1999) 53; *Regentcrest plc (in lip) v Cohen & Anor* [2001] BCC 494 [127] (***Regentcrest***).

76 Notably, the principle of 'enlightened shareholder value' is enshrined in the UK's companies legislation.[109] This principle recognises that directors may have regard to a wide range of stakeholders when making business judgements. This broader approach is a further factor that militates against judicial review of business judgments in the UK.[110]

Case study: application to duty to act in the best interests of the company

In *Regentcrest plc (in liq.) v Cohen & Anor*,[111] the plaintiff failed to displace the presumption of judicial non-interference with business decisions. The liquidators of Regentcrest claimed that Mr Richardson, a former director of the company, had breached his fiduciary duty to act *bona fide* in the interests of the company.

Mr Richardson had waived Regentcrest's entitlement to 'clawback' particular sums of money against the vendors of a company named Greenground, which Regentcrest had purchased. In return for the waiver, the vendors would provide their future services as directors of Regencrest free-of-charge.

Mr Richardson submitted that he had agreed to the waiver for a valid commercial reason and had honestly believed that it was in the best interests of the company. The court agreed and held that there was no breach of fiduciary duty. The court stated that whether Mr Richardson had breached his duty was not to be determined on the basis of whether the decision ultimately proved beneficial for the company, or whether the court would have acted differently in the circumstances.

4.4 Finding

77 Australia's BJR has a markedly different operation and application than the Comparator Jurisdictions' BJRs.

78 Uniquely among the Comparator Jurisdictions, it attaches only to the duty to act with skill, care and diligence. Conversely:

(a) Canada's and Delaware's common law BJRs, and the UK's 'soft' common law doctrine of judicial abstention, are flexible enough to apply to additional duties where appropriate; and

(b) South Africa's statutory BJR explicitly additionally attaches to the duty to act in the best interests of the company.

79 Also uniquely among the Comparator Jurisdictions, Australia's BJR operates as a defence that must be raised and made out by a defendant director. Conversely:

(a) Canada's and Delaware's common law BJRs, and the UK's 'soft' common law doctrine of judicial abstention, apply without a defendant director invoking them, and must be displaced by the plaintiff; and

(b) although it has received little judicial commentary, South Africa's statutory BJR likely operates in the same way.

80 Notably, in contrast to the Delaware BJR, Australia's BJR does not modify the level of director culpability required to establish a breach of the duty of care.

[109] *Companies Act 2006* (UK) s 172.
[110] Nettle (n 21) 1420.
[111] *Regentcrest* (n 108).

81 Given these marked differences between Australia's and the Comparator Jurisdictions' BJRs, this comparative review of the operation and application of the BJRs illustrates that Australia's is narrower and more difficult to invoke than the Comparator Jurisdictions', and suggests that it may provide a lower level of protection to directors.

5 Performance of business judgment rules

5.1 Background

82 To say that Australia's BJR may provide a lower level of protection to directors than the Comparator Jurisdictions' is not necessarily to say that the Comparator Jurisdictions' BJRs are fulfilling their policy objectives and Australia's is not. It conceivably could be the case that the Comparator Jurisdictions' BJRs are insulating directors from liability in inappropriate circumstances and Australia's imposes the right level of liability.

83 In this section, we synopsize key commentary on the performance of Australia's and the Comparator Jurisdictions' BJRs to assess their perceived effectiveness. In doing so, we highlight key distinguishing features of Australia's and the Comparator Jurisdictions' director liability environments.

84 We find that the performance of Australia's BJR has attracted more negative commentary than have the performance of the Comparator Jurisdictions'.

5.2 Analysis: Australia

85 The Australian director liability environment is characterised by the following unique features.

(a) 'Australia primarily relies on public enforcement of directors' duties, whereas the Comparator Jurisdictions rely primarily on private enforcement'.[112]

(b) This 'utilisation of a public enforcement mechanism renders the Australian director liability environment vastly different to those of the Comparator Jurisdictions, creates an additional exposure for Australian directors, and impacts the character of Australian directors' duties by emphasising their public character'.[113]

(c) 'ASIC increasingly is utilising the emergent doctrine of stepping stone liability to "piggy back" director civil liability on to Corporations Act and ASIC Act breaches by a corporation'.[114] This doctrine "has the potential to expand the ambit of directors" corporate governance obligations that are subject to public enforcement even further'.[115]

86 In this context, the performance of Australia's BJR has been the subject of a significant amount of commentary. Several key themes emerge from this commentary.

