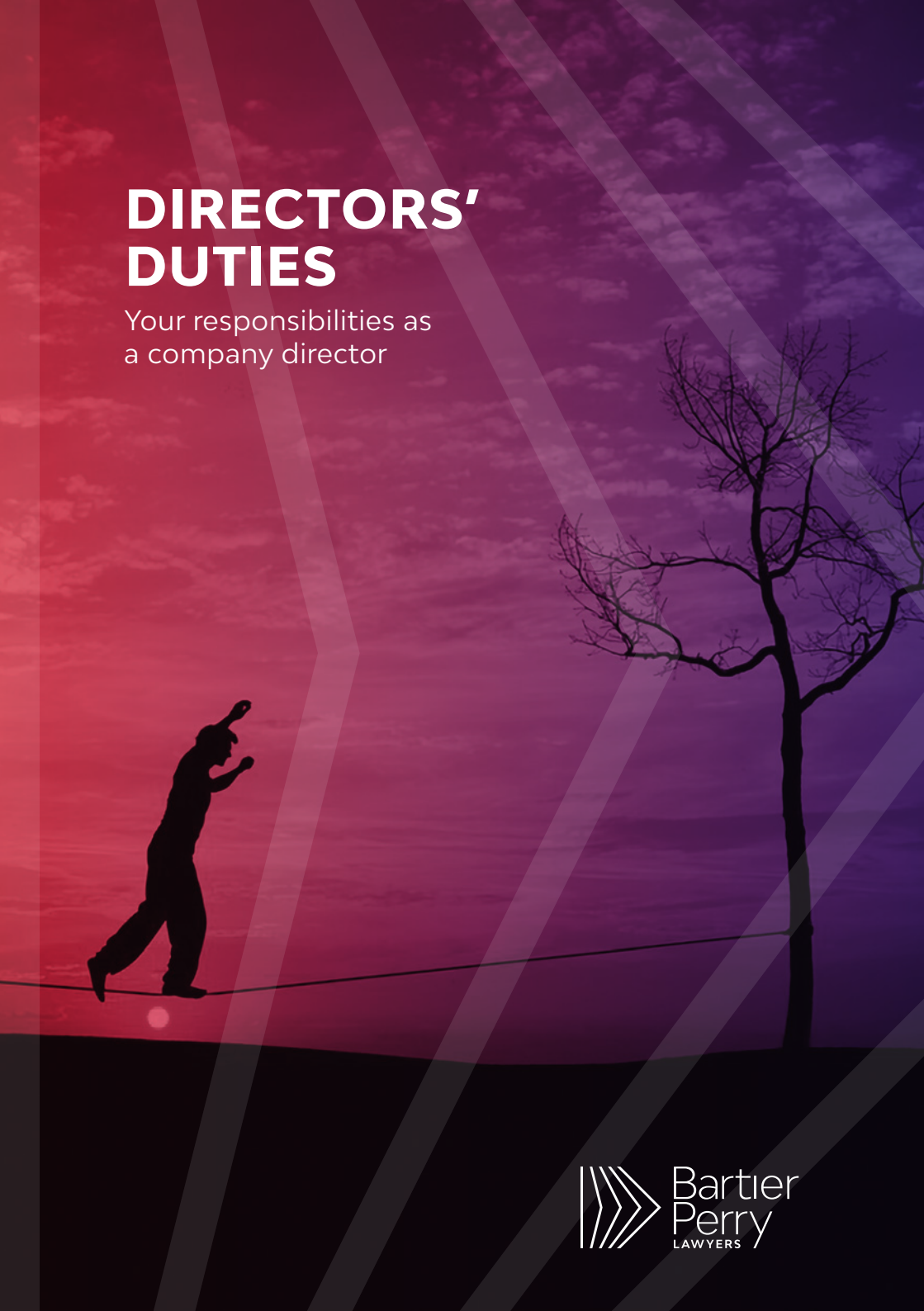
