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Directors' Duties in Australia

Introduction

Australian law imposes a wide range of duties and obligations on directors of Australian companies. These duties range from statutory and common law duties to act with care and diligence and prevent insolvent trading to more specific and evolving obligations such as disclosure requirements and managing environmental, cyber security and AI risks.

This Guide provides an overview of the key directors' duties and other obligations (such as financial reporting and continuous disclosure) and outlines other areas of critical relevance for directors in navigating their businesses under the framework of Australian law, including corporate governance priorities and other sources of liability.

As a trusted adviser to many of the top companies in Australia and globally, Baker McKenzie is recognised for its extensive experience advising boards of Australian companies.

This Guide provides you with a broad overview of the duties of directors of Australian companies, however it is not intended to be an exhaustive analysis of all relevant legal requirements. If you would like to discuss any of the issues raised in this Guide, please contact our expert team.

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All dollar amounts stated in this Guide are Australian dollars.

About Baker McKenzie Australia

Baker McKenzie is unique among Australian law firms in our ability to deliver the knowledge, experience and capabilities of our global network to our clients in the local market. Companies benchmark themselves against the best practice in their sectors, globally, not just domestically. We provide our clients with the innovative legal solutions they expect from the global top-tier law firm, together with commercial pragmatism and seasoned experience as leaders in Australia. Baker McKenzie has been an integral part of the Australian legal landscape since 1964.

1. Position as a director

1.1 Appointment of directors

A proprietary company must have at least one director. At least one director of a proprietary company must ordinarily reside in Australia.[1]

A public company must have at least three directors. At least two directors of a public company must ordinarily reside in Australia.

Only an individual (i.e., a natural person) who is at least 18 years of age may be appointed as a director. A person must give written consent to act as a director of a company before being appointed.

Directors may be appointed by the members of the company in a general meeting or by the other directors in a board meeting. Directors leave office if they resign, retire, are removed in accordance with the *Corporations Act 2001* (Cth) (**Corporations Act**) and/or the company's constitution, or are disqualified from managing companies.

Certain personal details of a director, such as their full name, date and place of birth and usual residential address, must be notified to the Australian Securities and Investments Commission (**ASIC**) shortly after the director is appointed. These details then become publicly available, and must be updated if they change.

Also, each director of an Australian company is required to verify their identity by holding or applying for a unique director identification number. For further details, see "Director identification regime" in section 1.9 below.

Notification must also be made to ASIC if a director ceases acting as a director within 28 days of the date that the person ceased acting as a director. If a director's resignation is not notified to ASIC within 28 days, the resignation is not effective until the date that ASIC is notified. Also, a director's resignation or a resolution of members of a proprietary company to remove a director, is generally not effective if the company does not have at least one other director remaining at the end of the day the resignation or resolution (as applicable) is to take effect.

1.2 Alternate directors

A director may generally appoint an alternate to exercise some or all of the director's powers for a specified period (for example, to attend and vote at board meetings when the director is unable to attend). The method of appointment and powers of alternate directors are usually set out in the constitution of the company. The appointment must be in writing, and the company must retain a copy of the appointment. A person acting as an alternate director is subject to the same duties and liabilities as other directors. The appointment and removal of an alternate director must be notified to ASIC.

1.3 Nominee directors

Appointed directors may also be nominee directors. A nominee director is a person who is appointed as a director to represent the interests of a stakeholder, such as a major shareholder or creditor. The method of appointment and powers of nominee directors are typically provided in the company's constitution or a shareholders agreement. Nominee directors must reconcile their obligations owed as a representative of their nominator with their overriding duty to the company as a whole. Although a nominee director's principal duty

[1] If a proprietary company wishes to raise capital through equity crowd-sourced funding (CSF), it will be subject to Australia's CSF regime which requires, amongst other things, that the company have at least two directors. If the company has two directors, one of the directors must be ordinarily resident in Australia. If the company has more than two directors, a majority of the directors must be ordinarily resident in Australia.

is to the company (rather than to their nominator), they can consider the interests of their nominator if they genuinely believe they are acting in the best interests of the company.

1.4 De facto and shadow directors

A person may be deemed to be a director of a company (even if they have not validly been appointed as a director) if:

- they act in the position of a director (**de facto director**); or
- the directors of the company are accustomed to act in accordance with the person's instructions or wishes (**shadow director**).

Determining whether or not a person is a de facto or shadow director will be based on the control and influence they have over the company's affairs, including considering the duties performed by that person in the context of the particular company. However, a person will not be considered to be a de facto or shadow director merely because the directors of a company act on advice given by the person in a professional advisory capacity (for example, an accountant or lawyer), or the person's business relationship with the directors or the company.

A person acting as a de facto director or shadow director is subject to the same duties and liabilities as a formally appointed director.

1.5 Other officers

Directors' duties do not just apply to directors, but can extend to other company officers. Specifically, the duties to:

- act with care and diligence, and in good faith and for a proper purpose, apply to all officers; and
- not misuse position or information apply to officers and employees.

Other officers of a corporation include:

- company secretaries;
- any person:
  - who makes or participates in making decisions that affect the whole or a substantial part of the business;
  - who has the capacity to affect significantly the company's financial standing; or
  - on whose instructions or wishes the directors are accustomed to acting (excluding advice given in professional capacity); and
- receivers, administrators, restructuring practitioners, liquidators and trustees.

The key to determining whether someone is an officer is to look at the person's position in the organisation and role in the particular decision. Although those immediately below board level and with an official title (e.g., CFOs, COOs and General Counsel) would typically be more likely to fall under the definition of an "officer", they are not automatically caught. The definition will cover anyone engaging in conduct that significantly influences a company's financial decisions or affairs, even though the ultimate decisions may be made by others.

1.6 Functions of the board of directors

The board's functions depend on the circumstances of the company and may include to:

- appoint and reward the company's chief executive;
- set goals, formulate strategies and approve business plans for the company;
- approve annual budgets and key management decisions (such as decisions on major capital expenditure, business acquisitions, restructuring and refinancing);
- monitor management performance and business results;
- set and review policies for member communication and provide reports to members;
- set and review budgetary control and conformance strategies; and
- monitor the company's corporate governance practices.

Although the directors of a company act collectively as a board, each director is individually subject to statutory and common law duties, including to act in good faith in the best interests of the company and with reasonable care and diligence.

1.7 The constitution

A company's internal management may be governed by the replaceable rules in the Corporations Act, by a constitution or by a combination of both.

It is common for a company to have a constitution. The constitution sets out rules by which the company is governed and regulates the relationships between the company, its officers and members. The constitution may include, amend or displace the replaceable rules in the Corporations Act.

The constitution typically includes provisions regarding:

- the share capital of the company, including procedures for issuing and transferring shares in the company;
- powers, rights and duties of members;
- appointment of officers and their powers; and
- the winding up of the company.

A company's constitution (if any) and any replaceable rules that apply to the company operate as a statutory contract that is binding on the company, each member and each director and secretary.

1.8 Responsibilities of individual directors

On a board of directors, individual directors may have distinct responsibilities to the company, depending on the nature of their particular role within the company.

Executive and non-executive directors

If there are executive and non-executive directors on a board, the executive directors will usually have greater responsibilities than the non-executive directors. The distinction between executive and non-executive responsibilities is reflected in the different standards of care applied to individual directors - a higher standard of care will automatically apply to executive directors (see section 2.3 below).

Managing directors

The board of directors can also choose to appoint a managing director to assume responsibility for the day-to-day management of the company. Where an individual director on a board would not have the ostensible authority to act alone on behalf of the company, a managing director may be empowered to act in a way akin to the board acting as a whole.

1.9 Director identification regime

Each director of an Australian company (including registered Australian bodies and registered foreign companies) is required to hold or apply for a unique identifier known as a "director identification number" (**director ID**). A director ID will be permanently assigned to each director, regardless of what company or companies they may be involved with over time, and will remain on record even if they cease being a director.

The aim of the director ID regime is to better track directors and their relationships between individuals and entities, in an effort to identify high-risk individuals and crack down on illegal activities such as phoenixing.

Under the director ID regime, directors appointed must apply for a director ID before their appointment. Directors must apply for their own director ID (as they need to verify their own identity). There is no application cost.

Substantial civil and criminal penalties apply for non-compliance with the requirements of the director ID regime.

2. Directors' duties

2.1 Who the duties are owed to

Directors must act for the benefit of "the company as a whole". In general, this means that directors must act in the interests of all members collectively. However, directors may sometimes be required or permitted to take other interests into account.

Individual members

In general, directors do not owe duties directly to individual members. However, in specific circumstances, a director may be found to owe a duty to an individual member. For example, a director acting as a proxy for a member at a meeting owes a duty to that member to vote according to their wishes.

Creditors

In addition to the duty to prevent insolvent trading (see section 2.6 below), directors may sometimes be required to take into account the interests of creditors, particularly where the company is insolvent or approaching insolvency. The duty to take into account the interests of creditors in certain circumstances when a company is approaching insolvency has been confirmed by UK courts, providing a gateway for applicability in other common law jurisdictions such as Australia.[2]

The Corporations Act also requires creditors' interests to be considered in specific circumstances (for example, where the company is proposing to pay a dividend, undertaking a capital reduction, buying back shares or financially assisting a person). For example, the Federal Court found that two former executive directors of Dick Smith breached their duty of care and diligence by approving a final dividend when the information available to them suggested that doing so would cause delays in the company's payments to creditors. The directors were held liable for damages equal to the dividend of almost $12 million.[3]

Employees

Directors do not owe any general duty to employees of the company. However, directors may breach their duties to the company if their actions cause the company to breach its obligations to employees. Directors (and others) are also prohibited from entering into agreements or transactions that are intended to avoid paying employee entitlements. Directors can be held personally liable for their companies' breaches under some employment and anti-discrimination laws (e.g., F*air Work Act 2009* (Cth) and *Sex Discrimination Act 1984* (Cth)). If the company is being wound up, a person who contravenes this prohibition is liable to compensate employees for their loss.

Corporate groups

Subject to the special case of wholly-owned subsidiaries outlined below, a director of a company owes duties to that company, and not to any related companies or any member who appointed the director. A director breaches their duty if they enter into a transaction or make a decision in the interests of a related company or appointing member if it is not also in the best interests of their company.

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[2] In *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25, the UK Supreme Court confirmed that directors owe a duty to creditors under the general law duty to act in the best interests of the company. The creditor duty may be enlivened where there is either imminent insolvency or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know. The precise nature of the duty is a question of fact and degree which needs to be balanced against shareholders' interests where they may conflict.

[3] *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd* [2022] NSWCA 165.

Wholly-owned subsidiaries

A director of a company that is a wholly-owned subsidiary of a holding company is taken to act in good faith in the best interests of the subsidiary if:

- the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company;
- the director acts in good faith in the best interests of the holding company; and
- the subsidiary is not insolvent at that time and does not become insolvent because of the director's act.

However, a director of a wholly-owned subsidiary must not disregard the subsidiary's interests entirely, and failure to identify and consider the consequences of their actions for the subsidiary may amount to a breach of their duty of care and diligence.

2.2 Overview of directors' duties

The directors of a company are, subject to its constitution, responsible for the overall management of the company. In performing their role, directors are subject to a range of duties and obligations under the Corporations Act, the common law and the company's constitution.

The key duties of directors are to:

- act with care and diligence;
- act in good faith and for a proper purpose;
- avoid conflicts of interest; and
- prevent insolvent trading.

A director who breaches any of their duties is liable to civil penalties. If the breach is reckless or dishonest, the director may also incur criminal penalties (see further, section 13 below).

Stepping stone liability

A director who unreasonably exposes their company to sanctions, civil liability or reputational damage by allowing the company to contravene the Corporations Act or another law, even if acting in accordance with the wishes of members, may be personally liable for a breach of their statutory duty of care to the company.[4] Any contravention of these duties may give rise to pecuniary penalties, disqualification from managing corporations and possible imprisonment.

This approach is known as "stepping stone liability" - essentially, depending on the responsibilities and degree of control a director has over the company and the particular circumstances of the company, the Court may find secondary personal liability on the part of a director for allowing a primary breach by the company. Further, members of the company cannot sanction, ratify or approve any such contravention by a director. Accordingly, although section 180 of the Corporations Act does not impose strict liability on directors for breaches of the Corporations Act or other laws, directors must exercise reasonable care and take precautions to avoid foreseeable risks of harm to the company and its members.

Stepping stone liability potentially applies to directors of all Australian companies, however public companies are disproportionality subject to ASIC's stepping stones liability cases. This is mainly because ASIC considers the impact of the misconduct on market, including potential loss of public confidence, in deciding whether or not to commence proceedings.

[4] *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52.

2.3 Duty to act with care and diligence

A director or other officer must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- were a director or other officer of a company in the same circumstances; and
- occupied the same office and had the same responsibilities within the company as the director or other officer.

The conduct required to satisfy this duty depends on the company's circumstances and the particular director's position and responsibilities. Executive directors, and other directors with special skills or experience, are held to a higher standard. For example, a finance director who is insufficiently diligent in relation to financial matters may breach this duty even though identical conduct by a non-executive director may not constitute a breach. Similarly, any special responsibilities held by the chair of the board may affect the scope of their duty of care.

However, a director's conduct will not necessarily be excused due to a lack of skills or experience. All directors are required to meet a minimum objective standard. For example, all directors are expected to take reasonable steps to be in a position to guide and monitor the management of the company. This means that directors should, at a minimum:

- become familiar with the fundamentals of the company's business;
- actively keep informed about the company's activities;
- monitor the company's affairs; and
- maintain familiarity with the financial status of the company, including reviewing the company's financial statements and board papers, and making further inquiries where appropriate to do so.

