



JLPH:
**Journal of Law, Politic
and Humanities**

E-ISSN: 2962-2816
P-ISSN: 2747-1985

<https://dinastires.org/JLPH> dinasti.info@gmail.com +62 811 7404 455

DOI: <https://doi.org/10.38035/jlph.v6i4>
<https://creativecommons.org/licenses/by/4.0/>

Strengthening the Legal Limits of the Business Judgment Rule on Decisions of Directors of State-Owned Enterprises: A Comparative Study of Indonesia and Australia

Muhammad Hanan Nuhi^{1*}, Diani Sadia Wati²

¹ Faculty of Law, Universitas Pembangunan Nasional “Veteran” Jakarta, Indonesia

² Faculty of Law, Universitas Pembangunan Nasional “Veteran” Jakarta, Indonesia

*Corresponding Author: 2210611206@mahasiswa.upnvj.ac.id

Abstract: The Company's objectives must be carried out based on the principles of Good Corporate Governance. The application of these principles can give rise to the doctrine of Fiduciary Duty for Directors, especially in making risky business decisions. In practice, Directors often face claims for losses resulting from business decisions taken, so the Business Judgment Rule exists as a form of legal protection. In Indonesia, the regulation of the Business Judgment Rule is contained in Article 97 paragraph (5) of the Company Law and Article 9F of the State-Owned Enterprise Law. However, these provisions still leave room for ambiguity and do not have clear indicators, thus creating legal uncertainty in several cases. This research is a normative juridical research with a statutory, comparative, and case approach using primary, secondary, and tertiary legal materials. The results of the study indicate that good faith and due care are important considerations for judges. Corporations Act 2001 of Australia sets out a number of objective parameters that can more measurably assess the Board of Directors' business decision-making process. Further strengthening of the Business Judgment Rule in Indonesia is needed through revisions to Article 97 paragraph (5) of the Limited Liability Company Law and Article 9F of the State-Owned Enterprises Law, as well as the creation of derivative regulations. However, the Directors of State-Owned Enterprise are still obliged to apply a number of Good Corporate Governance principles to avoid conflicting with the law or containing abuse of authority.

Keyword: Good Corporate Governance, State-Owned Enterprise, Business Judgment Rule.

INTRODUCTION

The driving force of the national economy rests on the direction of decisions taken, in other words, decisions can realize economic growth (Enni Soerjati Priowirjanto, 2021). Economic growth reflects increasing numbers, increasing welfare, and increasing national economic sovereignty which is structured on the principle of family as stipulated in Article 33 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD 1945). Several legal subjects are drivers of the national economy, one of which is the Limited Liability Company (Bagus SD Nur Buwono and Sulistiowati, 2022). Article 2 of Law Number 40 of 2007 concerning Limited Liability Companies (Company Law), essentially regulates that the

Company is carried out by paying attention to compliance with laws and regulations, public order, and/or morality. This can be interpreted as meaning that the Company's objectives must be carried out with generally referred to as the principle of Good Corporate Governance. The application of the principle of Good Corporate Governance is useful to ensure that the Company carries out its business activities professionally, responsibly, and oriented towards Good Corporate Governance in order to support business activities and of course national economic growth. The principles of Good Corporate Governance are formed by a number of values, namely transparency, accountability, independence, as well as equality and fairness (Asnita et al, 2025).

Table 1. The principles of Good Corporate Governance regulated in the Company Law

Principle	Article	Content
Transparency	Article 66, 67, 69, dan 100	The company's annual report must be prepared by the Board of Directors
	Article 68	Obligation to appoint a public accountant to audit the company's financial statements
Accountability	Article 92, and 97	Fiduciary Duty requires the Board of Directors to manage the Company in good faith and responsibly
	Article 108 and 114	Fiduciary Duty of the Board of Commissioners to supervise the management of the Company
	Article 63 and 64	Responsibility of the Board of Directors in preparing the annual work plan and budget, which will be submitted to the Board of Directors and the General Meeting of Shareholders
Responsibility	Article 74	Requirements for fulfilling social and environmental responsibilities
	Article 138	Investigations of companies if there are allegations that the company or its management has engaged in activities that are unlawful or detrimental to other parties
Independence	Article 36	Direct or indirect cross-ownership is essentially prohibited, except in certain cases
	Article 85	Prohibition on company directors representing shareholders in voting at the General Meeting of Shareholders
Equality and Justice	Article 34 (2), 35, and 62	The use of fair value, the determination of which is based on market prices or the results of an assessment by an independent party who has no affiliation in capital contributions, in the conversion of bills into shares, in relation to share buybacks, and also in relation to share conversions due to mergers
	Article 89 and 102	Important issues such as mergers and acquisitions, disposal of fixed assets must be approved by the General Meeting of Shareholders
	Article 84 and 85	The voting rights of shareholders or their proxies at the General Meeting of Shareholders are proportional to their percentage of share ownership
	Article 61 and 62	Minority Shareholder Rights: Derivative Lawsuits and Share Buybacks
	Article 52 and 66	Shareholders' rights to receive dividends and company assets upon liquidation and to receive periodic reports on the company's financial and business condition

Source: Research data (processed by Author)

The Corporate Governance Perception Index assesses 44 companies listed on the Indonesia Stock Exchange that effectively implement Good Corporate Governance principles, influencing risk management and producing annual reports trusted by investors and stakeholders (Made Aristya Krisna Dewi and Ketut Alit Suardana, 2021). The successful implementation of Good Corporate Governance principles can foster the doctrine of Fiduciary Duty, or trust in the company's Board of Directors (Aufa Wira Prakasa and Albertus Sentot Sudarwanto, 2025). Trust in the Board of Directors influences confidence in making business decisions, including risky decisions, especially decisions involving large investments, such as

mergers, acquisitions, and debt restructuring. It is not uncommon for Directors to face claims for losses due to risky decisions, particularly in situations where state capital participation in the form of shares in a State-Owned Enterprise (Athalia De Valerie and Moody Rizqy Syailendra Putra, 2024). The Business Judgment Rule doctrine is known as a form of legal protection against the claims in question (Lina Husnul Khairiyah and Heru Sugiyono, 2025).