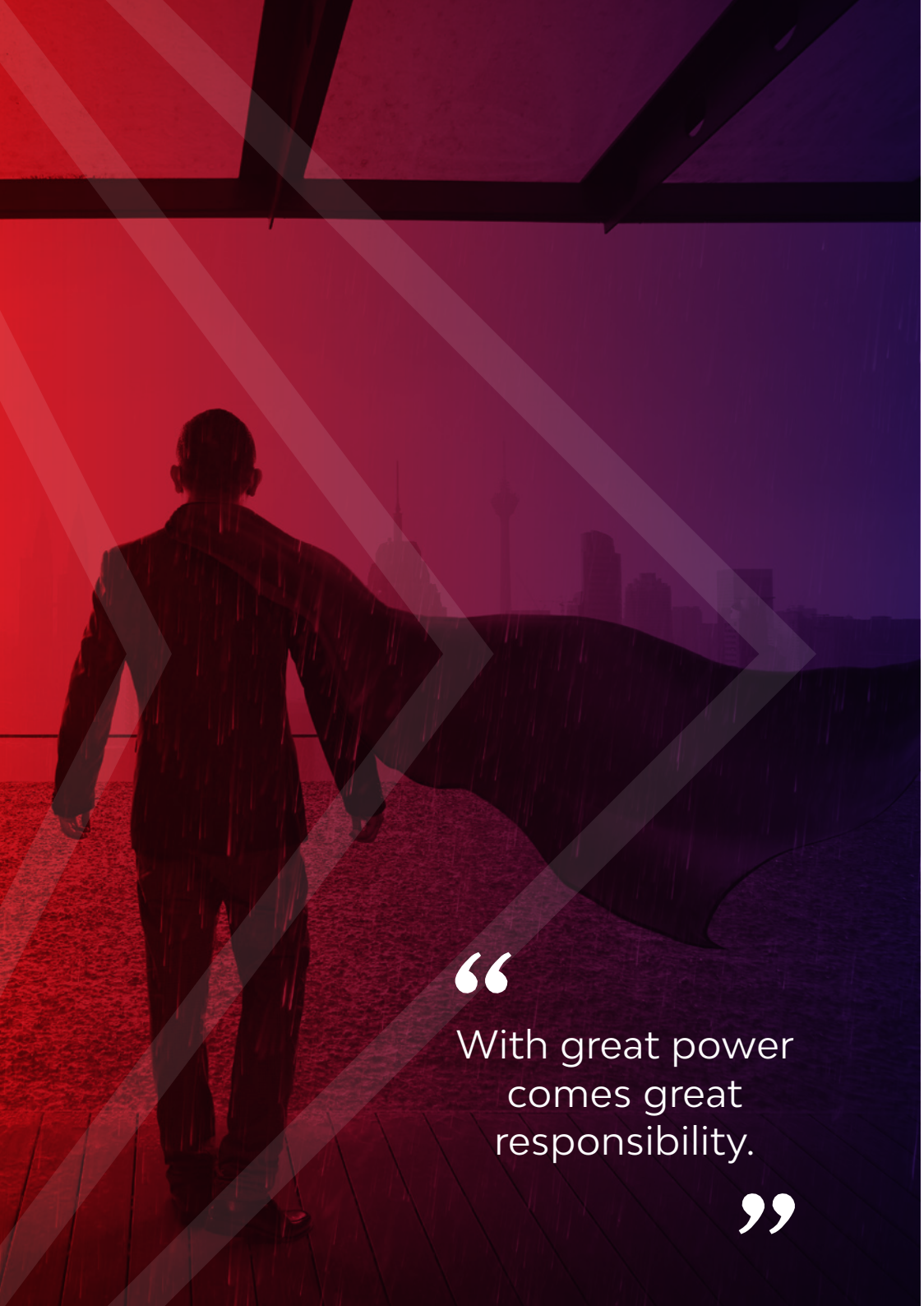
DIRECTORS' DUTIES

