



Do directors need better statutory protection when acting on the advice of others?

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There is a practical need for company directors to rely on advice and information supplied by others. Theory suggests this is also a most efficient practice that should be encouraged and supported. Failure to do so arguably raises the cost of corporate governance and affects directors' actions because of the risk of personal liability. When the common law caused the process of delegation and reliance to become problematic, amendments were introduced to the Corporations Act to better protect the practice. This article suggests however that these provisions now actually make the directors' position more difficult. Ironically they impose more stringent requirements than would have ever been intended. There are currently proposals to review these provisions and others to provide better protection for directors. It is argued however that those proposals would not adequately address the matters raised in the most recent authorities. There is a need for better clarity of principle and process on this issue. This article suggests a way forward that should be designed around more practical considerations and efficiencies.

1 Introduction

It is a reality that company officers need to rely on the advice and information provided by others within and outside their company.¹ If their actions, based upon that information or advice are inappropriate, they may be in breach of one or more of their duties to the company. Commonly, it may be a breach of their duty to act with care and diligence and any defence based around that officer's reliance on others has always been considered in the context of the relevant duty itself.² It was not until 1999 that ss 189 and 190 of the Corporations Act 2001 (Cth) were introduced to assist officers. Section 190 attempts to relieve officers from responsibility for the acts of delegates in certain circumstances and s 189 aids the determination of when reliance on others may be seen as being reasonable. It should be noted that s 189 operates as a presumption,³ so ultimately it is still a question of whether the actions of the officer, including the reliance, met the appropriate standard of their duty in the circumstances. As will be demonstrated, neither the introduction of these

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1 This has been recognised in Australian case law since *AWA Ltd v Daniels* (1992) 7 ACSR 759. Arguably it is a necessary part of corporate life given that the board simply cannot manage day-to-day operations: The HIH Royal Commission, *The Failure of HIH Insurance*, April 2003, at <<http://www.hihroyalcom.gov.au/>>, Vol 1, Pt III, para 6.2.4.

2 The question of reliance upon others as a defence has been a part of the law relating to insolvent trading since 1993 however the focus in recent years has been more generally on the question of an officer's duty of care and diligence.

3 In the absence of contrary evidence the delegation and reliance will be considered 'reasonable' if certain conditions are met: Corporations Act s 189.

provisions nor the developing judicial opinion has provided the sort of clarity in the law that could be appreciated and relied upon by our company officers.

A number of recent developments have occurred which have the potential to impact significantly on this area of corporate governance. While there is currently a push to provide better protection to officers who necessarily rely on the advice of others, recent decisions highlight the complexity of the problem and the need for a better resolution to this issue. The following three matters in particular, deserve close attention:

1. The Treasury has recently released a discussion paper intended to form the basis of a review of civil and criminal sanctions in the Corporations Act; *Review of Sanctions in Corporate Law*.⁴ As part of this discussion, the article questions whether the current s 189 of the Corporations Act places too high a burden on directors who do rely upon the information or advice of others. It proposes that the terms of s 189 should be relaxed to make it easier for directors to avail themselves of the presumption of 'reasonable' reliance.⁵ It is worth noting however that this is only part of a broader agenda to better protect directors through a more general business judgment defence applicable to all 'core' duties.⁶

2. The case law on this issue has generally involved non-executive directors seeking to defend actions for breach of duty based upon their 'reasonable reliance' on the advice or information supplied from executives, managers or others within the company. The most recent case to deal with this issue however, *Vines v ASIC*,⁷ highlights that other officers, including those who are not even directors, have a potential liability for acts done in reliance on the advice and information of others. Interestingly in this case, the liability of the non-director officer arose because of reliance on an executive director. Among other issues this case shows that there may be a number of complex relationships between corporate managers, whether they are on the board or not, and the reliance upon others will occur up and down the chain. This complexity and the interpretation and application of the law in this decision highlight the need for revision.

3. Developments in this area of the law become all the more significant considering the effect of legislative changes proposed last year by the Corporations and Markets Advisory Committee. As a result of their report, *Corporate Duties Below Board Level*,⁸ duties and liabilities under the Corporations Act will be extended to include a wider class of persons who operate below board level. This then begs the question as to how the liability of these people may affect the question of delegation to them. If they would be liable personally for the advice or information provided, does this strengthen the position of board members who would seek to rely upon them?

These matters have arisen independently, yet when considered together it is obvious that the whole question of how the law treats this aspect of corporate

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

5 Ibid, p 33.

6 Ibid, p 29.

7 (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341.

8 Corporations and Markets Advisory Committee, *Corporate Duties Below Board Level: Report*, April 2006, at <<http://www.camac.gov.au>>.

governance needs to be clarified. The purpose of this article is to bring these developments into perspective against the current law on this question. It will seek to provide a framework against which we can test the new proposals and look for the sort of certainty of principle that corporate officers must crave.

2 The common law position prior to legislative amendments in 1999

Statutory recognition of the directors' need to delegate and rely on the information and advice of others occurred first in 1993 with the introduction of the modern version of the insolvent trading provisions. A specific defence was introduced to allow directors to avoid liability where a competent and reliable person had been delegated the responsibility of monitoring the solvency of the company and it was reasonable to believe that the person was fulfilling that responsibility.⁹ Apart from this specific case of financial monitoring the legislation did not deal with the directors' ability generally to delegate and rely on others in the performance of their duties to the company until 1999. It was then that the Corporate Law Economic Reform Program Bill introduced ss 189 and 190. It was apparent in the Explanatory Memorandum to that bill that there were concerns over the direction the common law was taking on this issue:

Doubts have been expressed about the extent to which it is permissible for directors, non-executive directors in particular, to delegate functions to, and rely on, advice and information provided by others. Uncertainty about the circumstances in which it is appropriate for a director to delegate to, or place reliance on the advice of others could lead to an overly conservative approach to management and could impede the decision-making processes within a company. This is a less than optimal outcome and is not conducive to the development of sound corporate governance practices such as putting in place appropriate board committee systems. To remedy this, it is proposed to provide specific legislative authority for delegation and reliance by directors.¹⁰

To understand the reason for these doubts, it is necessary to review the case law just prior to the legislative intervention. *AWA Ltd v Daniels*¹¹ was the landmark decision that laid the foundation to the development of modern principles surrounding the question of when it is reasonable for directors to rely on others. As with other decisions prior to 1999 the issue of reliance was simply part of the overall question as to whether the directors satisfied their duties to the company.¹² In this instance reliance was being placed upon a particular person to engage in foreign exchange transactions and management was being relied upon to supervise and control such activity. Distinctions were drawn, in line with the development of the duties of care and skill at that time, between the standards of care owed by executive and non-executive officers.

