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Implementation Of The Business Judgement Rules (BJR) Doctrine As Legal Protection Against Board Of Directors In Bumh

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Abstract. *This legal writing discusses the implementation of the Business Judgment Rules (BJR) doctrine as legal protection for directors in BUMN. Regulations regarding the concept of Business Judgment Rule cannot be separated from the application of the concept of fiduciary duty. In writing this law, it uses a type of normative legal research, with a statutory approach and a conceptual approach. The legal materials used are primary legal materials, namely Law Number 40 of 2007 concerning Limited Liability Companies and Law Number 19 of 2003 concerning BUMN. Law Number 40 of 2007 concerning Limited Liability Companies basically regulates the protection of Directors in BUMN companies in protecting the rights of directors through the concept of the Business Judgment Rule doctrine as regulated in Article 97 Paragraph (5) and Article 104 Paragraph (4) of the Law -Law Number 40 of 2007 concerning Limited Liability Companies. Through the Business Judgment Rule Doctrine, it has provided legal protection for directors of state-owned companies who cannot be held individually responsible for losses to state-owned companies by proving that the losses were not due to the fault or negligence of the directors of state-owned companies, have made business policies in accordance with good faith and the principle of prudence and the absence of personal conflicts of interest when making business policies by BUMN director.*

Keywords: *BUMN; Business Judgement Rule; Director.*

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1. Introduction

Based on the Constitution of the Republic of Indonesia, namely the 1945 Constitution of the Republic of Indonesia, in the Preamble to the 4th Paragraph it states that the purpose of establishing the Republic of Indonesia, one of which is to "advance general welfare". Thus, it can be said that Indonesia is a welfare state. Efforts to realize this prosperity are carried out by the state through national economic development efforts.

The foundation for economic development in Indonesia is based on Article 33 of the 1945 Constitution of the Republic of Indonesia. Article 33 of the 1945 Constitution of the Republic of Indonesia is the main pillar for economic development in Indonesia with the aim of improving the welfare of society. The Indonesian state is required to take an important role in economic activities as an effort to realize state goals.

One of the important roles of the state in driving the economy is by regulating and establishing regulations in the economic sector so that they can be used as a means for both the private sector and the government sector to carry out economic activities through regulations related to business entities in Indonesia. Business entities that make a big contribution to driving the economy in society are business entities in the form of Limited Liability Companies (PT).¹

The legal basis for PT business entities is regulated in Law Number 40 of 2007 concerning Limited Liability Companies. In connection with the definition of a Limited Liability Company (PT), it has been included in Law Number 40 of 2007, Article 1 Number 1 which states that a Limited Liability Company is a legal entity which is a capital partnership, established based on an agreement, carrying out business activities with authorized capital which is completely divided into shares and fulfill the requirements regulated by the law and its implementing regulations.²

A Limited Liability Company (PT) is a legal entity that can carry out legal actions represented by the structure or organs of the company. The organs of a limited liability company as regulated in Article 1 Number 5 of Law Number 40 of 2007, consist of the General Meeting of Shareholders (GMS), Board of Commissioners and Directors.³ Each of these organs has certain inherent rights and obligations as well as duties and authority. Therefore, it can be said that a Limited Liability

¹ Desak Nyoman Alit Gunatri dan Ida Ayu Sukihana, 2019, "Akibat Hukum Pengaturan *Acquit Et De Charge* Terhadap Direksi Perseroan", *Jurnal Kertha Semaya Volume 7 Nomor 3, Bulan Juli 2019*, p. 2

² Lihat Pasal 1 Angka 1 Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas.