Your responsibilities as a company director



Bartier Perry LAWYERS



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YOUR DIRECTOR'S DUTIES

A director is a person who acts as a director. It is not necessarily that they be formally appointed. This includes spouses who act as 'sleeping' or 'passive' directors.

As a director, you are crucial to your company's success. Not only are you responsible for the day-to-day running of your business, you are also responsible – and accountable – to the company and its shareholders.

As part of this role you have serious legal responsibilities and must comply with your obligations under the *Corporations Act 2001* (Act) and at common law.

If you fail to meet your obligations under the Act, the civil or criminal penalties can be considerable.

The Act imposes several important duties on directors, which can be broadly categorised into:

1. **Duties of skill**
2. **Duties regarding personal interests**
3. **Duties regarding information and assets**
4. **Duties regarding financial mismanagement.**

Similar obligations to those under the Act are imposed at common law. A failure to satisfy those requirements can expose a director to claim for compensation.

01	02	03	04
			
DUTIES OF SKILL	**DUTIES REGARDING PERSONAL INTERESTS**	**DUTIES REGARDING INFORMATION AND ASSETS**	**DUTIES REGARDING FINANCIAL MISMANAGEMENT**
Duty to act with care and skill	Duty to act in good faith Duty not to abuse corporate opportunities Duty to avoid conflicts of interest	Duty not to misappropriate company property Duty not to disclose confidential information	Duty not to trade while insolvent Duty to ensure compliance with financial reporting requirements

A failure to comply with your director's duties may result in you being sued personally for loses suffered by others.

DUTIES OF SKILL

DUTY TO ACT WITH CARE AND SKILL

This duty requires directors to act with the same care and skill as a reasonable person with the same skills would in their circumstances.

This duty also requires a director to ensure they are properly informed as to the business affairs and financial position of the company.

The Act's business judgement rule does offer directors a safe harbour from personal liability in relation to this duty; however, it only applies to honest, informed and rational business judgements, provided they are made in good faith for a proper purpose and without a material personal interest.



SPOUSAL DUTIES

"Once the [spouse] takes on the office of a director, [the spouse] undertakes duties and obligations which require an active interest to be displayed in the affairs of the company."

Debelle J in *Group Four Industries Pty Ltd v Brosnan & Another*



The **maximum** monetary penalty of any one contravention is currently the greater of **$1,050,000 or three times the benefit** derived from the contravention.



In **2017–18**, more than **4,000** alleged civil breaches of the care and diligence section of the Act were reported.

What skills and experience do you contribute to the company? Are there any that need to be further developed to ensure you can make fully informed and independent decisions?

Are you fully aware of your company's business affairs and financial position? If not, you need to take steps now to ensure you are.



DUTIES REGARDING PERSONAL INTERESTS

DUTY TO ACT IN GOOD FAITH

Directors are required to exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose.

BOARD MEMBERS

"A board member must not allow [themselves] to be compromised by looking to the interests of the group which appointed [them] rather than to the interests for which the board exists. [They are] most certainly not a mere channel of communication or listening post on behalf of the group which elected [them]."

Street J in *Bennetts v Board of Fire Commissioners of NSW*

The **maximum** monetary penalty of any one contravention is currently the greater of **$1,050,000 or three times the benefit** derived from the contravention.

For **2017–18**, there were **341** alleged criminal breaches of the Act relating to a director's duty to act in good faith.

The **maximum** criminal penalty has been increased to **15 years** imprisonment.

Are you confident that you are considering what is in the company's best interests, as opposed to any other parties' interests, when making decisions?

DUTY NOT TO ABUSE CORPORATE OPPORTUNITIES

This duty requires directors not to improperly use their position to gain advantage for themselves or someone else.

Directors must not divert opportunities from the company or aim to profit or exploit opportunities for personal gain, or to the detriment of the company.

DIVERTING OPPORTUNITIES

A director of a cola manufacturer breached the duty when he bought the Pepsi company for his own benefit.

(*Guth v. Loft Inc,* 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939))

The **maximum** monetary penalty of any one contravention is currently the greater of **$1,050,000 or three times the benefit** derived from the contravention.

The **maximum** criminal penalty has been increased to **15 years** imprisonment.

When business opportunities arise, are they being offered to you by reason of and in the course of your role as director?

If so, are you sharing these opportunities with the company?

DUTY TO AVOID CONFLICTS OF INTEREST

Directors have a personal responsibility to avoid putting themselves in a position where there is a real and sensible possibility of conflict between the interests of the director and the interests of the company.

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

CONFLICT OF INTEREST

A director was found to be in breach where the company entered into agreements with other companies that he provided consultancy services to.

(SBA Music Pty Ltd v Hall (No 3))

HOW CAN A DIRECTOR AVOID A CONFLICT OF INTEREST:

1. The company should have a conflict of interest policy in place which sets out how a director should act in the event of a potential conflict
2. The director should fully disclose any potential conflict from the time of their appointment
3. A director should not participate in a decision making process if there is a possible conflict of interest

Are you considering what interests you have in the decisions you are making as a director?

Are you disclosing any potential conflicts that you foresee to the Board?

