



A GUIDE FOR RESIDENT AND NON-RESIDENT DIRECTORS

# Directors Duties in Australia

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# Overview of directors duties in Australia

## Overview of corporate governance in Australia

The Australian corporate governance landscape is changing. Gradually, there has been a shift towards imposing greater personal liability on directors. Whilst the law still accepts error of judgment involving commercial risk, the standard expected of directors is high. Recent caselaw demonstrates Australia's corporate regulatory authority is increasingly willing to pursue directors for civil and criminal penalties. The laws of directorship demand directors take an active role in the governance of the company. The duties imposed on directors reflect this. Broadly speaking, most duties imposed on directors are negative, meaning directors are prohibited from doing something. However, some impose a positive obligation, meaning directors must actively do something.

## Key messages for directors seeking appointments to Australian subsidiaries

- Directors must take their office seriously. Assuming the office of director of an Australian company is a serious undertaking. Under current

laws, directors are exposed to a number of duties, for which the penalties for contravention can be severe. Directors are also exposed to personal liability in specific circumstances, which may go beyond what non-resident directors are familiar with in their home jurisdictions.

- Corporate groups face difficulties. Directors who sit on the boards of a parent company and its Australian subsidiary face additional hurdles. Ordinarily, a director must act in the best interests of the subsidiary, even if its interests do not align with that of the group. This difficulty can be overcome by an express authorisation in the subsidiary's constitution. Additionally, governance tools such as the formation of a related party transactions committee are advisable in mitigating risk.
- Governance processes should be formalised and insurance obtained. The governance processes of the company should be a priority. For example, directors are advised to seek formal appointment to the board of the subsidiary. Formal appointment enables directors to obtain Director and Officer (D&O) Insurance.

## Three sources of directors duties

In Australia, there are three sources of directors duties. Corporations Act duties, fiduciary duties and statutory duties. Companies are primarily governed by the *Corporations Act 2001* (Cth) (**Act**). One of its principal purposes is to set out the obligations of companies and its boards, executives and members. Additionally, fiduciary duties are duties developed over time as a result of caselaw (commonly referred to as judge made law). Fiduciary duties work in cohesion with the Act. Although there is overlap, the Act does not replace fiduciary duties. Finally, numerous legislative instruments, both federal and state, impose additional duties and liabilities on directors. Legislation governing Workplace Health and Safety (**WHS**), environment, competition and consumer regulation, anti-bribery and corruption, and taxation law are of particular importance for directors.



## Australian company law and Australia's regulatory authority

Offences under the Act are primarily civil. However, criminal offences also exist. The Australian Securities and Investment Commission (**ASIC**) is Australia's corporate regulatory authority. It has wide-reaching powers under both the Act and the Australian Securities and Investment Commission Act 2001 (Cth) (**ASIC Act**). The personal liability of directors is governed by these acts. ASIC is responsible for bringing proceedings against companies, directors and officers. Depending on the alleged breach, ASIC will elect between civil or criminal proceedings. The obvious difference being that a criminal proceeding will demand a higher standard of proof. Criminal penalties can result in imprisonment. However, civil penalties are typically pecuniary and may exclude a person from acting as a director of an Australian company for a specified time.

## Principal directors duties

Fortunately, there is significant overlap in the content of duties imposed by the three sources of directors duties. For example, to act in the best interests of the company is a duty imposed by the Act as well as a fiduciary duty.

The principal duties are:

- Duty of care, skill and diligence;
- Duty to act in good faith and in the best interests of the company;
- Duty to exercise powers and use information for a proper purpose (not for personal profit);
- Duty to prevent insolvent trading;
- Duty to avoid conflicts of interest; and
- Duties relating to company records.



# Directors duties under the Corporations Act

## Overview of duties under the Act

The Act imposes a number of duties on officers of a company. Officer is defined in the Act to include directors and secretaries. It further includes any employee who makes or participates in decision making affecting the whole or a substantial part of the company's business, who has the capacity to significantly affect the company's financial standing or a person whose instructions or wishes the directors are accustomed to act in accordance with. This definition encompasses 'shadow' and 'de facto' directors. Therefore, directors of parent companies can be liable as 'shadow' or 'de facto' directors if the subsidiary is accustomed to act on their instructions or if they are found to be informally involved in decision making.