⁹ Corporations Act s 588H(3).

¹⁰ Explanatory Memorandum to Corporate Law Economic Reform Program Bill 1998, para 6.8.

¹¹ (1992) 7 ACSR 759.

¹² For an analysis of the implications of the decisions during this time refer to A Comerford and L Law, 'Directors' Duty of Care and the Extent of "Reasonable" Reliance and Delegation' (1998) 16 *C&SLJ* 103.

It was held that the latter were entitled to trust management and the auditors in this instance, to identify the inappropriate conduct, and reliance on them, in the absence of information of concern, was appropriate in the circumstances. The chief executive officer however was held to have received sufficient information to have been put on enquiry about the relevant rogue activities. In a judgment representing the high water mark for directors in their need to rely on company management, Rogers CJ included the following key statements within his famous description of the relevant principles:

- A director is justified in trusting officers of the corporation to perform all duties that, having regard to the exigencies of business, the intelligent devolution of labour and the articles of association, may properly be left to such officers . . . A director is entitled to rely without verification on the judgment, information and advice of the officers so entrusted.
- A director is also entitled to rely on management to go carefully through relevant financial and other information of the corporation and draw to the board's attention any matter requiring the board's consideration.
- Reliance would only be unreasonable where the director was aware of circumstances of such a character, so plain, so manifest and so simple of appreciation that no person, with any degree of prudence, acting on his behalf, would have relied on the particular judgment information and advice of the officers.¹³

There were a number of decisions that followed *AWA Ltd v Daniels*¹⁴ where reliance by directors was a critical factor in considering whether they had satisfied the standard of the relevant duties. In the first of these, *Australian Securities Commission v Gallagher*¹⁵ there was reliance by a non-executive director on the executive of the company, Rothwells Ltd,¹⁶ for the supply of relevant financial and other information. The question was whether someone in the position of the director should have made independent inquiry rather than simply rely on the information that was fed to him from the executive. Again in this instance the director was not found to be in breach. Some key information had been withheld from him and as he had made no independent inquiry as to the state of the company assets he was unaware of the true financial position of the company. Nevertheless the appeal court upheld the finding that he had acted reasonably in the circumstances because he did take steps to call a directors' meeting to seek clarification and would not otherwise have been put on notice as to the extent of the problem.

*Vrisakis v Australian Securities Commission*¹⁷ also arose from the failure of Rothwells Ltd. In this instance the action was against a non-executive director, Vrisakis, who had been appointed to the position as part of a business plan to turn around the welfare of the company. It was then under investigation by the National Companies and Securities Commission and the commission was contemplating the withdrawal of the company's security dealer's licence. The plan was not complied with and the company's financial position worsened to

13 *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 868.

14 (1992) 7 ACSR 759.

15 (1993) 11 WAR 105; 10 ACSR 43.

16 This was after the reconstitution of its board following investigations by the then National Companies and Securities Commission.

17 (1993) 9 WAR 395; 11 ACSR 162.

the point of liquidation. Essentially it was claimed the director was liable for his failure to take reasonable steps to ensure the terms of the plan were carried out. Although at first instance he was found liable as a result of inaction on some particulars contained in the business plan, the Supreme Court of Western Australia upheld an appeal on these matters. The comments by Rogers CJ in *AWA Ltd v Daniels* were supported¹⁸ particularly on the issue of when a director may be justified in trusting officers of the corporation.¹⁹ It was also relevant in this instance to consider the reliance the director placed upon the auditors to review the company's loan portfolio. The court could not see how this reliance could have been questioned in the absence of anything to suggest there would not be a thorough and proper analysis.

*Australian Securities Commission v Gallagher*²⁰ and *Vrisakis v Australian Securities Commission*²¹ and their support of the principles from *AWA Ltd v Daniels*²² were again endorsed by the Supreme Court of Western Australia in *Permanent Building Society v Wheeler*.²³ A short time later, *AWA Ltd v Daniels*²⁴ was also applied by Ipp J in *Biala Pty Ltd v Mallina Holdings Ltd*.²⁵ In this case non-executive directors were again held not to be negligent in relying upon the judgment of executive officers and that they would report accurately to them. They were able to trust the executive of a joint venturer without making independent enquiries themselves.

Eventually however the NSW Court of Appeal definitively took steps to retreat from *AWA Ltd v Daniels*²⁶ in the decision of *Daniels v Anderson*²⁷ when the matter went on appeal. This became a turning point in the development of legal principle. Although the court did not change the ultimate findings of liability for the relevant directors, they rejected the fundamental statements of principle enunciated by Rogers CJ. In the opinion of Clarke and Sheller JJA, that description of the law did 'not accurately state the extent of the duty of directors, whether non-executive or not, in modern company law'.²⁸ They went on to endorse US authorities as representative of how the law should be described in Australia. Unfortunately, from the perspective of certainty and guidance, those authorities ranged in view from the position that directors could not rely on the judgment of others to general statements about the need for minimum levels of skill and a proactive approach to the monitoring of management.

At the heart of the criticism by the Court of Appeal was clearly the view that Rogers CJ's description of principle could still be interpreted as supporting a subjective test regarding the duties of directors. Clarke and Sheller JJA were at pains to point out that the legislation and modern case law had imposed

18 Ibid, at WAR 406 per Malcolm CJ.

19 Ibid, at WAR 452 per Ipp J.

20 (1993) 11 WAR 105; 10 ACSR 43.

21 (1993) 9 WAR 395; 11 ACSR 162.

22 (1992) 7 ACSR 759.

23 (1994) 11 WAR 187; 14 ACSR 109.

24 (1992) 7 ACSR 759.

25 (1993) 13 WAR 11; 11 ACSR 785. As to the appeal from this decision see (1994) 13 WAR 124; 15 ACSR 1.

