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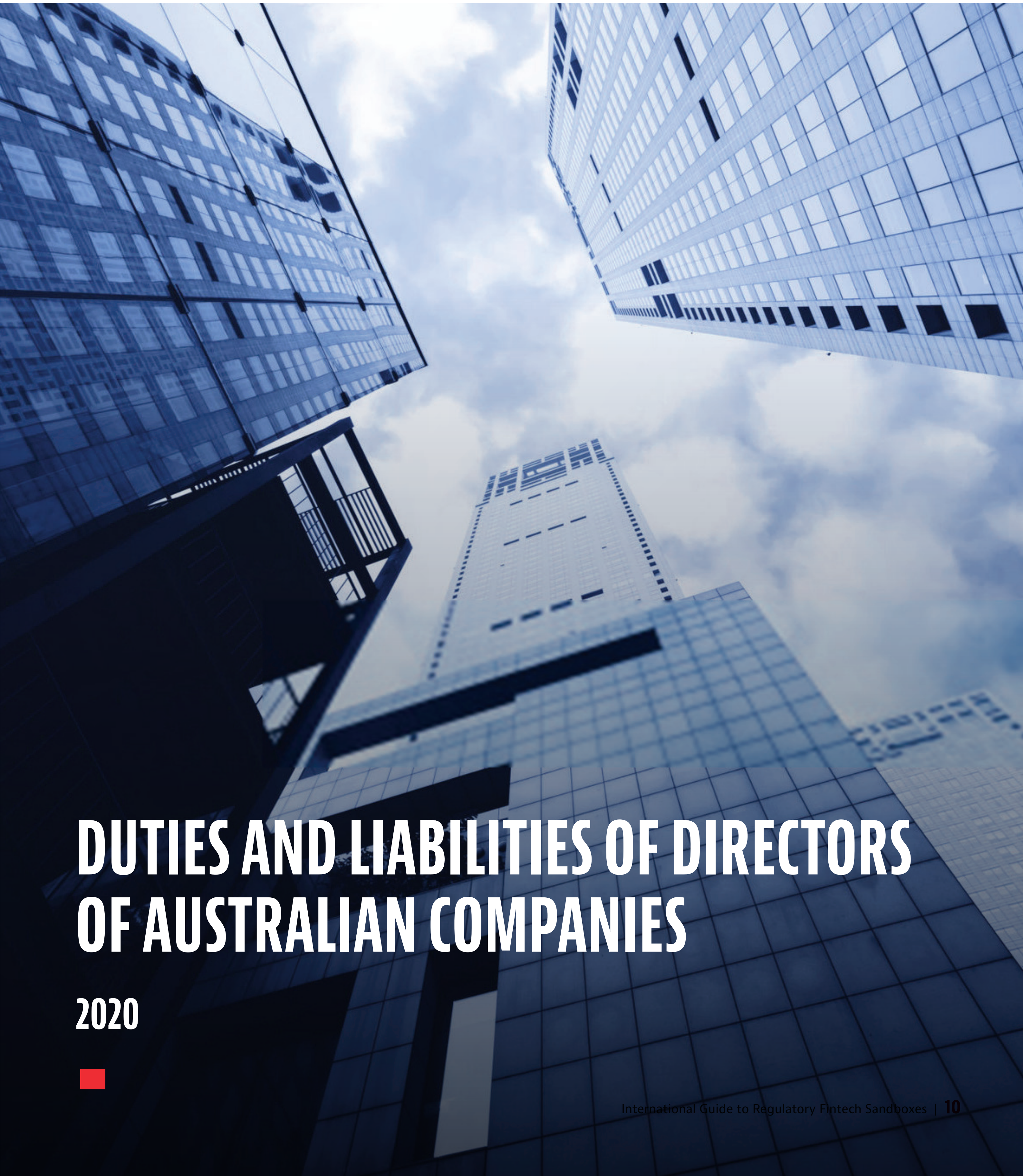

DUTIES AND LIABILITIES OF DIRECTORS OF AUSTRALIAN COMPANIES

2020

Introduction

Australian law imposes numerous duties and obligations upon various people who are employed by, or who act on behalf of, an Australian company. The particular duties depend upon the role of the person within the company. This Guide outlines the duties of directors of an Australian company.