87 A first key theme is that the circumstances in which the Australian BJR provides protection to defendant directors are unclear. As set out in paragraph 30(b) above, prior to the adoption of a statutory BJR, Australian courts were 'not at all hesitant in second-guessing business judgments and in holding directors liable for decisions with which those courts disagreed'.[116]

[112] Allens (n 29) 13 [60].
[113] Ibid 14 [65].
[114] Ibid 14 [66]. See also, Dr R T Langford, 'Corporate Culpability, Stepping Stones and *Mariner* – Contention Surrounding Directors' Duties Where the Company Breaches the Law' (2016) *Company & Securities Law Journal* 1, 7; Professor Pamela Hanrahan, 'The Implications of the Federal Court Decision on Cassimatis v ASIC' (2020) *Australian Institute of Company Directors* <http://aicd.companydirectors.com.au/membership/company-director-magazine/2020-back-editions/may/the-implications-of-the-federal-court-decision-on-cassimatis-v-asic>.
[115] Allens (n 29) 14 [67].
[116] Nettle (n 21) 1413. See, eg, *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

Following the adoption of a statutory BJR, Australian commentators embraced the promise of an 'explicit safe harbour', and predicted that the certainty of protection it would provide would '[put] the wind into directors' sails'.[117] However, two decades have elapsed since the BJR came into effect, no defendant director has avoided liability on the basis of the BJR,[118] and some commentators have argued that the statutory BJR does little more than offer the terms of the duty of care itself without providing any superior protection than the position that prevailed at common law prior to its adoption (discussed at paragraph 30(a) above).[119] Others have viewed it as a 'sleepy hollow' or 'mere window dressing'.[120] That said, some commentators have argued that the 'absence of case law' should not be taken as a failure of the rule, and that the few judicial decisions that do illustrate the promise and practical utility of the statutory BJR in Australia.[121]

88 A second key theme emerging from the commentary is that, by interpreting the BJR as a defence that must be made out by a defendant director, rather than a standard of review that must be overcome by a plaintiff, the courts have placed too high a burden on defendant directors.[122] In particular, commentators have criticised the courts on the basis that the Explanatory Memorandum made it ostensibly clear that the intention was for a presumption in favour of directors modelled on American BJRs.[123] In *Australian Securities and Investments Commission v Rich*, Austin J reasoned that putting the onus on defendants was not incompatible with the Explanatory Memorandum as '[i]t may happen in practice that the evidential burden can be shifted to the plaintiff relatively easily, if the defendant addresses the statutory elements in his or her affidavit.'[124] Despite these sentiments, observations of the BJR in practice suggest that positioning the onus of proof on directors has neutered any potential for the statutory BJR to offer a real and practical ‘defence’.

89 A third key theme emerging from the commentary is that the BJR applies in relation to too narrow a range of duties.[125] As discussed, the Australian BJR attaches only to the duty of reasonable care, skill and diligence, whereas the Comparator Jurisdictions' BJRs have varying degrees of relevance to other duties. One commentator has proposed an 'all-inclusive directors and other officers decisions defence', which would provide protection against all possible contraventions, so long as the requirements of the proposed new section were met.[126] The commentator's rationale is that such a defence would be 'conducive to a more streamlined implementation', as all decisions by directors would be guided by the same considerations, leading to greater certainty.[127]

90 A fourth key theme emerging from the commentary is that the BJR applies in relation to too narrow a range of business judgments.[128] In particular, the BJR does not apply to

[117] Annette Greenhow, ‘The Statutory Business Judgment Rule: Putting Wind into Directors’ Sails’ (1999) 11(1) *Bond Law Review* 33.
[118] *Adler* (n 55); *Resource Equities Ltd v Carr* [2009] NSWSC 1385; *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; *Fortescue Metals* (n 35).
[119] Redmond (n 47).
[120] Harris and Hargovan (n 7) 320; Neil Young QC, 'Has Directors’ Liability Gone Too far or Not Far Enough? A Review of the Standard of Conduct Required of Directors Under Sections 180–184 of the Corporations Act' (2008) 26(4) *Company and Securities Law Journal* 216.
[121] See, eg, Harris and Hargovan (n 7) 342; Michael Legg and Dean Jordan, 'The Australian Business Judgment Rule After ASIC v Rich: Balancing Director Authority and Accountability' (2014) 32 *Adelaide Law Review* 403, 425.
[122] Nettle (n 21), 1407.
[123] *Rich* (n 8) [7256]–[7257]; Nettle (n 21),1407; Legg and Jordan (n 119).
[124] *Rich* (n 8) [7270].
[125] Jean Du Plessis and Jim Mathiopoulos, 'Defences and Relief from Liability for Company Directors: Widening Protection to Stimulate Innovation' (2016) 31 *Australian Journal of Corporate Law* 287.
[126] Ibid 311–312.
[127] Ibid 315.
[128] Jean Du Plessis and Andreas Rühmkorf, 'New Trends Regarding Sustainability and Integrated Reporting for Companies: What Protection do Directors Have?' (2015) 36 *The Company Lawyer* 49.