In December 2022, ASIC commenced civil penalty proceedings in the Federal Court against 11 current and former directors and officers of The Star Entertainment Group Limited (Star) for allegedly breaching their duty of care under section 180 of the Corporations Act. ASIC alleges that Star's board and executives failed to give sufficient focus to the risk of money laundering and criminal associations that are inherent in the operation of a large casino with an international customer base. This action is significant because it is the first time ASIC is pursuing an entire board and senior management for alleged breaches of their directors' duties in relation to non-financial risk management (i.e., compliance with specific regulatory obligations of the company, in this case state casino laws and federal money laundering laws, as well as reputational risk). On 24 February 2025, the Federal Court found two former executives had breached their duty of care, ordering each to pay a penalty and disqualifying them from managing corporations for a period. The proceedings against Star and the remaining board members is still on foot. This case flags that all officers (particularly those of large, listed and high-profile companies) must play an active role in identifying and addressing key risks specific to the company (including non-financial risks).

Business judgment rule

To avoid unnecessary restrictions on proper entrepreneurial activity, there is a safe harbour for honest, informed and rational business decisions, called the "business judgement rule". A director who makes a "business judgment" is taken to satisfy their duty of care and diligence in respect of the judgment if they:

- make the judgment in good faith for a proper purpose;
- do not have a material personal interest in the subject matter of the judgment;
- inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

- rationally believe that the judgment is in the best interests of the company.

A "business judgment" is any decision to take or not take action with respect to a matter relevant to the business operations of the company. For example, decisions to enter into transactions and matters of planning and forecasting are likely to constitute "business judgments", but not the mere performance of directors' oversight responsibilities.

To benefit from the rule, a director must make a conscious and informed decision, even if it is a decision not to take action. A director who simply fails to turn their mind to a matter has not made a business judgment and is not protected by the rule.

This statutory business judgment rule provides a defence in relation to the duty of care and diligence only. It does not apply in relation to a director's other duties (although a court may still be reluctant to review a director's business judgments). The rule also does not apply to other potential liabilities of directors, including liability for misstatement in a prospectus or takeover document, insolvent trading or misleading or deceptive conduct. However, it is a sound guiding principle for making business decisions generally.

In October 2024, the Australian Institute of Company Directors (**AICD**) published a practice statement Directors' oversight of company compliance obligations, providing guidance for directors on practical steps they can take to discharge their duty of care and diligence in overseeing their companies' compliance obligations.

In December 2024, the business judgement rule was successfully used by directors of a listed company in response to an alleged breach of their duty of care. In *Pacific Current Group Limited v Fitzpatrick* [2024] FCA 1480, the Federal Court affirmed key principles of directors' duties and the business judgment rule, including that internal planning decisions can be protected by the rule, even where those decisions relate to complying with the law. The AICD published Directors use business judgement rule successful in court defence in April 2025, highlighting key takeaways for directors, including:

- a director's permissible reliance on others will depend on the company's characteristics, the skills and experience of the director and delegate, and the decision-making risks;
- executive directors have a higher duty of oversight and are unable to rely on other officers to the same extent as non-executive directors; and
- when evaluating a director's decision, consider their reasonable perception of the available options at the time (without the benefit of hindsight).

2.4 Duty to act in good faith and for a proper purpose

A director or other officer must exercise their powers and discharge their duties:

- in good faith in the best interests of the company; and
- for a proper purpose

The test for this duty is objective – the officer's conduct will be assessed by reference to what a reasonable person, having the same knowledge and skills as the officer, would consider to be the company's best interests. The company's interests refers to the collective interests of shareholders as a whole.

The company's constitution may specify the proper purposes of a power. Otherwise, the proper purpose will be determined based on the particular circumstances and the usual function of such a power. For example, one proper purpose of the power to issue shares is to raise capital. By contrast, issuing shares for the substantial purpose of diluting an existing member's voting power, is likely to be an improper exercise of the power.

It is not sufficient that a director honestly believes their actions are for a proper purpose if a court considers that purpose to be improper.

A director may have exercised a power for both improper and proper purposes. If the director would not have exercised the power "but for" an improper purpose, they may be found to have breached this duty.

Misuse of position or information

The duty to act in good faith and for a proper purpose is supplemented by additional statutory duties to not improperly use position or information. These duties provide that directors or other officers must not improperly use their position or information obtained by virtue of their position, to gain an advantage for themselves or someone else, or cause detriment to the company.

Such conduct is "improper" if it breaches the standards of conduct that would reasonably be expected of a person in the officer's position, regardless of whether the officer considers it improper.

The duty not to misuse company information continues to apply after a person ceases to be a director, officer or employee, provided that the person obtained the information while they were in that role. It also applies to information which is not confidential. A general duty of confidence also applies in relation to information which is confidential.

A person can also be found to have committed a criminal offence, punishable by imprisonment and/or a substantial fine, if they are reckless or dishonest in failing to exercise their duties of good faith or misusing their position or information.

It is important for directors to understand the separation between themselves and their company. The size or proprietary nature of a company, including family-owned businesses, does not exempt directors from their legal obligations. Directors have been prosecuted for dishonestly using their position for personal gain, such as transferring company funds to personal accounts or credit cards, and this may be the case even when claiming the funds were intended as future remuneration.[5]

2.5 Duty to avoid conflicts of interest

Directors must not place themselves in a position where there is an actual conflict, or a real possibility of conflict, between their duties to the company and a personal interest or duty owed elsewhere (for example, to another company).

Whether a real and sensible possibility of conflict exists will be determined by the position of a reasonable person looking at the relevant facts and circumstances. The test is not whether the director thinks they can set aside the other interest or duty and not have it affect their decision-making. It is whether a fair-minded third person might see the potential for their decision-making to be impacted by it. In essence, the question to ask is: "Can I bring an independent judgement to bear, or will the conflict divide my loyalties?"

It is not necessary for the company to suffer any detriment or the director to obtain any advantage in order for this duty to be breached.

The exact scope of the duty, and the steps required to avoid a breach, may be affected by the company's constitution, as discussed below. A general requirement, depending on the nature of the director's interest or other duty, is disclosure to the company. Once the conflict is identified and recorded, the board can then decide how it can be managed. For example, the conflicted director may be required to:

- refrain from participating in any discussion about related matters;
- remove themselves from the room; or
- abstain from voting on any matter related to the conflict.

[5] NSW director charged with dishonestly using her position (ASIC, 2025)

Disclosure of interest and other procedural requirements

A director who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest, unless an exception applies (for example, the interest relates to a proposed contract that is subject to approval by members). The notice must provide details of the nature and extent of the interest and its relation to the company's affairs and must be given at a directors' meeting as soon as practicable after the director becomes aware of their interest in the matter. Standing notice of the interest may also be given.

In addition, a director of a public company who is required to disclose such an interest must not be present at a directors' meeting while the relevant matter is being considered and must not vote on the matter, unless the disinterested directors resolve that the interest should not disqualify the director. The same restriction usually does not apply to directors of a proprietary company, depending on its constitution and the particular circumstances. However, even where a director is permitted to vote on a matter in which they are interested, they must do so with regard to the best interests of the company.

The constitution of the company, whether public or proprietary, may also impose additional restrictions regarding directors' interests or requirements regarding disclosure of interests and other procedures to be complied with by interested directors.

Dealing with the company

The duty to avoid conflicts of interest may be breached where a director enters into, or otherwise has a personal interest in, a contract or other transaction with the company, or is a director of two companies that are transacting with each other.

If the director breaches the duty (for example, by not complying with disclosure and other requirements), the company may be entitled to avoid the transaction and the director may be liable to compensate the company for any loss it suffers or account to the company for any profit made by the director.

However, under the replaceable rules in the Corporations Act, if the director of a proprietary company complies with the requirement to disclose any personal interest before a transaction is entered into, the director may retain benefits under the transaction and the company cannot avoid the transaction merely because of the director's interest. Even if a proprietary company's constitution displaces this rule, it will typically contain a provision with similar effect.

Nevertheless, an interested director is not entitled to deal freely with the company merely because they disclose their personal interest. The director must continue to satisfy all of their duties, particularly the duties to act in the company's best interests and with care and diligence. In some circumstances, those other duties may oblige an interested director to take additional action to protect the company's interests, such as disclosing further information about the transaction or actively attempting to prevent a transaction that is not in the company's interests.

Additional restrictions apply to dealings between a public company and its directors – see section 7.1 below.

Appropriation of corporate opportunities

A director must not appropriate, or divert to another person, a business opportunity which the company is considering or pursuing, or which the company could reasonably be expected to have an interest in. This fiduciary duty to the company continues to operate even after a director's relationship with the company ends, such as due to a retirement or resignation.

A director who breaches this rule is liable to account to the company for any profit made by the director, even if the transaction was fair to the company or the company was unable to exploit the opportunity itself or unlikely to have made the profit in question.

Authorisation by members

If a director has fully disclosed a personal interest or other duty, the members may authorise the director to act in what would otherwise be a breach of the above conflict rules or ratify a past breach by the director, unless the company's constitution provides otherwise.

For example, fully informed members may authorise a director to enter into a transaction with the company or to exploit an opportunity that the company does not wish to exploit. Such authorisation or ratification typically cannot be provided by the disinterested directors unless the constitution gives them that power.

Neither the members nor the disinterested directors are able to authorise or ratify a breach of a director's statutory duties (including the duties to act in the company's best interests and for a proper purpose), so an interested director must continue to satisfy those duties even if a potential conflict has been waived. However, in the case of a director's statutory duties not to "improperly" use their position or information (as discussed above), an appropriate approval may have the effect of removing any impropriety so that the duty is not breached.

In February 2025, the AICD published Managing conflict of interest or duty goes beyond declaration, providing directors with timely guidance on how to successfully handle conflicts of interest at board level.

2.6 Duty to prevent insolvent trading

Directors have a duty to prevent the company from trading while insolvent. A director breaches this duty if:

- the company is insolvent, or becomes insolvent, by incurring the debt (or a range of debts including the debt);
- at that time, there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent, by incurring the debt(s); and
- at that time, the director is aware that there are grounds for suspecting insolvency, or a reasonable person in a similar position would suspect insolvency.

A director who breaches this duty may be ordered by a court to pay a civil penalty and/or to pay to the company, its liquidator or the relevant creditor compensation equal to the amount of loss suffered by the creditor. In addition, a director who breaches this duty dishonestly may incur criminal penalties.

Insolvency

Generally, a company is insolvent if it is unable to pay all its debts as and when they fall due, determined by reference to the actual circumstances of the company. This is predominantly a cash flow rather than a balance sheet test, requiring an assessment of whether the company's anticipated current and future cash flows will be sufficient to enable its current and future liabilities to be paid when due.

A debt may be incurred not only by incurring a liability in the course of trading but also, for example, by declaring or paying a dividend or making a capital reduction.

However, the company's overall financial position may also be considered, having regard to commercial realities. For example, a temporary lack of liquidity or cash reserves may not constitute insolvency if the company is able to realise assets or raise funding in a timely manner.

Defences

It is a defence to a civil claim for insolvent trading if:

- the director had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent even if it incurred the debt;

- the director reasonably relied on a competent and reliable person to provide adequate information about the company's solvency and, on the basis of that information, expected that the company was and would remain solvent;
- due to illness or for some other good reason, the director did not take part in the management of the company when the debt was incurred; or
- the director took all reasonable steps to prevent the company from incurring the debt.

Safe harbour

Directors have the protection of a legislative carve-out from the duty to prevent insolvent trading. Specifically, directors of financially distressed companies are protected in relation to debts that the company incurs while pursuing a restructure or other course of action that is likely to deliver a better outcome for the company rather than proceeding immediately to voluntary administration or winding up.[6]

This safe harbour applies from the time the director starts developing a course of action until:

- the end of a reasonable period of time if the director fails to take the course of action within that reasonable period of time;
- the director stops taking the course of action;
- the course of action stops being reasonably likely to lead to a better outcome for the company; or
- the company goes into administration or liquidation.

Directors will not be able to rely on the safe harbour if the company is not meeting its obligations in relation to employee entitlements or its taxation reporting obligations.

Further, in order to have the protection of the safe harbour, directors bear the burden of adducing or pointing to evidence that suggests a reasonable possibility that they have been acting under the safe harbour.

Bearing the evidential burden in mind, in order to ensure that the safe harbour applies, directors should:

- obtain ongoing legal and financial advice as soon as they suspect insolvency or a risk of insolvency;
- obtain ongoing advice from a sufficiently briefed and appropriately qualified turnaround or restructuring professional;
- formulate a detailed turnaround plan that addresses operational, strategic and financial issues, including proposed courses of action; and
- carefully document the steps taken in implementing the turnaround plan through board minutes and file notes.

An independent review of the safe harbour provisions was conducted in 2021 and resulted in a number of recommendations aimed at simplifying and clarifying the wording of the provisions, including the development of a best practice guide to assist directors with understanding their obligations.[7] While these recommendations are yet to be implemented, progress is underway.

In December 2024, ASIC published updates to its insolvent trading guidance (Regulatory Guide 217 Duty to prevent insolvent trading: Guide for directors) aimed at helping directors better understand and comply with

[6] On 9 July 2024, the Government enacted the *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024* (Cth) which, among other things, expanded the scope of the safe harbour provisions, including by clarifying that ordinary trade debts incurred in the usual course of business are covered (in addition to debts incurred in connection with a course of action likely to lead to a better outcome).
[7] Review of the Insolvent Trading Safe Harbour Report (November 2021)

their duty to prevent insolvent trading. The updates provide clearer guidance on safe harbour provisions, emphasise timely action, and include revised indicators of insolvency and more practical examples.

