

Australian Institute of Company Directors**Criminal and Civil Frameworks for Imposing Liability on Directors**

1	Executive summary	2
2	Scope of review	3
3	General bases for imposing criminal and civil liability on directors	4
4	Director exposure to corporate criminal investigations and prosecutions	10
5	Key observations	12
	Schedule 1 : Summary of Director Liability Survey results	17
1	Corporations law	17
2	Consumer protection law	25
3	Competition law	27
4	Superannuation law	28
5	Employment law	29
6	Taxation law	33
7	Environmental law	36
8	Glossary of abbreviations	38
	Schedule 2 : Summary of Corporate Criminal Liability Survey results	40
	Schedule 3 : Charts Summarising Key Observations	42

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1 Executive summary

- 1 The Australian Law Reform Commission (**ALRC**) currently is conducting a review into Australia's corporate criminal responsibility regime. In this context, the Australian Institute of Company Directors (**AICD**) has asked Allens to review the director liability environment in Australia, as compared with the key comparator jurisdictions of Canada, Hong Kong, New Zealand, the United Kingdom and the United States of America (collectively, the **Comparator Jurisdictions**).
- 2 Allens surveyed the frameworks for imposing criminal and civil liability on directors in Australia and the Comparator Jurisdictions for contraventions of key corporations, prudential, competition, consumer, taxation, environmental and workplace laws (the **Director Liability Survey**), and considered key similarities and differences between the jurisdictions.
- 3 Allens also surveyed the mechanisms for imposing criminal liability on corporations in Australia and the Comparator Jurisdictions (the **Corporate Criminal Liability Survey**), and considered the extent to which directors might become entangled in corporate criminal investigations and prosecutions.
- 4 Australia utilises the same general frameworks for imposing criminal and civil liability on directors as do the Comparator Jurisdictions; namely, direct, accessorial and deemed liability. However, several aspects of Australia's director liability environment bear comment, as compared with the Comparator Jurisdictions.
 - (a) *First*, Australia regulates a relatively broad range of subject matter through the imposition of director liability.
 - (b) *Second*, Australia imposes criminal liability on directors relatively liberally, particularly in relation to dishonest or reckless contraventions of their corporate governance obligations.
 - (c) *Third*, Australian directors are exposed to relatively harsh criminal penalties.
 - (d) *Fourth*, Australia alone primarily utilises a public mechanism for civil enforcement of directors' duties.
 - (e) *Fifth*, the emergent doctrine of stepping stone liability has the potential to further expand the ambit of director conduct that may be subject to public civil enforcement.
 - (f) *Sixth*, Australia's public civil enforcement mechanism utilises a unique penalties regime, and Australia's civil penalties are harsh, even as compared with Australian and Comparator Jurisdiction criminal pecuniary penalties.
- 5 Additionally, Australia utilises a unique corporate criminal liability model, which can compel analysis of corporate culture, and which exposes Australian directors to entanglement in corporate criminal proceedings, even when their own conduct is not impugned.
- 6 The Director Liability and Corporate Criminal Liability Surveys undertaken by Allens (the **Allens Surveys**) indicate that Australia's director liability environment is unique—and in many regards, uniquely burdensome—as compared with the Comparator Jurisdictions.

2 Scope of review

- 7 The ALRC is currently conducting a review into Australia's corporate criminal responsibility regime. It is due to report on 30 April 2020.¹
- 8 In the context of the ALRC, the AICD asked Allens to conduct a review to ensure that the AICD has a comprehensive understanding of the criminal and civil frameworks for imposing liability on directors under Australian law, as compared with the Comparator Jurisdictions.²
- 9 Allens surveyed the frameworks for imposing criminal and civil liability on directors in Australia and the Comparator Jurisdictions for contraventions of key corporations, prudential, competition, consumer, taxation, environmental and workplace laws, and considered key similarities and differences between the jurisdictions. Allens did not survey the frameworks for imposing civil liability on directors under contract or tort law.
- 10 Allens also surveyed the mechanisms for imposing criminal liability on corporations in Australia and the Comparator Jurisdictions, and considered the extent to which directors might become entangled in corporate criminal investigations and prosecutions.
- 11 Our analysis of Comparator Jurisdiction laws is based on desktop research by Australian lawyers, however we sought confirmation of certain points of our analysis from overseas counsel.³
- 12 This paper consists of the following components.
- (a) This short-form summary of our key findings, which:
 - (i) provides an overview of the general bases for imposing liability on directors under Australian law, and draws comparisons with Comparator Jurisdictions (in Part 3 below);
 - (ii) provides an overview of the ways in which directors may become entangled in criminal prosecutions of companies in Australia, and draws comparisons with Comparator Jurisdictions (in Part 4 below); and
 - (iii) provides observations on the key respects in which the director liability environment in Australia differs from the Comparator Jurisdictions (in Part 5 below).
 - (b) Schedule 1, which presents the results of the Director Liability Survey in comparison tables.
 - (c) Schedule 2, which presents the results of the Corporate Criminal Liability Survey in a comparison table.
- 13 This paper draws general conclusions regarding the relative burdens Australia and the Comparator Jurisdictions impose on directors, and our comparison tables draw contravention-specific conclusions regarding the same. Given the qualitative nature of the exercise, these conclusions are informed by a range of factors, including: the scope of the obligation or

¹ Attorney-General for Australia, *Review into Australia's Corporate Criminal Responsibility Regime: Media Release* (10 April 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/Review-into-Australia%E2%80%99s-corporate-criminal-responsibility-regime-10-april-19.aspx>>.

² In analysing a federal jurisdiction's laws, where the federal and state or provincial governments have concurrent legislative powers, we have analysed federal laws, and where state or provincial governments have exclusive or residual powers, we have analysed a leading jurisdiction's laws. For example, in assessing United States corporations laws, we have focussed our attention on Delaware's laws.

³ Specifically, we discussed our high-level findings for (i) Hong Kong with Melvin Sng of Linklaters on 11 September 2019; (ii) New Zealand with Nathaniel Walker of Russell McVeagh on 13 September 2019; (iii) the United Kingdom with Alison Saunders of Linklaters on 26 September 2019; and (iv) the United States with Matthew Axelrod and Adam Lurie of Linklaters on 9 September 2019. We did not discuss our high-level findings for Canada with Canadian counsel.

prohibition to which liability is attached; whether criminal and/or civil liability is imposed; whether direct, deemed or accessorial liability is imposed; the defences that are available; the penalties that are imposed; and the enforcement climate in a jurisdiction. Where factors pull in different directions our guiding question has been, 'how exposed is a director to the possibility that an investigation, regulatory action or prosecution will be instituted against them, and what penalties will they face if this occurs?'

3 General bases for imposing criminal and civil liability on directors

- 14 The Director Liability Survey has considered the general bases for imposing criminal and civil liability on directors in Australia and the Comparator Jurisdictions.
- 15 In Australia, there are three general bases for imposing liability on directors. These are:
- (a) direct liability, pursuant to which liability is imposed directly on a director as a principal for their conduct;
 - (b) accessorial liability, pursuant to which liability is imposed on a director as an accessory to principal liability imposed on a company (or any other natural person); and
 - (c) deemed liability, pursuant to which a director is deemed liable for a contravention by a company.

These bases for imposing liability are described in more detail below.

- 16 The Comparator Jurisdictions utilise the same general bases for imposing criminal and civil liability on directors. We are not aware of a Comparator Jurisdiction imposing criminal or civil liability on directors on a basis other than direct, deemed or accessorial liability.⁴

3.1 Direct liability

(a) General doctrine

- 17 'Direct liability' describes the imposition of criminal or civil liability on a person as principal for their own culpable conduct.⁵ Direct liability may be imposed on a director alone, or concurrently with the imposition of liability on a company (or any other natural person).⁶
- 18 Direct liability is a relatively burdensome form of director liability, because, though it requires director culpability, it does not require a prior showing that a director's company—or an officer, employee or third-party representative of their company—committed a primary offence.
- 19 As set out in Table 1.1 of Schedule 1, Australia and each of the Comparator Jurisdictions impose direct liability for breaches of directors' general duties to the company. For example, each surveyed jurisdiction imposes direct civil liability on directors for breaches of their duty to act in good faith and in the best interests of the company (or similar).⁷ In addition, Australia

⁴ Among the comparator jurisdictions, in general, the United States has the narrowest statutory framework for imposing liability on directors. In this context, United States courts sometimes have utilised agency principles, corporate veil piercing and the responsible corporate officer doctrine to attribute liability to directors. We consider that these theories represent manifestations of direct (and in the latter case) deemed liability. For a general discussion of United States director liability modes, see Erik Gerding, 'United States' in H Andreson (ed), *Directors' Personal Liability for Corporate Fault* (2008) 302-305. Notably, the United States Department of Justice considers individual prosecutions to be the key deterrent of corporate crime. See American Bar Association, *DOJ Issues Updated U.S. Attorneys' Manual* (2019), available at <https://www.americanbar.org/groups/litigation/committees/criminal/practice/2019/doj-issues-updated-us-attorneys-manual/>.

⁵ Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (13 March 2002) 313.

⁶ *Ibid.*

⁷ See Schedule 1, Table 1.1.

and New Zealand impose direct criminal liability on directors for dishonest (and also, in the case of Australia, reckless) breaches of this duty.⁸

- 20 As set out in Tables 1.3-1.6 of Schedule 1, Australia and certain of the Comparator Jurisdictions sometimes impose direct liability for other contraventions of directors' corporate governance obligations. For example, Australia, Canada, New Zealand and the United Kingdom have enacted statutory directors' duties to prevent insolvent or reckless trading, and they impose direct civil liability (and, in the case of Australia and New Zealand, direct criminal liability) for contraventions of those duties.⁹ In contrast, Hong Kong imposes accessorial liability on directors who are knowing parties to corporate trading intended to defraud a company's creditors.¹⁰
- 21 Further, as set out in the Tables 2.1-7.1 of Schedule 1, Australia and the Comparator Jurisdictions also sometimes impose direct liability on directors in relation to other areas of regulation. For example, Australia, Canada and New Zealand impose direct liability on directors for certain workplace health and safety violations,¹¹ while the Australian Capital Territory, Queensland and Canada impose direct liability on directors for industrial manslaughter.¹²
- 22 It can be said on the basis of the Director Liability Survey that Australian policy makers impose direct criminal and/or civil liability on directors relatively liberally, in order to compel or prevent specific corporate actions.

(b) The emerging Australian doctrine of stepping stone liability

- 23 Australia primarily relies on public enforcement of directors' duties. In enforcing directors' duties, the Australian Securities and Investments Commission (**ASIC**) is bringing an increasing number of civil penalty applications alleging 'stepping stone liability'.¹³ Stepping stone liability is an emergent form of direct liability involving a 'two-step process', whereby 'directors and officers may be personally liable for failure to prevent contraventions of law by their corporation'.¹⁴ It 'is particularly well-suited to the kind of misconduct that often arises from flawed corporate cultures, [it] potentially increases the liability risks for directors and officers who oversee the activities of companies with such cultures',¹⁵ and it is '[p]erhaps the most significant contemporary development in relation to the liability of company directors and officers'.¹⁶
- 24 When alleging stepping stone liability, ASIC generally invokes the 'catch-all' duty to act with care and diligence to 'piggy back' director civil liability on to *Corporations Act 2001* (Cth) (**Corporations Act**) and *Australian Securities and Investments Commission 2001* (Cth) (**ASIC Act**) breaches by a corporation.¹⁷ If a director's conduct has been particularly egregious, ASIC

⁸ *Corporations Act 2001* (Cth) s 184; *Peoples Department Stores Inc (Trustee of) v Wise* (2004) 3 SCR 461; *Companies Act 1993* (NZ) ss 135, 136, 380; *Insolvency Act 1986* (UK) ss 213-214.

⁹ *Corporations Act* s 1588G(2)-(3); *Companies Act 1993* (NZ) s 138A.

¹⁰ *Companies (Winding Up And Miscellaneous Provisions) Ordinance* (HK) ss 275(1), (3).

¹¹ See, eg, *Work Health and Safety Act 2011* (Cth) ss 4, 19(1), 27.

¹² See *Work Health and Safety Act 2011* (Qld) s 34D; *Crimes Act 1900* (ACT) s 49D.

¹³ Jennifer Hill, 'Legal Personhood and Liability for Flawed Corporate Cultures' (European Corporate Governance Institute (ECGI)-Law Working Paper 431, 2018) 27.

¹⁴ *Ibid.*

¹⁵ *Ibid* 27-8.

¹⁶ Olivia Dixon and Jennifer Hill, 'The Protection of Investors and the Compensation for their Losses: Australia' (European Corporate Governance Institute (ECGI)-Law Working Paper 421, 2018) 21.

¹⁷ *Corporations Act* ss 180(1), 181, 182; Alice Zhou, 'A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability' (2019) 47 *Federal Law Review* 151, 152-4; Maeve McGregor, 'Stepping-Stone Liability and the Directors' Statutory Duty of Care and Diligence,' 36 *Company & Securities Law Journal* 245, 248.

also invokes directors' duties to act in good faith and in the best interests of the company, and to not misuse their position.¹⁸

- 25 Early decisions provided that a finding of company breach of a law was a prerequisite to establishing stepping stone liability¹⁹—and even then, Courts were circumspect about imposing stepping stone liability.²⁰ For example, in the 2015 case of *ASIC v Mariner*,²¹ Justice Beach commented that the directors' duty to act with care and diligence 'does not impose a wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance with law',²² and that the general directors' duties 'do not provide a backdoor method for visiting, on company directors, accessorial civil liability for contraventions of the Corporations Act in respect of which provision is not otherwise made'.²³
- 26 However, more recent decisions have cast doubt over the necessity of such a finding.²⁴ The Chief Justice of New South Wales commented last year that recent cases make clear that 'there is nothing improper about imposing [stepping stone] liability just because personal liability could not have been imposed on the director in relation to the primary contravention', and that the focus of stepping stone liability is whether 'steps taken in relation to compliance are reasonable, having regard to the degree of care and diligence of the reasonable director in the relevant circumstances'.²⁵
- 27 This shift is creating concern that stepping stone liability could be used to establish director liability based on the corporation's breach of acts other than the Corporations Act, including in relation to breach of environmental or workplace laws.²⁶ It is also creating concern that stepping stone liability could be used to establish director liability based on acts or omissions that fall short of breaching the law but nonetheless damage a company's interests,²⁷ particularly given that ASIC increasingly expects directors to foster positive corporate cultures.²⁸ Thus, some commentators argue that stepping stone liability raises the standard of care required of directors.²⁹
- 28 Among the Comparator Jurisdictions, there may be some limited scope for argument that a director breaches a general directors' duty by failing to prevent a breach of law by their corporation.³⁰ However, stepping stone liability is a unique feature of the Australian director liability environment because the Comparator Jurisdictions utilise private, rather than public, civil enforcement of directors' duties. Thus, Comparator Jurisdiction regulators are not able to 'step' from an enforcement action against a company to a civil penalty application against a

¹⁸ See, eg, *ASIC v Preston* [2005] FCA 1805 (Unreported, Finkelstein J, 13 December 2005) [12].

¹⁹ See, eg, the decision of the High Court in *Forrest v ASIC* (2012) 247 CLR 486.

²⁰ The Hon T F Bathurst AC (Chief Justice of New South Wales), *Directors' and Officers' Duties in the Age of Regulation* (Conference in Honour of Professor Baxt AO, 26 June 2018) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180626.pdf> 4, 7, referring to the reasoning of Brereton J in *ASIC v Maxwell* (2016) 336 ALR 209, [7]; Beach J in *ASIC v Mariner* (2015) 241 FCR 502, [482].

²¹ (2015) 241 FCR 502.

²² *ASIC v Mariner* (2015) 241 FCR 502, [444].