26 (1992) 7 ACSR 759.

27 (1995) 37 NSWLR 438; 16 ACSR 607

28 Ibid, at NSWLR 502; ACSR 665.

greater objective responsibilities on directors and their judgment was about giving recognition to this. It would appear they were concerned that on Rogers CJ's analysis at least non-executive directors could still defend themselves from liability based upon a general right to rely upon the company's management and a subjective lack of knowledge on their part of any concerns that would circumvent the need for any independent enquiry. For the purposes of subsequent analysis, it is suggested that a useful summary of the principles from the Court of Appeal may be put as follows:

- That directors need to meet a minimum objective level of skill which includes a minimum understanding of the business of the corporation. If a director cannot meet this level they need to inform themselves to the requisite degree or simply not act;
- Directors need to continue to keep themselves informed about the affairs of the company generally which would include such specific things as a regular review of financial statements;
- While directors will not be involved in day-to-day matters they need to adequately monitor and supervise management and their practices;
- Either as a result of this monitoring or in keeping themselves informed, they may come across information that creates a duty to make further enquiries beyond the ordinary attention to affairs. That is, on an objective assessment of their care and diligence they should have recognised the need to positively act and in such circumstances it is inadequate to say that management did not bring the particular matter to their attention.²⁹

In essence it is proposed that the difference of opinion on the question of reliance is inexorably tied up with the underlying duties of care and diligence. What is at stake is the question of when a director ought to know that further enquiries are needed. At what point would the exercise of the appropriate standard of care have put the director on notice that something was going wrong? Rogers CJ was not suggesting that a non-executive director can be entirely passive and ignore all but those problems actually brought to their attention in all circumstances.³⁰ It is a question of what matters can be appropriately left to certain delegates without the need to positively check on those outcomes and what matters, even when delegated, deserve further independent scrutiny.³¹ As will be analysed further, it is this practical approach that should be favoured. Such a view supports certainty and clarity and is

²⁹ This summary is the author's attempt to bring together the broad principles of the US authorities relied upon and endorsed in the judgment: *Daniels v Anderson* (1995) 37 NSWLR 438 at 502–5; 16 ACSR 607 at 665–7. Those authorities included *Federal Deposit Insurance Corporation v Bierman* 2 F 3d 1424 (1993); *Rankin v Cooper* 149 F 1010 (1907); *Francis v United Jersey Bank* 432 A 2d 814 (1981); *Federal Deposit Insurance Corporation v Stanley* 770 F Supp 1281 (ND Ind, 1991).

³⁰ *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 874–5. It is clear from this part of the judgment that Rogers CJ was concerned with the question of whether the non-executive directors 'ought to have been aware' of the relevant problems. In the circumstances however there was no evidence to suggest the directors could not rely on the internal controls that had been put in place and in fact had received information that they were being carried out.

³¹ This was one of those cases where the directors were entitled to rely on management (and auditors) to supervise in a manner the board had approved and objectively there was no reason to suggest this was not occurring appropriately.

likely to reflect the realities of corporate governance. It does not mean that directors are not subject to the need to investigate when the objective assessment of their duty dictates this, but may still create some reliable norms of practice.

The subsequent decision of *Re Property Force Consultants Pty Ltd*³² was again critical of Rogers CJ in *AWA Ltd v Daniels*³³ and supportive of the judgment in *Daniels v Anderson*.³⁴ When it came to the application of these principles however the result was very interesting. This case involved two directors of a land development company. One director who had primarily looked after the company's financial affairs managed to misappropriate company funds through an account jointly held with the other director. That other director was brought into the company because of expertise in town planning and failed to pick up on the fraud. While the court emphasised that his specialist role did not affect a general duty to pay attention to the financial matters they nevertheless found he was not in breach of duty as a result of trusting the conduct of his fellow director. Apparently in these circumstances there was no reason to suspect irregularities in the finances. Despite the fact that he had little direct prior knowledge of the work or ethics of the other director he was apparently justified in placing trust in his control and reporting of the financial matters. Clearly, in the application of the relevant principles there is a softening in the approach.

3 The case for the introduction of ss 189 and 190 to the Corporations Act

The Corporate Law Economic Reform Program Act of 1999 introduced a number of amendments that affected the duties of directors and their related abilities to delegate and rely on the advice of others. Arguably these changes, at least in part, were in response to business concerns about the direction of the law as a result of *Daniels v Anderson*³⁵ and related decisions. This view is best expressed in the blunt terms of Frank Carrigan as follows:

The CLERPA contains a number of legislative provisions aimed at transcending the impact of the *Daniels* case. Apart from the introduction of the statutory business judgment rule and reformulation of the duty of care, there are new provisions covering the ability of directors to delegate duties and rely on information provided by others. If executed in line with ss 189, 190 and 198D, any breach of the duty of care will be expunged by the director taking advantage of these safe harbour provisions. In effect, these new provisions undercut the guidelines on the power of directors to delegate and rely on others propounded by Clarke and Sheller JJA in the *Daniels* case. Codification of the power to delegate and rely on others is based on the soft approach taken by Rogers CJ in the *AWA* case. The safe harbour for reliance circumvents the *Daniels* case that rejected the view that non-executive directors, in particular, could rely on information provided by others. Business had found the

32 [1997] 1 Qd R 300; (1995) 13 ACLC 1051.

33 (1992) 7 ACSR 759.

34 (1995) 37 NSWLR 438; 16 ACSR 607.

35 *Ibid.*

jurisprudence of Rogers CJ suited their view of corporate regulatory ideology. The *AWA* case was used as a Trojan horse to sidestep the *Daniels* case and gain directors the legislative law they desired.³⁶

The first relevant case after this time was *Sheahan As Liquidator of SA Service Stations (In Liq) v Verco*.³⁷ The application of ss 189 and 190 did not arise given the timing of the relevant events and so the question of whether it was appropriate for the non-executive directors to have relied upon the chief executive officer in the manner they did turned upon an analysis of the general principles that support the statutory and common law duty of care and diligence. Nevertheless it provides useful insight into the application of the relevant principles. In this case two non-executive directors sought to defend actions for breaches of the duty of care and diligence³⁸ by their reliance on the chief executive officer or managing director. This person had secured their investment by misleading them as to the true financial position of the company. The duped directors were held to be liable. They were in breach of their duty because they had failed to inform themselves at all regarding the affairs of the company. In reviewing the authorities on the question of reliance the court clearly supported the principles laid down in *Daniels v Anderson*.³⁹ Further authorities were reviewed that considered the position of directors who had not adequately involved themselves and kept abreast of the affairs of the company.⁴⁰ In line with those authorities the liability for the non-executive directors in this case was quite clear. They knew nothing of the businesses of the company (service stations) and did not want to be involved in their management. They wanted a 'sleeping' role. On the basis of the principles of the duty as it had developed to this point that was clearly inappropriate. This was a case that neatly fell at one end of the spectrum of director performance. They had no understanding of the bare minimum expected of them under the duty and under any view of the principles that should be applied liability was inevitable.