In corporate law, the Business Judgment Rule is understood as a doctrine that provides protection to Directors against losses resulting from business decisions made in good faith and in accordance with regulations (Iman Wijaya, 2025). The Business Judgment Rule doctrine in Indonesia is based on the criteria stipulated in Article 97 paragraph (5) of the Company Law which states that Directors are not responsible for losses if they can prove that 1) the loss is not due to their fault or negligence; 2) they have carried out management in good faith and due care; 3) they have no conflict of interest in carrying out the act that caused the loss; and 4) they have taken action to prevent the occurrence or continuation of such losses. In addition to Article 97 paragraph (5) of the Company Law, the criteria for applying the Business Judgment Rule doctrine are also stated in Article 9F paragraph (1) of Law Number 19 of 2003 concerning State-Owned Enterprise as last amended by Law Number 16 of 2025 concerning the Fourth Amendment to Law Number 19 of 2003 concerning State-Owned Enterprise (State-Owned Enterprise Law).

Referring to the previous description, the discussion in this study focuses on the application of the Business Judgment Rule in Supreme Court Decision Number 121 K/Pid.Sus/2020 and Supreme Court Decision Number 417 K/PID.SUS/2014. The two decisions show differences in the judges considerations which have implications for the decision-making of the Board of Directors, especially in State-Owned Enterprise. This condition has the potential to cause excessive concern because every business risk can be interpreted as negligence or even a criminal act of corruption (Yelia Nathassa Winstar et al, 2025). Although in principle, losses arising from business decisions cannot necessarily be equated with acts of corruption as long as the Board of Directors has implemented the principles of Good Corporate Governance and met the criteria as stipulated in Article 97 paragraph (5) of the Company Law (A'an Efendi, Dyah Ochtorina Susanti, and Suwardi, 2024). However, the regulation does not yet provide clear criteria regarding the meaning of good faith and the principle of due care of the Board of Directors, so that it is necessary to formulate a firmer boundary between reasonable business risks and legal negligence in order to realize the Legal Certainty Theory by Gustav Radbruch.

Discussions related to Business Judgment have been conducted by several previous researchers, namely Shofiyah Az-zahra Dewi and Yudi Widagdo Harimurti (2024) entitled Business Judgment Rule Doctrine as Protection of Directors Against State Financial Losses in the *Inicio Legis Law Journal*. The study focused on the normative position of the Business Judgment Rule doctrine in the legal system, but its scope was limited to companies in Indonesia in general and did not specifically focus on State-Owned Enterprise, and the study did not examine in depth the regulatory aspects, especially the shortcomings or legal loopholes in the provisions of the Business Judgment Rule doctrine in Indonesia. Other researchers are A'an Efendi, Dyah Ochtorina Susanti, and Suwardi (2024) entitled Business Losses of Limited Liability Companies: Business Judgment Rule Versus Corruption Offenses in the *Indonesian Legal Development Journal*. The study emphasized whether business losses in Companies or State-Owned Enterprises can be categorized as state losses, because this has the potential to form corruption offenses.

Based on the above, the researcher intends to analyze the application of the Business Judgment Rule doctrine in decision-making by State-Owned Enterprise in Indonesia and strengthen the limitations of the Business Judgment Rule in decision-making by State-Owned Enterprise in Indonesia based on a comparison with Australian law.

METHOD

The type of research used in this study is normative juridical legal research, namely a research method on statutory regulations both from the perspective of hierarchy and harmonious relationships of legislation (Peter Mahmud Marzuki, 2005). The approach in this study is a statute approach, namely statutory regulations, a comparative approach between Indonesian and Australian law, and a case approach by examining the Supreme Court Decision Number 121 K / Pid.Sus / 2020 and the Supreme Court Decision Number 417 K / PID.SUS / 2014. The legal materials in this study are primary legal materials (statutory regulations), secondary legal materials (previous research, textbooks, or sources from scientific journals), and tertiary legal materials (Big Indonesian Dictionary (KBBI) and sources from the internet). The data in this study were collected by library research or collecting legal materials related to the research in accordance with the type of normative juridical legal research. In this study, the collected materials and data will then be analyzed using descriptive qualitative methods.

RESULTS AND DISCUSSION

Implementation of the Business Judgment Rule Doctrine in Decision-Making of State-Owned Enterprise in Indonesia

Black's Law Dictionary defines the Business Judgment Rule as protecting directors from legal liability for failed business decisions, as long as the decisions are taken honestly, carefully, and within their authority (Bryan A. Garner, 2024). The Business Judgment Rule is implemented in Indonesia based on the provisions stipulated in Article 97 paragraph (5) of the Company Law and Article 9F paragraph (1) of the State-Owned Enterprise Law, which are expected to create legal certainty (Hadiid 'Adn Wana Santosa, 2025). From the perspective of Gustav Radbruch's Theory of Legal Objectives, namely legal certainty, legal justice, and legal benefit, the Business Judgment Rule is more appropriately positioned as an instrument aimed at legal certainty. This is reflected in its main function of establishing normative criteria for directors so that they cannot be held accountable for losses as long as they meet certain elements. Thus, the Business Judgment Rule creates predictable standards and is used as criteria in assessing the objectivity of a business decision. In the context of the Indonesian legal system, which is rooted in civil law, legal certainty is understood as a written norm that must be formulated firmly and implemented consistently.

From this legal certainty, justice and benefit can then be realized through equal treatment of similar cases and the achievement of social goals in society. However, in practice, protection of the Board of Directors' decisions has not fully provided legal certainty (Hanifah Dwi Jayanti, 2025). This condition indicates that the legal status of decisions taken by the Board of Directors still leaves uncertainty, particularly in determining the criteria limits in the Business Judgment Rule doctrine itself (Diky Anandya, Kurnia Ramadhana, and Lalola Easter, 2023). This uncertainty of criteria is not limited to the normative aspect, but is also reflected in judicial practice. Furthermore, to clarify the situation, the following will analyze each of the Business Judgment Rule criteria in dua decisions that apply the Business Judgment Rule principle with different considerations, namely Supreme Court Decision Number 121 K/Pid.Sus/2020 against the former President Director of PT Pertamina Hulu Energi, namely Karen Agustiawan and Supreme Court Decision Number 417 K/PID.SUS/2014 against the former President Director of PT Merpati Nusantara Airlines, namely Hotasi Nababan.

