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Testing the Limits of Good Faith: The Consistency of Business Judgment Rule Standards in Criminal Adjudication Compared to Article 97(5) of the Indonesian Company Law (A Study of Supreme Court Decisions No. 121K/Pid.Sus/2020 and No. 1401K/Pid.Sus/2014)

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Abstract: This research compares Supreme Court Decision No. 121 K/Pid.Sus/2020 and Decision No. 1401 K/Pid.Sus/2014 to examine whether Indonesian courts apply a consistent standard of good faith under Article 97(5) of Law No. 40 of 2007 when the Business Judgment Rule is raised as a defense in criminal cases involving state-owned enterprise directors. Using a normative legal research method, this research finds that the two panels applied fundamentally different approaches, with neither decision applying all four conditions of Article 97(5). This inconsistency reveals that the provision offers no reliable protection in practice due to the absence of a written and measurable standard of good faith. This research recommends a legislative amendment to Article 97(5) and a formal Supreme Court ruling to ensure consistent application.

Keyword: Business Judgment Rule, good faith, Article 97(5), BUMN directors, legal certainty

INTRODUCTION

Company law has always faced one basic problem. Companies need leaders who are willing to take risks, but those same leaders must also be held responsible when their choices cause harm. Every business choice involves some amount of risk, because no one can know the future for sure. A director who agrees to a large investment, or places company money with an outside manager, is making a decision based on the best information available at the time. If the law punished every choice that later turned out badly, no one would want to be a company director, and companies would stop taking the risks needed to grow.

This is the problem that led to the rise of the Business Judgment Rule (BJR). First developed in the United States, the BJR has since been adopted by many other legal systems, including civil law countries, as a shield that protects directors from liability for business decisions that later turn out badly (Ahwan & Ristansti, 2025; Bainbridge, 2003). Under this principle, courts will not punish a director for a business decision if the director acted in good faith, exercised reasonable care, had sufficient information before deciding, and had no personal interest in the outcome, even if the company ultimately loses money as a result (Arifin & Sodikin, 2025; DeMott, 1992). The logic behind this protection is straightforward: judges are not business experts, and a decision that looked reasonable at the time it was made can easily appear careless in hindsight once it has already failed.

Indonesia adopted this idea into its own company law through Law Number 40 of 2007 on Limited Liability Companies. Article 97 of this law sets out the duties of directors (Hafizh Akram & Primadani Fanaro, 2019). Article 97(2) says that every director must act in good faith and with full responsibility. Article 97(5) explains when a director cannot be held personally responsible for a company's loss: when the loss was not caused by the director's fault or carelessness, when the director acted in good faith and carefully for the benefit of the company, when the director had no personal interest in the decision, and when the director took steps to prevent or reduce the loss. On paper, this looks like Indonesia's own version of the Business Judgment Rule. But the law never explains what "good faith" actually means in practice. There is no test, no checklist, and no clear sign that tells a judge how to know whether a director truly acted in good faith or not (Faqih Zuhdi Rahman, 2026). A judge is simply expected to decide yes or no, without any guide on how to reach that decision.

This gap becomes very serious when a state-owned company (BUMN) director makes a business decision that causes a financial loss, and the case ends up in a criminal court instead of a civil one. Under Indonesia's anti-corruption law, Law Number 31 of 1999 as amended by Law Number 20 of 2001, a director's decision can be charged as corruption if it causes loss to state finances (Ahwan & Ristansti, 2025). Because BUMN money is often treated as part of state finances, a normal business decision can turn into a criminal case (Marune, 2021). Instead of asking whether the decision meets the conditions in Article 97(5), the court instead focuses on whether the act was unlawful and whether it caused state loss. The Business Judgment Rule, if it appears at all, only shows up as something the defense brings up, not as something the court is required to check first (Branson, 2002).

This problem is clearly seen in Supreme Court Decision Number 1401 K/Pid.Sus/2014, involving H. Ronny Wahyudi, the former President Director of PT Kereta Api (Persero). In 2008, he signed an agreement to place Rp100 billion of company funds with an investment manager, PT Optima Kharya Capital Management (PT OKCM). The investment manager later misused much of the money for its own benefit and could not return it, causing a loss of Rp100 billion. At the first trial, the director was found not guilty of the main corruption charge but was found guilty of a lesser charge, abuse of power, and was sentenced to two years in prison. On appeal, the sentence was raised to three years. At the Supreme Court (cassation) stage, the defense directly used the Business Judgment Rule as an argument, naming Articles 92 to 97 of the Company Law, and explained that the decision followed proper internal steps, was reviewed by the board, and involved choosing between several investment managers. This was, in other words, a normal business decision and not a criminal act.

