

# Criminal and Civil Frameworks for Imposing Liability on Directors

Commissioned by Australian Institute of Company Directors

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## Contents

|           |                                                                                |           |
|-----------|--------------------------------------------------------------------------------|-----------|
| <b>1</b>  | <b>Executive summary</b>                                                       | <b>3</b>  |
| <b>2</b>  | <b>Background and scope of memorandum</b>                                      | <b>5</b>  |
| <b>3</b>  | <b>General bases for imposing criminal and civil liability on directors</b>    | <b>6</b>  |
| <b>4</b>  | <b>Director exposure to corporate criminal investigations and prosecutions</b> | <b>12</b> |
| <b>5</b>  | <b>Key observations</b>                                                        | <b>17</b> |
|           | <b>Schedule 1 : Summary of Director Liability Survey results</b>               | <b>23</b> |
| <b>1</b>  | <b>Corporations law</b>                                                        | <b>23</b> |
| <b>2</b>  | <b>Consumer protection law</b>                                                 | <b>34</b> |
| <b>3</b>  | <b>Competition law</b>                                                         | <b>36</b> |
| <b>4</b>  | <b>Cyber security</b>                                                          | <b>37</b> |
| <b>5</b>  | <b>Superannuation law</b>                                                      | <b>41</b> |
| <b>6</b>  | <b>Employment law</b>                                                          | <b>43</b> |
| <b>7</b>  | <b>Taxation law</b>                                                            | <b>48</b> |
| <b>8</b>  | <b>Environmental and sustainability law</b>                                    | <b>52</b> |
| <b>9</b>  | <b>Financial Accountability Regime</b>                                         | <b>57</b> |
| <b>10</b> | <b>Glossary of abbreviations</b>                                               | <b>60</b> |
|           | <b>Schedule 2 : Summary of comparison of reporting-related obligations</b>     | <b>62</b> |
|           | <b>Schedule 3 : Summary of Corporate Criminal Liability Survey results</b>     | <b>63</b> |

## 1 Executive summary

- 1 In 2019, Allens prepared a research memorandum (the **2019 Memo**) to the Australian Institute of Company Directors (**AICD**) that:
  - (a) surveyed the frameworks for imposing liability on directors 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**) for contraventions of key corporations, prudential, competition, consumer, taxation, environmental and workplace laws (the **Director Liability Survey**); and
  - (b) 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 (the **Corporate Criminal Liability Survey**).
- 2 In June 2025, in support of its ongoing education and policy work, the AICD engaged Allens to update the 2019 Memo by refreshing the Director Liability and Corporate Criminal Liability Survey results, completing new surveys for the emerging governance areas of cyber security, financial accountability and mandatory sustainability reporting<sup>1</sup>, and revisiting our analysis and key findings in light of recent developments.
- 3 **In our 2019 Memo, we concluded that Australia's director liability environment is uniquely burdensome as compared with the Comparator Jurisdictions. That conclusion stands.**
- 4 In respect of the areas of law that we looked at in the 2019 Memo, while the Comparator Jurisdictions' director liability environments have in some narrow respects 'caught up' with Australia, overall Australia's director liability environment remains unique and generally more burdensome.
- 5 In respect of emerging governance issues that we have considered for the first time in this memorandum (being cyber security, financial accountability and mandatory sustainability reporting), Australian directors have assumed additional duties and responsibilities, and while certain of the Comparator Jurisdictions impose more burdensome obligations in respect of individual governance issues, taken as a package, **Australian directors bear the most rigorous suite of cyber security, financial accountability and sustainability reporting obligations.**
- 6 Notably, as set out below, we have identified the emergence since 2019 of material new exposures for Australian directors across at least six broad areas of law, being:
  - (a) corporations law (new illegal phoenixing laws);
  - (b) cyber security (confirmation from various Australian regulators that directors' duties extend to cyber resilience, privacy and data management, and that regulators are seeking opportunities for enforcement action against directors);
  - (c) financial accountability (a new Financial Accountability Regime);
  - (d) foreign bribery (a new failure to prevent foreign bribery by associates corporate offence);

<sup>1</sup> Entities that are required to prepare an annual financial report under Ch 2M of the Corporations Act for a financial year, and meet one of the sustainability reporting thresholds in s292A, are required to prepare a sustainability report. The sustainability report must contain climate-related financial information required under the Corporations Act and AASB S2 Climate-related disclosures.

- (e) health and safety (new industrial manslaughter offences in all Australian states and territories); and
  - (f) sustainability reporting (new sign-off obligations).
- 7 Considering the number of Australian director liability provisions 'in the pipeline', we expect that Australia's overall director liability environment will continue to be more burdensome than those of the Comparator Jurisdictions. For example, throughout the course of 2026, reforms to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) will come into force placing additional oversight and risk assessment obligations on some Australian directors in respect of AML/CTF compliance matters.<sup>2</sup>
- 8 Separately, in November this year, directors of aged care providers will assume additional responsibilities to take steps to ensure the safety of the environment delivered by the provider.<sup>3</sup> In contrast, the New Zealand Ministry of Business, Innovation & Employment has recently conducted a consultation on its climate-related disclosure regime, a key focus being whether to reduce potential liability for directors under the regime's deemed liability provisions.<sup>4</sup>
- 9 Consequently, our overall observations are as follows.
- (a) *First*, Australia continues to regulate a relatively broad range of subject matter through the imposition of director liability, and is relatively quick to impose director liability in respect of emerging governance issues.
  - (b) *Second*, Australia continues to impose criminal liability on directors relatively liberally, despite longstanding principles endorsed by the Council of Australian Governments (**COAG**) to the effect that criminal liability should be confined to limited circumstances.
  - (c) *Third*, Australian directors continue to be exposed to relatively harsh penalties.
  - (d) *Fourth*, it remains the case that Australia alone utilises a public mechanism for civil enforcement of directors' duties. This grants Australian regulators a capacity to utilise directors' duties enforcement in respect of emerging governance issues that their Comparator Jurisdiction peers do not possess. A particularly noteworthy recent example is ASIC's enforcement action against 11 Star Entertainment directors and officers for alleged breaches of their *Corporations Act 2001* (Cth) (**Corporations Act**) duties arising in relation to, among other things, alleged AML/CTF compliance failures.<sup>5</sup>
  - (e) *Fifth*, the doctrine of stepping stone liability is now entrenched in Australian law, and provides an additional unique civil enforcement avenue for Australian regulators.
  - (f) *Sixth*, 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.

<sup>2</sup> *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) sch 1, item 24 (Pt 1A, Div 4).

<sup>3</sup> *Aged Care Act 2024* (Cth) ss 179-80.

<sup>4</sup> See Ministry of Business, Innovation & Employment, 'Adjustments to the Climate-Related Disclosures Regime' (Discussion Document, December 2024).

<sup>5</sup> For example, see *ASIC v Hawkins* [2025] FCA 121, where Star Entertainment Group Ltd's former Chief Casino Officer and Chief Financial Officer respectively agreed to pay penalties of \$180,000 and \$60,000, and to be disqualified from managing corporations for 18 months and nine months.

## 2 Background and scope of memorandum

- 10 In 2019, Allens prepared a research memorandum to the AICD in the context of a review being conducted by the Australian Law Reform Commission (**ALRC**) into Australia's corporate criminal responsibility regime.
- 11 The purpose of the 2019 Memo was to provide the AICD with an understanding of the criminal and civil frameworks for imposing liability on directors under Australian law, as compared with the Comparator Jurisdictions. The 2019 Memo did this by:
- (a) surveying the frameworks for imposing liability on directors in Australia and the Comparator Jurisdictions for contraventions of key corporations, prudential, competition, consumer, taxation, environmental and workplace laws, and considering important similarities and differences between the jurisdictions; and
  - (b) surveying the mechanisms for imposing criminal liability on corporations in Australia and the Comparator Jurisdictions, and considering the extent to which directors might become entangled in corporate criminal investigations and prosecutions.
- 12 In May 2019 and January 2020 respectively, the AICD made two submissions to the ALRC's review. The ALRC's Final Report was published in April 2020, including 20 recommendations for reform. No government has responded to these recommendations, and they have not been adopted into legislation.
- 13 In June 2025, in support of its ongoing education and advocacy work, the AICD engaged Allens to update the 2019 Memo by:
- (a) refreshing the Director Liability and Corporate Criminal Liability Survey results for all jurisdictions and areas of law for developments that have occurred since the issue of the 2019 Memo;
  - (b) completing new Director Liability Surveys for the same jurisdictions regarding three areas that have gained prominence in Australia since 2019 – mandatory sustainability reporting, cyber security and the new Financial Accountability Regime (**FAR**); and
  - (c) updating our analysis and key findings to reflect the updated Director Liability and Corporate Criminal Liability Survey results as well as other relevant developments.
- 14 Consistent with the 2019 Memo, our analysis of Comparator Jurisdiction laws is based on our desktop review. We have not been instructed to engage foreign counsel to review this research, and our research on the laws of the Comparator Jurisdictions does not constitute legal advice.
- 15 This memorandum consists of the following components.
- (a) This short-form memorandum, 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, including a summary of key developments since the 2019 Memo (in Part 5 below).

- (b) Schedule 1 to this short-form memorandum, which presents the results of our updated Director Liability Survey in comparison tables.
  - (c) Schedule 2, which presents the results of our survey of mandatory director sign-off obligations across Australia and the Comparator Jurisdictions.
  - (d) Schedule 3, which presents the results of our updated Corporate Criminal Liability Survey in a comparison table.
- 16 This short-form memorandum 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.
- 17 As was the case for the 2019 Memo, given the qualitative nature of the exercise, our conclusions are informed by a range of factors, including: the scope of the obligation or 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.

### 3 General bases for imposing criminal and civil liability on directors

- 18 Our Director Liability Survey has considered the general bases for imposing criminal and civil liability on directors in Australia and the Comparator Jurisdictions.
- 19 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.

We describe these bases for imposing liability in more detail below.

- 20 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.<sup>6</sup>

<sup>6</sup> 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) 302-5. 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) <<https://www.americanbar.org/groups/litigation/committees/criminal/practice/2019/doj-issues-updated-us-attorneys-manual/>>.

### 3.1 Direct liability

#### (a) General doctrine

In our 2019 Memo, we concluded that Australian policy makers impose direct criminal and/or civil liability on directors relatively liberally, in order to compel or prevent specific corporate actions. Based on our updated Director Liability Survey, our conclusion remains the same.

- 21 'Direct liability' describes the imposition of criminal or civil liability on a person as principal for their own culpable conduct.<sup>7</sup> Direct liability may be imposed on a director alone, or concurrently with the imposition of liability on a company (or any other natural person).<sup>8</sup>
- 22 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.
- 23 As set out in Tables 1.1 and 4 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).<sup>9</sup> In addition, Australia and New Zealand impose direct criminal liability on directors for dishonest (and also, in the case of Australia, reckless) breaches of this duty.<sup>10</sup>
- 24 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.<sup>11</sup> In contrast, Hong Kong imposes accessorial liability on directors who are knowing parties to corporate trading intended to defraud a company's creditors.<sup>12</sup>
- 25 Further, as set out in the Tables 2.1-9.1 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,<sup>13</sup> while all Australian states and territories as well as Canada impose direct liability on directors for industrial manslaughter.<sup>14</sup> Additionally, Australia and the UK impose direct criminal liability in relation to financial accountability obligations, and the UK and Hong Kong impose direct civil liability.<sup>15</sup>
- 26 On the basis of our Director Liability Survey, we consider that Australian policy makers impose direct criminal and/or civil liability on directors relatively liberally, in order to compel or prevent specific corporate actions.

<sup>7</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (13 March 2002) 313.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Schedule 1, Table 1.1.

<sup>10</sup> Corporations Act s 184; *Peoples Department Stores Inc (Trustee of) v Wise* (2004) 3 SCR 461; *Companies Act 1993* (NZ) ss 135, 136, 138A, 380.

<sup>11</sup> Corporations Act ss 588G(2)-(3); *Companies Act 1993* (NZ) s 380.

<sup>12</sup> *Companies (Winding Up And Miscellaneous Provisions) Ordinance* (HK) ss 275(1), (3)(C).

<sup>13</sup> See, eg, *Work Health and Safety Act 2011* (NSW) ss 19, 27; *Occupational Health and Safety Act 1990* (Ontario) s 32; *Health and Safety at Work Act 2015* (NZ) ss 36(1), 44(1).

<sup>14</sup> See, eg, *Work Health and Safety Act 2011* (NSW) s 34C; *Criminal Code 1985* (Can) ss 217.2, 219.

<sup>15</sup> See, eg, *Financial Accountability Regime Act 2023* (Cth) ss 46(3), 47(3), 48, 51(2), 53, 92(2); *Financial Services (Banking Reform) Act 2013* (UK) ss 36, 66, 66A, 66B; *Securities and Futures Ordinance 2003* (HK) ss 193(2), 194(3).

**(b) The Australian doctrine of stepping stone liability**

In our 2019 Memo, we concluded that stepping stone liability was a unique feature of the Australian director liability environment and imposes a unique burden on Australian directors. Since then, stepping stone liability has remained an entrenched feature of the Australian director liability (albeit that it has not been applied in respect of contraventions of statutes other than the Corporations Act and *Australian Securities and Investments Commission 2001* (Cth) (**ASIC Act**), as we speculated it might). It remains the case that stepping stone liability has not been adopted or applied by any of the Comparator Jurisdictions. Consequently, our conclusion remains that stepping stone liability is a unique feature of the Australian director liability landscape.

- 27 Australia primarily relies on public enforcement of directors' duties. In enforcing directors' duties, the Australian Securities and Investments Commission (**ASIC**) continues to bring a material number of civil penalty applications alleging 'stepping stone liability'.<sup>16</sup>
- 28 Stepping stone liability is a 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'.<sup>17</sup> 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',<sup>18</sup> and it is '[p]erhaps the most significant contemporary development in relation to the liability of company directors and officers'.<sup>19</sup>
- 29 When alleging stepping stone liability, ASIC generally invokes the 'catch-all' duty to act with care and diligence to 'piggyback' director civil liability on to Corporations Act and ASIC Act breaches by a corporation.<sup>20</sup> If a director's conduct has been particularly egregious, ASIC also invokes directors' duties to act in good faith and in the best interests of the company, and not to misuse their position.<sup>21</sup>
- 30 Early decisions provided that a finding of company breach of a law was a prerequisite to establishing stepping stone liability<sup>22</sup>—and even then, Courts were circumspect about imposing stepping stone liability.<sup>23</sup> For example, in the 2015 case of *ASIC v Mariner*,<sup>24</sup> 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',<sup>25</sup> 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'.<sup>26</sup> In 2017, Justice

<sup>16</sup> Jennifer Hill, 'Legal Personhood and Liability for Flawed Corporate Cultures' (European Corporate Governance Institute, Law Working Paper 431, 2018) 27.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* 27-8.

<sup>19</sup> Olivia Dixon and Jennifer Hill, 'The Protection of Investors and the Compensation for their Losses: Australia' (European Corporate Governance Institute, Law Working Paper 421, 2018) 21.

<sup>20</sup> 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' (2018) 36 *Company & Securities Law Journal* 245, 248.

<sup>21</sup> See, eg, *ASIC v Preston* [2005] FCA 1805, [12] (Finkelstein J).

<sup>22</sup> See, eg, the decision of the High Court in *Forrest v ASIC* (2012) 247 CLR 486.

<sup>23</sup> 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) 4, 7

<[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst\\_20180626.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180626.pdf)>, referring to the reasoning of Brereton J in *ASIC v Maxwell* (2006) 59 ACSR 373, [7] (**Maxwell**); Beach J in *ASIC v Mariner* (2015) 241 FCR 502, [482].

<sup>24</sup> (2015) 241 FCR 502.

<sup>25</sup> *Ibid* [444].

<sup>26</sup> *Ibid*, quoting *Maxwell* [110] (Brereton J).

Beach reiterated this position, emphasising that liability in such circumstances requires the director to have 'caused or failed to prevent the company from contravening the [Corporations] Act and where it is reasonably foreseeable that such contravention might harm the interests of the company'.<sup>27</sup>

- 31 However, subsequent decisions cast doubt over the necessity of such a finding.<sup>28</sup> In 2018, the Chief Justice of New South Wales commented that cases from around that time made 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'.<sup>29</sup>
- 32 This shift created initial concern that stepping stone liability could be used to establish director liability based on a corporation's breach of Acts other than the Corporations Act, including in relation to breach of environmental or workplace laws.<sup>30</sup> Expansion of director liability in this way has been expressly contemplated by the courts over the course of the last decade. For example, in 2016, Justice Edelman in *ASIC v Cassimatis (No 8)* hypothesised that a breach of a director's duty of care and diligence may be founded in a decision to intentionally discharge large volumes of toxic waste, suggesting that stepping stone liability may be extended to breach of environmental laws.<sup>31</sup>
- 33 However, despite initial concerns, ASIC has not, to date, successfully brought a stepping stone liability case founded exclusively in a non-Corporations Act breach. In fact, ASIC's only attempt to do so occurred in 2016. In this case, ASIC was unsuccessful in establishing a breach of duty of care by the directors in relation to a company's breach of trust under the *Trusts Act 1973* (Qld). In addition to an inability to establish a breach of trust by the company, ASIC was unsuccessful in proving that there was any reasonable alternative available to either the trustee or directors in the circumstances, leading to dismissal of the proceeding by the Federal Court.<sup>32</sup>
- 34 Nonetheless, stepping stone liability remains an entrenched feature of the Australian director liability environment. As at the time of the 2019 Memo, judgment had been delivered in 18 stepping stone liability cases brought by ASIC.<sup>33</sup> Since then, ASIC has brought at least five further cases that can be classified as being based on stepping stone principles.<sup>34</sup> A recent empirical study identifies that ASIC was successful in 72% of its stepping stone liability claims between July 2001 and March 2020.<sup>35</sup>
- 35 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.<sup>36</sup> For example, commentators have raised the possibility of the development of

<sup>27</sup> *ASIC v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, [216].

<sup>28</sup> See, eg, *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, 218 [4]–[6] (*Cassimatis*).

<sup>29</sup> Bathurst, above n 23, [16], [20].

<sup>30</sup> *Ibid* [26].

<sup>31</sup> *Cassimatis* [485].

<sup>32</sup> *ASIC v Drake [No 2]* (2016) 340 ALR 75.

<sup>33</sup> Ian Ramsay and Miranda Webster, 'An Analysis of the Use of Stepping Stones Liability against Company Directors and Officers' (2021) 50(1) *Australian Bar Review* 168, 187.

<sup>34</sup> *ASIC v Big Star Energy Ltd* (2020) 389 ALR 17; *ASIC v Select AFSL Pty Ltd (No 2)* (2022) 162 ACSR 1; *ASIC v Wilson (No 3)* (2023) 171 ACSR 1; *ASIC v Holista Colltech Ltd* [2024] FCA 244; *ASIC v iSignthis Ltd* [2024] FCA 669.

<sup>35</sup> Ramsay and Webster, above n 33, 169.

<sup>36</sup> Regarding Delaware and the United Kingdom, see Hill, above n 16, 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').

'stepping stone' liability in Hong Kong in the future,<sup>37</sup> however to date this has not occurred. Consequently, stepping stone liability is a unique feature of the Australian director liability environment and imposes a unique burden on Australian directors.

### 3.2 Accessorial liability

In our 2019 Memo, we concluded that Australian policy makers make broad use of accessorial liability provisions to impose liability on company directors, but that this is not a unique aspect of the Australian director liability environment. Based on our updated Director Liability Survey, our conclusion remains the same.

- 36 '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.<sup>38</sup> Accessorial liability requires knowledge of the essential matters that give rise to a contravention,<sup>39</sup> and practical involvement in the acts or omissions which constitute the contravention.<sup>40</sup>
- 37 Accessorial liability is 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.
- 38 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 Criminal Code.<sup>41</sup>
- 39 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,<sup>42</sup> they must undertake a positive act which constitutes intentional participation,<sup>43</sup> and their conduct must cause the contravention or render it more likely.<sup>44</sup> A raised civil liability standard of proof is required to establish liability for involvement in a contravention.<sup>45</sup>

<sup>37</sup> Ernest Lim, 'Directors Liability and Climate Risk: White Paper on Hong Kong' (Commonwealth Climate and Law Initiative, 10 December 2021) 19.

<sup>38</sup> Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (2018) [16.170] (**Ford, Austin and Ramsay**).

<sup>39</sup> *ASIC v ActiveSuper Pty Ltd* (in liq) (2015) 235 FCR 181, [397]-[405].

<sup>40</sup> *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 [608] (Nicholas J).

<sup>41</sup> 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.

<sup>42</sup> 'When is a person involved in a contravention?', *ASIC Corporate Investigations and Hearings* (Thomson Reuters) [8.1980].