Supreme Court Decision Number 121 K/Pid.Sus/2020 against the former President Director of PT Pertamina Hulu Energi, namely Karen Agustiawan

The Karen Agustiawan case relates to the decision to acquire a 13.5% participating interest in part of the assets of Roc Oil Company Ltd (ROC Ltd), an Australian oil company that was a partner in the acquisition of the Basker Manta Gummy oil field (Blok BMG) by PT

Pertamina (Persero) in 2009 as an effort to increase oil reserves in the deep sea which allegedly caused state financial losses of IDR 568 billion. In the first decision, namely the District Court Decision Number: 15 / Pid.Sus-TPK / 2019 / PN.JKT, Karen Agustiawan was found guilty of committing a criminal act of corruption as in the primary charge and sentenced to 15 years in prison and a fine of IDR 1,000,000,000. This decision was strengthened in the High Court Decision Number: 34 / Pid.Sus-TPK / 2019 / PT.DKI. However, in Supreme Court Decision Number 121 K/Pid.Sus/2020, the Panel of Judges of the Supreme Court finally acquitted Karen Agustiawan with one of the considerations being that the decision constituted a business risk and was within the realm of the Business Judgment Rule doctrine by fulfilling the following criteria:

1. The loss is not due to their fault or negligence

Karen Agustiawan received the primary charge of Article 2 paragraph (1) in conjunction with Article 18 letter b of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption (Corruption Law) in conjunction with Article 55 paragraph (1) point 1 of the Criminal Code and the subsidiary charge of Article 3 in conjunction with Article 18 letter b of the Corruption Law in conjunction with Article 55 paragraph (1) point 1 of the Criminal Code. That despite this, the Panel of Judges of the Supreme Court placed the investment losses in the BMG Block as a consequence of business risks inherent in the oil and gas sector, not as a result of criminal acts of corruption. Based on Article 2 and Article 3 of the Corruption Law, specifically the provision "...unlawfully carrying out acts to enrich oneself or another person or a corporation...", the form of intent is included "with intent or with the aim". These provisions indicate that unlawful acts must be accompanied by intent and purpose, generally known as proving "mens rea," or the perpetrator's malicious intent (Andi Bau Mallarangeng et al., 2023).

Furthermore, the Public Prosecutor in the first decision failed to establish a relationship between Karen Agustiawan and ROC, Ltd., indicating that the mens rea element, namely malicious intent to enrich oneself, another person, or a particular corporation, was not convincingly proven. This situation reflects the failure of the mens rea element, or malicious intent, to prove criminal liability against Karen Agustiawan. The acquisition of the BMG Block participating interest was carried out within the framework of a corporate policy to increase PT Pertamina (Persero)'s offshore oil reserves, so the action essentially remained within the scope of the Board of Directors' business discretion. This consideration is important because criminal liability is not sufficient only based on state losses, but must be proven to have an inner attitude that shows intent or unlawful abuse of authority (Aris Munandar Ar, et al, 2024). The Supreme Court's approach also confirms that the Business Judgment Rule doctrine functions to ensure that business decision errors are not automatically criminalized without proving the elements of criminal wrongdoing.

2. Have carried out management in good faith and due care

The Karen Agustiawan case shows a significant difference in the judge's assessment between the first and cassation levels. At the first level, the panel of judges stated that Karen Agustiawan's series of actions along with the other members of the Board of Directors had not fully demonstrated good faith and due care, based on the existence of important documents and information that were deemed not yet provided to ROC Ltd., so that the investment and acquisition of the BMG Block by PT Pertamina (Persero) was deemed to have a high risk. However, the Panel of Judges of the Supreme Court actually assessed that Karen Agustiawan had fulfilled the elements of good faith and due care because before the decision was made, comprehensive legal and financial due diligence had been carried out. In addition, Karen Agustiawan was also deemed to have followed up on recommendations

from the results of due diligence, involved the Board of Commissioners in the process of approving and supervising transactions, and implemented decisions in accordance with the 2009 Company Work Plan and Budget approved by the Ministry of State-Owned Enterprise. The Panel of Judges of the Supreme Court through its considerations emphasized the emphasis on the business decision-making process carried out based on adequate information and legitimate corporate procedures. These differences of opinion show that the phrase “good faith” and “due care “ in this criterion still depends heavily on the judge's interpretation of the Director's standard of due care.

3. Have no conflict of interest in carrying out the act that caused the loss

The Supreme Court panel of judges assessed that there was no evidence to suggest that Karen Agustiawan obtained any personal benefit, either directly or indirectly. Karen Agustiawan did not act in her own interests when acquiring the BMG Block, instead, she acted in the interests of PT Pertamina (Persero). The trial evidence did not reveal any cash flow, gratuities, or other financial benefits received by Karen Agustiawan from the transaction. In addition to the absence of any personal benefit, the acquisition decision was also made through a corporate mechanism involving various company organs. The approval and oversight of the Board of Commissioners is one indicator that the decision was not made unilaterally.

4. Have taken action to prevent the occurrence or continuation of such losses

The Supreme Court Judges assessed that Karen Agustiawan had taken various risk mitigation measures before and after the acquisition. In August 2010, ROC Ltd stopped production because the BMG Block was uneconomical. The decision to stop production was rejected by PT Pertamina (Persero) because it believed that the BMG Block could still provide economic benefits from its operations, which Karen Agustiawan wanted to maximize. In its consideration, the Supreme Court Judges assessed that Karen Agustiawan had attempted to maximize the potential profits from the investment and did not remain silent when the risk of loss began to emerge. With only 10% of the voting shares, PT Pertamina (Persero) ultimately had no choice but to comply with the majority decision to stop production. This evidence shows that, in accordance with the provisions of Article 97 paragraph (5) letter d of the Company Law, Karen Agustiawan had taken action to minimize losses that might arise from her business activities.

Supreme Court Decision Number 417 K/PID.SUS/2014 against the former President Director of PT Merpati Nusantara Airlines, namely Hotasi Nababan.