Matters covered in this Guide include common law and statutory duties, delegation, reliance on others, insider trading, disclosure requirements and directors' insurance and indemnities. A Glossary of key terms is included at the end of the Guide.

Being a trusted adviser to many of the top companies in Australia, Baker McKenzie is recognised for its extensive experience advising directors of Australian companies.

We hope that this Guide provides you with a broad overview of the duties of directors of Australian companies. It is not intended, however, to be an exhaustive analysis of all relevant legal requirements. If you are uncertain about any of the issues raised in this Guide or require further details or assistance, please do not hesitate to contact us.

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PARTNER CONTACTS

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This Guide is current as at 1 September 2020 unless indicated otherwise.

All dollar amounts stated in this Guide are Australian dollars.

1. Position as a director

1.1 Appointment of directors

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

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

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 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 ASIC shortly after the director is appointed. These details then become publicly available.

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. A person acting as an alternate director is subject to the same duties and liabilities as other directors.

1.3 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; and
- set and review budgetary control and conformance strategies.

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.

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[1] If a proprietary company wishes to raise capital through equity crowd-sourced funding (**CFS**), it will be subject to Australia's CFS 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.

1.4 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.

1.5 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 apply to executive directors (see section 2.5 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.

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.[2]

[2] Currently, the extent to which directors owe a fiduciary duty to consider the interests of stakeholders other than members as a whole (such as individual members, creditors and employees), may be affected by the impact of COVID-19 on the company. Directors are required to be proactive in understanding the risks and opportunities that the current economic situation presents to their company, particularly if the company is in financial distress. In relation to the impact of COVID-19 on directors' duties, ASIC Commissioner John Price has stated that "*… directors and officers will need to carefully reflect on their fundamental duties to act with due care, skill and diligence and to act in the best interests of the company. This will include reflection on which stakeholders' interests need to be factored into decisions – including employees, investors and creditors*." (see further: ASIC: Directors duties in context of COVID-19).

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 2.7 below), directors may sometimes be required to take into account the interests of creditors, particularly where the company is insolvent or approaching insolvency. The Corporations Act also requires creditors' interests to be considered in specific circumstances (for example, where the company is proposing a capital reduction or share buy-back).

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. 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 shareholder 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 shareholder if it is not also in the best interests of their company.

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.

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 (if it has one).

The key duties of directors are to:

- act in good faith in the best interests of the company;
- exercise their powers for the purposes for which they were conferred;
- act with reasonable care and diligence;
- avoid conflicts of interest; and
- not improperly use company information or their position to gain an advantage for themselves or someone else or to cause detriment to the company.

This Guide deals with the duties of directors, but similar duties (except for the duty to avoid conflicts of interest) apply to all company officers, including secretaries.

A director may rely on certain information or advice given by certain people, provided the reliance was made in good faith and after making an independent assessment of the information or advice.

Unless the company's constitution provides otherwise, the directors may delegate any of their powers to others, and are not responsible for a delegate's exercise of power if the delegation satisfies a test of reasonableness (see section 3 below).

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 12 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 shareholders, may be liable for a breach of their statutory duty of care to the company.[3] Any contravention of this duty may give rise to both civil penalties and disqualification as a director.

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, shareholders 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 breach 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 shareholders.

2.3 Duty of good faith

Directors must exercise their powers and discharge their duties in good faith in the best interests of the company as a whole. At a minimum, this duty requires directors to act in what they honestly believe to be the company's best interests. In addition, a director's conduct may be assessed objectively by reference to what a reasonable director would consider to be the company's best interests.

2.4 Duty to act for a proper purpose

Directors must exercise their powers and discharge their duties for a proper purpose.

The company's constitution may specify the proper purposes of a power, otherwise the proper purposes must 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 shareholder'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.

2.5 Duty of care and diligence

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

[3] See: *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52.

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

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 is likely to mean that directors should not be absent from board meetings without good reason. All directors must also have sufficient financial literacy at least to understand the company's financial position and any financial statements the company is required to prepare.

