DIRECTORS' DUTY OF CARE AND THE BUSINESS JUDGMENT RULE: AMERICAN PRECEDENTS AND AUSTRALIAN CHOICES

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Regardless of local differences in detail, directors occupy a central position in systems of corporate law. Significant and pervasive questions surround the expectations defined by the law for directors' performance in office, along with the circumstances under which directors incur personal liability. This essay begins by explaining the development, in the United States, of the law defining the duty of care a director owes to a corporation, along with the circumstances under which a director will be personally liable for breaching that duty. It then examines the relevance of these developments to the current Australian context.

As a general matter, directors owe three duties to corporations: to act lawfully, to act loyally and to act carefully.[1] The duty of care reaches broadly, applying to all decisions directors make and indeed even more broadly, to all decisions they should make, were they to exercise ordinary care. The general duty of care has, in turn, three component subparts. As the third is the most intriguing (or troublesome, depending on one's perspective), I deal briefly with the first two.

First, directors are obliged to monitor or oversee the conduct of the corporation's business. Non-executive directors, who are not full time managers, are not likely to play an active role in making any but the most major operational decisions for the corporation. Their responsibility is to act reasonably in delegating authority to act to others and in choosing delegates. To enable them to monitor effectively, directors should insist that the corporation institute and maintain systems to record and process information about the corporation's operations and financial condition. The details and complexity of such systems vary widely, and the suitability of any given

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1 For an excellent explication, see Eisenberg, 'The Duty of Care of Corporate Directors and Officers' (1990) 51 U Pitt L Rev 945.

system turns on the nature of a particular corporation's business and its size. Exotic financial transactions, like forex dealings, are especially worrisome unless adequate information systems are in place.[2]

Second, directors are under a duty of inquiry, that is, a duty to ask questions on the basis of information they receive (from whatever source) that reasonably gives cause for concern. If a line of the corporation's business experiences loss, the directors should ask why. Indeed, information directors receive from sources external to the corporation itself may require inquiry. Information gleaned by reading the newspaper, for example, may prompt questions. A harder question is the extent to which directors should be expected to anticipate problems in the absence of specific information. For example, should we expect directors to inquire about the corporation's program to comply with increasingly complex environmental regulation? Are directors simply to react to information they receive, most of which will realistically be generated internally within the corporation itself? Or may we reasonably expect directors to be pro-active, that is, to anticipate problems and anticipate the need to take action to resolve those problems? The likely gravity of the problem, should it materialize, is surely relevant. Directors are not expected to bring the skills of lawyers, or other special skills, to their position. It is arguable, though, that the notoriety and gravity of some types of legal and regulatory issue require that directors have a general awareness of them and their likely pertinence to the corporation. A recent case from New Jersey, *Francis v United Jersey Bank*, requires directors to have 'at least a rudimentary understanding of the business of the corporation [to] become familiar with the fundamentals of the business in which the corporation is engaged'.[3] My suggestion is that, at present, the 'fundamentals' of a corporation include the most prominent features of the regulatory climate that constrain its operation of its business. Within the boardroom directors are likely to rely on the particular skills, such as knowledge of the law, possessed by various of their colleagues, and on expert advice provided by the corporation's employees and, on occasion, by its external advisers.

Third, directors must use care in making decisions. In turn, the duty to use care requires directors to be properly informed prior to making a decision. How much information will suffice? How reliable must it be? The answer will vary with the magnitude of the decision itself, the time available to make the decision and the cost of acquiring pertinent information. As we know, information is not cheap, especially when it consists of reports or opinions prepared by professionals like barristers, accountants and merchant bankers. We know also that information varies greatly in its ultimate reliability, accuracy and usefulness. In *Smith v Van Gorkom* the Delaware Supreme Court held that directors breached their duty of care in agreeing, after a two-hour meeting, to sell the company through a merger transaction

2 See eg, *AWA Ltd v Daniels* (1992) 10 ACLC 933 (NSW Sup Ct).

3 *Francis v United Jersey Bank*, (1981) 87 NJ 15, 30, 432 A 2d 814, 821-822.