This stands in contrast with Supreme Court Decision Number 121 K/Pid.Sus/2020, involving Karen Agustiawan, the former President Director of PT Pertamina (Persero). The case arose from her decision, made while she was serving as Acting Upstream Director and later as President Director of Pertamina between 2008 and 2014, to acquire a ten percent Participating Interest in the Basker Manta Gummy oil and gas block in Australia, known internally as Project Diamond, from ROC Oil Company Limited for USD 30 million. The acquisition process was troubled from the start. The due diligence conducted by external advisors was incomplete because ROC Ltd declined to provide essential financial data, including cash flow figures and accounting policies. The Sale and Purchase Agreement was signed on 27 May 2009 before full internal approvals were secured from the relevant legal division. By August 2010, ROC Ltd as operator had declared a Non Production Phase, concluding that the cost of replacing equipment exceeded projected revenue, and PT Pertamina Hulu Energi, as the subsidiary holding the participating interest, was obliged to continue paying cash calls until 2012 while receiving nothing in return. The total recorded loss amounted to approximately AUD 35.19 million.

At the first instance and on appeal, Karen Agustiawan was convicted under the subsidiair charge of Article 3 of the Anti-Corruption Law and sentenced to eight years in prison. Both courts treated the financial loss suffered by PT Pertamina Hulu Energi as a loss to state finances and found that her decision had gone beyond the limits of lawful authority. At the cassation stage, however, the Supreme Court panel reasoned differently. The panel acknowledged that the facts of the charge were proven but concluded that the act did not constitute a criminal offence. Its reasoning rested on three connected points. First, the loss suffered by PT Pertamina Hulu Energi, as a subsidiary of Pertamina rather than Pertamina itself, did not constitute a real loss to state finances under the Constitutional Court's Decision Number 01/PHPU-Pres/XVII/2019, which held that capital placed by a state-owned company into its subsidiary does not make the subsidiary a state-owned entity subject to state finance laws. Second, what was recorded as a loss was in substance an asset impairment, a fluctuating reduction in book value recognised under standard accounting principles, rather than an actual and definitive corporate loss. Third, and most directly relevant to this research, the panel found that what Karen Agustiawan and the Pertamina board had done was entirely aimed at expanding the company's oil and gas reserves, and that the steps taken did not go outside the boundaries of the Business Judgment Rule, as evidenced by the absence of fraud, conflict of interest, unlawful conduct, and intentional wrongdoing. On this basis, the Supreme Court granted her cassation, cancelled the lower court decisions, and ordered her release under an *ontslag van alle rechtsvervolging*, a discharge from all legal proceedings.

Placed side by side, these two cases share many structural similarities. Both involve directors of state-owned companies who made discretionary investment decisions that resulted in large financial losses. Both raised good faith arguments grounded in Article 97 of the Company Law. Both were prosecuted under the same anti-corruption statute. Yet the two cases ended in opposite results, and neither decision explains in precise terms what standard was applied to measure good faith. In the Ronny Wahyudi case, the Business Judgment Rule argument was acknowledged and then set aside without substantive engagement. In the Karen Agustiawan case, the same kind of argument appears to have shaped the entire outcome, with the Supreme Court explicitly invoking the Business Judgment Rule by name as part of its ratio decidendi. What the two decisions do not tell us, taken alone or together, is what standard was actually used to reach these different conclusions and whether that standard can be identified, reconstructed, or predicted.