Business judgment 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 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.

2.6 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).

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.

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 may not be present at a directors' meeting while the relevant matter is being considered and may 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 4.1 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.

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.

Misuse of position or information

Overlapping with the preceding general rule, directors have a statutory duty not to improperly use their position, or information obtained by virtue of their position, to gain an advantage for themselves or someone else or to 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 director's position, regardless of whether the director considers it improper.

The duty not to misuse company information can apply to information which is not confidential. A general duty of confidence also applies in relation to information which is confidential.

Authorisation by shareholders

If a director has fully disclosed a personal interest or other duty, the shareholders 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 shareholders 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 shareholders 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, an appropriate approval may have the effect of removing any impropriety so that the duty is not breached.

2.7 Duty to prevent insolvent trading

Insolvency

A company is insolvent if it is not able to pay all of its debts, as and when they become due and payable. 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.

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.

Duty to prevent insolvent trading

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

- the director fails to prevent the company from incurring a debt;
- the director is aware that there are reasonable grounds for suspecting that the company is insolvent or would become insolvent by incurring the debt, or a reasonable person in the circumstances would be so aware; and
- the company is insolvent or becomes insolvent by incurring the debt.

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.

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.

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;
- the director took all reasonable steps to prevent the company from incurring the debt; or
- 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.

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 in connection with developing and taking a course of action that is reasonably likely to lead to a better outcome for the company, than proceeding immediately to voluntary administration or winding up.[4]

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 suspecting 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

[4] The Federal Government has also recently implemented an additional "safe harbour" from insolvent trading liability to provide further relief for businesses impacted by COVID-19. Specifically, directors will be protected from debts incurred "in the ordinary course of the company's business" from 25 March 2020 until 31 December 2020 (as at the date of this Guide). However, directors should note that general directors' duties still apply. Accordingly, directors must continue to actively identify and manage business issues, and satisfy themselves as to the ability of the company to return to solvent trading once the six-month period ends.

- carefully document the steps taken in implementing the turnaround plan through board minutes and file notes.

2.8 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.

2.9 Liabilities of trustee company

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 (if any); 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;
- generally 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).

That is, 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, see section 12.4 below).

4. 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.

4.1 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.

4.2 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 shareholder 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. 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; and
- 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).

5. 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.

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.

6. Financial reporting

6.1 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.

6.2 Reporting obligations

Disclosing entities (which include listed companies and certain companies with 100 or more shareholders), public companies, 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;
- have the financial report 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 ASX if the company is listed on ASX); and
- if the company is a public company, lay the financial report, directors' report and auditor's report before the annual general meeting.

Disclosing entities 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 the CSF regime and have raised over $3 million must also have their financial statements audited.

6.3 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 the 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
- whether, in the directors' opinion, 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.

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

6.5 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.[5] A director commits an offence if they breach this obligation dishonestly.

7. Continuous disclosure obligations

In addition to the periodic reporting obligations outlined in section 6 above, listed companies and other disclosing entities have continuous disclosure obligations under the Corporations Act and the ASX Listing Rules (as applicable).

A company listed on ASX must immediately notify ASX of any information concerning the company that would reasonably be expected to have a material effect on the price or value of its securities.[6] 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.

Civil and criminal penalties apply for non-compliance with the continuous disclosure requirements, and this liability extends to a director (or any other person) who is involved in a breach of these obligations (see further, section 12 below). However, a "due diligence" defence is available if the person took all reasonable steps to ensure that the entity complied with its continuous disclosure obligations and reasonably believed that the entity was complying.

A company listed on ASX 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 company or a related company. If details of a director's interests in securities are not disclosed to ASX by the company, the director is personally obliged to notify ASX, and commits an offence if they fail to do so.

8. Financial assistance for share acquisitions

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 shareholders or the company's ability to pay its creditors;
- the company follows certain procedures involving shareholder approvals and lodging documents with ASIC; or
- an exception applies, for example if the assistance is given under an employee share scheme approved by shareholders.