for $750,000,000.[4] The directors, the court said, lacked sufficient information about the value of the corporation at the point they agreed to the terms of the merger. The directors agreed to the terms of the merger transaction, proposed to them without advance notice at a board meeting, knowing little but that the corporation's chief executive officer sponsored the transaction and that, on a per share basis, the sale price represented a premium over the price which the corporation's shares had been trading on the New York Stock Exchange. Not enough, according to the Delaware Supreme Court. The trading price, said the court, represents only the price of one share.[5] Selling the entire company may lead to the realization of value on other bases. The directors' position in litigation was not strengthened by the chief executive's history of telling them frequently that the stock market persistently undervalued their corporation's shares.

A more difficult question is the extent, if any, to which United States law requires directors to do more: specifically, to what extent does the law concern itself with the quality of directors' decisions? Should the law concern itself with whether the decisions were correct or reasonable when they were made? The law recognizes in many situations that decisions may have been reasonable ones when made, and subsequently turn out badly. The focus of this inquiry is the merit of the decision, assessed as of the time it was made without the benefit of hindsight. Do directors fulfill their duty by acting carefully in making a decision if most people would have made a different decision? Suppose no reasonable person would have made the decision the directors made at the time they made it? Suppose the directors themselves, had they the opportunity to travel back in time and make the decision afresh, would make a different decision? The response to this difficult question in the United States is generally known as the business judgment rule. The rule, which may seem simple, has several intriguing dimensions and consequences.

In technical terms, the business judgment rule does two things. First, it creates a set of rebuttable presumptions. The rule creates a presumption that directors had an informed basis for their act or decision,[6] that they acted in good faith (a concept explored later), and that they acted with an honest belief that the action was in the company's best interest. Second, the business judgment rule creates a highly deferential standard of judicial review for the merits or the quality of directors' decisions that applies unless one of the presumptions is rebutted. Many authorities treat the standard as looking ultimately to rationality,[7] that is, to the existence of a basis on which the

4 *Smith v Van Gorkom*, (1985) 488 A 2d 858 (Del).

5 See ibid at 876.

6 *Smith v Van Gorkom* is an example of a case in which the plaintiff successfully rebutted this presumption. The plaintiff did not, as it happens, claim that the sale price was grossly inadequate. Ibid at 889. The remedy granted by the court was an award of damages equal to the difference between the sale price per share, and the corporation's intrinsic value, on a per share basis.

7 See eg, American Law Institute, Principles of Corporate Governance s4:01 (Proposed Final Draft 1992).

decision could be explained. In that form, the standard is objective.[8] The standard, as applied, also reaches whether the directors had a rational belief that in making the decision they were acting in the corporation's best interests.[9] This formulation combines a subjective component (the directors' actual belief) with an objective component (whether the directors' actual belief was rational). The significance and consequences of the business judgment rule are best illustrated by the cases that apply it. *Shlensky v Wrigley*[10] provides a vivid initial illustration. The corporation involved in *Shlensky* owned and operated the baseball franchise for the Chicago Cubs as well as operating Wrigley Field, the venue for Cubs' games. The corporation had a majority shareholder, Mr. Wrigley, who clearly played a dominant role on its board of directors. At the time of the litigation, the Cubs were the only baseball team in the National league, indeed the only major-league professional baseball team, that played on a field without lights. Thus, none of the Cubs' home games could be played at night. The Cubs' gate revenues were demonstrably higher when the Cubs played road or away games, many of them at night, than revenues for home games. The directors of the corporation, at Mr. Wrigley's behest, nonetheless decided not to install lights on Wrigley field. They gave two reasons for the decision. Mr. Wrigley and his fellow directors believed that the installation of lights, and the conduct of night games, would be disruptive to the neighbourhood in the immediate vicinity of Wrigley Field. Secondly, the directors believed, as did Mr. Wrigley, that baseball was intrinsically a daytime game, which should not be played at night, or, at the least, should not be played at night under circumstances within the corporation's immediate control.