considerations about corporate compliance with legal obligations, such as whether and how to disclose material information to the public as required by law, on the basis that they are not decisions 'related to the business operations of the corporation.[129] This is despite the fact that market disclosure decisions will often involve considerable business judgment, informed by legal advice. In one notable case,[130] non-executive directors and an officer of a company were liable for a breach of the duty of care for not picking up an error in the company's financial statement, notwithstanding that the reports were prepared in close collaboration with auditors and the CEO recommended approval of the statements by the board of directors.[131] Although the penalties were considered 'light', it sent 'shock waves through Australia' that there could be no recourse to the BJR in such a scenario.[132]

91 The significance of this criticism is compounded by key trends in the Australian director liability.

(a) First, Australian companies are under increasing pressure to recognise, manage and disclose a vast array of risks to the market;[133] particularly key environmental and social risks. Australian regulators now expect companies to address these risks as part of their governance and risk management frameworks, and to make public disclosures where appropriate.[134]

(b) Second, as noted in paragraph 85(c) above, a doctrine of stepping stone liability has emerged whereby directors can be held liable in respect of a company's contraventions. Commentators have observed that this doctrine may continue to expand, such that a broader range of Australian corporate decision-making is reviewable.[135] For example, in the future, it may be used to establish director liability based on acts that fall short of contraventions of the law, if those acts result in mismanagement of the company leading to reputational harm.[136]

Taken together, these factors suggest that Australian BJR's failure to protect some forms of corporate decision-making may take on increased significance in the future.

92 A final and overarching theme emerging from the commentary on the performance of Australia's BJR is that any protection it actually provides is not felt by directors.[137] Over the past decade, surveys assessing Australian directors' views on the liability environment they face have concluded 'that boards are being more cautious and are finding it harder to attract

[129] *Fortescue Metals* (n 35) [197]; *Australian Securities and Investments Commission v Vocation Limited (in liquidation)* (2019) 371 ALR 155 [739].
[130] *ASIC v Healey* (2011) 196 FCR 291.
[131] Ibid.
[132] Du Plessis and Rühmkorf (n 128) 54.
[133] Noel Hutley SC and Sebastian Hartford Davis, *Climate Change and Directors' Duties – 'Supplementary Memorandum of Opinion* (26 March 2019) The Centre for Policy Development <https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf>; ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Fourth Edition, February 2019) <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf> (***Corporate Governance Principles and Recommendations***); ASIC, *Climate risk disclosure by Australia's listed companies* (Report 593, September 2018) <https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf>.
[134] ASX Corporate Governance Council (n 133); ASIC (n 133).
[135] Langford (n 114) 7; Aze Herzberg and Helen Anderson, 'Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 *Federal Law Review* 181.
[136] Hutley and Hartford (n 133); The Honourable Thomas Frederick Bathurst AC (Chief Justice of New South Wales), Directors' and Officers' Duties in the Age of Regulation (Conference in Honour of Professor Baxt AO, 26 June 2018) [35].
[137] Jenifer Varzaly, 'Protecting the Authority of Directors: An Empirical Analysis of the Statutory Business Judgment Rule' (2012) 12 *Journal of Corporate Law Studies* 429.

the best people to become directors, because of concerns about liability'.[138] Commentators continue to voice such concerns.[139]

93 In summary, informed commentary suggests that Australia's BJR may not be fulfilling its policy objectives. In particular, few commentators believe that it provides real additional protection to directors in relation to bona fide commercial decisions, or is encouraging sensible commercial risk-taking.

5.3 Analysis: Comparator Jurisdictions

(a) Delaware

94 The Delaware director liability environment is characterised by the following features.

(a) Directors' duties are enforced through private actions, including company actions, derivative actions and shareholder class actions.