<sup>43</sup> *Ibid*; *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd* [2014] FCA 581 [9], [22]; *Gore v ASIC* (2017) 249 FCR 167, [163]; *Lewis Securities Ltd (in liq) v Carter* (2018) 355 ALR 703, [210]; *King v ASIC* [2018] QCA 352, [138]-[139].

<sup>44</sup> 'When is a person involved in a contravention?', *ASIC Corporate Investigations and Hearings* (Thomson Reuters) [8.1980]; *Giorgianni v The Queen* (1985) 156 CLR 473, 492, cited in *ASIC v Camelot Derivatives Pty Ltd* (in liq) [2012] FCA 414, [55]; *ASIC v Munro* [2016] QSC 9, [73].

<sup>45</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162; *Digital Cinema Network Pty Ltd v Omnilib Media Pty Ltd* (No 2) [2011] FCA 509, [177], [209]; *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd* [2014] FCA 581, [20].

- 40 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 employment<sup>46</sup> and environmental laws.<sup>47</sup>
- 41 The Comparator Jurisdictions, particularly Hong Kong, also make use of accessorial liability, both in relation to corporations and non-corporations laws. Hong Kong's Criminal Procedure Ordinance provides that, where a company commits an offence with the consent or connivance of a director, the director is also guilty of the offence.<sup>48</sup> Canada<sup>49</sup> and Hong Kong<sup>50</sup> utilise it in relation to certain corporate governance contraventions to which directors may be exposed. Hong Kong<sup>51</sup> and the United Kingdom<sup>52</sup> utilise it for contraventions of workplace health and safety. Canada,<sup>53</sup> Hong Kong<sup>54</sup> and New Zealand<sup>55</sup> use it in relation to certain company tax offences. And all Comparator Jurisdictions except New Zealand and United States regulate misleading and deceptive conduct through criminal accessorial liability.<sup>56</sup> However, the United States uses it for cartel conduct.<sup>57</sup>
- 42 On the basis of our Director Liability Survey, while Australian policy makers make broad use of accessorial liability provisions to impose liability on company directors, we do not consider this to be a unique aspect of the Australian director liability environment, as the Comparator Jurisdictions do the same.

### 3.3 Deemed liability

In our 2019 Memo, we concluded that while deemed liability provisions are relatively uncommon in Australia and the Comparator Jurisdictions, Australian policy makers are relatively willing to utilise deemed liability. Based on our updated Director Liability Survey, our conclusion remains the same.

- 43 '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.<sup>58</sup> 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.<sup>59</sup>
- 44 Deemed liability is the most burdensome form of director liability because it imposes a reverse burden of proof on a director once company culpability is established.
- 45 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

<sup>46</sup> *Fair Work Act 2009* (Cth) s 550(1).

<sup>47</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 484, 494, 495.

<sup>48</sup> *Criminal Procedure Ordinance* (Cap 221) (HK) s 101E.

<sup>49</sup> *Canada Business Corporations Act* (Can) s 250.

<sup>50</sup> *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32) (HK) s 275(1)-(3).

<sup>51</sup> *Occupational Safety and Health Ordinance* (Cap 509) (HK) s 33(1).

<sup>52</sup> *Health and Safety at Work etc Act 1974* (UK) s 37(1).

<sup>53</sup> *Income Tax Act* (Can) s 242.

<sup>54</sup> *Inland Revenue Ordinance* (Cap 112) (HK) s 80E.

<sup>55</sup> *Tax Administration Act 1994* (NZ) s 148(1).

<sup>56</sup> *Competition Act* (Can) s 52; *Trade Descriptions Ordinance* (Cap 362) (HK) s 20; *Digital Markets, Competition and Consumers Act 2024* (UK) s 239.

<sup>57</sup> 15 USC § 1.

<sup>58</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (13 March 2002) 309-10.

<sup>59</sup> Ford, Austin and Ramsay, above n 38, [16.170].

commits a prescribed tax offence,<sup>60</sup> unless a defence applies.<sup>61</sup> Relatedly, the Australian Taxation Office (**ATO**) frequently enforces the deemed liability of directors for a company's unpaid PAYG withholding, GST and super guarantee charges by issuing 'director penalty notices' (**DPNs**) in respect of these amounts under s 269-25 of Schedule 1 to the TAA. Over 25,000 DPNs were issued across the 2023-24 financial year alone, and the ATO's 'aggressive' use of these largely unconstrained powers has been roundly criticised by liquidators and small business advocates.<sup>62</sup>

- 46 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.<sup>63</sup> In addition, in 2009 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.<sup>64</sup> COAG further recognised that in such circumstances, directors could be criminally liable if they participate in or negligently or 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'.<sup>65</sup> In short, the COAG Principles suggest that deemed liability should be imposed on directors only in very limited circumstances.
- 47 Some of the Comparator Jurisdictions also use 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 TAA.<sup>66</sup> For example, Canada and the United States impose deemed director liability in relation to certain environmental offences sampled.<sup>67</sup> Hong Kong imposes deemed liability on directors in relation to failures to remit superannuation contributions.<sup>68</sup> And deeming provisions impose liability in the United Kingdom and New Zealand in relation to financial record keeping obligations.<sup>69</sup>
- 48 On the basis of our Director Liability Survey, while the Comparator Jurisdictions do impose deemed liability on directors for corporate contraventions, we consider that Australian policy makers are also relatively willing to do so.

#### 4 Director exposure to corporate criminal investigations and prosecutions

In our 2019 Memo, we concluded that Australia's unique corporate criminal responsibility model was more likely than the Comparator Jurisdictions' models to require scrutiny of

<sup>60</sup> *Taxation Administration Act 1953* (Cth) s 8Y(1).

<sup>61</sup> *Ibid* s 8Y(2).

<sup>62</sup> ABC, 'ATO Moves to Claw Back \$50 Billion in Debt, but during a Cost-of-Living Crisis It's Causing Turmoil' (19 July 2024) <<https://www.abc.net.au/news/2024-07-19/ato-good-cop-to-bad-cop-to-claw-back-50-billion-in-tax-and-super/104114212>>; ABC, 'As Tax and Superannuation Debts Grow, ATO Issues Tens of Thousands of Director Penalty Notices that Could Send More People Bankrupt' (16 July 2024) <<https://www.abc.net.au/news/2024-07-16/directors-personally-liable-for-unpaid-superannuation-tax-ato/104086046>>.

<sup>63</sup> Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (2006) 13.

<sup>64</sup> 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.

<sup>65</sup> *Ibid*.

<sup>66</sup> For example, the equivalents of *Taxation Administration Act* s 8Y in the Comparator Jurisdictions all relied on accessory 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; *Companies Act 2006* (UK) s 387(1); *Internal Revenue Code*, 26 USC § 7201.

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

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

<sup>69</sup> *Companies Act 2006* (UK) ss 387(1), 415(4); *Companies Act 1993* (NZ) ss 194(4), 207G(3).

director conduct in a corporate criminal prosecution. The United Kingdom's corporate criminal responsibility model is evolving rapidly, and director conduct may be relevant in considering whether a defence of 'adequate procedures' or the like is available in respect of an alleged 'failure to prevent offence'. Nonetheless, based on our updated Corporate Criminal Liability Survey, our conclusion remains the same.

- 49 Our Corporate Criminal Liability Survey has surveyed the mechanisms for imposing criminal liability on corporations in Australia and the Comparator Jurisdictions.
- 50 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.<sup>70</sup> Examples of Commonwealth offences to which the model applies include bribing a foreign public official,<sup>71</sup> making false or misleading statements in applications for licences and permits,<sup>72</sup> intentionally or negligently dealing in proceeds of crime,<sup>73</sup> offences under the *Work Health and Safety Act 2011* (Cth),<sup>74</sup> *Civil Aviation Act 1988* (Cth)<sup>75</sup> and ASIC Act,<sup>76</sup> and most competition law offences.<sup>77</sup> Examples of offences to which the model does not apply include certain cartel offences,<sup>78</sup> access to service contraventions,<sup>79</sup> and anti-competitive conduct in the telecommunications industry.<sup>80</sup>
- 51 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;<sup>81</sup> and
  - (b) either:
    - (i) the board or a high managerial agent expressly, tacitly or impliedly authorised or permitted the commission of the offence;<sup>82</sup> 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.<sup>83</sup>
- 52 Since our 2019 Memo, Australia has adopted its first 'failure to prevent' offence—legislation commenced in September 2024 making corporations criminally responsible for failing to prevent bribery of foreign public officials by 'associates'. There is a defence available where the corporation had in place adequate procedures designed to prevent such bribery.<sup>84</sup> Therefore, a regulator, prosecutor or court may have cause to consider whether directors established and oversaw the operation of an 'adequate' anti-bribery and corruption compliance framework in considering whether a corporation may avail itself of an 'adequate procedures'

<sup>70</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 2.2, 12.1 (**Australian Criminal Code**).

<sup>71</sup> *Ibid* s 70.2.

<sup>72</sup> *Ibid* s 136.1.

<sup>73</sup> *Ibid* Part 10.2.

<sup>74</sup> *Work Health and Safety Act 2011* (Cth) s 244.

<sup>75</sup> *Civil Aviation Act 1988* (Cth) s 7A.

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

<sup>77</sup> *Competition and Consumer Act 2010* (Cth) s 6AA.

<sup>78</sup> *Ibid* ss 6AA(2), 45AF, 45AG.

<sup>79</sup> *Ibid* s 6AA(2), Part IIIA.

<sup>80</sup> *Ibid* s 6AA(2), Part XIC, Part XIB Division 7.

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

<sup>82</sup> Australian 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.

<sup>83</sup> *Ibid* ss 12.3(2)(c)-(d)

<sup>84</sup> *Ibid* s 70.5A(5).

defence.<sup>85</sup> While the ALRC recommended that consideration be given to extending this liability to other offences that might arise in the context of transnational business (for example, modern slavery), this has not yet occurred.<sup>86</sup>

53 In contrast to Australia, most of the Comparator Jurisdictions use 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 employment<sup>87</sup> and partly or wholly for the benefit of the corporation.<sup>88</sup> A company may be found liable for acts of its employees and officers, regardless of seniority.<sup>89</sup> However, criminal liability of an individual is a precondition to company liability.<sup>90</sup> Notably, United States federal courts may consider the corporations' compliance and ethics programs as a factor in sentencing.<sup>91</sup> 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.<sup>92</sup>
- (b) Hong Kong<sup>93</sup> and New Zealand<sup>94</sup> 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.<sup>95</sup> Criminal liability of an individual is a precondition of company liability.<sup>96</sup>
- (c) The United Kingdom has traditionally used a particularly restrictive form of the identification model.<sup>97</sup> However, in two respects, the United Kingdom has adopted a more permissive approach to corporate criminal liability in recent years.
  - (i) *First*, the United Kingdom has adopted supplementary corporate criminal offences of failing to prevent bribery,<sup>98</sup> failing to prevent fraud,<sup>99</sup> and failing to prevent the facilitation of tax evasion,<sup>100</sup> 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 and fraud offences, it was not reasonable to expect the corporation to have such procedures in place).

<sup>85</sup> Attorney-General's Department, 'Guidance on adequate procedures to prevent the commission of foreign bribery (August 2024)' 6-7.

<sup>86</sup> ALRC, *Corporate Criminal Responsibility* (Report 136 (2020)), 447.

<sup>87</sup> *United States v Richmond*, 700 F 2d 1183, 1195 (1983).

<sup>88</sup> *United States v Cincotta*, 689 F 2d 238, 241 (1982).

<sup>89</sup> *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).

<sup>90</sup> 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.

<sup>91</sup> United States Sentencing Commission, *Guidelines Manual* (2018) Ch 8.

<sup>92</sup> United States Department of Justice, *Justice Manual* (2018) § 9-28.300.

<sup>93</sup> *R v Lee Tsat-Pin* [1985] HKEC 87.

<sup>94</sup> OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-bribery Convention in New Zealand* (2013) [28]-[31].

<sup>95</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 180 (Morris LJ), 186-8 (Dilhorne LJ), 190 (Pearson LJ).

<sup>96</sup> *Ibid.*

<sup>97</sup> 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.

<sup>98</sup> *Bribery Act 2010* (UK) s 7.

<sup>99</sup> *Economic Crime and Corporate Transparency Act 2023* (UK) s 199, sch 13.

<sup>100</sup> *Criminal Finance Act 2017* (UK) Part 3.

- (ii) *Second*, legislation has recently been passed to make corporations responsible for certain economic offences (such as theft, fraud or bribery)<sup>101</sup> committed by 'senior managers' within the scope of their actual or apparent authority.<sup>102</sup> A Bill is currently being considered by the House of Commons which, if passed, would extend the operation of this provision to all offences and fully replace the identification model.<sup>103</sup>
  - (d) Canada uses a statutory composite model that combines aspects of the United States' vicarious liability model and the United Kingdom's identification model, pursuant to which a corporation can be held responsible for prescribed conduct by a senior officer.<sup>104</sup>
- 54 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.
- 55 *First*, Australia allows for the attribution of liability to a corporation if a director expressly, tacitly or impliedly permitted the commission of an offence.<sup>105</sup> Directors may tacitly or impliedly permit the commission of the offence if they recklessly allow it to occur.<sup>106</sup> 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.
- 56 *Second*, Australia uses 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.<sup>107</sup> This broad and flexible concept has been the subject of little judicial commentary (either prior to or since the issue of our 2019 Memo), 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'.<sup>108</sup>
- 57 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'.<sup>109</sup> ASIC and the Australian Prudential Regulatory Authority (**APRA**) have indicated that directors have a critical role to play in setting the tone from the top within an organisation, through both practical

<sup>101</sup> *Economic Crime and Corporate Transparency Act 2023* (UK) sch 12.

<sup>102</sup> *Ibid* s 196. A 'senior manager' is defined in s 196(4) as an 'individual who plays a significant role in (a) the making of decisions about how the whole or a substantial part of the activities of the body corporate ... are to be managed or organised, or (b) the actual managing or organising of the whole or a substantial part of those activities'.

<sup>103</sup> *Crime and Policing Bill 2025* (UK) s 165.

<sup>104</sup> *Criminal Code*, RSC, 1985, c C-46 §22.2.

<sup>105</sup> Australian 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 0 below.

<sup>106</sup> Attorney-General's Department (Cth), above n 81, para 12.3-D.

<sup>107</sup> Australian Criminal Code s 12.3(6).

<sup>108</sup> *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.

<sup>109</sup> FS Royal Commission 334-5.

supervisory actions and internal and external communications.<sup>110</sup> Most recently, in March this year, APRA reiterated directors' 'central' roles in articulating 'the purpose and values of the entity, and desired culture' and providing 'leadership and constructive challenged to senior management'. Notably, these roles were identified as core responsibilities in the context of recent concerns about the 'overweight' of operational matters on board agendas, at the expense of strategic issues, highlighting their continued importance.<sup>111</sup> 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.<sup>112</sup>

- 58 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.
- 59 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,<sup>113</sup> Comparator Jurisdiction regulators and prosecutors would 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. (One emerging exception to this is the United Kingdom's growing family of 'failure to prevent' offences, as consideration of director conduct may be relevant to whether a corporation is entitled to an 'adequate procedures' defence when a contravention is alleged). Therefore, 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.

<sup>110</sup> 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.

<sup>111</sup> APRA, *Governance Review Discussion Paper* (March 2025) 25-6.

<sup>112</sup> Allens, *Corporate Culture Guide*, 8 <<https://www.allens.com.au/globalassets/pdfs/campaigns/corporatecultureguide.pdf>>.

<sup>113</sup> 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 Key observations

In our 2019 Memo, we made the following key observations:

- Australia regulates a relatively broad range of subject matter through the imposition of director liability.
- Australia imposes criminal liability on directors relatively liberally, particularly in relation to dishonest or reckless contraventions of their corporate governance obligations.
- Australian directors are exposed to relatively harsh criminal penalties.
- Australia alone primarily uses a public mechanism for civil enforcement of directors' duties.
- The doctrine of stepping stone liability has the potential to further expand the ambit of director conduct that may be subject to public civil enforcement.
- Australia's public civil enforcement mechanism uses a unique penalties regime, and Australia's civil penalties are harsh, even as compared with Australian and Comparator Jurisdiction criminal pecuniary penalties.

Based on our updated Director and Corporate Criminal Liability Surveys, we make the following observations.

- In respect of the areas of law that we looked at in the 2019 Memo, while the Comparator Jurisdictions' director liability environments have in some narrow respects 'caught up' with Australia's, Australia's director liability environment remains unique and generally more burdensome.
- In respect of the new areas of law that we look at in this memorandum (being cyber security, financial accountability and mandatory reporting), Australian directors have assumed additional duties and responsibilities relating to emerging governance issues, and while certain of the Comparator Jurisdictions impose more burdensome obligations in respect of individual governance issues, taken as a package Australian directors bear the most rigorous cyber security, financial accountability and sustainability reporting obligations.
- Our conclusion remains the same, save that while stepping stone liability has become an entrenched feature of the Australian director liability environment, it now appears less likely that it will be used by ASIC to 'piggyback' director civil liability on to breaches of statutes other than the Corporations Act and ASIC Act by a corporation.

60 Based on our Director and Corporate Criminal Liability Surveys, we consider that several aspects of the Australian director liability environment bear comment. Most of these render the Australian director liability unique—and in many regards, uniquely burdensome.

### 5.1 Despite some developments in Comparator Jurisdictions, Australia's director liability environment remains unique and generally more burdensome

61 Since we issued our 2019 Memo:

- (a) the key developments in Australia's director liability environment are that:

- (i) directors now have additional duties, in response to concerns about 'illegal phoenix activity', to prevent 'credit-defeating dispositions'<sup>114</sup> and to register for a 'Director Identification Number';<sup>115</sup>
  - (ii) directors have assumed a number of additional duties relating to the emerging governance issues of cyber security, financial accountability and mandatory sustainability reporting;<sup>116</sup>
  - (iii) there is now legislation in all Australian states and territories pursuant to which directors may be held criminally liable for industrial manslaughter;<sup>117</sup> and
  - (iv) Parliament has passed legislation to make companies liable for the failure of its directors to prevent bribery of foreign public officials, modelled on the 'failure to prevent' offences in the United Kingdom.<sup>118</sup>
- (b) the key developments in the Comparator Jurisdictions' director liability environment are that:
- (i) in the United Kingdom, there is now much greater scope for public enforcement of consumer protection law, with the Competition & Markets Authority being able to issue monetary penalties and other orders;<sup>119</sup>
  - (ii) criminal liability can now be imposed on New Zealand directors for company contraventions of competition law;<sup>120</sup>
  - (iii) criminal liability can be imposed on directors in both the United Kingdom and New Zealand in respect of a company's failure to comply with mandatory sustainability reporting requirements;<sup>121</sup>
  - (iv) there has been an expansion in the application of existing directors' duties to cyber security obligations in all Comparator Jurisdictions;<sup>122</sup> and
  - (v) as discussed in Part 4 above, legislation has been passed in the United Kingdom which expands the scope for companies to be held liable for the conduct of its directors, which may expose directors to greater scrutiny.
- 62 Consequently, our overall view is that, while the Comparator Jurisdictions' director liability environments have in some narrow respects 'caught up' with Australia's, Australia's director liability environment remains unique and generally more burdensome.
- 63 This position is expected to persist going forward, considering a number of upcoming additions to the Australia's director liability environment and developments in Comparator Jurisdictions. For example, from March 2026, boards will have a duty under the AML/CTF Act to take reasonable steps to ensure that the company is appropriately identifying, assessing, managing and mitigating money laundering and terrorism financing risks.<sup>123</sup> Further, from November 2025, directors of aged care providers in Australia may incur personal liability for a failure to ensure that the provider does not adversely affect the health or safety of people in their care.<sup>124</sup> On the other hand, a consultation has been recently coordinated by the New Zealand

<sup>114</sup> Corporations Act ss 588GAB(2), 588GAC(2).

<sup>115</sup> Ibid ss 1272C, 1272D, 1272G, 1272H.

<sup>116</sup> See, eg, Schedule 1, Tables 4, 8.2, 9.

<sup>117</sup> See, eg, *Work Health and Safety Act 2011* (NSW) s 34C.

<sup>118</sup> Australian Criminal Code s 70.5A(1).

<sup>119</sup> *Digital Markets, Competition and Consumers Act 2024* (UK) Pt 3.

<sup>120</sup> *Commerce (Criminalisation of Cartels) Amendment Act 2019* (NZ) s 4. This amendment came into effect in April 2021.

<sup>121</sup> *Financial Markets Conduct Act 2013* (NZ) ss 461ZG, 461ZHD; *Companies Act 2006* (UK) ss 414A, 414D.

<sup>122</sup> See Schedule 1, Table 4 for further information.

<sup>123</sup> *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024* (Cth) sch 1, item 24 (Pt 1A, Div 4).