²³ *ASIC v Mariner* (2015) 241 FCR 502, [444] (quoting *ASIC v Maxwell* (2006) 59 ACSR 373, [110] (Brereton J)).

²⁴ See, eg, *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, 218 [4]–[6].

²⁵ Bathurst, above n 20, [16], [20].

²⁶ *Ibid* [26].

²⁷ *Ibid* [35].

²⁸ John Price (Commissioner, Australian Securities and Investments Commission), *ASIC's Strategic Focus and Key Priorities over the Next Year: Improving Conduct and Restoring Trust* (Risk Management Association Annual Chief Risk Officer Conference 2018, 4 September 2018) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-s-strategic-focus-and-key-priorities-over-the-next-year-improving-conduct-and-restoring-trust/>>.

²⁹ Maeve McGregor, 'Stepping-Stone Liability and the Directors' Statutory Duty of Care and Diligence' (2018) 36 *Company and Securities Law Journal* 245.

³⁰ Regarding Delaware and the United Kingdom, see Hill, above n 13, 27. Hill concludes that there is little practical risk of such an argument succeeding in either Delaware (because the US duty of oversight on which such an argument would be based is 'aspirational') or the United Kingdom (because 'directors of UK public companies still run virtually no risk of being sued for damages for breach of their duty of care').

director in the manner ASIC can, and stepping stone liability places a unique burden on Australian directors.

3.2 Accessorial liability

- 29 'Accessorial liability' (or indirect liability) refers to the imposition of liability on a director on the basis of their involvement in culpable conduct by a company or another natural person.³¹ Accessorial liability requires knowledge of the essential matters that give rise to a contravention,³² and practical involvement in the acts or omissions which constitute the contravention.³³
- 30 Accessorial liability can be viewed as a less burdensome form of liability than direct liability, because it requires a prior showing that a director's company—or an officer, employee or third-party representative of their company—committed a primary offence, as well as a showing of director culpability.
- 31 Australia imposes accessorial liability for most Commonwealth criminal offences through section 11.2 of the Schedule to the *Criminal Code Act 1995* (Cth) (**Criminal Code**), which extends criminal liability to any person who knowingly aids, abets, counsels or procures the commission of an offence under the Code.³⁴
- 32 Australia also imposes accessorial liability for contraventions of the Corporations Act's civil penalty provisions through section 79, which provides that a person is 'involved in' a contravention of the Act if they (i) aid, abet, counsel or procure the contravention, (ii) induce the contravention, (iii) in any way are knowingly concerned in or party to a contravention, or (iv) have conspired with others to effect the contravention. The Corporations Act's civil accessorial standard is drawn from, but broader than, Australia's criminal accessorial standard. To be liable under the Act's civil accessorial standard, a person must have knowledge of the essential matters giving rise to the contravention,³⁵ they must undertake a positive act which constitutes intentional participation,³⁶ and their conduct must cause the contravention or render it more likely.³⁷ A raised civil liability standard of proof is required to establish liability for involvement in a contravention.³⁸
- 33 Further, as set out in the Tables in subsequent Parts of Schedule 1, Australia also imposes accessorial liability in relation to certain company contraventions of non-corporations laws to which directors may be exposed through specific statutory provisions, including employment³⁹ and environmental laws.⁴⁰

³¹ Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (2018) 16.170.

³² *ASIC v ActiveSuper Pty Ltd* (in liq) (2015) 235 FCR 181, [397]–[405].

³³ *ASIC v SensaSlim Australia Pty Ltd (in liq) (No 5)* (2014) 98 ACSR 347, [543]. For example, in a recent Federal Court decision, Justice Nicholas held that a CEO and non-executive director were not 'involved in' a company's breach of s 674(2A) solely on the basis that they had knowledge of underlying facts of the offence. *ASIC v Vocation Limited (in liq)* [2019] FCA 807 (Unreported, Nicholas J, 31 May 2019) [608].

³⁴ Generally, accessorial liability requires intention on the part of the accessory to assist the commission of the offence. *Giorgianni v The Queen* (1985) 156 CLR 473, 487–8.

³⁵ ASIC Corporate Investigations and Hearings, [8.1980] *When is a person involved in a contravention?*

³⁶ ASIC Corporate Investigations and Hearings, [8.1980] *When is a person involved in a contravention?*; *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd* [2014] FCA 581 at [9] and [22]; *Gore v ASIC* (2017) 249 FCR 167; 265 A Crim R 29; [2017] FCAFC 13 at [163]; *Lewis Securities Ltd (in liq) v Carter* (2018) 334 FLR 9; 355 ALR 703; [2018] NSWCA 118 at [210]; and *King v ASIC* [2018] QCA 352 at [138]–[139].

³⁷ ASIC Corporate Investigations and Hearings, [8.1980] *When is a person involved in a contravention?*; *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473 at 492 cited in *ASIC v Camelot Derivatives Pty Ltd* (in liq) [2012] FCA 414 at [55]; and *ASIC v Munro* [2016] QSC 9 at [73].

³⁸ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 81 ALJR 1107; [2007] HCA 22 at 162 (CLR); *Digital Cinema Network Pty Ltd v Omnilab Media Pty Ltd (No 2)* [2011] FCA 509 at [177] and [209]; and *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd* [2014] FCA 581 at [20].

³⁹ *Fair Work Act 2009* (Cth) s 550(1).

⁴⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 484, 494, 495.

34 The Comparator Jurisdictions, particularly Hong Kong, also make use of accessorial liability, both in relation to corporations and non-corporations laws. Canada⁴¹ and Hong Kong⁴² utilise it in relation to certain corporate governance contraventions to which directors may be exposed. Hong Kong⁴³ and the United Kingdom⁴⁴ utilise it for contraventions of workplace health and safety. Canada,⁴⁵ Hong Kong⁴⁶ and New Zealand⁴⁷ use it in relation to certain company tax offences. And all Comparator Jurisdictions except the United States regulate misleading and deceptive conduct through criminal accessorial liability,⁴⁸ while the United States uses it for cartel conduct.⁴⁹

35 It can be said on the basis of the Director Liability Survey that, while Australian policy makers make broad use of accessorial liability provisions to impose liability on company directors, this is not a unique aspect of the Australian director liability environment, as the Comparator Jurisdictions do the same.

3.3 Deemed liability

36 'Deemed liability' (or managerial or derivative liability) refers to the imposition of criminal or civil liability on the basis of a director's involvement in the management of a company that has engaged in culpable conduct, irrespective of the director's involvement in the culpable conduct itself.⁵⁰ Deemed liability provisions typically provide that, if a company contravenes a provision, every director of the company is deemed to have contravened the provision, unless they can prove that the company's contravention occurred without their knowledge or fault.⁵¹

37 Deemed liability can be viewed as the most burdensome form of director liability, because it imposes a reverse burden of proof on a director once company culpability is established.

38 Australia makes relatively liberal use of deemed liability to impose liability on directors for contraventions of prudential and taxation laws. Most significantly, section 8Y of the *Taxation Administration Act 1953* (Cth) (**TAA**) imposes liability on executive directors if a company commits a prescribed tax offence⁵² unless a defence applies.⁵³

39 In a still significant 2006 report, the Corporations and Markets Advisory Committee criticised Australia's 'marked tendency' to impose criminal liability on directors based on their role, rather than their actual acts or omissions, such as through deemed liability mechanisms.⁵⁴ In addition, in 2009 the Council of Australian Governments (**COAG**) endorsed principles for directors' liability for corporate fault, recognising that director personal criminal liability generally should be confined to situations where: (i) there are compelling public policy reasons for such liability, (ii) corporate liability alone is insufficient to promote compliance and (iii) it is reasonable in all the circumstances to impose such liability.⁵⁵ COAG further recognised that in such circumstances, directors could be criminally liable if they participate in or negligently or

⁴¹ *Canada Business Corporations Act* (Can) s 250.

⁴² *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32) (HK) s 47(1) s 275(1)-(2).

⁴³ *Occupational Safety and Health Ordinance* (Cap 509) (HK) s 33(1).

⁴⁴ *Health and Safety at Work etc Act 1974* (UK) s 37(1).

⁴⁵ *Income Tax Act* (Can) s 242.

⁴⁶ *Inland Revenue Ordinance* (Cap 112) (HK) s 80E.

⁴⁷ *Tax Administration Act 1994* (NZ) ss 147(1)(b)(i), 148(1).

⁴⁸ *Competition Act* (Can) s 52; *Trade Descriptions Ordinance* (Cap 362) (HK) s 20, *Fair Trading Act 1986* (NZ) s 40 (**NZ FTA**); *Consumer Protection from Unfair Trading Regulations 2008* (UK) reg 15.

⁴⁹ 15 USC § 1.

⁵⁰ Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (13 March 2002) 309-10.

⁵¹ Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (2018) 16.170.

⁵² *Taxation Administration Act 1953* (Cth) s 8Y(1).

⁵³ *Taxation Administration Act 1953* (Cth) s 8Y(2).

⁵⁴ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (2006) 13.

⁵⁵ Council of Australian Governments Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance report for 2009-10* (23 December 2010) 206-7.

recklessly allow an offence, and that in some limited instances it may be appropriate to 'put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable'.⁵⁶ In short, the COAG Principles suggest that deemed liability should be imposed on directors only in very limited circumstances.

- 40 The case of *Hookham v R*⁵⁷ provides an example of the burden deemed criminal liability imposes on directors. A company committed nine offences under the *Income Tax Assessment Act 1936* (Cth) (*ITAA*)⁵⁸ by failing to remit PAYG deductions to the ATO.⁵⁹ A director was deemed liable pursuant to section 8Y of the TAA as a person concerned in the management of a corporation,⁶⁰ and was required to pay a \$1,000 criminal fine for each count of the relevant offence. In addition, the director was required to pay almost \$200,000 in reparation payments to the Commonwealth, pursuant to the section 21B of the *Crimes Act 1914* (Cth). In considering the director's appeal, the High Court held that section 8Y's 'function is to reverse the onus of proof which would otherwise rest upon the prosecution of proving that a defendant who is concerned in, or takes part in, the management of a corporation is a participant in a taxation offence'.⁶¹ Since the director had not advanced and proved a defence, the director was deemed to have committed the offence and could be held liable for all penalties available against a criminal offender, not just the specific penalty under section 8Y of the TAA itself.⁶²
- 41 The case of *Buist v Commissioner of Taxation* provides another example of the burden deemed criminal liability imposes on directors.⁶³ The defendant was a director of various companies that committed offences under section 162 of the ITAA by failing to lodge their returns. The companies' accountant informed the director that the ATO had issued final notices to the companies for various years. The accountant and director had several conversations about the returns and the director instructed the accountant to file them. Nonetheless, the accountant failed to file the returns in a timely manner.⁶⁴ The director was deemed liable pursuant to section 8Y, as the Court considered that the director had inappropriately relied on the accountant, and should have made further inquiries about the notices, such as checking on the accountant's progress or engaging others to complete the task.⁶⁵
- 42 Some of the Comparator Jurisdictions also utilise deemed liability for corporations law and non-corporations law contraventions. However, the Comparator Jurisdictions attach deemed liability to relatively circumscribed obligations, and none attaches deemed liability to a provision as broad as section 8Y of the ITAA.⁶⁶ For example, Canada and the United States impose deemed director liability in relation to a small number of environmental offences.⁶⁷ Canada and Hong Kong impose deemed liability on directors in relation to failures to remit superannuation contributions.⁶⁸ And deeming provisions impose liability in the United Kingdom and New Zealand in relation to financial record keeping obligations.⁶⁹

⁵⁶ Ibid.

⁵⁷ (1994) 181 CLR 450.

⁵⁸ Pursuant to *Income Tax Assessment Act 1936* (Cth) ss 221F(5)(a) and (14) (no longer in force).

⁵⁹ *Hookham v R* (1994) 125 ALR 23, 25-6 (Deane, Dawson and Gaudron JJ).

⁶⁰ *Hookham v R* (1994) 125 ALR 23, 26 (Deane, Dawson and Gaudron JJ).

⁶¹ *Hookham v R* (1994) 125 ALR 23, 26-7 (Deane Dawson and Gaudron JJ).

⁶² *Hookham v R* (1994) 125 ALR 23, 29 (Toohey J).

⁶³ *Buist v Commissioner of Taxation* (1988) 19 ATR 1165.

⁶⁴ *Buist v Commissioner of Taxation* (1988) 19 ATR 1165, 1165-7.

⁶⁵ *Buist v Commissioner of Taxation* (1988) 19 ATR 1165, 1168-35, 1170-45, 1171-22.

⁶⁶ For example, the equivalents of TAA s 8Y in the Comparator Jurisdictions all relied on accessorial or direct liability. See *Income Tax Act* (Can) s 242; *Inland Revenue Ordinance (Cap 112)* (HK) s 80E; *Tax Administration Act 1994* (NZ) s 147; *Finance Act 2007* (UK) Ch 24 paras 1, 19; *Internal Revenue Code*, 26 USC § 7201.

⁶⁷ *Environmental Protection Act 1999* (Can) s 280(3); *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 USC § 9607.

⁶⁸ *Canada Pension Plan 1985* (Can) s 22.1(1); *Mandatory Provident Fund Schemes Ordinance (Cap 485)* (HK) s 44(3).

⁶⁹ *Companies Act 2006* (UK) s 387(1); *Companies Act 1993* (NZ) ss 194(4), 207G(3).

43 It can be said on the basis of the Director Liability Survey that, while the Comparator Jurisdictions do impose deemed liability on directors for corporate contraventions, Australian policy makers are also relatively willing to do so.

4 Director exposure to corporate criminal investigations and prosecutions

44 The Corporate Criminal Liability Survey surveyed the mechanisms for imposing criminal liability on corporations in Australia and the Comparator Jurisdictions.

45 Australia utilises a unique statutory corporate criminal responsibility model for Commonwealth offences, except where the model is displaced by special provisions for attributing physical or fault elements of particular offences to a corporation.⁷⁰ Examples of Commonwealth offences to which the model applies include bribing a foreign public official,⁷¹ making false or misleading statements in applications for licences and permits,⁷² intentionally or negligently dealing in proceeds of crime,⁷³ offences under the *Work Health and Safety Act 2011* (Cth),⁷⁴ *Civil Aviation Act 1988* (Cth)⁷⁵ and ASIC Act,⁷⁶ and most competition law offences.⁷⁷ Examples of offences to which the model does not apply include certain cartel offences,⁷⁸ access to service contraventions,⁷⁹ and anti-competitive conduct in the telecommunications industry.⁸⁰

46 Pursuant to this model, criminal liability can be attributed to a company if:

- (a) an officer, agent or employee of a company commits the physical element of the offence (even if they did not have the required state of mind for the offence) while acting within the scope of their employment or actual or implied authority;⁸¹ and
- (b) either:
 - (i) the board or a high managerial agent expressly, tacitly or impliedly authorised or permitted the commission of the offence;⁸² or
 - (ii) the company maintained a corporate culture that directed, encouraged, tolerated or led to non-compliance, or failed to create and maintain a corporate culture that required compliance, with the relevant provision.⁸³

47 In contrast to Australia, most of the Comparator Jurisdictions utilise more conventional corporate criminal responsibility models.

- (a) The United States generally uses a 'vicarious liability' model, pursuant to which a corporation can be held responsible for the acts of its directors, employees and agents if those acts are performed within the scope of their employment⁸⁴ and partly or wholly for the benefit of the corporation.⁸⁵ A company may be found liable for acts of its

⁷⁰ *Criminal Code Act 1995* (Cth) sch 1 (**Criminal Code**) ss 2.2, 12.1.

⁷¹ *Criminal Code* s 70.2.

⁷² *Criminal Code* s 136.1.

⁷³ *Criminal Code* Part 10.2.

⁷⁴ *Work Health and Safety Act 2011* (Cth) s 244.

⁷⁵ *Civil Aviation Act 1988* (Cth) s 7A.