(b) The 'legal environment in the United States is uniquely hospitable to litigation against directors',[140] including because litigants bear their own costs whether they win or lose in court, class action and derivative suits are readily available to shareholders, and the US legal system 'treats plaintiffs' attorneys as entrepreneurs who seek out legal violations and suitable clients rather than waiting passively for litigants to come to them'.[141]

95 The performance of the Delaware BJR has been the subject of surprisingly little focused consideration. This may be because, as a foundational feature of the US director liability environment, and being a long-standing common law rule rather than a recent statutory creation, US commentators are less inclined to consider this topic afresh. Nonetheless, a few key themes have emerged from the commentary.

96 A first is that commentators consider that the BJR has a very important role to play in Delaware, given the very high level of directors' duties litigation and the unique hospitability to litigation against directors. For example, one commentator observes that, if the business judgement rule was removed, 'board decision-making and shareholder wealth would doubtless suffer as a result'.[142]

97 A second is that commentators appear to accept the Delaware BJR in its present form. Although there is ongoing discussion around exactly where the margins of the doctrine should be drawn,[143] we have not identified any significant reform proposals.

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[138] Harris and Hargovan (n 7) 327. See also Treasury and the Australian Institute of Company Directors, *Survey of Company Directors* (2008); Australian Institute of Company Directors, *Director Sentiment Index Research* (November 2011); Australian Institute of Company Directors, *A Proposal for Law Reform: The Honest and Reasonable Director Defence* (August 2014).
[139] Tim Gordon, 'Why Australia Needs a New Accord on Directors' Duties' (online), *Australian Financial Review,* 2 June 2020 <https://www.afr.com/companies/professional-services/why-australia-needs-a-new-accord-on-directors-duties-20200602-p54ynr>.
[140] Hill and Conaglen (n 11) 11.
[141] Brian Cheffins and Bernard Black, 'Outside Director Liability Across Countries' (2006) 84(6) *Texas Law Review* 1385, 1393.
[142] Bernard Sharfman, 'The Importance of the Business Judgement Rule' (2017) 14(1) *New York University Journal of Law & Business* 27, 69.
[143] For example, one notable point of disagreement between commentators is whether the BJR should offer protection to corporate officers. Lyman Johnson, 'Delaware's Long Silence on Corporate Officers' (23 May 2017) *The CLS Blue Sky Blog* <https://clsbluesky.law.columbia.edu/2017/05/23/delawares-long-silence-on-corporate-officers/>. While Delaware courts have found that officers owe fiduciary duties, they have indicated that the BJR does not provide coverage to officers: *Gantler v Stephens* 965 A.2d 695 (Del 2009) 709; *Palmer v Reali* 211 F.Supp.3d 655 (Del. 2016) 666. One commentator argues that BJR protection should not extend to officers as well as directors because the positions involve different roles, meaning different policy rationales apply and officers ought to be held accountable with the threat of civil liability: Lyman Johnson, 'Corporate Officers and Business Judgement Rule' (2005) 50(2) *Business Lawyer* 439. His opponents say otherwise: Lawrence A Hamermesh and A Gilchrist Sparks, 'Corporate Officers and the Business Judgement Rule: A Reply to Professor Johnson' (2005) 60(3) *Business Lawyer* 865.

98 In summary, informed commentary tends to suggest that Delaware's BJR is fulfilling its policy objectives.

(b) Canada

99 The Canadian director liability environment is characterised by the following features.

(a) Directors' duties are enforced through private actions, including through company actions, derivative actions, shareholder class actions and Canada's idiosyncratic oppression remedy.[144]

(b) The *Canada Business Corporations Act* extends derivative actions and the oppression remedy to non-shareholder groups, in recognition that such groups may have significant monetary and non-monetary interests in corporations. Illustratively, Canada recently codified a stakeholder principle that 'when acting in the best interests of the corporation, directors and officer may consider, but are not limited to the interests of shareholders, employees, retirees and pensioners, creditors, consumers, governments; the environment; and the long-term interests of the corporation'.[145]

(c) Oppression actions are more common than derivative actions.[146] Oppression is a very broad remedy, which grants courts equitable jurisdiction to enforce 'not just what is legal but what is fair'.[147] Conversely, derivative actions are not available 'unless the complainant first gives the directors reasonable notice of its intention to bring a derivative action and the directors do not cause the corporation to bring and diligently prosecute the action',[148] and unless the court is satisfied that the complainant is acting in good faith and in the best interests of the corporation. Given these restrictions, Canada is less hospitable to derivative actions than Delaware , where there is no leave requirement, and where the decision of whether the litigation is in the best interests of the company is decided by a 'special litigation committee' appointed by the company's board of directors, rather than a court.[149]