## Key duties imposed by the Act

1. Act with care and diligence.  
There is an obligation to ensure a basic understanding of the company's activities, size, distribution of functions and its financial position.
2. Act in good faith, in the interests of the company and for a proper purpose. In corporate groups, the interests of the company extend to both the interests of shareholders as well as the interests of other stakeholders. This requires a

balance. Further, additional consideration must be given to shareholder appointed directors in joint ventures. The relationship of wholly-owned subsidiary and corporate group is discussed below.

3. Not use his or her position to gain advantage for themselves or another or to cause detriment to the company.
4. Not use information to gain advantage for themselves or another or to cause detriment to the company (duty continues after cessation of appointment).

Directors and officers who breach these duties are liable for civil and, in some circumstances criminal penalties. Furthermore, the duty to act with care and diligence imposes an obligation on directors to have a basic understanding of the company's activities and its financial position. These obligations are discussed further below.

The Act further imposes a number of additional duties on directors including:

1. A duty to disclose to fellow directors any material personal interest in matters relating to the affairs of the company; and
2. A duty to prevent insolvent trading.

'Personal material interest' is not defined in the Act. However, caselaw indicates the interest must be personal, of some substance or value and must have a realistic capacity or propensity to influence the director's decisions in administering the company's affairs.

## Procedural and disclosure requirements

The Act specifies certain procedures directors must follow including procedures for calling and holding meetings of members and board meetings. Directors must also disclose certain remuneration and benefits they receive.

## Financial records and accounts

The Act requires every company keep written financial records that:

- Accurately record and explain the company's transactions, financial position and performance;
- Enable true and fair financial statements to be prepared and audited; and
- Prepare a number of reports each year including a financial report and directors' report.

Failure to comply with these requirements is a strict liability offence and can result in criminal penalties applying.



## Duty to prevent insolvent trading

Under section 588G of the Act, a director (or directors jointly) can be held personally liable for the debts of the company if they allow it to continue trading whilst it is insolvent or insolvency would objectively have been suspected.

Insolvency occurs when a company is unable to pay its debts when they are due. Insolvent trading occurs when a company incurs a debt whilst insolvent or insolvent by incurring the debt. There are a limited number of defences including where:

1. The director can prove he or she took reasonable steps to prevent the company incurring the debt;
2. The director had reasonable grounds to expect, and did expect, the company to be solvent when the debt was incurred;
3. The director received adequate information as to the solvency of the company from a competent and reliable person fulfilling the responsibility to provide such information, had reason to believe that person and did believe the company was solvent and would remain solvent when the debt was incurred;
4. The director was not taking part in the management of the company due to illness or some other good reason when the company traded insolvent; and
5. The director acted honestly and reasonably in the circumstances when the company traded insolvent.

Accordingly, directors should:

1. Take great care in monitoring the company's financial position at all times; and

2. Seek appropriate financial assistance immediately if there are concerns about the company's solvency.

## Consequences for breaching duties under the Act

Penalties for breaching the Act can be severe. A director or officer who fails to perform his or her duties may be:

1. Guilty of a criminal offence incurring a fine up to the greater of A\$945,000 or three times the benefit derived or detriment avoided by the contravention, or imprisonment up to 15 years or both;
2. Ordered to pay the Commonwealth a penalty up to the greater of A\$1,050,000 or three times the benefit derived or detriment avoided by the contravention;
3. Personally liable to compensate the company or others for any loss or damage; or
4. Prohibited from managing a company.

## Contravention through involvement

'Involvement' in a contravention of the Act is also deemed to be a contravention. 'Involvement' includes:

1. Aiding, abetting, counselling or procuring the contravention;
2. Inducing the contravention;
3. Being in any way, by act or omission, knowingly concerned in or party to the contravention; and
4. Conspiring with others to effect the contravention.