This missing standard is the central problem this research sets out to examine. Article 97(5) of the Company Law lists four conditions that protect a director from personal liability, but it provides no measurable indicator of what good faith looks like in practice, no threshold of care that a director must meet, and no method by which a court is expected to assess whether those conditions are satisfied. Most existing research on the Business Judgment Rule in Indonesia treats the inconsistency visible in cases like these as a symptom of incomplete legal reception, a sign that the rule has not yet been fully absorbed into Indonesian legal culture. That framing, while not wrong, stops short of asking the more precise questions that the two decisions above actually raise. The first is whether the Supreme Court panels in Decision No. 1401 K/Pid.Sus/2014 and Decision No. 121 K/Pid.Sus/2020 applied any discernible standard of good faith under Article 97(5) when evaluating the Business Judgment Rule as a defense, and what accounts for the stark difference in how each panel reasoned on that question. The second is what the absence of a written and measurable standard of good faith in Article 97(5) means for the legal certainty of BUMN directors whose business decisions are subjected to criminal adjudication under the Anti-Corruption Law. By conducting a close comparative analysis of the legal reasoning in both decisions, this research aims to answer these two questions and to determine whether Indonesian courts have already developed an implicit standard for measuring good faith, whether that standard is applied consistently, and what reforms the current state of the law demands. In doing so, this research proposes that any judicially workable good faith test under Article 97(5) should consist of objective and verifiable indicators that courts can apply consistently regardless of the outcome of the decision being examined. These indicators include whether the director conducted or commissioned adequate procedural due diligence before the decision was made, whether the decision was subject to genuine board deliberation rather than unilateral action, whether independent expert consultation was sought where the complexity of the decision required it, whether a conflict-of-interest assessment was carried out and documented, whether the quality of the documentation surrounding the decision reflects a process that was taken seriously at the time, and whether the director took identifiable post-decision steps to monitor and mitigate risk once the decision had been implemented. These elements need not all be satisfied in equal measure in every case, but their presence or absence should form the structured analytical framework through which courts assess the good faith question under Article 97(5), rather than leaving that assessment to the unguided discretion of each adjudicating panel.

METHOD

This research employs normative juridical research, using a statute approach, case approach, and comparative approach. Because this is doctrinal rather than empirical research, the research subjects are not a human population or sample but legal materials and judicial decisions, selected through purposive sampling. Two decisions form the core sample, Supreme Court Decision Number 1401K/Pid.Sus/2014 concerning the management of a discretionary retirement fund at PT Kereta Api Indonesia (Persero), and Supreme Court Decision Number 121K/Pid.Sus/2020 concerning an investment decision by the President Director of PT Pertamina (Persero), chosen because both involve a BUMN director invoking the Business Judgment Rule under Article 97(5) of the Company Law yet produced opposite outcomes on the question of good faith. As library based research, no fixed research location is required; materials were obtained primarily from the official Direktori Putusan Mahkamah Agung, university library collections, and academic journal repositories.

Data was collected through library research, drawing on primary legal materials (Law Number 40 of 2007 on Limited Liability Companies, Law Number 31 of 1999 as amended by Law Number 20 of 2001 on the Eradication of Corruption Crimes, and the verbatim text of both decisions), secondary legal materials (textbooks, journal articles, and prior theses on the Business Judgment Rule), and tertiary materials such as legal dictionaries. The primary instrument used was document study, specifically a structured reading guide for isolating the Menimbang sections of each decision addressing good faith, paired with a comparative matrix to organize the factors each panel treated as relevant. The collected materials were analyzed using qualitative descriptive analysis combined with deductive legal reasoning, proceeding from a description of the statutory requirements of Article 97(5), to a categorization of each decision's reasoning on good faith, to a comparative analysis identifying convergence and divergence between the two, in order to determine whether a consistent measure for good faith can be reconstructed from existing jurisprudence or whether the divergence reflects a doctrinal gap warranting a normative recommendation.

RESULTS AND DISCUSSION

Whether the Two Panels Applied Any Discernible Standard of Good Faith Under Article 97(5), and What Accounts for the Difference in Their Reasoning

Decision No. 121 K/Pid.Sus/2020 arose from Karen Agustiawan's decision as President Director of PT Pertamina (Persero) to acquire a ten percent Participating Interest in the Basker Manta Gummy oil and gas field in Australia, known internally as Project Diamond, from ROC Oil Company Limited for USD 30 million. The acquisition process was troubled from the start. The external due diligence team engaged by Pertamina could not complete its work because ROC Ltd withheld essential financial data. Despite this, the board approved the acquisition in April 2009 following a presentation to Pertamina's internal portfolio committee, and the Sale and Purchase Agreement was signed in Sydney on 27 May 2009 after the Board of Commissioners issued formal approval. By August 2010, ROC Ltd had declared a Non Production Phase, finding that replacement costs exceeded projected revenue. PT Pertamina Hulu Energi, holding only ten percent of the block, had no power to override this decision and was forced to continue paying cash call obligations through 2012 while receiving nothing from the field, resulting in a recorded loss of AUD 35,189,996. Karen Agustiawan was convicted on the backup corruption charge and sentenced to eight years in prison at both the first instance and appellate levels, with both courts treating the loss as state financial loss.