What is interesting however is that Mullighan J went on to consider what they could have done to satisfy their obligations in their particular circumstances. As discussed throughout all the authorities mentioned, they needed to have taken positive steps to inform themselves about the affairs of the company generally and about its true financial position more particularly:

Had they done so and found it to be financially healthy and well managed with appropriate procedures for reporting through the chief executive officer to the board

36 F Carrigan, 'The role of capital in regulating the duty of care and business judgment rule' (2002) 14 *Aust Jnl Corp Law* 215.

37 (2001) 79 SASR 109; 37 ACSR 117; 19 ACLC 814.

38 Section 232(4) of the Corporations Law as the forerunner to s 180 of the Corporations Act 2001 was considered given the timing of the company's failure.

39 (1995) 37 NSWLR 438; 16 ACSR 607.

40 *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; 9 ACLC 946; *Metal Manufacturers Ltd v Lewis* (1988) 13 NSWLR 315; 13 ACLR 357; 6 ACLC 725; *Statewide Tobacco Services Ltd v Morley* (1990) 2 ACSR 405; 8 ACLC 827; *Morley v Statewide Tobacco Services Ltd* [1993] 1 VR 423; (1992) 8 ACSR 305; 10 ACLC 1,233.

of directors, it may be expected that they could have left many matters to [the chief executive officer] and staff of the Company without being in breach of their duty as directors.⁴¹

So the issue was not that the non-executive directors could not have relied upon the chief executive officer or employees of the company but that this was not defensible where those directors had not first satisfied themselves about the financial position of the company and the management, reporting and monitoring systems that should be in place. If they had done that, could they have indeed left matters to the chief executive officer without the need to further check on them and verify their status? Apparently so.

This case confirms that the focus of *Daniels v Anderson*⁴² and the cases that followed were on clarifying the direction of the development of the duty of care and diligence. The courts were pushing the following principles:

- Directors needed to accept the move towards an objective assessment of their obligations and those expectations had grown and were continuing to develop.
- As part of this assessment, directors needed to actively take steps to appropriately inform themselves about the affairs of the company, particularly its true financial status.
- Delegation and reliance on others was considered as one factor in the application of the duty. That delegation and reliance on others was not appropriate where directors would have failed to meet minimum expectations of their own active investigations.

Despite some concern initially perhaps about the meaning of *Daniels v Anderson*,⁴³ the cases clearly would support delegation and reliance on others but only where it is reasonable in the circumstances. Reasonable it would seem in the sense that the directors had at least met minimum standards in satisfying themselves that appropriate systems were in place to monitor and keep abreast of the financial and other key affairs of the company. While it is hard to pin down all those circumstances where reliance will be reasonable the more interesting question becomes this: If it were reasonable to delegate and rely on that person, to what extent does the director himself have to take positive steps to investigate the veracity of the advice or information received? Do they have to keep making independent enquiries to verify the accuracy of what they receive? It was these matters that were at the heart of the original judgment in *AWA Ltd v Daniels*⁴⁴ that was so criticised and it is still the matter which poses most conjecture.

4 What effect has ss 189 and 190 had on the developing legal principles?

A review of more recent decisions provides some appreciation as to whether the purpose of the legislative changes in s 189 and s 190 has been achieved. Have the courts taken to the amendments and softened their view on the

41 (2001) 79 SASR 109 at 135; 37 ACSR 117; 19 ACLC 814 at 836.

42 (1995) 37 NSWLR 438; 16 ACSR 607.

43 Ibid.

44 (1992) 7 ACSR 759 at 868.

question of delegation and reliance? This review will suggest this has not been the case and therefore it is perhaps not surprising that further changes to s 189 are now proposed.

The most significant case since the introduction of these provisions was *ASIC v Adler*.⁴⁵ It was significant in this context, not because of the circumstances of the case itself but because of the clear statements of principle. The question of delegation and reliance arose as a minor part in relation to a number of breaches of directors' duties following the failure of HIH Insurance Ltd. In this particular instance the question was whether Mr Williams, as chief executive officer could have relied upon Mr Adler to handle a particular financial transaction in a legal and appropriate manner in the interests of the company. It was clear that Mr Williams could not rely upon s 190 to support such delegation where there was an obvious conflict of interest in Mr Adler. Because the delegation was not defensible in any event, the question of how s 189 may apply was not canvassed. The decision itself however does provide a neat summary of general principles on the issue and provides telling commentary on the relationship between those principles and the then new provisions.

Firstly it was confirmed that:

at general law, a director is entitled to rely without verification on the judgment, information and advice of management and other officers appropriately so entrusted. However, reliance would be unreasonable where directors know, or by the exercise of ordinary care should have known, any facts that would deny reliance on others: *Daniels v Deloitte Haskins & Sells* at ACSR 665–6.⁴⁶

Secondly, the following factors were identified as being important to determining the reasonableness of any reliance and delegation:

- (a) the function that has been delegated;
- (b) the extent to which the director is put on inquiry, or ought to have been put on inquiry;
- (c) the director must believe that the delegate is trustworthy, competent and someone on whom reliance can be placed;
- (d) the risk involved and nature of the transaction;
- (e) the extent of steps taken by the director, for example, inquiries made or other circumstances engendering 'trust'; and
- (f) whether the position of the director is executive or non-executive.⁴⁷

Finally, what is of particular interest is that rather than seeing s 190 as supporting delegation and then consequently reliance on that delegation, it has been interpreted as being consistent with the more stringent interpretation of principle held in *Daniels v Anderson*. It was certainly the view of Santow J that any tension in principle between *Daniels v Anderson*⁴⁸ and *AWA Ltd v Daniels*⁴⁹ was now irrelevant as s 190 now meant that in any event the essence of the principle relied upon by the trial judge could no longer stand. It was now wholly inconsistent with s 190 to claim: 'A director being entitled to rely,

45 (2002) 41 ACSR 72; 20 ACLC 576.