The Hotasi Nababan case relates to the leasing of three Boeing 737-400s and one Boeing 737-500 by PT Merpati Nusantara Airlines in 2006 through a leasing mechanism. In this process, PT Merpati Nusantara Airlines submitted a security deposit of USD 1 million to a third party related to the leasing company Third Avenue Leasing Group (TALG). However, the promised aircraft were never delivered and the deposit was not returned, resulting in default and losses. In the first decision, namely the Decision of the Central Jakarta District Court No. 36 / Pid.B / TPK / 2012 / PN.JKT.PST, Hotasi Nababan was declared not legally and convincingly guilty of committing a criminal act of corruption together. However, in the Supreme Court Cassation Decision Number 417 K / PID.SUS / 2014, Hotasi Nababan was declared legally and convincingly guilty of committing a criminal act of corruption. The analysis of fulfillment of the Business Judgment Rule criteria is as follows:

1. The loss is not due to their fault or negligence

From a Business Judgment Rule perspective, the losses suffered by PT Merpati Nusantara Airlines essentially arose from the failing to fulfill an obligation and fraud committed by TALG, the third party in the leasing of three Boeing 737-400s and one Boeing 737-500. Prior to the transaction, Hotasi Nababan of PT Merpati Nusantara Airlines had taken various business steps, such as physically inspecting the aircraft, preparing an owner estimate, and requesting legal advice from the Legal Division regarding the Lease and Security Agreement Transaction documents. PT Merpati Nusantara Airlines even rejected the lease price increase proposed by TALG, deeming it inconsistent with the results of its financial due diligence. This fact demonstrates that the business decision was based on specific considerations and does not indicate any fault or negligence on his part. Although Hotasi Nababan's actions were deemed to meet the elements of Articles 2 and 3 of the Corruption Law, proof of *mens rea*, or malicious intent, in making the decision was never conclusively revealed in court (Diky Anandya, Kurnia Ramadhana, and Lalola Easter, 2023).

There was no evidence that Hotasi Nababan intentionally intended to cause state losses or obtain personal benefits from the security deposit payment to TALG. This assessment was also strengthened by both the Corruption Eradication Commission and the Directorate III of Corruption Crimes of the Criminal Investigation Agency of the Republic of Indonesia National Police, which essentially stated that the aircraft procurement case did not fulfill the elements of a criminal act of corruption and no state losses were found. It is important to distinguish between business losses and unlawful acts. State losses arising from failed business decisions cannot fulfill the elements of a criminal act of corruption if they are not accompanied by *mens rea* or malicious intent, abuse of authority, or actions that were initially directed towards unlawful purposes.

2. Have carried out management in good faith and due care

A number of Hotasi Nababan's actions essentially reflect the implementation of due care in the business decision-making process in the form of leasing three Boeing 737-400 units and one Boeing 737-500 unit. This is evident from the physical inspection of the Boeing 737-400 and Boeing 737-500 aircraft by the internal team of PT Merpati Nusantara Airlines, the preparation of an analysis of the estimated value and standard price of the aircraft lease (owner estimate), and a request for a legal opinion on the Lease and Security Agreement Transaction (LASOT) document from the Legal Division of PT Merpati Nusantara Airlines. In addition, PT Merpati Nusantara Airlines also rejected TALG's request to increase the aircraft lease price from USD 135,000 to USD 155,000 because it was deemed inconsistent with the results of financial due diligence. These steps indicate that the decision to lease the aircraft was not made unilaterally or without specific business considerations.

However, the Supreme Court Judges considered that Hotasi Nababan was deemed to have ignored the recommendations of the Legal Division of PT Merpati Nusantara Airlines regarding the aircraft ownership status which was not yet fully in the hands of TALG. In addition, the security deposit payment of USD 1 million was made in cash without going through a letter of credit or escrow account mechanism, and the aircraft rental plan was not first requested for approval from the General Meeting of Shareholders and was not included in the Company's Work Plan and Budget. These considerations indicate that even though there are actions that reflect a duty of care, the criteria for management in good faith and with due care remain an important consideration for judges in determining whether BUMN directors cannot be held responsible for losses based on the Business Judgment Rule doctrine.

3. Have no conflict of interest in carrying out the act that caused the loss

The trial facts do not indicate any personal gain by Hotasi Nababan from the decision to lease three Boeing 737-400 units and one Boeing 737-500 unit. No flow of funds or personal relationship between Hotasi Nababan and TALG was found. Instead, Hotasi Nababan's position actually shows that he acted in his capacity as President Director of PT Merpati Nusantara Airlines to meet the company's operational needs by leasing three Boeing 737-400 units and one Boeing 737-500 unit. After TALG failed to realize the delivery of the aircraft and did not return the security deposit, PT Merpati Nusantara Airlines immediately took legal action through a civil lawsuit in the District of Columbia Court against TALG. The lawsuit was later granted and TALG was required to return the security deposit and interest. The fact that Hotasi Nababan took legal action shows that he did not have a conflict of interest in the transaction. Therefore, from the perspective of the Business Judgment Rule, the element of no conflict of interest has basically been fulfilled.

4. Have taken action to prevent the occurrence or continuation of such losses

The actions of Hotasi Nababan and PT Merpati Nusantara Airlines demonstrate an effort to mitigate and recover the company's losses after TALG defaulted. When the Boeing 737-400 aircraft was not delivered, PT Merpati Nusantara Airlines immediately demanded the return of the security deposit and canceled plans to lease other aircraft. PT Merpati Nusantara Airlines also filed a civil lawsuit against TALG in the District of Columbia Court, which was later granted, requiring TALG to return the entire security deposit. In addition, regulations regarding the Procurement Mechanism were further outlined in Board of Directors Decree No. SKEP/20/I/2007 as a form of internal evaluation to minimize similar risks in the future. These steps demonstrate that the Board of Directors continues to strive to recover and prevent further losses through legal and administrative mechanisms. However, the Panel of Judges of the Supreme Court still considered that the elements of a criminal act of corruption were met because the level of caution of the Board of Directors was deemed suboptimal in the business decision-making process.