DUTIES REGARDING INFORMATION & ASSETS

DUTY NOT TO MISAPPROPRIATE COMPANY PROPERTY

Directors are under a duty not to misappropriate property from a company for their own or a third party's benefit. This includes damaging company property.

To ensure compliance with these requirements, directors should regard all company property and information as belonging to the company, not to them as directors.

"Property" is defined as "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description…". This includes a company's money, shares, real estate, furniture, information, etc.



THE MISAPPROPRIATION RULE

"The misappropriation rule can be stated relatively easily: a director may not apply company property either for the director's personal benefit or for the benefit of any other person without the authority of the company."

Case Study

ASIC v Hill

In **2016**, Steven William Hill was banned from engaging in credit activities and providing financial services when he was found guilty of **misappropriating over $200,000 of investment funds** that were paid to himself and other third parties rather than the company. Mr Hill was also **sentenced to 2 years and 9 months jail** for fraudulent misappropriation.

For what purpose are you planning on using company property and assets?



DUTY NOT TO DISCLOSE CONFIDENTIAL INFORMATION

Directors have a responsibility not to make unauthorised use of confidential information belonging to the company.

Confidential information includes information which is:

- not publicly available
- reasonably believed to be detrimental or of benefit to others if disclosed
- industry knowledge considered worthy of protection.



IMPROPER USE OF INFORMATION

"A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to gain an advantage for themselves or someone else; or cause detriment to the corporation."

The Corporations Act 2001

EXAMPLES OF CONFIDENTIAL INFORMATION INCLUDE:



- information about how a company operates
- information about a company's clients (that is not publicly available information)
- a company's strategy
- a company's pending plans to raise capital.

How have you obtained this information about the company?



Case Study

ASIC v Vizard

In the matter of *ASIC v Vizard*, Stephen William Vizard admitted to carrying out share dealings for his benefit while a director of Telstra.

Through his position, Mr Vizard obtained confidential information and used this information to influence his decision to purchase and sell shares.

Mr Vizard was disqualified for **10 years** from managing a corporation and was ordered to pay penalties in the sum of **$390,000**. The court declined to follow ASIC's recommendation of a five-year disqualification order and imposed a **ten-year disqualification order** on Mr Vizard.

The court would have imposed a higher penalty if "left uninstructed" by ASIC. The court held that "indeed general deterrence is of primary importance in cases of this kind. A message must be sent to the business community that for white collar crime 'the game is not worth the candle'.

Points to consider

01	Who else is aware of this information?
02	How do you intend on using this information?
03	Is the information available to the public?
04	If you use this information, are you likely to personally benefit from its use?

DUTIES REGARDING FINANCIAL MANAGEMENT

DUTY NOT TO TRADE WHILE INSOLVENT

As a director, you have a duty to prevent your company trading if it is insolvent, or may become insolvent by incurring a debt.

Your company is deemed insolvent if it cannot pay its debts as and when they fall due.

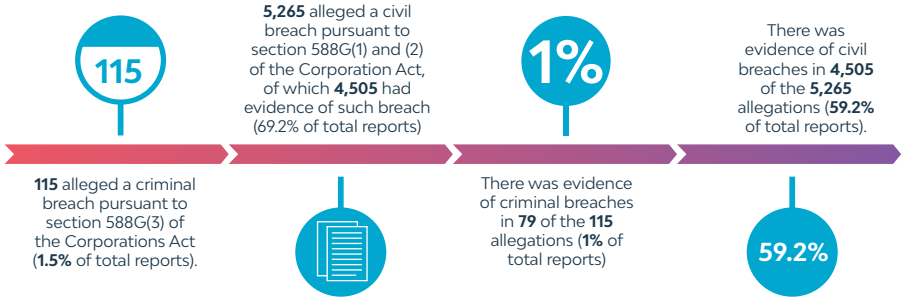
INSOLVENCY CHECKLIST

Some indicators that your company may be insolvent:

- it has a history of continuing trading losses
- it has cash flow problems
- it is experiencing difficulty collecting debts and selling stock
- it is unable to pay creditors on agreed trading terms
- Commonwealth and state taxes, including PAYG instalments and GST, are not paid when due
- it has reached the limit of its funding facilities and has defaulted, or is likely to default on agreements with financiers
- it is uncertain that company assets can be sold relatively quickly to create funds to meet and pay debts
- company cheques are being dishonoured and returned
- it cannot show its financial position and trading performance or prepare financial forecasts in a timely manner because the company is unable to produce accurate financial information.