[5] Directors should note that a number of temporary changes have been made to financial reporting obligations to assist companies during the COVID-19 crisis. These include ASIC extending the deadline for both listed and unlisted entities to lodge certain financial reports by one month, and permitting public companies with financial years ended 31 December 2019 to 7 July 2020 to hold their AGM up to seven months after year end (even if this means the requirement to hold an AGM in calendar year 2020 is not satisfied). ASIC has also provided guidance on the implications of COVID-19 on financial reporting requirements (see further: COVID-19 implications for financial reporting and audit: FAQs).

[6] The continuous disclosure threshold for ASX listed entities has been temporarily modified as a result of the COVID-19 pandemic. Under the modified laws, which apply from 26 May 2020 until 26 November 2020 (as at the date of this Guide) and for the purposes of civil proceedings only, non-public information need only be disclosed if the entity "*knows or is reckless or negligent with respect to whether that information would, if it were generally available, have a material effect on the price or value of the entity's securities*".

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.

9. Clawback of 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.

10. Whistleblower protections

The Corporations Act protects individuals 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, as 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 breaching a whistleblower's confidentiality (including during an investigation into the whistleblower's concerns).

From 1 January 2020, public companies, large proprietary companies and corporate trustees of superannuation entities regulated by 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 whistleblowers, and how the company will investigate whistleblower disclosures and protect whistleblowers from detriment.

11. Climate change risk

Climate change risk is a major emerging area of Australian corporate governance, with regulators putting increased pressure on directors and other officers to appropriately manage the financial risks and opportunities associated with climate change.

A directors' report for a listed entity must contain information that a member of that company would reasonably require to make an informed assessment of, among others, the future prospects of the company. In some cases, this will include risks to the business that may arise as a result of climate change.[7]

The importance of understanding and assessing climate change as an emerging risk has also been recognised by the Reserve Bank of Australia, ASIC and APRA. Further, the Australian Accounting Standards Board (AASB) and the Auditing and Assurance Standards Board (AUASB) have released a practice statement on the importance of considering climate-related risks in financial statements, rather than confining climate change to corporate social responsibility documents.[8]

Directors can use the Taskforce on Climate Related Financial Reporting (**TCFD**) 2017 Recommendations as a best-practice guide to reporting on their financial risks.[9] The TCFD Recommendations include assessing both

[7] Recent legal opinions by senior Australian barristers Noel Hutley SC and Sebastian Hartford-Davis have expressed the view that climate change risk may constitute financial risk for some companies, and therefore disclosure of that risk will be required.
[8] See Climate-related and other emerging risks disclosures (April 2019).
[9] See Taskforce on Climate-Related Financial Disclosures: Final Report.

physical risks to business operations and transitional risk (which may include policy and legal, technology, market and reputation risk categories) under different warming scenarios and developing approaches to risk management and strategy to respond to those risks.

While the detail and relevance of climate risk disclosure is likely to vary between industries, in most instances, regulators and investors expect more than a cursory acknowledgement of risks and companies may need to engage in financial analysis, targeted governance and develop sophisticated whole-firm responses.

Failure to adequately disclose climate risk may result in action against the company for breaches of its statutory reporting obligations, or against the directors for breaches of directors' duties such as the duty of care and diligence. In addition to legal and regulatory concerns, consideration and disclosure of climate change risks can also be motivated by investor pressure.

12. 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 shareholders;
- creditors, insolvency administrators or trustees in bankruptcy;
- third parties; and
- regulatory authorities.

12.1 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.

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).

12.2 Liability for involvement in a contravention

Where certain provisions of the Corporations Act (such as those discussed in sections 6 and 7 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.

12.3 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 others for loss suffered;
- liability to account to the company for profits made by the director; and
- disqualification from managing companies.

If a director's breach of duty constitutes an offence (which often, but not always, involves dishonesty), the director may also be liable for substantial criminal penalties (such as a term of imprisonment).

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.

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.

12.4 Approach to corporate governance and contravention

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**), launched in 2017 and finalised in 2019, triggered a wide-spread toughening of approach by regulators to corporate governance and contravention in Australia, including as set out below.