46 *Ibid*, at ACSR 167.

47 *Ibid*, at ACSR 167–8.

48 (1995) 37 NSWLR 438; 16 ACSR 607.

49 (1992) 7 ACSR 759.

without verification, on the judgment, information and advice of the officers so entrusted.’⁵⁰

Rather than help the cause of directors, s 190 has served only to confirm a more stringent application of principle. Santow J’s discussion of principle and application in this case on the issue of delegation and reliance by Williams was supported by the Court of Appeal in *Adler v ASIC*.⁵¹

*ASIC v Rich*⁵² evidences an even more obvious example of inappropriate delegation and reliance. In this case the chairman of a publicly listed company, simply relied upon unsatisfactory financial information supplied by management, without question. No steps were taken to ensure the board was receiving adequate or accurate data and it was accepted the reliance was unreasonable. By any analysis, liability should flow and the case did not test the issues in question here.

The strongest analysis regarding the effect of ss 189 and 190 to the general principles of delegation and reliance comes in the form of the final report of the HIH Royal Commission.⁵³ The succinct views of the Commissioner, Mr Justice Owen, are clear in the following extract:

In *Daniels v Anderson* . . . the court, at first glance, appeared to place very stringent limitations on the notion of reliance and delegation. But I do not think this is a correct reading of the decision. In any event the legislature has specifically recognised the power of delegation . . . I think *Daniels v Anderson* and other authorities establish the general proposition that directors can rely on information supplied by others provided the reliance is reasonable in all the circumstances.⁵⁴

Mr Justice Owen went on to elaborate on the factors that would impact on the reasonableness of the reliance and these included:

- The nature of the functions delegated or in respect of which the information was given;
- The nature of the transaction or event to which the information relates and, in particular, the risk that it involves;
- The relationship between the director and provider of the information.⁵⁵

However the most important element to his mind was the extent to which the director had made enquiries regarding the relevant matter and that s 189 demonstrated the proper approach. That is, the director must make an independent assessment of the information or advice, having regard to the matters specified in s 189(b)(ii).⁵⁶

So the curious result is that while it is acknowledged that a strict reading of *Daniels v Anderson*⁵⁷ is not appropriate, the interpretation of s 189 supports a very severe limitation on the principles of reliance in any event. Requiring an independent assessment on every occasion of reliance in order to take advantage of s 189 would, as it has been shown in the above case analysis, go

50 (2002) 41 ACSR 72 at 182; 20 ACLC 576 in reference to *AWA Ltd v Daniels* (1992) 7 ACSR 759.

51 (2003) 46 ACSR 504; 179 FLR 1; [2003] NSWCA 131; BC200303670 at [529]–[530].

52 (2004) 50 ACSR 500; 22 ACLC 1232; [2004] NSWSC 836; BC200406016.

53 The HIH Royal Commission, above n 1.

54 *Ibid*, Ch 6 para 6.2.4

55 *Ibid*, Ch 6 para 6.2.4

56 *Ibid*, Ch 6 para 6.2.4

57 (1995) 37 NSWLR 438; 16 ACSR 607.

further than general principles would dictate.⁵⁸ The very purpose of the introduction of ss 189 and 190 was to try and make it easier for directors to delegate and leave matters to those who, on the face of it, can be trusted. It is ironic that the provisions were meant to overcome the perceived strictness of *Daniels v Anderson*.⁵⁹ Now that subsequent analysis and actual applications of principle suggest a softer approach it is interesting that the interpretation of s 189 would provide a greater hurdle. Section 189 itself may now be making matters more difficult for directors than was ever the case as a result of *Daniels v Anderson*.⁶⁰

5 The latest authority: *Vines v ASIC*

The most recent judicial guidance on the question of the ability to delegate and rely on the advice of others comes in the form of *Vines v ASIC*.⁶¹ This was an appeal from three previous judgments regarding breaches of the duty of care and diligence⁶² by a chief financial officer, Mr Geoffrey William Vines. In many of the cases reviewed in this area it is commonly a non-executive officer who is trying to defend against potential liability on the basis that they reasonably relied upon the information or advice of executive officers or other company managers. The first interesting thing to note about this case is that it is an executive officer, who is not even a director, who is trying to defend himself with the claim that it was reasonable for him to rely on the veracity of information supplied by an executive director. His position however was likened to that of a non-executive officer in the sense that he was dependent upon the company's executives to provide him with relevant up to date information.⁶³ In his particular role he was operating at a level of corporate strategy and managerial direction. What was expected of his role was 'a level of scrutiny as befits supervision, not the detailed direct involvement that is associated with operational responsibility'.⁶⁴

Vines was chief financial officer of the GIO Group. This company was the subject of a hostile takeover bid by AMP Ltd. As a result, Vines assumed further and particular work in his company's response to the takeover including, among many others, involvement in the preparation of the Part B statement required from the target company under the then Corporations Law and special responsibility with respect to the integrity of the profit forecast included in that statement. This profit forecast proved to be wholly inappropriate and, in part, Vines was liable for signing off on it when he 'ought to have known' it was improbable and for failing to inform the relevant

58 Note that the requirement for an independent assessment inserted just prior to approval (ie, s 189(b)(ii)) means there is a need to consider relevant views and materials and bring own judgment to bear on the matter: *Southern Resources Ltd v Residues Treatment & Trading Co Ltd* (1990) 56 SASR 455; 3 ACSR 207; 8 ACLC 1151; *Blackwell v Moray* (1991) 5 ACSR 255; 9 ACLC 924

59 (1995) 37 NSWLR 438; 16 ACSR 607.

60 *Ibid.*

61 (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341.

62 Note that these breaches relate to s 232(4) of the Corporations Law given that the conduct related to a period around 1998.

63 (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341 at [734] per Santow JA (dissenting judgment).