At the cassation stage, the Supreme Court panel cancelled both lower court decisions and issued an *ontslag van alle rechtsvervolging* on the ground that the proven acts did not constitute a criminal offence. The panel's reasoning rested on three findings. First, the recorded loss was an asset impairment, a fluctuating reduction in book value under standard accounting principles, rather than a real and definitive financial loss qualifying as kerugian keuangan negara (Undang-Undang Nomor 31 Tahun 1999 jo. Undang-Undang Nomor 20 Tahun 2001). Second, PT Pertamina Hulu Energi, as a subsidiary rather than a state-owned company in its own right, was not subject to the state finance laws under the Constitutional Court's Decision No. 01/PHPU-Pres/XVII/2019, meaning its loss fell outside the scope of the Anti-Corruption Law. Third, and most relevant to the first research question, the panel stated explicitly that the steps taken by Karen Agustiawan did not go outside the boundaries of the Business Judgment Rule, supported by the finding that no fraud, conflict of interest, unlawful conduct, or deliberate wrongdoing was present. The panel also treated it as a matter of common knowledge requiring no proof that oil companies are inherently full of risk and that what happened at Blok BMG was a normal commercial outcome for the industry.

The first research question asks whether any discernible standard of good faith was applied. In Decision No. 121 K/Pid.Sus/2020, the answer is yes, though the standard is implicit rather than formally derived from Article 97(5). The panel never referenced Article 97(5) by name (Undang-Undang Nomor 40 Tahun 2007, Pasal 97 ayat (5)). It constructed its own BJR analysis built entirely around the absence of corrupt markers rather than positive evidence of good faith, which is consistent with how the Business Judgment Rule operates in comparative scholarship as an abstention doctrine rather than a positive duty (Bainbridge, 2003). It treated industry risk as a contextual shield against inferring bad faith from a bad outcome. And it implicitly drew on the procedural regularity of the decision-making process as evidence that the decision was a normal business judgment. The standard this produces can be described as follows: a BUMN director's decision falls within the Business Judgment Rule when it was made for a legitimate company purpose, when no corrupt markers are identifiable, when the adverse outcome is explicable by normal industry risk, and when the decision-making process followed recognisable corporate governance steps (Firmansyah et al., 2024). This standard is workable but unwritten, and the panel did not explain what weight to assign to each element or how to handle conflicts between them.

When this implicit standard is measured against the four conditions of Article 97(5), the gaps become visible. The first condition, that the loss was not caused by the director's fault or negligence, was addressed only partially. The panel treated the impairment character of the loss and the inherent industry risk as sufficient to negate fault, but it never evaluated whether the incomplete due diligence itself constituted negligence. The second condition, that the director acted in good faith in the genuine interest of the company, was the most directly addressed through the negative markers analysis, though approached from the negative side rather than through positive verification. The third condition, that the director had no personal interest in the decision, was never examined as a standalone requirement. The panel found no conflict of interest, which is only one form of personal interest, and said nothing further about the broader concept. The fourth condition, that the director took active steps to prevent or reduce the loss, was entirely unaddressed. The panel did not examine what Karen Agustiawan did after the Non Production Phase was declared, and it did not treat the eventual divestment from Blok BMG as evidence relevant to this condition. The panel in Decision No. 121 K/Pid.Sus/2020 therefore engaged with the first and second conditions in substance, though imprecisely, while leaving the third and fourth conditions untouched. The decision captures the spirit of Article 97(5) without applying its full requirements.

Decision No. 1401 K/Pid.Sus/2014 arose from Ronny Wahyudi's decision as President Director of PT Kereta Api (Persero) to place Rp100 billion of company funds with PT Optima Kharya Capital Management. PT OKCM subsequently misused those funds and was unable to return them, causing PT Kereta Api a loss of Rp100 billion. Ronny Wahyudi was convicted of a lesser abuse of power charge and sentenced to two years at first instance, a sentence the appellate court raised to three years. At the cassation stage, the defense raised a direct and explicit Business Judgment Rule argument, citing Articles 92 to 97 of the Company Law and arguing that the fund placement had followed proper internal procedures, had been reviewed by the relevant board organs, and had involved a selection process among competing investment managers. The defense framed this as a normal business decision that fell within the protection that the Company Law provides to directors acting in good faith, and argued that it could not and should not be treated as a criminal act.