³ Lihat Pasal 1 Angka 2 Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas

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Company is included in the category of independent legal subject (recht person) which has the rights and obligations to be able to carry out its business activities.⁴

The organs in a Limited Liability Company in carrying out their duties and authority have responsibilities carried out by each organ. The responsibilities carried out by limited liability company organs are limited (limited liability). Each organ carries out its duties and authority to achieve the aims and objectives of establishing the company. One of the organs that plays an important role in the activities and running of a limited liability company is the board of directors. The Board of Directors, based on the provisions in Article 1 Number 5 of Law Number 40 of 2007, has the duty and authority to represent the company both inside and outside the court in accordance with the provisions of the Articles of Association and Bylaws (AD/ART) and is fully responsible for the management company to achieve the company's interests and objectives.⁵

When carrying out their duties and authority as one of the organs of a limited liability company, the directors in carrying out the management of the company are based on the principle of having a fiduciary duty given in the General Meeting of Shareholders (GMS) forum. Directors in carrying out their duties through the principle of fiduciary duty are expected to be able to develop and achieve the company's objectives, one of which is to achieve business profits. Directors must therefore be people who have the capacity, capability, integrity, professionalism and skills in managing and running a limited liability company.⁶

The management of limited liability companies in the form of BUMN by the Board of Directors has in recent times become an interesting topic of discussion among academics and legal practitioners. The reason is that in managing these BUMNs, directors will be faced with legal problems, where, when managing BUMNs, especially those in the form of Persero, when the BUMN experiences losses it will also be considered that the directors have harmed state finances. This will create a dilemma for state-owned company directors, because they could be accused of committing criminal acts of corruption and on the other hand, directors have the responsibility to develop the state-owned company's business in order to make a profit.

⁴ Agus Budiarto, 2009, *Kedudukan Hukum dan tanggung Jawab Pendiri PT Edisi 2 Cet. 2*, Jakarta: Ghalia Indonesia, p. 57

⁵ I Made Sanditya Edi Kurniawan dan Made Gde Subha Karma Rasen, 2013, "Tanggung Jawab Direksi Terhadap Kerugian PT Berdasarkan Doktrin Business Judgement Rules", *Jurnal Kertha Semaya Volume 01 Nomor 09, Bulan September 2013*, p. 2

⁶ R. Khairandy, 2009, *Persero Terbatas: Doktrin, Peraturan Perundang-Undangan dan Yurisprudensi (Revisi)*, Jakarta: Total Media

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If in making a BUMN policy to gain profits it actually causes losses for the BUMN, which is correlated with state financial losses, then to be able to determine the responsibility of the directors of the BUMN it must be seen according to the principle of fiduciary duties and based on the concept of Business Judgment Rule. The Business Judgment Rule concept is a concept as a legal protection tool for BUMN directors who carry out BUMN management with the principle of prudence, good faith and with the principle of accountability that has been implemented. This means that for BUMN losses that occur, the directors cannot be held responsible, because the losses experienced are part of the existing business risks and are not based on the directors' fault.

An interesting case relating to the accountability of BUMN directors who are considered to have harmed state finances is the case of the Director of PT. Pertamina, namely Karen Agustiawan. Karen Agustiawan as director of PT. Pertamina is considered to have caused losses to the state for its investment in Australia's Basker Manta Gummy (BMG) block for an offshore oil drilling project, which is managed by Australia's Rock Oil Company. It has not been a year since it turned out that the oil reserves in the Basker Manta Gummy (BMG) block did not match initial research, so Rock Oil Company stopped the drilling project in the BMG block.⁷

Based on the policy of Karen Agustiawan, who is a BUMN director at PT. Pertamina, he is suspected of abusing his authority and is considered to have enriched other people (in this case the Rock Oil Company) thereby causing losses to the state amounting to Rp. 568.06 billion. Karen is considered to have abused her authority as a director of PT. Pertamina is a state-owned company and has been brought to court for corruption crimes. Karen Agustiawan in the First Level and Appeal Level Corruption Court was found guilty of committing the criminal act of abuse of authority and was sentenced to 8 years in prison and a fine of Rp. 1 billion subsidiary 4 months in prison. Due to the verdict at the first level corruption crime court and the appeal, Karen Agustiawan filed an appeal at the Supreme Court. Based on the Supreme Court's decision read out on March 10 2020, Karen Agustiawan was declared free because the policy she carried out in investing in the BMG block was a business practice concept, namely the Business Judgment Rule which is regulated in Law Number 40 of 2007 concerning Limited Liability Companies.