For example, if the company was to commit a breach of the Act, one or more directors may be

held to have been 'involved' in that contravention and so contravened the Act themselves.

## Director's reliance on information or advice from others

Directors will sometimes base their decisions on information or advice provided by others. The Act permits such reliance provided it is reasonable. Recent caselaw has expanded upon the statutory regime.

Under the Act, there is a presumption the director's reliance will be reasonable where he or she relies on advice given or prepared by employees, professional advisers or experts, other directors or officers or committees of directors. However, the presumption will only apply where:

1. The reliance is reasonable, that is, the director must reasonably believe the matter relied upon is within the professional competence of the person on whom they rely;
2. The reliance is in good faith; and
3. The director makes an independent assessment of the information or advice, 'having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation'.

If these requirements are not met, directors who accept advice or information may be responsible for the consequences flowing from it, even if that information or advice was incorrect, misleading or incomplete.

## Delegation of a director's power

A director can delegate a power to any person if it is recorded in the company's minutes and provided it is exercised in accordance with the powers of the director. However, a director will remain responsible for how that delegated power is exercised unless the director believed on reasonable grounds:

1. The delegate, at all times, would exercise the power in conformity with the law and the company's Constitution; and
2. In good faith and after making proper inquiry, the delegate was reliable and competent in relation to the power delegated if the circumstances indicated the need for inquiry.

## Corporate Group

Inherently, directors may have conflicting duties by virtue of sitting on the boards of a parent company and its wholly-owned subsidiary. Therefore, the interaction between a parent company and its subsidiary must be scrutinised. It is not uncommon to establish specific committees to oversee related party transactions, such as intra-group loans, to ensure commercial fairness. Further, the Act enables a director to act in good faith, in the best interests of the subsidiary, provided:

1. The constitution of the subsidiary expressly authorises the director to act in the best interests of the parent company;
2. The director acts in good faith, in the best interests of the parent company; and
3. The subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

## Protection against directors liability

It is commonplace for directors of an Australian company to seek appropriate protection against liability. Typically, this includes:

1. Updating the company's constitution to include provisions addressing related party transactions, indemnity and insurance;
2. Ensuring appropriate D&O insurance is in place; and
3. Ensuring individual directors and one or more group companies enter into access deeds.



# Directors duties at general law (fiduciary duties)

## Overview of fiduciary duties

A director of a company owes fiduciary duties to the company, meaning he or she must act in the company's best interests. These duties have developed from the general law. General law is commonly referred to as judge made law because it is found in the decisions of judges on cases brought before them. A director must:

1. Act in good faith and in the best interests of the company.

'Good faith' is both subjective and objective, in that a director must genuinely believe he or she is acting in the company's best interests and must also act in a way that an honest and reasonable director would.

2. Exercise his or her powers for a proper purpose.

In determining what is a proper purpose, the purpose motivating the exercise of power must accord with the objective purpose for which the power was granted.

3. Not fetter his or her own future discretion.

A director must exercise discretion and not improperly limit their decision-making authority. This does not prevent directors delegating powers provided such a decision is made

with authority and is entered into the minutes of the company.

4. Avoid conflicts of interest and duty.

If a director must choose between his or her own interests and the interests of the company, the director must usually choose the latter. A director should avoid actual and perceived conflicts of interest including providing advice and voting on such conflicts.

## Additional duties

Additional fiduciary duties require a director must:

- Not obtain the company's property for his or her own benefit or for a benefit of another without the company's permission;
- Account to the company for any profit made as a result of his or her office without the company's informed consent; and
- Not exploit or divert a business opportunity from the company that is within the company's current or prospective line of business.

## Who can bring an action against directors for a breach of a fiduciary duty?

If a company suffers a consequential loss resulting from a breach, the company may bring a claim for damages or compensation.

ASIC may also recover damages or property from directors who breach their duties or engage in misconduct under the Act.