INTERESTING FACTS AND FIGURES

Of the 7,613 initial external administrators' reports lodged in the 2018 financial year to ASIC:



* section 588G refers to prohibition of insolvent trading.

INSOLVENCY IMPLICATIONS

As a director, you may be personally liable for any debts that are incurred while a company is insolvent or any debts that caused the company to become insolvent. You must be aware of your obligations if you believe that the company is insolvent or likely to be insolvent.

SOME OPTIONS IF YOUR COMPANY IS INSOLVENT OR POSSIBLY INSOLVENT

VOLUNTARY ADMINISTRATION

A quick and simple process which aims to manage a company's affairs. It is distinguished from liquidation in that attempts are made to save the company. A company may enter into a deed of company arrangement (DOCA) which is an agreement between creditors and the company in relation to how a company's affairs will be managed.

LIQUIDATION

An independent person (liquidator) is appointed to wind up the company and manage the company affairs for the benefit of the creditors, either voluntarily by members or creditors, or by the court.

RECEIVERSHIP

A creditor with a security over the company may appoint a receiver to collect and sell a company's assets to repay the creditor's debt.

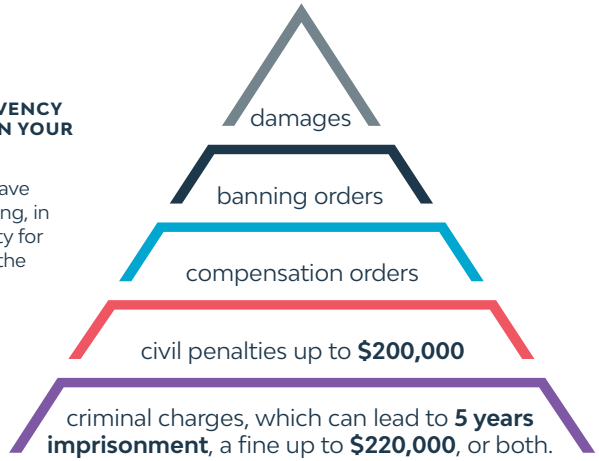
THE ROLE OF DIRECTORS DURING EXTERNAL ADMINISTRATION

Directors no longer have control of a company if it goes into liquidation or administration but they must:

- provide details regarding company property and assets
- deliver company property and/or assets to an administrator or liquidator
- provide company books and records
- produce a Report on Company Activities and Property which sets out the company's financial property and business circumstances
- assist the external administrator with any reasonable enquiries regarding the company.

ARE ANY OF THE INSOLVENCY INDICATORS PRESENT IN YOUR COMPANY?

If a company is found to have engaged in insolvent trading, in addition to personal liability for any debts incurred whilst the company was insolvent, a director may be liable for:



ASIC may also commence compensation proceedings against a director for amounts lost by creditors.



DUTY TO ENSURE COMPLIANCE WITH FINANCIAL REPORTING REQUIREMENTS



Directors must ensure that the company maintains proper financial records and complies with any reporting requirements.

UNDER THE ACT, PROPER FINANCIAL RECORDS INCLUDE:

- invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers
- documents of prime entry (where transactions are first logged before they are recorded in a company's accounting financial system)
- working papers and other documents needed to explain:
  - the methods by which financial statements are made up;
  - adjustments to be made in preparing financial statements.

INTERESTING FACTS AND FIGURES

Directors must ensure that the company maintains proper financial records and complies with any reporting requirements:



Of the **7,613** initial external administrators' reports lodged in the 2018 financial year to ASIC there were **3,329** allegations of possible misconduct (**44%** of reports) in relation to the obligation of a company to keep financial records.



Failure to comply with this duty is the **third** largest reported case behind duty of care and insolvent trading breaches.



Are your company books and financial statements up-to-date?



Do your company's financial records correctly record and explain the financial position of the company?



Are you retaining your financial records for seven years?

A company may be presumed to be insolvent if it fails to maintain adequate financial records. See above section on insolvent trading for further detail regarding a director's liability.

As a director, you don't need to be an accounting expert. However, you must be able to understand a company's financial statements and form a view in relation to the accuracy of the information.