100 In this context, the performance of Canada's BJR has been the subject of a moderate amount of commentary.

101 The key focus of the commentary has been the application of the BJR to derivative and oppression actions. In theory, the extension of derivative actions and the oppression remedy to a range of stakeholders gives Canadian courts a radical role to play in assessing the impact of corporate policy on individual groups,[150] and gives the duties of care, skill and diligence and to act in the best interests of the corporation a particularly robust role to play in Canadian corporate governance. However, in practice, the BJR often serves as a 'major impediment' to the success of actions by shareholder and non-shareholder groups, and Canadian courts

[144] The oppression action gives shareholders, creditors, directors and officers the right to bring an action where a corporation has engaged in conduct that is oppressive, unfairly prejudicial or which unfairly disregards their interests. *Canada Business Corporations Act* (Can) s 241.
[145] On 21 June 2019, section 122(1.1) of the *Canada Business Corporations Act* (Can) received Royal Assent. According to the Federal Government, the reason for the amendment was to 'set higher expectations and better oversight of corporate behaviour' and to emphasise that federally incorporated businesses are able to consider diverse interests, such as those of workers and pensioners, in corporate decision-making: House of Commons, *Investing in the Middle Class Budget 2019 Government of Canada* (News Release, 19 March 2019) <https://www.budget.gc.ca/2019/docs/plan/budget-2019-en.pdf>.
[146] Osler, Hoskin & Harcourt LPP and Institute of Corporate Directors, 'Directors' Responsibilities in Canada' (2014), 18.
[147] *BCE* (n 82), [58].
[148] M Hoffman, 'The Statutory Derivative Action in Australia: An Empirical Review of its Use and Effectiveness in Australia in Comparison to the United States, Canada and Singapore' (2005) *Corporate Governance eJournal,* 4.
[149] Ibid.
[150] PM Vasudev, 'Corporate Stakeholders in Canada – An Overview and a Proposal' (2014) 45 OOTTLR 137, 148.

afford directors significant deference in applying the BJR.[151] In this context, commentators have debated whether the protection it provides for directors is too broad.

102 On one view, Canadian courts are applying the BJR too readily, with the result that there is very little objective analysis of corporate policy in Canada.

(a) One commentator has argued that Canadian courts are 'circumspect'[152] in applying the BJR, and that reform is needed to make 'Canadian corporate law more real and robust'.[153] Notably, in this regard, the proposals were not to pare back the BJR rule, but rather to increase certainty as to which stakeholders directors owed a duty of care to[154] – which, as noted above, has recently occurred.

(b) The same commentator has also suggested that Canadian courts are 'additionally deferential as to the substance of the decision because of a lack of business experience in the judiciary', and that 'increased expertise in the judiciary' is needed.[155] In this regard, rather than proposing a codified BJR similar to that in Australia to narrowly define the circumstances in law when a director should be afforded deference, the commentator proposes the creation of specialised interdisciplinary panels to inquire into stakeholder disputes.[156]

103 On another view, Canada's BJR is performing heavy work to ensure that directors retain discretion to consider and balance stakeholder interests.[157] So long as directors take the relevant stakeholder interests into account, meaning they inform themselves and consider the potential impact of business decisions on such interests; and so long as the final decision is among a range of reasonable options available at the time, the directors will be considered to have been acting in the best interest of the corporation.[158] Therefore, the BJR is effectively protecting the authority of directors to make bona fide commercial decisions about corporate policy and strategy, which is arguably even more important when the challenge is not just maximising shareholder value, but balancing competing stakeholder interests.[159]

104 In summary, informed commentary tends to suggest that it is fulfilling its policy objectives reasonably well.

(c) South Africa

105 The South African director liability environment is characterised by the following features.

(a) Directors' duties are enforced through private actions, including through company actions and derivative actions.[160]