An individual director or shareholder may also bring a claim under certain circumstances.

## Remedies available in the event of a breach of a fiduciary duty

A number of remedies exist including:

- Grant of injunction;
- Claim for damages or compensation;
- Entitlement to profits made by a director;
- An order for property (of the director) to be held on trust for the company; and
- Rescission of any contract improperly entered into by a director.

## Can shareholders relax the duties, ratify or exonerate a breach of a fiduciary duty?

In limited circumstances, a company's shareholders (**Members**) can ratify or relax duties owed by directors by passing a resolution at a general meeting. This essentially authorises what would otherwise be a breach or forgives an existing breach. Any consent given by members must be informed consent.



# Directors duties under workplace health and safety

## Overview of duties under Workplace Health & Safety Legislation

Under the *Workplace Health and Safety Act 2011* (Cth) (**WHS Act**), an officer of a person conducting a business or undertaking (**PCBU**) must exercise due diligence to ensure the PCBU complies with his or her duty or obligation. The WHS Act adopts the definition of 'officer' in the Act. A **PCBU's** primary obligation is to ensure, so far as is 'reasonably practicable', the health and safety of workers whose performance of work activities is influenced or directed by the **PCBU**.

## Duty to exercise due diligence

A director's duty of due diligence includes obligations to:

- Acquire and update his or her knowledge of WHS matters;
- Understand the operations carried out by PCBU employed to do so, as well as the hazards and risks associated with the operations;
- Monitor information on incidents, hazards and risks;
- Ensure PCBU have, and use, appropriate resources and processes to eliminate or minimise WHS risks arising from work being carried out;
- Verify the use of processes and resources to minimise risks to WHS;
- Ensure WHS and legal compliance;
- Facilitate consultation on WHS issues; and

- Ensure PCBU have, and use, processes for complying with duties or obligations under the WHS Act.

## Duty to contractors and other workers

The definition of 'worker' under the WHS Act has been expanded to include contractors and other individuals carrying out work in any capacity, whether paid or as a volunteer. Consequently, directors are exposed to a greater risk of breaching their duty to exercise due diligence. In *Baiada Poultry Pty Ltd v The Queen*,<sup>1</sup> the High Court found the principal was not liable for the death of a contractor's employee. However, the High Court made it clear the use of contractors does not necessarily absolve directors from their WHS obligations. Directors must continue to exercise "reasonable and practicable" steps to mitigate WHS risks.

## Consequences for breaching duties under the WHS Act

Penalties for breaching the WHS Act are severe. Penalties can be a fine up to A\$3,000,000 for a body corporate and A\$600,000 fine and/or 5 years imprisonment for a director or PCBU.

## Recommendations for directors

In practice, there may be a disconnect between what senior management believe is happening in respect of WHS and what is actually taking place. To guard against this, a continuous,

performance based evaluation process should be implemented. Such a process should include regular reporting by management on safety and analysis of whether WHS systems are effective or not. The following is a recommended WHS checklist for directors, issued by the Australian Institute of Company Directors:

- Maintain an adequate and current knowledge base.
- Respond to potential hazards in a timely manner.
- Ensure there is an effective WHS management system in place.
- Set goals to improve WHS performance and review them regularly.
- Have metrics (measurable data) in place to monitor performance.
- Demonstrate active and visible leadership in WHS management.
- Be familiar with your top WHS risks.
- Make WHS the first item on the board's agenda.
- Request WHS reports from unit managers.
- Include WHS as a KPI in all position descriptions and performance reviews.
- Include WHS in strategy and budget processes.
- Ensure that the business is adequately resourced to manage WHS.

1. [2012] HC 14.

# Directors duties under environmental legislation

## Overview of liability under environmental legislation

The federal, state and territory and local governments jointly administer environmental protection. However, environmental regulation is largely governed by state regimes. As a result, duties imposed on directors varies state by state. In common however, each jurisdiction seeks to ensure directors are held personally liable for a company's breach of environment compliance.