2.7 Responsibility for administrative obligations

A company's secretary is responsible for ensuring that the company complies with certain requirements under the Corporations Act, such as the requirements to have a registered office and to notify ASIC of certain details. If a proprietary company does not have a secretary, each director is instead responsible for any contravention of such requirements, unless the director took reasonable steps to ensure the company's compliance.

2.8 Liabilities of corporate trustees

If a company which acts as trustee:

- incurs a liability which it cannot discharge; and
- is not entitled to be indemnified by the trust against that liability due to the terms of the trust or because the company committed a breach of trust or acted outside the scope of the trust,

the directors are jointly and severally liable to discharge the trustee company's liability (unless any particular director is held responsible).

3. Delegation and reliance on others

3.1 Delegation

Unless the company's constitution provides otherwise, the directors of a company may collectively (but not individually) delegate any of their powers to a committee of directors, an individual director, an employee of the company or any other person.

The appointed delegate must exercise the powers delegated in accordance with the directions of the directors. Any exercise of power by the delegate is as effective as if the directors themselves had exercised it. However, each director remains responsible for the exercise of the power by the delegate unless the director believed, on reasonable grounds:

- that the delegate would exercise the power in conformity with the duties imposed on directors by the Corporations Act and the company's constitution; and
- in good faith and after making proper inquiry, that the delegate was reliable and competent in relation to the power delegated.

3.2 Non-delegable powers and responsibilities

Irrespective of the above, there are certain powers and responsibilities of directors that cannot be delegated and must be exercised by directors themselves. Some of the non-delegable powers and responsibilities include:

- becoming and remaining familiar with the operations and business fundamentals of the company;
- monitoring and remaining informed as to the company's operations (for example, by regularly attending board meetings and making inquiries as to the company's operations);
- maintaining a reasonably informed opinion of the financial status and solvency of the company;
- understanding the company's financial status including, at minimum, having a basic understanding of financial statements and the general accounting standards applicable to the company; and
- approving the company's financial statements.

Also, directors have an obligation to generally supervise and remain informed of a delegate's use of any delegated powers and responsibilities, including applying the director's own knowledge to information provided to the director by that delegate.

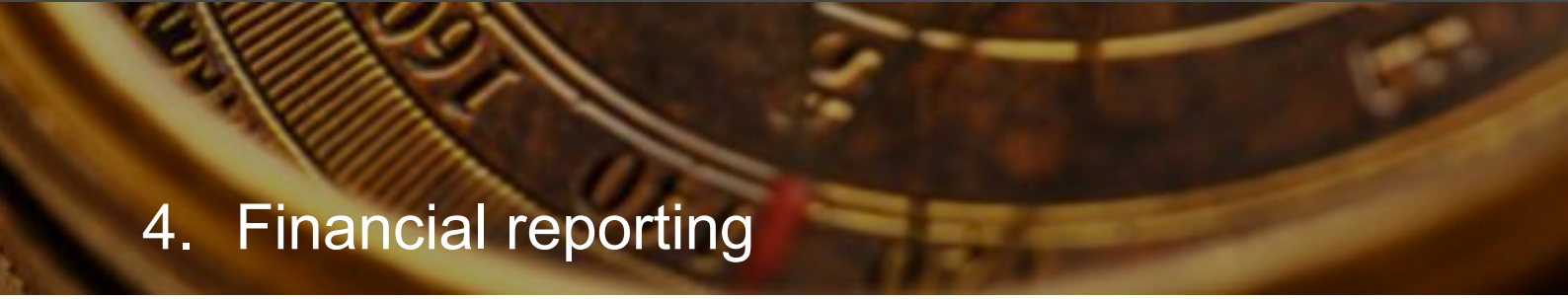
3.3 Reliance on information or advice

In certain circumstances, a director is entitled to rely on information, or professional or expert advice given or prepared by:

- an employee of the company whom the director reasonably believes to be reliable and competent in relation to the relevant matters;
- a professional adviser or expert if the director reasonably believes that the relevant matters are within that person's professional or expert competence;
- another director or officer in relation to matters within that person's authority; or
- a committee of directors on which the director did not serve in relation to matters within the committee's authority.

A director's reliance on such information or advice is presumed to be reasonable if the reliance was made in good faith and after the director made an independent assessment of the information or advice (having regard to the director's knowledge of the company and the complexity of the structure and operations of the company).

Directors must bring an independent mind to bear when considering professional or expert advice and must not simply accept the views of others. Also, directors should not automatically expect to be kept properly informed by senior management or others of all important matters relating to the company. Directors should not only exercise independent judgement on company matters, but also regularly engage with senior management and other key personnel in the company, to facilitate a healthy flow of information between the board and management (see further, section 14 below).



4. Financial reporting

4.1 Financial records

All companies are required to keep written financial records and retain them for at least seven years after the transactions covered by the records are completed.

The financial records must correctly record and explain the company's transactions and financial position and performance and enable true and fair financial statements to be prepared and audited.

4.2 Reporting obligations

Directors must inform themselves of the reporting obligations of their company depending on its size and type. Public companies, disclosing entities, large proprietary companies and certain small proprietary companies are all required to prepare annual financial reports and directors' reports.

The basic financial reporting requirements of these companies are, with limited exceptions, to:

- prepare an annual financial report and directors' report;
- arrange for the financial report to be audited;
- send the financial report, directors' report and auditor's report to members;
- lodge the financial report, directors' report and auditor's report with ASIC (or the Australian Securities Exchange (**ASX**) if the company is listed on ASX); and
- if the company is a public company, present the financial report, directors' report and auditor's report at the annual general meeting (**AGM**).

Disclosing entities (including listed companies and certain companies with 100 or more members) also have half-yearly reporting obligations, including to:

- prepare a half-yearly financial report and directors' report and have the financial report audited or reviewed by an auditor and obtain an auditor's report; and
- lodge the financial report, directors' report and auditor's report with ASIC (or ASX if the company is listed on ASX).

Companies listed on ASX have additional periodic reporting obligations under the ASX Listing Rules.

Proprietary companies that are subject to Australia's crowd-sourced funding regime and have raised over $3 million must also have their financial statements audited.

4.3 Financial report

The financial report of a company for a financial year consists of:

- the financial statements for the year;
- notes to the financial statements; and
- a directors' declaration about the statements and notes.

Financial statements and notes

The financial statements and notes must comply with Australia's accounting standards issued by the Australian Accounting Standards Board (**Accounting Standards**) and must give a true and fair view of the financial position and performance of the company (or a consolidated group, if required by the Accounting Standards).

If a company is required to prepare a financial report, it is generally also required to have the report audited and obtain an auditor's report.

Directors' declaration

As part of the financial report, the directors of a company must make a declaration about the financial statements and notes. This declaration must be made in accordance with a resolution of the directors. It must also specify the date on which the declaration was made and be signed by a director.

The directors' declaration must include declarations such as whether, in the directors' opinion:

- there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable; and
- the financial statements and notes are in accordance with the Corporations Act, including that they:
  - comply with the Accounting Standards; and
  - give a true and fair view of the financial position and performance of the company.

The directors of a listed company must only make the directors' declaration after each person who performs a chief executive function or a chief financial officer function has given the directors a declaration regarding the company's financial records, financial statements and notes.

Consolidated entity disclosure

With effect from 9 April 2024, changes to the Corporations Act were implemented requiring all Australian public companies (listed and unlisted) to include a new "consolidated entity disclosure statement" in their annual financial reports, disclosing information about their consolidated entities (including their country of tax domicile). Directors, and CEOs and CFOs of listed companies, are required to confirm in their respective declarations that the consolidated entity disclosure statement is true and correct. This change applies in relation to financial years commencing from 1 July 2023.[8]

4.4 Directors' report

The directors' report for a financial year must include information such as:

- the names of the directors;
- a review of the company's operations and the results of those operations;
- details of any significant changes in the company's state of affairs;
- the company's principal activities, and any significant changes in the nature of those activities;
- details of dividends paid, or recommended or declared but not paid;
- significant post-financial year matters, and likely developments in the company's operations for future years;

[8] *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Act 2024* (Cth).

- if the company's operations are subject to any particular and significant environmental regulation, details of the entity's performance in relation to environmental regulation; and
- indemnities given and insurances paid by the company for its officers and auditor.

The directors' report for a listed company must include additional information such as:

- each director's interests in shares and other securities of the company or a related company;
- directorships of other listed companies held by a director in the current or previous two financial years;
- information to enable an informed assessment of the company's business strategies and prospects;
- details of amounts paid or payable to the company's auditor for non-audit services; and
- a report on the remuneration of key management personnel, as discussed below.

Remuneration report

The remuneration report must include details of the remuneration of each member of the key management personnel of the company (or the consolidated group, if applicable), such as details of:

- the person's short-term, long-term, termination and post-employment benefits;
- any performance conditions that apply to any part of the person's remuneration;
- equity instruments, and options and rights over them, held or controlled by the person or a close family member of the person; and
- the duration, termination notice periods and termination payments under any contract of employment with the person.

At a listed company's AGM, a resolution to adopt the remuneration report must be put to a vote of members (excluding key management personnel covered by the report and their closely related parties). This vote is advisory only and does not bind the directors or the company. However, if 25% of votes oppose adoption of the report at two consecutive AGMs, at the second AGM members may resolve to hold a "spill meeting" within 90 days at which they will vote to replace or re-appoint all directors (except for a managing director whose appointment is indefinite). If the company does not hold the spill meeting within 90 days, each director at that time commits an offence.

Further, at a listed company's AGM, the chair must allow a reasonable opportunity for the members to ask questions about, or make comments on, the remuneration report.

4.5 Directors' obligations

Directors have an obligation to take all reasonable steps to comply with, or to secure compliance with, the financial record-keeping and reporting obligations set out in the Corporations Act. A director commits a criminal offence if they breach this obligation dishonestly.

5. Company meetings

5.1 Member meetings

Member meetings provide opportunities for a company and its directors to provide information to members and agree key decisions. A public company must hold an AGM within 18 months of its incorporation and within 5 months of the end of its financial year. There is no requirement for a proprietary company to hold an AGM, but certain actions (such as changing the company's name or its capital structure) are required to be approved by members.

Meetings of members can be called by a director or at the request of members with at least 5% of the votes that may be cast at the meeting. An unlisted company must give at least 21 days' notice in advance of a meeting and a listed company must give at least 28 days' notice in advance of a meeting, unless the constitution specifies a longer period of notice.

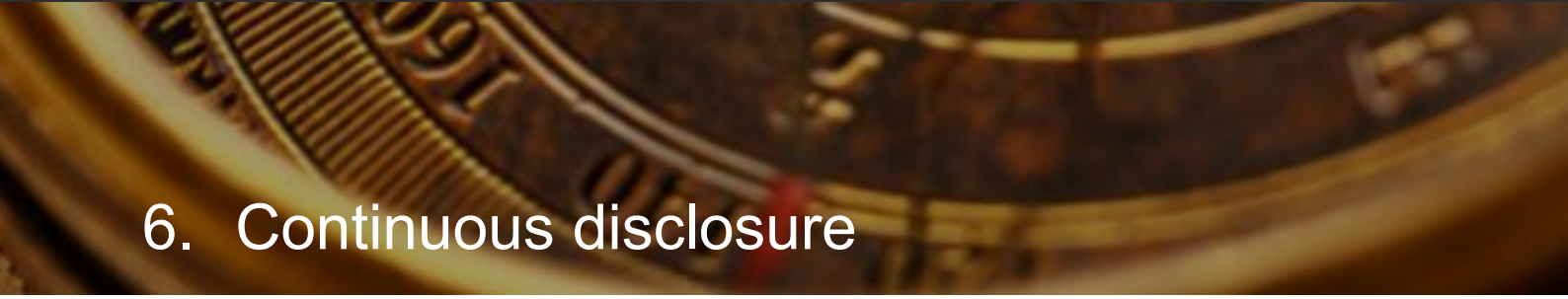
5.2 Director meetings

Meetings of directors are less regulated than member meetings. The rules applying to directors' meetings are typically contained in the company's corporate documents, including the constitution and members agreement (if any). Some matters, such as resolutions required for key decisions and use of technology, may need to follow Corporations Act requirements.

5.3 Hybrid or virtual meetings

Companies are permitted to hold hybrid meetings and, if expressly provided by the company's constitution, virtual-only meetings.[9] The Corporations Act specifies particular requirements for companies to comply with if they convene and hold meetings using virtual technology. Generally, all meetings must allow members as a whole a reasonable opportunity to participate in the meeting. This includes, for example, holding the meeting at a reasonable time and allowing members to ask questions and make comments both orally and in writing. (The amendments to the Corporations Act that permitted online meetings and electronic execution were under statutory review, with the final report released in August 2024 essentially recommending no changes to these amendments.)

[9] In April 2023, the Federal Court upheld a broad interpretation of company directors' power to change the mode of general meetings, allowing directors to change the venue of a meeting called by shareholders to be virtual only (*Keybridge Capital Limited v WAM Active Limited [2023]* FCA 339).



6. Continuous disclosure

In addition to the periodic reporting obligations outlined in section 4 above, listed companies and other disclosing entities have continuous disclosure obligations under the Corporations Act and the ASX Listing Rules (as applicable).