⁷⁶ *Australian Securities and Investments Commission Act 2001* (Cth) s 4A.

⁷⁷ *Competition and Consumer Act 2010* (Cth) s 6AA.

⁷⁸ *Competition and Consumer Act 2010* (Cth) ss 45AF, 45AG.

⁷⁹ *Competition and Consumer Act 2010* (Cth) s 6AA(2), Part IIIA.

⁸⁰ *Competition and Consumer Act 2010* (Cth) Part XIC, Part XIB Division 7.

⁸¹ *Criminal Code* ss 2.2, 12.2. See also Attorney-General's Department (Cth), *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 295.

⁸² *Criminal Code* s 12.3(2)(a)-(b). Liability also may be imposed in circumstances where the board or a high managerial agent themselves intentionally or recklessly engaged in the relevant conduct.

⁸³ *Criminal Code* s 12.3(2)(c)-(d)

⁸⁴ *United States v Richmond*, 700 F 2d 1183, 1195 (1983).

⁸⁵ *United States v Cincotta*, 689 F 2d 238, 241 (1982); *Id* at 241 et seq.

employees and officers, regardless of seniority.⁸⁶ However, criminal liability of an individual is a precondition to company liability.⁸⁷ Notably, United States federal courts may consider the corporations' compliance and ethics programs as a factor in sentencing.⁸⁸ Additionally, federal prosecutors may consider 'the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management' and the 'the adequacy and effectiveness of the corporation's compliance program' in determining whether to prosecute (or enter into a deferred or non-prosecution agreement with) a company.⁸⁹

- (b) Hong Kong,⁹⁰ New Zealand⁹¹ and the United Kingdom⁹² generally use 'identification models', pursuant to which a corporation can be held responsible only for acts of persons who are the 'directing mind and will' of the company.⁹³ In practice, only a very limited class of directors and managers meet the requisite threshold to enable corporate prosecution in the United Kingdom.⁹⁴ Again, criminal liability of an individual is a precondition of company liability.⁹⁵ Notably, the United Kingdom has adopted supplementary corporate criminal offences of failing to prevent bribery⁹⁶ and failing to prevent the facilitation of tax evasion,⁹⁷ pursuant to which a corporation is held responsible for the relevant act of an associated person, unless the corporation had adequate prevention procedures in place (or, in the case of the tax evasion offence, it was not reasonable to expect the corporation to have such procedures in place).
- (c) Canada uses a statutory composite model that combines aspects of the United States' vicarious liability model and the United Kingdom's identification model, and pursuant to which a corporation can be held responsible for prescribed conduct by a senior officer.⁹⁸

48 Australian directors are significantly exposed to the possibility that a regulator, prosecutor or court will scrutinise their conduct in considering whether to investigate, prosecute or convict a corporation, even if there is no suggestion that the director breached a law, as compared with their Comparator Jurisdiction counterparts. This is so for two reasons.

49 *First*, Australia allows for the attribution of liability to a corporation if a director expressly, tacitly or impliedly permitted the commission of an offence.⁹⁹ Directors may tacitly or impliedly permit the commission of the offence if they recklessly allow it to occur.¹⁰⁰ Consequently, a regulator, prosecutor or court may have cause to consider whether a director failed to implement relevant controls in considering whether to investigate, prosecute or convict a corporation pursuant to this avenue.

⁸⁶ *United States v Basic Const Co*, 711 F 2d 570, 517 (1983); *Standard Oil Company of Texas v. United States*, 307 F 2d 120, 127 (1962).

⁸⁷ Mark Pieth, 'The Responsibility of Legal Persons' in M Pieth, LA Low and PJ Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) 173–206, 20–1.

⁸⁸ United States Sentencing Commission, *Guidelines Manual* (2018) Ch 8.

⁸⁹ United States Department of Justice, *Justice Manual* (2018) § 9-28.300.

⁹⁰ *R v Lee Tsat-Pin* [1985] HKEC 87.

⁹¹ OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-bribery Convention in New Zealand* (2013) [28]-[31].

⁹² See generally Celia Wells, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in M Pieth and R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (2011) 91–112.

⁹³ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 180 (Morris LJ), 186-8 (Dilhorne LJ), 190 (Pearson LJ).

⁹⁴ Wells, above n 92, 91–112, 94.

⁹⁵ *Ibid.*

⁹⁶ *Bribery Act 2010* (UK) s 7.

⁹⁷ *Criminal Finance Act 2017* (UK) Pt 3.

⁹⁸ *Criminal Code*, RSC, 1985, c C-46 §22.2.

⁹⁹ *Criminal Code* s 12.3(2). Australia also allows for the attribution of liability to a corporation if a director if a director intentionally, knowingly or recklessly engaged in the relevant conduct, however this is not uncommon among the Comparator Jurisdictions. See Schedule 2 below.

¹⁰⁰ Attorney-General's Department (Cth), above n 67, § 12.3-D.

- 50 *Second*, Australia utilises corporate culture as a general basis for attributing liability to a corporation. 'Corporate culture' describes an 'attitude, policy, rule, course of conduct or practice' that exists in a company generally, or in the part of the company where the activities which resulted in the contravention took place.¹⁰¹ This broad and flexible concept has been the subject of little judicial commentary, however Commissioner Hayne addressed the concept in the *Financial Services Royal Commission Final Report*, describing it as 'the shared norms and values that shape behaviour and mindsets', and 'what people do when no one is watching'.¹⁰²
- 51 Directors play a key role in establishing culture. Commissioner Hayne commented that the structures and processes of corporate governance have a significant impact on corporate culture, as they embed 'values or norms' and 'shape[] how the business is run'.¹⁰³ ASIC and the Australian Prudential Regulatory Authority have indicated that directors have a critical role to play in setting the tone from the top within an organisation, through both practical supervisory actions and internal and external communications.¹⁰⁴ And the *ASX Corporate Governance Principles and Recommendations* provide that the instillation and reinforcement of a strong corporate culture across an organisation is a key aspect of corporate governance.¹⁰⁵
- 52 Given the symbiotic link between directors' conduct and corporate culture, a regulator, prosecutor or court may have cause to consider directors' conduct, even if there is no suggestion that the director breached a law, in determining whether a corporation maintained a corporate culture that directed, encouraged, tolerated or led to non-compliance, or failed to create and maintain a corporate culture that required compliance, with the relevant provision.
- 53 Given that Australia's utilisation of director authorisation or permission and corporate culture as general bases for attributing criminal responsibility to a corporation is unique among,¹⁰⁶ Comparator Jurisdiction regulators and prosecutors should not have the same level of cause to scrutinise the actions of a director in considering whether to investigate, prosecute or convict a corporation if the director's conduct has not been impugned. Thus, Australia's corporate criminal responsibility mechanism creates an additional potential exposure for Australian directors, as compared with their Comparator Jurisdiction counterparts, and is a unique aspect of the Australian director liability environment.

5 Key observations

- 54 Several aspects of the Australian director liability environment bear comment based on the Allens Surveys. Most of these render the Australian director liability unique—and in many regards, uniquely burdensome.

¹⁰¹ *Criminal Code* s 12.3(6).

¹⁰² *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019) 334 (**FS Royal Commission**), citing APRA, *Prudential Inquiry into the Commonwealth Bank of Australia: Final Report* (2018) 81 but deliberately omitting 'reference to a 'system' of shared values and norms if only to emphasise that culture is observed and described, not created apart from, or imposed on, the entity' and *FS Royal Commission* 334, citing G30, *Banking Conduct and Culture: A Call for Sustained and Comprehensive Reform* (July 2015) 17.

¹⁰³ *FS Royal Commission* 334-5.

¹⁰⁴ APRA, *Prudential Inquiry into the Commonwealth Bank of Australia: Final Report* (2018) 13; APRA, *Information Paper: Self-Assessments of Governance, Accountability and Culture* (22 May 2019) 24-5.

¹⁰⁵ Allens, *Corporate Culture Guide*, available at <https://www.allens.com.au/globalassets/pdfs/campaigns/corporatecultureguide.pdf>, 8.

¹⁰⁶ Excepting that these factors may have relevance to the United Kingdom's failure to prevent bribery and the facilitation of tax evasion offences and the United States' federal prosecution and sentencing policies

5.1 Australia regulates a broad range of subject matter through exposure of directors to liability

55 Australia utilises director liability in furtherance of the regulation of a broad range of corporate activities. Specifically, Australia uses director liability to regulate corporations' interactions with most of their key stakeholders, including shareholders and creditors (through directors' duties and director liability for other corporate governance contraventions), employees (through director liability for employment law contraventions), customers (through directors' exposure as natural persons for consumer law contraventions), and the community generally (through director liability for environment and tax law contraventions, as well as directors' exposure as natural persons for competition contraventions).

56 While Australia's use of director liability as a key tool of corporate regulation is not unique among the Comparator Jurisdictions, the Director Liability Survey did not identify a Comparator Jurisdiction that utilises director liability to regulate a broader range of corporate activities and interactions.

5.2 Australia imposes criminal liability on directors for a relatively broad range of corporate governance contraventions

57 Australia imposes criminal liability on directors for a range of contraventions of their corporate governance obligations, including: certain dishonest or reckless contraventions of their duties to act in good faith, to exercise their powers for a proper purpose, and to not misuse information or their position;¹⁰⁷ dishonest failures to secure compliance with financial record keeping obligations;¹⁰⁸ and dishonest involvement in certain restricted transactions.¹⁰⁹

58 While the Comparator Jurisdictions, particularly Hong Kong, New Zealand and the United Kingdom, also impose criminal liability on directors for contraventions of their corporate governance obligations,¹¹⁰ it can be said that Australia does so in the broadest range of circumstances.

59 Australian directors' exposure to criminal liability in a broad range of circumstances is a distinguishing feature of the Australian director liability environment.

5.3 Australia uniquely relies on public enforcement of directors' duties

60 As touched on in Part 3.1(b) above, Australia primarily relies on public enforcement of directors' duties, whereas the Comparator Jurisdictions rely primarily on private enforcement.

61 Australia utilises a civil penalties regime for many contraventions of the *Corporations Act 2001* (Cth), including directors' duties, pursuant to which ASIC may seek pecuniary penalty orders payable to the Commonwealth,¹¹¹ relinquishment orders payable to the Commonwealth,¹¹² compensation orders payable to a company,¹¹³ and disqualification orders against individuals.¹¹⁴

62 Australia's reliance on public enforcement of directors' duties has in practice weakened the 'historic private law roots [of directors' duties] and enhance[d] their "public" nature'.¹¹⁵ Justice

¹⁰⁷ *Corporations Act* s 184.

¹⁰⁸ *Corporations Act* s 344(2).

¹⁰⁹ *Corporations Act* ss 209(3), 260D(3), 588G(3).

¹¹⁰ See generally Schedule 1, Part 1 below.

¹¹¹ *Corporations Act* s 1317G.

¹¹² *Corporations Act* s 1317GAB.

¹¹³ *Corporations Act* s 1317H.

¹¹⁴ *Corporations Act* s 206C.

¹¹⁵ Jennifer Hill and Matthew Conaglen, 'Directors' Duties and Legal Safe Harbours: A Comparative Analysis' in DG Smith and AS Gold (eds), *Research Handbook on Fiduciary Law* (2017) 13.

Edelman recently commented that there is a 'public interest in the enforcement of directors' duties'.¹¹⁶ ASIC considers the strategic significance of matters in light of its regulatory objectives, including effective deterrence, in determining whether and how to take regulatory action against directors for breaches of their corporate governance obligations.¹¹⁷ In addition, ASIC most often seeks disqualification and pecuniary penalty orders—as opposed to compensation orders—when bringing civil penalty applications against directors, indicating that its primary regulatory priority in enforcing directors' duties is protecting the wider community, rather than compensating victims of contraventions.¹¹⁸

63 Australia's public enforcement mechanism stands beside a private enforcement mechanism, as Australia also permits companies and shareholders to pursue directors for contraventions of their duties.

64 In contrast, the Comparator Jurisdictions rely almost exclusively on private enforcement of directors' duties, be it through company actions, derivative actions, shareholder class actions or, in the case of Canada, a very broad and flexible statutory oppression remedy—and even then, levels of private enforcement vary significantly. For example, Delaware witnesses a very high volume of actions for director breaches of fiduciary duties, whereas 'directors of UK public companies run virtually no risk of being sued for damages for breach of directors' duties'.¹¹⁹

65 Australia's utilisation of a public enforcement mechanism renders the Australian director liability environment vastly different to those of the Comparator Jurisdictions, creates an additional exposure for Australian directors, and impacts the character of Australian directors' duties by emphasising their public character.

5.4 Australia's emergent doctrine of stepping stone liability is creating new exposures for directors

66 As discussed in Part 3.1(b) above, ASIC increasingly is utilising the emergent doctrine of stepping stone liability to 'piggy back' director civil liability on to Corporations Act and ASIC Act breaches by a corporation. This has created concern that the doctrine could be used to establish director liability based on a corporation's breaches of non-corporations laws, or even corporate conduct that falls short of a breach of law but nonetheless damages the company's interests.¹²⁰

67 Australia's emergent doctrine of stepping stone liability is a unique feature of the Australian director liability environment, and has the potential to expand the ambit of directors' corporate governance obligations that are subject to public enforcement even further.

5.5 Australia recently has significantly strengthened civil and criminal liability for directors

68 In response to the ASIC Enforcement Review Taskforce Report,¹²¹ and in the wake of the Final Report of the Financial Services Royal Commission, Australia's Parliament recently strengthened mechanisms to impose personal liability on individuals concerned in the management of corporations. This inevitably imposes a heavier burden on directors.

¹¹⁶ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [503].

¹¹⁷ ASIC, *ASIC's Approach to Enforcement, Information Sheet 151* (2013).

¹¹⁸ Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217, 237-9.

¹¹⁹ Hill and Conaglen, above n 115, 11.

¹²⁰ Bathurst, above n 20, [35].

¹²¹ ASIC, *ASIC Enforcement Review Taskforce Report* (December 2017)

<<https://static.treasury.gov.au/uploads/sites/1/2018/04/ASIC-Enforcement-Review-Report.pdf>>.

- 69 The key legislative amendment, the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (the **Treasury Act**), amended the Corporations Act (as well as the ASIC Act, *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) and *Insurance Contracts Act 1984* (Cth)) in the following key ways.
- (a) The Treasury Act introduced a lower and simpler standard of 'dishonesty' into the Corporations Act, pursuant to which dishonesty is assessed 'according to the standards of ordinary people', and without reference to an individual's subjectivity.¹²² This amendment may make it easier for Australian regulators to establish criminal offences involving dishonesty.
 - (b) The Treasury Act significantly increased criminal penalties for individuals, including directors, who are now exposed to:
 - (i) maximum criminal fines of \$945,000 (up from \$420,000);¹²³
 - (ii) maximum imprisonment terms for serious offences (for example, recklessly or dishonestly failing to act in good faith¹²⁴) of 15 years (up from 10 years for a few select offences and five years for the most serious offences);¹²⁵ and
 - (iii) higher penalties for comparatively 'minor' offences.¹²⁶
 - (c) The Treasury Act significantly increased civil penalties for individuals. As a result, directors now are exposed to:
 - (i) maximum pecuniary penalty orders (payable to the Commonwealth) for the greater of AU\$1.05m (up from \$200,000 for Corporations Act contraventions and \$420,000 for ASIC Act and Credit Act contraventions¹²⁷), or three times the benefit they derived;¹²⁸
 - (ii) relinquishment orders (payable to the Commonwealth) equal to the benefit the director derived or the detriment they avoided;¹²⁹ and
 - (iii) compensation orders (payable to corporations) equal to the amount of damage the corporation suffered.¹³⁰
 - (d) The Treasury Act expanded the circumstances in which infringement notices are available to Australian regulators.
- 70 While directors in the Comparator Jurisdictions, particularly Hong Kong, New Zealand and the United Kingdom, also face imprisonment and criminal fines for criminal contraventions of their corporate governance obligations,¹³¹ it can be said that Australia now has the harshest criminal penalties regime.
- 71 In addition, while Australian directors are exposed to pecuniary penalty orders of equivalent quanta to criminal fines, as discussed in Part 5.3 above, none of the Comparator Jurisdictions utilise civil penalties regimes for directors' duties contraventions.