The differences between the decisions at the corruption criminal trials at the first level and the appeal level with the Supreme Court decisions indicate that in the application of the concept of

⁷ <https://www.cnnindonesia.com/nasional/20200310195508-12-482249/eks-dirut-pertamina-karen-agustiawan-nama-baik-saya-rusak>, diakses pada tanggal 10 Juli 2022, pukul 14.43 WIB

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Business Judgment Rule in Indonesia, especially in relation to state-owned companies, the size of the state-owned company is still unclear and there is disharmonization of laws and regulations between the laws and regulations. Law Number 19 of 2003 with Law Number 40 of 2007

Based on the above, a title can be taken in examining the legal protection of Directors through the Business Judgment Rule doctrine, especially for Directors of limited liability companies in the form of BUMN.

One problem that can be identified in this legal research is, firstly, how is the Business Judgment Rule doctrine regulated for Directors based on Law Number 40 of 2007? The second problem is, what is the legal protection for BUMN directors in the event of a company loss?.

2. Research Methods

In writing this law, it uses a type of normative legal research, with a statutory approach and a conceptual approach. The legal materials used are primary legal materials, namely Law Number 40 of 2007 concerning Limited Liability Companies and Law Number 19 of 2003 concerning BUMN..

This research is descriptive-juridical in nature by describing the regulations regarding the legal protection of Directors through the Business Judgment Rule doctrine, especially for Directors of limited liability companies in the form of BUMN. The data collection technique used in this writing uses library research using books and legal journals related to the problem being studied, namely the legal protection of Directors through the Business Judgment Rule doctrine, especially for Directors of limited liability companies in the form of BUMN.

3. Results and Discussion

3.1. Regulation of the Business Judgment Rule Doctrine for Directors Based on Law Number 40 of 2007.

Limited Liability Companies (PT) have characteristics in carrying out their business activities, because theoretically limited companies are also legal subjects that have rights and obligations and can carry out valid legal actions. Limited Liability Company (PT) is a legal subject in the form of a legal entity (recht persoon). The legal basis for the regulation of limited liability companies,

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according to positive law in Indonesia, is regulated by Law Number 40 of 2007 concerning Limited Liability Companies.

When carrying out and carrying out its business activities, a limited liability company has aims and objectives. This is stipulated in Article 2 of Law Number 40 of 2007, which states that in the case of establishing a company it must have aims and objectives as well as business activities that do not conflict with statutory regulations, public order and morality. In order to achieve the company's aims and objectives, this matter becomes the full duty and authority of the Board of Directors.

The existence of directors in a limited liability company has an important role because whether a company develops or not is largely determined by the directors in taking business steps and how the directors manage the company. The Board of Directors has full duties and authority in running the company. In carrying out their duties and authority, the board of directors has two (2) functions, namely the management function and the representative function which are further regulated in the company's AD/ART. The Board of Directors has full power, authority and responsibility for the company.⁸

The task of running and developing a company carried out by the directors has its own challenges, where in the uncertain business world the company is faced with profit which is the company's goal and on the other hand, it is faced with losses (even bankruptcy) as a risk of the business being run. To be able to carry out the duties and authority of directors optimally, in corporate law theory there is a concept that protects business decisions made by directors, known as the Business Judgment Rule (BJR) doctrine. This doctrine teaches that directors' business decisions cannot be held accountable because they result in losses or even bankruptcy for the company, if they are based on good faith and the principle of prudence.⁹

The concept of Business Judgment Rule is a concept in the field of business law which originally developed in countries that adhere to the Anglo Saxon legal system or Common Law system and is mainly a derivative of Corporate Law in the United States. Initially, this concept was used to prevent courts in the United States from questioning or questioning policy decisions in corporate business development efforts by the Board of Directors that were taken in good faith. The basis for considering the Business Judgment Rule concept is that not every business policy

⁸ Hasbullah F. Sjawie, 2017, "Tanggung Jawab Direksi Perseroan Terbatas Atas Tindakan Ultra Vires", *Jurnal Hukum Prioris Volume 6 Nomor 1, Bulan Juni 2017*, p. 12-32

⁹ Kusmono, 2016, "Pembelaan Melalui Prinsip-Prinsip *Business Judgement Rule* bagi Direksi BUMN Persero Bila Terjadi Kerugian", *Jurnal Info Arta Volume 3 Bulan Maret 2016*, p. 33-42.