An entity listed on ASX must immediately notify ASX of any information concerning the entity that would reasonably be expected to have a material effect on the price or value of its securities. Unlisted disclosing entities must similarly notify ASIC as soon as possible of materially price-sensitive information that is not generally available (or follow ASIC's published guidance regarding website disclosure). In both cases, there is a limited exception in relation to certain confidential information.

The disclosure obligations extend to both newly created and emerging information, as well as to information concerning matters that have ceased to exist, such as the termination of a material relationship. In *ASIC v iSignthis Limited* [2024] FCA 669, the Federal Court held that iSignthis engaged in misleading conduct and breached its continuous disclosure obligations by failing to disclose that a significant revenue item was one-off and not recurring and that VISA had terminated its relationship with the company.[10]

An ASX-listed entity must also disclose other specific information to ASX, such as the material terms of employment, service and consultancy agreements with directors or their related parties, and details of directors' interests in securities of the entity or a related entity. If details of a director's interests in securities are not disclosed to ASX by the entity, the director is personally obliged to notify ASX, and commits an offence if they fail to do so.

A "due diligence" defence is available if a director takes all reasonable steps to ensure that the entity complies with its continuous disclosure obligations and reasonably believes that the entity is complying.

In 2021, permanent changes were made to the continuous disclosure laws under the Corporations Act, heightening the bar for civil contraventions of these obligations (**2021 Reforms**). Under the 2021 Reforms:

- disclosing entities and their directors are only to be exposed to civil liability for continuous disclosure breaches if there has been "knowledge, recklessness or negligence" (**Fault Test**) in updating the market with price sensitive information (instead of the previous "reasonable person" test); and
- the Fault Test must also be established for a breach under the misleading or deceptive conduct provisions of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth), meaning that a breach of continuous disclosure obligations no longer automatically triggers misleading and deceptive conduct liability unless the Fault Test is proven.[11]

This standard applies both in proceedings brought by ASIC and in private proceedings, such as shareholder class actions.

The 2021 Reforms did not impact:

- the existing criminal offence for failing to comply with the continuous disclosure obligations under the ASX Listing Rules and the Corporations Act;

[10] It may not be necessary to disclose a counterparty's decision to terminate a relationship if the parties are still engaged in negotiations to resolve the dispute which satisfy the disclosure exception for incomplete negotiations. That is, the exception not only applies to negotiations to establish a relationship but can extend to negotiations intended to resolve a dispute with the intention of preserving a business relationship.

[11] A director who is found not to be liable for continuous disclosure breaches because the director did not **actually** know the information was price sensitive information may still breach their duty to act with reasonable care and diligence if they **should** have known the information is likely to be price sensitive information (see *Australian Securities and Investments Commission v Blue Star Helium Limited (No 4)* [2021] FCA 1578).

- liability for disclosing information to the market that is misleading or deceptive or if guidance or other forward-looking statements are made without reasonable grounds; or
- ASIC's power to issue infringement notices to listed entities, if ASIC has reasonable grounds to believe that an entity has failed to disclose non public information that a reasonable person would consider materially price-sensitive,

none of which require the Fault Test to be established.

On 12 August 2024, the Government response to the report of the independent review was published, agreeing to each of the following key recommendations:

- the Fault Test be removed for ASIC proceedings, noting that this would allow for more efficient enforcement of the regime;
- the Fault Test be retained for private proceedings (including class actions), but to reconsider if, in the longer term, evidence shows that this has a negative effect on disclosure standards or practices; and
- if the Fault Test is retained, amendments be made clarifying its application, noting that this was considered while drafting the mandatory climate-related financial reporting legislation.

Given that the Government has decided to repeal or amend the 2021 Reforms, the bar for liability will potentially be lowered from the Fault Test to the previous "reasonable person" test. Once these changes take effect, the risk of regulatory and class actions for continuous disclosure breaches by companies and directors is likely to be heightened. Continuous disclosure breaches are one of ASIC's enduring enforcement priorities (see section 14 below), and ASIC has been vigorously policing these rules. Shareholder class actions are also an ongoing threat in this area and can have a particularly damaging effect for companies and their directors.

ASX Compliance Update 2/25 now provides listed entities with greater scope not to name the counterparty in an announcement about a market sensitive contract if the entity considers that the identity of the counterparty is not, of itself, market sensitive information.

The potential penalties for failing to comply with disclosure rules are severe. Civil and criminal penalties apply, and directors also face an increased risk of being held personally liable (see section 13 below), as ASIC and aggrieved shareholders can take action against directors for breach of the continuous disclosure laws and also for breach of their duty of care to the company under the "stepping stone liability" principle (see section 2.2 above).

The court will use its discretion to impose severe penalties for egregious director misconduct that affects the investing public, including significant fines and being suspended from managing corporations for a number of years. For example, in February 2023 the Federal Court ordered GetSwift Limited (**GetSwift**) to pay a penalty of $15 million, being the largest penalty handed down against a company for breaching continuous disclosure laws. GetSwift's former CEO and executive chairman was ordered to pay a penalty of $2 million and disqualified from managing corporations for 15 years. Two other former directors were ordered to pay penalties of $1 million and $75,000 and disqualified from managing corporations for 12 years and two years respectively. The penalties in this case were particularly high because the directors were found liable for both being "involved" in the company's continuous disclosure contraventions and for breach of section 180 on the basis of stepping stone liability (increasing the number of breaches and therefore the penalties imposed).

In this evolving environment, directors must continue to be vigilant in their approach to disclosures, and ensure their company's policies and processes for identifying and escalating significant information are robust and effective.

7. Restricted benefits

The duty to avoid conflicts of interest is supplemented by the following statutory restrictions on certain benefits that may be received by directors and others.

7.1 Financial benefits to related parties of public companies

For a public company, or an entity controlled by a public company, to give a financial benefit to a related party of the public company:

- the public company or controlled entity must obtain the approval of the public company's members and give the benefit within 15 months after approval; or
- the giving of the benefit must fall within an exception under the Corporations Act (as outlined below).

"Giving a financial benefit" is to be interpreted broadly and includes arrangements that are indirect, informal or involve conferring a financial advantage rather than paying money. Examples include:

- providing a related party with finance or property;
- buying an asset from or selling an asset to a related party;
- leasing an asset from or to a related party;
- supplying services to or receiving services from a related party; and
- issuing securities or granting an option to a related party.

"Related parties" of a public company include:

- directors of the public company or an entity that controls the public company;
- the spouses of those directors and the parents and children of the directors or their spouses; and
- entities controlled by any of those people,

at the relevant time, in the previous six months, or if likely in the future.

There are several exceptions to the requirement for member approval. For example, if the financial benefit is:

- on arm's length terms;
- reasonable remuneration to an officer or employee of the public company or a related company;
- payment of expenses incurred by such an officer or employee in performing their duties; or
- no more than $5,000 in a financial year.

7.2 Payment for loss or retirement from office

A company (and its associates) must not give anyone a benefit in connection with a person's retirement or resignation from, or loss of, an office or position of employment in the company or a related company if:

- the office or position is a managerial or executive office; or
- the retiree has held a managerial or executive office in the company or a related company in the previous three years,

unless certain member approvals are obtained. If this prohibition is contravened, the provider of the benefit and, in many cases, the recipient of the benefit both commit an offence.

For a listed company, a "managerial or executive office" is one held by a member of the key management personnel (being persons (including directors) who have authority and responsibility for planning, directing and controlling the activities of the company, directly or indirectly). For an unlisted company, "managerial or executive office" means the office of director, or any other office or position held by a person who is also a director of the company or a related company.

The prohibition does not apply to certain benefits including:

- exempt benefits, such as certain deferred bonuses and redundancy payments; or
- benefits which are:
  - genuine payments by way of damages for breach of contract;
  - given under an agreement entered into before the person began to hold the office or position from which they are retiring; or
  - payments by way of pension or lump sum for past services to the company or a related company,

  provided the total value of all benefits does not exceed the retiree's average annual base salary (pro rata if the person held the office or position for less than a year).

7.3 Financial assistance

A company is prohibited from financially assisting a person to acquire shares (or any right or interest in shares) in the company or a holding company of the company, unless:

- the assistance does not "materially prejudice" the company or its members or the company's ability to pay its creditors;
- the company follows certain procedures involving member approvals and lodging documents with ASIC (known as a "whitewash" procedure); or
- an exception applies, for example if the assistance is given under an employee share scheme approved by members.

Subject to certain exceptions, a company is also prohibited from acquiring shares in itself or taking security over shares in itself or in a company that controls it.

7.4 Directors' bonuses

If a director receives a benefit from the company which is "unreasonable" (i.e., uncommercial from the company's point of view), and a winding up of the company begins within the following four years, a court may order the director to return some or all of the benefit and/or pay the company a fair amount for some or all of the benefit (in addition to other possible orders).

This rule applies whether the benefit is a payment, company property, securities in the company or the right to such a benefit (such as an option over shares), and whether the benefit is given to a director, a close associate of a director or another person on behalf of a director or their close associates.

8. Insider trading

Insider trading by a director, or any other person, is an offence. Insider trading occurs where:

- a person possesses "inside information", i.e., information which is not generally available and which a reasonable person would expect to have a material effect on the price or value of particular securities (or certain other financial products) if it were generally available;
- the person knows or ought to know that the information is inside information; and
- the person trades in or agrees to trade in the relevant securities (or procures another person to do so).

If the securities are listed, it is also an offence if a person communicates inside information to another person and knows or ought to know that the other person would be likely to trade in the relevant securities.

Information which is generally available is not inside information. Generally available information includes readily observable matter, information likely to have come to the attention of persons who commonly invest in the relevant kind of securities, and inferences drawn from these two types of information.

The legislation does not require a fiduciary relationship between the insider and the company, focusing instead on the possession of materially price-sensitive information. Liability under the legislation can extend to anyone (not just directors or employees), meaning directors must exercise caution to avoid disclosing inside information to individuals both within and outside their organisation.

Directors are expected to ensure that the company has adequate policies and procedures in place to prevent insider trading and to enforce compliance with these policies. If a failure occurs and insider information is used for trading, directors may be held accountable even if they did not communicate the insider information. In this case, liability would be found under the general duty to act with care and diligence, rather than under insider trading provisions themselves.

Exceptions and defences

There are a number of exceptions and defences to the insider trading prohibitions, for example where:

- a director is obtaining a share qualification;
- communication of the relevant information is required by law;
- the person being prosecuted obtained the relevant information solely because it was made known in a manner that was likely to bring it to the attention of persons who commonly invest in the relevant kind of securities; or
- the other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction.

9. Environment

In Australia, environmental legislation and regulation operates at a Federal, State and Territory level.

In 2022, the Federal Government released its Nature Positive Plan detailing its aims to undertake significant reforms to the *Environment Protection and Biodiversity Act 1999* (Cth) (**EPBC Act**) and strengthen Australia's environment laws. The Stage 1 reforms were passed in 2023 and included the establishment of the Nature Repair Market in March 2025. The Nature Repair Market is a voluntary market where eligible participants such as landholders, First Nations organisations and investors, can register their nature restoration projects with the Clean Energy Regulator and receive tradable biodiversity certificates. The Stage 2 reforms, which included legislatively defining 'nature positivity', establishing two independent bodies (the Environment Information Australia and the Environment Protection Australia (**EPA**)) and enhancing EPBC Act enforcement powers will no longer progress after not gaining enough support in the Senate earlier this year. This occurred following strong resistance from Western Australia's Premier Roger Cook over his government's concerns that the State's mining industry would be negatively impacted. While these Stage 2 reforms will not materialise, the Labor Party has announced that it is still committed to the establishment of an independent body like the EPA in the future. The Stage 3 reforms, which include the publication of National Environment Standards and amendments to environmental assessment and approval processes, are set to be deferred with the timing for this currently unknown.

On a State-based level, the *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024* (NSW) was passed on 21 March 2024, expanding the NSW Environmental Protection Authority's investigation and enforcement capabilities under a range of NSW environmental legislation (such as the *Protection of the Environmental Operations Act 1997* (NSW)) and increasing the penalty amounts for many contraventions for corporations. Further, the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Act 2024* passed in June 2024, amending the *Environment Protection Act 1997* (Qld) to include (among other things) a duty to restore the environment and to clarify definitions of 'material environmental harm' and 'serious environmental harm', with the difference between the two definitions being its severity. 'Material environmental harm' is the lower threshold, being harm that is 'not trivial or negligible' and that results in loss or damage to property between $10,000 and $100,000, whereas 'serious environmental harm' is harm that is 'irreversible, of a high impact or widespread', affecting areas of high conservational value, or resulting in loss or damage to property over $100,000.[12]

The imposition of stricter environmental obligations for corporations and directors will likely be the subject of further reforms for other States and Territories, as Commonwealth and State governments have committed to achieving net zero emissions by 2050. Similarly, the number of large Australian companies making net zero commitments has also risen. These net zero pledges, if unsubstantiated, may attract risk of personal liability for directors as acts of misleading and deceptive conduct under Australian Consumer Law.

It is imperative for directors to comply with new legislation and industry standards by ensuring proper strategies and implementation measures are in place. The recent scrutiny of climate-related disclosures and greenwashing further highlights the need for directors to embed climate action as a core focus for their organisation.

Mandatory climate-related financial disclosure

New mandatory climate-related financial reporting laws came into effect on 18 September 2024, applying to Australia's largest public and private entities from 1 January 2025. The new laws are being rolled out in three tranches and will apply to other large entities from 1 July 2026 and 1 July 2027 respectively (with certain entities now already subject to the regime).