¹²² *Corporations Act* s 9.

¹²³ *Treasury Act* sch 1, s 1311B(3); sch 2, s 93D(3); sch 3, s 288C(4).

¹²⁴ *Corporations Act* s 184(1).

¹²⁵ *Corporations Act* sch 3; Explanatory Memorandum, *Treasury Act*, 13-14.

¹²⁶ For example, the penalty for the offence of failing to take reasonable steps to ensure that a document given to ASIC is not false or misleading in a material particular was increased from five penalty units to a maximum of two years imprisonment.

Corporations Act ss 1308(4); Explanatory Memorandum, 17.

¹²⁷ *Corporations Act* s 1317G; *Treasury Act* sch 3, s 48.

¹²⁸ *Corporations Act* s 1317G.

¹²⁹ *Corporations Act* s 1317GAB.

¹³⁰ *Corporations Act* s 1317H.

¹³¹ See generally Schedule 1, Part 1 below.

72 Australia's relatively harsh criminal and civil penalties regimes are a distinguishing feature of the Australian director liability environment.

5.6 Australian directors may become entangled in corporate criminal proceedings in unique ways

73 As discussed in Part 4 above, given Australia's unique corporate criminal responsibility model, Australian directors may become entangled in corporate criminal proceedings in unique ways. Specifically, an Australian regulator, prosecutor or court may carefully scrutinise the actions of a director, even if the director's conduct has not been impugned, in considering whether to investigate, prosecute or convict a corporation on the basis of director authorisation or permission of relevant conduct or a deficient corporate culture.

74 Except in relation to the United Kingdom's failure to prevent bribery and failure to prevent the facilitation of tax evasion offences, and United States courts' and prosecutors' sentencing and non-prosecution decisions, Comparator Jurisdiction regulators and prosecutors should not have cause to take similar steps.

75 The shadow cast by Australia's unique corporate criminal responsibility model creates an additional potential exposure for Australian directors, as compared with their Comparator Jurisdiction counterparts, and is another distinguishing feature of the Australian director liability environment.

Schedule 1: Summary of Director Liability Survey results

A glossary of the abbreviations used in these tables can be found at 8 below.

1 Corporations law¹³²**1.1 General directors' duties**

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Criminal liability Primarily public enforcement; CPOs and potential disqualification 	Less burdensome <ul style="list-style-type: none"> Different duty regime with similar substance No criminal liability Private civil enforcement; unique civil penalty regime requiring oppressive conduct 	Less burdensome <ul style="list-style-type: none"> Similar duties No criminal liability Private enforcement 	Less burdensome <ul style="list-style-type: none"> Similar duties Criminal liability with shorter imprisonment and lower fines Primarily private enforcement 	Less burdensome <ul style="list-style-type: none"> Broad duty to act in good faith No criminal liability Private enforcement; low level of litigation 	Less burdensome <ul style="list-style-type: none"> Different duty regime with similar substance and business judgment rule as review standard No criminal liability Private enforcement; high level of litigation
Modes of liability						
Criminal—direct	✓ (reckless or dishonest violations of duty to act in good faith only and not to misuse information or position only) (CA s 184)	✗	✗	✓ (dishonest violations of duty to act in good faith only (NZ CA s 138A))	✗	✗
Civil—direct	✓	✓	✓	✓	✓	✓
Duties						
Duty to act with care and diligence or similar	✓ (CA s 180(1))	✓ (Can BCA s 122(1)(b))	✓ (HK 622 s 465)	✓ (NZ CA s 137)	✓ (UK CA s 174)	✓ (common law)
Duty to act in good faith in the best interests of the company or similar	✓ (CA s 181(1)(a))	✓ (Can BCA s 122(1)(a))	✓ (common law)	✓ (NZ CA s 131)	✓ ¹³³ (UK CA s 172)	✓ (subsumed under the common law duty of loyalty)
Duty to exercise powers for a proper purpose or similar	✓ (CA s 181(1)(b))	✓ (subsumed under the statutory duty to act in good faith ¹³⁴)	✓ (common law)	✓ (NZ CA s 133)	✓ (UK CA s 171)	✓ (see previous)
Duty to avoid conflicts of interest or similar	✓ (CA ss 191-195, Ch 2E; common law)	✓ (see previous)	✓ (common law)	✓ (common law)	✓ (UK CA s 175)	✓ (see previous)
Duty to not misuse information or position or similar	✓ (CA ss 182-183)	✓ (see previous)	✓ (common law)	✓ (NZ CA s 145)	✓ (UK CA s 176)	✓ (see previous)
Duty to retain (not fetter) discretion or similar	✓ (common law)	✓ (see previous)	✓ (common law)	✓ (common law)	✓ (UK CA s 173)	✓ (see previous)

¹³² For contraventions addressed in this section, liability is imposed on directors and/or officers only, unless otherwise stated.¹³³ Uniquely, the United Kingdom duty to act in good faith requires directors to consider the impact of a decision on other stakeholders—including the company's business partners, employees and community—in considering the best interests of the company.¹³⁴ The statutory duty to act in good faith similarly requires directors to (i) respect the trust and confidence that have been reposed in them to manage the assets of the corporation, (ii) avoid conflicts of interest with the corporation, (iii) avoid abusing their position to gain personal benefit and maintain the confidentiality of information they acquire by virtue of their position, and (iv) serve the corporation selflessly, honestly and loyally. *Peoples Department Stores Inc (Trustee of) v Wise* (2004) 3 SCR 461.

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Other		Duty to manage or supervise management (Can BCA s 102(1)) Duty to comply with the Can BCA, regulations, articles, etc. (Can BCA s 122(2))	Duty to observe the company's constitution and resolutions (HKEX Guidance , codifying common law)	Duty to comply with the NZ CA, company constitution (NZ CA s 134)		
Defences						
Business judgment rule (applies to duty to act with care and diligence only)	✓ (CA s 180(2))	✓ (common law ¹³⁵)	✗	✗	✗	* (see 'Other', below)
Reasonable reliance on information or advice	✓ (CA s 189)	✓ (Can BCA s 122(5))	✓ (common law)	✓ (NZ CA s 138)	✓ (common law ¹³⁶)	✓ (8 Del C § 141(e))
Reasonable reliance on delegate	✓ (CA s 190)	✗	✗	✓ (NZ CA s 130)	✓ (common law ¹³⁷)	✗
Proper consideration rule (applies to the duty to retain discretion only)	✓ (common law ¹³⁸)	✗	✗	✗	✗	✗
Shareholder ratification	✓ (common law ¹³⁹)	✗	✓ (HK 622 s 473)	✗	✓ (UK CA s 239)	* (see 'Other', below)
Court power to grant relief	✓ (CA s 1317S(2))	✗	✓ (HK 622 s 902)	✗	✓	✗
Other		Reasonable diligence (Can BCA s 122(5))			Authorisation by directors (applies to duty to avoid conflicts of interest only) UK CA s 175(4)-(5) Agreement for future rule (applies to the duty to retain discretion only) UK CA s 173	Business judgment rule as standard of review ¹⁴⁰ (general law) Certificate of incorporation may provide for the elimination or limitation of certain breaches (8 Del C § 102(b)(7))
Penalties						
Imprisonment	✓ (up to 15 years) (CA Sch 3)	✗	✗	✓ (5 years max (NZ CA s 373(4)))	✗	✗
Criminal fines	✓ (the greater of AU\$945,000 or three times the benefit derived) (CA s 1311B(4))	✗	✗	✓ (NZ\$200,000 max (~AU\$192,000) (NZ CA s 373(4)))	✗	✗
Civil penalty orders (CPOs) (applies to statutory duties only)	✓ (PPO for the greater of AU\$1.05mm or three times the benefit derived (CA s 1317G))	✗	✗	✗	✗	✗

¹³⁵ See, eg, *BCE Inc v 1976 Debenture holders* (2008) 3 SCR 560.

¹³⁶ See, eg, *Green v Walkling* [2007] EWHC 3251 (Ch).

¹³⁷ See, eg, *Dovey v Cory* [1901] AC 477.

¹³⁸ See, eg, *Thorby v Goldberg* (1964) 112 CLR 597.

¹³⁹ Applies to breaches of common law obligations only; does not apply to breaches of CA duties. See, eg, *Furs Ltd v Tomkies* (1936) 54 CLR 583; *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209.

¹⁴⁰ In Delaware, when a director's conduct is challenged, and the director has fulfilled their duty of loyalty, a court will apply the business judgment rule as a standard of review, rather than a defence. See, eg, *Aranson v Lewis*, 473 A 2d 805, 812 (Del, 1984).

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
	(DO equal to the benefit derived or detriment avoided (CA s 1317GAB)) (CO equal to the amount of damage the company suffered (CA s 1317H))					
Disqualification	✓ (Court-determined period) (CA s 206C)	✗	✗	✓ (criminal violation only; Court-determined period) (NZ CA s 383)	✓ (max 15 years) (UK CDDA s 2)	✗
Common law and other remedies	✓ (general law remedies for breaches of general law duties only)	✓ (oppression remedy (i.e., any order Court deems fit)) (Can BCA s 241(3) ; compliance orders)	✓ (general law remedies)	✓ (general law remedies)	✓ (general law remedies)	✓ (general law remedies)

1.2 Failure to comply with securities exchange disclosure obligations¹⁴¹

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> No other jurisdiction statutorily backs securities exchange disclosure obligations. 	No liability <ul style="list-style-type: none"> Securities exchange disclosure obligations are not statutorily backed. 	No liability <ul style="list-style-type: none"> Securities exchange disclosure obligations are not statutorily backed. 	No liability <ul style="list-style-type: none"> Securities exchange disclosure obligations are not statutorily backed. 	No liability <ul style="list-style-type: none"> Securities exchange disclosure obligations are not statutorily backed. 	No liability <ul style="list-style-type: none"> Securities exchange disclosure obligations are not statutorily backed.
Modes of liability						
<i>Criminal—direct</i>	×	×	×	×	×	×
<i>Criminal—deemed</i>	×	×	×	×	×	×
<i>Criminal—accessorial</i>	×	×	×	×	×	×
<i>Civil—direct</i>	×	×	×	×	×	×
<i>Civil—deemed</i>	×	×	×	×	×	×
<i>Civil—accessorial</i>	✓ (CA s 674(2A))	×	×	×	×	×
Defences / Exceptions						
<i>Reasonable steps to secure compliance</i>	✓ (CA s 674(2B))	×	×	×	×	×
<i>Special exceptions</i>	✓ (ASX Listing Rule 3.1A)	×	×	×	×	
<i>Court power to grant relief</i>	✓ (CA s 1317S(2))	×	×	×	×	×
Penalties						
<i>Imprisonment</i>	×	×	×	×	×	×
<i>Criminal fines</i>	×	×	×	×	×	×
<i>Civil penalty orders</i>	✓ (see Directors' Duties CPOs)	×	×	×	×	×
<i>Disqualification</i>	✓ (Court determined period) (CA s 206C)	×	×	×	×	×
<i>Common law remedies</i>	×	×	×	×	×	×

¹⁴¹ Each jurisdiction imposes liability for securities fraud and misrepresentation. These and related offences have not been surveyed.

1.3 Failure to comply with financial recordkeeping obligations¹⁴²

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Long imprisonment and high criminal fine CPOs and potential disqualification 	Less burdensome <ul style="list-style-type: none"> Far shorter imprisonment and lower criminal fine Different civil regime, requiring oppressive conduct 	Less burdensome <ul style="list-style-type: none"> Shorter imprisonment and lower criminal fine No CPOs 	Significantly less burdensome <ul style="list-style-type: none"> No imprisonment and lower criminal fine No CPOs or disqualification 	Less burdensome <ul style="list-style-type: none"> Higher criminal fine but shorter imprisonment No CPOs 	No Liability <ul style="list-style-type: none"> Delaware does not statutorily require the keeping of books and records
Modes of liability						
Criminal—direct	✓ (CA s 344(2))	✓ (Can BCA ss 155, 158, 171(8), 251)	✓ (HK 622 s 379(4)-(5))	✗	✗	✗
Criminal—deemed	✗	✗	✗	✓ (NZ CA ss 194(4), 207G(3))	✓ (UK CA s 387(1))	✗
Criminal—accessorial	✗	✓ (Can BCA s 250)	✗	✗	✗	✗
Civil—direct	✓ (CA s 344(1))	✓ (oppression remedy ¹⁴³) (Can BCA s 241)	✗	✗	✗	✗
Civil—deemed	✗	✗	✗	✗	✗	✗
Civil—accessorial	✓ (CA s 1317E(4) (imposed on natural persons generally))	✗	✗	✗	✗	✗
Defences / Exemptions						
Honest and excusable act	✗	✗	✗		✓ (UK CA s 387(2))	✗
Reasonable steps to secure compliance	✓ (CA s 344(1))	✓ (Can BCA s 251(3))	✓ (HK 622 s 379(4)-(5))	✓ (NZ CA s 376)	✗	✗
Reasonable reliance on information	✗	✗	✓ (HK 622 s 379(6))	✗	✗	✗
Penalties						
Imprisonment	✓ (15 years max) (CA Sch 3)	✓ (6 months max) (Can CC s 787)	✓ (1-year max) (HK 622 s 379(5))	✗	✓ (2 years max) (UK CA s 387(3))	✗
Criminal fines	✓ (the greater of AU\$945,000 or three times the benefit derived) (CA Sch 3)	✓ (C\$5,000 max (~AU\$5,500)) (Can CC s 787)	✓ (HK\$300,000 (~AU\$55,000)) (HK 622 s 379(4)-(5))	✓ (NZ\$50,000 max (~AU\$48,000)) (NZ CA s 374)	✓ (unlimited) (UK CA s 387(3))	✗
Civil penalty orders	✓ (see Directors' Duties CPOs)	✗	✗	✗	✗	✗
Disqualification	✓ (Court determined period) (CA s 206C)	✗	✓ (15 years max) (HK 32 s 168E)	✗	✓ (max 15 years) (UK CDDA s 2)	✗
Common law remedies	✗	✓ (any order Court deems fit) (Can BCA s 241)	✗	✗	✗	✗

¹⁴² Each jurisdiction imposes criminal liability for false accounting. These offences have not been surveyed.

¹⁴³ Shareholders can seek compensatory damages based on Canada's very broad and flexible oppression remedy. See Can BCA s 241. While there are no statutory defences to an oppression claim, a plaintiff must show more than mere insolvent trading (ie, that a director exercised their powers or conducted the company's affairs in a manner that is oppressive, unfairly prejudicial to, or unfairly disregards the interests of the creditor). Can BCA s 241(2).