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from the Board of Directors can bring profits to the corporation, there are business risks that can actually cause losses. In making policies to develop the business, the Board of Directors must be based on corporate interests by applying the principle of prudence and in good faith.¹⁰

In connection with the regulations regarding the Business Judgment Rule, it has been adopted in Law Number 40 of 2007 concerning Limited Liability Companies. The concept of Business Judgment Rule is contained in Law Number 40 of 2007 concerning Limited Liability Companies regulated in Article 97 Paragraph (5) which states that:¹¹

“Members of the Board of Directors cannot be held responsible for losses as intended in Paragraph (3) if they can prove it:

- 1) The loss is not due to fault or negligence
- 2) Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company
- 3) Have no conflict of interest, either directly or indirectly, regarding management actions that result in losses, and
- 4) Have taken action to prevent the occurrence or continuation of the loss.

Furthermore, the concept of Business Judgment Rule is also outlined in Article 104 Paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies in relation to bankruptcy situations experienced by corporations. The article states that:¹²

Members of the Board of Directors are not responsible for the company's bankruptcy as intended in Paragraph (2) if they can prove:

- a) Bankruptcy is not due to fault or negligence
- b) Has carried out management in good faith, prudence and full responsibility for the interests of the company and in accordance with the aims and objectives of the company.

¹⁰ Bismar Nasution, 2019, “Prinsip *Business Judgment Rule* Dalam Pengelolaan Perseroan”, *Dalam Makalah yang Disampaikan pada Seminar Sehari “Good Corporate Governance (GCG) PT. Perusahaan Listrik Negara (Persero) dan Anak Perusahaannya pada tanggal 29 Agustus 2019 di Batam* , p. 1

¹¹ Lihat Pasal 97 Ayat (5) Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas

¹² Lihat Pasal 104 Ayat (4) Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas

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- c) Does not have any direct or indirect interest in the management actions carried out, and
- d) Have taken action to prevent bankruptcy.

Regulations regarding the concept of Business Judgment Rule cannot be separated from the application of the concept of fiduciary duty. Fiduciary duty, in the opinion of Conelius Simanjuntak and Natalie Mulia, is a duty and responsibility in carrying out the day-to-day management of the company for the benefit of and in accordance with the aims and objectives of the company's founding. Fiduciary duty is used to measure the trust of company shareholders in the directors. In carrying out the day-to-day management of the company, the Board of Directors will be faced with business risks in the field. The risks faced can be in the form of things that are beyond the control of the Board of Directors or constitute a force majeure condition so that a concept is needed to legally protect against the incapacity of the board of directors. Under these conditions, the concept of Business Judgment Rule is used.

The relationship between the responsibilities of BUMN Directors and the regulations regarding the concept of Business Judgment Rules as contained in Law Number 40 of 2007 concerning Limited Liability Companies is that:

- 1) BUMN directors in carrying out all obligations in managing BUMN must be based on the aims and objectives of the BUMN as well as the interests of the BUMN as mandated in the Law and AD/ART establishing the BUMN. In running a state-owned company, the Board of Directors is always based on good faith, a sense of responsibility and based on the principle of prudence when issuing business policies.
- 2) BUMN directors, in carrying out their duties and authority, can be held individually responsible for losses to the BUMN company, if they make mistakes and/or negligence due to actions that are not based on good faith and do not implement the precautionary principle.
- 3) Directors have the right to immunity in making business policies for state-owned companies as a legal protection for directors. Directors cannot be prosecuted criminally or civilly for losses suffered by a state-owned company if they have fulfilled the following elements:
 - a) That the company's losses were not due to the fault or negligence of the BUMN directors.
 - b) The Board of Directors has implemented good faith and the principle of prudence in making business policies.