[151] Ibid 138, 148. See, eg, *BCE* (n 81) [56], [66], [71], [87], [104]; *Peoples; Air Canada Pilots Association v Air Canada ACE Aviation Holdings (2007)* 26 BLR (4th) 124, 28 CBR (5th) 163 (ON SC).
[152] See eg, PM Vasudev (n 150) 149.
[153] Ibid 137.
[154] See eg, J Anthony Vanduzer, 'BCE v 1976 Debentureholders: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision Since Peoples' (2010) 43 *U.B.C Law Review* 205.
[155] Ibid. See also J Farley, *Canada: The Canadian Courts' Perspective on The Business Judgment Rule* (20 September 2006) Mondaq <https://www.mondaq.com/canada/CorporateCommercial-Law/42880/The-Canadian-Courts-Perspective-On-The-Business-Judgment-Rule>.
[156] PM Vasudev (n 150).
[157] Jeffrey Bone, 'Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of BCE Inc. and Bell Canada' (2009) 27 *Windsor Review of Legal and Social Issues*, 5; Edward B Rock and Michael L Wachter, 'Islands of Conscious Power: Law, Norms, and the Self-governing Corporation' (2001) 149 *University of Pennsylvania Law Review* 1619.
[158] *BCE* (n 82) [40], [104].
[159] Bone (n 157); Ed Waitzer and Johnny Jaswal, 'Peoples, BCE, and the Good Corporate "Citizen" (2009) 47 *Osgood Hall Law Journal* 439.
[160] ICGL, *South Africa: Corporate Governance Laws and Regulations 2020* (July 2020) <https://iclg.com/practice-areas/corporate-governance-laws-and-regulations/south-africa>.

(b) That said, the chances of private litigation being commenced against a director are 'very small'.[161]

106 As South Africa's statutory BJR has been the subject of limited judicial consideration, we have not identified any commentary assessing its performance.

107 However, we note that the formulation of South Africa's BJR was the subject of generally positive commentary following its adoption.

(a) One commentator has noted that South Africa's statutory directors' duties set the bar for director conduct far higher than the common law, and might have discouraged directors from taking sensible commercial risks if they had not been moderated by the BJR.[162]

(b) Another commentator has noted that the South African BJR justifiably provides broader protection than the Australian rule, extending to all activities and not just business judgements, making the South African formulation broader and better than the Australian one.[163]

(c) A primary concern among commentators is that it is still unclear how the courts will apply the BJR in practice, so it remains to be seen whether legislators have 'struck the right balance' between ensuring high standards of director conduct and moderating director liability.[164]

(d) United Kingdom

108 The UK director liability environment is characterised by the following features.

(a) Directors' duties are enforced through private actions, including through company actions and derivative actions.[165]

(b) That said, 'the amount of private litigation commenced against company directors in the United Kingdom is negligible. The reality is that directors of UK public companies run virtually no risk of being sued for damages for breach of directors' duties'.[166]

109 Given this, and that the common law doctrine of judicial abstention from interference in business judgments is 'very well established',[167] directors in the UK are in a decidedly more privileged and protected position than directors in Australia.[168]

110 In this context, the performance of the doctrine has been the subject of little direct commentary.

111 However, notably, in 1999, the England and Wales Law Commission (the ***Law Commission***) considered whether the UK should adopt a statutory BJR.[169] The following key points emerged from the consultation.

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[161] David O'Sullivan, *D&O Liabilities – Is Corporate South Africa Ignoring the Issue?* (22 March 2017) Biz News <https://www.biznews.com/leadership/2017/03/22/liabilities-corporate-south-africa>. We have only identified one instance of the BJR being raised in court since its commencement in 2011: *Visser Sitrus* (n 97).
[162] David Luckett and Kelly Kramer, *South Africa: Read This Before Becoming a Company Director*' (20 December 2011) Routledge Modise <https://www.mondaq.com/southafrica/directors-and-officers/158340/read-this-before-becoming-a-company-director>; Deloitte, *Duties of Directors*' (2017) 5.
[163] Jean Du Plessis, 'Open Sea or Safe Harbour? American, Australian and South African Business Judgment Rules Compared: Part 2' (2011) 32(12) *The Company Lawyer* 377, 383.
[164] Ibid.
[165] Matthew Conaglen and Jennifer Hill, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis* (Working Paper No 351/2017, April 2018) 10-11 <https://ecgi.global/sites/default/files/working_papers/documents/finalconaglenhill.pdf>.
[166] Ibid 11.
[167] Quinn (n 17) 122. See also *Law Commission* (n 108) 53.
[168] Nettle (n 21), 1417.
[169] *Law Commission* (n 108) 53.