1.4 Restriction on financial assistance by a company to a person acquiring shares in the company

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Long imprisonment and high criminal fine CPOs and potential disqualification 	No liability	Less burdensome <ul style="list-style-type: none"> Shorter imprisonment and lower criminal fine No CPOs 	Significantly less burdensome <ul style="list-style-type: none"> Different offence No imprisonment and lower criminal fine No CPOs or disqualification 	Less burdensome <ul style="list-style-type: none"> Higher criminal fine but shorter imprisonment No CPOs 	No liability
Modes of liability						
<i>Criminal—direct</i>	✗	✗	✗	✓ ¹⁴⁴ (NZ CA s 76-78)	✗	✗
<i>Criminal—deemed</i>	✗	✗	✓ (HK 622 s 275)	✗	✓ (UK CA s 680)	✗
<i>Criminal—accessorial</i>	✓ (imposed on natural persons generally) (CA ss 260A, 260D(3))	✗	✗	✗	✗	✗
<i>Civil—direct</i>	✗	✗	✗	✗	✗	✗
<i>Civil—deemed</i>	✗	✗	✗	✗	✗	✗
<i>Civil—accessorial</i>	✓ (imposed on natural persons generally) (CA ss 260A, 260D(2))	✗	✗	✗	✗	✗
Defences / Exemptions						
<i>No material prejudice to shareholders or creditors</i>	✓ (CA s 260A(1)(a))	✗	✗	N/A	✓ (UK CA s 680)	✗
<i>Shareholder approval</i>	✓ (CA s 260C)	✗	✓ (HK 622 ss 283-284)	N/A	✗	✗
<i>Court approval</i>	✗	✗	✓ (HK 622 s 288)	N/A	✗	✗
<i>Special exemptions</i>	✓ (CA s 260D)	✗	✓ (HK 622 ss 277-28)	N/A	✓ (UK CA s 681, 682(2))	✗
Penalties						
<i>Imprisonment</i>	✓ (5 years max) (CA Sch 3)	✗	✓ (12 months max) (HK 622 s 275)	✗	✓ (2 years max) UK CA s 680(2)	✗
<i>Criminal fines</i>	✓ (AU\$420,000 max) (CA Sch 3)	✗	✓ (HK\$150,000 max (~AU\$27,500)) (HK 622 s 275)	✓ (NZ\$5,000 max (~AU\$4,800)) (NZ CA s 373)	✓ (unlimited) (UK CA s 680(2))	✗
<i>Civil penalty orders</i>	✓ (see Directors' Duties CPOs)	✗	✗	✗	✗	✗
<i>Disqualification</i>	✓ (Court determined period) (CA s 206C)	✗	✓ (15 years max) (HK 32 s 168E)	✗	✓ (max 15 years) (UK CDDA s 2)	✗
<i>Common law remedies</i>	✗	✗	✗	✗	✗	✗

¹⁴⁴ Directors must sign a certification relating to financial assistance in New Zealand. [NZ CA](#) ss 76-78. The relevant offences in New Zealand pertain to failures by directors to sign such certifications, rather than to involvement in grants of financial assistance per se.

1.5 Restrictions on related-party transactions

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Criminal liability High-water mark civil remedies, and potential disqualification 	No liability <ul style="list-style-type: none"> No statutory restrictions Securities regulators require certain disclosures; disclosure failures may result in regulatory action 	Less burdensome <ul style="list-style-type: none"> No criminal liability Less burdensome civil remedies, and no potential disqualification 	No liability <ul style="list-style-type: none"> No statutory restrictions Securities regulator requires certain disclosures; disclosure failures may result in regulatory action 	Less burdensome <ul style="list-style-type: none"> No criminal liability Less burdensome civil remedies, and no potential disqualification 	No liability <ul style="list-style-type: none"> No statutory restrictions Securities regulator requires certain disclosures; disclosure failures may result in regulatory action
Modes of liability						
<i>Criminal—direct</i>	×	×	×	×	×	×
<i>Criminal—deemed</i>	×	×	×	×	×	×
<i>Criminal—accessorial</i>	✓ (requires dishonesty; imposed on natural persons generally) (CA s 209(3))	×	×	×	×	×
<i>Civil—direct</i>	×	×	✓ (HK 622 s 513(3))	×	✓ (UK CA ss 195(2), 213(2))	×
<i>Civil—deemed</i>	×	×	×	×	×	×
<i>Civil—accessorial</i>	✓ (imposed on natural persons generally) (CA s 209(2))		×	×	×	×
Defences / Exceptions						
<i>Reasonable steps to secure compliance</i>	×	×	✓ (HK 622 s 513(4)(b))	×	✓ (UK CA ss 195(2), 213(2))	×
<i>No knowledge of contravention</i>	✓ (general principles)	×	✓ (HK 622 s 513(4)(c))	×	✓ (UK CA ss 195(2), 213(2))	×
<i>Shareholder approval</i>	✓ (CA s 208(1))	×	✓ (HK 622 s 514)	×	✓ (UK CA ss 190, 197)	×
<i>Special exceptions</i>	✓ (CA ss 210-216)	×	✓ (HK 622 ss 505-512)	×	✓ (UK CA ss 192-194, 204-209)	×
Penalties						
<i>Imprisonment</i>	✓ (5 years max) (CA Sch 3)	×	×	×	×	×
<i>Criminal fines</i>	✓ (AU\$420,000 max) (CA Sch 3)	×	×	×	×	×
<i>Civil penalty orders</i>	✓ (see Directors' Duties CPOs)	×	×	×	×	×
<i>Disqualification</i>	✓ (Court determined period) (CA s 206C)	×	×	×	×	×
<i>Common law and other remedies</i>	×	×	✓ (accounting for personal gain; indemnity for damage to company) (HK 622 s 513(2))	×	✓ (accounting for personal gain; indemnity for damage to company) (UK CA ss 195(3), 213(3))	×

1.6 Restrictions on insolvent trading

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (Delaware)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Long imprisonment and high criminal fine CPOs and potential disqualification 	Less burdensome <ul style="list-style-type: none"> No criminal liability Different civil regime, requiring oppressive conduct 	Less burdensome <ul style="list-style-type: none"> Same imprisonment and higher criminal fine No CPOs and shorter disqualification 	Less burdensome <ul style="list-style-type: none"> Same imprisonment and lower criminal fine No CPOs 	Less burdensome <ul style="list-style-type: none"> No criminal liability No CPOs and shorter disqualification 	No liability <ul style="list-style-type: none"> Derivative claims for breaches of fiduciary duties; no general duty to prevent insolvent trading
Modes of liability						
Criminal—direct	✓ (requires dishonesty) (CA s 588G(3))	✗	✗	✓ (requires fraud or dishonesty) (NZ CA s 380)	✗	✗
Criminal—deemed	✗	✗	✗	✗	✗	✗
Criminal—accessorial	✗	✗	✓ (requires fraud) (HK 32 s 275(3))	✗	✗	✗
Civil—direct	✓ (CA s 588G(2))	✓ ¹⁴⁵ (common law)	✗	✓ (NZ CA ss 135-136)	✓ (UK IA ss 213-214)	✗
Civil—deemed	✗	✗	✗	✗	✗	✗
Civil—accessorial	✓ (CA s 1317E(4) (imposed on natural persons generally))	✗	✓ (requires fraud) (HK 32 s 275(1))	✗	✗	✗
Defences						
Reasonable expectation that company was solvent	✓ (CA s 588H(2))	✗	✗	✗	✗	✗
Reasonable reliance on info regarding solvency	✓ (CA s 588H(3))	✗	✗	✓ (NZ CA s 138)	✓ (common law)	✗
Reasonable steps to prevent debt	✓ (CA s 588H(5))	✗	✗	✓ (NZ CA s 376)	✓ (UK IA s 214(3))	✗
Better outcome safe harbour	✓ (CA s 588GA)	✗	✗	✗	✗	✗
Other	✗	✓	✗	✗	✗	✗
Penalties						
Imprisonment	✓ (5 years max) (CA Sch 3)	✗	✓ (5 years max) (HK 32 Sch 12)	✓ (5 years max) (NZ CA s 373)	✗	✗
Criminal fines	✓ (AU\$420,000 max) (CA Sch 3)	✗	✓ (unlimited) (HK 32 Sch 12)	✓ (NZ\$200,000 (AU~\$192,000)) (NZ CA s 373)	✗	✗
Civil penalty orders	✓ (Directors' Duties CPOs)	✗	✗	✗	✗	✗
Disqualification	✓ (Court-determined period) (CA s 206C)	✗	✓ (15 years max) (HK 32 Sch 12)	✓ (Court-determined period) (NZ CA s 383)	✓ (15 years max) (UK CDDA s 8)	✗
Common law and other remedies	✓ (Court-determined comp.) (CA ss 588J-588K)	✓ (any order Court deems fit) (Can BCA s 241(3))	✓ (Court-determined contribution) (HK 32 s 168L)	✓ (Court-determined contribution) (NZ CA s 301)	✓ (Court-determined contribution) (UK IA ss 213-214)	✗

¹⁴⁵ Canadian courts have identified a directors duty to prevent insolvent trading. *Peoples Department Stores Inc (Trustee of) v Wise* (2004) 3 SCR 461. Creditors can seek compensatory damages based on Canada's very broad and flexible oppression remedy. See [Can BCA](#) s 241. While there are no statutory defences to an oppression claim, a plaintiff must show more than mere insolvent trading (ie, that a director exercised their powers or conducted the company's affairs in a manner that is oppressive, unfairly prejudicial to, or unfairly disregards the interests of the creditor). [Can BCA](#) s 241(2).

2 Consumer protection law

2.1 Misleading or deceptive conduct / false or misleading representations

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal, Delaware)
Overall assessment	High-water mark <ul style="list-style-type: none"> Broad liability regime for misleading or deceptive conduct. NB: similar prohibitions are also present in the <i>Corporations Act</i> and <i>ASIC Act</i>. 	Comparably burdensome <ul style="list-style-type: none"> Broad liability regime for false or misleading statements and 'reviewable conduct'. Although the scope of the prohibitions are not as broad as Australia, severe penalties may result from contravention 	Less burdensome <ul style="list-style-type: none"> Robust liability regime, which expressly provides for director liability. The scope of the prohibitions are not as broad as Australia 	Less burdensome <ul style="list-style-type: none"> Similar prohibitions to Australia against misleading or deceptive conduct, or false or misleading representations Penalties are generally lesser than Australia 	Less burdensome <ul style="list-style-type: none"> Similar prohibitions to that of Australia. Lesser risks to directors 	Less burdensome <ul style="list-style-type: none"> Generally, State-based consumer regulation Delaware has generally weak consumer law prohibitions compared with other States
Modes of liability¹⁴⁶						
Criminal—direct	✓ (ACL , s 151 ¹⁴⁷)	✓ (Can CA , s 52)	✓ (HK 362 , ss 6-9, 13E)	✓ (NZ FTA , s 40)	✓ (UK CPR , regs 5-6, 9-10)	✗
Criminal—deemed	✗	✓ (Can CA , s 52.1(8), 53(5)) (certain offences only) (imposed on officers and directors only)	✗	✗	✗	✗
Criminal—accessorial	✗	✓ (Can CA , s 52)	✓ (HK 362 , s 20) (imposed on officers and directors only)	✓ (NZ FTA , s 40)	✓ (UK CPR , reg 15) (imposed on officers and directors only)	✗
Civil—direct	✓ (ACL , ss 18, 29)	✓ (Can CA , s 74)	✗	✓ (NZ FTA , ss 9-12, 13)	✓ (UK EA , Pt 8)	✓ (15 USC § 45; 6 Del C §§ 2513(a); 2532)
Civil—deemed	✗	✗	✗	✗	✗	✗
Civil—accessorial	✓ (ACL , ss 18, 29)	✓ (Can ASL , s 52)	✗	✓ (NZ FTA , ss 9-12, 13)	✓ (UK EA , Pt 8) (imposed on officers and directors only)	✗
Key defences / exemptions						
Innocent publication	✓ (ACL , ss 209, 251)	✗	✓ (HK 362 , s 27)	✗	✓ (UK CPR , reg 18)	✓ (6 Del C §§ 2513(b), 2534)
Fault-based defences (eg, knowledge, reliance)	✓ (ACL , ss 207, 252)	✓ (Can CA , s 52.1(8), 53(5)); Can ASL , s 54)	✓ (HK 362 , s 26)	✓ (NZ FTA , ss 44-45)	✓ (UK CPR , reg 17)	✗
Penalties						
Imprisonment	✓ (up to 3 years: eg, NSW FTA , s 64 ¹⁴⁸)	✓ (up to 14 years: Can CA , s 52)	✓ (up to five years: HK 362 , s 18)	✗	✓ (up to two years: UK CPR , reg 13)	✗
Criminal penalties	✓ (up to AU\$500,000: ACL , s 151)	✓ (at court's discretion: Can CA , s 52)	✓ (HK\$500,000 (~AU\$92,850): HK 362 , s 18)	✓ (NZ FTA , up to NZ\$200,000 (~AU\$187,400))	✓ (UK CPR , reg 13)	✗
Damages / Compensation / redress orders	✓ (ACL , ss 236-239)	✓ (Can CA , s 74.1)	✓ (HK 362 , s 18A)	✓ (NZ FTA , s 43)	✓ (UK CPR , reg 27J),	✓ (6 Del C §§ 2525)

¹⁴⁶ Imposed on all natural persons unless otherwise noted.¹⁴⁷ Certain types of false or misleading representations may attract criminal liability.¹⁴⁸ Imprisonment may be available for up to three years for a second or subsequent conviction for an offence against Part 4-1 of the ACL.

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal, Delaware)
Civil penalty orders	✓ (up to AU\$500,000: ACL , s 224)	✓ (up to CA\$750,000 (~AU\$829,200) (or CAD 1m (~AU\$1,105,600) for subsequent contraventions): Can CA , s 74.1)	✗	✗	✗	✓ (US\$10,000 (~AU\$14,600) per violation: 15 USC § 45(m); 6 Del C §2533)
Disqualification	✓ (ACL , s 248)	✗	✗	✓ (NZ FTA , ss 46C)	✓ (UK CDA , s 2)	✗

3 Competition law

3.1 Cartel conduct

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment	Burdensome <ul style="list-style-type: none"> Robust regime with potential for criminal and civil liability against directors 	More burdensome <ul style="list-style-type: none"> Robust regime with potential for criminal and civil liability against directors Higher criminal penalties 	Less burdensome <ul style="list-style-type: none"> No criminal liability for cartel conduct 	Less burdensome <ul style="list-style-type: none"> Currently no criminal liability for cartel conduct From April 2021, individuals will face criminal liability for cartel conduct 	Slightly less burdensome <ul style="list-style-type: none"> Robust regime with potential for criminal liability against directors No civil liability 	High-water mark <ul style="list-style-type: none"> Robust regime with potential for criminal and civil liability against directors Strong criminal penalties and high enforcement against individuals
Modes of liability¹⁴⁹						
Criminal—direct	×	✓ (Can CA , s 45)	×	× ¹⁵⁰	✓ (UK EA , s 188)	✓ (15 USC § 1)
Criminal—deemed	×	×	×	×	×	✓ (15 USC § 24) (imposed on officers and directors only)
Criminal—accessorial	✓ (CCA , s 79)	×	×	×	×	✓ (15 USC § 1)
Civil—direct	×	✓ (private law)	✓ (eg, HK 619 , ss 93)	✓ (NZ CoA , s 80)	×	✓ (15 USC § 15)
Civil—deemed	×	×	×	×	×	×
Civil—accessorial	✓ (CCA , s 76)	×	✓ (eg, HK 619 , ss 93)	✓ (NZ CoA , s 80)	×	×
Key defences / exemptions						
Immunity/Leniency	✓	✓	✓ (HK 619 , s 80)	✓	✓	✓
Court discretion to excuse conduct	✓ (CCA , s 85)	×	×	✓ (NZ CoA , s 80(2))	×	×
Penalties						
Imprisonment	✓ (up to 10 years: CCA , s 79)	✓ (up to 14 years: Can CA , s 45(2))	×	×	✓ (up to five years: UK EA , s 190)	✓ (up to 10 years: 15 USC § 1)
Criminal penalties	✓ (up to AU\$420,000: CCA , s 79)	✓ (up to CA\$25 million (~AU\$27,640,000): Can CA , s 45)	×	×	✓ (unlimited fine: UK EA , s 190)	✓ (up to US\$1 million (~AU\$1,457,600) 15 USC § 1)
Damages / Compensation / redress orders	✓ (CCA , ss 82)	✓ (private law)	✓ (HK 619 , s 110)	✓ (NZ CoA , s 82)	×	✓ (15 USC § 15)
Civil penalty orders	✓ (up to AU\$500,000: CCA , s 76)	×	✓ (HK 619 , ss 92-93)	✓ (up to NZ\$500,000 (~AU\$468,200): NZ CoA , s 80)	×	×
Disqualification	✓ (CCA , s 86E)	✓	✓ (HK 619 , s 101)	✓ (NZ CoA , s 80C)	✓ (UK CDA , s 9A)	×

¹⁴⁹ Imposed on all natural persons unless otherwise noted.¹⁵⁰ The *Commerce (Criminalisation of Cartels) Amendment Act 2019* (NZ), which enters into force in April 2021, introduces criminal liability for cartel conduct of up to: 7 years' imprisonment; and/or a fine of NZ\$500,000.