The court treated the directors' decision not to install lights as the kind of decision obviously protected by the business judgment rule. Unlike *Smith v Van Gorkom*, *Shlensky* does not evaluate whether the directors were adequately informed in making the decision. The directors were not financially interested in the transaction. Indeed, to the extent Mr. Wrigley had a financial interest as a major shareholder his interest would be consistent with installing lights to enhance the corporation's gate receipts and earnings. Additionally, the court concluded that the decision was not irrational. The decision could be explained. To be sure, the directors' rationale for the decision appeared to give weight to the interest of persons other than the Cubs' shareholders because it expressly considered the interests of Wrigley Field's neighbours. In the long run, though, having contented neighbours is consistent with the corporation's ability to carry on business without interruption.[11]

Well might we wonder how far this doctrine extends. Suppose Mr. Wrigley strongly held the opinion that baseball was, not just a day game, but

8 See Eisenberg above at 965 (a decision that 'simply cannot be explained' is the most obvious type of decision that lacks rationality).

9 See Principles of Corporate Governance above s 4:01.

10 *Shlensky v Wrigley*, (1968) 237 NE 2d 776, 780 (Ill App).

11 See ibid at 780-781.

a morning game, indeed perhaps a game ideally played in the early morning before the sun has burnt the dew off the field. Suppose the directors decided that games at Wrigley Field must conclude by 9:00 am in the morning? My suggestion is that *some* kinds of decisions are likely to evoke judicial scepticism. The precise doctrinal shape in which the scepticism is embodied may differ, of course. A court might conclude that the decision that baseball may be played only in the early morning is a decision that on its face appears not to have been a business judgment. That is, it appears to be a decision likely motivated by non business reasons. Relatedly, a court might conclude that the decision on its face is so eccentric, so idiosyncratic, that somehow its explanation is to be found in interests possessed by the people who made the decision that differ from the interests of the corporation's shareholders as a whole. In the terminology used in some recent cases, this type of decision might provoke an inquiry into whether the directors acted in good faith in making the decision that they did.[12]

In short, understandable scepticism about the quality of the decision or the merits of the decision may generate a hunch that the process leading to the decision was flawed. In turn, the hunch may become a presumption that the process must have been flawed. The decision must have been afflicted by an interest of some sort of the part of the directors that caused their decision making abilities to be diverted from fidelity to the interests of the corporation's shareholders. If the directors claim otherwise, the court is not likely to believe their accounts of their subjective state of mind at the point they made the decision. In this respect, corporate law is not all that different from other bodies of legal doctrine. Consider the operation of the doctrine of constructive fraud as it applies to the resolution of contractual disputes. Under its auspices, the court may upset a bargain on the basis that a grossly one-sided transaction justifies a fairly strong presumption that the behaviour leading up to the transaction was problematic in some significant respect.[13]

Indeed, case law from the United States also recognizes that, in some situations, directors are likely to be tempted by other considerations. Delaware cases hold that when directors make a decision that is responsive to a takeover threat, the directors have the burden in litigation of establishing that they had a reasonable basis for believing in a threat to the corporation's policy and effectiveness, as well as the burden of establishing that the decision they took was a proportionate and reasonable response to the perceived threat.[14] Imposing this burden is justified by 'the omnipresent specter that a board may be acting primarily in its own interests, rather than

12 See *In re RJR Nabisco Shareholders Litigation,* [1988-1989] Fed Sec L Rep (CCH) at 94, 194 (Del Ch Jan 31, 1989). Directors who engage in illegal conduct are not acting in good faith for purposes of the business judgment rule. See *Geygan v Queen City Grain Co,* (1992) 593 NE 2d 328 (Ohio App) (directors of grain elevator authorized speculative transactions which contravened statute).

13 See Story J, *Commentaries on Equity Jurisprudence* 244-246, 13th ed; (1886) Bigelow. Story's treatise was first published in 1835.

14 See *Unocal Corp v Mesa Petroleum Co,* (1985) 493 A 2d 946 (Del).

those of the corporation and its shareholders . . ."[15] If the directors meet both the criteria, then the merits of the decision are treated as a business judgment.