[12] *Environment Protection Act 1997* (Qld), ss 16 and 17

The new laws impose mandatory climate-related financial disclosure obligations for certain Australian companies that prepare financial reports under Chapter 2M of the Corporations Act. As part of its annual financial reporting cycle, a reporting company will need to prepare a sustainability report disclosing material financial risks and opportunities relating to climate.

The timeline for mandatory disclosure is summarised as follows:

- on from 1 January 2025, the following Australian companies are now subject to the requirement to prepare climate-related financial disclosure reports:
    - entities that are required to report under Chapter 2M of the Corporations Act (**Reporting Entities**) and fulfil at least two of the following three thresholds: (1) $500 million or more in consolidated revenue; (2) $1 billion or more in consolidated gross assets; and (3) 500 or more employees; and
    - corporations registered or required to be registered under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Reporting Entities**) that meet the NGER publication thresholds;
- commencing in the first financial year on or after 1 July 2026, the following Australian companies will fall within the regime climate-related financial disclosure report regime:
    - Reporting Entities that fulfil at least two of the following three thresholds: (1) $200 million or more in consolidated revenue; (2) $500 million or more in consolidated gross assets; and (3) 250 or more employees;
    - NGER Reporting Entities that do not meet the NGER publication thresholds; and
    - entities that own $5 billion or more in consolidated gross assets; and
- commencing in the first financial year on or after 1 July 2027:
    - Reporting Entities that fulfil at least two of the following three thresholds: (1) $50 million or more in consolidated revenue; (2) $25 million or more in consolidated gross assets; and (3) 100 or more employees will be required to prepare climate-related financial disclosure reports too in their Chapter 2M financial reports.

The content of disclosure is determined by sustainability standards issued by the Australian Accounting Standards Board (**AASB**). The AASB has issued two sustainability standards:

- AASB S1: a voluntary standard covering sustainability-related financial information (not just climate-related information); and
- AASB S2: a mandatory standard dealing with only climate-related information, focusing on: risks/opportunities, governance, strategy, risk management, metrics and targets.

The sustainability report consists of a 'climate statement' and a 'directors' declaration' as to whether, in the directors' opinion, the substantive provisions of the sustainability report are in accordance with the requirements of the standards and disclosure requirements. However, for the first three years of the regime (i.e., from 1 January 2025 to 1 January 2028), directors will only be required to provide an opinion that the entity has taken 'reasonable steps' to ensure the substantive provisions of the sustainability report meet the relevant requirements The reason for this relief period is to allow for sustainability reporting systems of Reporting Entities' and directors' expertise to mature in the initial stages of the new reporting regime. Directors of Reporting Entities should therefore ensure they are using this period to develop appropriate internal systems and processes with respect to reporting, accounting and data management given the higher threshold that will apply from 2028.

Commencing on or after 1 July 2027, Reporting Entities will be exempted from the requirement to submit a climate statement if the entity does not have any material climate-related financial risks or opportunities. However, the entity will still be required to give a statement to this effect in their sustainability report.

Other entities exempted from the requirement to submit a climate statement include:

- companies that are not required to prepare financial reports under the Corporations Act;
- companies that are consolidated into the financial reports of their Australian parent company (does not apply to companies with a foreign parent company);
- companies that have no material climate risks or opportunities to disclose (such companies must still prepare a sustainability report, but climate statements merely need to state that the company faces no material climate risks or opportunities and explain why, with reference to the AASB 2 standards); and
- companies granted "bespoke" relief by ASIC, which is assessed against the standard criteria ASIC applies in the context of financial reporting relief.

Directors should be aware that there are four key sources of potential liability for misleading sustainability reports under the Corporations Act:

- a company that fails to lodge its sustainability report with ASIC on time will potentially be liable for a substantial fine;
- a director who fails in their duty to take all reasonable steps to secure their company's compliance risks substantial fines and, if the failure is dishonest, imprisonment;
- if a company suffers loss as a result of failing to disclose foreseeable climate-related risks, that failure may involve a breach by the company's directors of their duty of care and diligence, which could expose the directors to personal liability (including a substantial civil penalty); and
- misleading and deceptive conduct in relation to dealing in, or inducing other parties to deal in, financial products can give rise to liability (similar to 'greenwashing' cases, as set out below).

In March 2025, ASIC released a guide on the sustainability reporting regime (Regulatory Guide 280: Sustainability reporting). The regulatory guide provides guidance on:

- how to determine who must prepare a sustainability report under the Corporations Act, including guidance on sustainability reporting thresholds and exemptions;
- the content and details required in the sustainability report;
- how to disclose sustainability-related financial information outside the sustainability report (e.g., product disclosure statements);
- the practicalities of complying with sustainability reporting obligations, including the obligation to keep sustainability records; and
- how ASIC administers the sustainability reporting requirements, including enforcement during the early years of sustainability reporting.

Overall, directors should be taking these steps to ensure compliance:

- identifying whether their company is caught by the new climate disclosure requirements;
- determining if any exemptions apply; and

- if no exemptions apply, ensuring that they understand the required timeline for compliance, are familiar with the required disclosures and have adequate processes in place to capture all relevant information to be included in their sustainability reports.

In addition to the guidance released by ASIC outlined above, the following publications are available to help directors and their organisations navigate climate-related corporate governance:

- Principles for setting climate targets: a guide for Australian boards: sets out 10 key principles for setting climate targets and managing associated risks. The principles are structured around four phases of the target-setting process: development, implementation, communication and review, and include suggested questions for directors to ask management for each phase.
- A director's guide to mandatory climate reporting: practical guidance for directors overseeing their organisations' disclosures under Australia's mandatory climate reporting laws.
- Climate Governance Study 2024: an overview of perspectives and actions in relation to climate governance by Australian directors, including emerging better governance practices and key recommendations.

Greenwashing

"Greenwashing" refers to the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical. Both ASIC and the ACCC have continued to flag greenwashing as a key enforcement and surveillance priority and published practical guidance on how to avoid greenwashing.[13]

Demonstrating this increased regulatory focus, ASIC has been active in issuing infringement notices and launching Federal Court civil penalty proceedings in relation to potential misleading marketing and/or greenwashing conduct. In the 15 months leading up to 30 June 2024, ASIC had issued over $123,000 in infringement notice payments.[14] In March 2024, ASIC secured its first court victory from its anti-greenwashing activities, with the Federal Court finding that Vanguard Investments Australia contravened the law by making misleading claims about certain ESG exclusionary screens applying to investments in one of its index funds. ASIC Deputy Chair Sarah Court stated that "As ASIC's first greenwashing court outcome, the case shows our commitment to taking on misleading marketing and greenwashing claims made by companies in the financial services industry. It sends a strong message to companies making sustainable investment claims that they need to reflect the true position."[15] Vanguard Investments Australia was ordered to pay $12.9 million for making its misleading claims.

ASIC reinforced these efforts to combat greenwashing with another Federal Court win in June 2024 against the trustee of the superannuation fund Active Super for misrepresentations to potential investors in securities that it claimed were restricted by its ESG investment screens.[16] Active Super was ordered to pay $10.5 million for greenwashing misconduct.

In August 2024, the Federal Court ordered Mercer Superannuation (Australia) Limited to pay a $11.3 million penalty for making misleading statements on its website about the sustainable nature of the investment options it offered. With these three court victories within a 12-month period and significant penalties awarded, ASIC has made it clear that companies who participate in greenwashing activities and misconduct will be penalised.

[13] ASIC 2024 enforcement priorities (ASIC, 21 November 2023) and ACCC 2023-24 Compliance and Enforcement Priorities (ACCC, March 2023)
[14] ASIC's interventions on greenwashing misconduct (August 2024)
[15] ASIC wins first greenwashing civil penalty action against Vanguard (ASIC, March 2024)
[16] Court finds Active Super made misleading ESG claims in a greenwashing action brought by ASIC (ASIC, June 2024)

In May 2024, ASIC Chair Joe Longo noted that ASIC's greenwashing interventions broadly related to these main categories:

- net zero statements and targets, that were either made without a reasonable basis or that were factually incorrect;
- the use of terms such as 'carbon neutral', 'clean' or 'green', that weren't founded on reasonable grounds;
- the overstatement or inconsistent application of sustainability-related investment screens; and
- the use of inaccurate labelling or vague terms in sustainability-related funds.[17]

The ACCC is also cracking down on greenwashing conduct, announcing in February 2025 that "*we have several important investigations that are ongoing, and we will continue to proactively target misleading green claims aimed at consumers in a range of sectors including energy, food, fashion, and homewares*",[18] and that "*the ACCC has made tackling greenwashing a priority [and that it will] continue to work with the likes of ASIC and the Clean Energy Regulator to facilitate information sharing that can help [it] in addressing greenwashing conduct*".[19] In December 2023, the ACCC released guidance Making environmental claims setting out eight fundamental principals for businesses to ensure they are making trustworthy environmental claims (see section 16.2 below). In April 2024, the ACCC kicked-off its first greenwashing proceedings against Clorox Australia for alleged false and misleading representations that its garbage bags comprised 50% recycled 'ocean plastic' (with the ACCC claiming this was not the case, due to the plastics being collected up to 50 kilometres from the shoreline).[20] By April 2025, the Federal Court had ordered Clorox Australia to pay a $8.25 million penalty for its false and misleading representations.

It is not just ASIC and the ACCC that are leading the way in taking companies who engage in greenwashing practices to court. In July 2023, the 'Parents for Climate' group initiated proceedings in the Federal Court against Energy Australia, alleging that the electricity and gas provider engaged in misleading or deceptive conduct by marketing its "Go Neutral" product as carbon neutral as the company was buying carbon credits. However, the group argues that the product is sourced from fossil fuels and that carbon offsets do not cancel out the emissions released from this product. On 19 May 2025, Energy Australia and Parents of Climate settled the legal action where Energy Australia released the following public settlement statement: "*Today, Energy Australia acknowledges that carbon offsetting is not the most effective way to assist customers to reduce their emissions and apologises to any customer who felt that the way it marketed its Go Neutral products was unclear. Energy Australia has now shifted its focus to direct emissions reductions. Energy Australia acknowledges the importance of consumers understanding the climate impact of products and services offered to them and that offsets are not the most effective means of reducing greenhouse gas emissions*." This case is significant as it is the first greenwashing case in Australia to involve 'carbon neutral' marketing and which led the company making carbon neutral claims to release a public statement recognising that carbon offsetting is not the most effective method of achieving carbon neutrality. In light of this case and its outcome, companies should be cognisant and ensure its marketing policies, strategies and campaigns align with their products, services and actions to avoid potential greenwashing claims being brought against it by regulators or activist organisations.

The Governance Institute of Australia has published a guide Greenwashing: a governance perspective highlighting the importance of directors understanding and managing the risks and governance issues related to greenwashing and how to develop governance structures to manage those risks. Similarly, ASIC's How to avoid greenwashing when offering or promoting sustainability-related products provides guidance on how

[17] Greenwashing: a view from the regulator (ASIC, May 2024)
[18] ACCC's compliance and enforcement priorities update 2025-26 address (ACCC, February 2025)
[19] 2nd Annual Sustainability Reporting Summit speech (ACCC, 27 February 2025)
[20] GLAD bags manufacturer in court for '50% ocean plastic' claims (ACCC, April 2024)

entities who offer or promote sustainability-related products can avoid greenwashing. In this guidance, ASIC suggests that entities should consider whether:

- the product is true to label;
- vague terminology is used, given that 'socially responsible' or 'ethical investing' or 'impact investing' can mean different things to different people and can vary across products;
- the headline claims are potentially misleading; and
- there is an explanation of how sustainability-related factors are incorporated into investment decisions.

It remains to be seen whether ASIC will pursue directors personally in relation to greenwashing breaches, but it is critical for directors to ensure their organisation's compliance when making environmental claims. Looking ahead, ASIC and the ACCC will continue their focus on this area, with ASIC zeroing in on the superannuation industry and wholesale green bond market disclosures in particular.

Nature-related risks

Directors' duty of care may go beyond complying with climate-related disclosure and preventing greenwashing, and extend to broader, "nature-related risks" (that is, potential threats arising from the company's dependencies and impacts on nature).

According to an Australian legal opinion on Nature-related risks and directors' duties, directors are obliged by their duty of care and diligence under section 180 of the Corporations Act to consider, disclose and manage their company's "nature-related risks". This follows a series of earlier opinions, including in other jurisdictions, that similarly argued directors were required to consider climate-related risks as part of their directors' duties, and reflects the global movement of ESG regulation beyond climate to nature and biodiversity.

The focus of environmental board governance has shifted from considering and disclosing risks to planning and actively managing risks and opportunities in the transition to a zero carbon economy. This is a signal for directors to start considering and managing their organisation's impact and dependency on the natural environment, or risk exposure to potential legal consequences and liability.

10. Cyber security

In the wake of recent high profile cyber security breaches and growing cybercrime activity, cyber security risk management is now a critical issue for company boards to consider. With increasing regulatory focus on cyber incidents and data breaches, the Australian Government is focussed on implementing stronger cyber security regulation to support Australia's growing digital economy and protect it from cyber security threats.

On 22 November 2023, Australia's Cyber Security Minister released the 2023-2030 Cyber Security Strategy (**Cyber Strategy**), a roadmap for Australia to become a global cyber leader, highlighting opportunities for Australian businesses and outlines new funding and six "cyber shields" designed to safeguard Australians from cyber threats, including several proposed legal reforms. Supplementing the Cyber Strategy, the Government also published the 2023-2030 Australian Cyber Security Action Plan, detailing the key initiatives intended to implement the Cyber Strategy.