4 Superannuation law

4.1 Liability for unpaid superannuation contributions

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment	Burdensome • Personal civil liability for unpaid contributions and penalties	More burdensome • Personal criminal and civil liability for unpaid contributions and penalties	High-water mark • Criminal liability for unpaid contributions.	No specific liability • No director liability for unpaid superannuation contributions	Comparably burdensome • Personal civil liability for unpaid contributions	No specific liability • No express statutory director liability for unpaid superannuation contributions
Modes of liability¹⁵¹						
Criminal—direct	×	×	×	×	×	×
Criminal—deemed	×	×	✓ (HK 485, s 44(3)) (imposed on officers and directors only)	×	×	×
Criminal—accessorial	×	✓ (Can PP, s 41); (Can PP, 103) (imposed on officers and directors only)	✓ (HK 485, s 44(1)) (imposed on officers and directors only if company fails to pay Court-ordered sum)	×	×	×
Civil—direct	×	×	×	×	×	✓ (29 USC § 1109) ¹⁵²
Civil—deemed	✓ (TAA, Sch 1, Div 269) (imposed on directors)	✓ (Can PP, s 22.1(1)) (imposed on directors)	×	×	×	×
Civil—accessorial	×	×	×	×	✓ (UK PA, s 38)	×
Key defences / exemptions						
Illness	✓ (TAA, Sch 1, s 269-35(1))	×	×	×	×	×
Reasonable steps / due diligence / Reasonable excuse	✓ (TAA, Sch 1, s 265-65(3); s 269-35(2))	✓ (Can PP, s 22.1(2))	✓ (HK 485, s 43B)	×	×	×
Penalties						
Imprisonment	×	✓ (up to six months: Can PP, s 41)	✓ (up to 4 years: HK 485, s 43B(1C))	×	×	×
Criminal penalties	×	✓ (up to CA\$5,000 (~AU\$5500): Can PP, s 41)	✓ (up to HK\$450,000 (~AU\$83,650) plus HK700 (~AU\$130) per day for continuing offence: HK 485, s 43B(1C))	×	×	×
Damages / Compensation / redress orders	×	✓ (Can PP, s 22.1(1))	×	×	✓ (UK PA, s 38)	✓ (29 USC § 1109)
Civil penalty orders	✓ (equal to company's outstanding liability and related penalties: TAA, Sch 1, Div 269)	×	×	×	×	×
Disqualification	×	×	×	×	✓ (UK CDA, s 8)	×

¹⁵¹ Imposed on all natural persons unless otherwise noted.¹⁵² The *Employee Retirement Income Security Act of 1974* (US) does not explicitly provide for director liability for unpaid pension contributions. However, in certain cases, directors may be personally liable as fiduciaries for unpaid contributions (see, eg: *Rahm v Halpin*, 566 F 3d 286 (2d Cir, 2009); *ITPE Pension Fund v Hall*, 334 F 3d 1011 (11th Cir, 2003)).

5 Employment law

5.1 Duty to ensure health and safety of workers and other persons

	Australia (NSW ¹⁵³)	Canada (Ontario)	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment						
	Relatively burdensome <ul style="list-style-type: none"> Direct liability Relatively broad duty Strong penalties 	High-water mark <ul style="list-style-type: none"> Direct liability Broader duty (to take reasonable steps to ensure compliance with the Act) Lighter penalties 	Less burdensome <ul style="list-style-type: none"> Accessorial liability, requiring corporate offence and director consent, connivance or negligent contribution Lighter penalties 	Comparably burdensome <ul style="list-style-type: none"> Based on Australia's Model WHS Law Direct liability Similar duty Identical penalties 	Less burdensome <ul style="list-style-type: none"> Accessorial liability, requiring corporate offence and director consent, connivance or negligent contribution Lighter penalties 	No liability <ul style="list-style-type: none"> Liability imposed on 'employers', rather than directors or officers Regulators occasionally try to pierce the corporate veil
Modes of liability						
Criminal—direct	✓ (imposed on officers) ¹⁵⁴ NSW WHS ss 19, 27	✓ (imposed on directors and officers) ¹⁵⁵ ON OHS s 32	✗	✓ (imposed on persons conducting business) NZ HSA ss 36(1) and 44(1)	✗	✗
Criminal—deemed	✗	✗	✗	✗	✗	✗
Criminal—accessorial	✗	✗	✓ (imposed on directors and officers) ¹⁵⁶ HK 509 s 33(1)	✗	✓ (imposed on directors and officers) ¹⁵⁷ UK HSW ss 2, 33, 37(1)	✗
Civil—direct	✗	✗	✗	✗	✗	✗
Civil—deemed	✗	✗	✗	✗	✗	✗
Civil—accessorial	✗	✗	✗	✗	✗	✗
Defences						
Due diligence/reasonable care	✓ NSW WHS s 27(5)	✓ ON OHS s 32	✓ HK 509 s 6(2)	✓ NZ HSA ss 36(3), 44(3)	✓ UK HSW s 2(2)	✗
Penalties						
Imprisonment	✓ (5 years max) NSW WHS ss 27(2), 31	✓ (1-year max) ON OHS s 66(1)	✓ (6 months max)— HK 509 s 6(4)	✓ (5 years max) NZ HSA s 47(3)	✓ (2 years max)— UK HSW s 33, Sch 3A	✗
Criminal fines	✓ (AU\$600,000 max) NSW WHS ss 27(1), 31	✓ (CA\$100,000 max) (~AU\$110,000) ON OHS s 66(1)	✓ (HK\$200,000 max) (~AU\$37,700) HK 509	✓ (NZ\$600,000 max) (~AU\$566,200) NZ HSA s 47(3)	✓ (unlimited)— UK HSW s 33, Sch 3A	✗

¹⁵³ The *Work Health and Safety Act 2011* (NSW) is representative of the Commonwealth Model Workplace Health and Safety Act.

¹⁵⁴ Requirement to act with due diligence to ensure company discharges its duty (as far as reasonably practicable) to ensure the health and safety of its workers.

¹⁵⁵ Requirement to take reasonable care to ensure the corporation complies with the act.

¹⁵⁶ The director will be liable for the company's offence if they consented, connived or negligently contributed to the company committing the offence.

¹⁵⁷ The director will be liable for the company's offence if they consented, connived or negligently contributed to the company committing the offence.

5.2 Offence of industrial manslaughter – conduct caused the death of a worker and the director was negligent in causing the death (in Queensland) or (in the ACT only) serious harm

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment						
	Relatively burdensome <ul style="list-style-type: none"> Personal industrial manslaughter offence for directors in the ACT and Queensland only Victoria¹⁵⁸ and the NT¹⁵⁹ are considering introducing industrial manslaughter provisions. 	High-water mark <ul style="list-style-type: none"> Industrial manslaughter provisions apply nationwide Heavier maximum criminal sentence and no provision for fine 	No liability <ul style="list-style-type: none"> No personal industrial manslaughter offence for directors 	No liability <ul style="list-style-type: none"> No personal industrial manslaughter offence for directors There have been calls to introduce a corporate manslaughter offence.¹⁶⁰ 	No liability <ul style="list-style-type: none"> No personal industrial manslaughter offence for directors Common law manslaughter can still be pursued against directors¹⁶¹ 	No liability <ul style="list-style-type: none"> No personal industrial manslaughter offence for directors Common law manslaughter can still be pursued against directors¹⁶²
Modes of liability						
Criminal—direct	✓ (imposed on senior officers) Qld WHS s 34D; ACT CA s 49D	✓ (imposed on persons who have authority to direct how another performs work) Can CC ss 217.1, 219 ¹⁶³	✗	✗	✗	✗
Criminal—deemed	✗	✗	✗	✗	✗	✗
Criminal—accessorial	✗	✗	✗	✗	✗	✗
Civil—direct	N/A	N/A	N/A	N/A	N/A	N/A
Civil—deemed	N/A	N/A	N/A	N/A	N/A	N/A
Civil—accessorial	N/A	N/A	N/A	N/A	N/A	N/A
Defences						
Volunteer director	✓ Qld WHS s 34B	✗	✗	✗	✗	✗
Penalties						
Imprisonment	✓ ACT & QLD: (20 years max) (ACT CA s 49D; Qld WHS s 34D(1))	✓ (life max) Can CC s 220	✗	✗	✗	✗
Criminal fines	✓ Only ACT: (AU\$320,000 max) (ACT CA s 49D)	✗	✗	✗	✗	✗

¹⁵⁸ Senate Standing Committee on Education and Employment, Parliament of Australia, *Inquiry into Industrial Deaths in Australia*

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialDeathsInAus/Report/section?id=committees%2Freportsen%2F024170%2F26563> at 5.8; Stephanie Anderson, *Daniel Andrews Promises Industrial Manslaughter to Become New Criminal Offence* (26 May 2018) ABC News <<https://www.abc.net.au/news/2018-05-26/daniel-andrews-criminal-offence-industrial-manslaughter/9803490>>.

¹⁵⁹ Emily Smith, *NT Workplace Health and Safety Review Calls for Industrial Manslaughter Laws* (14 March 2019) <<https://www.abc.net.au/news/2019-03-13/nt-workplace-health-and-safety-review-industrial-manslaughter/10895670>>.

¹⁶⁰ Centre for Labour, Employment and Work, University of Wellington, *'Dying for Work' – Workplace Safety and Corporate Liability* (21 May 2018) <https://www.victoria.ac.nz/_data/assets/pdf_file/0007/1586482/CLEWd-In-June2018-Corporate-Manslaughter-article-FINAL.pdf>.

¹⁶¹ Neil Foster, 'Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing from Company Workplace Safety Breach' (2006) (1) *Flinders Law Reform Journal* 87-88.

¹⁶² Kathleen Brickley, 'Death in the Workplace: Corporate Liability for Criminal Homicide' (2012) (4) *Journal of Law, Ethics and Public Policy* 752-790.

¹⁶³ Directors can be held liable if they have authority to direct how a person performs their work and they fail to take reasonable steps to avoid injury or death to that person in the course of the person's work. Reasonable steps taken by the director is a defence in Canada, rather than an element of the offence.

5.3 Personal liability for company contravention of employment law

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment						
	Relatively burdensome <ul style="list-style-type: none"> Catch-all provision Accessory civil liability, requiring corporate contravention and personal involvement 	No general liability <ul style="list-style-type: none"> No catch-all provision 	No general liability <ul style="list-style-type: none"> No catch-all provision 	Comparably burdensome <ul style="list-style-type: none"> Catch-all provision Accessory civil liability, requiring corporate contravention and personal involvement 	No general liability <ul style="list-style-type: none"> No general catch-all provision equivalent Officers can be held responsible for accessory criminal liability for some company offences¹⁶⁴ 	No general liability <ul style="list-style-type: none"> No catch-all provision
Modes of liability						
<i>Criminal—direct</i>	×	×	×	×	×	×
<i>Criminal—deemed</i>	×	×	×	×	×	×
<i>Criminal—accessorial</i>	×	×	×	×	×	×
<i>Civil—direct</i>	×	×	×	×	×	×
<i>Civil—deemed</i>	×	×	×	×	×	×
<i>Civil—accessorial</i>	✓ (imposed on all persons) FWA s 550 ¹⁶⁵	×	×	✓ (imposed on officers) NZ ERA ss 5, 142W, 142X ¹⁶⁶	×	×
Defences						
<i>Other</i>	×	×	×	✓ NZ ERA ss 142ZD(2)(a), (3) ¹⁶⁷ , 142ZD(2)(b) ¹⁶⁸	×	×
Penalties						
<i>Imprisonment</i>	×	×	×	×	×	×
<i>Criminal fines</i>	×	×	×	×	×	×
<i>Civil penalties</i>	✓ (AU\$126,000 max) FWA s 539(2)	×	×	✓ (NZ\$50,000 max) (~AU\$47,200) NZ ERA s 142G	×	×

¹⁶⁴ [UK EPA](#) s 180(1).

¹⁶⁵ For example, for contravention of [FWA](#) ss 44, 340, 535.

¹⁶⁶ Liability for being involved in a breach of minimum employment standards.

¹⁶⁷ Officers can avoid liability if they reasonably relied on information from another person (not an agent).

¹⁶⁸ Officers can avoid liability if they took all reasonable and proper steps to avoid the contravention.

5.4 Personal liability for failure to provide minimum wages or conditions

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment	<p>High-water mark</p> <ul style="list-style-type: none"> • Accessorial civil liability, requiring corporate contravention and personal involvement 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Deemed liability, but limited to 6 months' wages, and available only once the company is insolvent • Less accessible than the Australian action 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Accessorial criminal liability, requiring Labour Tribunal unpaid wages order against company, and director consent or connivance to company failure to comply with unpaid wages order • Less accessible than the Australian action 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Accessorial civil liability, requiring corporate contravention and personal involvement • Lower penalties 	<p>No specific liability</p> <ul style="list-style-type: none"> • No specific provision for director liability for unpaid wages • Plaintiffs recently have pursued directors for inducing breaches of employment contract obligations to pay wages¹⁶⁹ 	<p>No specific liability</p> <ul style="list-style-type: none"> • No specific provision for director liability for unpaid wages • Plaintiffs occasionally try to pierce the corporate veil
Modes of liability						
Criminal—direct	×	×	×	×	×	×
Criminal—deemed	×	×	×	×	×	×
Criminal—accessorial	×	×	✓ (imposed on directors) ¹⁷⁰ HK 57 ss 23, 43N, 43P, 43Q(1)	×	×	×
Civil—direct	×	×	×	×	×	×
Civil—deemed	×	✓ (imposed on directors) ¹⁷¹ Can BCA s 119(1)	×	×	×	×
Civil—accessorial	✓ (imposed on all persons) ¹⁷² FWA s 44(1), 550	×	×	✓ (imposed on officers) NZ MWA s 4 NZ ERA ss 5, 142W ¹⁷³	×	×
Defences	×	×	×	×	×	×
Penalties						
Criminal imprisonment	×	×	✓ (3 years max) HK 57 s43P(1)	×	×	×
Criminal fines	×	×	✓ (HK\$350,000 max) (~AU\$66,000) HK 57 s 43P(1) ¹⁷⁴	×	×	×
Civil penalties	✓ (AU\$126,000 max) FWA s 539(2) ¹⁷⁵	×	×	✓ (NZ\$50,000 max) (~AU\$47,200) NZ ERA s 142G	×	×
Civil damages	×	✓ (unpaid wages) ¹⁷⁶	×	×	×	×

¹⁶⁹ See, For example, *Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843, where directors were held liable for breaches of ss 174 and 172 of the [UK CA](#) for underpaying staff.

¹⁷⁰ If consented, connived or through neglect contributed to the company failing to pay a sum awarded by a labour or employment claims tribunal.

¹⁷¹ Directors jointly and severally liable for unpaid employee wages up to 6 months.

¹⁷² Contravention of the National Employment Standards (including minimum wages).

¹⁷³ Liability for being involved in a breach of minimum employment standards.

¹⁷⁴ In *HKSAR v Li Fung Ching Catherine* FAMC 4/2012, the director was fined HK\$100,000 for unpaid wages.

¹⁷⁵ In *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482, a sole director was ordered to pay \$51,400 for involvement in underpaying employees.