<sup>124</sup> *Aged Care Act 2024* (Cth) ss 179-80.

government in relation its climate-related disclosure regime, including whether existing deemed liability provisions should be adjusted to reduce exposure for directors.<sup>125</sup>

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

- 64 Australia continues to use director liability in furtherance of the regulation of a broad range of corporate activities than do the Comparator Jurisdictions. 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 and financial accountability contraventions), employees (through director liability for employment law contraventions), customers (through directors' exposure as natural persons for consumer law contraventions and, now, cybersecurity failures), and the community generally (through director liability for environment and tax law contraventions, as well as directors' exposure as natural persons for competition contraventions).
- 65 Beyond the scope of the subject areas surveyed in this memorandum, the breadth of board activity subject to regulation in Australia continues to grow. Directors of Australian companies which qualify as 'reporting entities' for the purposes of the *Modern Slavery Act 2018* (Cth) are required to approve modern slavery statements with at least one director signing the statement, attesting to the accuracy of the information contained.<sup>126</sup> Although, to date, there have been no penalties associated with non-compliance with the Act, the Federal Government has recently agreed, in principle, to the introduction of corporate penalties for non-compliance which, if legislated, will increase liability exposure.<sup>127</sup> Additionally, the board of a typical APRA-regulated is subject to approximately 150 requirements under APRA prudential standards, including in relation to operational risks and remuneration under recently-introduced CPS 230 and CPS 511.<sup>128</sup>
- 66 While Australia's use of director liability as a key tool of corporate regulation is not unique among the Comparator Jurisdictions, it remains the case that we have not identified a Comparator Jurisdiction that uses director liability to regulate a broader range of corporate activities and interactions.

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

- 67 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 not to misuse information or their position;<sup>129</sup> dishonest failures to secure compliance with financial record keeping obligations;<sup>130</sup> and dishonest involvement in certain restricted transactions.<sup>131</sup>
- 68 While the Comparator Jurisdictions, particularly Hong Kong, New Zealand and the United Kingdom, also impose criminal liability on directors for contraventions of their corporate

<sup>125</sup> See Ministry of Business, Innovation & Employment, 'Adjustments to the Climate-Related Disclosures Regime' (Discussion Document, December 2024).

<sup>126</sup> *Modern Slavery Act 2018* (Cth) ss 5, 13.

<sup>127</sup> Australian Government, *Australian Government Response to the Review Report of the Modern Slavery Act 2018* (Cth) (December 2024), 27.

<sup>128</sup> APRA, *Governance Review Discussion Paper* (March 2025) 7.

<sup>129</sup> Corporations Act s 184.

<sup>130</sup> *Ibid* s 344(2).

<sup>131</sup> *Ibid* ss 209(3), 260D(3), 588G(3).

governance obligations,<sup>132</sup> it continues to be our view that Australia does so in the broadest range of circumstances.

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

#### 5.4 Australia uniquely relies on public enforcement of directors' duties

- 70 As touched on in Part 3.1(b) above, it remains the case that Australia primarily relies on public enforcement of directors' duties, whereas the Comparator Jurisdictions rely primarily on private enforcement.
- 71 Australia utilises a civil penalties regime for many contraventions of the Corporations Act, including directors' duties, pursuant to which ASIC may seek pecuniary penalty orders payable to the Commonwealth,<sup>133</sup> relinquishment orders payable to the Commonwealth,<sup>134</sup> compensation orders payable to a company,<sup>135</sup> and disqualification orders against individuals.<sup>136</sup>
- 72 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'.<sup>137</sup> 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.<sup>138</sup> In addition, ASIC most often seeks pecuniary penalty and disqualification 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.<sup>139</sup>
- 73 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.
- 74 In contrast, it remains the case that 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 has historically witnessed a very high volume of actions for director breaches of fiduciary duties, whereas 'directors of UK public companies [have] run virtually no risk of being sued for damages for breach of directors' duties'.<sup>140</sup>
- 75 Australia's utilisation of a public enforcement mechanism continues to render the Australian director liability environment vastly different to those of the Comparator Jurisdictions, create an additional exposure for Australian directors, and impact the character of Australian directors' duties by emphasising their public character.

<sup>132</sup> See generally Schedule 1, Part 1 below.

<sup>133</sup> Corporations Act s 1317G.

<sup>134</sup> Ibid s 1317GAB.

<sup>135</sup> Ibid s 1317H.

<sup>136</sup> Ibid s 206C.

<sup>137</sup> 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.

<sup>138</sup> ASIC, *ASIC's Approach to Enforcement, Information Sheet 151* (2023).

<sup>139</sup> 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; Ian Ramsay and Miranda Webster, 'An Analysis of the Use of Civil Penalties by the Australian Securities and Investments Commission' (2024) 53 *Federal Law Review* 970 pp 3, 22.

<sup>140</sup> Hill and Conaglen, above n 115, 11. See also Jennifer G Hill, 'Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance' (2020) 5(1) *UC Irvine Journal of International, Transnational and Corporate Law* 163, 174.

## 5.5 Australia's doctrine of stepping stone liability is unique

76 As discussed in Part 3.1(b) above, the doctrine of stepping stone liability is now an entrenched feature of the Australian director liability environment, and ASIC continues to utilise it to 'piggyback' director civil liability on to Corporations Act and ASIC Act breaches by a corporation. The doctrine has not been adopted in any Comparator Jurisdiction since our 2019 Memo, and remains a unique feature of the Australian director liability environment.

## 5.6 Australia has relatively harsh criminal and civil penalty regimes

77 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,<sup>141</sup> in our view Australia has the harshest criminal penalties regime.

78 In addition, while Australian directors are exposed to pecuniary penalty orders of equivalent quanta to criminal fines, as discussed in Part 5.4 above, none of the Comparator Jurisdictions utilise civil penalties regimes for directors' duties contraventions.

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

## 5.7 Australian directors are subject to rigorous cyber security, financial accountability and sustainability reporting obligations

80 Since our 2019 Memo, Australian directors have assumed additional duties and responsibilities relating to the emerging governance issues of cyber security, financial accountability and sustainability reporting. While certain of the Comparator Jurisdictions impose more burdensome obligations in respect of individual governance issues, taken as a packaging, Australian directors bear the most rigorous cyber security, financial accountability and sustainability reporting obligations.

81 *First*, Australian regulators have very clearly signalled that directors' statutory duties and reporting obligations require them to address operational risks arising from cyber resilience, privacy and data management, and report on cyber breaches.<sup>142</sup> While Comparator Jurisdiction directors' duties may impose similar obligations, the public character of directors' duties enforcement in Australia creates unique risks.

82 *Second*, under Australia's newly instituted FAR, Australian directors are now exposed to various forms of liability in respect of corporate failures to comply with the mandatory responsibility and accountability framework administered by APRA and ASIC. While Australian directors' Hong Kong and United Kingdom peers are subject to comparable regimes, Canada, New Zealand and the United States have not adopted comparable regimes.

83 *Third*, Australian directors have significant duties to ensure compliance with their sustainability reporting, assurance and record-keeping obligations. Dishonest failures to comply with these obligations may result in criminal penalties of up to 15 years' imprisonment or \$1,485,000 fines.<sup>143</sup> While the United Kingdom maintains a similar reporting regime, and New Zealand's is arguably stronger, Canada, Hong Kong and the United States do not maintain comparable director sign-off obligations.

<sup>141</sup> See generally Schedule 1, Part 1 below.

<sup>142</sup> ASIC, *Cyber Resilience: Health Check* (Report 429, March 2015).

<sup>143</sup> Corporations Act s 344(2), sch 3. Penalty figures in this memo are as at 1 August 2025, with a penalty unit valued at \$330.

84 In these ways, our view is that Australian directors are consistently subject to ever more burdensome obligations than their counterparts in Comparator Jurisdictions.

**5.8 Australian directors may become entangled in corporate criminal proceedings in unique ways**

85 As discussed in Part 4 above, it remains the case that Australia's statutory corporate criminal responsibility model poses unique risks of entanglement in corporate criminal for Australian directors. 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, or whether a corporation had adequate prevention procedures in place to prevent bribery of foreign public officials by an associate.

86 Except in relation to the United Kingdom's failure to prevent bribery, failure to prevent fraud 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.

87 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.

**Rachel Nicolson**

Partner  
Allens  
Rachel.Nicolson@allens.com.au  
T +61 3 9613 8300

**Andrew Wilcock**

Managing Associate  
Allens  
Andrew.Wilcock@allens.com.au  
T +61 3 9613 8440

## Schedule 1: Summary of Director Liability Survey results

A glossary of the abbreviations used in these tables can be found at 10 below.

### 1 Corporations law<sup>144</sup>

#### 1.1 General directors' duties

|                                                                                  | Australia                                                                                                                                                                                                                                                                                                                          | Canada                                                                                                                                                                                                                                               | Hong Kong                                                                                                                                              | New Zealand                                                                                                                                                                                             | United Kingdom                                                                                                                                                                                   | United States (Delaware)                                                                                                                                                                                                                                     |
|----------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                                                        |                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                      |                                                                                                                                                        |                                                                                                                                                                                                         |                                                                                                                                                                                                  |                                                                                                                                                                                                                                                              |
|                                                                                  | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Criminal liability.</li> <li>Primarily public enforcement; CPOs and potential disqualification.</li> </ul>                                                                                                                                                           | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Different duty regime with similar substance.</li> <li>No criminal liability.</li> <li>Private civil enforcement; unique civil penalty regime requiring oppressive conduct.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Similar duties.</li> <li>No criminal liability.</li> <li>Private enforcement.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Similar duties.</li> <li>Criminal liability with shorter imprisonment and lower fines.</li> <li>Primarily private enforcement.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Broad duty to act in good faith.</li> <li>No criminal liability.</li> <li>Private enforcement; low level of litigation.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Different duty regime with similar substance and business judgment rule as review standard.</li> <li>No criminal liability.</li> <li>Private enforcement; high level of litigation.</li> </ul> |
| <b>Modes of liability</b>                                                        |                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                      |                                                                                                                                                        |                                                                                                                                                                                                         |                                                                                                                                                                                                  |                                                                                                                                                                                                                                                              |
| <b>Criminal—direct</b>                                                           | ✓ (reckless or dishonest violations of duties to act in good faith, not to misuse information or position, to prevent creditor-defeating dispositions, not to prejudice employee entitlements and to obtain and not misrepresent DINs) only) ( <a href="#">CA</a> ss 184, 588GAB(1), 588GAC(1), 596AB, 1272C, 1272D, 1272G, 1272H) | ✗                                                                                                                                                                                                                                                    | ✗                                                                                                                                                      | ✓ (dishonest violations of duty to act in good faith only) ( <a href="#">NZ CA</a> s 138A)                                                                                                              | ✗                                                                                                                                                                                                | ✗                                                                                                                                                                                                                                                            |
| <b>Civil—direct</b>                                                              | ✓                                                                                                                                                                                                                                                                                                                                  | ✓                                                                                                                                                                                                                                                    | ✓                                                                                                                                                      | ✓                                                                                                                                                                                                       | ✓                                                                                                                                                                                                | ✓                                                                                                                                                                                                                                                            |
| <b>Duties</b>                                                                    |                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                      |                                                                                                                                                        |                                                                                                                                                                                                         |                                                                                                                                                                                                  |                                                                                                                                                                                                                                                              |
| <b>Duty to act with care and diligence or similar</b>                            | ✓ ( <a href="#">CA</a> s 180(1))                                                                                                                                                                                                                                                                                                   | ✓ ( <a href="#">Can BCA</a> s 122(1)(b))                                                                                                                                                                                                             | ✓ ( <a href="#">HK 622</a> s 465)                                                                                                                      | ✓ ( <a href="#">NZ CA</a> s 137)                                                                                                                                                                        | ✓ ( <a href="#">UK CA</a> s 174)                                                                                                                                                                 | ✓ (common law)                                                                                                                                                                                                                                               |
| <b>Duty to act in good faith in the best interests of the company or similar</b> | ✓ ( <a href="#">CA</a> s 181(1)(a))                                                                                                                                                                                                                                                                                                | ✓ ( <a href="#">Can BCA</a> s 122(1)(a))                                                                                                                                                                                                             | ✓ (common law)                                                                                                                                         | ✓ ( <a href="#">NZ CA</a> s 131)                                                                                                                                                                        | ✓ <sup>145</sup> ( <a href="#">UK CA</a> s 172)                                                                                                                                                  | ✓ (subsumed under the common law duty of loyalty)                                                                                                                                                                                                            |
| <b>Duty to exercise powers for a proper purpose or similar</b>                   | ✓ ( <a href="#">CA</a> s 181(1)(b))                                                                                                                                                                                                                                                                                                | ✓ (subsumed under the statutory duty to act in good faith <sup>146</sup> )                                                                                                                                                                           | ✓ (common law)                                                                                                                                         | ✓ ( <a href="#">NZ CA</a> s 133)                                                                                                                                                                        | ✓ ( <a href="#">UK CA</a> s 171)                                                                                                                                                                 | ✓ (see previous)                                                                                                                                                                                                                                             |

<sup>144</sup> For contraventions addressed in this section, liability is imposed on directors and/or officers only, unless otherwise stated.

<sup>145</sup> 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.

<sup>146</sup> 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.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                                                     | Australia                                                                                                                                                                                                             | Canada                                                                                                                                       | Hong Kong                                                                                        | New Zealand                                                       | United Kingdom                                                                                         | United States (Delaware)                                                                                                                      |
|-------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Duty to avoid conflicts of interest or similar</b>                               | ✓ (CA ss 191-195, Ch 2E; common law)                                                                                                                                                                                  | ✓ (see previous)                                                                                                                             | ✓ (common law)                                                                                   | ✓ (NZ CA ss 140 and 141)                                          | ✓ (UK CA ss 175 and 177)                                                                               | ✓ (see previous) (see also <a href="#">8 Del C</a> s 144)                                                                                     |
| <b>Duty to not misuse information or position or similar</b>                        | ✓ (CA ss 182-183)                                                                                                                                                                                                     | ✓ (see previous)                                                                                                                             | ✓ (common law)                                                                                   | ✓ (NZ CA s 145)                                                   | ✓ (UK CA s 176)                                                                                        | ✓ (see previous)                                                                                                                              |
| <b>Duty to retain (not fetter) discretion or similar</b>                            | ✓ (common law)                                                                                                                                                                                                        | ✓ (see previous)                                                                                                                             | ✓ (common law)                                                                                   | ✓ (common law)                                                    | ✓ (UK CA s 173)                                                                                        | ✓ (see previous)                                                                                                                              |
| <b>Other</b>                                                                        | ✓ (prevent creditor-defeating dispositions) (CA ss 588GAB(2), 588GAB(3), 588GAC(2))<br>✓ (not prejudice employee entitlements) (CA s 596AC)<br>✓ (obtain and not misrepresent DIN) (CA ss 1272C, 1272D, 1272G, 1272H) | Duty to manage or supervise management (Can BCA s 102(1))<br>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) |                                                                                                        |                                                                                                                                               |
| <b>Defences</b>                                                                     |                                                                                                                                                                                                                       |                                                                                                                                              |                                                                                                  |                                                                   |                                                                                                        |                                                                                                                                               |
| <b>Business judgment rule (applies to duty to act with care and diligence only)</b> | ✓ (CA s 180(2))                                                                                                                                                                                                       | ✓ (common law <sup>147</sup> )                                                                                                               | ✗                                                                                                | ✗                                                                 | ✗                                                                                                      | * (see 'Other', below)                                                                                                                        |
| <b>Reasonable reliance on information or advice</b>                                 | ✓ (CA s 189)                                                                                                                                                                                                          | ✓ (Can BCA s 123(5))                                                                                                                         | ✓ (common law)                                                                                   | ✓ (NZ CA s 138)                                                   | ✓ (common law <sup>148</sup> )                                                                         | ✓ (8 Del C § 141(e))                                                                                                                          |
| <b>Reasonable reliance on delegate</b>                                              | ✓ (CA s 190)                                                                                                                                                                                                          | ✗                                                                                                                                            | ✗                                                                                                | ✓ (NZ CA s 130)                                                   | ✓ (common law <sup>149</sup> )                                                                         | ✗                                                                                                                                             |
| <b>Proper consideration rule</b>                                                    | ✓ (common law <sup>150</sup> ) (applies to the duty to retain discretion only)                                                                                                                                        | ✗                                                                                                                                            | ✗                                                                                                | ✗                                                                 | ✗                                                                                                      | ✓ (8 Del C § 144(a)(1) – re conflicts of interest)                                                                                            |
| <b>Shareholder ratification</b>                                                     | ✓ (common law <sup>151</sup> )                                                                                                                                                                                        | ✗                                                                                                                                            | ✓ (HK 622 s 473)                                                                                 | ✗                                                                 | ✓ (UK CA s 239)                                                                                        | ✓ (8 Del C § 144(a)(2) – re conflicts of interest)<br>* (see also 'Other', below)                                                             |
| <b>Court power to grant relief</b>                                                  | ✓ (CA s 1317S(2))                                                                                                                                                                                                     | ✗                                                                                                                                            | ✓ (HK 622 ss 903-904)                                                                            | ✗                                                                 | ✓ (UK CA s 1157)                                                                                       | ✗                                                                                                                                             |
| <b>Other</b>                                                                        |                                                                                                                                                                                                                       | Reasonable diligence (Can BCA s 123(4))                                                                                                      |                                                                                                  |                                                                   | Authorisation by directors (applies to duty to avoid conflicts of interest only) (UK CA ss 175(4)-(5)) | Business judgment rule as standard of review (general law <sup>152</sup> )<br>Certificate of incorporation may provide for the elimination or |

<sup>147</sup> See, eg, *BCE Inc v 1976 Debenture holders* (2008) 3 SCR 560.

<sup>148</sup> See, eg, *Green v Walkling* [2007] EWHC 3251 (Ch).

<sup>149</sup> See, eg, *Dovey v Cory* [1901] AC 477.

<sup>150</sup> See, eg, *Thorby v Goldberg* (1964) 112 CLR 597.

<sup>151</sup> 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; *Cassimatis*.

<sup>152</sup> 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).