Table 2. Analysis of Fulfillment of Business Judgment Rule Criteria for Both Decisions

<i>Business Judgment Rule Criteria</i>	Karen Agustiawan	Hotasi Nababan
The loss is not due to his fault or negligence	Fulfillment	Can meet the considerations
	Reason	The BMG Block investment loss is considered a business risk in the oil and gas sector and not due to the Board of Directors' intentional or negligent actions. The acquisition was based on a feasibility study and a strategy to increase national oil and gas reserves.
Have carried out management in good faith and due care	Fulfillment	Able to fulfill the considerations in the Supreme Court Decision, but was declared not to fulfill the considerations in the District Court Decision and the High Court Decision.
	Reason	The Supreme Court assessed that this element was fulfilled because due diligence, a feasibility study, approval from the Board of Commissioners, and compliance with the RKAP had been carried out.

Have no conflict of interest in carrying out the act that caused the loss	Fulfillment	Can meet the considerations	Can meet the considerations
	Reason	No personal gain or conflict of interest was found in the decision to acquire the BMG Block. All actions were carried out in the company's best interests.	There was no evidence of any personal gain from the aircraft rental transaction.
Have taken action to prevent the occurrence or continuation of such losses	Fulfillment	Can meet the considerations	Can meet the considerations
	Reason	PT Pertamina continues to strive to maintain the economic value of the BMG Block and rejects the cessation of production by ROC Ltd. as a form of loss mitigation.	PT Merpati Nusantara Airlines sued TALG in the District of Columbia Court to recover the security deposit and issue internal procurement policies to prevent similar risks.

Source: Research data (processed by Author)

Based on a comparison of the two cases, in the case of Karen Agustawan, the judge considered that the decision-making process had been carried out carefully through due diligence, feasibility studies, approval from the Board of Commissioners, and compliance with the RKAP 2009. Conversely, in the case of Hotasi Nababan, although there were actions that demonstrated a duty of care, the judge still considered there were shortcomings in the aspect of due care because the Directors ignored the recommendations of the Legal Division and payments were made without a letter of credit. The criteria for the loss is not due to his fault or negligence, conflict of interest, and loss prevention measures tend to be easier to prove objectively, while the criteria for good faith and due care are more abstract and depend on the judge's assessment of the business decision-making process (Erlita Lily Cahya Aulia Putri Perdana, and Gialdah Tapiansari Batubara, 2025). Referring to the case discussed above, it is clear that in judicial practice, judges not only consider the proof of mens rea to assess whether the loss was not caused by their fault or negligence, but also the criteria of management in good faith and due care are also important considerations for judges as to whether the BUMN Directors cannot be held responsible for a loss based on the Business Judgment Rule doctrine. Although Article 97 paragraph (5) of the Company Law and Article 9F paragraph (1) of the State-Owned Enterprise Law has determined when a State-Owned Enterprise Director cannot be held responsible for a loss, this provision still leaves room for ambiguity regarding the interpretation of good faith and due care. Without clear indicators, the line between business losses and unlawful acts becomes biased, thus potentially triggering uncertainty in judicial practice (Hanifah Dwi Jayanti, 2025).

Strengthening the Limits of the Business Judgment Rule in Decision-Making of State-Owned Enterprise in Indonesia Based on Comparisons with Law in Australia

The position of State-Owned Enterprise in Indonesia lies at the intersection of business entities and public entities, as State-Owned Enterprise operate profit-oriented businesses, while also serving the public and managing capital directly invested in the State Budget (Syafana Hanifah de Vries and Ratih Damayanti, 2025). This overlap has led to complexities in determining the legal liability of State-Owned Enterprise directors, particularly when a business decision results in company losses that are often equated with state losses. This situation then creates legal uncertainty as the boundaries between business risks and corruption become overlapping (I Komang Arya Putra and Komang Widiani Purnawan, 2026). In this context, the State-Owned Enterprise Law introduces changes through Article 4B of the State-Owned Enterprise Law, which emphasizes that State-Owned Enterprise profits or losses are the profits or losses of the State-Owned Enterprise itself as a business entity. Furthermore, in the Circular Letter of the Corruption Eradication Commission Number 12 of 2025 concerning Guidelines for the Implementation of Duties, Functions, and Authorities of the Corruption Eradication Commission after Law Number 1 of 2025 concerning the Third Amendment to

Law Number 19 of 2003 concerning State-Owned Enterprise, in essence it states that losses in State-Owned Enterprise are basically still considered as losses to the state/state economy as long as they are caused by unlawful acts or abuse of authority.

The regulation shows a shift in the approach to managing State-Owned Enterprise from a public entity to a business entity, where business losses cannot be equated with state losses, unless the losses are caused by unlawful acts/abuse of authority by the State-Owned Enterprise Board of Directors. The existence of the State-Owned Enterprise Law is basically expected to be able to provide normative clarity regarding the legal status of State-Owned Enterprise, including the status of company organs, to the limits of criminal liability in managing business activities (Agustinus Nugroho Jati et al 2025). The provisions of the Business Judgment Rule criteria are basically also regulated in Article 9F of the State-Owned Enterprise Law, but these provisions have the same substance as the provisions of Article 97 paragraph (5) of the Company Law, namely not fully resolving the problems of implementing the Business Judgment Rule which only formulates general criteria regarding the loss is not due to their fault or negligence, have carried out management in good faith and due care, have no conflict of interest in carrying out the act that caused the loss, and have taken action to prevent the occurrence or continuation of such losses measures without providing clear criteria regarding the standards of behavior of Directors who are considered to meet these criteria. As a result, the application of the Business Judgment Rule in practice often depends heavily on the subjectivity of the judge's assessment of the business decision-making process, as seen in the differences in considerations in the Karen Agustiawan and Hotasi Nababan cases.

To answer this question, a comparative approach is needed to the laws of other countries that have definitive and systematic Business Judgment Rule regulations. Australia is relevant as a comparative country because the Business Judgment doctrine essentially developed from the common law tradition, which places courts as the determinants of the fiduciary duty of directors through a series of previous court decisions (Yaowen Shan and Sue Wright, 2024). Although Indonesia adheres to a civil law system, comparisons with common law countries are still possible because modern corporate law is transnational and develops through the harmonization of good corporate governance principles (Gilson Gray, 2022). Furthermore, comparisons between civil law and common law systems are a widely accepted practice in comparative law, given the increasingly evident convergence between the two legal systems, including in Indonesia. Legal convergence is a recognized method in national legal reform, thus providing a legitimate methodological foundation for the transplantation of doctrines from common law jurisdictions into civil law jurisdictions (Abdul Malik Mufty and Nurul Chaerani Nur, 2026).