The Supreme Court panel did not engage with this argument. Instead, it classified the question of whether Ronny Wahyudi had acted in good faith as a question of fact already determined by the lower courts, and on that basis held that it lacked the authority to revisit it under Article 253(1) of the Criminal Procedure Code (Undang-Undang Nomor 8 Tahun 1981, Pasal 253 ayat (1)). The Business Judgment Rule argument was set aside without any assessment of its merits. The panel then accepted the prosecutor's cassation petition, reinstated the primary corruption charge that both lower courts had dismissed, and raised Ronny Wahyudi's sentence to seven years in prison.

The first research question asks whether any discernible standard of good faith was applied. In Decision No. 1401 K/Pid.Sus/2014, the answer is no. The classification of good faith as purely factual is analytically problematic because the conditions in Article 97(5) are not questions about the director's subjective mental state alone (Undang-Undang Nomor 40 Tahun 2007, Pasal 97 ayat (5)). Whether a director acted in good faith with full responsibility for the company's benefit, had no personal interest in the decision, and took active steps to prevent loss are normative assessments that require measuring conduct against a legal standard. They are mixed questions of law and fact, and the cassation court is competent to review whether the lower courts applied the correct standard to their factual findings. By treating the entire question as factual, the panel avoided specifying any standard and avoided checking whether the lower courts had applied one. None of the four conditions of Article 97(5) were examined at any level once the cassation panel declined to engage with them. The protection that Article 97(5) is supposed to provide was not found to be inapplicable.

The two cases are structurally very similar. Both involve the top executive of a state-owned company making a discretionary financial decision that caused a large loss. Both defenses were grounded explicitly in the Business Judgment Rule and Article 97(5) of the Company Law. Both reached the Supreme Court at cassation stage with the good faith question directly before the panel. The difference in outcomes cannot be explained by differences in facts or in the strength of the defense argument. It can only be explained by how each panel understood the nature of the good faith question.

In Decision No. 121 K/Pid.Sus/2020, the panel treated the Business Judgment Rule as one of three grounds for its decision, but the only one it shared with Decision No. 1401 K/Pid.Sus/2014's defense argument, capable on its own of determining whether the proven acts were criminal. In Decision No. 1401 K/Pid.Sus/2014, the panel treated good faith as a factual matter already settled, removing the Business Judgment Rule from the analysis entirely. This reflects a fundamental disagreement about whether Article 97(5) of the Company Law can operate as a legal shield in a criminal corruption case. The panel in the 121K case answered yes. The panel in the 1401K case, by refusing to engage, produced an outcome consistent with no without ever stating that position. Until a binding legal authority resolves this foundational question, the outcome of any Business Judgment Rule defense will depend more on which panel hears the case than on what the law says.

Even where a discernible standard was applied, as in Decision No. 121 K/Pid.Sus/2020, the standard has three practical weaknesses that limit its value as precedent. It cannot be consulted in advance because it only becomes visible after adjudication. It is not binding on future panels because it is not formally stated as a legal principle, as the 1401K decision proves. And it is internally incomplete because it does not address all four conditions of Article 97(5) and does not explain how to weigh its elements against each other. These weaknesses bring the second research question directly into focus.

What the Absence of a Written and Measurable Standard of Good Faith in Article 97(5) Means for the Legal Certainty of BUMN Directors

The findings produced in answering the first research question have direct implications for the second. If the two panels had applied the same standard and produced consistent results, the second question would still matter, but it would be less urgent. The inconsistency that the first research question revealed makes the second question pressing. The absence of a written and measurable standard of good faith in Article 97(5), combined with the inconsistency the two decisions demonstrate, creates a kind of vulnerability for BUMN directors that is different from ordinary business risk (Undang-Undang Nomor 40 Tahun 2007, Pasal 97 ayat (5); Latumeten, 2023). A normal business risk is something a director can see, assess, and plan around before making a decision. The risk of being prosecuted for corruption is also, in principle, something that can be assessed if the legal standard is clear. What cannot be assessed in advance is a standard that may or may not be applied depending on which panel hears the case, and that when it is applied takes a form that only becomes clear after the fact (Farhan et al., 2025).