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                                       | Australia                                                                                                                                                                                                                                                                                       | Canada                                                                                                         | Hong Kong                | New Zealand                                                                                                                                                              | United Kingdom                                                                                            | United States (Delaware)                                                                                                                                                                                      |
|-----------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|--------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                       |                                                                                                                                                                                                                                                                                                 |                                                                                                                |                          |                                                                                                                                                                          | Agreement for future rule (applies to the duty to retain discretion only) ( <a href="#">UK CA s 173</a> ) | limitation of certain breaches ( <a href="#">8 Del C § 102(b)(7)</a> )<br>Act or transaction is fair as to the corporation and shareholders ( <a href="#">8 Del C § 144(a)(3)</a> – re conflicts of interest) |
| <b>Penalties</b>                                                      |                                                                                                                                                                                                                                                                                                 |                                                                                                                |                          |                                                                                                                                                                          |                                                                                                           |                                                                                                                                                                                                               |
| <b>Imprisonment</b>                                                   | ✓ (15 years max) ( <a href="#">CA Sch 3</a> )<br>✓ (10 years max for creditor-defeating dispositions) ( <a href="#">CA Sch 3</a> )<br>✓ (1 year max for misrepresenting DIN) ( <a href="#">CA Sch 3</a> )                                                                                       | ✗                                                                                                              | ✗                        | ✓ (5 years max) ( <a href="#">NZ CA s 373(4)</a> ) – re a serious breach of director's duty to act in good faith and in the company's best interests)                    | ✗                                                                                                         | ✗                                                                                                                                                                                                             |
| <b>Criminal fines</b>                                                 | ✓ (the greater of AU\$1,485,000 or three times the benefit derived) ( <a href="#">CA s 1311B(4)</a> )<br>✓ (AU\$19,800 for misrepresenting DINs) ( <a href="#">CA Sch 3</a> )                                                                                                                   | ✗                                                                                                              | ✗                        | ✓ (NZ\$200,000 max (~AU\$182,000)) ( <a href="#">NZ CA s 373(4)</a> ) – re a serious breach of director's duty to act in good faith and in the company's best interests) | ✗                                                                                                         | ✗                                                                                                                                                                                                             |
| <b>Civil penalty orders (CPOs) (applies to statutory duties only)</b> | ✓ (PPO for the greater of AU\$1,650,000 or three times the benefit derived) ( <a href="#">CA s 1317G</a> )<br>(DO equal to the benefit derived or detriment avoided) ( <a href="#">CA s 1317GAB</a> )<br>(CO equal to the amount of damage the company suffered) ( <a href="#">CA s 1317H</a> ) | ✗                                                                                                              | ✗                        | ✗                                                                                                                                                                        | ✗                                                                                                         | ✗                                                                                                                                                                                                             |
| <b>Disqualification</b>                                               | ✓ (Court-determined period) ( <a href="#">CA s 206C</a> )                                                                                                                                                                                                                                       | ✗                                                                                                              | ✗                        | ✓ (criminal violation only; Court-determined period) ( <a href="#">NZ CA s 383</a> )                                                                                     | ✓ (15 years max) ( <a href="#">UK CDDA s 2</a> )                                                          | ✗                                                                                                                                                                                                             |
| <b>Common law and other remedies</b>                                  | ✓ (general law remedies for breaches of general law duties only)                                                                                                                                                                                                                                | ✓ (oppression remedy (ie, any order Court deems fit)) ( <a href="#">Can BCA s 241(3)</a> ) (compliance orders) | ✓ (general law remedies) | ✓ (general law remedies)                                                                                                                                                 | ✓ (general law remedies)                                                                                  | ✓ (general law remedies)                                                                                                                                                                                      |

## Criminal and Civil Frameworks for Imposing Liability on Directors

1.2 Failure to comply with securities exchange disclosure obligations<sup>153</sup>

|                                              | Australia                                                                                                                                   | Canada (Ontario)                                                                                                                                                                                                             | Hong Kong                                                                                                                            | New Zealand                                                                                                                                 | United Kingdom                                                                                                                       | United States (Delaware)                                                                                                                                                                                              |
|----------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                    |                                                                                                                                             |                                                                                                                                                                                                                              |                                                                                                                                      |                                                                                                                                             |                                                                                                                                      |                                                                                                                                                                                                                       |
|                                              | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Securities exchange disclosure obligations are statutorily backed.</li> </ul> | <b>Significantly less burdensome</b> <ul style="list-style-type: none"> <li>Statutory obligations to disclose inside information apply, but only breaches that facilitate insider trading give rise to liability.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Statutory obligations to disclose inside information apply.</li> </ul> | <b>High water mark</b> <ul style="list-style-type: none"> <li>Securities exchange disclosure obligations are statutorily backed.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Statutory obligations to disclose inside information apply.</li> </ul> | <b>Not applicable</b> <ul style="list-style-type: none"> <li>Delaware does not have an exchange that imposes disclosure obligations. Most Delaware companies list in New York, which has such obligations.</li> </ul> |
| <b>Modes of liability</b>                    |                                                                                                                                             |                                                                                                                                                                                                                              |                                                                                                                                      |                                                                                                                                             |                                                                                                                                      |                                                                                                                                                                                                                       |
| <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 674A(3))                                                                                                                            | ×                                                                                                                                                                                                                            | ✓ (HK 571 ss 307B, 307G(2), 307Z)                                                                                                    | ✓ (NZ FMCA ss 270, 486(1), 533)                                                                                                             | ✓ (person knowingly concerned) (Market Abuse Regulation (UK) art 17(1); Financial Services and Markets Act 2000 (UK) ss 123, 417)    | ×                                                                                                                                                                                                                     |
| <b>Defences / Exceptions</b>                 |                                                                                                                                             |                                                                                                                                                                                                                              |                                                                                                                                      |                                                                                                                                             |                                                                                                                                      |                                                                                                                                                                                                                       |
| <i>Reasonable steps to secure compliance</i> | ✓ (CA s 674A(4))                                                                                                                            | ×                                                                                                                                                                                                                            | ×                                                                                                                                    | ✓ (NZ FMCA s 272)                                                                                                                           | ×                                                                                                                                    | ×                                                                                                                                                                                                                     |
| <i>Special exceptions</i>                    | ✓ (ASX Listing Rule 3.1A)                                                                                                                   | ×                                                                                                                                                                                                                            | ×                                                                                                                                    | ✓ (NZX Listing Rule 3.1.2; NZ FMCA s 503(2))                                                                                                | ×                                                                                                                                    |                                                                                                                                                                                                                       |
| <i>Court power to grant relief</i>           | ✓ (CA s 1317S(2))                                                                                                                           | ×                                                                                                                                                                                                                            | ×                                                                                                                                    | ×                                                                                                                                           | ×                                                                                                                                    | ×                                                                                                                                                                                                                     |
| <b>Penalties</b>                             |                                                                                                                                             |                                                                                                                                                                                                                              |                                                                                                                                      |                                                                                                                                             |                                                                                                                                      |                                                                                                                                                                                                                       |
| <i>Imprisonment</i>                          | ×                                                                                                                                           | ×                                                                                                                                                                                                                            | ×                                                                                                                                    | ×                                                                                                                                           | ×                                                                                                                                    | ×                                                                                                                                                                                                                     |
| <i>Criminal fines</i>                        | ×                                                                                                                                           | ×                                                                                                                                                                                                                            | ×                                                                                                                                    | ×                                                                                                                                           | ×                                                                                                                                    | ×                                                                                                                                                                                                                     |
| <i>Civil penalty orders</i>                  | ✓ (see Directors' Duties CPOs)                                                                                                              | ×                                                                                                                                                                                                                            | ✓ (HK 571 ss 307N(1)(d), 307Z)                                                                                                       | ✓ (NZ FMCA ss 486-9)                                                                                                                        | ✓ (UK FSMA s 123)                                                                                                                    | ×                                                                                                                                                                                                                     |
| <i>Disqualification</i>                      | ✓ (Court determined period) (CA s 206C)                                                                                                     | ×                                                                                                                                                                                                                            | ✓ (HK 571 ss 307B, 307N(1)(a)(i))                                                                                                    | ✓ (NZ CA s 383(1)(c)(i))                                                                                                                    | ✓ (from positions involving investment firm management decisions) (UK FSMA s 123A)                                                   | ×                                                                                                                                                                                                                     |
| <i>Common law remedies</i>                   | ×                                                                                                                                           | ×                                                                                                                                                                                                                            | ×                                                                                                                                    | ×                                                                                                                                           | ×                                                                                                                                    | ×                                                                                                                                                                                                                     |

<sup>153</sup> Each jurisdiction imposes liability for securities fraud and misrepresentation. These and related offences have not been surveyed.

## Criminal and Civil Frameworks for Imposing Liability on Directors

1.3 Failure to comply with financial record keeping and reporting obligations<sup>154</sup>

|                                              | Australia                                                                                                                                                                                                                                   | Canada                                                                                                                                                                                    | Hong Kong                                                                                                                                | New Zealand                                                                                                                                                           | United Kingdom                                                                                                                           | United States (Delaware)                                                                                                                                                                             |
|----------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                    |                                                                                                                                                                                                                                             |                                                                                                                                                                                           |                                                                                                                                          |                                                                                                                                                                       |                                                                                                                                          |                                                                                                                                                                                                      |
|                                              | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Long imprisonment and high criminal fine.</li> <li>CPOs and potential disqualification.</li> </ul>                                                                            | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Far shorter imprisonment and lower criminal fine.</li> <li>Different civil regime, requiring oppressive conduct.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Shorter imprisonment and lower criminal fine.</li> <li>No CPOs.</li> </ul> | <b>Significantly less burdensome</b> <ul style="list-style-type: none"> <li>No imprisonment and lower criminal fine.</li> <li>No CPOs or disqualification.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Higher criminal fine but shorter imprisonment</li> <li>No CPOs.</li> </ul> | <b>No Liability</b> <ul style="list-style-type: none"> <li>Delaware does not impose statutory liability on directors for failure to keep financial records and/or make financial reports.</li> </ul> |
| <b>Modes of liability</b>                    |                                                                                                                                                                                                                                             |                                                                                                                                                                                           |                                                                                                                                          |                                                                                                                                                                       |                                                                                                                                          |                                                                                                                                                                                                      |
| <b>Criminal—direct</b>                       | ✓ (CA ss 344(2) (requires dishonesty), 1308(1) (requires knowledge; all contraventions under this section imposed on natural persons generally); 1308(3) (strict liability), 1309 (requires knowledge or failure to take reasonable steps)) | ✓ (Can BCA ss 155, 158, 171(8), 250, 251)                                                                                                                                                 | ✓ (HK 622 ss 373(5)-(6), 379(4)-(5), 388(6)-(7))                                                                                         | ✗                                                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                                                    |
| <b>Criminal—deemed</b>                       | ✗                                                                                                                                                                                                                                           | ✗                                                                                                                                                                                         | ✗                                                                                                                                        | ✓ (NZ CA ss 194(4), 207G(3))                                                                                                                                          | ✓ (UK CA ss 387(1), 415(4))                                                                                                              | ✗                                                                                                                                                                                                    |
| <b>Criminal—accessorial</b>                  | ✗                                                                                                                                                                                                                                           | ✓ (Can BCA s 250)                                                                                                                                                                         | ✗                                                                                                                                        | ✗                                                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                                                    |
| <b>Civil—direct</b>                          | ✓ (CA ss 344(1); s1308(4) (requires knowledge or recklessness); 1308(5) (strict liability), 1309 (requires failure to take reasonable steps))                                                                                               | ✓ (oppression remedy <sup>155</sup> ) (Can BCA s 241)                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                                                    |
| <b>Civil—deemed</b>                          | ✗                                                                                                                                                                                                                                           | ✗                                                                                                                                                                                         | ✗                                                                                                                                        | ✗                                                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                                                    |
| <b>Civil—accessorial</b>                     | ✓ (CA s 1317E(4)) (imposed on natural persons generally)                                                                                                                                                                                    | ✗                                                                                                                                                                                         | ✗                                                                                                                                        | ✗                                                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                                                    |
| <b>Defences / Exemptions</b>                 |                                                                                                                                                                                                                                             |                                                                                                                                                                                           |                                                                                                                                          |                                                                                                                                                                       |                                                                                                                                          |                                                                                                                                                                                                      |
| <b>Honest and excusable act</b>              | ✗                                                                                                                                                                                                                                           | ✗                                                                                                                                                                                         | ✗                                                                                                                                        |                                                                                                                                                                       | ✓ (Record-keeping) (UK CA s 387(2))                                                                                                      | ✗                                                                                                                                                                                                    |
| <b>Reasonable steps to secure compliance</b> | ✓ (CA s 344(1))                                                                                                                                                                                                                             | ✓ (Can BCA s 250(3))                                                                                                                                                                      | ✓ (HK 622 ss 373(5)-(6), 379(4)-(5), 388(6)-(7))                                                                                         | ✓ (NZ CA s 376)                                                                                                                                                       | ✓ (Directors' report) (UK CA s 415(4)(b))                                                                                                | ✗                                                                                                                                                                                                    |
| <b>Reasonable reliance on information</b>    | ✗                                                                                                                                                                                                                                           | ✗                                                                                                                                                                                         | ✓ (HK 622 ss 373(7), 379(6), 388(8))                                                                                                     | ✗                                                                                                                                                                     | ✗                                                                                                                                        | ✗                                                                                                                                                                                                    |
| <b>Other</b>                                 |                                                                                                                                                                                                                                             | ✓ (Can BCA s 155(2) – omission in financial statements)                                                                                                                                   |                                                                                                                                          |                                                                                                                                                                       |                                                                                                                                          |                                                                                                                                                                                                      |

<sup>154</sup> Each jurisdiction imposes criminal liability for false accounting. These offences have not been surveyed. Similarly, offences for disclosure failures in respect of specific forms of documents have not been surveyed (e.g., in the Australian context, takeover-related documents (CA ss 670A and 670C), disclosure documents (CA ss 728 and 729), and financial services disclosure documents (CA ss 1021D, 1021E and 1022B)).

<sup>155</sup> 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 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).

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                             | Australia                                                                                                                                                     | Canada                                                                                                                                                                    | Hong Kong                                                                                                                                                                                                                                                                                                                                                 | New Zealand                                       | United Kingdom                                                                                                       | United States (Delaware) |
|-----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|--------------------------|
|                             |                                                                                                                                                               | acceptable if reason given; s 156 – exemption for reasonable belief that the detriment that may be caused outweighs benefits to shareholders / the public)                |                                                                                                                                                                                                                                                                                                                                                           |                                                   |                                                                                                                      |                          |
| <b>Penalties</b>            |                                                                                                                                                               |                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                           |                                                   |                                                                                                                      |                          |
| <b>Imprisonment</b>         | ✓ (344) (15 years max) (CA Sch 3)<br>✓ (1308 and 1309) (5 years max) (CA Sch 3)                                                                               | ✓ (Untrue or misleading statements in reports) (6 months max) (Can BCA ss 250(1)-(2))<br>✓ (Other offences punishable on summary conviction) (2 years max) (Can CC s 787) | ✓ (Record-keeping – where failure is wilful) (1 year max) (HK 622 s 373(6))<br>✓ (Financial statements – where failure is wilful) (1 year max) (HK 622 s 379(5))<br>✓ (Directors' report – where failure is wilful) (6 months max) (HK 622 s 388(7))                                                                                                      | ✗                                                 | ✓ (Record-keeping) (2 years max) (UK CA s 387(3)) <sup>156</sup>                                                     | ✗                        |
| <b>Criminal fines</b>       | ✓ (344) the greater of AU\$1,485,000 or three times the benefit derived) (CA Sch 3, ss 1311B(1)(b), (4))<br>✓ (1308 and 1309) (\$198,000) (CA Sch 3, s 1311B) | ✓ (C\$5,000 max (~AU\$5,500)) (Can BCA ss 250(1)-(2); Can CC s 787)                                                                                                       | ✓ (Record-keeping – regardless of whether failure is wilful) (HK\$300,000 (~AU\$58,000) (HK 622 s 373(5)-(6))<br>✓ (Financial statements – regardless of whether failure is wilful) (HK\$300,000 (~AU\$58,000)) (HK 622 s 379(4)-(5))<br>✓ (Directors' report – regardless of whether failure is wilful) (HK\$150,000 (~AU\$29,000) (HK 622 s 388(6)-(7)) | ✓ (NZ\$50,000 max (~AU\$46,000)) (NZ CA s 374(3)) | ✓ (Record-keeping) (unlimited) (UK CA s 387(3))<br>✓ (Directors' report) (unlimited) (UK CA s 415(5)) <sup>157</sup> | ✗                        |
| <b>Civil penalty orders</b> | ✓ (see Directors' Duties CPOs)                                                                                                                                | ✗                                                                                                                                                                         | ✗                                                                                                                                                                                                                                                                                                                                                         | ✗                                                 | ✗                                                                                                                    | ✗                        |
| <b>Disqualification</b>     | ✓ (Court determined period) (CA s 206C)                                                                                                                       | ✗                                                                                                                                                                         | ✓ (15 years max) (HK 32 s 168E)                                                                                                                                                                                                                                                                                                                           | ✗                                                 | ✓ (15 years max) (UK CDDA s 2)                                                                                       | ✗                        |
| <b>Common law remedies</b>  | ✗                                                                                                                                                             | ✓ (any order Court deems fit) (Can BCA s 241)                                                                                                                             | ✗                                                                                                                                                                                                                                                                                                                                                         | ✗                                                 | ✗                                                                                                                    | ✗                        |

<sup>156</sup> The penalties included in respect of the United Kingdom here reflect the maximum penalties only. For completeness, note that the UK CA imposes penalties that distinguish between jurisdictions (ie, England and Wales, as opposed to Scotland and Northern Ireland) and seriousness of the offence.

<sup>157</sup> As above.

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 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) |
|-----------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| <b>Overall assessment</b>                                 |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                             |                                                                                                                                          |                                                                                                                                                                                                   |                                                                                                                                           |                          |
|                                                           | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Long imprisonment and high criminal fine.</li> <li>CPOs and potential disqualification.</li> </ul> | <b>Varies between provinces</b> <ul style="list-style-type: none"> <li>Some provinces have no restrictions.</li> <li>Others allow financial assistance, provided some forms are disclosed, the assistance occurs in the ordinary course of business or the assistance does not cause insolvency.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Shorter imprisonment and lower criminal fine.</li> <li>No CPOs.</li> </ul> | <b>Significantly less burdensome</b> <ul style="list-style-type: none"> <li>Different offence.</li> <li>No imprisonment and lower criminal fine.</li> <li>No CPOs or disqualification.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Higher criminal fine but shorter imprisonment.</li> <li>No CPOs.</li> </ul> | <b>No liability</b>      |
| <b>Modes of liability</b>                                 |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                             |                                                                                                                                          |                                                                                                                                                                                                   |                                                                                                                                           |                          |
| <b>Criminal—direct</b>                                    | ×                                                                                                                                                                | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ✓ <sup>158</sup> ( <a href="#">NZ CA</a> ss 76-78)                                                                                                                                                | ×                                                                                                                                         | ×                        |
| <b>Criminal—deemed</b>                                    | ×                                                                                                                                                                | ×                                                                                                                                                                                                                                                                                                           | ✓ ( <a href="#">HK 622</a> s 275)                                                                                                        | ×                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> s 680)                                                                                                          | ×                        |
| <b>Criminal—accessorial</b>                               | ✓ (imposed on natural persons generally) ( <a href="#">CA</a> ss 260A, 260D(3))                                                                                  | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |
| <b>Civil—direct</b>                                       | ×                                                                                                                                                                | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |
| <b>Civil—deemed</b>                                       | ×                                                                                                                                                                | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |
| <b>Civil—accessorial</b>                                  | ✓ (imposed on natural persons generally) ( <a href="#">CA</a> ss 260A, 260D(2))                                                                                  | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |
| <b>Defences / Exemptions</b>                              |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                             |                                                                                                                                          |                                                                                                                                                                                                   |                                                                                                                                           |                          |
| <b>No material prejudice to shareholders or creditors</b> | ✓ ( <a href="#">CA</a> s 260A(1)(a))                                                                                                                             | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ×                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 678(2), (4), 679(2), (4)) (framed as 'assistance given in good faith and in the interests of the company')   | ×                        |
| <b>Shareholder approval</b>                               | ✓ ( <a href="#">CA</a> s 260C)                                                                                                                                   | ×                                                                                                                                                                                                                                                                                                           | ✓ ( <a href="#">HK 622</a> s 284)                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |
| <b>Court approval</b>                                     | ×                                                                                                                                                                | ×                                                                                                                                                                                                                                                                                                           | ✓ ( <a href="#">HK 622</a> s 288)                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |
| <b>Special exemptions</b>                                 | ✓ ( <a href="#">CA</a> s 260D)                                                                                                                                   | ×                                                                                                                                                                                                                                                                                                           | ✓ ( <a href="#">HK 622</a> ss 277-282)                                                                                                   | ×                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 681, 682(2))                                                                                                 | ×                        |
| <b>Penalties</b>                                          |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                             |                                                                                                                                          |                                                                                                                                                                                                   |                                                                                                                                           |                          |
| <b>Imprisonment</b>                                       | ✓ (5 years max) ( <a href="#">CA</a> Sch 3)                                                                                                                      | ×                                                                                                                                                                                                                                                                                                           | ✓ (12 months max) ( <a href="#">HK 622</a> s 275)                                                                                        | ×                                                                                                                                                                                                 | ✓ (2 years max) ( <a href="#">UK CA</a> s 680(2))                                                                                         | ×                        |
| <b>Criminal fines</b>                                     | ✓ (AU\$660,000 max) ( <a href="#">CA</a> Sch 3)                                                                                                                  | ×                                                                                                                                                                                                                                                                                                           | ✓ (HK\$150,000 max (~AU\$29,000)) ( <a href="#">HK 622</a> s 275)                                                                        | ✓ (NZ\$5,000 max (~AU\$4,500)) ( <a href="#">NZ CA</a> s 373(1))                                                                                                                                  | ✓ (unlimited) ( <a href="#">UK CA</a> s 680(2))                                                                                           | ×                        |
| <b>Civil penalty orders</b>                               | ✓ (see Directors' Duties CPOs)                                                                                                                                   | ×                                                                                                                                                                                                                                                                                                           | ×                                                                                                                                        | ×                                                                                                                                                                                                 | ×                                                                                                                                         | ×                        |

<sup>158</sup> 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.