In addition, liability may depend on the location of the company's registered office and business operations. Therefore, environmental compliance processes should be adapted for each jurisdiction in which the business operates. Further, it is recommended directors ensure environmental compliance policies and procedures are up-to-date and regularly reviewed.

A defence is available in respect of personal liability, provided a director can establish:

1. He or she took all reasonable steps to ensure the company complied with the relevant legislative provision; or
2. He or she was not in a position to influence the conduct of the company in respect of the offence.

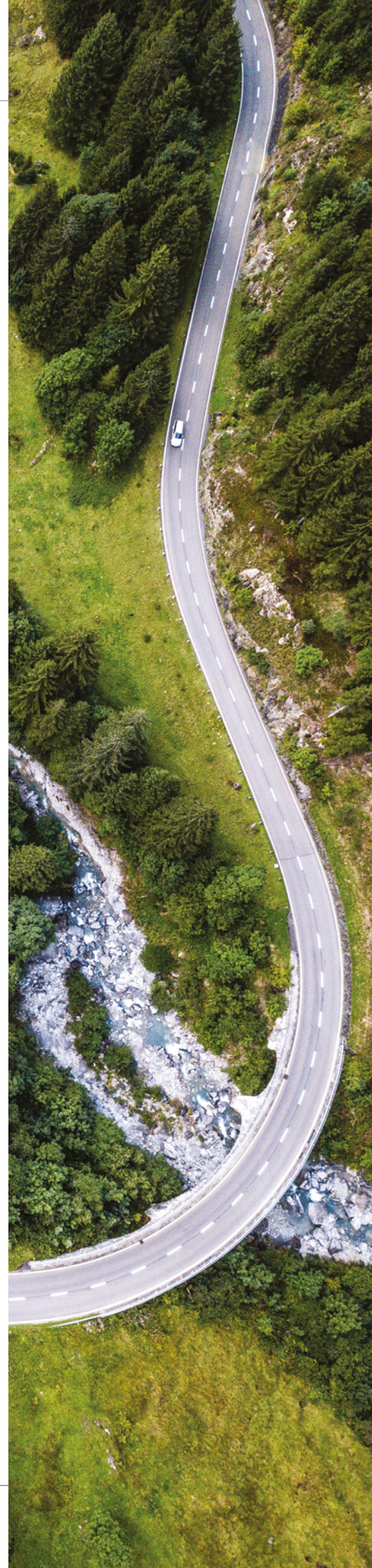
The first of the defences is commonly referred to as the 'due diligence defence'.

In determining whether the defence has been made out, the courts consider whether:

1. Precautions are in place to prevent the specific and likely risks arising from operations, rather than merely general precautions taken in the ordinary course of business;
2. A pollution prevention system was in place and whether it was supervised, inspected and improved over time;
3. A compliance system is in place and whether directors and officers review the environmental compliance reports;
4. The officers immediately and personally react when they have notice the system has failed; and
5. Reasonable precautions were taken beforehand to prevent the incident.

## Corporate social responsibility

Of importance, compliance with legal obligations may not satisfy a director's social obligations in respect of environmental best practice. For example, it is not a legal obligation for most companies to produce an energy efficiency report. However, such a report may provide guidance for best practice and significantly reduce energy consumption. It is recommended directors review the company's corporate social responsibility policy to ensure it aligns with the company's overall strategic objectives.



# Directors liability under the Australian Consumer Law

## Overview of liability under the Australian Consumer Law

In addition to directors being disqualified or penalised for breaches of civil penalty provisions under the Act, the now superseded Trade Practices Act 1974 (Cth) (**TPA**) also imposed personal liability on directors for misuse of market power and product safety breaches. Under the Australian Consumer Law (**ACL**) introduced in 2011, these personal liability provisions have been adopted. Additionally, the ACL enables ASIC and the Australian Competition and Consumer Commission (**ACCC**) to seek orders against directors and senior management for company breaches of consumer protection provisions including:

- Unconscionable conduct;
- False representations in relation to supply of goods;
- Unsolicited agreements;
- Breach of certain consumer safety provisions, including notification requirements; and
- Failure to comply with a substantiation notice.