The impact of treating the directors' decision in this context as a business judgment can be startling. In *Paramount Communications v Time Inc*, the Delaware Supreme Court held that the directors of Time satisfied the criteria for applying the business judgment rule to their decision.[16] The decision followed a takeover bid by Paramount to buy all shares in Time for $200 per share in cash, announced by Paramount after Time entered into an agreement to merge with a third company, Warner Communications, through a share exchange transaction.[17] To defeat Paramount's bid, which they perceived as a threat to Time's long-nurtured plan to merge with Warner, as well as a threat to the culture of Time as a publishing company, Time's directors decided to abandon the merger transaction and acquire all shares in Warner for cash, which required Time to assume 7-10 billion dollars in debt to fund the purchase. Warner abandoned its bid. Time's directors acted on the basis of investment banker's opinion that the $200 per share offered by Paramount was an inadequate price. After Time's acquisition of Warner, however, its shares traded for less then $100 per share. It is likely that many Time shareholders (in particular, many of those who were not also Time employees) would have preferred to sell at $200, rather than await the long-term fulfillment of their directors' business plan, however carefully designed and well-intended that plan may have been.

The business judgment rule may acquire additional dimensions when the corporation is operating 'within the vicinity of insolvency,' as a recent case felicitously puts it. Once a corporation is insolvent, its directors have long been treated by US law as fiduciaries operating the company on behalf of its creditors;[18] prior to that point the conventional understanding has been that the relationship between the corporation and its creditors is one of contact, supplemented by the norms of fraudulent conveyance law. These make voidable any transfer of the corporation's property without fair consideration, if the effect of the transfer is to make the corporation unable to pay its debts as they come due. In a recent case, *Credit Lyonnais Bank Nederland v Pathe Communications Co*, Delaware's Chancery Court observed that, once the corporation enters the vicinity of insolvency, directors should no longer be treated as accountable exclusively to the interests of shareholders. Instead directors owe their duty to 'the corporate enterprise,' inclusive of the interests

15 See ibid at 954.

16 *Paramount Communications Inc v Time Inc*, (1989) 571 A 2d 1140 (Del).

17 The court held that the merger agreement did not have the effect of putting Time 'up for sale,' in which case the directors must act solely with regard to maximizing the sale price for the benefit of shareholders. See *Revlon v MacAndrews & Forbes Holdings Inc*, (1986) 506 A 2d 173 (Del).

18 For a recent illustration, see *Geyer v Ingersoll Publication Co*, Civil No 12406, Del Ch Jan 18, 1992 (1992 WL 136473). *Geyer* holds that the fiduciary duty arises at 'the moment of insolvency' rather than at the later time when statutory insolvency proceedings are instituted.

of creditors and employees.[19] The 'vicinity of insolvency' doctrine seems to create no right, beyond those created by contact, that would be enforceable by any particular creditor; indeed the divergence among the interests of different types of creditors undercuts any argument for the existence of an enforceable extra-contractual duty owed to any particular creditor. At most the doctrine expands the range of factors a director may take into account in good faith in making a business judgment.

The determination that a corporation is insolvent is difficult and arguably always somewhat uncertain, turning as it does on various calculations of asset values, estimations of cash flow and assessment of creditors' behaviour. That a corporation has entered the 'vicinity of insolvency' is an even more problematic conclusion. In *Credit Lyonnais* itself the corporation had cash flow problems in the immediate aftermath of an aggressively structured leveraged buy out. Management adopted a 'slow pay' policy for trade claims, given the cash drain caused by the buy out debt. When does aggressive cash management meander into the vicinity of insolvency? One might also wonder whether the 'vicinity of insolvency' concept applies to the directors' decision to authorize and facilitate a transaction (the leveraged buy out) that placed the corporation in the suburbs, if not the immediate vicinity, of insolvency. What are the policy rationales that support the business judgment rule? The primary rationale is that it is desirable for directors of businesses to take risk. Business risk precedes business growth. Desirable risk-taking, in turn, may be inhibited if directors' decisions are subsequently subject to exacting judicial review of their merits. Indeed, perhaps directors who are timid in making business decisions because they fear personal liability have not been faithful to the interests of the shareholders as a whole. Directors may, that is, be diverted by the personal interest of protecting themselves against the risk of personal liability in after-the-fact litigation, from undertaking the degree of business risk that is consistent with the interests of all the corporation's shareholders in operating its business.[20] Directors who fear personal liability may also spend the corporation's cash on expert opinions and other self-protective and insulating devices to a degree inconsistent with the shareholders' best interests.