ASX Corporate Governance Principles and Recommendations

The latest edition of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (**Principles and Recommendations**)[10], effective from 1 January 2020, highlights 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. Whilst the Principles and Recommendation are applicable to listed entities only, they are considered to be a benchmark for corporate governance generally, and should also be reflected in the corporate governance practices of non-listed entities.

ASIC Corporate Governance Report

Similar to the Principles and Recommendations as mentioned above, ASIC's Corporate Governance Taskforce Report has urged directors and officers to focus on overseeing and managing compliance risk, and implement better information flow between directors, senior management and risk committees.[11] This places a higher onus on directors to be pro-active in assessing and holding management accountable for non-financial

[10] See ASX Corporate Governance Principles and Recommendations (4th ed).
[11] See ASIC's Corporate Governance Taskforce Report.

risks (such as operational, conduct and compliance risks), in addition to directors' customary focus on financial risks.

ASIC's "why not litigate?" approach

In response to recommendations made by the Royal Commission, ASIC has established an internal "Office of Enforcement", aimed at the deterrence, public denunciation and punishment of wrongdoing by way of litigation. Through the Office of Enforcement, when ASIC considers a possible contravention of law, it now starts with the question: "why not litigate?" This has increased the risk of public exposure and more punitive sanctions for directors who breach their duties.

Penalties under the Corporations Act

Penalties under the Corporations Act have also been significantly increased in the wake of the Royal Commission, giving ASIC the power to seek much higher penalties against directors and others who breach the law. The following maximum penalties are effective on and from 1 July 2020:

- for criminal offences, 15 years' imprisonment and/or a fine the greater of:
  - $999,000 for an individual or $9.99 million for a body corporate;
  - three times the benefit gained and detriment avoided by the offence; or
  - for a body corporate, 10% of its annual turnover; and
- for civil breaches, a pecuniary penalty the greater of:
  - $1.11 million for an individual or $11.1 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 $555 million.

Director Identification Number (DIN) regime

A new regime, featuring a unique identifier called a "Director Identification Number" (**DIN**) to be assigned to each director of an Australian company, is expected to commence in early 2021. The aim of the DIN 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. This follows on from the introduction of new legislation in February 2020 giving ASIC, the ATO and liquidators more robust powers to help deter and disrupt illegal phoenixing activities, and prosecute culpable directors and associated persons.[12] The DIN regime will have a transitional period allowing existing directors and new directors time to apply for a DIN. However, after the transitional period, directors will need to apply for the DIN before being appointed (unless provided otherwise by the registrar or regulations).

13. Directors' 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 as 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.

13.1 Restrictions on indemnifying directors

Indemnities for liabilities other than legal costs

[12] See the *Treasure Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth).

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.

13.2 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.

14. 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 are outlined below but this is not an exhaustive summary.

14.1 Anti-bribery and corruption legislation

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.

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 or 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.

Baker McKenzie recommends that corporations adopt a compliance program to discourage and prevent bribery and corruption within their organisation. This program should 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.

14.2 Taxation laws

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 knowingly concerned in, or a party to, the commission of the offence.

Unremitted taxation and superannuation amounts - personal liability

Very broadly, directors are personally liable for any:

- pay as you go (PAYG) withholding amounts that are not remitted to the Commissioner of Taxation;
- superannuation contributions not made;
- goods and services tax (GST) liabilities or instalments of the company; and
- excise tax and wine equalisation tax,

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); or
- begins to be wound up.

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 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 ups; 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.

14.3 Competition and consumer laws

Directors are liable for any personal contraventions of the Competition and Consumer Act or the Australian Consumer Law, for example by engaging in misleading or deceptive conduct.

In addition, if a company breaches the Competition and Consumer Act or the Australian Consumer Law, any director (or other person) who was "involved" in the contravention is also 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 Competition and Consumer Act or the Australian Consumer Law, or for legal costs incurred in proceedings in which they are found liable to pay such a pecuniary penalty.

14.4 Environmental legislation

Each state and territory of Australia regulates pollution control, contamination, hazardous materials, waste disposal, and biodiversity protection through state-based legislation and environmental protection agencies. The approach of each state and territory to this regulation differ in certain ways, however broadly, they all regulate the discharge of pollutants into the air, land, and water, and the storage, use, and transportation of hazardous materials and waste.