## Extent of directors' liability under the ACL

Not only can directors be held liable under the ACL for their own contravention of consumer protection provisions but they can also be found liable in circumstances where they have:

1. Attempted to contravene such a provision;
2. Aided, abetted, counselled or procured another person to contravene such a provision;

3. Induced, or attempted to induce, a person to contravene such a provision;
4. Been in any way, directly or indirectly, knowingly concerned in the contravention of such a provision by another person; or
5. Conspired with others to contravene such a provision.

## Recent examples of directors being found personally liable

Since the ACCC began enforcing the ACL, the courts have made orders for penalties over A\$1 million dollars on a number of occasions. For example, in *ACCC v Energy Watch Pty Ltd*, Energy Watch's CEO and director was found personally liable for false and misleading representations about goods and services and was ordered to pay a penalty of A\$1.95 million dollars. The contravention related to advertisements claiming residential and business customers would save A\$386 and A\$1,878 dollars respectively over a 12 month period. The Federal Court found there was no adequate basis for making such claims, the CEO's appearance in the advertisements added significant seriousness and had compounded the effect of the false representations. In handing down his decision, Justice Marshall noted deterrence was a strong consideration for such a penalty and said the 'corporate world should know it is wrong to engage in such deceptive business practices and doing so will incur the risk of large penalties'.

In *Grande Enterprises Ltd v Pramoko*, Mr Pramoko, a director of Southern Cross International Investments

Limited, was found liable for misleading and deceptive conduct in respect of a promise made on behalf of Southern Cross. He was ordered to pay Grande Enterprises A\$2.25 million dollars in exchange for 30 million shares in Zen Resources Limited. Liability arose out of an agreement entered into by Grande Enterprises and Southern Cross for the purchase of the Zen Resources shares. The agreement was signed by both parties and Mr Pramoko in his capacity as a director of Southern Cross. The agreement contained a clause to the effect that if Zen was not taken over by a company listed on the Australian Securities Exchange or not itself listed on a major stock exchange within two years, then Southern Cross would buy back the shares from Grande Enterprises for the same price. Subsequently, Zen Resources was not taken over by a listed company or itself listed on a major stock exchange. Southern Cross failed, despite demand, to buy back the shares. The decision in *Grande Enterprises Ltd v Pramoko* demonstrates directors engaging in misleading or deceptive conduct when entering into a commercial transactions on behalf of companies can incur severe personal consequences. The case is one example of how personal liability can arise notwithstanding the use of a corporate entity to conduct business.



## Prohibition on indemnification

A Company can usually indemnify directors and managers for personal liability through provisions in its constitution. However, under the ACL there is a prohibition on indemnifying directors from personal liability for civil penalties or legal costs incurred in defending proceedings where liability has been found.

## Directors and Officers Insurance

Under the ACL, there is no specific prohibition on obtaining D&O insurance against personal liability for civil penalties. This is in contrast to the Act, which expressly prohibits insurance for certain breaches. However, the ACL prohibits a company indemnifying itself or by use of an 'interposed entity'. It states:

A body corporate (the first body), or a body corporate related to the first body, commits an offence if it indemnifies a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against either of the following liabilities incurred as an officer (within the meaning of the Corporations Act 2001) of the first body:

1. A liability to pay a pecuniary penalty under section 224;
2. Legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

The drafting of this provision is ambiguous. It is unclear whether the courts will interpret an insurer to constitute an 'interposed

entity' by reason of it agreeing to indemnify under an insurance policy. Consequently, it is recommended D&O insurance be obtained from an arm's length insurer for a commercial premium. It is reasonably arguable the literal meaning should not apply and "interposed entity" should be interpreted to mean an entity that is controlled by the company or which the company uses to achieve a result indirectly that it cannot achieve directly. Therefore, obtaining D&O insurance on the above mentioned terms is likely (although not definitive) to avoid the insurer constituting an "interposed entity".