In November 2024, the Government enacted three key new cyber security laws (known as the "Cyber Security Legislative Package 2024"):

- *Cyber Security Act 2024* (Cth): seeks to increase proactive industry reporting and engagement following cyber incidents, including by giving the Government broad power to prescribe mandatory security standards, imposing a "Limited Use Obligation" on government bodies receiving cyber security incident information and setting a framework for mandatory reporting of ransomware and cyber extortion payments;
- *Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Act 2024* (Cth): aims to remedy gaps in the current regulatory framework for protecting critical infrastructure and broaden the asset classes that fall within the scope of the framework; and
- *Intelligence Services and Other Legislation Amendment (Cyber Security) Act 2024* (Cth): designed to create a safe environment for businesses to voluntarily report on cyber security incidents, without compromising the efficacy of the regulatory function.

The Cyber Security Legislative Package 2024 is targeted at bringing Australia in line with global best practice on cyber security and fostering collaboration and information sharing between industry and government. Directors should be aware of these new regulatory requirements and ensure their organisations are complying to the extent applicable.

The ASX has also issued Compliance Update (No. 06/24), highlighting two key changes, including a new data breach example in Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 to 3.1B, addressing common disclosure issues by company directors during cyber incidents. The example demonstrates how established rules apply to a hypothetical data breach scenario, including in relation to trading halts, voluntary suspensions, and confidential engagement with regulators.

On 2 December 2024, the Department of Home Affairs opened a consultation on Guiding Principles to Embed Zero Trust Culture, seeking feedback to help shape policies about Commonwealth cyber security resilience. The consultation closed on 28 February 2025.

While Australia's cyber policy continues to develop, directors should be on high alert that consideration and management of cyber security risks falls within the ambit of their directors' duties, and ASIC will prosecute officers who fail to adequately prepare their organisations for cyber attacks. As shown by high profile cases involving Medibank and Optus, cyber security breaches can also result in class actions by aggrieved shareholders.

ASIC Chair Joe Longo has emphasised that directors will be exposing themselves to enforcement action by ASIC if they fail to give cyber security and cyber resilience sufficient priority. That is because such a failure

creates a foreseeable risk of harm to companies and indicates a failure of the director to meet their duty to act with reasonable care and diligence.[21] To avoid potential regulatory and shareholder action, directors are expected to proactively understand the cyber risks affecting their business and take reasonable steps to address those risks. This is particularly crucial for the boards and risk committees of listed companies, any business storing significant amounts of data and those trading subject to the Australian Consumer Law.

ASIC has also flagged the importance for listed companies to review their continuous disclosure plans to ensure they comply with their continuous disclosure obligations in the event of a material cyber security incident, noting that "*the dynamic nature of both the extent and impact of a cyberattack means planning is critical*".[22]

There may also be additional cyber security and risk management obligations which will apply in regard to a company's assets that are "critical infrastructure sector assets" under the *Security of Critical Infrastructure Act 2018* (Cth), which covers 11 industry sectors and 22 categories of critical infrastructure assets.

To assist directors improve their organisation's cyber security and resilience, ASIC has published the following eight key questions for boards of directors to consider:

- Are cyber risks an integral part of the organisation's risk management framework?
- How often is the cyber resilience program reviewed at the board level?
- What risk is posed by cyber threats to the organisation's business?
- Does the board need further expertise to understand the risk?
- How can cyber risk be monitored and what escalation triggers should be adopted?
- What is the people strategy around cyber security?
- What is in place to protect critical information assets?
- What needs to occur in the event of a breach?

The importance for boards to consider these questions was highlighted following the results of ASIC's Cyber Pulse Survey. The survey - conducted to measure cyber resilience in Australia's corporate and financial markets - revealed that a significant proportion of listed companies did not test their cyber security incident response with critical third party suppliers. ASIC noted other areas of concern included failing to encrypt certain confidential information, have a cyber incident response plan in place and adopt a cyber security standard.

In addition to ASIC's guidance, various other bodies have published guides for directors and other officers in navigating their responsibilities to manage cyber security risk:

- Cyber Security Governance Principles: provides a practical framework for directors to build organisational cyber resilience, underpinned by key cyber security governance principles. This framework recognises that directors have a critical role to play in managing cyber security risks and must seek to enhance their own skills and knowledge on cyber security to foster a cyber resilient culture within their organisation;
- Effective Cyber Risk Management: provides detailed guidance on effective cyber risk management to help directors and others to prepare for, defend against and respond to cyber incidents;
- Governing Through a Cyber Crisis: designed to assist boards and directors with overseeing effective response and recovery from cyber incidents, and promoting cyber resilience. This guide flags the importance for directors of maintaining a current and comprehensive cyber incident response plan,

[21] Being a director isn't meant to be easy (ASIC, March 2024)
[22] ASIC warns on cyber incident disclosure (ASIC, March 2023)

and provides practical tips for directors to ensure their organisation is ready and responsive in the event of a cyber incident;

- Cyber Security Handbook: intended for directors of SMEs and NFPs, this guide includes a summary of the role of a director in an elevated cyber threat environment, the fundamentals of cyber security and how to develop internal policies and governance models that strengthen cyber resilience;
- Overview of Cyber Security Obligations for Corporate Leaders: aimed at assisting directors and managers of critical infrastructure owners and operators to navigate their cyber security obligations in relation to preparing for, reporting and responding to cyber incidents; and
- Data Governance Foundations for Boards: Key principles for director oversight and value creation: addresses key principles and recommendations to assist boards effectively oversee data governance, including case studies, director insights and an SME and NFP board checklist.

In a relatively recent case, *Australian Securities and Investments Commission v Lanterne Fund Services Pty Ltd* [2024] FCA 353, the Federal Court applied the landmark case of *Australian Securities and Investments Commission v RI Advice Group Pty Ltd* [2024] FCA 496 in finding that a company holding an Australian financial services licence (**AFSL**) contravened its Corporations Act obligations as an AFSL holder by failing to have adequate cyber security risk management systems in place to manage cyber security risks. The RI Advice Group decision was influential as it was the first time in Australia that a financial institution has been found to be in breach of the Corporations Act due to conduct involving cyber security. Specifically, the company was found to have contravened its obligation to have adequate risk management systems pursuant to section 912A(1)(h) of the Corporations Act, which covers cyber security measures. ASIC has used these decisions as a platform to warn that it will pursue directors personally for failing to manage their company's cyber security risk.

11. Artificial Intelligence

Artificial Intelligence (**AI**) is a rapidly emerging risk area for businesses and their boards, presenting a dual-edged sword for directors in guiding their companies to take advantage of the new technology while safeguarding against the risks. Expectations placed on boards will only continue to grow in the next financial year while the use and regulation of AI strengthens, particularly where mistakes can lead to costly and reputation-harming consequences.

ASIC has flagged that it will be focussing on the use and development of AI as one of its strategic priorities, including monitoring how financial services licensees use AI technology.[23] More importantly for boards, ASIC's Chair Joe Longo has publicly stated that directors must pay special attention to AI in respect of their directors' duties. ASIC is already reviewing the use of AI in the banking, credit, insurance and advice sectors, warning that it will act early to deter "bad behaviour" in this area.[24]

The 2024-2025 Federal Budget announced investments in AI of approximately $40 million over the next five years, primarily through the Department of Industry, Science and Resources. The Government is working on a regulatory framework to both mitigate dangers and support local innovation in AI across a range of industries in. Based on the Government's interim response in January 2024 to the consultation paper Safe and Responsible AI in Australia the immediate focus will be on defining "high risk" AI for mandatory regulation, informed by developments in other countries and in consultation with Australian industry experts. Once the concept of "high-risk" AI is agreed, regulatory guardrails will be developed around testing, transparency and accountability for such high-risk AI applications. It is likely that the use of low risk AI tools and applications will be allowed to continue under existing legal frameworks, without the need for bespoke AI regulation.

There have been several key developments in progressing Australia's AI-related regulatory reforms:

- in August 2024, the Government introduced the Voluntary AI Safety Standard, consisting of 10 voluntary guardrails applicable to all organisations throughout the AI supply chain. These voluntary guardrails aim to establish a consistent approach for organisations to develop and deploy AI safely;
- in September 2024, the Government released a Proposals Paper to introduce mandatory guardrails for high-risk AI settings (**Proposals Paper**). The Proposals Paper includes three options to mandate these guardrails, including the creation of a new dedicated framework AI legislation, such as an Australian AI Act;
- in late November 2024, the Senate Select Committee on Adopting Artificial Intelligence published its report on AI, making several significant recommendations including the establishment of new, whole-of-economy, dedicated legislation to regulate high-risk uses of AI (in line with the option presented in the Proposals Paper); and
- in December 2024, the *Privacy and Other Legislation Amendment Act 2024* (Cth) implemented the first tranche of approved changes to the *Privacy Act 1988* (Cth) and the Criminal Code. Notably, from 10 December 2026, Australian Privacy Principle 1 will be amended to require organisations to specify in their privacy policies, decisions that are made or influenced by AI or other automated decision-making systems. (For further information on privacy reforms, see section 16.6).

From a consumer law perspective, in October 2024 the Government released a consultation paper for the Review of AI and the Australian Consumer Law seeking views on whether specific reforms of are required to the Australian Consumer Law (ACL) to improve consumer outcomes and support the safe and responsible use of AI by businesses. Feedback from this consultation will inform ongoing work to clarify and strengthen existing laws to address AI-related risks and harms.

[23] ASIC Corporate Plan 2024-25 (ASIC, August 2024)
[24] We're not there yet: Current regulation around AI may not be sufficient (ASIC, 31 January 2024)

While the Government is formulating specific AI regulations, directors must continue complying with their directors' duties by ensuring their organisation has robust and effective risk management and governance arrangements in place. In the light of ongoing AI developments, this will involve understanding how AI impacts their particular company and its obligations, and forming a strategic plan on how to best harness the new technology, while continuing to navigate the labyrinth of existing laws impacting AI (including data protection and privacy, Australian Consumer Law, anti-discrimination and intellectual property).

To assist directors and their organisations navigate the developing world of AI governance, various guidelines and standards have been published:

- in January 2024, the Australian Signals Directorate's Australian Cyber Security Centre (**ACSC**) released Engaging with Artificial Intelligence Guidelines, emphasising security challenges associated with AI systems and providing recommendations for organisations to use AI systems securely and to manage associated risks;
- in June 2024, the AICD published A Director's Guide to AI Governance to assist directors with navigating the ethical and informed use of AI as well as the associated risks posed. The guide, which provides a suite of resources for directors, includes an introduction to AI which outlines foundational knowledge of AI concepts, a practical guidance for boards' using or wishing to deploy AI within the company, a snapshot of key elements of AI governance and an AI governance checklist for SMEs and NFPs;
- in October 2024, ASIC announced its report Beware the gap: Governance arrangements in the face of AI innovation, reporting on governance arrangements in the face of AI innovation, highlighting the need for financial services and credit licensees to implement strong risk management frameworks that cater for specific risks associated with AI;
- also in October 2024, the Office of the Australian Information Commissioner (**OAIC**) published Guidance on privacy and the use of commercially available AI products and Guidance on privacy and developing and training generative AI models, explaining how Australian privacy law applies to AI, and setting out the regulator's expectations and best practice for use and development of AI; and
- in May 2025, the AICD and the Governance Institute published a joint statement Effective Board Minutes & the Use of AI, refreshing core principles and addressing current issues including the role of technology in minute preparation, the use of AI tools, and associated governance risks.

12. Whistleblower protections

The Corporations Act protects corporate sector "whistleblowers" who make public interest disclosures by identifying and calling out potential misconduct of companies.

Directors, auditors and other senior people within companies must be aware of their obligations to protect whistleblowers, and those who fail to handle whistleblower reports correctly may be in breach of their Corporations Act obligations. Contravention of the whistleblower protections may result in criminal or civil penalties for any person found to be:

- causing or threatening to cause detriment to a whistleblower; or
- disclosing a whistleblower's identity or information likely to lead to their identification, unless that disclosure is authorised under the law.

Public companies, large proprietary companies and corporate trustees of superannuation entities regulated by the Australian Prudential Regulation Authority (**APRA**) are also required to have compliant internal company policies to ensure that whistleblowers are appropriately protected, and their complaints are heard. Such policies must include, amongst other things, information setting out the legal protections available to a whistleblower, and how the company will investigate whistleblower disclosures and protect whistleblowers from detriment.

In March 2023, ASIC released a report setting out good practices when designing programs or frameworks for handling whistleblower disclosures.[25] The report recommends that Australian entities should:

- establish a strong foundation for the whistleblower program, through implementing procedures and systems to embed the program's requirements;
- foster a whistleblowing culture which actively protects and support whistleblowers who make disclosures;
- invest resources and training for relevant officers and employees, and in particular for eligible recipients who receive disclosures;
- conduct periodic reviews of the program and associated policies, procedures and practices;
- take steps to address the issues raised by whistleblowers and use information obtained from disclosures to address emerging areas of risk;
- embed executive accountability for the program; and
- formalise arrangements for board or board committee oversight of the policy and program.

In November 2023, the Federal Government released a consultation paper seeking views on what additional reforms are needed to protect whistleblowers. The paper contemplated a new body to protect whistleblowers, an expanded range of protected disclosures and additional support and civil remedies for whistleblowers, but any such proposals are yet to be accepted or implemented.