EMPLOYMENT OBLIGATIONS



EMPLOYMENT OBLIGATIONS: AN OVERVIEW

Businesses – and their directors – must ensure their employees are correctly paid and are provided with their statutory entitlements, and that such compliance is correctly documented.

Minimum pay obligations are contained in modern awards, enterprise agreements and the national minimum wage.

Minimum statutory entitlements in areas such as leave (annual, compassionate, domestic violence, parental, personal/carer's and public holidays), ordinary hours of work, notice of termination and redundancy pay, and the right to request flexibility, are contained in the National Employment Standards (NES).

Awards and enterprise agreements establish other conditions of employment that must be complied with by businesses, including obligations in respect of allowances, hours of work, penalties and overtime.

A contravention is a failure to comply with any one of these obligations.



Penalties can be imposed on individuals for breach of their obligations and they may also be ordered to personally pay compensation.

Businesses also have statutory obligations in respect of:

01	**DISCRIMINATION** discrimination covering protected attributes including age, disability (physical and mental), race and sex (family or carer's responsibilities, marital status, pregnancy and sexual orientation)
02	**BULLYING AND SEXUAL HARASSMENT** preventing bullying and sexual harassment at the workplace
03	**NON-AVOIDANCE OF OBLIGATIONS** not (mis)treating workers as contractors when they are employees, called sham contracting
04	**UNLAWFUL TERMINATION** unlawful termination, including because of a temporary absence from work, religion or political opinions
05	**HEALTH AND SAFETY** work health and safety, and ensuring the safety of workers
06	**WORKPLACE RIGHTS** workplace rights, and not taking adverse action against an employee because they have, propose to, or do exercise, a workplace right.

EMPLOYMENT LAW: YOUR PERSONAL EXPOSURE

"It is becoming common for plaintiffs and their legal representatives to bring claims personally against directors and managers."

Under the *Fair Work Act 2009*, a person involved in a contravention is taken to have also contravened the law. A person "involved in a contravention" can include a director. A person will be deemed to have been involved if they have in any way, by act or omission, directly or indirectly, been knowingly concerned in or a party to the contravention.

PENALTIES

The penalties for an individual for each contravention of a civil remedy provision can be up to **$12,600** (compared to company exposure of up to **$63,000**). These maximum amounts do increase over time.

A *"serious contravention"* attracts penalties of up to **$126,000** for individuals (compared to company exposure of up to **$630,000**). A serious contravention involves a deliberate contravention that is part of a systematic pattern of conduct.

Individuals involved in a contravention can be ordered to pay compensation.

Do you know the minimum employment entitlements of the company's employees?

Do you know what statutory protections are afforded to the company's employees?

Is the company complying with its obligations?

WORK, HEALTH AND SAFETY

WORK, HEALTH AND SAFETY: YOUR DUE DILIGENCE DUTIES

Businesses must ensure, so far as is reasonably practicable, the health and safety of all workers at work. Under the *Work Health and Safety Act 2011**, there is a positive duty of **due diligence** on officers, which includes you as a director.

Under this Act, a director must exercise due diligence to ensure that the business complies with all its duties and obligations.

A failure to exercise due diligence is a criminal offence.

Penalties for officers range from: up to $100,000 for a low range offence or up to $600,000 or 5 years jail for reckless conduct leading to death or serious injury.

* Note, WA and Victoria have not implemented harmonised WHS laws.

DUE DILIGENCE INCLUDES TAKING REASONABLE STEPS TO:

- acquire and keep up-to-date knowledge of work health and safety matters
- gain an understanding of the nature of the operations and generally of the hazards and risks associated with those operations
- ensure that the person conducting the business has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety
- ensure that the person conducting the business has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information
- to ensure that the person conducting the business has, and implements, processes for complying with any duty or obligation under the WHS Act
- to verify the provision and use of the resources and processes.