64 *Ibid.*, at [731].

due diligence committee of that improbability. The crux of the matter for the purposes of this article is that the profit forecast was crucially dependent upon an estimate of the exposure of liability of the company to claims arising out of a particular hurricane. Vines relied on the computations and advice of Mr Fox, an executive director, for the details of that estimate. This was arguably not a matter on which Vines had direct operational responsibility but did fall within his supervisory role.⁶⁵ To a large degree the liability of Vines turned on the question of whether it was reasonable for him to have relied on that estimate provided by Fox without further inquiry or independent review and therefore whether he ought to have known that the estimate was inaccurate, bringing about a breach of his duty of care and diligence.

The Court of Appeal found by a majority of 2:1 that liability for Vines was appropriate in these circumstances. In essence the majority found that while Vines may have been entitled to rely upon Fox's assessment at one time, circumstances subsequently arose that required Vines to become proactive and instigate inquiries. Those inquiries would have revealed the real exposure of risk and accordingly was something Vines 'ought to have known'. Two particular circumstances that raised the duty of inquiry in this case included, receiving information indicating dramatic rises in claims from the hurricane and learning that retrocession insurance cover to assist GIO to protect itself against claims from the hurricane could not be regarded as effective. There were however, at least in the opinion of Ipp J, several warning signs. Had Vines then checked on the claims he would have found the risk had been seriously underestimated and therefore that GIO's profit forecast would have been inaccurate.

The difference between the majority and the dissenting opinion of Santow J does not lie on the question of interpretation of legal principle and statutory duty. Rather, it seems to turn on the particular complex facts regarding the special responsibilities of Vines and what he may have known over the relevant period. It was much more significant for Santow J to confirm that Vines, in his opinion, had a supervisory role not an operational role and that it was wholly appropriate in these circumstances (rather like the position of non-executive director) to rely on the executive director to provide the relevant 'up-to-date' information on the likely losses from the hurricane. From his perspective there were no circumstances, nor anything in the conduct of his advisor, nor anything from his own field of responsibilities that should have excited suspicion and put him on inquiry.⁶⁶

Though dissenting, Santow J does provide very useful commentary specifically on the legal principles underpinning an officer's ability to rely on others. Interestingly he seems to regard the purpose of the judgment of Clarke and Sheller JJA in *Daniels v Anderson*⁶⁷ was to raise the standard for non-executive directors so it is closer to those of executive directors.⁶⁸ The

65 Note the view of the Chief Justice that the estimate of liability was a matter over which Vines had express responsibility because of its place in the Part B statement and that this was not an operational issue: (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341 at [727].

66 Ibid, at [734].

67 (1995) 37 NSWLR 438; 16 ACSR 607.

68 (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341 at [730].

evil that needed to be overcome was the wilful blindness of such officers. Reliance on others could not be seen as a means of avoiding their underlying duty to the company. But it will be perfectly permissible to have such reliance in the appropriate circumstances and those circumstances are inexorably connected to the duty itself. In reliance on *ASIC v Adler*⁶⁹ his honour described the focus as being on:

- The characteristics of the company;
- The skills and experience of the officer concerned and the delegate;
- The reasonably anticipated risks entailed in the reliance.⁷⁰

Most importantly he goes on to discuss when there would be a need for independent scrutiny or monitoring. 'Where there is no cause for suspicion nor circumstances demanding critical and detailed attention, it is reasonable for an officer to rely on advice, without independently verifying the information or scrutinising the data or circumstances upon which that advice is based.'⁷¹

So despite the dire interpretations that flowed following the judgment of Clarke and Sheller JJA in *Daniels v Anderson* there is no doubt about an officer's ability to delegate and to rely on the advice and information of others. What has been a struggle is to bring the principles together in a more meaningful way that can provide practical, on the ground, guidance. It is understood that officers who put their heads in the sand and cannot satisfy minimum expectations in terms of keeping themselves informed do not deserve a defence that others were responsible for supplying relevant information. Their own independent enquiry and analysis must be brought to bear on the matter. The real problem area for finding a consistent approach lies in the case where there is appropriate delegation. When will the officer have to check or question that reliance? It seems there can never be a situation where it can be said that an officer will never have to verify the advice or information. It may certainly be reasonable not to do so where you have good monitoring systems in place, and nothing arises that puts you on enquiry, but there is evidently an underlying principle that runs through the duty of care and diligence itself that cannot be ignored. Even in the absence of matters that put you on enquiry your duty of care and diligence is controlled by the nature and extent of the foreseeable risk of harm for the company. So the latest authorities mean the question of delegation and reliance can never be reduced to a matter of process.

It is worth looking closely at the judgments of Spigelman CJ and Ipp J. At least for the Chief Justice it was not necessary to find Vines was put on notice by a particular event to check on Fox's estimate.⁷² It was part of his underlying responsibilities. While Ipp J described the various warnings that should have put Vines on notice he emphasised the significance of putting the relevant events in the context of the overall duty. The question then of whether the duty has been met 'can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to

69 (2002) 41 ACSR 72; 20 ACLC 576.

70 (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341 at [731].

71 Ibid, at [731].

72 Ibid, at [447].

accrue to the company from the conduct in question'.⁷³ The point is that in circumstances like this where the consequences of getting it wrong were so grave the duty itself may require something more of you than acceptance of the advice of others without question or verification even where delegation to that person may have been appropriate.

It is this requirement that brings any reliable delegation process unstuck. Even if you could demonstrate appropriate behaviour in all other respects the matter itself which is the subject of delegation may mean further is required. With respect, how one makes that assessment is always going to be a matter of conjecture and one which is difficult to implement in any decisive way. This should be the focus of any attempt to practically assist directors. It is this factor, more than any other, that will perpetuate the legal uncertainty surrounding the acts of delegation and reliance.

Santow J, the judge who gave us the most cogent and clear analysis of the law in *ASIC v Adler*,⁷⁴ also gives us a dissenting judgment in *Vines v ASIC*⁷⁵ and it is this judgment that highlights this new underlying problem for directors. Santow J makes the following interesting analogy in finding the chief financial officer was not in breach of duty when relying on the advice and information from an executive director: 'Mr Vines having a dog on the job, did not need to bark as well, unless he had reason to believe the dog was asleep on the job. I conclude he did not.'⁷⁶ Unfortunately it now appears the matter is not as simple as that. If what you are protecting is important enough and the consequences of the failure to bark serious enough you may well have to find your voice and take more responsibility for that bark. The problem however is knowing when that has to happen.