This vulnerability is more serious for BUMN directors than it is for directors of purely private companies, for reasons that go beyond the text of the Company Law. BUMN directors are appointed by the Minister of State-Owned Enterprises acting as the general meeting of shareholders, which means they operate under a layer of political and administrative oversight that does not apply to private company directors (Alfadani & Bayuaji, 2025). The finances of state-owned companies are treated as closely connected to state finances for the purposes of the Anti-Corruption Law, as governed by Law No. 17 of 2003 and Law No. 19 of 2003 (Undang-Undang Nomor 17 Tahun 2003; Undang-Undang Nomor 19 Tahun 2003). The Anti-Corruption Law itself does not require proof of criminal intent in the same direct way that the general criminal law does (Undang-Undang Nomor 31 Tahun 1999 jo. Undang-Undang Nomor 20 Tahun 2001). It treats the causing of state financial loss as itself a central element of the offence, which means that a business decision that goes wrong and causes a loss can become the basis for a criminal charge almost automatically, without the prosecutor needing to show that the director intended to cause harm (Addinda et al., 2025). The only thing standing between a BUMN director and criminal liability in this situation is Article 97(5) of the Company Law (Mahyani, 2019). And as the findings from the first research question show, the protection that Article 97(5) actually provides depends almost entirely on how the panel handling the case decides to treat the question of good faith. That is not a stable foundation for legal certainty (Farhan et al., 2025)

One of the clearest patterns that emerges from the answers to the first research question, and one that has direct implications for legal certainty, is a tendency, more visible in Decision No. 1401 K/Pid.Sus/2014 than in Decision No. 121 K/Pid.Sus/2020, to judge the quality of a business decision by what it produced rather than by how it was made. In Decision No. 1401 K/Pid.Sus/2014, the fact that PT OKCM misused the company's funds and could not return them appears to have been treated as evidence that the decision to place those funds with PT OKCM was itself a bad decision in a legal sense. The reasoning that led from the bad outcome to the finding of criminal guilt was never laid out in full, because the panel declined to engage with the good faith argument and simply deferred to the lower courts' factual findings. But the structure of the result, a conviction upheld and then made significantly heavier, reflects an approach that works backward from the loss to the decision, treating the fact that the loss happened as confirmation that the decision was improper. This way of judging business decisions gets the logic of the Business Judgment Rule exactly backwards, and its implications for legal certainty are severe (Setiawati & Gisa Vitrana, 2025). The Business Judgment Rule exists precisely because the connection between a bad outcome and a bad decision is not straightforward. Every business decision is made without knowing what the future will bring. A decision that looks careless in hindsight may have been entirely reasonable at the time it was made, given the information available then. A decision that follows every proper procedure and reflects genuine care and good judgment can still produce a terrible outcome because of factors that no one could have foreseen or controlled. The Business Judgment Rule responds to this reality by saying that courts should judge the quality of a business decision by looking at the process through which it was made, not by looking at the outcome it produced (Bainbridge, 2003). When a court does the opposite, it is effectively punishing directors for the fact that the future is uncertain, which is not something any legal system should be doing (Silitonga et al., 2022). For legal certainty, this means that a BUMN director who follows every proper procedure cannot rely on those procedures as a guarantee of protection, because a court may still convict by reasoning backward from the loss. Decision No. 121 K/Pid.Sus/2020 resists this approach more clearly, particularly in its treatment of the oil industry's inherent risk as a normal part of commercial life. But the resistance in that case was supported by two other legal conclusions, about the nature of the loss and the status of the subsidiary, which took some of the weight off the Business Judgment Rule finding. It remains unclear whether the Business Judgment Rule reasoning alone would have been enough if those other two grounds had not been available (Zulfikar & Muryanto, 2025). This raises a necessary question of research design: if the outcome in Decision No. 121 K/Pid.Sus/2020 rests on three independent grounds rather than on the Business Judgment Rule alone, can the divergence between the two decisions still be attributed primarily to differing treatments of good faith, rather than to differences in the underlying legal context of each case? The answer depends on whether Decision No. 1401 K/Pid.Sus/2014 presented comparable grounds for the other two findings and simply reached different conclusions on them, or whether those grounds were never in play at all. The record supports the latter. The loss in the 1401K case arose from funds directly held and placed by PT