¹⁷⁶ In *Boucher v Shaw*, 572 F 3d 1087 (2009), the director was found personally liable for the unpaid wages.

6 Taxation law

6.1 Personal liability for unpaid company taxes PAYG

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Deemed liability in a relatively broad range of circumstances 	Less burdensome <ul style="list-style-type: none"> Deemed liability, but available only once the company is insolvent Less accessible than the Australian action 	No liability <ul style="list-style-type: none"> No equivalent provision 	Less burdensome <ul style="list-style-type: none"> Deemed liability in a narrower range of circumstances (i.e., in circumstances of asset stripping) 	Less burdensome <ul style="list-style-type: none"> Direct liability, requiring fraud or neglect on the part of the director 	Less burdensome <ul style="list-style-type: none"> Direct liability, requiring wilful failure to remit on the part of the director
Modes of liability						
<i>Criminal—direct</i>	×	×	×	×	×	×
<i>Criminal—deemed</i>	×	×	×	×	×	×
<i>Criminal—accessorial</i>	×	×	×	×	×	×
<i>Civil—direct</i>	×	×	×	×	✓ (imposed on officers) UK SSA s 121C (requires fraud or neglect)	✓ (applies to all persons) 26 USC § 7501 ¹⁷⁷
<i>Civil—deemed</i>	✓ (imposed on directors) TAA Sch 1 ss 269-15, 269-20	✓ (imposed on directors) Can ITA s 227.1(1)	×	✓ (imposed on directors) NZ ITA s HD 15	×	×
<i>Civil—accessorial</i>	×	×	×	×	×	×
Defences						
<i>For some good reason, not reasonable to expect the director was taking part in the management of the company at the time</i>	✓ TAA Sch 1 s 269-35(1)	×	×	×	×	×
<i>All reasonable steps taken to prevent the contravention</i>	✓ TAA Sch 1 s 269-35(2)	✓ Can ITA s 227.1(3)	×	×	×	×
<i>Other</i>	×	×	×	✓ NZ ITA s HD 15(3)(a), ¹⁷⁸ HD 15(3)(b) ¹⁷⁹	×	×
Penalties						
<i>Criminal imprisonment</i>	×	×	×	×	×	×
<i>Criminal fines</i>	×	×	×	×	×	×
<i>Civil penalties</i>	✓ (unpaid tax amount)	✓ (unpaid tax amount)	×	✓ (unpaid tax amount)	✓ (unpaid tax amount) ¹⁸⁰	✓ (unpaid tax amount)
<i>Civil damages</i>	×	×	×	×	×	×

¹⁷⁷ Referred to as 'trust fund recovery penalties' these amounts can include outstanding amounts on PAYG or social security payments.

¹⁷⁸ It is a defence in New Zealand if the director can establish that they derived no benefit from the arrangement, and at first reasonable opportunity they formally record their dissent.

¹⁷⁹ It is a defence in New Zealand if the director can establish that they had no involvement in the management of the company at the time and no knowledge of the issue.

¹⁸⁰ [UK SSA](#) s 121C(3), the Inland Revenue Office can also determine that the liability should be shared between any other culpable officers.

6.2 Personal liability for company tax offences where the person is concerned in the management of the corporation

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment						
	High-water mark <ul style="list-style-type: none"> Deemed liability for company tax offences, imposing a reverse burden of proof 	Less burdensome <ul style="list-style-type: none"> Accessory liability for company tax offences, requiring culpability Applies in relation to a similar range of tax offences 	Less burdensome <ul style="list-style-type: none"> Accessory liability for company tax offences, requiring culpability Applies in relation to a narrower range of tax offences¹⁸¹ 	Less burdensome <ul style="list-style-type: none"> Accessory liability for company tax offences, requiring culpability Applies in relation to a similar range of tax offences 	Significantly less burdensome <ul style="list-style-type: none"> Direct liability, requiring deliberate inaccuracy No criminal liability¹⁸² 	Less burdensome <ul style="list-style-type: none"> Direct liability, requiring culpable intent Applies in relation to a narrower range of tax offences
Modes of liability						
Criminal—direct	×	×	×	✓ NZ TAA s 147 (applies to all employees, agents or officers where caused or committed by them)	×	✓ (applies to all persons) ¹⁸³ 26 USC ss 7201, ¹⁸⁴ 7203, ¹⁸⁵ 7204 ¹⁸⁶
Criminal—deemed	✓ (imposed on persons taking part in management) TAA s 8Y(1)	×	×	×	×	×
Criminal—accessorial	×	✓ ¹⁸⁷ (applies to directors, officers and agents) Can ITA s 242	✓ ¹⁸⁸ (applies to all directors and officers) HK 112 s80E	✓ NZ TAA s 148 (applies to all persons)	×	×
Civil—direct	×	×	×	×	✓ (applies to officers) (requires deliberate inaccuracy) UK FA (UK) Sch 24 Part 1, paras 1, 19	×
Civil—accessorial	×	×	×	×	×	×
Defences						
Did not aid or abet the offence, and was not in any way knowingly concerned in or party to the act or omission	✓ TAA s 8Y(2)	✓ ¹⁸⁹	✓ ¹⁹⁰	✓ ¹⁹¹	×	✓ ¹⁹²
Penalties						
Criminal imprisonment	✓ (2 years max) ¹⁹³	✓ varies, eg: 12 months max Can ITA s238(1) ¹⁹⁴	✓ (3 years max) ¹⁹⁵	✓ (5 years max) ¹⁹⁶	×	✓ (5 years max) 26 USC § 7202

¹⁸¹ [HK 112](#) s 80E (a).¹⁸² HM Revenue & Customs, *Compliance Handbook* (4 September 2018) <<https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch81150>>.¹⁸³ Director liable if they wilfully attempt to evade a tax obligation imposed on the company.¹⁸⁴ Attempt to evade or defeat tax.¹⁸⁵ Wilful failure to file return, supply information or pay tax.¹⁸⁶ Giving fraudulent statements or failing to give statements to employees.¹⁸⁷ Director liable if directed, authorised, assented to, acquiesced in or participated in the commission of the offence.¹⁸⁸ Director liable if concerned in or takes part in the management of the corporation and offence committed with their *consent* or *connivance*.¹⁸⁹ Although this is a defence in Australia, it is an element of the offence in Canada.¹⁹⁰ Although this is a defence in Australia, it is an element of the offence in Hong Kong.¹⁹¹ Although this is a defence in Australia, it is an element of the offence in New Zealand.¹⁹² Although this is a defence in Australia, it is an element of the offence in the United States.¹⁹³ For example, breach of [TAA](#) s 8T (incorrectly keeping records with the intention to mislead or deceive) can result in a imprisonment of 12 months on first conviction or \$21,000 on subsequent conviction. See [TAA](#) s 8V.¹⁹⁴ For example, if the company fails to file a required tax return (prohibited by s 238(1) of the [Can ITA](#)) then the director may be imprisoned up to 1 year.¹⁹⁵ For example, the offence of providing misleading or false information with the intent to defraud under [HK 112](#) s 80G can result in imprisonment for 3 years.¹⁹⁶ For example, tax evasion offence under [NZ TAA](#) s 143B(1) carries with it a maximum 5 years imprisonment.

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Criminal fines	✓ (AU\$21,000 max) ¹⁹⁷ and reparations ¹⁹⁸	✓ varies, eg: CA\$25,000 (failure to file) (~AU\$27,750) Can ITA s238(1) ¹⁹⁹	✓ (HK\$50,000 max) (~AU\$9,400) ²⁰⁰	✓ (NZ\$50,000 max) (~AU\$47,200) ²⁰¹	✗	✓ (US\$10,000 max) (~AU\$14,800) 26 USC § 7202
Civil penalties	✗	✗	✗	✗	✓ (up to 200% of the unpaid tax) ²⁰²	✗
Civil damages	✗	✗	✗	✗	✗	✗

¹⁹⁷ For example, breach of [TAA](#) s 8T (incorrectly keeping records with the intention to mislead or deceive) can result in a fine of \$10,500 on first conviction or \$21,000 on subsequent conviction. See [TAA](#) s 8V.

¹⁹⁸ For example, in *ASIC v Hookham* (1994) 125 ALR 23 a director was made to pay reparations to the Commonwealth for the tax offences of the company.

¹⁹⁹ For example, if the company fails to file a required tax return (prohibited by [Can ITA](#) section 238(1)) then the director may be personally fined a maximum of \$25,000 (~AU\$27,600).

²⁰⁰ For example, A director of a financial institution could be personally fined a maximum of \$50,000 (~AU\$9,300) on indictment if they consented or connived in the company committing an offence under [HK 112](#) s 80B(8)-(9) for giving a materially misleading return with intention to defraud.

²⁰¹ For example, tax evasion offence under [NZ TAA](#) s 143B(1) carries with it a maximum \$50,000 (~AU\$46,800) fine.

²⁰² [UK FA](#) Sch 24, Part 2 (4).

7 Environmental law

7.1 Liability for company environmental law contraventions and prescribed offences

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Overall assessment	<p>High-water mark</p> <ul style="list-style-type: none"> • Accessorial criminal liability with a relatively low culpability requirement • Relatively moderate maximum criminal fines, but relatively long maximum imprisonment • Unique accessorial civil liability regime with high penalties 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Accessorial criminal liability in relation to general offences with higher culpability standard • Deemed criminal liability in relation to disposal at sea offences • No civil liability regime 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Accessorial criminal liability in relation to general offences with higher culpability standard • No civil liability regime 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Accessorial criminal liability in relation to general offences with higher culpability standard • No civil liability regime 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Accessorial criminal liability in relation to general offences with a similar culpability requirement • No civil liability regime 	<p>Less burdensome</p> <ul style="list-style-type: none"> • Piecemeal direct criminal and civil liability in relation to a narrow range of contraventions, but with very high penalties
Modes of liability						
Criminal—direct	✗	✗	✗	✗	✗	✓ eg: 42 USC § 6928(d) (applies to all persons)
Criminal—deemed	✗	✓ Can EPA s 280.1(3) (disposal at sea offences) ²⁰³	✗	✗	✗	✗
Criminal—accessorial	✓ EPBC ss 495, 496 (imposed on executive officers, in relation to certain offences) ²⁰⁴	✓ Can EPA s 280(1) (applies to all directors, officers or agents; requires actual assent, authorisation etc) ²⁰⁵	✓ HK 358 s 10A(1) ²⁰⁶ , HK 311 s 47A(1) ²⁰⁷ (apply to anyone concerned in the management of the company; requires consent, connivance or neglect)	✓ NZ RMA s 340(3) (requires authority, permission or consent) ²⁰⁸	✓ UK EPA s 157(1) (requires consent, connivance or neglect)	✗
Civil—direct	✗	✗	✗	✗	✗	✗
Civil—deemed	✗	✗	✗	✗	✗	✓ eg, 42 USC § 9607(a) (applies to any owner or operator; not a civil penalty provision but provides for civil recovery)
Civil—accessorial	✓ EPBC ss 484 (imposed on all persons for involvement in civil penalty contravention), ²⁰⁹ 494, 496 (imposed on executive officers in relation to civil penalty provisions; different elements) ²¹⁰	✗	✗	✗	✗	✗

²⁰³ Director will be liable if directed or influenced the corporation's policies or activities in relation to the offence committed by the corporation.

²⁰⁴ Director will be liable where they knew or were reckless or negligent to the contravention occurring, were in a position to influence the conduct of the company/organisation which resulted in the contravention and failed to take all reasonable steps to prevent the contravention. See [EPBC](#) ss 495(1), 496.

²⁰⁵ It is not necessary for the company to be prosecuted or convicted for a director to be liable under this provision.

²⁰⁶ There are a wide range of environmental protection ordinances in Hong Kong each focusing on a particular aspect of environmental legislation. For example, [HK 358](#) focuses on water pollution, [HK 311](#) focuses on air pollution.

²⁰⁷ Liability under [HK 311](#), s 47A requires consent or connivance in the offence.

²⁰⁸ Director did not authorise or permit the offence being committed and did not know that the offence was going to be committed (nor should they have known).

²⁰⁹ Where civil penalty provision contravened by the company, liability for director 'involvement' in the contravention (aiding, abetting, inducing, knowingly being concerned in or conspiring to contravene civil penalty provisions).

²¹⁰ Director will be liable where they knew, or were negligent or reckless to the contravention occurring, were in a position to influence the conduct of the company in relation to the contravention, and they failed to take all reasonable steps to prevent the contravention. [EPBC](#) s494, 496.

	Australia	Canada	Hong Kong	New Zealand	United Kingdom	United States (federal)
Defences						
	✗	✗	✗	✗	✗	✗ ²¹¹
Penalties						
Criminal imprisonment	✓ (7 years max) ²¹²	✓ (3 years max) ²¹³	✓ (2 years max) ²¹⁴	✓ (2 years max) ²¹⁵	✓ (5 years max) ²¹⁶	✓ varies ²¹⁷
Criminal fines	✓ (AU\$88,200 max) ²¹⁸	✓ (CA\$2 million max) (~AU\$2,220,000) ²¹⁹	✓ (HK\$1 million max) (~AU\$188,900) ²²⁰	✓ (NZ\$300,000 max) (~AU\$283,100) ²²¹	✓ (unlimited max) ²²²	✓ varies ²²³
Civil penalties	✓ (AU\$1.05 million max) ²²⁴	✗	✗	✗ ²²⁵	✗	✓ (US\$50 million max plus costs of response) (AU\$74 million) 42 USC § 9607(c)
Civil damages	✗	✗	✗	✗	✗	✗

²¹¹ Case law defence that the director did not know about the offence. See Geoffrey M Dugan, 'Liabilities of Corporate Individuals for Environmental Claims Under CERCLA: The Current State of the Law and Strategies for Coping' (1993) (23) *Environmental Law Reporter* 10074.

²¹² For example, breach of s 15A(1) of the [EPBC](#) (taking action which has an impact on the world heritage value of a World Heritage property) they can be imprisoned for 7 years.

²¹³ For example, for breach of [Can EPA](#) s 171 by carrying out a work that results in a prohibited substance the director may be imprisoned for 3 years ([Can EPA](#) s 272(2)).

²¹⁴ For example, if the company commits an offence under [HK 358](#) s 9(1) by discharging poisonous waste into a communal sewer or drain they can be imprisoned for 1 year for a first offence or 2 years for a subsequent offence ([HK 358](#) s 11(2)).

²¹⁵ For example, the maximum penalty that can be imposed on an individual for contravening [NZ RMA](#) s 15A(1) (dumping waste in a marine area) is imprisonment for two years, per [NZ RMA](#) s 338.

²¹⁶ For example, for conviction on indictment for dumping controlled waste. See [UK EPA](#) s 33(8)(b).

²¹⁷ For example, knowing endangerment as a result of the transportation or disposal of hazardous waste can result in imprisonment for up to 15 years, per [42 USC](#) § 6928(e).

²¹⁸ For example, breach of s 15A(1) of the [EPBC](#) (taking action which has an impact on the world heritage value of a World Heritage property) they can be fined \$88,200. But in *PA v Foxman Environmental Development Services (No 2)* [2016] NSWLEC 120, a director was prosecuted and found liable under s169(1) and fined \$250,000.

²¹⁹ For a repeat offender, per [Can EPA](#) s 272(2)(a)(ii).

²²⁰ For example, if the company commits an offence under [HK 358 358](#) s 9(1) by discharging poisonous waste into a communal sewer or drain they can be fined on indictment up to \$400,000 (~AU\$74,350) for a first offence or \$1,000,000 (~AU\$185,900) for a subsequent offence ([HK 358](#) s 11(2)).

²²¹ For example, the maximum penalty that can be imposed on an individual for contravening [NZ RMA](#) s 15A(1) (dumping waste in a marine area) is a fine of \$300,000. See [NZ RMA](#) s 338.