6 The current proposal to relax the terms of s 189 and a new broader business judgment defence

The matter which has brought ss 189 and 190 back into the spotlight along with the whole question of delegation and reliance by company officers is the current discussion paper from the Corporations and Financial Services Division of The Treasury, *Review of Sanctions in Corporate Law*.⁷⁷ Despite its name 'the tone, focus and substance of the discussion paper seem to be set more upon minimising the regulatory burden on companies rather than striking hard against corporate misconduct'.⁷⁸

In this vein, there are two proposals contained in the paper that will have an impact. Firstly, there is the suggestion that the current wording of s 189 (in particular, s 189(b)(ii)) places too high a burden on directors in trying to take advantage of the presumption. That is, that s 189(b)(ii) actually requires directors in every instance to make an independent assessment of the

⁷³ Ibid, at [814] per Ipp J in reference back to his own judgment in *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 449–50; 11 ACSR 162.

⁷⁴ (2002) 41 ACSR 72; 20 ACLC 576.

⁷⁵ (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341.

⁷⁶ Ibid, at [738].

⁷⁷ Above n 4.

⁷⁸ A Dahdal, 'Sanctions in Corporate Law', 31 May 2007, Australian Corporate News, CCH, at <<http://ww5.cch.com.au/acn/acn10.html>>.

information or advice on which they want to rely. As discussed above this is a fundamental practical issue. That close analysis of the general principles as they have developed would suggest that interpretation is not consistent with the current view of the courts. Provided one meets the minimum expectations in terms of keeping oneself informed there is scope for appropriate delegation and reliance on that delegation without the constant need for the independent assessment of the received information or advice unless of course matters arose which put you on enquiry. What has been proposed is that the wording of the provision, revert to the terms originally proposed when it was in bill form.⁷⁹ That is, that reliance would be made in good faith and 'after making proper inquiry if the circumstances indicated the need for inquiry'.⁸⁰ The intention obviously is to remove the requirement for constant independent assessments. As suggested earlier, s 189 and s 190, despite intentions at the time, may have only served to hamper the development of appropriate law on this issue. Not only is the amendment more supportive of officers and the practicalities of corporate governance it would better serve the original intent. What we still need to come to terms with however is that it may not assist directors to the extent first thought when you review the meaning of the judgments above. It still will not affect the overarching factor applied in *Vines v ASIC*⁸¹ above. That is, the 'foreseeable risk of harm' element that will undo any attempt to develop a reliable process.

The second proposal in the discussion paper is a general defence for directors to be protected from liability under the core duties (ss 180–183) and insolvent trading provisions (s 588G). The relief from liability might apply to decisions made where the directors act:

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

Clearly there will be much further debate and analysis of the merits of such a general defence but it would also have a consequence to the question of delegation and reliance. As already mentioned, s 189 operates as a presumption in favour of directors who rely upon others. Ultimately the appropriateness of that reliance comes down to a question of whether they have met the standards of the underlying duty. The proposed general defence would have the potential to protect them against that liability arising from decisions made on the basis of information and advice received from others. However again it is doubtful whether such a general defence would overcome the claim that the conduct, in this case delegation and reliance, was a breach of duty because subsequent analysis determines what was then a 'foreseeable risk of harm'.

⁷⁹ Note that the government at the time agreed to amend the provision to its current wording in order to secure passage of the bill: The Treasury, above n 4, para 3.20.

⁸⁰ Ibid, para 3.22.

⁸¹ (2007) 62 ACSR 1; 25 ACLC 448; [2007] NSWCA 75; BC200702341.

7 Economic analysis in support of a simpler and clearer legal framework

For a long time economic theory has sought to explain the nature of the firm and the consequences of having a limited liability corporation. Theoretically, the corporation provides a structure that appropriately distributes risk to allow for entrepreneurial activity. Economic analysis supports the efficiencies that the corporation provides, although there has always been debate regarding the extent of the benefits for the various stakeholders.⁸² Within the corporation itself that same analysis would support the most efficient management and decision-making processes. Information should be gathered and interpreted where it is most efficient to do so. That will ultimately be passed up to the board for decision-making or action of some kind. The more the law interferes with the process the less cost effective and more complicated it becomes.

While the law has shown some support for delegation and reliance, it does so with some strong limitations that principally revolve around the director's need to make enquiries and be informed about the matter and or the adviser and not always on clear grounds. Arguably, the more we require of directors to verify the information and advice sought the more inefficient the process. Account needs to be taken of the associated costs of the monitoring required of those on whom you need to rely.

The issue has been most succinctly put by Whincop in his article on the economic analysis of directors' duties:

the corporation is a prime example of specialisation of risk bearing, management and, in the case of directors, corporate governance and monitoring. It makes sense that decisions are delegated to persons in the organisation who make them most efficiently. That will rarely be the directors. Unquestionably, there is the potential for frauds to occur under these circumstances. Managers may act incompetently or corruptly. Incompetent management provides no basis for imposing any duty on directors or limiting their capacity to rely on managers. Other forms of checks and balances operate: the work of managers is reviewed by decision controlled mechanisms hierarchically and laterally. So far as corruption is concerned, managers may be likely to conceal their frauds. Yet this provides no basis for limiting the reliance directors may place on managers, unless one improbably assumes that directors have a comparative advantage in detecting these frauds. The appropriate means for preventing corruption is the development of an ethical corporate culture, and the use of mandatory law aimed directly at fraudulent conduct by employees and officers . . .⁸³

82 That analysis can be followed through the following key publications across the law and economics literature: R H Coase, 'The Problem of Social Cost' (1960) 3 *Jnl of Law and Economics* 1; J M Landers, 'Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy' (1976) 43 *Uni of Chicago L Rev* 527; F H Easterbrook and D R Fischel, 'Limited Liability and the Corporation' (1985) 52 *Uni of Chicago L Rev* 89; F H Easterbrook and D R Fischel, *The Economic structure of Corporate Law*, Harvard University Press, 1991; R H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *Yale L Jnl* 857; P Halpern, M Trebilcock and S Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *Uni of Toronto L Jnl* 117; M Jensen, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) *Jnl of Financial Economics* 305.