A second policy justification for the business judgment rule is that it has the effect of focusing judicial scrutiny and judicial resources on the examination of corporate decisions made by directors with a personal interest in the outcome, or directors who did not act in good faith. In those circumstances, decision makers have the burden of establishing the substantive merits of the decision that they made.[21] Assuming that society

19 *Credit Lyonnais Bank Nederland, NV v Pathe Communications, Inc*, Civil No 12150, Del Ch, Dec 30, 1991 Slip op at 108 (1991 WL 277613).

20 Cf *RJR Nabisco*, above at 91, 171: 'Greed is not the only human emotion that might lead one from the path of propriety. So might hatred, lust, envy, revenge, or as is here alleged, shame or pride.'

21 In the United States controlling shareholders are treated as fiduciaries toward minority shareholders. The relationship of this proposition to the business judgment rule, as it

limits the resources it invests in operating judicial systems and in paying the other costs necessary to the formal resolution of disputes, and that factually complicated disputes are expensive to resolve, the business judgment rule has the desirable effect of focusing those resources on situations in which the decision was biased by a conflicting interest.

An additional and inescapable consequence of the business judgment rule leads to a more debatable policy justification. As *Shlensky* illustrates, having a highly deferential standard of judicial review, and a relatively expansive concept of what constitutes a business judgment, produces a combination of factors that tend to protect somewhat idiosyncratic or unusual decisions. The business judgment doctrine, that is, has the effect of protecting decisions that most people would not make, indeed most business people acting reasonably would not make. Moreover, some protected decisions, like those in *Shlensky and Paramount,* seem prompted by factors other than the directors' desire to maximize profits, at least over the short run.[22]

Is this desirable? In many respects, it is. First, in the United States, shareholders who invest in publicly traded companies have available to them an enormous amount of information about each company, about how the company operates, about the relationships between the company and its directors and about directors' interests that may create financial bias. This information is produced in standardized formats dictated by federal regulation of activity incident to, and following public investment in, securities especially equity securities. Moreover, investment decisions are made in a context shaped by publicly available financial information produced under accounting standards that historically have left relatively less scope for creativity than have the counterpart Australian standards for public company accounting. Thus, an investor who chooses to buy into the Chicago Cubs, if its securities are available for public investment, may do so with a fair amount of information about Mr. Wrigley's domination of the corporation and the Cubs' distinctive operating philosophy. To be sure, investing in a baseball corporation that plays only in the daytime at home would not be an attractive investment to many people. It may appeal to some, however; many distinctive or idiosyncratic visions do. So long as the investment decision can be an adequately informed one, why not permit it to be available to those interested. In short, we might view an investment in the Cubs as an investment, not just in a corporation but in a relatively idiosyncratic vision of the nature of the game of baseball, an investment package whose distinctive features can be fully described to those whose investment is being invited.

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applies to directors' decisions, is complex. The tendency in the cases is to treat directors, in situations in which the shareholder exercised control, as that shareholder's agents. See, eg, *Zahn v Transamerica Corp*, 162 F 2d 36 (3d Cir 1947); *Jones v HF Ahmanson & Co*, (1969) 1 Cal 3d 93, 81 Cal Rptr 592, 460 P 2d 464.

22 But see Kushner, 'A Survey of The Ohio Courts' Application of the Business Judgment Rule -- Fortifying the Shield for Corporate Directors', (1990) 15 U Dayton L RW 511, 513 (business judgment rule supported by rationale of enhancing corporate profitability by *stimulating innovative* and creative entrepreneurial activities).