Criminal and Civil Frameworks for Imposing Liability on Directors

|                            | Australia                                                   | Canada | Hong Kong                                        | New Zealand | United Kingdom                                  | United States (Delaware) |
|----------------------------|-------------------------------------------------------------|--------|--------------------------------------------------|-------------|-------------------------------------------------|--------------------------|
| <i>Disqualification</i>    | ✓ (Court determined period)<br>( <a href="#">CA</a> s 206C) | ✗      | ✓ (15 years max) ( <a href="#">HK 32</a> s 168E) | ✗           | ✓ (15 years max) ( <a href="#">UK CDDA</a> s 2) | ✗                        |
| <i>Common law remedies</i> | ✗                                                           | ✗      | ✗                                                | ✗           | ✗                                               | ✗                        |

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 1.5 Restrictions on related-party transactions

|                                              | Australia                                                                                                                                                             | Canada                                                                                                                                                                                                            | Hong Kong                                                                                                                                                                   | New Zealand                                                                                                                                                                                                       | United Kingdom                                                                                                                                                              | United States (Delaware)                                                                                                                                                                                          |
|----------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                    |                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |
|                                              | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Criminal liability.</li> <li>High-water mark civil remedies, and potential disqualification.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No statutory restrictions.</li> <li>Securities regulators require certain disclosures; disclosure failures may result in regulatory action.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>No criminal liability.</li> <li>Less burdensome civil remedies, and no potential disqualification.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No statutory restrictions.</li> <li>Securities regulator requires certain disclosures; disclosure failures may result in regulatory action.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>No criminal liability.</li> <li>Less burdensome civil remedies, and no potential disqualification.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No statutory restrictions.</li> <li>Securities regulator requires certain disclosures; disclosure failures may result in regulatory action.</li> </ul> |
| <b>Modes of liability</b>                    |                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |
| <b>Criminal—direct</b>                       | ×                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Criminal—deemed</b>                       | ×                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Criminal—accessorial</b>                  | ✓ (requires dishonesty; imposed on natural persons generally) ( <a href="#">CA</a> s 209(3))                                                                          | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Civil—direct</b>                          | ×                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">HK 622</a> ss 513(2), (3))                                                                                                                                  | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 195, 213)                                                                                                                                      | ×                                                                                                                                                                                                                 |
| <b>Civil—deemed</b>                          | ×                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Civil—accessorial</b>                     | ✓ (imposed on natural persons generally) ( <a href="#">CA</a> s 209(2))                                                                                               |                                                                                                                                                                                                                   | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Defences / Exceptions</b>                 |                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |
| <b>Reasonable steps to secure compliance</b> | ×                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">HK 622</a> s 513(4)(b))                                                                                                                                     | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 195(6), 213(6))                                                                                                                                | ×                                                                                                                                                                                                                 |
| <b>No knowledge of contravention</b>         | ✓ (general principles)                                                                                                                                                | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">HK 622</a> s 513(4)(c))                                                                                                                                     | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 195(2), 213(2))                                                                                                                                | ×                                                                                                                                                                                                                 |
| <b>Shareholder approval</b>                  | ✓ ( <a href="#">CA</a> s 208(1))                                                                                                                                      | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">HK 622</a> s 514)                                                                                                                                           | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 190, 197)                                                                                                                                      | ×                                                                                                                                                                                                                 |
| <b>Special exceptions</b>                    | ✓ ( <a href="#">CA</a> ss 210-216)                                                                                                                                    | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">HK 622</a> ss 505-512)                                                                                                                                      | ×                                                                                                                                                                                                                 | ✓ ( <a href="#">UK CA</a> ss 192-194, 204-209)                                                                                                                              | ×                                                                                                                                                                                                                 |
| <b>Penalties</b>                             |                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |                                                                                                                                                                             |                                                                                                                                                                                                                   |
| <b>Imprisonment</b>                          | ✓ (5 years max) ( <a href="#">CA</a> Sch 3)                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Criminal fines</b>                        | ✓ (AU\$660,000 max) ( <a href="#">CA</a> Sch 3)                                                                                                                       | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Civil penalty orders</b>                  | ✓ (see Directors' Duties CPOs)                                                                                                                                        | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Disqualification</b>                      | ✓ (Court determined period) ( <a href="#">CA</a> s 206C)                                                                                                              | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                           | ×                                                                                                                                                                                                                 |
| <b>Common law and other remedies</b>         | ×                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ✓ (accounting for personal gain; indemnity for damage to company) ( <a href="#">HK 622</a> s 513(2))                                                                        | ×                                                                                                                                                                                                                 | ✓ (accounting for personal gain; indemnity for damage to company) ( <a href="#">UK CA</a> ss 195(3), 213(3))                                                                | ×                                                                                                                                                                                                                 |

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 1.6 Restrictions on insolvent trading

|                                                        | Australia                                                                                                                                                        | Canada                                                                                                                                                         | Hong Kong                                                                                                                                                           | New Zealand                                                                                                                           | United Kingdom                                                                                                                                 | United States (Delaware)                                                                                                                                                |
|--------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                              |                                                                                                                                                                  |                                                                                                                                                                |                                                                                                                                                                     |                                                                                                                                       |                                                                                                                                                |                                                                                                                                                                         |
|                                                        | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Long imprisonment and high criminal fine.</li> <li>CPOs and potential disqualification.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>No criminal liability.</li> <li>Different civil regime, requiring oppressive conduct.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Same imprisonment and higher criminal fine.</li> <li>No CPOs and shorter disqualification.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Same imprisonment and lower criminal fine.</li> <li>No CPOs.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>No criminal liability.</li> <li>No CPOs and shorter disqualification.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>Derivative claims for breaches of fiduciary duties; no general duty to prevent insolvent trading.</li> </ul> |
| <b>Modes of liability</b>                              |                                                                                                                                                                  |                                                                                                                                                                |                                                                                                                                                                     |                                                                                                                                       |                                                                                                                                                |                                                                                                                                                                         |
| <b>Criminal—direct</b>                                 | ✓ (requires dishonesty) (CA s 588G(3))                                                                                                                           | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✓ (requires fraud or dishonesty) (NZ CA s 380)                                                                                        | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Criminal—deemed</b>                                 | ✗                                                                                                                                                                | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Criminal—accessorial</b>                            | ✗                                                                                                                                                                | ✗                                                                                                                                                              | ✓ (requires fraud) (HK 32 s 275(3))                                                                                                                                 | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Civil—direct</b>                                    | ✓ (CA s 588G(2))                                                                                                                                                 | ✓ <sup>159</sup> (common law)                                                                                                                                  | ✗                                                                                                                                                                   | ✓ (NZ CA ss 135-136)                                                                                                                  | ✓ (UK IA ss 213-214)                                                                                                                           | ✗                                                                                                                                                                       |
| <b>Civil—deemed</b>                                    | ✗                                                                                                                                                                | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Civil—accessorial</b>                               | ✓ (CA s 1317E(4) (imposed on natural persons generally))                                                                                                         | ✗                                                                                                                                                              | ✓ (requires fraud) (HK 32 s 275(1))                                                                                                                                 | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Defences</b>                                        |                                                                                                                                                                  |                                                                                                                                                                |                                                                                                                                                                     |                                                                                                                                       |                                                                                                                                                |                                                                                                                                                                         |
| <b>Reasonable expectation that company was solvent</b> | ✓ (CA s 588H(2))                                                                                                                                                 | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Reasonable reliance on info regarding solvency</b>  | ✓ (CA s 588H(3))                                                                                                                                                 | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✓ (NZ CA s 138)                                                                                                                       | ✓ (common law)                                                                                                                                 | ✗                                                                                                                                                                       |
| <b>Reasonable steps to prevent debt</b>                | ✓ (CA s 588H(5))                                                                                                                                                 | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✓ (NZ CA s 376)                                                                                                                       | ✓ (UK IA s 214(3))                                                                                                                             | ✗                                                                                                                                                                       |
| <b>Better outcome safe harbour</b>                     | ✓ (CA s 588GA)                                                                                                                                                   | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Other</b>                                           | ✓ (coronavirus response) (CA s 588GAAA(1))<br>✓ (debt incurred during restructuring) (CA s 588GAAB(1))                                                           | ✓ Business judgement rule and reasonable care and due diligence                                                                                                | ✗                                                                                                                                                                   | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Penalties</b>                                       |                                                                                                                                                                  |                                                                                                                                                                |                                                                                                                                                                     |                                                                                                                                       |                                                                                                                                                |                                                                                                                                                                         |
| <b>Imprisonment</b>                                    | ✓ (5 years max) (CA Sch 3)                                                                                                                                       | ✗                                                                                                                                                              | ✓ (5 years max) (HK 32 Sch 12)                                                                                                                                      | ✓ (5 years max) (NZ CA s 373(4))                                                                                                      | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Criminal fines</b>                                  | ✓ (AU\$660,000 max) (CA Sch 3)                                                                                                                                   | ✗                                                                                                                                                              | ✓ (unlimited) (HK 32 Sch 12)                                                                                                                                        | ✓ (NZ\$200,000 (AU~\$182,000)) (NZ CA s 373(4))                                                                                       | ✗                                                                                                                                              | ✗                                                                                                                                                                       |
| <b>Civil penalty orders</b>                            | ✓ (Directors' Duties CPOs)                                                                                                                                       | ✗                                                                                                                                                              | ✗                                                                                                                                                                   | ✗                                                                                                                                     | ✗                                                                                                                                              | ✗                                                                                                                                                                       |

<sup>159</sup> 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).

Criminal and Civil Frameworks for Imposing Liability on Directors

|                                      | Australia                                                            | Canada                                                            | Hong Kong                                                        | New Zealand                                                      | United Kingdom                                                        | United States (Delaware) |
|--------------------------------------|----------------------------------------------------------------------|-------------------------------------------------------------------|------------------------------------------------------------------|------------------------------------------------------------------|-----------------------------------------------------------------------|--------------------------|
| <b>Disqualification</b>              | ✓ (Court determined period) ( <a href="#">CA</a> s 206C)             | ✗                                                                 | ✓ (15 years max) ( <a href="#">HK 32</a> s 168L)                 | ✓ (Court determined period) ( <a href="#">NZ CA</a> s 383)       | ✓ (15 years max) ( <a href="#">UK CDDA</a> s 2)                       | ✗                        |
| <b>Common law and other remedies</b> | ✓ (Court determined compensation) ( <a href="#">CA</a> ss 588J-588K) | ✓ (any order Court deems fit) ( <a href="#">Can BCA</a> s 241(3)) | ✓ (Court determined contribution) ( <a href="#">HK 32</a> s 275) | ✓ (Court determined contribution) ( <a href="#">NZ CA</a> s 301) | ✓ (Court determined contribution) ( <a href="#">UK IA</a> ss 213-214) | ✗                        |

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 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)                                                                                                                                                                               |
|-------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                             |                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                 |
|                                                       | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Broad liability regime for misleading or deceptive conduct.</li> <li>NB: similar prohibitions are also present in the Corporations Act and ASIC Act.</li> </ul> | <b>Comparably burdensome</b> <ul style="list-style-type: none"> <li>Broad liability regime for false or misleading statements and 'reviewable conduct'.</li> <li>Although the scope of the prohibitions are not as broad as Australia, severe penalties may result from contravention.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Robust liability regime, which expressly provides for director liability.</li> <li>The scope of the prohibitions are not as broad as Australia.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Similar prohibitions to Australia against misleading or deceptive conduct, or false or misleading representations.</li> <li>Penalties are generally lesser than Australia.</li> </ul> | <b>Comparably burdensome</b> <ul style="list-style-type: none"> <li>Similar prohibitions to that of Australia.</li> <li>Recent amendments allow for greater public enforcement by the Competition &amp; Markets Authority, including by way of monetary penalties and other orders.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Generally, State-based consumer regulation.</li> <li>Delaware has generally weak consumer law prohibitions compared with other States.</li> </ul> |
| <b>Modes of liability<sup>160</sup></b>               |                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                 |
| <b>Criminal—direct</b>                                | ✓ ( <a href="#">ACL</a> s 151 <sup>161</sup> )                                                                                                                                                                                | ✓ ( <a href="#">Can CA</a> s 52)                                                                                                                                                                                                                                                                  | ✓ ( <a href="#">HK 362</a> ss 6-9, 13E)                                                                                                                                                                                  | ✓ ( <a href="#">NZ FTA</a> s 40)                                                                                                                                                                                                                    | ✓ ( <a href="#">UK DMCCA</a> ss 225-227, 237)                                                                                                                                                                                                                                                  | ✗                                                                                                                                                                                                               |
| <b>Criminal—deemed</b>                                | ✗                                                                                                                                                                                                                             | ✓ ( <a href="#">Can CA</a> ss 52.1(8), 53(5)) (certain offences only) (imposed on officers and directors only)                                                                                                                                                                                    | ✗                                                                                                                                                                                                                        | ✗                                                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                                                                                                              | ✗                                                                                                                                                                                                               |
| <b>Criminal—accessorial</b>                           | ✗                                                                                                                                                                                                                             | ✓ ( <a href="#">Can CA</a> ss 52(1), (1.2))                                                                                                                                                                                                                                                       | ✓ ( <a href="#">HK 362</a> ss 6-9, 13E, 20) (imposed on officers and directors only)                                                                                                                                     | ✗                                                                                                                                                                                                                                                   | ✓ ( <a href="#">UK DMCCA</a> ss 225-227, 239) (imposed on officers and other persons whose conduct caused the offence)                                                                                                                                                                         | ✗                                                                                                                                                                                                               |
| <b>Civil—direct</b>                                   | ✓ ( <a href="#">ACL</a> ss 18, 29)                                                                                                                                                                                            | ✓ ( <a href="#">Can CA</a> s 74)                                                                                                                                                                                                                                                                  | ✗                                                                                                                                                                                                                        | ✓ ( <a href="#">NZ FTA</a> ss 9-12, 13)                                                                                                                                                                                                             | ✓ ( <a href="#">UK DMCCA</a> ss 225-227)                                                                                                                                                                                                                                                       | ✓ ( <a href="#">15 USC</a> § 45; <a href="#">6 Del C</a> §§ 2513(a), 2532))                                                                                                                                     |
| <b>Civil—deemed</b>                                   | ✗                                                                                                                                                                                                                             | ✗                                                                                                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                        | ✗                                                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                                                                                                              | ✗                                                                                                                                                                                                               |
| <b>Civil—accessorial</b>                              | ✓ ( <a href="#">ACL</a> ss 18, 29, 224, 236-237)                                                                                                                                                                              | ✓ ( <a href="#">Can CA</a> ss 52(1.2), 74; <a href="#">Can ASL</a> , s 52)                                                                                                                                                                                                                        | ✗                                                                                                                                                                                                                        | ✓ ( <a href="#">NZ FTA</a> ss 9-12, 13, 41, 43)                                                                                                                                                                                                     | ✓ ( <a href="#">UK DMCCA</a> ss 156, 225-227)                                                                                                                                                                                                                                                  | ✗                                                                                                                                                                                                               |
| <b>Key defences / exemptions</b>                      |                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                 |
| <b>Innocent publication</b>                           | ✓ ( <a href="#">ACL</a> ss 209, 251)                                                                                                                                                                                          | ✗                                                                                                                                                                                                                                                                                                 | ✓ ( <a href="#">HK 362</a> s 27)                                                                                                                                                                                         | ✗                                                                                                                                                                                                                                                   | ✓ ( <a href="#">UK DMCCA</a> s 238(3))                                                                                                                                                                                                                                                         | ✓ ( <a href="#">6 Del C</a> §§ 2513(b), 2534)                                                                                                                                                                   |
| <b>Fault-based defences (eg, knowledge, reliance)</b> | ✓ ( <a href="#">ACL</a> ss 207, 252)                                                                                                                                                                                          | ✓ ( <a href="#">Can CA</a> ss 52.1(8), 53(5); <a href="#">Can ASL</a> s 54) (certain offences only)                                                                                                                                                                                               | ✓ ( <a href="#">HK 362</a> ss 21, 26)                                                                                                                                                                                    | ✓ ( <a href="#">NZ FTA</a> ss 44)                                                                                                                                                                                                                   | ✓ ( <a href="#">UK DMCCA</a> s 238(1))                                                                                                                                                                                                                                                         | ✗                                                                                                                                                                                                               |
| <b>Penalties</b>                                      |                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                 |
| <b>Imprisonment</b>                                   | ✓ (3 years max (eg, <a href="#">NSW FTA</a> s 64 <sup>162</sup> ))                                                                                                                                                            | ✓ (14 years max) ( <a href="#">Can CA</a> s 52)                                                                                                                                                                                                                                                   | ✓ (5 years max: <a href="#">HK 362</a> s 18)                                                                                                                                                                             | ✗                                                                                                                                                                                                                                                   | ✓ (2 years max) ( <a href="#">UK DMCCA</a> s 240)                                                                                                                                                                                                                                              | ✗                                                                                                                                                                                                               |

<sup>160</sup> Imposed on all natural persons unless otherwise noted.

<sup>161</sup> Certain types of false or misleading representations may attract criminal liability.

<sup>162</sup> 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.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                | Australia                                          | Canada                                                                                                                         | Hong Kong                                                    | New Zealand                                                       | United Kingdom                                                    | United States (federal, Delaware)                                                                           |
|------------------------------------------------|----------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|-------------------------------------------------------------------|-------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------|
| <b>Criminal penalties</b>                      | ✓ (AU\$2,500,000 max) ( <a href="#">ACL</a> s 151) | ✓ (at court's discretion) ( <a href="#">Can CA</a> s 52)                                                                       | ✓ (HK\$500,000 (~AU\$99,300)) ( <a href="#">HK 362</a> s 18) | ✓ (NZ\$200,000 max (~AU\$184,700)) ( <a href="#">NZ FTA</a> s 40) | ✓ (unlimited fine) ( <a href="#">UK DMCCA</a> s 240)              | ✗                                                                                                           |
| <b>Damages / Compensation / redress orders</b> | ✓ ( <a href="#">ACL</a> ss 236-239)                | ✓ ( <a href="#">Can CA</a> s 74.1)                                                                                             | ✓ ( <a href="#">HK 362</a> s 18A)                            | ✓ ( <a href="#">NZ FTA</a> s 43)                                  | ✓ ( <a href="#">UK DMCCA</a> ss 157, 232 <sup>163</sup> )         | ✓ ( <a href="#">6 Del C</a> §§ 2525)                                                                        |
| <b>Civil penalty orders</b>                    | ✓ (AU\$2,500,000 max) ( <a href="#">ACL</a> s 224) | ✓ (CA\$750,000 max (~AU\$850,900) (or CA\$1m (~AU\$1,134,600) for subsequent contraventions)) ( <a href="#">Can CA</a> s 74.1) | ✗                                                            | ✗                                                                 | ✓ (£300,000 max (~AU\$626,500)) ( <a href="#">UK DMCCA</a> s 158) | ✓ (US\$10,000 (~AU\$15,400) per violation) ( <a href="#">15 USC</a> § 45(m); <a href="#">6 Del C</a> §2533) |
| <b>Disqualification</b>                        | ✓ ( <a href="#">ACL</a> s 248)                     | ✓ ( <a href="#">Can CA</a> s 34 <sup>164</sup> )                                                                               | ✗                                                            | ✓ ( <a href="#">NZ FTA</a> s 46C)                                 | ✓ ( <a href="#">UK CDA</a> s 2)                                   | ✗                                                                                                           |

<sup>163</sup> Section 232 – albeit not yet in force – will provide consumers with rights of redress where a trader engages in certain 'prohibited practices', including a contravention of s 225.

<sup>164</sup> We note that since our 2019 advice, some secondary commentators have concluded that the general power of the courts to issue prohibition orders pursuant to this section could be used to disqualify directors involved in contraventions.