(a) A small majority of respondents to the consultation were against the introduction of a statutory BJR.[170]

(b) Respondents in favour of a statutory BJR largely referenced the need to clarify the law and to avert dangers of the courts applying hindsight bias.[171]

(c) The Law Commission considered that the main reason for introducing a statutory BJR would be if directors were concerned that the dual objective and subjective standards within the duty of care would result in a raised standard and defensive management. The Law Commission concluded that its research did not reveal particular concern among directors about this issue.[172]

(d) Ultimately the Law Commission did not recommend its introduction.[173] In reaching its conclusion, the Law Commission recognised that courts do not judge directors with the wisdom of hindsight and do not 'second-guess' directors on commercial matters.[174] The consultation did not reveal particular concern in respect of the dual objective and subjective standard.[175] The Law Commission noted that it would be difficult to formulate a business judgment principle without either narrowing it or making it too rigid.[176] As such, it was determined that the principle of judicial non-interference with business judgments would be best left to be developed by the courts.[177]

112 Similarly in 2000, the UK Government's Company Law Review Steering Group opposed the introduction of a statutory BJR.[178] The Steering Group referenced the well-established judicial approach and noted the major difficulties in embodying such a provision in statutory form.[179] It also feared that the imposition of a statutory standard of business judgment would create a culture of excessive caution by company directors.[180]

5.4 Finding

113 Overall, the performance of Australia's BJR has attracted more negative commentary than have the performance of the Comparator Jurisdictions' BJRs. We have observed higher levels of dissatisfaction with the status quo in Australia, as compared with the Comparator Jurisdictions.

[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Department of Trade and Industry (UK), Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (2000, URN 00/656) [3.69]–[3.70].
[179] Ibid.
[180] Ibid.

6 Conclusion and key observations

114 In light of the preceding analysis, several aspects of Australia's BJR bear comment. These aspects render Australia unique among the Comparator Jurisdictions.

6.1 Australia's and the Comparator Jurisdictions' BJRs share overlapping origins and have consistent policy objectives

115 Australia's and the Comparator Jurisdictions' BJRs share overlapping origins. In particular, the Australian and South African rules reflect a cross-pollination between the Delaware and UK rules, and the Canadian rule has developed 'in tandem' with the Delaware rule.

116 Unsurprisingly in this context, Australia's and the Comparator Jurisdictions' BJRs share consistent policy objectives. Their key functions are to:

(a) protect the authority of directors to make bona fide commercial decisions, including by acknowledging that courts lack the expertise and information necessary to interfere in business judgments;

(b) acknowledge that directors make decisions with imperfect information, including by avoiding hindsight bias; and

(c) avoid an unreasonable level of risk aversion and encourage sensible commercial risk-taking, including by avoiding discouraging qualified persons from becoming director.

117 At the same time, Australia's and the Comparator Jurisdictions' BJRs are not intended to insulate directors from liability in relation to negligence or contraventions of fiduciary standards.

6.2 Australia's BJR provides less protection to directors than do those of the Comparator Jurisdictions

118 Australia's BJR clearly has a narrower application than do those of the Comparator Jurisdictions. Most notably, Australia's BJR:

(a) attaches only to the duty of reasonable care, skill and diligence, whereas the Comparator Jurisdictions' BJRs have varying degrees of relevance to other duties;

(b) functions as a defence that must be made out by a defendant director, whereas the Comparator Jurisdictions' BJRs function as standards of review / doctrines of judicial abstention that must be overcome by the plaintiff; and

(c) does not modify the level of director culpability required to establish a breach of the duty of care, whereas the important and influential Delaware BJR requires a showing of gross negligence to establish a breach of that duty.

119 Accordingly, Australia's BJR provides a lesser degree of protection to directors than do the Comparator Jurisdictions' BJRs.

6.3 Australia's BJR operates in a unique director liability environment

120 Australia's director liability environment is unique among the Comparator Jurisdictions. Most significantly, 'Australia primarily relies on public enforcement of directors' duties, whereas the Comparator Jurisdictions rely primarily on private enforcement'.[181]

121 Private enforcement against directors is more easily commenced in some jurisdictions than others. While Canada is relatively hospitable to directors' duties litigation, and Delaware is

[181] Allens (n 29) 13 [60].

uniquely hospitable to such litigation, there are low volumes of private litigation against directors in South Africa and the UK.

122 The operation of Australia's BJR as a defence, rather than a standard of review, may have facilitated the public enforcement of directors' duties in Australia. Justice Collier of the Federal Court of Australia has noted that ASIC has been active (and successful) in pursuing civil penalty proceedings for breach of s 180(1).[182]

123 However, in our view, the public character of directors duties enforcement in Australia does not present a policy basis for providing narrower protection to directors by shifting the onus relating to the BJR from the plaintiff to the defendant director. We consider it unlikely that the chilling effect this reversed burden could have on commercial decision-making and risk-taking is offset by the fact that ASIC, rather than shareholders, is primarily responsible for directors' duties enforcement.