Therefore, the comparison with Australia is not intended to adopt its legal system in its entirety, but rather to identify normative formulations that can clarify the limits of legal protection for State-Owned Enterprise Directors in Indonesia. Indonesian law still regulates the Business Judgment Rule in a very limited manner. However, this formulation does not explain how the parameters of "good faith" and "due care" should be measured in business decision-making practices. Several studies developed in recent years have shown that the absence of clear normative indicators in the application of the Business Judgment Rule has led to a tendency for State-Owned Enterprise directors to be defensive in making business decisions due to concerns that business failure will be interpreted as corruption or abuse of authority. This condition ultimately has the potential to hinder the courage of directors in making strategic decisions that are actually necessary to achieve business goals and increase the competitiveness of State-Owned Enterprises (Sulistiowati, 2021).

Unlike in Indonesia, the Business Judgment Act in Australia is regulated in more detail in the Corporations Act 2001, specifically in Sections 180–184, which regulates the standards of Directors obligations through a separation between civil obligations and criminal offenses.

Section 180 not only confirms the protection of Directors business decisions but also sets out concrete parameters regarding when Directors are deemed to have fulfilled their duty of care and diligence. Section 181 regulates the obligation of Directors to exercise their authority in good faith for a proper purpose (which can give rise to a fiduciary duty). Furthermore, Section 182 prohibits Directors from improperly using their positions to obtain personal gain or cause loss to the company. A similar prohibition is regulated in Section 183 regarding the misuse of company information, including after someone is no longer an officer or employee of the company. Furthermore, the requirement of good faith for a just purpose in Sections 180 and 181 is reinforced and clarified in Section 184, which states that directors can be held liable for certain violations if they are committed dishonestly or recklessly. A comparison of the Business Judgment Rule regulations in Indonesia and Australia can be seen in the following table.

Table 3. Comparison of Business Judgment Rule criteria in Indonesia and Australia

Criteria of the Business Judgment Rule in Indonesia (Article 97 paragraph (5) of the Company Law and Article 9F of State-Owned Enterprise Law)	Criteria of the Business Judgment Rule in Australia (Sections 180–184 Corporations Act 2001)
The loss is not due to his fault or negligence	Section 180 (1) sets out an objective standard of duty of care and diligence, namely that Directors are required to act as a reasonable person in the same position and with the same responsibilities would. Thus, the measure of error or negligence is determined through more measurable objective parameters.
Have carried out management in good faith and due care	Section 180 (2) (a) specifically states that business decisions must be made with 1) good faith and proper purpose, 2) no material personal interest, 3) inform themselves to the extent reasonably appropriate, and 4) rationally believe in the best interests of the corporation. This provision not only requires general good faith, but also examines whether the purpose of the decision is correct and in the interests of the corporation. Section 181 (1) emphasizes the obligation of the Board of Directors to exercise their authority: 1) in good faith in the best interests of the corporation; and 2) for a proper purpose. This means that the element of good faith in Australian law is concretized into two main indicators, namely the best interests of the company and the purpose of the legitimate use of authority. Section 184 (1) clarifies the limits of a breach of good faith by providing a criminal standard, namely if the Directors act dishonestly or recklessly. Thus, the Corporations Act 2001 provides further specifications regarding when good faith is deemed to be breached..
Have no conflict of interest in carrying out the act that caused the loss	Section 180 (2) (b) expressly states that directors must not have a material personal interest in the principal business decisions they make. This provision is more specific because it emphasizes personal interests that are material and relevant to corporate decisions.
Have taken action to prevent the occurrence or continuation of such losses	Section 180 (2) (c) requires directors to inform themselves to a reasonably appropriate extent before making business decisions. Furthermore, Section 180 (2) (d) requires directors to rationally believe in the best interests of the corporation. This provision demonstrates that loss prevention is measured through a rational, informed decision-making process.

Source: Research data (processed by Author)

Based on this comparison, strengthening the Business Judgment Rule in Indonesia should be directed at establishing more measurable normative indicators regarding the good faith and due care. Indonesia needs to adopt a process-based approach, as implemented in Australia, namely by assessing whether the Board of Directors has made business decisions with good faith and proper purpose, no material personal interest, inform themselves to the extent reasonably appropriate, and rationally believe in the best interests of the corporation. More

specifically, the criteria for good faith and due care can adopt the provisions of Section 180 (2) (a), Section 181 (1), and Section 184 (1) of the Corporations Act 2001, as compared in Table 3. With these indicators, the assessment of the element of due care is no longer based solely on losses incurred, but rather on the standard business decision-making process carried out by the Board of Directors (Tim Bednall, Anthea Yong, and Jack Wheatstone, 2025). Such a revision is especially important in the context of state-owned enterprises (State-Owned Enterprises) that have an intersectional position of business entities and public entities, so that the Board of Directors often faces more complex risk pressures than ordinary companies.

Comparison with Australia shows that the Business Judgment Rule arrangement in Australia is more definitive and systematic because it not only formulates general principles, but also provides objective indicators regarding the business decision-making process. Therefore, strengthening the Business Judgment Rule in Indonesia can be done by revising Article 97 paragraph (5) of the Company Law and Article 9F of the State-Owned Enterprise Law by adopting the Corporations Act 2001. This reform is important to create legal certainty, encourage the courage of the Board of Directors in making strategic business decisions, and at the same time maintain the principle of accountability in State-Owned Enterprise management in accordance with the provisions of Article 2 paragraph (1) of the State-Owned Enterprise Law, which essentially states that the purpose of State-Owned Enterprise is to gain profits, increase company value, as a contribution to the national economy, parties that carry out business activities that cannot yet be accommodated by the private sector and cooperatives, empowering MSMEs and cooperatives, providing goods, strategic public benefits, and developing strategic industries. In addition, the functions and roles of State-Owned Enterprise in the Indonesian economic system as stated by the National Legal Development of the Department of Law and Human Rights of the Republic of Indonesia are: 1) contribution to the state economy, 2) public benefit services, 3) pioneering strategic businesses, 4) providing community needs, and 5) supporting government policies (Sunaryati Hartono, 2005).