# Directors liability under Anti-Bribery and Corruption Legislation

## Overview of liability for breaches of anti-bribery and corruption laws

In recent years, the Organisation for Economic Co-operation and Development (OECD) has become increasingly critical of Australia's lack of enforcement of companies in violation of domestic and foreign anti-bribery and corruption laws. Consequently, it is expected the Australian Federal Police (AFP) and ASIC will pursue individuals and companies more vigorously. As a result, it is likely there will be an escalation in the number of anti-bribery investigations targeting breaches of directors duties. A company's failure to comply with obligations under domestic and foreign anti-bribery laws will expose directors to criminal and personal liability.

## Australian Criminal Code

Under the Criminal Code Act 1995 (Cth) (Code), bribing a public or foreign public official attracts severe penalties for directors. Additionally, a company may be found liable of the lesser offence of 'giving a corrupting benefit' where receipt of a benefit by a public official may influence the exercise of his or her duties, irrespective of the giver's intention. A 'benefit' is not limited to money or property. Consequently, directors are advised to review company policies in respect of the giving of gifts and entertainment to avoid potential breaches of the Code. Further, it is recommended companies maintain regularly scrutinised gift registers.

The offence of bribing a foreign official was adopted under the Code as a consequence of Australia implementing the OECD Anti-Bribery Convention. A contravention will occur where a person:

- Provides or offers someone (directly or indirectly) a benefit not legitimately due;
- With the intention of influencing a foreign public official in the exercise of his or her duties; and
- In order to obtain or retain business or a business advantage.

The offence captures the conduct of an Australian citizen, resident or company, whether the conduct occurred in Australia or overseas.

## Consequences for breaching the Code

Directors can be held liable for the activities of a company's employees, agents, or officers in circumstances where the company expressly, tacitly or impliedly authorised the corrupt conduct. In addition, a company may also be found liable despite the directors not having actual knowledge, where the company is found to be wilfully blind or deliberately ignorant of the corrupt conduct.

Penalties include up to:

- 10 years imprisonment and/or a fine up to \$1.7 million for individuals; and
- For a company, the greater of:
  - A \$17 million fine;
  - Three times the value of the benefit reasonably attributable to the conduct; or

- Where the value of the benefit cannot be determined, up to 10% of the annual turnover of the company during the relevant period.

The maximum penalty for 'giving a corrupting benefit' is five years imprisonment.

## Defences to bribing a foreign official

There are two defences to bribing a foreign official. These are:

- The conduct was not unlawful in the country where it occurred.
- The benefit was a 'facilitation payment'.

The Code defines a facilitation payment as a minor payment made to speed up or secure the performance of 'routine government action'. Examples of a routine government action include:

- Granting a permit, licence or other official document qualifying a person to do business in a foreign country;
- Processing government papers such as visas or work permits;
- Providing police protection, mail collection or delivery;
- Scheduling inspections associated with contract performance or the transit of goods;
- Providing telecommunications services, power or water;
- Loading and unloading cargo;
- Protecting perishable products, or commodities, from deterioration; and
- Any other action of a similar nature.



- The defence is yet to be tested through the courts. Therefore, the distinction between bribes and facilitation payments remains ambiguous. Consequently, best practice dictates facilitation payments should be avoided.

### US Foreign Corrupt Practices Act

Under the Foreign Corrupt Practices Act 1997 (USA) (FCPA), jurisdiction extends to United States of America (US) foreign nationals and companies, provided:

- A related party operates in the US;
- A related party is listed on a US exchange;
- A related party uses the services of a US financial institution; or
- It uses US government services of interstate commerce. This includes sending mail through US post or sending emails, text messages or faxes to and from the US.

Jurisdiction further extends to co-conspirators regardless of whether they have entered the US or not.

Traditionally, the US Department of Justice has been proactive in its prosecution of companies and

directors for alleged breaches of the FCPA. Consequently, directors should ensure the company's anti-bribery and corruption policies are continually reviewed.