Kereta Api (Persero) itself, with no intermediate subsidiary structure comparable to PT Pertamina Hulu Energi; the question of whether a subsidiary's loss constitutes state financial loss under the Constitutional Court's Decision No. 01/PHPU-Pres/XVII/2019 therefore never arose, because there was no subsidiary in the transaction. Likewise, the loss suffered by PT Kereta Api was not a fluctuating book impairment but funds actually misappropriated and never returned by PT OKCM, so no asset-impairment characterization was available for the defense to raise. Neither of these two grounds, in other words, was a live issue in the 1401K case that the panel could have accepted or rejected; they were simply absent from its factual matrix. What remained available to the defense in the 1401K case, and what the defense in fact raised at cassation, was the Business Judgment Rule argument alone, framed through Article 97 of the Company Law. The panel's refusal to engage with that argument on its merits is therefore not confounded by differences in loss characterization or subsidiary status, because those variables were never before it. This isolates the comparison to the one variable both cases share: how each panel treated a Business Judgment Rule argument raised by the defense. On that narrower and more defensible comparison, the divergence between the two decisions is attributable to differing treatments of good faith, while the additional grounds available in the 121K case explain why that decision's ultimate outcome was more strongly supported, not why the two panels reasoned differently about good faith itself.

The second research question asks specifically what the absence of a written and measurable standard means for legal certainty. Based on the findings from the first research question and the analysis in this section, the answer has three parts. The first part is that legal certainty for BUMN directors in the context of criminal adjudication is currently dependent on judicial discretion rather than on the written law. Article 97(5) of the Company Law in its current form is not able to give BUMN directors reliable protection from criminal prosecution when their business decisions cause financial losses (Undang-Undang Nomor 40 Tahun 2007, Pasal 97 ayat (5)). The provision states four conditions but gives no guidance on how to apply them. It tells directors what they need to show but gives courts no method for deciding whether what has been shown is enough. The result is that the strength of the protection depends entirely on the approach taken by the individual panel hearing the case. A panel that treats good faith as a legal question and engages with it seriously, as the panel in Decision No. 121 K/Pid.Sus/2020 did, may find that the Business Judgment Rule applies and that no crime was committed. A panel that treats good faith as a factual matter already settled by the lower courts, as the panel in Decision No. 1401 K/Pid.Sus/2014 did, may never engage with the question at all and may reach a very different result without that difference being visible as a legal error. The second part is that the consequences of this uncertainty fall most heavily on the directors themselves and on the companies they lead. A BUMN director who cannot know in advance whether good faith will be treated as a legal question or a factual one, and who cannot predict which panel will hear their case if things go wrong, is a director who cannot make fully informed decisions about risk. The practical consequence of this is not just individual unfairness to directors who are prosecuted. It is a systemic disincentive to the kind of bold and commercially minded decision-making that BUMN directors are supposed to be encouraging. A director who knows that a bad outcome may lead to criminal prosecution, regardless of how carefully the decision was made, has every reason to avoid difficult decisions, to seek approval for everything, and to prioritise caution over the company's long-term commercial interests (Setiawati & Gisa Vitrana, 2025). That outcome is bad for the companies, bad for state finances, and bad for the purpose that BUMN law is supposed to serve. The third part is what the current state of the law demands in response. What is needed is either an amendment to Article 97(5) that sets out a clear and measurable standard for good faith, one that specifies the procedural steps whose completion is sufficient to invoke the protection and the substantive conditions whose presence removes it, or a formal Supreme Court ruling that establishes a consistent framework for applying the good faith standard whenever a BUMN director's business decision is being examined in a criminal case (Alfiansyah et al., 2025). Without one or the other, the Business Judgment Rule in Indonesia will continue to work as a general idea rather than a workable legal protection. Directors will know in broad terms that good faith is supposed to protect them, but they will not know what they need to do to make sure that protection actually applies (Nurhayati, 2026). And when a case goes wrong and ends up in court, the outcome will depend less on what the law says and more on how the panel hearing the case happens to think about a question that the law has never properly answered (Art & Lie, 2025).

CONCLUSION

This research set out to answer two questions about the Business Judgment Rule and good faith under Article 97(5) of Law No. 40 of 2007 on Limited Liability Companies in the context of criminal adjudication of BUMN directors. On the first question, the comparison between Decision No. 1401 K/Pid.Sus/2014 and Decision No. 121 K/Pid.Sus/2020 shows that the two panels applied fundamentally different approaches to the same legal question. In Decision No. 121 K/Pid.Sus/2020, a discernible standard was applied. The panel treated the Business Judgment Rule as a substantive legal framework, assessed the decision against an implicit standard built around the absence of corrupt markers, the legitimacy of the corporate purpose, normal industry risk, and procedural regularity, and concluded that the proven acts were not criminal. However, when this implicit standard is measured against the four conditions of Article 97(5), only the first and second conditions were addressed in any meaningful way, while the third and fourth conditions, concerning personal interest and active steps to reduce loss, went entirely unexamined. In Decision No. 1401 K/Pid.Sus/2014, no standard was applied at all. The panel classified good faith as a purely factual question already resolved by the lower courts and declined to engage with the Business Judgment Rule argument on its merits, allowing the conviction to stand and the sentence to be significantly increased without any of the four conditions of Article 97(5) ever being examined. What accounts for this difference is not a difference in facts or in the quality of the arguments presented. It is a difference in how each panel understood the nature of the good faith question itself, specifically whether it is a legal question that a cassation court must address or a factual question already settled below. That foundational disagreement remains unresolved in Indonesian law.