Although the Business Judgment Rule in Australia was developed in the context of private companies through the Corporations Act 2001, a comparison with Indonesia remains relevant because conceptually, the doctrine is also rooted in general company law that applies to all company directors. In the Indonesian legal system, the Business Judgment Rule was not specifically established for State-Owned Enterprise. Instead, it is regulated in Article 97 paragraph (5) of the PT Law, which applies to all directors of limited liability companies, including Persero (Persero), a form of State-Owned Enterprise. Therefore, the position of State-Owned Enterprise directors is essentially subject to general principles of company law regarding fiduciary duty, duty of care, and accountability for business decisions. The difference lies in the characteristics of State-Owned Enterprise in Indonesia, which are at the intersection of business entities and public entities. On the one hand, State-Owned Enterprise operate profit-oriented businesses, but on the other, they also serve the public. Therefore, the comparison with Australia is not intended as a complete legal adoption, but rather as a comparative method to identify normative parameters that can clarify the standards of due care and good faith of directors in the context of company management in Indonesia.

Furthermore, the Australian model cannot be directly implemented without considering the institutional structure and objectives of establishing State-Owned Enterprise in Indonesia. Unlike private companies in Australia, which are primarily shareholder-oriented, Indonesian State-Owned Enterprise are obligated to perform public service functions, which places the discretionary space for State-Owned Enterprise Directors at a more complex level of legal risk than for Directors of ordinary companies. Therefore, strengthening the Business Judgment Rule in Indonesia should be carried out through an adaptive approach while maintaining the specific characteristics of State-Owned Enterprise. In this context, the regulations in Australia are more appropriately placed as a comparison regarding objective indicators in the business decision-

making process, which are then adjusted to the principles of Good Corporate Governance in State-Owned Enterprise. Such regulations provide legal certainty while maintaining a balance between protection for Directors and corporate accountability mechanisms. In addition, this regulation reflects the function of the Business Judgment Rule doctrine to encourage Directors to remain brave in making business decisions without causing excessive concern about the risk of legal liability for any losses arising from reasonable business risks. (Tim Bednall, Anthea Yong, and Jack Wheatstone, 2025).

In addition to revising the Article 97 paragraph (5) of the Limited Liability Company Law and Article 9F of the State-Owned Enterprises Law, derivative regulations can also be created specifically to guide the application of the Business Judgment Rule in the management practices of State-Owned Enterprise. To date, there are no derivative regulations in the form of government regulations, ministerial decrees, or other technical guidelines that explain concrete indicators for the application of the Business Judgment Rule principles. The existence of derivative regulations can be useful in creating more definitive assessment standards. With the revision of the Article 97 paragraph (5) of the Limited Liability Company Law and Article 9F of the State-Owned Enterprises Law, and the creation of specific derivative regulations, the application of the Business Judgment Rule is expected to no longer create room for ambiguity and will be able to provide more effective legal certainty for BUMN Directors in carrying out their company management functions. Nevertheless, State-Owned Enterprise Directors must still avoid making business decisions that are contrary to the law or involve abuse of authority. Therefore, the implementation of Good Corporate Governance still needs to be accompanied by, at a minimum, compliance with the principles of Good Corporate Governance, which are formed by a number of values, namely transparency, accountability, independence, and equality and fairness.

CONCLUSION

Based on a comparison of Supreme Court Decision Number 121 K/Pid.Sus/2020 and Decision Number 417 K/PID.SUS/2014, it is clear that the criteria for management in good faith and with due care remain an important consideration for judges in determining the application of the Business Judgment Rule doctrine to State-Owned Enterprise Directors. Although Article 97 paragraph (5) of the Company Law and Article 9F of the State-Owned Enterprise Law have regulated the requirements for Directors not to be held responsible for company losses, these provisions still leave ambiguity regarding the meaning of good faith and due care because they are not accompanied by clear indicators. Based on a comparison with the Corporations Act 2001 of Australia, the Business Judgment Rule in Australia sets out a number of objective parameters that can be used to assess the Board of Directors' business decision-making process in a more measurable manner. Therefore, strengthening the Business Judgment Rule in Indonesia needs to be done through revision of the Article 97 paragraph (5) of the Company Law and Article 9F of the State-Owned Enterprise Law also the formation of derivative regulations. However, the State-Owned Enterprise Board of Directors is still obliged to implement a number of Good Corporate Governance principles, namely transparency, accountability, independence, as well as equality and fairness.

REFERENCE

- Anandya, D., Ramadhana, K., dan Easter, L. (2023). *Mendudukan Kembali Implementasi Prinsip Business Judgment Rule Dalam Perkara Korupsi*. Indonesia Corruption Watch, Jakarta.
- Asnita et al. (2025). Pengaruh Good Corporate Governance Terhadap Kepuasan & Kepercayaan Stakeholders, *Jurnal Manajemen, Hukum dan Sosial*. Vol. 3 No. 1. <https://jurnal2.umsu.ac.id/index.php/jmhs/article/view/89>.