83 M J Whincop, 'A Theoretical and Policy Critique of the Modern Reformulation of Directors'

There will be failures as a result of actions taken on the advice of others, but this does not necessarily mean reliance on the advice was inappropriate and should have a legal consequence. The point has been made, time and time again, in the law and economics literature that company directors are poor risk bearers. This does not mean that directors should not have potential personal liability but where that risk cannot be appropriately managed there are natural negative consequences, particularly where the liability is uncertain. Those consequences include increases in the cost of corporate governance as compensation for the increased personal risk and a shift away from risky activities. Corporations by their nature were created as a vehicle to engage in the riskier ventures.

As already demonstrated the most significant issue is that a director could not, with any confidence, consider the question of delegation and reliance as a process that can be checked. If it could be then the uncertainty is removed and directors can manage the risk more appropriately. The associated agency and monitoring costs are reduced and efficiencies are gained. To achieve this, the law needs to refine its requirements. The thread running through all the cases on this topic is the fact that there will be delegation to and reliance on others. What needs to be removed is any uncertainty about the process and its consequences. Where directors meet their minimum standard of duty with regard to being informed about the company's financial status and performance then the law should consider the matter procedurally. That is, provided the delegation and reliance is reasonable given the skills of the parties and provided nothing arises to put the officer on enquiry the action should be defensible. No doubt officers would welcome the potential to avoid subsequent revision of the decision-making process, where with the benefit of hindsight, the relevant risk was found to be much greater and the law determines either that delegation was not appropriate or that greater monitoring of that delegation was required.

When looking back at decisions made on the advice of others it may be possible to identify where the advice was fraudulently or incompetently given. Where the delegation of that work was appropriate in the sense described above, holding the director responsible for the incompetence or fraud of the other assumes that could be controlled by the director. The director may be in no better position than anyone else to detect this. Surely the more appropriate response is to let the liability lie where it should. Where the advisers take some part in management it will be more likely that they themselves will have a personal liability for their work and surely that is the more appropriate consequence.

8 The consequences of the new potential liabilities for managers below board level

After the failure of the HIH insurance group in 2001, Mr Justice Owen conducted a Royal Commission to report on the reasons for, and

Duties of Care' (1996) 6 *Aust Jnl Corp Law* 72 with reference to E F Fama and M C Jensen, 'Separation of Ownership and Control' (1983) 26 *Jnl of Law and Economics* 301–25 and W G Ouchi, 'Markets, Bureaucracies and Clans' (1980) 25 *Administrative Science Quarterly* 124–41.

circumstances surrounding, that collapse.⁸⁴ He recognised the reality that the governance of larger corporations is dependent upon advice and information from personnel such as employees, consultants and advisers who are delegated certain functions. Further, significant decisions may be made by management without reference to the board.⁸⁵ The Commissioner therefore voiced his frustration by the disinclination of ‘middle management’ in the case of HIH to accept responsibility for undesirable decisions and practices that ultimately brought the company undone. It was clearly his view that corporate governance, as a matter of practice, extends beyond the board room and to be effective the law needs to deal with that.⁸⁶

In April last year, as a result of the Royal Commission and subsequent discussion papers, the Corporations and Markets Advisory Committee recommended that the Corporations Act be amended to extend the duties and liabilities of officers to a wider class of persons. As a result, liability will extend to managers, consultants and advisers who are not directors but who may take part or are concerned in the management of the corporation.⁸⁷ Clearly any potential liability for directors flowing from delegation to and reliance upon company management should take into account the duties and liabilities those delegates themselves will have to the company.

9 Conclusions and recommendations

This article has sought to distil the key principles that inevitably directors must consider in delegating functions and relying on the advice and information supplied by others. That analysis has revealed that this issue has been caught up in the development of the fiduciary duties and in that growth of principle directors have been left with considerably less certainty than is practically needed. The law has clearly never recognised that directors could rely on others as a means of avoiding their underlying duty to the company. Objective standards must be reached. What has been more difficult is determining the risk of liability where the delegation has been appropriate and takes place within good governance systems. In those circumstances it is still necessary to understand that directors may be put on enquiry to look further into the matter should issues arise that raise any suspicion. However, it seems more may be required. If an assessment after the fact suggests the foreseeable risk was greater than was obviously made by the company officer (otherwise it would not have been made in the first place) the whole question of whether the delegation should have been made and therefore whether any consequential advice was reliable is brought back into issue. It is argued that the uncertainty that this generates outweighs its merit.

It is proposed that the question of delegation and reliance should be considered with more procedural certainty. Provided officers themselves are

⁸⁴ The HIH Royal Commission, above n 1

⁸⁵ Ibid, Ch 6 p 15.

⁸⁶ Ibid, Ch 6 p 15. See also M Byrne, ‘The Duties and Liabilities of Persons Below Board Level’ (2006) 9 *Canberra L Rev* 45 at 49.

⁸⁷ Corporations and Markets Advisory Committee, above n 8. The first two recommendations of the committee at p 35 contain the key amendments that will allow the application of the duties in ss 180, 181 and 184 of the Corporations Act to ‘any person who takes part, or is concerned, in the management of that corporation’.

meeting minimum expectations in terms of their own standard of duty then allow the process of delegation and reliance on others where it has met the appropriate procedures outlined throughout the cases.⁸⁸ Where officers receive information that puts this into question⁸⁹ there is the need to investigate and inaction will create the risk of liability. Otherwise however officers should not have to revisit the issue. The certainty that this will provide would arguably reduce some angst and cost associated with corporate governance and promote more efficient processes. This could be achieved by redrafting ss 189 and 190 to raise the presumption in this fashion. Alternatively the proposed new and broader business judgment defence might allow officers to prevent that post risk analysis by the courts that has been the basis for opening up and reviewing the whole question of delegation in the first place. As mentioned earlier however that defence should specifically address this issue as it arguably would not go far enough in its current proposed format.

⁸⁸ For example, that the delegate has the appropriate skills.

⁸⁹ Or where of course they ought to have suspected problems based upon an objective assessment of their duty.