²²² For example, for the offence of failing (without reasonable excuse) to comply with a notice served by the Secretary of State or the waste regulation authority. See [UK EPA](#) s 71(2A).

²²³ For example, knowing endangerment as a result of the transportation or disposal of hazardous waste can result in a fine up to \$250,000 (~AU\$364,300), per [42 USC](#) § 6928(e).

²²⁴ For example, breach of s 12(1), containing the requirement for approval of activities with a significant impact on a declared World Heritage property.

²²⁵ Pecuniary penalties are used in other environmental schemes, where the company may be held liable to a pecuniary penalty as a result of the director's actions. See *Hazardous Substances and New Organisms Act 1996* (NZ), ss 124B, 124I and *Biosecurity Act 1993* (NZ), s 154H.

8 Glossary of abbreviations

ACL	<i>Competition and Consumer Act 2010 (Cth) sch 1</i>
CA	<i>Corporations Act 2001 (Cth)</i>
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
EPBC	<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i>
FWA	<i>Fair Work Act 2009 (Cth)</i>
TAA	<i>Taxation Administration Act 1953 (Cth)</i>
ACT CA	<i>Crimes Act 1900 (ACT)</i>
NSW FTA	<i>Fair Trading Act 1987 (NSW)</i>
NSW WHS	<i>Work Health and Safety Act 2011 (NSW)</i>
Qld WHS	<i>Work Health and Safety Act 2011 (Qld)</i>
Can ASL	<i>Canada's Anti-Spam Legislation (Can)</i>
Can BCA	<i>Canada Business Corporations Act (Can)</i>
Can CA	<i>Competition Act (Can)</i>
Can CC	<i>Criminal Code (Can)</i>
Can EPA	<i>Canadian Environmental Protection Act (Can)</i>
Can ITA	<i>Income Tax Act (Can)</i>
Can PP	<i>Canada Pension Plan (Can)</i>
ON OHS	<i>Occupational Health and Safety Act (Ontario)</i>
HK 32	<i>Cap 32 Companies (Winding Up and Miscellaneous Provisions) Ordinance (Hong Kong)</i>
HK 57	<i>Cap 57 Employment Ordinance (Hong Kong)</i>
HK 112	<i>Cap 112 Inland Revenue Ordinance (Hong Kong)</i>
HK 311	<i>Cap 311 Air Pollution Control Ordinance (Hong Kong)</i>
HK 358	<i>Cap 358 Water Pollution Control Ordinance (Hong Kong)</i>
HK 362	<i>Cap 362 Trade Descriptions Ordinance (Hong Kong)</i>
HK 485	<i>Cap 485 Mandatory Provident Fund Schemes Ordinance (HK)</i>
HK 509	<i>Cap 509 Occupational Safety and Health Ordinance (Hong Kong)</i>
HK 622	<i>Cap 622 Companies Ordinance (Hong Kong)</i>
HKEX Guidance	Hong Kong Companies Registry, <i>A Guide on Directors' Duties</i> (March 2014)
NZ HSA	<i>Health and Safety at Work Act 2015 (NZ)</i>
NZ CA	<i>Companies Act 1993 (NZ)</i>
NZ CoA	<i>Commerce Act 1986 (NZ)</i>
NZ ERA	<i>Employment Relations Act 2000 (NZ)</i>
NZ ITA	<i>Income Tax Act 2007 (NZ)</i>

Criminal and Civil Frameworks for Imposing Liability on Directors

NZ FTA	<i>Fair Trading Act 1986 (NZ)</i>
NZ MWA	<i>Minimum Wage Act 1983 (NZ)</i>
NZ RMA	<i>Resource Management Act 1991 (NZ)</i>
NZ TAA	<i>Tax Administration Act 1994 (NZ)</i>
UK CA	<i>Companies Act 2006 (UK)</i>
UK CDA	<i>Company Directors Disqualification Act 1986 (UK)</i>
UK CDDA	<i>Company Directors Disqualification Act 1986 (UK)</i>
UK CPR	<i>Consumer Protection from Unfair Trading Regulations 2008 (UK)</i>
UK EA	<i>Enterprise Act 2002 (UK)</i>
UK EPA	<i>Environmental Protection Act 1990 (UK)</i>
UK FA	<i>Finance Act 2007 (UK)</i>
UK HSW	<i>Health and Safety at Work Etc Act 1974 (UK)</i>
UK IA	<i>Insolvency Act 1986 (UK)</i>
UK PA	<i>Pensions Act 2004 (UK)</i>
UK SSA	<i>Social Security Administration Act 1992 (UK)</i>

Schedule 2: Summary of Corporate Criminal Liability Survey results

	Australia	Canada	Hong Kong	New Zealand	UK (general mechanism)	UK (failure to prevent bribery and tax evasion offences ²²⁶)	United States (federal)
Overall assessment of likelihood of director entanglement in corporate criminal prosecution							
	<p>High-water mark</p> <ul style="list-style-type: none"> Unique statutory model allowing scrutiny of corporate culture Highest possibility that a regulator, prosecutor or court will scrutinise the conduct of a director who is not directly involved in the commission of an offence 	<p>Less burdensome</p> <ul style="list-style-type: none"> Unique statutory model combining aspects of identification and vicarious liability models Limited possibility that a regulator, prosecutor or court will scrutinise the conduct of a director who is not directly involved in the commission of an offence 	<p>Far less burdensome</p> <ul style="list-style-type: none"> Identification model Little possibility that a regulator, prosecutor or court will scrutinise the conduct of a director who is not directly involved in the commission of an offence 	<p>Far less burdensome</p> <ul style="list-style-type: none"> Identification model Little possibility that a regulator, prosecutor or court will scrutinise the conduct of a director who is not directly involved in the commission of an offence 	<p>Far less burdensome</p> <ul style="list-style-type: none"> Identification model Little possibility that a regulator, prosecutor or court will scrutinise the conduct of a director who is not directly involved in the commission of an offence 	<p>Similarly burdensome</p> <ul style="list-style-type: none"> Unique deemed liability offence Defence that a corporation maintained adequate prevention procedures High possibility that a regulator, prosecutor or court will scrutinise the conduct of a director who is not directly involved in the commission of an offence 	<p>Burdensome</p> <ul style="list-style-type: none"> Vicarious liability model However, director conduct nonetheless is potentially relevant to prosecution and sentencing decisions Corporate culture relevant to prosecution and sentencing
Physical element (narrowest to broadest scope)							
<i>A director or officer committed the physical element</i>	✓	✓	✓	✓	✓	✓	✓
<i>A high managerial agent (or similar) committed the physical element</i>	✓	✓	✗	✗	✗	✓	✓
<i>An employee or agent committed the physical element</i>	✓	✓	✗	✗	✗	✓	✓
Mental element (narrowest to broadest scope)							
<i>The person who committed the physical act had the requisite mental state</i>	✓ (directors and high managerial agents only)	✓ (directors and senior officers only)	✓	✓	✓	✓	✓
<i>Irrespective of whether the person who committed the physical element had the requisite mental element;</i>							
<ul style="list-style-type: none"> a director or high managerial agent (or 	✓	✓	✗	✗	✗	N/A	✗

²²⁶ Bribery Act 2010 (UK) s 7; Criminal Finance Act 2017 (UK) Pt 3.

	Australia	Canada	Hong Kong	New Zealand	UK (general mechanism)	UK (failure to prevent bribery and tax evasion offences ²²⁶)	United States (federal)
<ul style="list-style-type: none"> • <i>similar) directed the physical element;</i> 	✓	✓	✗	✗	✗	N/A	✗
<ul style="list-style-type: none"> • <i>a director had knowledge that the physical element would occur but did not take reasonable steps to stop it;</i> 	✓	✗	✗	✗	✗	N/A	✗
<ul style="list-style-type: none"> • <i>a director otherwise expressly, tacitly or impliedly permitted the physical element;</i> 	✓	✗	✗	✗	✗	N/A	✗
<ul style="list-style-type: none"> • <i>the corporation had a culture that encouraged non-compliance; or</i> 	✓	✗	✗	✗	✗	N/A	✗
<ul style="list-style-type: none"> • <i>the corporation had a culture that failed to discourage non-compliance</i> 	✓	✗	✗	✗	✗	N/A	✗
Additional requirements							
<i>The physical element was committed within the relevant person's actual or apparent scope of employment (or similar)</i>	✓	✓	✗	✗	✗	✓	✓
<i>The physical element was committed for benefit of corporation</i>	✗	✓	✗	✗	✗	✗	✓
<i>The relevant person was acting as directing mind and will of company</i>	✗	✗	✓	✓	✓	✗	✗
<i>Adequate prevention procedures defence</i>	✗	✗	✗	✗	✗	✓	✗

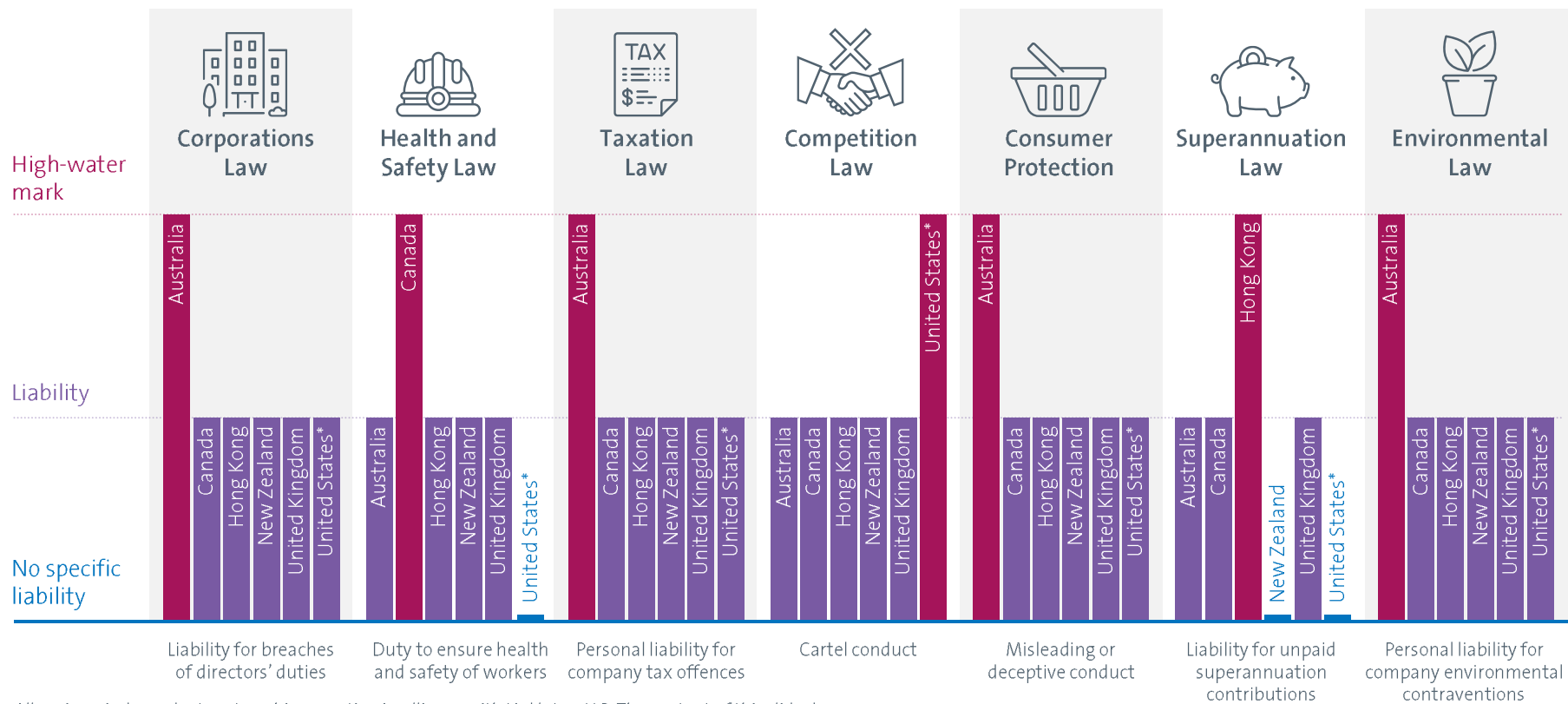
Criminal and Civil Frameworks for Imposing Liability on Directors

Schedule 3: Charts Summarising Key Observations

See following pages.

➤ Australia is the high-water mark for most subject matter surveyed

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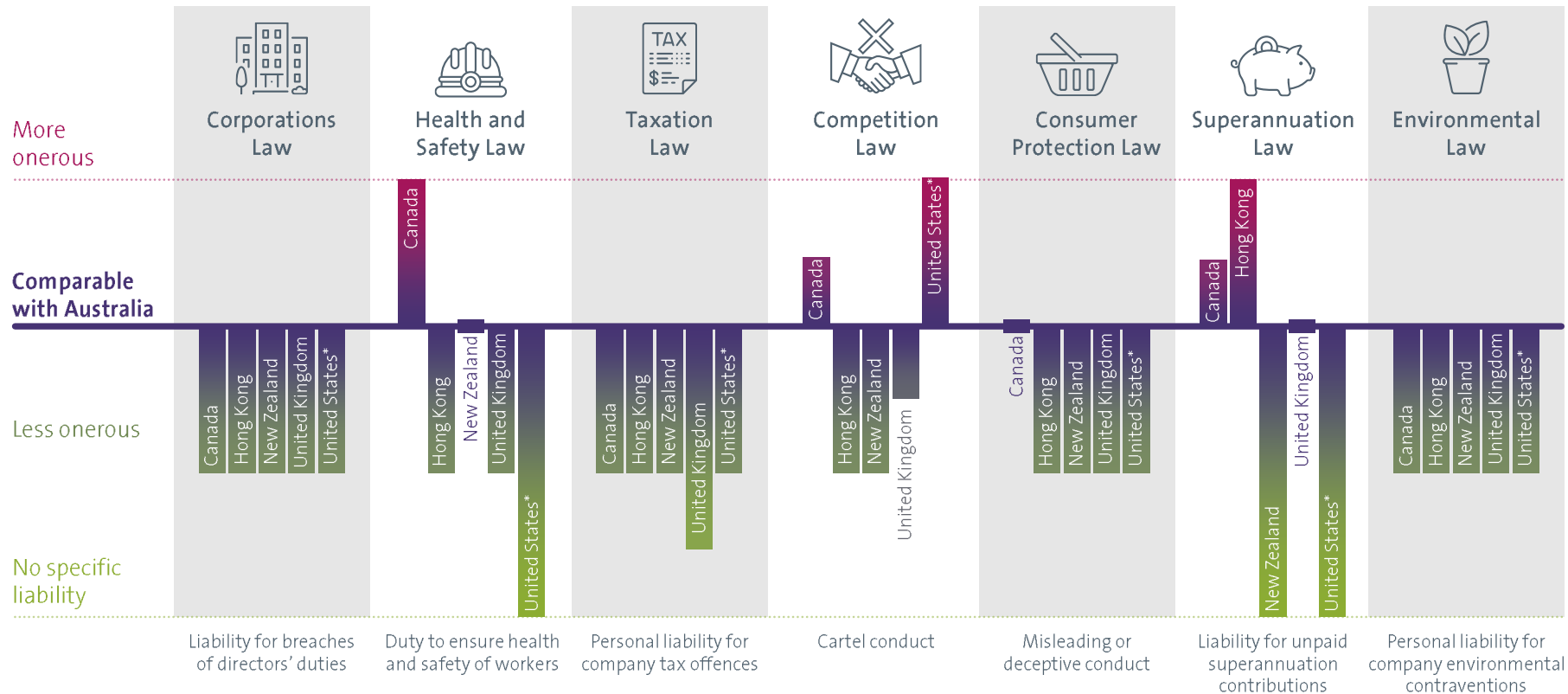


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➤ Australia's director liability environment is relatively onerous

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