On the second question, the absence of a written and measurable standard of good faith in Article 97(5) means that the legal certainty of BUMN directors in criminal adjudication currently depends on judicial discretion rather than on the written law. Article 97(5) lists four conditions but provides no method for applying them, no threshold of care that can be consulted in advance, and no binding guidance on how courts are expected to assess them. The result is that the protection Article 97(5) offers is real in principle but unreliable in practice. A director who follows every proper procedure cannot be certain that protection will apply, because a future panel may simply treat good faith as factual and bypass the protection entirely. Beyond individual unfairness, this creates a systemic disincentive to bold decision-making in state-owned companies, because directors who face unpredictable criminal exposure will rationally prefer inaction and excessive caution over commercially necessary risk-taking (Sesara, 2020).

This research therefore concludes that two responses are needed. The legislature should amend Article 97(5) to include a clear and measurable standard of good faith that specifies the procedural and substantive criteria whose satisfaction is sufficient to invoke the protection. The legislature should amend Article 97(5) to include a clear and measurable standard of good faith that specifies the procedural and substantive criteria whose satisfaction is sufficient to invoke the protection. The Supreme Court should, at minimum, issue a Peraturan Mahkamah Agung, or a Surat Edaran Mahkamah Agung formalizing a Rumusan Pleno Kamar Pidana, establishing a uniform interpretive framework for applying the good faith standard in criminal cases involving BUMN directors, one that treats good faith as a legal question rather than a factual one and that requires all four conditions of Article 97(5) to be assessed explicitly. Such an instrument would not bind future panels with the force of statute, but it would supply the standardized reference point for cassation review that Article 97(5) currently lacks. Until either response is provided, the Business Judgment Rule in Indonesia will remain a possibility rather than a protection, and its application will continue to depend more on which panel hears the case than on what the law says. The second response, a Supreme Court instrument establishing a uniform framework for the good faith standard, requires clarification of its legal status before its practical value can be assessed. Indonesian law recognizes several instruments the Supreme Court may issue for this purpose, principally a Surat Edaran Mahkamah Agung (SEMA) and a Peraturan Mahkamah Agung (PERMA), and in practice these are often preceded by a Rumusan Hasil Rapat Pleno Kamar Pidana, an internal chamber agreement subsequently disseminated through a SEMA rather than a separate instrument in its own right. None of these carries the force of a statute. Law No. 12 of 2011 on the Formation of Legislation does not list SEMA among the recognized types of peraturan perundang-undangan, and Indonesian legal scholarship classifies it as a policy rule (*beleidsregel*): an internal administrative instrument addressed to judges and court officials rather than a generally binding rule of law. A SEMA cannot be challenged through judicial review, and a judge who departs from it does not, for that reason alone, commit a legal error correctable at cassation, because Article 3 of Law No. 48 of 2009 on Judicial Power preserves judicial independence in deciding individual cases. A PERMA stands on firmer footing: it is more readily recognized within the hierarchy contemplated by Article 8 of Law No. 12 of 2011 as an instrument issued under attributed authority, and, unlike a SEMA, it may itself be tested through the Supreme Court's power of judicial review over regulations below statute. Given this distinction, a PERMA, or at minimum a SEMA formalizing a Rumusan Pleno Kamar Pidana specifically addressed to the treatment of good faith under Article 97(5) in criminal proceedings, offers a more institutionally secure route to consistency than an ordinary circular, though neither is a substitute for legislative amendment. What such an instrument can realistically achieve is not binding compulsion in the way a statute binds, but a standardized interpretive reference that cassation panels are institutionally and professionally expected to follow, reinforced by the Supreme Court's own supervisory function over decisions that depart from it without justification. This is the sense in which the recommendation below should be understood. Until either response is provided, the Business Judgment Rule in Indonesia will remain a possibility rather than a protection, and its application will continue to depend more on which panel hears the case than on what the law says.

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