## Criminal and Civil Frameworks for Imposing Liability on Directors

### 3 Competition law

#### 3.1 Cartel conduct

|                                                | Australia                                                                                                                                            | Canada                                                                                                                                                                                        | Hong Kong                                                                                                          | New Zealand                                                                                                                                                                                                | United Kingdom                                                                                                                                                                                          | United States (federal)                                                                                                                                                                                                                |
|------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                      |                                                                                                                                                      |                                                                                                                                                                                               |                                                                                                                    |                                                                                                                                                                                                            |                                                                                                                                                                                                         |                                                                                                                                                                                                                                        |
|                                                | <b>Burdensome</b> <ul style="list-style-type: none"> <li>Robust regime with potential for criminal and civil liability against directors.</li> </ul> | <b>More burdensome</b> <ul style="list-style-type: none"> <li>Robust regime with potential for criminal and civil liability against directors.</li> <li>Higher criminal penalties.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>No criminal liability for cartel conduct.</li> </ul> | <b>Similarly burdensome</b> <ul style="list-style-type: none"> <li>Robust regime with potential for criminal liability against directors.</li> <li>Penalties are generally less than Australia.</li> </ul> | <b>Slightly less burdensome</b> <ul style="list-style-type: none"> <li>Robust regime with potential for criminal liability against directors.</li> <li>No civil liability against directors.</li> </ul> | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Robust regime with potential for criminal and civil liability against directors.</li> <li>Strong criminal penalties and high enforcement against individuals.</li> </ul> |
| <b>Modes of liability<sup>165</sup></b>        |                                                                                                                                                      |                                                                                                                                                                                               |                                                                                                                    |                                                                                                                                                                                                            |                                                                                                                                                                                                         |                                                                                                                                                                                                                                        |
| <b>Criminal—direct</b>                         | ✗                                                                                                                                                    | ✓ ( <a href="#">Can CA</a> s 45)                                                                                                                                                              | ✗                                                                                                                  | ✓ ( <a href="#">NZ CoA</a> s 82B)                                                                                                                                                                          | ✓ ( <a href="#">UK EA</a> s 188)                                                                                                                                                                        | ✓ ( <a href="#">15 USC</a> § 1)                                                                                                                                                                                                        |
| <b>Criminal—deemed</b>                         | ✗                                                                                                                                                    | ✗                                                                                                                                                                                             | ✗                                                                                                                  | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                       | ✓ ( <a href="#">15 USC</a> § 24) (imposed on officers and directors only)                                                                                                                                                              |
| <b>Criminal—accessorial</b>                    | ✓ ( <a href="#">CCA</a> ss 45AF, 45AG, 79)                                                                                                           | ✗                                                                                                                                                                                             | ✗                                                                                                                  | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                       | ✓ ( <a href="#">15 USC</a> § 1)                                                                                                                                                                                                        |
| <b>Civil—direct</b>                            | ✗                                                                                                                                                    | ✓ ( <a href="#">Can CA</a> ss 36, 45)                                                                                                                                                         | ✓ (eg, <a href="#">HK 619</a> ss 6, 93)                                                                            | ✓ ( <a href="#">NZ CoA</a> ss 30, 80)                                                                                                                                                                      | ✗                                                                                                                                                                                                       | ✓ ( <a href="#">15 USC</a> §§ 1, 15)                                                                                                                                                                                                   |
| <b>Civil—deemed</b>                            | ✗                                                                                                                                                    | ✗                                                                                                                                                                                             | ✗                                                                                                                  | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                       | ✗                                                                                                                                                                                                                                      |
| <b>Civil—accessorial</b>                       | ✓ ( <a href="#">CCA</a> ss 45AJ, 45AK, 76)                                                                                                           | ✗                                                                                                                                                                                             | ✓ (eg, <a href="#">HK 619</a> ss 6, 93)                                                                            | ✓ ( <a href="#">NZ CoA</a> ss 30, 80)                                                                                                                                                                      | ✗                                                                                                                                                                                                       | ✗                                                                                                                                                                                                                                      |
| <b>Key defences / exemptions</b>               |                                                                                                                                                      |                                                                                                                                                                                               |                                                                                                                    |                                                                                                                                                                                                            |                                                                                                                                                                                                         |                                                                                                                                                                                                                                        |
| <b>Immunity/Leniency</b>                       | ✓                                                                                                                                                    | ✓                                                                                                                                                                                             | ✓ ( <a href="#">HK 619</a> s 80)                                                                                   | ✓                                                                                                                                                                                                          | ✓                                                                                                                                                                                                       | ✓                                                                                                                                                                                                                                      |
| <b>Court discretion to excuse conduct</b>      | ✓ ( <a href="#">CCA</a> s 85)                                                                                                                        | ✗                                                                                                                                                                                             | ✗                                                                                                                  | ✓ ( <a href="#">NZ CoA</a> s 80(2))                                                                                                                                                                        | ✗                                                                                                                                                                                                       | ✗                                                                                                                                                                                                                                      |
| <b>Penalties</b>                               |                                                                                                                                                      |                                                                                                                                                                                               |                                                                                                                    |                                                                                                                                                                                                            |                                                                                                                                                                                                         |                                                                                                                                                                                                                                        |
| <b>Imprisonment</b>                            | ✓ (10 years max) ( <a href="#">CCA</a> s 79)                                                                                                         | ✓ (14 years max) ( <a href="#">Can CA</a> s 45(2))                                                                                                                                            | ✗                                                                                                                  | ✓ (7 years max) ( <a href="#">NZ CoA</a> s 82B(2))                                                                                                                                                         | ✓ (5 years max) ( <a href="#">UK EA</a> s 190)                                                                                                                                                          | ✓ (10 years max) ( <a href="#">15 USC</a> § 1)                                                                                                                                                                                         |
| <b>Criminal penalties</b>                      | ✓ (AU\$660,000 max) ( <a href="#">CCA</a> s 79)                                                                                                      | ✓ (at court's discretion) ( <a href="#">Can CA</a> s 45)                                                                                                                                      | ✗                                                                                                                  | ✓ (NZ\$500,000 max (~AU\$463,100)) ( <a href="#">NZ CoA</a> s 82B(2))                                                                                                                                      | ✓ (unlimited fine) ( <a href="#">UK EA</a> s 190)                                                                                                                                                       | ✓ (US\$1 million max (~AU\$1,457,600)) ( <a href="#">15 USC</a> § 1)                                                                                                                                                                   |
| <b>Damages / Compensation / redress orders</b> | ✓ ( <a href="#">CCA</a> s 82)                                                                                                                        | ✓ ( <a href="#">Can CA</a> s 36)                                                                                                                                                              | ✓ ( <a href="#">HK 619</a> s 110)                                                                                  | ✓ ( <a href="#">NZ CoA</a> s 82)                                                                                                                                                                           | ✗                                                                                                                                                                                                       | ✓ ( <a href="#">15 USC</a> § 15)                                                                                                                                                                                                       |
| <b>Civil penalty orders</b>                    | ✓ (AU\$2,500,000 max) ( <a href="#">CCA</a> s 76)                                                                                                    | ✗                                                                                                                                                                                             | ✓ ( <a href="#">HK 619</a> ss 92-93)                                                                               | ✓ (up to NZ\$500,000 (~AU\$463,100)) ( <a href="#">NZ CoA</a> s 80)                                                                                                                                        | ✗                                                                                                                                                                                                       | ✗                                                                                                                                                                                                                                      |
| <b>Disqualification</b>                        | ✓ ( <a href="#">CCA</a> s 86E)                                                                                                                       | ✓ ( <a href="#">Can CA</a> s 34 <sup>166</sup> )                                                                                                                                              | ✓ ( <a href="#">HK 619</a> s 101)                                                                                  | ✓ ( <a href="#">NZ CoA</a> s 80C)                                                                                                                                                                          | ✓ ( <a href="#">UK CDA</a> s 9A)                                                                                                                                                                        | ✗                                                                                                                                                                                                                                      |

<sup>165</sup> Imposed on all natural persons unless otherwise noted.

<sup>166</sup> We note that since our 2019 advice, some secondary commentators have concluded that the general power of the courts to issue prohibition orders pursuant to this section could be used to disqualify directors involved in contraventions.

## Criminal and Civil Frameworks for Imposing Liability on Directors

#### 4 Cyber security

##### 4.1 General cyber and data security obligations

|                           | Australia                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Canada                                                                                                                                                                                                                                                                                                                                                                      | Hong Kong                                                                                                                                                                                                                                                        | New Zealand                                                                                                                                                                                                                                                                                                | United Kingdom                                                                                                                                                                                                                                                                                                                                                                                              | United States (Delaware / Federal)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|                           | <b>Burdensome<sup>167</sup></b> <ul style="list-style-type: none"> <li>Confirmation from various Australian regulators that directors' duties extend to cyber resilience, privacy and data management, and that regulators are seeking opportunities for enforcement action against directors.</li> <li>Directors are expressly required to make attestations under the <i>Security of Critical Infrastructure Act 2018</i> (Cth) in relation to the accuracy of their organisations annual report lodged with the Critical Infrastructure Security Centre.</li> <li>Direct criminal liability.</li> <li>Accessory civil liability.</li> <li>Primarily public enforcement; CPOs and potential disqualification.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Different duty regime with similar substance.</li> <li>No explicit commentary from regulators regarding application of regime to cyber security.</li> <li>No direct or accessory criminal liability.</li> <li>Private civil enforcement; unique civil penalty regime requiring oppressive conduct.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Similar duties.</li> <li>No explicit commentary from regulators regarding application of regime to cyber security.</li> <li>No direct criminal liability.</li> <li>Private enforcement.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Similar duties.</li> <li>No explicit commentary from regulators regarding application of regime to cyber security.</li> <li>Criminal liability with shorter imprisonment and lower fines.</li> <li>Primarily private enforcement.</li> </ul> | <b>Burdensome<sup>168</sup></b> <ul style="list-style-type: none"> <li>Broad duty to act in good faith.</li> <li>No explicit commentary from regulators regarding application to cyber security.</li> <li>Directors may also be liable for breaches of the <a href="#">Data Protection Act 2018 (UK)</a>.</li> <li>No criminal liability.</li> <li>Private enforcement; low level of litigation.</li> </ul> | <b>Burdensome<sup>169</sup></b> <ul style="list-style-type: none"> <li>Different duty regime with similar substance and business judgment rule as review standard.</li> <li>Other general common law fiduciary duties for directors - eg, the <i>Caremark</i> doctrine (a duty of oversight), under which directors must ensure information and reporting systems are in place and monitor those systems - <b>may</b> be relevant in a cyber and data security context although the doctrine has not been applied in this manner to date.<sup>170</sup></li> <li>Directors may be liable for misleading statements / omissions relating to cyber security.</li> <li>No criminal liability.</li> <li>Private enforcement; high level of litigation.</li> </ul> |
| <b>Modes of liability</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Criminal—direct</b>    | ✓ (reckless or dishonest violations of duty to act in good faith only) ( <a href="#">CA</a> s 184)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | ✗                                                                                                                                                                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                                                                | ✓ (dishonest violations of duty to act in good faith only) ( <a href="#">NZ CA</a> s 138A))                                                                                                                                                                                                                | ✗                                                                                                                                                                                                                                                                                                                                                                                                           | ✗ (however, there have been instances of executive-level employees being found liable for criminal offences related to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

<sup>167</sup> In Australia, there are criminal consequences associated with a breach of directors' duties. These duties extend to cybersecurity risks and management; however the duties themselves are broad and less prescriptive than other jurisdictions. While we are aware that ASIC is actively investigating cases of this nature, and has indicated that this is a clear enforcement priority, this has not yet been tested in Australian courts.

<sup>168</sup> In the UK, there are prescriptive requirements relating to cybersecurity for directors, however there is currently no associated criminal liability.

<sup>169</sup> In the US, there are prescriptive requirements relating to cybersecurity for directors, however there is currently no associated criminal liability. For completeness, individuals at the executive-level have been held criminally responsible in certain cases.

<sup>170</sup> We note that a *Caremark*-based claim is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win judgment': *Segway Inc. v. Cai*, C.A. No. 2022-1110-LWW, 2023 WL 8643017, at \*5 (Del. Ch. Dec. 14, 2023). See also fn 31 above.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                                                     | Australia                                                                                                                                                                                                                    | Canada                                                                                                                                                                                                                                                                                                                                                                                                             | Hong Kong                                                            | New Zealand                                                         | United Kingdom                                                                                                                                                   | United States (Delaware / Federal)                                                                                                                                                                                                                                                                                                                                     |
|-------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------|---------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                     |                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                      |                                                                     |                                                                                                                                                                  | cybersecurity in Federal Trade Commission proceedings <sup>171</sup> )                                                                                                                                                                                                                                                                                                 |
| <b>Civil—direct</b>                                                                 | ✓                                                                                                                                                                                                                            | ✓ (including under the duties regime and under provincial laws for directors who authorise collection of personal information without taking reasonable measures to ensure protection of the information or who obstruct a regulatory investigation into a breach, fail to report a mandatory reportable incident, or retaliate against employees who raise concerns about the protection of personal information) | ✓                                                                    | ✓                                                                   | ✓ (including under the duties regime and for recklessly disclosing personal data without the consent of the controller) ( <a href="#">UK DPA</a> Article 170(a)) | ✓ <sup>172</sup> (including under the duties regime; for knowingly or utterly breaching duties under <i>Caremark</i> doctrine where the breach poses a 'potential mission critical legal risk' for the company; and for material misstatements and omissions in securities exchange documents with particular cyber security-related disclosure items <sup>173</sup> ) |
| <b>Criminal – accessorial</b>                                                       | ✗                                                                                                                                                                                                                            | ✗                                                                                                                                                                                                                                                                                                                                                                                                                  | ✗                                                                    | ✗                                                                   | ✗                                                                                                                                                                | ✗                                                                                                                                                                                                                                                                                                                                                                      |
| <b>Civil—accessorial</b>                                                            | ✓ (civil penalty provisions eg, being knowingly concerned in serious or repeated interferences with privacy under Privacy Act) ( <a href="#">Regulatory Powers (Standard Provisions) Act 2014 (Cth)</a> ss 92(1)(b) and (d)) | ✗                                                                                                                                                                                                                                                                                                                                                                                                                  | ✗                                                                    | ✗                                                                   | ✗                                                                                                                                                                | ✗                                                                                                                                                                                                                                                                                                                                                                      |
| <b>Duties</b>                                                                       |                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                      |                                                                     |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Duty to act with care and diligence or similar</b>                               | ✓ ( <a href="#">CA</a> s 180(1)) (General duty, not cyber specific. Regulators have expressly stated can apply to cyber risks)                                                                                               | ✓ ( <a href="#">Can BCA</a> s 122(1)(b)) (General duty, not cyber specific)                                                                                                                                                                                                                                                                                                                                        | ✓ ( <a href="#">HK 622</a> s 465) (General duty, not cyber specific) | ✓ ( <a href="#">NZ CA</a> s 137) (General duty, not cyber specific) | ✓ ( <a href="#">UK CA</a> s 174) (General duty, not cyber specific)                                                                                              | ✓ (common law) (General duty, not cyber specific)                                                                                                                                                                                                                                                                                                                      |
| <b>Duty to act in good faith in the best interests of the company or similar</b>    | ✓ ( <a href="#">CA</a> s 181(1)(a)) (General duty, not cyber specific. Regulators have expressly stated can apply to cyber risks)                                                                                            | ✓ ( <a href="#">Can BCA</a> s 122(1)(a)) (General duty, not cyber specific)                                                                                                                                                                                                                                                                                                                                        | ✓ (common law) (General duty, not cyber specific)                    | ✓ ( <a href="#">NZ CA</a> s 131) (General duty, not cyber specific) | ✓ <sup>174</sup> ( <a href="#">UK CA</a> s 172) (General duty, not cyber specific)                                                                               | ✓ (subsumed under the common law duty of loyalty) (General duty, not cyber specific)                                                                                                                                                                                                                                                                                   |
| <b>Defences / Exemptions</b>                                                        |                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                      |                                                                     |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Business judgment rule (applies to duty to act with care and diligence only)</b> | ✓ ( <a href="#">CA</a> s 180(2))                                                                                                                                                                                             | ✓ (common law <sup>175</sup> )                                                                                                                                                                                                                                                                                                                                                                                     | ✗                                                                    | ✗                                                                   | ✗                                                                                                                                                                | ✓ (Business judgment rule as standard of review <sup>176</sup> ) (general law)                                                                                                                                                                                                                                                                                         |

<sup>171</sup> Executives have been held criminally responsible for covering up or concealing cybersecurity breaches. See, eg, *USA v Sullivan*, No. 23-927 (9<sup>th</sup> Cir. 2025) where Uber's Chief Security Officer was sentenced to probation and a fine for obstruction of justice and misprision / concealment of a felony. Note, these proceedings were brought against Sullivan in his capacity as an executive of the company (responsible for security).

<sup>172</sup> See, *FTC v Drizly LLC and James Cory Rellas*, No. C-4780, in which the CEO was found to be responsible for failures of the company to address cybersecurity issues after being made aware of defects. Note, these proceedings were brought against the CEO in their capacity as an executive of the company.

<sup>173</sup> See SEC Form 8-K and Form 10-K.

<sup>174</sup> 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.

<sup>175</sup> See, eg, *BCE Inc v 1976 Debenture holders* (2008) 3 SCR 560.

<sup>176</sup> 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).

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                                       | Australia                                                                                                                                                                                                                                                                                                                        | Canada                                | Hong Kong                              | New Zealand                                                                                                                                                           | United Kingdom                                  | United States (Delaware / Federal)    |
|-----------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|----------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|---------------------------------------|
| <b>Reasonable reliance on information or advice</b>                   | ✓ ( <a href="#">CA</a> s 189) (Australian regulators have commented that cybersecurity is a board-level risk and lack of cybersecurity expertise does not absolve directors from proactively managing cybersecurity risks and making appropriate inquiries; it may be insufficient to rely on the judgement of management alone) | ✓ ( <a href="#">Can BCA</a> s 123(5)) | ✓ (common law)                         | ✓ ( <a href="#">NZ CA</a> s 138)                                                                                                                                      | ✓ (common law <sup>177</sup> )                  | ✓ ( <a href="#">8 Del C</a> § 141(e)) |
| <b>Reasonable reliance on delegate</b>                                | ✓ ( <a href="#">CA</a> s 190(2))                                                                                                                                                                                                                                                                                                 | ✗                                     | ✗                                      | ✓ ( <a href="#">NZ CA</a> s 130)                                                                                                                                      | ✓ (common law <sup>178</sup> )                  | ✗                                     |
| <b>Court power to grant relief</b>                                    | ✓ ( <a href="#">CA</a> s 1317S(2))                                                                                                                                                                                                                                                                                               | ✗                                     | ✓ ( <a href="#">HK 622</a> ss 903-904) | ✗                                                                                                                                                                     | ✓ (UK CA s 1157)                                | ✗                                     |
| <b>Penalties</b>                                                      |                                                                                                                                                                                                                                                                                                                                  |                                       |                                        |                                                                                                                                                                       |                                                 |                                       |
| <b>Imprisonment</b>                                                   | ✓ (up to 15 years – re duty of good faith breach per s 184) ( <a href="#">CA</a> Sch 3)                                                                                                                                                                                                                                          | ✗                                     | ✗                                      | ✓ (5 years max ( <a href="#">NZ CA</a> s 373(4) – re a serious breach of director's duty to act in good faith and in the company's best interests)                    | ✗                                               | ✗                                     |
| <b>Criminal fines</b>                                                 | ✓ (the greater of AU\$1,485,000 or three times the benefit derived) ( <a href="#">CA</a> s 1311B(4))                                                                                                                                                                                                                             | ✗                                     | ✗                                      | ✓ (NZ\$200,000 max (~AU\$182,000) ( <a href="#">NZ CA</a> s 373(4) – re a serious breach of director's duty to act in good faith and in the company's best interests) | ✗                                               | ✗                                     |
| <b>Civil penalty orders (CPOs) (applies to statutory duties only)</b> | ✓ (PPO for the greater of AU\$1.650,000 or three times the benefit derived ( <a href="#">CA</a> s 1317G))<br>(DO equal to the benefit derived or detriment avoided ( <a href="#">CA</a> s 1317GAB))<br>(CO equal to the amount of damage the company suffered ( <a href="#">CA</a> s 1317H))                                     | ✗                                     | ✗                                      | ✗                                                                                                                                                                     | ✗                                               | ✗                                     |
| <b>Disqualification</b>                                               | ✓ (Court-determined period) ( <a href="#">CA</a> s 206C)                                                                                                                                                                                                                                                                         | ✗                                     | ✗                                      | ✓ (criminal violation only; Court-determined period) ( <a href="#">NZ CA</a> s 383 )                                                                                  | ✓ (max 15 years) ( <a href="#">UK CDDA</a> s 2) | ✗                                     |

<sup>177</sup> See, eg, *Green v Walkling* [2007] EWHC 3251 (Ch).

<sup>178</sup> See, eg, *Dovey v Cory* [1901] AC 477.