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c) The Board of Directors has no conflict of interest when running the company, either directly or indirectly.

d) Has made preventive efforts to deal with losses experienced by state-owned companies

Law Number 40 of 2007 concerning Limited Liability Companies basically regulates the protection of Directors in BUMN companies in protecting the rights of directors through the concept of the Business Judgment Rule doctrine as regulated in Article 97 Paragraph (5) and Article 104 Paragraph (4) of the Law -Law Number 40 of 2007.

3.2. Legal Protection for Directors of BUMN Companies in the Event of Company Losses

The board of directors is an organ that has an important role in the progress of limited liability companies, especially for state-owned companies because the board of directors is the organ that runs or operates state-owned companies. BUMN directors in running the company must be able to uphold the principles of good corporate governance which are based on Law Number 40 of 2007, BUMN AD/ART and decisions at the GMS. BUMN directors, like directors of public companies, have great authority in making business policies with the aim of business development and gaining profits for the BUMN..¹³

Directors of state-owned companies, when carrying out their duties and authority in running the company, will always be faced with the challenges of a business world that is completely uncertain and full of business risks which can cause potential losses for state-owned companies. So when a BUMN company experiences a loss, the first person to be held accountable is the director of the BUMN company. Where, in relation to state-owned companies where the majority of their capital comes from the APBN, directors of state-owned companies are faced with criminalization because they are considered to be detrimental to state finances.

Several cases related to the criminalization of directors of well-known state-owned companies in Indonesia include the case of Karen Agustiawan (former President Director of PT. Pertamina), the case of Hendrisman Rahim (former President Director of PT. Asuransi Jiwasraya) or the case of Emirsyah Satar (former President Director of PT Garuda Indonesia). The large number of cases of losses to state-owned companies that have occurred recently has prompted the government to issue regulations that can ensnare directors and board of commissioners in state-owned companies to be held individually accountable by the government for causing state losses. This

¹³ Ridwan Khairandy dan Camelia Malik, 2007, *Good Corporate Governance, Perkembangan Pemikiran dan implementasinya di Indonesia dalam Perspektif Hukum*, Yogyakarta: Kreasi Total Media, p. 46

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legal rule is contained in Government Regulation Number 23 of 2022 concerning Amendments to Government Regulation Number 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of State-Owned Enterprises (BUMN).

Every business policy of the directors of a state-owned company when running the company, if it is based on good faith and the principle of prudence and is not proven to benefit themselves or others, then legally, the directors are protected by the Business Judgment Rule doctrine. Through the Business Judgment Rule doctrine, directors cannot be held personally responsible for losses experienced by state-owned companies. So, in this case directors of state-owned companies cannot be criminalized with criminal charges.

The Business Judgment Rule doctrine is a concept to be able to provide legal protection to company directors which is adopted from concepts in corporate law that developed in countries with Common Law legal systems, especially in the United States. Legal protection for directors of BUMN companies through the Business Judgment Rule doctrine aims to provide legal certainty and immunity rights for BUMN directors who have carried out their duties and authority in accordance with the principle of fiduciary duty. Thus, the Business Judgment Rule doctrine is a guarantee of legal protection for directors of state-owned companies in the event of financial losses to state-owned companies resulting from business risks and not due to errors or negligence of the directors..¹⁴

The Business Judgment Rule doctrine protects and protects company directors from lawsuits or demands made by anyone with the requirement that the BUMN directors in making business policies are carried out in good faith for the interests of the BUMN company and apply the principle of prudence. This can be measured by the presence of facts or data, initial research, opinions of business experts and reports which are the basis for directors of state-owned companies in making business decisions.

According to the opinion expressed by Bismar Nasution, as quoted by Ningrum Natasya Sirait, stated that in implementing the Business Judgment Rule doctrine there are conditions that must be met so that directors cannot be held individually responsible for business policies that cause losses to state-owned companies, namely as follows: following:¹⁵

- 1) Taken in good faith for progress and achieving BUMN goals.