Judicial deference to business decisions made by financially disinterested directors may also be justified because other mechanisms of social control (other than liability imposed on directors, that is) take their own revenge on decision makers whose business decisions go visibly awry. Directors and senior executives do not enjoy indefinite job tenure. Some social circles become closed to people who are perceived to be failures. In short, labour markets and social structures create powerful constraints of their own on behaviour. Indeed, because most people can visualize unemployment and social ostracism more visibly and painfully than they visualize litigation over questions of corporate law, these extra-legal constraints may be more powerful than constraints created by legal rules and the risk of personal liability.

Moreover, it is harder to say of business decisions than of decisions made in the course of other activities that a decision has been clearly correct or clearly incorrect. One notes, for example, that the decision to drive on the right side of the road is, in this jurisdiction, a clear error. Business decisions are much more complicated than those incident to driving a car. Much turns on the period of time over which one evaluates the decision and the criteria one takes into account. Even in contrast with decisions made by professionals like solicitors and medical practitioners, as a practical matter it is harder to establish that any given business decision was, in fact, a clear mistake when it was made.

Several distinctive elements in the Australian corporate legal landscape warrant careful consideration in evaluating the attractions and drawbacks of a business judgment rule. Some statutory features in Australian law are substantially different from statutory corporations law in the United States. Corporations statutes in the United States contain no counterpart to section 592 in the present *Corporations Law*. It makes directors of a corporation personally liable for the business debts of the corporation if the debt is incurred when there are reasonable grounds to expect that the corporation will not be able to pay all its debts as and when they come due. Section 588G of the Corporate Law Reform Bill proposes to impose personal liability on directors for a company's debt if the company was insolvent at the time it incurred the debt, or thereby became insolvent, unless the director had reasonable grounds to expect that the *company was solvent* at that time. At a minimum, for companies operating within the vicinity of insolvency, these provisions create an additional range of factors that directors as a practical matter should take into account in making business decisions. The provisions may also increase the cost of operating a corporation by making it prudent for a director to demand affirmative assurances of solvency, generated by internal or external experts, in connection with many transactions.

The provisions also operate very differently from the 'vicinity of insolvency' doctrine discussed earlier. In effect the Australian statutory provisions make directors contingent guarantors of the company's business debts, in the absence of any express contract of guarantee. It is not obvious why this statutory solution is preferable to private contract. Many creditors, especially financial creditors like bank lenders, are in a position to bargain over the terms on which they lend money to a corporation. One such term is whether the corporation's directors or various of its shareholders personally guarantee its debt. The 'vicinity of insolvency' doctrine, in contrast, seems simply to encompass creditors' interests, beyond creditors' entitlements defined by contract, within those interests a director may in good faith take into account. Once a corporation is insolvent, when US law has long treated directors as fiduciaries on behalf of creditors, directors do not simply become parties to the corporation's contracts or guarantors of its debts. Instead, their obligation to creditors is to act loyally and carefully with regard to creditors' interests. If directors breach either of these duties, their liability is to account for profit or compensate for loss, arising from their breach of duty. Nor are the provisions the equivalent of doctrines which, one way or another 'pierce the corporate veil'. Veil-piercing doctrines impose liability on shareholders, not on directors per se.

Differences among vehicles for shareholder-initiated litigation also create significant questions. The Australian *Corporations Law* contains a section broadly addressed to oppression, for which there are few counterparts in the United States. Section 260 permits an action by a member to establish that affairs of the company are being conducted in a manner that is oppressive to or unfairly prejudicial to or unfairly discriminatory against a member or members or in a manner contrary to the interest of the members as a whole. In the leading case from the Australian High Court interpreting the predecessor provision, *Wayde v New South Wales Rugby League*,[23] the plaintiff conceded that the league's directors acted in good faith. The decision the directors made was readily explainable; they decided to exclude a poorly-performing rugby league team from a competition. Nonetheless, the court's opinion discusses and reviews the merits of the decision. Under a business judgment rule the plaintiff's concession that the directors acted in good faith would have precluded further judicial inquiry.