Criminal and Civil Frameworks for Imposing Liability on Directors

|                                      | Australia                                                        | Canada                                                                                                         | Hong Kong                | New Zealand              | United Kingdom           | United States (Delaware / Federal) |
|--------------------------------------|------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|--------------------------|--------------------------|--------------------------|------------------------------------|
| <b>Common law and other remedies</b> | ✓ (general law remedies for breaches of general law duties only) | ✓ (oppression remedy (i.e., any order Court deems fit)) ( <a href="#">Can BCA</a> s 241(3); compliance orders) | ✓ (general law remedies) | ✓ (general law remedies) | ✓ (general law remedies) | ✓ (general law remedies)           |

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 5 Superannuation law

### 5.1 Liability for unpaid superannuation contributions

|                                                             | Australia                                                                                                                            | Canada                                                                                                                                                 | Hong Kong                                                                                                             | New Zealand                                                                                                                    | United Kingdom                                                                                                                    | United States (federal)                                                                                                                          |
|-------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                                   |                                                                                                                                      |                                                                                                                                                        |                                                                                                                       |                                                                                                                                |                                                                                                                                   |                                                                                                                                                  |
|                                                             | <b>Burdensome</b> <ul style="list-style-type: none"> <li>Personal civil liability for unpaid contributions and penalties.</li> </ul> | <b>More burdensome</b> <ul style="list-style-type: none"> <li>Personal criminal and civil liability for unpaid contributions and penalties.</li> </ul> | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Criminal liability for unpaid contributions.</li> </ul> | <b>No specific liability</b> <ul style="list-style-type: none"> <li>No director liability for unpaid contributions.</li> </ul> | <b>Comparably burdensome</b> <ul style="list-style-type: none"> <li>Personal civil liability for unpaid contributions.</li> </ul> | <b>No specific liability</b> <ul style="list-style-type: none"> <li>No express statutory director liability for unpaid contributions.</li> </ul> |
| <b>Modes of liability<sup>179</sup></b>                     |                                                                                                                                      |                                                                                                                                                        |                                                                                                                       |                                                                                                                                |                                                                                                                                   |                                                                                                                                                  |
| <b>Criminal—direct</b>                                      | ×                                                                                                                                    | ×                                                                                                                                                      | ×                                                                                                                     | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Criminal—deemed</b>                                      | ×                                                                                                                                    | ×                                                                                                                                                      | ✓ (HK 485 s 44(3)) (imposed on officers and directors only)                                                           | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Criminal—accessorial</b>                                 | ×                                                                                                                                    | ✓ (Can PP ss 41, 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)                 | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Civil—direct</b>                                         | ×                                                                                                                                    | ×                                                                                                                                                      | ×                                                                                                                     | ×                                                                                                                              | ×                                                                                                                                 | ✓ (29 USC § 1109 <sup>180</sup> )                                                                                                                |
| <b>Civil—deemed</b>                                         | ✓ (TAA Sch 1, Div 269) (imposed on directors)                                                                                        | ✓ (Can PP s 21.1(1)) (imposed on directors)                                                                                                            | ×                                                                                                                     | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Civil—accessorial</b>                                    | ×                                                                                                                                    | ×                                                                                                                                                      | ×                                                                                                                     | ×                                                                                                                              | ✓ (UK PA s 38)                                                                                                                    | ×                                                                                                                                                |
| <b>Key defences / exemptions</b>                            |                                                                                                                                      |                                                                                                                                                        |                                                                                                                       |                                                                                                                                |                                                                                                                                   |                                                                                                                                                  |
| <b>Illness</b>                                              | ✓ (TAA Sch 1, s 269-35(1))                                                                                                           | ×                                                                                                                                                      | ×                                                                                                                     | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Reasonable steps / Due diligence / Reasonable excuse</b> | ✓ (TAA Sch 1, ss 269-35(2)-(3))                                                                                                      | ✓ (Can PP s 21.1(2))                                                                                                                                   | ✓ (HK 485 s 43B)                                                                                                      | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Penalties</b>                                            |                                                                                                                                      |                                                                                                                                                        |                                                                                                                       |                                                                                                                                |                                                                                                                                   |                                                                                                                                                  |
| <b>Imprisonment</b>                                         | ×                                                                                                                                    | ✓ (6 months max) (Can PP s 41)                                                                                                                         | ✓ (4 years max) (HK 485 s 43B(1C))                                                                                    | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Criminal penalties</b>                                   | ×                                                                                                                                    | ✓ (CA\$5,000 max (~AU\$5,500)) (Can PP s 41)                                                                                                           | ✓ (HK\$450,000 max (~AU\$83,650) plus HK\$700 (~AU\$130) per day for continuing offence) (HK 485 s 43B(1C))           | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |
| <b>Damages / Compensation / redress orders</b>              | ×                                                                                                                                    | ✓ (Can PP s 21.1(1))                                                                                                                                   | ×                                                                                                                     | ×                                                                                                                              | ✓ (UK PA s 38)                                                                                                                    | ✓ (29 USC § 1109)                                                                                                                                |
| <b>Civil penalty orders</b>                                 | ✓ (equal to company's outstanding liability and related                                                                              | ×                                                                                                                                                      | ×                                                                                                                     | ×                                                                                                                              | ×                                                                                                                                 | ×                                                                                                                                                |

<sup>179</sup> Imposed on all natural persons unless otherwise noted.

<sup>180</sup> 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)).

Criminal and Civil Frameworks for Imposing Liability on Directors

|                         | Australia                                              | Canada | Hong Kong | New Zealand | United Kingdom                  | United States (federal) |
|-------------------------|--------------------------------------------------------|--------|-----------|-------------|---------------------------------|-------------------------|
|                         | penalties) ( <a href="#">TAA</a> Sch 1, Div 269-20(5)) |        |           |             |                                 |                         |
| <i>Disqualification</i> | ×                                                      | ×      | ×         | ×           | ✓ ( <a href="#">UK CDA</a> s 8) | ×                       |

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 6 Employment law

### 6.1 Duty to ensure health and safety of workers and other persons

|                                      | Australia (NSW <sup>181</sup> )                                                                                                                             | Canada (Ontario)                                                                                                                                                                                           | Hong Kong                                                                                                                                                                                                           | New Zealand                                                                                                                                                                                        | United Kingdom                                                                                                                                                                                                      | United States (federal)                                                                                                                                                                                       |
|--------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>            |                                                                                                                                                             |                                                                                                                                                                                                            |                                                                                                                                                                                                                     |                                                                                                                                                                                                    |                                                                                                                                                                                                                     |                                                                                                                                                                                                               |
|                                      | <b>Relatively burdensome</b> <ul style="list-style-type: none"> <li>Direct liability.</li> <li>Relatively broad duty.</li> <li>Strong penalties.</li> </ul> | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Direct liability.</li> <li>Broader duty (to take reasonable steps to ensure compliance with the Act).</li> <li>Lighter penalties.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Accessorial liability, requiring corporate offence and director consent, connivance or negligent contribution.</li> <li>Lighter penalties.</li> </ul> | <b>Comparably burdensome</b> <ul style="list-style-type: none"> <li>Based on Australia's Model WHS Law.</li> <li>Direct liability.</li> <li>Similar duty.</li> <li>Identical penalties.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Accessorial liability, requiring corporate offence and director consent, connivance or negligent contribution.</li> <li>Lighter penalties.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>Liability imposed on 'employers', rather than directors or officers.</li> <li>Regulators occasionally try to pierce the corporate veil.</li> </ul> |
| <b>Modes of liability</b>            |                                                                                                                                                             |                                                                                                                                                                                                            |                                                                                                                                                                                                                     |                                                                                                                                                                                                    |                                                                                                                                                                                                                     |                                                                                                                                                                                                               |
| <b>Criminal—direct</b>               | ✓ (imposed on officers <sup>182</sup> ) ( <a href="#">NSW WHS</a> ss 19, 27 <sup>183</sup> )                                                                | ✓ (imposed on directors and officers <sup>184</sup> ) ( <a href="#">ON OHS</a> s 32)                                                                                                                       | ✗                                                                                                                                                                                                                   | ✓ (imposed on persons conducting business) <a href="#">NZ HSA</a> ss 36(1) and 44(1)                                                                                                               | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                             |
| <b>Criminal—deemed</b>               | ✗                                                                                                                                                           | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                  | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                             |
| <b>Criminal—accessorial</b>          | ✗                                                                                                                                                           | ✗                                                                                                                                                                                                          | ✓ (imposed on directors and officers) <sup>185</sup> <a href="#">HK 509</a> s 33(1)                                                                                                                                 | ✗                                                                                                                                                                                                  | ✓ (imposed on directors and officers <sup>186</sup> ) ( <a href="#">UK HSW</a> ss 2, 33, 37(1))                                                                                                                     | ✗                                                                                                                                                                                                             |
| <b>Civil—direct</b>                  | ✗                                                                                                                                                           | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                  | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                             |
| <b>Civil—deemed</b>                  | ✗                                                                                                                                                           | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                  | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                             |
| <b>Civil—accessorial</b>             | ✗                                                                                                                                                           | ✗                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                  | ✗                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                             |
| <b>Defences</b>                      |                                                                                                                                                             |                                                                                                                                                                                                            |                                                                                                                                                                                                                     |                                                                                                                                                                                                    |                                                                                                                                                                                                                     |                                                                                                                                                                                                               |
| <b>Due diligence/reasonable care</b> | ✓ ( <a href="#">NSW WHS</a> s 27(5))                                                                                                                        | ✓ ( <a href="#">ON OHS</a> s 32)                                                                                                                                                                           | ✓ ( <a href="#">HK 509</a> s 6(2))                                                                                                                                                                                  | ✓ ( <a href="#">NZ HSA</a> ss 36(3), 44(3), 47(1)(1))                                                                                                                                              | ✓ ( <a href="#">UK HSW</a> s 2(2))                                                                                                                                                                                  | ✗                                                                                                                                                                                                             |
| <b>Penalties</b>                     |                                                                                                                                                             |                                                                                                                                                                                                            |                                                                                                                                                                                                                     |                                                                                                                                                                                                    |                                                                                                                                                                                                                     |                                                                                                                                                                                                               |
| <b>Imprisonment</b>                  | ✓ (10 years max) ( <a href="#">NSW WHS</a> ss 27(2), 31)                                                                                                    | ✓ (1 year max) <a href="#">ON OHS</a> s 66(2.1)                                                                                                                                                            | ✓ (2 years max) ( <a href="#">HK 509</a> s 6(4)(a))                                                                                                                                                                 | ✓ (5 years max) ( <a href="#">NZ HSA</a> s 47(3))                                                                                                                                                  | ✓ (2 years max) ( <a href="#">UK HSW</a> s 33, Sch 3A)                                                                                                                                                              | ✗                                                                                                                                                                                                             |
| <b>Criminal fines</b>                | ✓ (AU\$2,168,000 max) ( <a href="#">NSW WHS</a> ss 27(1), 31)                                                                                               | ✓ (CA\$1,500,000 max (~AU\$1,680,585)) ( <a href="#">ON OHS</a> s 66(2.1))                                                                                                                                 | ✓ (HK\$10 million max (~AU\$1,960,760)) ( <a href="#">HK 509</a> s 6(4)(b))                                                                                                                                         | ✓ (NZ\$600,000 max (~AU\$556,899)) ( <a href="#">NZ HSA</a> s 47(3))                                                                                                                               | ✓ (unlimited) ( <a href="#">UK HSW</a> s 33, Sch 3A)                                                                                                                                                                | ✗                                                                                                                                                                                                             |

<sup>181</sup> [NSW WHS](#) is representative of the Commonwealth Model Workplace Health and Safety Act.

<sup>182</sup> 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.

<sup>183</sup> Nature, content, and extent of officer's duty clarified in *SafeWork NSW v Miller Logistics Pty Ltd* [2024] NSWDC 58.

<sup>184</sup> Requirement to take reasonable care to ensure the corporation complies with the act.

<sup>185</sup> The director will be liable for the company's offence if they consented, connived or negligently contributed to the company committing the offence.

<sup>186</sup> The director will be liable for the company's offence if they consented, connived or negligently contributed to the company committing the offence.

## Criminal and Civil Frameworks for Imposing Liability on Directors

### 6.2 Offence of industrial manslaughter

|                             | Australia (NSW <sup>187</sup> )                                                                                                                                                                                 | Canada                                                                                                                                                                                            | Hong Kong                                                                                                                                     | New Zealand                                                                                                                                                                                                                 | United Kingdom                                                                                                                                                                                                        | United States (federal)                                                                                                                                                                                               |
|-----------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>   |                                                                                                                                                                                                                 |                                                                                                                                                                                                   |                                                                                                                                               |                                                                                                                                                                                                                             |                                                                                                                                                                                                                       |                                                                                                                                                                                                                       |
|                             | <b>Relatively burdensome</b> <ul style="list-style-type: none"> <li>Industrial manslaughter provisions apply nationwide. The maximum penalty and fault elements differs in each State and Territory.</li> </ul> | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Industrial manslaughter provisions apply nationwide</li> <li>Heavier maximum criminal sentence and no provision for fine</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No personal industrial manslaughter offence for directors<sup>188</sup></li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No personal industrial manslaughter offence for directors</li> <li>There have been calls to introduce a corporate manslaughter offence.<sup>189</sup></li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No personal industrial manslaughter offence for directors</li> <li>Common law manslaughter can still be pursued against directors<sup>190</sup></li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No personal industrial manslaughter offence for directors</li> <li>Common law manslaughter can still be pursued against directors<sup>191</sup></li> </ul> |
| <b>Modes of liability</b>   |                                                                                                                                                                                                                 |                                                                                                                                                                                                   |                                                                                                                                               |                                                                                                                                                                                                                             |                                                                                                                                                                                                                       |                                                                                                                                                                                                                       |
| <b>Criminal—direct</b>      | ✓ (imposed on persons who have a health and safety duty) ( <a href="#">NSW WHS s 34C</a> )                                                                                                                      | ✓ (imposed on persons who have authority to direct how another performs work) ( <a href="#">Can CC ss 217.1, 219<sup>192</sup></a> )                                                              | ✗                                                                                                                                             | ✗                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                     | ✗                                                                                                                                                                                                                     |
| <b>Criminal—deemed</b>      | ✗                                                                                                                                                                                                               | ✗                                                                                                                                                                                                 | ✗                                                                                                                                             | ✗                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                     | ✗                                                                                                                                                                                                                     |
| <b>Criminal—accessorial</b> | ✗                                                                                                                                                                                                               | ✗                                                                                                                                                                                                 | ✗                                                                                                                                             | ✗                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                     | ✗                                                                                                                                                                                                                     |
| <b>Civil—direct</b>         | N/A                                                                                                                                                                                                             | N/A                                                                                                                                                                                               | N/A                                                                                                                                           | N/A                                                                                                                                                                                                                         | N/A                                                                                                                                                                                                                   | N/A                                                                                                                                                                                                                   |
| <b>Civil—deemed</b>         | N/A                                                                                                                                                                                                             | N/A                                                                                                                                                                                               | N/A                                                                                                                                           | N/A                                                                                                                                                                                                                         | N/A                                                                                                                                                                                                                   | N/A                                                                                                                                                                                                                   |
| <b>Civil—accessorial</b>    | N/A                                                                                                                                                                                                             | N/A                                                                                                                                                                                               | N/A                                                                                                                                           | N/A                                                                                                                                                                                                                         | N/A                                                                                                                                                                                                                   | N/A                                                                                                                                                                                                                   |
| <b>Defences</b>             |                                                                                                                                                                                                                 |                                                                                                                                                                                                   |                                                                                                                                               |                                                                                                                                                                                                                             |                                                                                                                                                                                                                       |                                                                                                                                                                                                                       |
| <b>Volunteer director</b>   | ✓ ( <a href="#">NSW WHS s 34D<sup>193</sup></a> )                                                                                                                                                               | ✗                                                                                                                                                                                                 | ✗                                                                                                                                             | ✗                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                     | ✗                                                                                                                                                                                                                     |
| <b>Penalties</b>            |                                                                                                                                                                                                                 |                                                                                                                                                                                                   |                                                                                                                                               |                                                                                                                                                                                                                             |                                                                                                                                                                                                                       |                                                                                                                                                                                                                       |
| <b>Imprisonment</b>         | ✓ (20 years max) ( <a href="#">NSW WHS s 34C</a> )                                                                                                                                                              | ✓ (life max) ( <a href="#">Can CC s 220<sup>194</sup></a> )                                                                                                                                       | ✗                                                                                                                                             | ✗                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                     | ✗                                                                                                                                                                                                                     |
| <b>Criminal fines</b>       | ✗                                                                                                                                                                                                               | ✗                                                                                                                                                                                                 | ✗                                                                                                                                             | ✗                                                                                                                                                                                                                           | ✗                                                                                                                                                                                                                     | ✗                                                                                                                                                                                                                     |

<sup>187</sup> The New South Wales offence is analysed by way of example.

<sup>188</sup> Lower level managers were charged with manslaughter in *R v Ajax Engineering Services* but higher level managers were not. See 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* 87-8.

<sup>189</sup> 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](https://www.victoria.ac.nz/_data/assets/pdf_file/0007/1586482/CLEWd-In-June2018-Corporate-Manslaughter-article-FINAL.pdf)>.

<sup>190</sup> 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* 87-8.

<sup>191</sup> Kathleen Brickley, 'Death in the Workplace: Corporate Liability for Criminal Homicide' (2012) (4) *Journal of Law, Ethics and Public Policy* 752-90.

<sup>192</sup> 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.

<sup>193</sup> A volunteer may still be liable for an offence of manslaughter under s 18(1)(b) Crimes Act 1900 if their actions are unlawful/dangerous or negligently breach a duty of care and cause the death of the deceased. For a discussion of s 18(1)(b) see the [NSW Criminal Trial Courts Bench Book](#).

<sup>194</sup> [Can CC s 220\(a\)](#): 'where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years.'

## Criminal and Civil Frameworks for Imposing Liability on Directors

### 6.3 Personal liability for company contravention of employment law

|                             | Australia                                                                                                                                                                                             | Canada                                                                                                | Hong Kong                                                                                             | New Zealand                                                                                                                                                                                           | United Kingdom                                                                                                                                                                                                                                  | United States (federal)                                                                               |
|-----------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>   |                                                                                                                                                                                                       |                                                                                                       |                                                                                                       |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                 |                                                                                                       |
|                             | <b>Relatively burdensome</b> <ul style="list-style-type: none"> <li>Catch-all provision.</li> <li>Accessorial civil liability, requiring corporate contravention and personal involvement.</li> </ul> | <b>No general liability</b> <ul style="list-style-type: none"> <li>No catch-all provision.</li> </ul> | <b>No general liability</b> <ul style="list-style-type: none"> <li>No catch-all provision.</li> </ul> | <b>Comparably burdensome</b> <ul style="list-style-type: none"> <li>Catch-all provision.</li> <li>Accessorial civil liability, requiring corporate contravention and personal involvement.</li> </ul> | <b>No general liability</b> <ul style="list-style-type: none"> <li>No general catch-all provision equivalent .</li> <li>Officers can be held responsible for accessorial criminal liability for some company offences.<sup>195</sup></li> </ul> | <b>No general liability</b> <ul style="list-style-type: none"> <li>No catch-all provision.</li> </ul> |
| <b>Modes of liability</b>   |                                                                                                                                                                                                       |                                                                                                       |                                                                                                       |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                 |                                                                                                       |
| <b>Criminal—direct</b>      | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Criminal—deemed</b>      | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Criminal—accessorial</b> | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Civil—direct</b>         | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Civil—deemed</b>         | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Civil—accessorial</b>    | ✓ (imposed on all persons) ( <a href="#">FWA</a> s 550 <sup>196</sup> )                                                                                                                               | ×                                                                                                     | ×                                                                                                     | ✓ (imposed on officers) ( <a href="#">NZ ERA</a> ss 5, 142W, 142X <sup>197</sup> )                                                                                                                    | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Defences</b>             |                                                                                                                                                                                                       |                                                                                                       |                                                                                                       |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                 |                                                                                                       |
| <b>Other</b>                | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ✓ ( <a href="#">NZ ERA</a> ss 142ZD(2)(a), (3), <sup>198</sup> 142ZD(2)(b) <sup>199</sup> )                                                                                                           | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Penalties</b>            |                                                                                                                                                                                                       |                                                                                                       |                                                                                                       |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                 |                                                                                                       |
| <b>Imprisonment</b>         | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Criminal fines</b>       | ×                                                                                                                                                                                                     | ×                                                                                                     | ×                                                                                                     | ×                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |
| <b>Civil penalties</b>      | ✓ (AU\$198,000 max) ( <a href="#">FWA</a> s 539(2))                                                                                                                                                   | ×                                                                                                     | ×                                                                                                     | ✓ (NZ\$50,000 max (~AU\$46,200)) ( <a href="#">NZ ERA</a> s 142G)                                                                                                                                     | ×                                                                                                                                                                                                                                               | ×                                                                                                     |

<sup>195</sup> [UK EPA](#) s 180(1).

<sup>196</sup> For example, for contravention of [FWA](#) ss 44, 340, 535.

<sup>197</sup> Liability for being involved in a breach of minimum employment standards.

<sup>198</sup> Officers can avoid liability if they reasonably relied on information from another person (not an agent).

<sup>199</sup> Officers can avoid liability if they took all reasonable and proper steps to avoid the contravention.