### United Kingdom Bribery Act

Unlike Australia, the United Kingdom Bribery Act (UK Bribery Act) does not provide a 'facilitation payment' defence. Failure to prevent bribery is also an offence. Furthermore, jurisdiction extends to foreign companies with a 'demonstrable business presence in the UK'. Therefore, companies conducting business in the UK must continually regulate its own conduct or risk prosecution.

### Compliance regime recommendations

A robust compliance regime should include:

- Implementation of policies and procedures including:
  - Code of business conduct;
  - Record keeping policy;
  - Whistle-blower policy; and
  - Compliance guide for employees, agents and contractors.

The compliance guide should specify clear guidelines for gift-giving, entertainment, and hosting.

- Enforcement of a zero tolerance policy in respect of bribery and corruption.
- Standard form documentation requiring third parties (dealing with the company) to act in accordance with the company's anti-bribery and corruption policies.
- Thorough record keeping practices in respect of facilitation payments, cash or unusual payments, per diems and any payments made to government officials or related entities.
- Mandatory anti-bribery and corruption training delivered regularly to company officers, employees and contractors.
- Implementation of systems to assess and monitor the compliance regime.
- Appropriate due diligence investigations into prospective clients, agents, intermediaries and joint venture partners.





# Directors liability under Taxation Legislation

## Overview of liability for breaches of taxation obligations

Directors have a responsibility to ensure their company meets its Pay As You Go (**PAYG**) withholding and superannuation guarantee charge (**SGC**) obligations. PAYG and SGC payments are compulsory under Australian law. Directors who fail to meet these obligations when they fall due automatically become personally liable for a penalty equal to the outstanding amount.

## Powers of the Australian Taxation Office

The Australian Taxation Office (ATO) is authorised to:

- Issue directors in contravention a penalty notice;
- Commence legal proceedings against directors to recover the penalty; and
- Collect the penalty by other means including the withholding of a tax refund.

## Defences

Directors will not be liable if one of the following defences are available:

- If illness or for some other good reason, he or she did not take part (and it would have been unreasonable to expect you to take part) in the management of the company;
- He or she took all reasonable steps to ensure either:
  - The company paid the amount outstanding; and
  - An administrator was appointed to the company; and
  - The directors began winding up the company.
- In the case of an unpaid SGC liability, the company treated the Superannuation Guarantee (Administration) Act 1992 (Cth) as applying in a way that could be reasonably argued was in accordance with the law, and took reasonable care in applying that Act.

## Other examples

The states and territories also have legislation relating to taxation and duties. Some, such as the Taxation Administration Act 1996 (NSW) impose personal liability on directors for specific offences. For example, if a company registers an interest in a dutiable property or dutiable transaction before the duty is stamped, directors may have committed an offence and be liable for a penalty up to A\$11,000.

## Disclaimer

Taxation law in Australia is fluid and change in legislation and regulation is frequent. Specialised taxation advice should be sought regularly to ensure compliance.

## Protections for directors

### Recommended protection for directors

In order to maximise the protection available to directors by law, the following actions are recommended:

- Ensure the company and its directors enter into a deed of indemnity, insurance and access.
- Ensure sufficient D&O insurance is in place, which is obtained from an arm's length insurer and for a commercial premium.
- Ensure the company's constitution includes provisions addressing related party transactions, indemnity and insurance.

### Indemnification under the Corporations Act

A deed of indemnification enables companies to indemnify directors against:

- Failure to comply with laws and regulatory obligations;
- Regulatory reporting errors;
- Liability to third parties (unless arising from a lack of good faith); and
- Payment of legal expenses arising from successfully defending prosecutions or claims.

However, there are exceptions, including:

- Where a director is liable to the company; and
- His or her liability for a pecuniary penalty order or compensation order.

### Insurance and the Corporations Act

D&O insurance provides indemnification against costs arising from defending proceedings (civil and criminal) irrespective of outcome. Despite indemnification for legal costs, it cannot provide an indemnity in respect of liability arising from wilful breach of duty to the company or improper use of position or information.

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sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.