A disclosure is not protected under the Corporations Act if it is solely a personal work-related grievance, and this must be expressly stated in a company's whistleblower policy.[26] The policy should explain what personal work-related grievance means and include examples. Relevant examples of a personal work-related grievance include interpersonal conflicts between employees; decisions of an employer that are not in breach

[25] Good practices for handling whistleblower disclosures (ASIC, March 2023)
[26] Whistleblower Rights and Protections Information Sheet 238 (ASIC, June, 2023)

of a workplace law; and a decision to terminate, vary conditions of employment or discipline an employee.[27] A company's whistleblower policy must also explain when a disclosure that relates to or includes a personal work-related grievance will still be protected. If a disclosure relates to misconduct against employees other than just the employee making the disclosure, or if it raises significant implications for the company, then the report may be a protected disclosure. A disclosure that includes a personal work-related grievance will also be protected if it relates to an offence under legislation, relates to conduct that is a risk to the public or the financial system or is a disclosure that is made to a legal practitioner for the purpose of receiving legal advice on whistleblower protections. An employee will also be covered by whistleblower protections if they suffer from or are threatened with detriment for making a disclosure.

[27] Whistleblower Policies, Regulatory Guide 270 (ASIC, November 2019)

13. Contraventions

If a director contravenes any of their duties, or they fail to meet any of their obligations, proceedings may be brought against them. Proceedings can be brought by:

- the company;
- the company's members;
- creditors, insolvency administrators or trustees in bankruptcy;
- third parties; and
- regulatory authorities.

13.1 Regulatory authorities

The main regulatory authorities responsible for governing Australia's corporate sector are set out below.

ASIC

The Australian Securities and Investments Commission (**ASIC**) is a government body that enforces and regulates company and financial services laws through the general administration of the Corporations Act.

ASX

Alongside ASIC, the Australian Securities Exchange Limited (**ASX**) is responsible for the market regulation and compliance of Australia's listed companies.

ACCC

The Australian Competition and Consumer Commission (**ACCC**) is charged with administering Australian competition regulation through the implementation of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

APRA

The Australian Prudential Regulation Authority (**APRA**) is the national regulator of the Australian financial services industry, supervising prudential institutions including deposit-takers (i.e., banks, building societies and credit unions), insurance companies and superannuation funds (other than self-managed superannuation funds).

13.2 Liability for involvement in a contravention

Where certain provisions of the Corporations Act (such as those discussed in sections 2, 4 and 6 above) are contravened, a director (or any other person) who is "involved" in the contravention may also be liable. A person is involved in a contravention if they aid, abet, counsel, procure or induce the contravention, are knowingly concerned in or party to the contravention, or conspire with others to effect the contravention.

Similarly, a director (or any other person) who aids, abets, counsels or procures the commission of any criminal offence is taken to have committed the same offence themselves.

13.3 Consequences of contravention

A director who breaches their duties or other obligations may be liable to suffer significant consequences, including:

- pecuniary penalties (fines)

- liability to compensate the company or stakeholders for loss suffered or account for profits
- disqualification from managing corporations
- for criminal offences, up to 15 years' imprisonment (in addition to fines)
- reputational damage

In civil proceedings only, the court has discretion to excuse a director from certain liabilities, if the director acted honestly and ought fairly to be excused for a contravention. Also, officers of listed entities will not contravene the civil penalty provisions of the Corporations Act if they can show that they took all reasonable steps in the circumstances to ensure that the entity complied with its obligations under the civil penalty provisions, and after doing so, believed on reasonable grounds that the entity was complying with its obligations.

The Court may also make a relinquishment order to neutralise any financial benefit that might have been gained from misconduct. Further, in making a pecuniary order, relinquishment order or imposing a fine, the Court must give priority to the compensation of victims.

The risk of reputational damage should not be underestimated. It is often the most serious consequence, as one of the most valuable assets a director has is their personal and professional reputation. This is of particular concern for those on the boards of listed and high profile companies, as intense media scrutiny can have long term ramifications both professionally and personally.

13.4 Penalties under the Corporations Act

The maximum penalties, for offences committed on or after 7 November 2024, are:

- for criminal offences, 15 years' imprisonment and/or a fine the greater of:
  - $1.485 million for an individual or $14.85 million for a body corporate;
  - three times the benefit gained and detriment avoided by the offence;[28] or
  - for a body corporate, 10% of its annual turnover; and
- for civil breaches, a pecuniary penalty the greater of:
  - $1.65 million for an individual or $16.5 million for a body corporate;
  - three times the benefit gained and detriment avoided by the breach; or
  - for a body corporate, 10% of its annual turnover, up to $825 million.

These penalty amounts will be next indexed on 1 July 2026.

[28] Where there is reference to the 'benefit gained', it refers to the value of the gross benefit, with no deduction applicable for any costs referable to obtaining the benefit (*The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23).

14. Corporate governance

14.1 ASIC's Corporate Plan for 2024 to 2028

In its Corporate Plan for 2024 to 2028 (Focus 2024-25), ASIC set out six strategic priorities for the next four years:

- **Improve consumer outcomes**, focussing on the design and distribution of financial products, predatory sales and lending, financial hardship assistance, insurance claims handling and the adequacy of internal dispute resolution processes;
- **Address financial system climate change risk**, specifically targeting climate-related disclosure, greenwashing, energy and carbon credit markets and insurer handling of claims and complaints after severe weather events;
- **Better retirement outcomes and member services**, driving industry progress by targeting superannuation fund services and compliance;
- **Advance digital and data resilience and safety**, focussing on business, cyber and operational resilience, technology enabled misconduct and the misuse of AI; and
- **Drive consistency and transparency across markets and products**, surveying outcomes in public and private markets and current and emerging financial products and services.

ASIC also announced that it would be focussed on strengthening its operational capabilities, including by investing in digital technology to become a leading digitally enabled and data-informed regulator.

14.2 ASX Corporate Governance Principles and Recommendations

The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (**Principles and Recommendations**) highlight the importance for directors and officers to monitor and take responsibility for culture, conduct and behaviour within companies, and an increased need for boards to engage with senior management on non-financial (as well as financial) risks. While the Principles and Recommendation are applicable to listed entities only, they are considered to be a benchmark for corporate governance in Australia generally and should also be reflected in the corporate governance practices of non-listed entities.

14.3 ASIC Corporate Governance Report

Similar to the Principles and Recommendations as mentioned above, ASIC's Corporate Governance Taskforce Report urges directors and officers to focus on overseeing and managing compliance risk, and implement better information flow between directors, senior management and risk committees. This places a higher onus on directors to be pro-active in assessing and holding management accountable for non-financial risks (such as operational, conduct and compliance risks), in addition to directors' customary focus on financial risks.

14.4 ASIC's enforcement powers

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) triggered a wide-spread toughening of approach by regulators to corporate governance and contravention in Australia.[29] In response to recommendations made by the Royal Commission, ASIC established an internal "Office of Enforcement", which has a broad range of enforcement powers aimed at the deterrence and punishment of wrongdoing in a targeted and proportionate way. ASIC's range of enforcement

[29] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (February 2019)

powers include issuing infringement notices, negotiating enforceable undertakings and initiating civil and criminal proceedings.

ASIC's enduring enforcement priorities are:

- misconduct damaging market integrity, including insider trading, continuous disclosure breaches and market manipulation;
- misconduct impacting First Nations people;
- misconduct involving a high risk of significant consumer harm, particularly conduct targeting financially vulnerable consumers;
- systemic compliance failures by large financial institutions resulting in widespread consumer harm;
- new or emerging conduct risks within the financial system; and
- governance and directors' duties failures.

15. Insurance and indemnities

A director may be insured and/or indemnified against liabilities they may incur as a director, subject to a number of restrictions outlined below. In addition, a company or a related company must not exempt a person from a liability to the company incurred as a director of the company.

Commonly, a company will have directors and officers (D&O) insurance, and a company's constitution sets out indemnification rights for directors and officers alongside a deed of access, indemnity and insurance. Officers are encouraged to enter a deed of access, indemnity and insurance with the company, and seek independent advice on that deed, to ensure that they continue to be covered after they cease being an officer of the company (as the constitution may only apply to current officers).

15.1 Restrictions on indemnifying directors

Indemnities for liabilities other than legal costs

A company or a related company must not indemnify a person against any of the following liabilities incurred as a director of the company:

- a liability owed to the company or a related company;
- a liability to pay a pecuniary penalty or compensation ordered under the Corporations Act; or
- a liability that did not arise out of conduct in good faith.

These restrictions do not apply to indemnities for legal costs, which are restricted as set out below.

Indemnities for legal costs

A company or a related company must not indemnify a person against legal costs incurred in defending an action for a liability incurred as a director of the company if:

- the director is found to have a liability for which the company may not indemnify them, as outlined above;
- the director is found guilty in criminal proceedings;
- the proceedings are brought by ASIC or a liquidator and the grounds for making the order sought are established; or
- the costs are incurred in connection with proceedings for relief to the director under the Corporations Act and the relief is not granted.

15.2 Restrictions on insuring directors

A company or a related company must not pay a premium for a contract insuring a present or former director of the company against a liability (other than for legal costs) arising out of:

- conduct involving a wilful breach of duty in relation to the company; or
- a breach of the duties not to improperly use their position or information.

Generally speaking, insurance is more practically useful to directors than indemnities, as it is less limited and a more efficient way to facilitate settlement and avoid protected legal action.

16. Other sources of liability

In addition to the potential liabilities under the Corporations Act and common law summarised above, directors may incur liabilities under various other laws. Key laws of importance to directors are outlined below, but this is not an exhaustive summary.

16.1 Anti-bribery and corruption

Australia has anti-bribery laws at Commonwealth, state and territory levels, governing bribery offences relating to Commonwealth public officials, foreign public officials, and commercial or private bribery.

Directors can be personally liable for directly or indirectly giving or receiving a bribe, or if they are involved in the bribery, they may have accessorial liability. This can result in fines or imprisonment. In addition, if a director authorises a bribe, then this could result in significant financial penalties for a company.

With effect from 8 September 2024, a company may be liable for failing to prevent its associates from committing bribery in relation to a foreign public official for the profit or gain of the company unless the company can establish that it has 'adequate procedures' in place to prevent the commission of bribery by its associates. 'Associate' is defined broadly and can include officers, employees, agents or contractors of a company, someone who performs services for or on behalf of the company as well as subsidiaries or other entities controlled by the company. This offence can also result in significant financial penalties for a company. The Attorney General's Guidance on adequate procedures to prevent the commission of foreign bribery sets out what are considered to be the responsibility of top-level management in relation to developing, implementing and promoting a company's anti-bribery compliance program.

ASIC, Australia's main corporate regulator, can be involved in investigations into corrupt conduct where an Australian corporation is involved - particularly in relation to associated offences in relation to the books and records of the company or in relation to directors' duties. Directors have been liable for breaching their directors' duties in circumstances where they "failed to join the dots" and identify corrupt conduct occurring within the company.

Corporations should adopt a compliance program to discourage and prevent bribery and corruption within their organisation. This program should take into account the Attorney General's Guidance on Adequate Procedures including undertaking and documenting a risk assessment so that the program can be tailored to the corporation's geographical and operational risks, and directors should ensure that it is comprehensively and continually communicated, monitored and enforced. Directors should ensure that they receive regular reports in relation to the implementation of the compliance program and information in relation to any evidence of such conduct.

16.2 Competition

Directors may be liable for any personal contraventions of the CCA or Schedule 2 of the CCA (**ACL**), for example by engaging in misleading or deceptive conduct.

In addition, if a company breaches the CCA or ACL, any director (or other person) who was "involved" in the contravention may also be liable. A director is involved in a contravention if they aid, abet, counsel, procure, induce (or attempt to induce), are in any way knowingly concerned in or party to, or conspire with others to effect, the contravention.

A director who commits or is involved in a contravention may incur significant pecuniary penalties, liability to compensate others for loss suffered as a result of the contravention and, in the case of the prohibition on cartel conduct, substantial criminal penalties (up to 10 years' imprisonment). A director may also be disqualified from managing a corporation.

A company is prohibited from indemnifying a director for liability to pay a pecuniary penalty for breach of the CCA or ACL, or for legal costs incurred in proceedings in which they are found liable to pay such a pecuniary penalty.

The ACCC's compliance and enforcement priorities for 20254-26, include competition and consumer issues in the supermarket and retail sector, competition and consumer issues in relation to essential services (including telecommunications, electricity and gas), competition and consumer issues in the aviation sector, competition and consumer issues in the digital economy, surcharging, unfair contract terms, and consumer guarantees. The ACCC is also continuing to prioritise competition and consumer concerns in relation to environmental claims and sustainability. The ACCC released Sustainability collaborations and Australian competition law: A guide for business in December 2024.

From 1 January 2026, a new merger control regime will operate in Australia, requiring mandatory notification to the ACCC of certain mergers and acquisitions. It is expected that a significantly higher number of merger transactions will be subject to ACCC approval under the new regime, essentially increasing the costs of many M&A deals, and potentially extending timelines.

In light of the new regime, directors will need to carefully evaluate the impact of the new laws on any proposed M&A activity, and to consider the company's ACCC engagement strategy upfront, especially for complex and multi-jurisdictional deals. In particular, deal timelines should be carefully planned during the transitional period to avoid having to restart the process once the new framework comes into effect. It will also be important to carefully consider key provisions of transaction agreements that will be impacted by these changes such as ACCC conditions precedent and associated obligations of the merger parties, and any post-completion restraints and goodwill provisions which will also be subject to ACCC review as part of the new system.

16.3 Employment

Directors can incur personal liability for their companies' breaches of some employment laws.