For a variety of reasons beyond the modest scope of this essay, proportionately more litigation challenging directors' decisions in Australia occurs under oppression statutes than in the United States. This fact is significant because oppression statutes call the court's attention to factors somewhat different from those previously discussed. The focus under an oppression statute is the impact of the decision on the member or the members, and the fairness of that impact, rather than the situation of the directors when they made the decision. Judgments in some oppression cases state that courts should not readily interfere with management decisions,[24] but a vague reluctance to become involved does not operate with the

23 (1985) 61 ALR 225.

24 See ibid at 231; see also *Brant Investments Ltd v KeepRite, Inc*, (1991) 80 DLR (4th) 161, 190-192 (Ont Ct App).

precision of the business judgment rule. Many oppression cases, moreover, involve small corporations, frequently run by families, in which it is likely that many decisions are made for reasons that are not solely or even predominantly commercial. To accommodate a business judgment rule to this reality could, among other things, require a specialized definition of good faith.

Beyond the statutory structure, one notes the long-standing occurrence in Australia of litigation concerning the purpose for which directors took a particular action and the propriety of that purpose.[25] To what extent does a 'proper purpose' criterion resemble the 'good faith' criterion that underlies application of the business judgment rule? Authorities in the United States note that the meaning of 'good faith' in this context is not clear, and suggest that it may well reach any number of questions beyond the directors' honesty and freedom from financial interest in the outcome of the decision.[26] Nonetheless, it seems likely that judicial prerogative is broader under a 'proper purpose' standard because the standard acknowledges that shareholders have entitlements of ownership that lie beyond the proper scope of directors' authority to use their powers to manage. Directors like the Time Inc. directors in the *Paramount* case are, one suspects, likely to be happier with their prospects under the business judgment formulation than under a 'proper purposes' test.

The Australian *Corporation Law* also expressly grants the court broad statutory power to relieve persons from liability. Under section 1318, in an action brought against a director for breach of duty, if it appears to the court before which the proceedings were taken that the person 'is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach,' from liability, then as it sees fit the court may relieve the person either wholly or partially. This provision to some extent resembles the business judgment rule as I have described it because it requires that the impugned action have been taken honestly. But it seems also to give the court broad discretion to relieve or not, as it sees fit, in ways that the business judgment rule does not do. That is, section 1318 places firmly within the realm of relatively unstructured equitable decision making, judicial assessments that, at a minimum, would be much more structured under a business judgment rule. Indeed, section 1318 seems to invite judicial attention to a broad range of factors that could readily include the court's evaluation of the merits of a business decision.

Conclusion

Corporate law is inevitably complex, featuring as it does numerous inter-

25 See Ford above at 473-481.

26 See Eisenberg above at 968-9.

related statutory provisions and long entrenched case law doctrines derived from the common law and from equity. Amidst its profusion of statutory detail and case law elaborations, corporate law also reflects a number of profound policy choices that are characteristic of a particular jurisdiction. As a result, to import norms from a foreign system requires caution and sophistication. The business judgment rule is a good illustration of the potential pitfalls of unreflective importation. The jurisprudence of 'business judgment,' as it has evolved in the United States, has features and consequences that are, in some respects, profoundly at odds with policy choices reflected in the Australian corporation statute and long-developed case law doctrines. Within the last decade, the conditions in the United States for applying the business judgment rule have tightened somewhat, while the rule continues, when it applies, to be generous and indulgent. In particular, what counts as a 'business' judgment is defined loosely and in a fashion tolerant of idiosyncratic and likely-to-fail visions. Moreover, apart from the ill-defined criterion of good faith, courts in the United States have never developed a counterpart to the 'proper purposes' doctrine. As a consequence, a philosophy of managerialism seems more operative in the United States: directors are less constrained in the use of powers in ways contrary to most shareholders' likely expectations and wishes. On the other hand, at least in public companies, management in the United States operates subject to a complex regime of mandatory reporting and disclosure. As well, it is likely that the Australian statutory provisions imposing liability for corporate debts on directors reflect policy determinations about risk and attitudes toward a predictable scenario for business risk that are not fully compatible with a full-blooded embrace of the consequences of a business judgment.