¹⁴ Sutan Remi Syahdeni, 2011, *Tanggung Jawab Direksi dan Komisaris*, Jakarta: Pustaka Yustisia, p. 78

¹⁵ Ningrum Natasya Sirait, 2017, *Hukum Kontrak Bisnis*, Medan: USU Press, p. 89

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- 2) Taken on a strong basis and through a thorough plan by minimizing all existing business risks.
- 3) There is no conflict of interest from the directors of state-owned companies.

The Business Judgment Rule doctrine is an initial hypothesis that in making business policies carried out by directors of BUMN companies which have resulted in losses to the BUMN, it is considered a company action for which individual directors of the BUMN are not held accountable, as happened in the case of Karen Agustiawan and other. If the company's directors in making business policies are based on adequate research, data, reports and the principle of prudence without any personal conflict of interest, then the directors are legally protected from lawsuits and demands from anyone according to the Business Judgment Rule doctrine..¹⁶

In company law in Indonesia, the Business Judgment Rule doctrine has been implicitly stated in Article 97 Paragraph (5) and Article 104 Paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies. Apart from that, Government Regulation Number 23 of 2022 concerning Amendments to Government Regulation Number 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of State-Owned Enterprises (BUMN) also adopts the Business Judgment Rule doctrine as regulated in Article 27 Paragraph (2a) which states that:¹⁷

“Each member of the board of directors cannot be held responsible for losses as intended in paragraph (2) if they can prove:

- a) The loss was not due to his fault or negligence.
- b) Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the BUMN
- c) Have no conflict of interest, either directly or indirectly, regarding management actions that result in losses, and
- d) Have taken action to prevent the occurrence or continuation of the loss”

¹⁶ Simon Santoso, 2016, “Business Judgement Rule Sebagai Perlindungan Hukum Terhadap Direksi”, dalam *Jurnal Hukum Bisnis Edisi Bulan September 2016*, p. 29

¹⁷ Lihat dalam Pasal 27 Ayat (2a) Peraturan Pemerintah Nomor 23 Tahun 2022 Tentang Perubahan Atas Peraturan Pemerintah Nomor 45 Tahun 2005 Tentang Pendirian, Pengurusan, Pengawasan dan Pembubaran Badan Usaha Milik Negara (BUMN)

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Through the Business Judgment Rule Doctrine, it has provided legal protection for directors of state-owned companies who cannot be held individually responsible for losses to state-owned companies by proving that the losses were not due to the fault or negligence of the directors of state-owned companies, have made business policies in accordance with good faith and the principle of prudence and the absence of personal conflicts of interest when making business policies by BUMN directors.

4. Conclusion

Based on the description of the discussion, the conclusions that can be drawn are:

- 1) Law Number 40 of 2007 concerning Limited Liability Companies basically regulates the protection of Directors in BUMN companies in protecting the rights of directors through the concept of the Business Judgment Rule doctrine as regulated in Article 97 Paragraph (5) and Article 104 Paragraph (4) Law Number 40 of 2007 concerning Limited Liability Companies
- 2) Through the Business Judgment Rule Doctrine, it has provided legal protection for directors of state-owned companies who cannot be held individually responsible for losses to the state-owned company by proving that the losses were not due to the fault or negligence of the directors of the state-owned company, and have made business policy decisions in accordance with their i'tikad. good and prudent principles and no personal conflicts of interest when making business policies by BUMN directors.

Based on the conclusions that have been obtained, the author can provide suggestions, namely:

1. The government, especially the Legislative Institution, needs clearer and firmer regulations regarding the application of the Business Judgment Rule doctrine in order to provide more legal certainty for directors of BUMN companies in carrying out the management of BUMN.
2. For directors of state-owned companies, it is necessary to have guidelines that are in accordance with statutory regulations before taking business policies in state-owned companies so that they can be legally protected and not easily criminalized for the business policies they take.

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