OBLIGATIONS

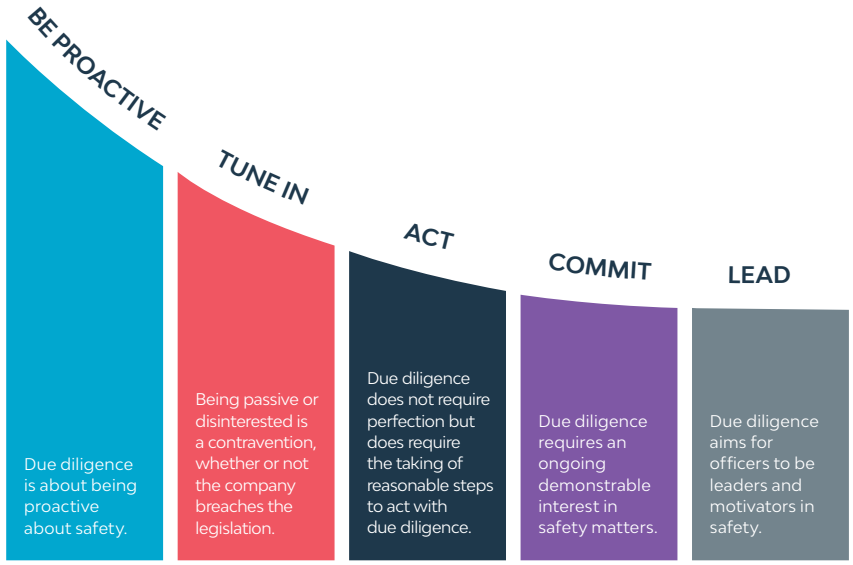
Do you know your obligations and the company's obligations under work, health and safety law?

There are a myriad of obligations in the work, health and safety legislation and regulations to navigate.

Have you actively exercised due diligence in relation to the company's obligations under work, health and safety law?

Board papers only disclosing injuries and lost time or incidents will not be enough.

OUR TIPS ON DUE DILIGENCE:



OTHER IMPORTANT CONSIDERATIONS FOR DIRECTORS



GOOD GOVERNANCE

Good corporate governance is key to meeting a company's objectives and successfully monitoring the performance of a company. While directors are not solely responsible for this, good governance is often synonymous with a director fulfilling their duties and acting in the best interest of the company.



FRAUD & CORRUPTION

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) was introduced in December 2017 and if passed, places a greater onus on directors to prevent and respond to corruption.

The proposed new laws make it an offence if a company fails to prevent foreign bribery and places an onus on directors to show that they had adequate systems in place to protect against bribery.



INTERNATIONAL GOVERNANCE

Directors of companies which operate in foreign jurisdictions must ensure that they understand the legal system, language and cultural expectations and corporate governance requirements so that they can fulfil their obligations as a director. For example, in a number of jurisdictions, including the United Kingdom, directors must consider the interests of other stakeholders when making decisions (eg a company's employees, members as a whole).



INFORMATION TECHNOLOGY

The governance of information technology (IT) has become an integral part of corporate governance and director responsibilities.

Directors should understand the role of IT in the company, understand the opportunities and risks that IT presents to the company and consider how a director can oversee the implementation of IT in an organisation.



CYBER SECURITY

A company must be prepared and able to respond to a cyber-attack. Inability to do so may result in a decrease in investor confidence, undermine the company and damage its reputation.

It is estimated that cyber-attacks cost the global economy approximately $600 billion USD in 2017. This is up from approximately $400 billion in 2014.

Directors need to assess the threat of cyberattacks to their organisation and ask themselves how cyber risks can impact on their director's duties. For example, directors may need to consider whether certain cyber risks should be disclosed to investors.



WHISTLEBLOWERS

New strict laws protecting whistleblowers commenced 1 July 2019. A culture where people can report, without retribution, misconduct and an improper state of affairs allows corporations to be ethical and have a strong positive corporate culture.

OTHER SOURCES OF PERSONAL LIABILITY

In addition to civil and criminal liability for breaches of directors' duties, there are numerous other sources of personal liability for directors, including:

- **Personal guarantees**
- **Tax**
  - Pay as You Go (PAYG)
  - Super Guarantee Charge (SGC)
  - State-based taxes (eg payroll tax)
- **Australian Consumer Law**
- **Privacy laws**
- **Indemnity for unfair preferences**
- **Environmental laws**

FULFILLING DUTIES AND MITIGATING LIABILITY

There are a number of ways that directors can seek to limit or manage their personal liability, including:

- Deeds of Access, Insurance and Indemnity
- D&O Insurance

KEY CONTACTS

Bartier Perry has a long history of helping directors and company officers navigate their legal obligations, implement successful business decisions and achieve best practice corporate governance.

For more information, contact one of our key team members.



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