Under the *Fair Work Act 2009* (Cth) (Australia's national employment legislation) a director who was "involved in" a contravention of a "civil remedy provision" of that Act (most of the important provisions of that Act are civil remedy provisions) is deemed to have personally contravened that provision. This can happen if the director aided or abetted the contravention, induced the contravention, conspired with others to effect the contravention, or was "knowingly concerned in" the contravention. Higher penalties apply where the company commits a serious contravention (that is, the provision was knowingly contravened and as part of a systematic pattern of conduct), and the director knew the company's contravention was a serious contravention.

There are numerous civil remedy provisions in the Fair Work Act, but the most relevant for these purposes are the National Employment Standards (including employee rights and entitlements with respect to maximum working hours, requests for flexible work, requests for casual conversion, parental leave, annual leave, personal and carer's leave, community service leave, public holidays, and superannuation contributions); the prohibitions against contravening Enterprise Agreements and Modern Awards; and the prohibition against taking adverse action against an employee for a protected reason or trait. As explained above, a director who is "involved in" a contravention of any of these provisions could be held personally liable for the contravention.

An addition to the civil remedy provisions came into effect on 7 June 2023: a prohibition on including pay secrecy terms in employment contracts or other written agreements with employees that are inconsistent with the newly created "workplace right" in relation to pay secrecy.

Wage theft continues to be a core focus for state and federal governments. Queensland's criminal code includes "wage theft" as a type of stealing. Under these laws, a director who aids the committing of an offence or counsels or procures a person to commit an offence will be taken to have committed the offence.

Under Victorian "wage theft" laws, directors are deemed to have committed an "employee entitlement offence" if their company has done so. An "employee entitlement offence" includes deliberately withholding wages or other employee entitlements, deliberately and dishonestly underpaying employees, falsifying employee

entitlement records to gain a financial advantage and avoiding keeping entitlement records. In those circumstances, the onus will fall on the director to show that they exercised due diligence to prevent the occurrence of the offence. A director can still be prosecuted and found guilty even if the company is not. In April 2025 the Victorian Wage *Theft Amendment Bill* 2025 passed the first reading in the Legislative Assembly of the Parliament of Victoria. If the Bill is passed it will repeal Victoria's wage theft offence. The Victorian Government announced that it intended to repeal the wage theft offence as a federal wage theft offence has now been introduced into the Fair Work Act.

On 1 January 2025, intentional underpayments of employee entitlements became a criminal offence under the Fair Work Act. This offence captures underpayment of statutory employee entitlements (including superannuation contributions), but not underpayments of purely contractual entitlements. An employer will have "intentionally" underpaid an employee if it "means to engage in that conduct". The offence does not capture honest mistakes or miscalculations.

Directors can be prosecuted for wage theft, regardless of whether the employer has also been prosecuted for, or convicted of, wage theft. A director will be guilty of wage theft if they intentionally aided, abetted, counselled or procured wage theft, unless, before the offence was committed, the director terminated their involvement and took all reasonable steps to prevent the commission of the theft.

The federal wage theft penalties are severe: a maximum sentence of 10 years' imprisonment for individuals and/or a maximum fine calculated as the greater of 3 times the amount of the underpayment, or (currently) $1,565,000 for an individual and $7,825,000 for a body corporate. Employers and directors who suspect they may have engaged in wage theft may seek a cooperation agreement with the Fair Work Ombudsman regarding the underpayments, which will prevent referral of the matter to the Director of Public Prosecutions or the Australian Federal Police for criminal prosecution (however any civil proceedings on foot may continue).

There are also new laws affecting directors in the finance industry. The Financial Accountability Regime now requires directors working for banks, and directors working for insurers and superannuation entities to, among other things, act with honesty and integrity and with due skill, care and diligence. Such directors are obliged to take reasonable steps to prevent material contraventions of specified financial services laws.

Please note this Guide focusses on director duties and liability. Between 2023 and 2025, the Closing Loopholes legislation was introduced which made substantial changes to employment laws in Australia, such as: increases in penalty amounts; changes to the definition of casual employee and the pathway from casual to permanent employment; changes to the definitions of employee and independent contractor; changes to unfair contract laws in relation to independent contractors; and the introduction of a statutory right to disconnect and new provisions for employee-like workers. These changes may not increase director duties specifically, but are important for directors to understand in the context of their businesses at large.

16.4 Anti-discrimination and sexual harassment

Commonwealth, State and Territory anti-discrimination legislation prohibit discrimination in the workplace and in the provision of goods and services on various grounds. These prohibited grounds vary slightly from State to State, but usually include age, physical or mental disability, union activity, pregnancy, breastfeeding, gender identity, intersex status, race, sex and sexual orientation. These laws also prohibit sexual harassment, workplace environments that are hostile on the ground of sex, and victimisation in the workplace.

Employers are vicariously liable for a contravention of these laws by an employee, unless the employer can prove that they took reasonable precautions to prevent the contravening conduct. Directors can be held personally liable for a contravention if it is found that the director caused, instructed, induced, aided or permitted another person to contravene the prohibition.

In 2022, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) introduced additional employee protections into the *Sex Discrimination Act 1984* (Cth), including a positive duty on employers to take reasonable and proportionate measures to eliminate, as far as possible, sexual

harassment, sex-based discrimination and harassment, hostile workplace environments and victimisation in the workplace.

The *Fair Work Act 2009* (Cth) also prohibits the taking of adverse action against an employee (or prospective employee) on the basis of their race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, social origin, or because the employee has been or continues to be subjected to family and domestic violence. This is a civil remedy provision, so a director will be taken to have contravened the provision if they aided or abetted the contravention, induced the contravention, conspired with others to effect the contravention, or was "knowingly concerned in" the contravention.

The *Fair Work Act 2009* (Cth) now also prohibits sexual harassment in connection with work. Employers can be held vicariously liable if the sexual harassment is committed by an employee or agent of the employer. An employer will have a valid defence if they can prove that they took all reasonable steps to prevent the employee or agent from committing the sexual harassment.

From 1 March 2025 employers in Queensland are required to have a written prevention plan that explains how identified risks of sexual harassment and sex or gender-based harassment will be proactively managed in the workplace.[30]

In March 2025 the Commonwealth Government published the *Work Health and Safety (Sexual and Gender-based Harassment) Code of Practice*. It is intended that this Code of Practice is read and applied in conjunction with the *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice*, which was published in October 2024. These Codes of Practice provide employers with guidance on how to meet their obligations. The Codes can be used in court proceedings as evidence of what is currently known about a particular workplace hazard and can be used to assess what is a reasonably practicable management procedure.

16.5 Workplace health and safety

A company which conducts business activities or undertakings in Australia, including engaging employees and contractors, has obligations under work health and safety legislation in each State and Territory. These obligations extend to workers, contractors, sub-contractors, employees of contractors, visitors, customers and any other person affected by the business activities or undertakings conducted by the company.

Directors can also be personally liable for offences under work health and safety legislation. Uniform work health and safety legislation in most States and Territories (except Victoria) imposes positive obligations on each director and company officer to exercise due diligence to ensure the company complies with its work health and safety obligations. There is an equivalent provision in Victoria requiring persons with management or control of a workplace (to any extent) to ensure the workplace is safe and without risks to health (so far as is reasonably practicable).

Substantial penalties are imposed on companies and individuals for breaches of work health and safety legislation. An individual director, officer or employee may also be imprisoned for up to five years for reckless conduct under work health and safety legislation.

A number of States and Territories have also recently introduced industrial or workplace manslaughter laws. The detail of these laws varies from place to place. In Victoria, a director who by negligent conduct causes the death of a person who is owed a duty under workplace safety legislation can, in some circumstances, be prosecuted and, if convicted, jailed for up to 25 years.

From 1 July 2024, there is a federal offence of industrial manslaughter under the *Work Health and Safety Act 2011* (Cth), carrying a maximum penalty of $18 million for bodies corporate and 25 years' jail for individuals.

[30] *Work Health and Safety Regulation 2011* (QLD) section 55H

This new law only applies to Government departments and agencies, so is not relevant for non-Government employers and directors.

Additionally, in October 2022, NSW was the first State to pass amendments to their Work Health and Safety Regulations to provide for an explicit duty to eliminate or minimise workplace psychosocial risks. A psychosocial risk is one that arises from the design, management, environment, plant or interactions at work, that may increase the risk of work-related stress which can then lead to psychological or physical harm.

Other States have followed suit, or have introduced Codes of Practice, reflecting a broader shift in the minimum standards expected in the management of psychosocial risks in the workplace.

In Victoria new regulations (*Occupational Health and Safety (Psychological Health) Regulations*) are expected to be finalised in October 2025 and come into force in December 2025. The Regulations will create new obligations for employers with respect to the management of psychological hazards. The Regulations will recognise psychological and physical hazards as equally important for employers to manage. It is expected that the Regulations will create obligations for employers to have written prevention plans to identify and control psychosocial hazards, as far as is reasonably practicable. The Victorian Government will publish a Compliance Code to assist employers meet their duties under the new regulations.[31]

In October 2024 the Federal Government published the *Work Health and Safety (Managing Psychosocial Hazards at work) Code of Practice*. This Code of Practice provides employers with practical guidance on the identification and management of psychosocial hazards. The Code also identifies common psychosocial hazards in the workplace that employers should be particularly aware of, including job insecurity, lack of role clarity, poor support, inadequate recognition, high or low job demands, intrusive surveillance and fatigue.

16.6 Privacy

There have been significant recent changes made to the *Privacy Act 1988* (Cth), designed to strengthen Australia's privacy regime and bring it up to date with the digital age.

The AICD highlights the following major changes relevant for directors:

- a new direct right for individuals to take court action seeking compensation for loss or damage as a result of a serious breach of privacy;
- a new statutory tort of privacy, allowing individuals to sue for serious invasions of privacy committed "intentionally and recklessly" in circumstances outside the ambit of the legislation; and
- the inclusion of employee records under privacy laws.

On 10 December 2024, the first tranche of reforms was enacted under the *Privacy and Other Legislation Amendment Act 2024* (Cth), with the second tranche expected to follow. Key changes relevant to directors include:

- the creation of a statutory tort allowing individuals to take legal action for serious invasions of privacy;
- the requirement for organisations to disclose when decisions are made using automated processes; and
- expanded regulatory enforcement powers, including new OAIC powers to issue infringement and compliance notices and Ministerial powers to 'whitelist' countries with similar privacy protections.

The definition of personal information under the Act has been broadened to include any data that can reasonably identify an individual, even if it is indirect, such as metadata or behavioural information.

[31] New Rules to Protect Workers' Mental health (Victoria State Government, 21 February 2025)

(More controversial proposals, such as removing an exemption for small businesses, have not yet been implemented.)

These reforms will affect directors of all businesses handling personal information, as privacy requirements will become more prescriptive, and boards will be held more accountable for how their companies use personal data. To ensure they are meeting their duty to act with care and diligence, directors must play an active role in overseeing their organisation's privacy risk management processes, including building capacity to comply with the new obligations and those in the pipeline. Failure to implement adequate data protection measures could expose the company and directors to legal risks (including increased penalties) and reputational risks.

16.7 Tax

Complicity in taxation offences

If a company commits a taxation offence, the directors who are concerned in, or take part in, the management of the company are deemed to have committed the same offence.

It is a defence if the director proves that they:

- did not aid, abet, counsel or procure the commission of the offence; or
- were not in any way knowingly concerned in, or a party to, the commission of the offence.

Causing an entity to be unable to meet a tax liability

A director commits an offence if:

- they intentionally enter into, or are in any way concerned in or party to, an arrangement or transaction that renders a company or trustee unable to meet a liability to pay tax; or
- they directly or indirectly aid, abet, counsel or procure another person (including a company) to enter into such an arrangement or transaction.

Personal liability for taxation and superannuation amounts

If a director is convicted of a tax offence which results in a loss to the Commonwealth, they may be ordered to make a reparation payment for the loss.

Directors will be also personally liable for certain unremitted taxation and superannuation amounts of the company, even without being convicted of an offence.

Very broadly, directors are personally liable for any:

- amounts that are required to be withheld from payments by the company and remitted to the Commissioner of Taxation, including:
  - pay as you go (PAYG) withholding amounts;
  - TFN/ABN withholding amounts;
  - dividend, interest and royalty withholding amounts;
  - withholding amounts on payments or distributions to foreign residents; and
  - other amounts required to withheld under Division 12 of Schedule 1 of the Tax Administration Act 1953;
- superannuation contributions owed by the company;

- goods and services tax (GST) liabilities or instalments of the company; and
- excise tax and wine equalisation tax owed by the company,

unless the company:

- pays the amount in question;
- enters into an instalment arrangement with the Commissioner to remit the amounts;
- goes into voluntary administration (where an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Act);
- appoints a small business restructuring practitioner for the company under section 453B of the Corporations Act; or
- begins to be wound up.

These penalties may also apply to new directors who become directors after the due day for the amounts. New directors can incur a director penalty for the outstanding liabilities if they have not discharged the obligation (by payment, appointment of administrator, or winding up) within 30 days of becoming a director. Resigning within 30 days of becoming a director will not prevent a new director from being liable for director penalties if the obligations were not discharged.

Generally, it is a defence if a director can prove that:

- they did not take part in managing the company during the relevant time due to illness or some other good reason, provided it would have been unreasonable to expect the director to take part, and the director did not take part, in the management of the company;
- they took all reasonable steps to ensure that the company complied with its obligation, caused an administrator of the company to be appointed, the directors caused the company to begin to be wound up, or there were no reasonable steps that could have been taken to ensure that any of these things happened; or
- to the extent the penalty resulted from the company treating the *Superannuation Guarantee (Administration) Act 1992* (Cth) or the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), as applying to a matter in a particular way that was reasonably arguable, if the company took reasonable care in connection with applying the relevant legislation to the matter.

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