6.4 Australian commentators are more dissatisfied with the performance of their country's BJR than are their Comparator Jurisdiction peers

124 Australian commentators appear to be more dissatisfied with the performance of their country's BJR than their Comparator Jurisdiction peers.

125 On the one hand, the overall tenor of the Australian commentary we have reviewed is that in practice, the Australian BJR has been of little real assistance to directors in litigation, and is not actually performing its policy objective of encouraging risk-taking in business. Key criticisms are that it:

(a) places too high an onus on directors;

(b) applies to too few duties;

(c) protects too narrow a range of activities;

(d) has an unclear application in a context where corporate governance expectations are expanding rapidly; and

(e) does not provide a degree of protection that is actually felt by directors.

126 By contrast, commentary on the Delaware BJR suggests a general acceptance of the rule, and commentary on the Canadian BJR suggests that it is doing heavy work to do in Canada's unique corporate governance environment. The UK's peak law reform body has considered but rejected adopting a statutory BJR, and while there is limited data on the performance of South Africa's BJR, commentators generally viewed its adoption positively.

127 These themes emerging from the commentary may suggest that Australia's BJR is fulfilling its policy objectives less effectively than are the Comparator Jurisdictions' BJRs.

6.5 Key issues raised by Australian commentators may be accentuated due to evolving corporate governance expectations

128 A notable feature of Australia's director liability is that ASIC increasingly is 'utilising the emergent doctrine of stepping stone liability to "piggy back" director civil liability on to Corporations Act and ASIC Act breaches by a corporation'.[183]

[182] The Honourable Justice Berna Collier, 'Recent Developments in Australian Corporate Governance' (2017) *Federal Judicial Scholarship* 8, 9.
[183] Allens (n 29) 14 [66].

129 In *Australian Securities and Investments Commission v Mariner Corporation Limited*,[184] Justice Beach commented that the directors' duty to act with care and diligence 'does not impose a wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance with law'. His Honour warned that stepping stone liability ought not be used as 'a backdoor method for visiting, on company directors, accessorial civil liability for contraventions of the Corporations Act in respect of which provision is not otherwise made'.[185]

130 However, in the recent Full Federal Court decision in *Cassimatis v Australian Securities and Investments Commission*,[186] the majority affirmed a lower court's decision to grant penalties against the executive directors of a company for permitting the company's breaches of the *Corporations Act 2001* (Cth), notwithstanding that it did not take action against the company for those breaches. While the majority denied that it was imposing 'some sort of dystopian accessorial liability',[187] Rares J issued a strong dissent, criticising ASIC's litigation strategy as 'artificial' and 'arcane',[188] and a 'backdoor way of creating liability'.[189]

131 As discussed in our previous paper, there is concern among commentators that 'stepping stone liability could be used to establish director liability based on acts or omissions that fall short of breaching the law but nonetheless damage a company's interests'[190] – for example, 'aggressively pursuing short-term profit in disregard of the best interests of customers and long-term viability'.[191] If this eventuates, a wide range of corporate decision-making might become reviewable as a breach of the duty of skill, care and diligence.

132 As discussed in paragraph 103 above, the duties of care, skill and diligence and to act in the best interests of the corporation have a particularly robust role to play in Canadian corporate governance, as Canadian law recognises the interests of a wide range of stakeholders in corporations. The Canadian example demonstrates that, in such a context, the BJR has particularly heavy work to do in ensuring that directors retain discretion to consider and balance stakeholder interests.

133 If the doctrine of stepping stone liability continues to expand, such that a broader range of Australian corporate decision-making is reviewable, the Australian BJR may take on an increasingly significant role in protecting directors' capacities to define and balance the interests of the corporation. This, coupled with increasing regulatory and societal expectations that companies consider and balance a range of stakeholders' interests, might accentuate key criticisms of the Australian BJR, and suggest that the time may be ripe to reconsider the Australian formulation of the BJR.

Allens

Allens

3 December 2020

[184] *Mariner* (n 51).
[185] Ibid [444] quoting *ASIC v Maxwell* (2006) 59 ACSR 373, [110] (Brereton J).
[186] *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261.
[187] Ibid [77].
[188] Ibid [286].
[189] Ibid [272].
[190] Allens (n 29) 6 [27].
[191] Bathurst (n 136) [35].