States and territories actively enforce this legislation, and penalties for breach are determined with reference to the circumstance of the breach, the intention of the offender, and the severity of the harm to the environment. These penalties can be significant, exceeding A$5 million in some instances, and include imprisonment for individuals. Directors can be held directly liable for offences committed by their company and can be subject to positive due diligence obligations, such as to have comprehensive risk management systems and ensure that such systems keep pace with legislative reforms.

At a federal level, directors can be found civilly or criminally liable if the company takes an action without necessary approval, and that action has, or is likely to have, a significant impact on a matter of national significance.

Generally, under both state and federal laws, a director will only be personally liable for the company's actions where the director knew of the offence, failed to take reasonable steps to prevent it and was in a positon to influence the conduct of the company. The steps taken to prevent an offence could be shown through the company's environmental management policies and its response to individual events.

14.5 Employment legislation

Directors can incur personal liability for their company's 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 (and 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.

Additionally, under recently passed Victorian "wage theft" laws (which have not yet come into operation), directors are deemed to have committed an "employment entitlement offence" if their company has done so.

In those circumstances, the onus will then fall on the director to show that he/she exercised due diligence to prevent the occurrence of the offence.

14.6 Anti-discrimination legislation

Commonwealth, state and territory legislation prohibit discrimination in the workplace and in the provision of goods and services on various grounds. These grounds include age, disability, union activity, pregnancy, race, sex and sexual orientation. These laws also prohibit sexual harassment and, in some cases, other forms of harassment and conduct likely to humiliate or intimidate.

Directors may be held personally liable under such laws if they engage in discriminatory conduct or request, induce, instruct, encourage, authorise, or assist another person to commit a discriminatory or unlawful act.

14.7 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 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.

Substantial penalties are imposed on companies and individuals for breach 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.

Additionally, a number of States and Territories have 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 20 years.

Glossary

Accounting Standards	Australia's accounting standards as issued by the Australian Accounting Standards Board from time to time.
AGM	Annual General Meeting of a company.
APRA	The Australian Prudential Regulation Authority.
ASIC	The Australian Securities and Investments Commission.
ASX	ASX Limited or the Australian Securities Exchange market which it operates, as the context requires.
Australian Consumer Law	Schedule 2 of the Competition and Consumer Act.
CFS regime	The crowd-sourced funding legislative regime governed by the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth).
Competition and Consumer Act	*Competition and Consumer Act 2010* (Cth).
Corporations Act	*Corporations Act 2001* (Cth).
director	Defined in the Corporations Act as: (a) a person who: (i) is appointed to the position of a director, or (ii) is appointed to the position of an alternate director and is acting in that capacity; regardless of the name that is given to their position; and (b) unless the contrary intention appears, a person who is not validly appointed as a director if: (i) they act in the position of a director; or (ii) the directors of the company are accustomed to act in accordance with the person’s instructions or wishes. Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person’s professional capacity, or the person’s business relationship with the directors or the company.
disclosing entity	An entity which is subject to an enhanced disclosure regime under the Corporations Act, such as listed companies and certain companies with 100 or more shareholders.
key management personnel	Key management personnel has the same meaning as in the Accounting Standards, that is, the persons who have authority and responsibility for planning, directing and

	controlling the activities of the company, directly or indirectly, including any director (whether executive or otherwise).
large proprietary company	A proprietary company that for a financial year satisfies at least two of the following criteria: ■ the consolidated revenue for the financial year of the company and the entities it controls (if any) is $50 million or more; ■ the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $25 million or more; ■ the company and the entities it controls (if any) have 100 or more employees at the end of the financial year.
listed	Included in the official list of ASX or certain other financial markets.
member	In general, a person who holds shares in a company.
officer	Includes a director, secretary, or other person who makes or participates in making decisions that affect the business of a company (or a substantial part of it) or who has the capacity to significantly affect the company's financial standing.
secretary	The Corporations Act does not define the term "secretary", but the secretary usually acts as chief administrative officer of the company.

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