- Bednall, T., Yong, A., and Wheatstone, J. (2025) *Australian Institute of Company Director, Directors use business judgment rule successfully in court defence*, <https://www.aicd.com.au/board-of-directors/duties/breach-corporations-act/directors-use-business-judgment-rule-successfully-in-court-defence.html>.
- Buwono, B, SD, N. B., dan Sulistiowati (2022). *Running A Company Under Indonesian Laws*. Rajawali Pers, Depok.
- Corporations Act 2001.
- Dewi, M. A. K. dan Ketut Alit Suardana, K. A. (2021) The Influence of Good Corporate Governance, Corporate Social Responsibility and Company Size on Financial Performance in Banking Companies Registered in Indonesia Stock Exchange in 2017-2019. *American Journal of Humanities and Social Sciences Research*. Vol. 5 Issue-2, pp-213-220. <https://www.ajhssr.com/volume-5-issue-02/>.
- Dewi, S. A. dan Harimurti, Y. W. (2024). Doktrin Business Judgment Rule Sebagai Perlindungan Direksi Terhadap Kerugian Keuangan Negara. *Jurnal Hukum Inicuo Legis*, Vol. 5 No. 4, <https://doi.org/10.21107/il.v5i2.27605>.
- Efendi, A., Susanti, D.O., dan Suwardi (2024) Kerugian Bisnis Persero: Business Judgment Rule Versus Delik Korupsi. *Jurnal Pembangunan Hukum Indonesia*, Vol. 6, No. 2, <https://doi.org/10.14710/jphi.v6i2.193-209>.
- Garner, B. A. (2024). *Black's Law Dictionary, 12th edition*, Thomson Reuters Publisher.
- Gray, G. (2022) *Directors' Duties-The former common law regime*, <https://gilsongray.co.uk/blog/directors-duties-the-former-common-law-regime/>.
- Hartono, S. (2005) *Analisa dan Evaluasi Hukum tentang Privatisasi Badan Usaha Milik Negara (BUMN)*. Badan Pembinaan Hukum Nasional Departemen Hukum dan HAM RI, <https://perpustakaan.iaiskjmalang.ac.id/e-book/analisa-dan-evaluasi-hukum-tentang-privatisasi-badan-usaha-milik-negara-bumn/>.
- Jati, A. N, Widjaja, G., dan Yustanti, D. E. (2025). Prinsip Tata Kelola Dan Perubahan Paradigma Pengelolaan BumN Dalam UU No. 1 Tahun 2025. *Netizen: Journal Of Society And Bussiness*, Vol. 1 No. 9.
- Jayant, H. D. (2025). *Perlu Batasan Jelas dalam Business Judgment Rule sebagai Perisai Hukum Direksi Perusahaan* <https://www.hukumonline.com/berita/a/perlu-batasan-jelas-dalam-business-judgment-rule-sebagai-perisai-hukum-direksi-perusahaan-lt68d4aea0ee10a/?page=1>.
- Khairiyah, L. K. dan Sugiyono, H. (2025). Kepastian Hukum Business Judgment Rule Dalam Memberikan Perlindungan Hukum Bagi Direksi Perseroan. *Jurnal USM Law Review*, Vol. 8 No. 3, <https://doi.org/10.26623/julr.v8i3.12930>.
- Law Number 19 of 2003 concerning State-Owned Enterprises as last amended by Law Number 16 of 2025 concerning the Fourth Amendment to Law Number 19 of 2003 concerning State-Owned Enterprises.
- Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.
- Law Number 40 of 2007 concerning Limited Liability Companies.
- Marzuki, P. M. (2005). *Penelitian Hukum: Edisi Revisi* Prenada Media Group, Jakarta.
- Mufty, A. M. dan Nur, N. C. (2026). *Perbandingan Hukum Pidana: Teori, Sistem, Dan Transformasi Global*. Penerbit Tahta Media Group, Jawa Tengah
- Muhaimin. (2020). *Metode Penelitian Hukum*. Mataram University Press, Mataram.
- Perdana, E. L. C. A. P dan Batubara, G. T. (2025). Implikasi Disparitas Putusan Hakim dalam Penerapan Prinsip Business Judgment Rule terhadap Implementasi Tujuan Hukum. *UNES Law Review*, Vol. 7 No. 4, <https://doi.org/10.31933/unesrev.v7i4.2421>.

- Prakasa, A. W. dan Sudarwanto, A. S. (2025). Doktrin Fiduciary Duty: Peranannya sebagai Pedoman Pengurusan Perseroan Terbatas oleh Direksi. *Al-Zayn: Jurnal Ilmu Sosial & Hukum*, Vol. 3 No. 2. <https://doi.org/10.61104/alz.v3i2.993>.
- Priowirjanto, E. S. (2021). *Hukum Ekonomi Indonesia Suatu Pengantar*. Keni Media. Bandung.
- Putra, I. K. A dan Purnawan, K. W. (2026). Business Judgment Rule Dan Pertanggungjawaban Pidana Direksi Badan Usaha Milik Negara Pasca Berlakunya Kitab Undang-Undang Hukum Pidana 2023. *Jurnal Media Akademik (JMA)*, Vol. 4 No. 2, <https://doi.org/10.62281/qz5t5a76>.
- Santosa, H. A. W. (2025). BUMN dan Era Baru Keputusan Bisnis: Penegasan Business Judgment Rule dalam UU No. 1 Tahun 2025, <https://law.uui.ac.id/blog/2025/12/16/bumn-dan-era-baru-keputusan-bisnis-penegasan-business-judgment-rule-dalam-uu-no-1-tahun-2025/>.
- Shan, Y dan Sue, W. (2024). Good Governance. *Australian Accounting Review*, Vol. 34 No. 4, <https://doi.org/10.1111/auar.12443>.
- Supreme Court Decision Number 121 K/Pid.Sus/2020
Supreme Court Decision Number 417 K/PID.SUS/2014
Circular Letter of the Corruption Eradication Commission Number 12 of 2025 concerning Guidelines for the Implementation of Duties, Functions, and Authorities of the Corruption Eradication Commission after Law Number 1 of 2025 concerning the Third Amendment to Law Number 19 of 2003 concerning State-Owned Enterprises.
- Valerie, A. D. dan Putra, M. R. S. (2024). Penerapan Asas Fiduciary Duty Dalam Tanggung Jawab Direksi pada Perseroan Terbatas. *JLEB: Journal of Law, Education and Business*, Vol. 2 No. 1, 373-379, <https://doi.org/10.57235/jleb.v2i1.1670>.
- Vries, S. H. dan Damayanti, R. (2025). Implikasi Dualitas Kedudukan BumN Terhadap Kemandirian Korporasi Dan Fungsi Pelayanan Publik. *Jurnal Kertha Semaya*, Vol. 13 No. 10, <https://doi.org/10.24843/KS.2025.v13.i10.p05>.
- Wijaya, I. (2025). *Business Judgement Rule Direksi BUMN*. CV Damera Press, Jakarta.
- Winstar, Y. N. et al (2025). Perlindungan Hukum Direksi Melalui Business Judgement Rules (BJR) Terkait Tanggung Jawab Sosial Dan Lingkungan Perusahaan. *Pagaruyuang Law Journal*, Vol. 9 No. 1, <https://jurnal.umsb.ac.id/index.php/pagaruyuang/article/view/6965>.
- 1945 Constitution of the Republic of Indonesia