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 6.4 Personal liability for failure to provide minimum wages or conditions

|                                  | Australia                                                                                                                                                                         | Canada                                                                                                                                                                                                                                | Hong Kong                                                                                                                                                                                                                                                                                                                | New Zealand                                                                                                                                                                                                                                                                 | United Kingdom                                                                                                                                                                                                                                                                             | United States (federal)                                                                                                                                                                                              |
|----------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>        |                                                                                                                                                                                   |                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                      |
|                                  | <b>High-water mark</b> <ul style="list-style-type: none"> <li>• Accessorial civil liability, requiring corporate contravention and personal involvement.<sup>200</sup></li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Deemed liability, but limited to 6 months' wages, and available only once the company is insolvent.</li> <li>• Less accessible than the Australian action.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• 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.</li> <li>• Less accessible than the Australian action.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Accessorial civil liability, requiring corporate contravention and personal involvement.</li> <li>• Lower penalties. Criminal offence introduced for employers distinct from directors/officers.</li> </ul> | <b>No specific liability</b> <ul style="list-style-type: none"> <li>• No specific provision for director liability for unpaid wages.</li> <li>• Plaintiffs recently have pursued directors for inducing breaches of employment contract obligations to pay wages.<sup>201</sup></li> </ul> | <b>No specific liability</b> <ul style="list-style-type: none"> <li>• No specific provision for director liability for unpaid wages.</li> <li>• Plaintiffs occasionally try to pierce the corporate veil.</li> </ul> |
| <b>Modes of liability</b>        |                                                                                                                                                                                   |                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                      |
| <b>Criminal—direct</b>           | ×                                                                                                                                                                                 | ×                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                                                                                                        | ×                                                                                                                                                                                                                                                                           | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Criminal—deemed</b>           | ×                                                                                                                                                                                 | ×                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                                                                                                        | ×                                                                                                                                                                                                                                                                           | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Criminal—accessorial</b>      | ✓ (imposed on directors and officers) ( <a href="#">FWA ss 327A</a> ; Criminal Code Div 11)                                                                                       | ×                                                                                                                                                                                                                                     | ✓ (imposed on directors <sup>202</sup> ) ( <a href="#">HK 57</a> ss 23, 43N, 43P, 43Q(1))                                                                                                                                                                                                                                | ✓ (imposed on a person who employs another person and is required to pay them under an employment agreement or an act) ( <a href="#">NZ CA</a> s 220AA(1))                                                                                                                  | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Civil—direct</b>              | ×                                                                                                                                                                                 | ×                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                                                                                                        | ×                                                                                                                                                                                                                                                                           | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Civil—deemed</b>              | ×                                                                                                                                                                                 | ✓ (imposed on directors <sup>203</sup> ) ( <a href="#">Can BCA</a> s 119(1))                                                                                                                                                          | ×                                                                                                                                                                                                                                                                                                                        | ×                                                                                                                                                                                                                                                                           | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Civil—accessorial</b>         | ✓ (imposed on all persons <sup>204</sup> ) ( <a href="#">FWA</a> ss 44(1), 550)                                                                                                   | ×                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                                                                                                        | ✓ (imposed on officers) ( <a href="#">NZ MWA</a> s 4; <a href="#">NZ ERA</a> ss 5, 142W <sup>205</sup> )                                                                                                                                                                    | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Defences</b>                  |                                                                                                                                                                                   |                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                      |
| <b>Without reasonable excuse</b> | ×                                                                                                                                                                                 | ×                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                                                                                                                        | ✓ ( <a href="#">NZ CA</a> s 220AA(2))                                                                                                                                                                                                                                       | ×                                                                                                                                                                                                                                                                                          | ×                                                                                                                                                                                                                    |
| <b>Penalties</b>                 |                                                                                                                                                                                   |                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                      |

<sup>200</sup> Criminal liability has been introduced for 'employers' under [FWA s 327A](#). There is no specific reference to directors or officers.

<sup>201</sup> See, eg, *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.

<sup>202</sup> If consented, connived or through neglect contributed to the company failing to pay a sum awarded by a labour or employment claims tribunal.

<sup>203</sup> Directors jointly and severally liable for unpaid employee wages up to 6 months.

<sup>204</sup> Contravention of the National Employment Standards (including minimum wages).

<sup>205</sup> Liability for being involved in a breach of minimum employment standards.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                              | Australia                                                                                                | Canada                          | Hong Kong                                                                           | New Zealand                                                                                                                                                                                                                            | United Kingdom | United States (federal) |
|------------------------------|----------------------------------------------------------------------------------------------------------|---------------------------------|-------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-------------------------|
| <b>Criminal imprisonment</b> | ✓ (10 years max) ( <a href="#">FWA</a> s 327A(4))                                                        | ✗                               | ✓ (3 years max) ( <a href="#">HK 57</a> s 43P(1))                                   | ✗ (7 years max if value of stolen property exceeds NZ\$1,000; 1 year max if value of stolen property exceeds NZ\$500 but not NZ\$1,000; 3 months max if value of stolen property does not exceed NZ\$500) ( <a href="#">NZ CA</a> 223) | ✗              | ✗                       |
| <b>Criminal fines</b>        | ✓ (the greater of either 3 times the underpayment amount and \$550,000) ( <a href="#">FWA</a> s 327A(4)) | ✗                               | ✓ (HK\$350,000 max (~AU\$68,000)) ( <a href="#">HK 57</a> s 43P(1) <sup>206</sup> ) | ✗                                                                                                                                                                                                                                      | ✗              | ✗                       |
| <b>Civil penalties</b>       | ✓ (AU\$198,000 max) ( <a href="#">FWA</a> s 539(2) <sup>207</sup> )                                      | ✗                               | ✗                                                                                   | ✓ (NZ\$50,000 max) (~AU\$46,200) ( <a href="#">NZ ERA</a> s 142G)                                                                                                                                                                      | ✗              | ✗                       |
| <b>Civil damages</b>         | ✗                                                                                                        | ✓ (unpaid wages) <sup>208</sup> | ✗                                                                                   | ✗                                                                                                                                                                                                                                      | ✗              | ✗                       |

<sup>206</sup> In *HKSAR v Li Fung Ching Catherine* FAMC 4/2012, the director was fined HK\$100,000 for unpaid wages.

<sup>207</sup> 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.

<sup>208</sup> In *Boucher v Shaw*, 572 F 3d 1087 (2009), the director was found personally liable for the unpaid wages.

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 7 Taxation law

## 7.1 Personal liability for unpaid company taxes PAYG

|                                                                                       | Australia                                                                                                                               | Canada                                                                                                                                                                                            | Hong Kong                                                                                      | New Zealand                                                                                                                                                                 | United Kingdom                                                                                                                                     | United States (federal)                                                                                                                                  |
|---------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                                                             |                                                                                                                                         |                                                                                                                                                                                                   |                                                                                                |                                                                                                                                                                             |                                                                                                                                                    |                                                                                                                                                          |
|                                                                                       | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Deemed liability in a relatively broad range of circumstances.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Deemed liability, but available only once the company is insolvent.</li> <li>Less accessible than the Australian action.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No equivalent provision.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Deemed liability in a narrower range of circumstances (i.e., in circumstances of asset stripping).</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Direct liability, requiring fraud or neglect on the part of the director.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Direct liability, requiring wilful failure to remit on the part of the director</li> </ul> |
| <b>Modes of liability</b>                                                             |                                                                                                                                         |                                                                                                                                                                                                   |                                                                                                |                                                                                                                                                                             |                                                                                                                                                    |                                                                                                                                                          |
| <b>Criminal—direct</b>                                                                | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Criminal—deemed</b>                                                                | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Criminal—accessorial</b>                                                           | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Civil—direct</b>                                                                   | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ✓ (imposed on officers) ( <a href="#">UK SSA</a> s 121C) (requires fraud or neglect)                                                               | ✓ (imposed on officers and employees) ( <a href="#">26 USC</a> §§ 6672, 7501 <sup>209</sup> ) (requires a wilful failure)                                |
| <b>Civil—deemed</b>                                                                   | ✓ (imposed on directors) ( <a href="#">TAA</a> Sch 1, ss 269-15, 269-20)                                                                | ✓ (imposed on directors) ( <a href="#">Can ITA</a> s 227.1(1))                                                                                                                                    | ×                                                                                              | ✓ (imposed on directors) ( <a href="#">NZ ITA</a> s HD 15)                                                                                                                  | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Civil—accessorial</b>                                                              | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Defences</b>                                                                       |                                                                                                                                         |                                                                                                                                                                                                   |                                                                                                |                                                                                                                                                                             |                                                                                                                                                    |                                                                                                                                                          |
| <b>Not reasonable to expect the director was taking part in management of company</b> | ✓ ( <a href="#">TAA</a> Sch 1 s 269-35(1))                                                                                              | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>All reasonable steps taken to prevent the contravention</b>                        | ✓ ( <a href="#">TAA</a> Sch 1 s 269-35(2))                                                                                              | ✓ ( <a href="#">Can ITA</a> s 227.1(3))                                                                                                                                                           | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Other</b>                                                                          | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ✓ ( <a href="#">NZ ITA</a> ss HD 15(3)(a) <sup>210</sup> , (b) <sup>211</sup> )                                                                                             | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Penalties</b>                                                                      |                                                                                                                                         |                                                                                                                                                                                                   |                                                                                                |                                                                                                                                                                             |                                                                                                                                                    |                                                                                                                                                          |
| <b>Criminal imprisonment</b>                                                          | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |
| <b>Criminal fines</b>                                                                 | ×                                                                                                                                       | ×                                                                                                                                                                                                 | ×                                                                                              | ×                                                                                                                                                                           | ×                                                                                                                                                  | ×                                                                                                                                                        |

<sup>209</sup> Referred to as 'trust fund recovery penalties', these amounts can include outstanding amounts on PAYG or social security payments.

<sup>210</sup> 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.

<sup>211</sup> 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

Criminal and Civil Frameworks for Imposing Liability on Directors

|                        | Australia                                                       | Canada                                                      | Hong Kong | New Zealand                                                | United Kingdom                                                         | United States (federal)                                |
|------------------------|-----------------------------------------------------------------|-------------------------------------------------------------|-----------|------------------------------------------------------------|------------------------------------------------------------------------|--------------------------------------------------------|
| <b>Civil penalties</b> | ✓ (unpaid tax amount) ( <a href="#">TAA</a> Sch 1, s 269-20(5)) | ✓ (unpaid tax amount) ( <a href="#">Can ITA</a> s 227.1(5)) | ✗         | ✓ (unpaid tax amount) ( <a href="#">NZ ITA</a> s HD 15(3)) | ✓ (unpaid tax amount) ( <a href="#">UK SSA</a> s 121C <sup>212</sup> ) | ✓ (unpaid tax amount) ( <a href="#">26 USC</a> § 6672) |
| <b>Civil damages</b>   | ✗                                                               | ✗                                                           | ✗         | ✗                                                          | ✗                                                                      | ✗                                                      |

<sup>212</sup> Under [UK SSA](#), s 121C(3), the Inland Revenue Office can also determine that the liability should be shared between any other culpable officers.

## Criminal and Civil Frameworks for Imposing Liability on Directors

## 7.2 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)                                                                                                                                                                 |
|----------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>                                      |                                                                                                                                                         |                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                           |                                                                                                                                                                                         |
|                                                                | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Deemed liability for company tax offences, imposing a reverse burden of proof.</li> </ul> | <b>Slightly less burdensome</b> <ul style="list-style-type: none"> <li>Accessorial liability for company tax offences, requiring culpability.</li> <li>Applies in relation to a similar range of tax offences, with significant penalties.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Accessorial liability for company tax offences, requiring culpability.</li> <li>Applies in relation to a narrower range of tax offences.</li> </ul> | <b>Slightly less burdensome</b> <ul style="list-style-type: none"> <li>Direct and accessorial liability for company tax offences, requiring culpability.</li> <li>Applies in relation to a similar range of tax offences.</li> </ul> | <b>Slightly less burdensome</b> <ul style="list-style-type: none"> <li>Direct liability, requiring deliberate inaccuracy, deemed liability for some penalties, and accessorial liability, requiring culpability.</li> <li>No criminal liability.<sup>213</sup></li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Direct liability, requiring culpable intent.</li> <li>Applies in relation to a narrower range of tax offences.</li> </ul> |
| <b>Modes of liability</b>                                      |                                                                                                                                                         |                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                           |                                                                                                                                                                                         |
| <b>Criminal—direct</b>                                         | ×                                                                                                                                                       | ×                                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ✓ (applies to employees, agents or officers where caused or committed by them) ( <a href="#">NZ TAA</a> s 147)                                                                                                                       | ×                                                                                                                                                                                                                                                                         | ✓ (applies to all persons <sup>214</sup> ) (eg, <a href="#">26 USC</a> §§ 7201, <sup>215</sup> 7202, <sup>216</sup> 7203, <sup>217</sup> 7204 <sup>218</sup> )                          |
| <b>Criminal—deemed</b>                                         | ✓ (imposed on persons taking part in management) ( <a href="#">TAA</a> s 8Y(1))                                                                         | ×                                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                                                                                    | ×                                                                                                                                                                                                                                                                         | ×                                                                                                                                                                                       |
| <b>Criminal—accessorial</b>                                    | ×                                                                                                                                                       | ✓ (applies to directors, officers and agents) ( <a href="#">Can ITA</a> s 242 <sup>219</sup> )                                                                                                                                                        | ✓ (applies to directors and officers) ( <a href="#">HK 112</a> s 80E <sup>220</sup> )                                                                                                                             | ✓ (applies to all persons) ( <a href="#">NZ TAA</a> s 148)                                                                                                                                                                           | ×                                                                                                                                                                                                                                                                         | ×                                                                                                                                                                                       |
| <b>Civil—direct</b>                                            | ×                                                                                                                                                       | ×                                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                                                                                    | ✓ (applies to officers) (requires deliberate inaccuracy) ( <a href="#">UK FA 2007</a> Sch 24, paras 1, 19)                                                                                                                                                                | ×                                                                                                                                                                                       |
| <b>Civil—deemed</b>                                            | ×                                                                                                                                                       | ×                                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                                                                                    | ✓ (applies to directors) (requires company insolvency) ( <a href="#">UK FA 2020</a> Sch 13, para 5)                                                                                                                                                                       | ×                                                                                                                                                                                       |
| <b>Civil—accessorial</b>                                       | ×                                                                                                                                                       | ×                                                                                                                                                                                                                                                     | ×                                                                                                                                                                                                                 | ×                                                                                                                                                                                                                                    | ✓ (imposed on directors and participators in a company) ( <a href="#">UK FA 2020</a> Sch 13, para 2)                                                                                                                                                                      | ×                                                                                                                                                                                       |
| <b>Defences</b>                                                |                                                                                                                                                         |                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                   |                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                           |                                                                                                                                                                                         |
| <b>Did not aid or abet the offence, and was not in any way</b> | ✓ ( <a href="#">TAA</a> s 8Y(2))                                                                                                                        | ✓ <sup>221</sup>                                                                                                                                                                                                                                      | ✓ <sup>222</sup>                                                                                                                                                                                                  | ✓ <sup>223</sup>                                                                                                                                                                                                                     | ✓ (some offences) <sup>224</sup>                                                                                                                                                                                                                                          | ✓ <sup>225</sup>                                                                                                                                                                        |

<sup>213</sup> HM Revenue & Customs, *Compliance Handbook* (4 September 2018) <<https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch81150>>.

<sup>214</sup> Director liable if they wilfully attempt to evade a tax obligation imposed on the company.

<sup>215</sup> Attempt to evade or defeat any tax.

<sup>216</sup> Wilful failure to collect or pay tax.

<sup>217</sup> Wilful failure to file return, supply information or pay tax.

<sup>218</sup> Giving fraudulent statements or failing to give statements to employees.

<sup>219</sup> A director is liable if they directed, authorised, assented to, acquiesced in or participated in the commission of the offence.

<sup>220</sup> A director is liable if the offence was committed with their consent or connivance.

<sup>221</sup> Whereas this is a defence in Australia, it is an element of the offence in Canada.

<sup>222</sup> Whereas this is a defence in Australia, it is an element of the offence in Hong Kong.

<sup>223</sup> Whereas this is a defence in Australia, it is an element of the offence in New Zealand

<sup>224</sup> Whereas this is a defence in Australia, it is an element of some UK provisions.

<sup>225</sup> Whereas this is a defence in Australia, it is an element of the offence in the United States.

Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                               | Australia                                                             | Canada                                                                                                                       | Hong Kong                                       | New Zealand                                      | United Kingdom                                                                               | United States (federal)                            |
|---------------------------------------------------------------|-----------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|--------------------------------------------------|----------------------------------------------------------------------------------------------|----------------------------------------------------|
| <i>knowingly concerned in or party to the act or omission</i> |                                                                       |                                                                                                                              |                                                 |                                                  |                                                                                              |                                                    |
| Penalties                                                     |                                                                       |                                                                                                                              |                                                 |                                                  |                                                                                              |                                                    |
| <i>Criminal imprisonment</i>                                  | ✓ (2 years max <sup>226</sup> )                                       | ✓ (5 years max <sup>227</sup> )                                                                                              | ✓ (3 years max <sup>228</sup> )                 | ✓ (5 years max <sup>229</sup> )                  | ✗                                                                                            | ✓ (5 years max <sup>230</sup> )                    |
| <i>Criminal fines</i>                                         | ✓ (AU\$33,000 max, <sup>231</sup> and/or reparations <sup>232</sup> ) | ✓ (CA\$1 million max (~AU\$1,500,000) <sup>233</sup> or up to 200% of the amount of tax sought to be evaded <sup>234</sup> ) | ✓ (HK\$50,000 max (~AU\$9,700) <sup>235</sup> ) | ✓ (NZ\$50,000 max (~AU\$45,900) <sup>236</sup> ) | ✗                                                                                            | ✓ (US\$100,000 max (~AU\$152,800) <sup>237</sup> ) |
| <i>Civil penalties</i>                                        | ✗                                                                     | ✗                                                                                                                            | ✗                                               | ✗                                                | ✓ (£1 million max (~AU\$2,081,200) <sup>238</sup> or 200% of the unpaid tax <sup>239</sup> ) | ✗                                                  |
| <i>Civil damages</i>                                          | ✗                                                                     | ✗                                                                                                                            | ✗                                               | ✗                                                | ✗                                                                                            | ✗                                                  |

<sup>226</sup> 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 two years on subsequent conviction ([TAA](#) s 8V).

<sup>227</sup> For example, if the company makes false or deceptive statements or wilfully evades taxes (prohibited by [Can ITA](#) s 239(1)), then the director may be imprisoned for up to 5 years ([Can ITA](#) s 239(2)).

<sup>228</sup> For example, the offence of fraudulently filing a misleading, false or inaccurate return in relation to 'country-to-country' reporting obligations ([HK 112](#) s 80G(9)) can result in imprisonment for 3 years ([HK 112](#) s 80G(10)).

<sup>229</sup> For example, the tax evasion offence under [NZ TAA](#) s 143B carries with it a maximum of 5 years' imprisonment.

<sup>230</sup> For example, the tax evasion offence under [26 USC](#) § 7201 imposes a maximum of 5 years' imprisonment.

<sup>231</sup> For example, breach of [TAA](#), s 8T (incorrectly keeping records with the intention to mislead or deceive) can result in a fine of CA\$16,500 on first conviction or CA\$33,000 on subsequent conviction ([TAA](#) s 8V).

<sup>232</sup> 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.

<sup>233</sup> For example, if the company uses, acquires or produces an 'electronic suppression of sales device' in relation to records that it is required to keep (prohibited by [Can ITA](#) s 239.1(2)), then the director may be personally fined up to CA\$1 million ([Can ITA](#) s 239.1(3)).

<sup>234</sup> For example, if the company makes false or deceptive statements or wilfully evades taxes (prohibited by [Can ITA](#) s 239(1)), then the director may be personally fined between 100% and 200% of the amount of tax that was sought to be evaded ([Can ITA](#) s 239(2)).

<sup>235</sup> For example, the offence of fraudulently filing a misleading, false or inaccurate return in relation to 'country-to-country' reporting obligations ([HK 112](#) s 80G(9)) can result in a fine at 'level 5' ([HK 112](#) s 80G(10)).

<sup>236</sup> For example, the tax evasion offence under [NZ TAA](#) s 143B(1) carries with it a maximum NZ\$50,000 fine.

<sup>237</sup> For example, the tax evasion offence under [26 USC](#) § 7201 imposes a maximum of US\$100,000 fine.

<sup>238</sup> The maximum penalty for a tax offence captured by [UK FA 2020](#) Sch 13, para 5(6) is £1 million.

<sup>239</sup> The maximum penalty available for deliberate inaccuracies under [UK FA 2007](#) Sch 24 is 200% of the potential lost revenue ([UK FA 2007](#) Sch 24, para 4).

## Criminal and Civil Frameworks for Imposing Liability on Directors

### 8 Environmental and sustainability law

#### 8.1 Liability for company environmental law contraventions and prescribed offences<sup>240</sup>

|                             | Australia (federal)                                                                                                                                                                                                                                                                                                                 | Canada                                                                                                                                                                                                                                                                                          | Hong Kong <sup>241</sup>                                                                                                                                                                                          | New Zealand                                                                                                                                                                                                       | United Kingdom                                                                                                                                                                                                          | United States (federal)                                                                                                                                                         |
|-----------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>   |                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                   |                                                                                                                                                                                                                   |                                                                                                                                                                                                                         |                                                                                                                                                                                 |
|                             | <b>High-water mark</b> <ul style="list-style-type: none"> <li>• Accessorial criminal liability with a relatively low culpability requirement.</li> <li>• Relatively moderate maximum criminal fines, but relatively long maximum imprisonment.</li> <li>• Unique accessorial civil liability regime with high penalties.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Accessorial criminal liability in relation to general offences with higher culpability standard.</li> <li>• Deemed criminal liability in relation to disposal at sea offences.</li> <li>• No civil liability regime.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Accessorial criminal liability in relation to general offences with higher culpability standard.</li> <li>• No civil liability regime.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Accessorial criminal liability in relation to general offences with higher culpability standard.</li> <li>• No civil liability regime.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Accessorial criminal liability in relation to general offences with a similar culpability requirement.</li> <li>• No civil liability regime.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>• Civil liability in relation to certain sampled environmental offences, but with very high penalties.</li> </ul> |
| <b>Modes of liability</b>   |                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                   |                                                                                                                                                                                                                   |                                                                                                                                                                                                                         |                                                                                                                                                                                 |
| <b>Criminal—direct</b>      | ✗                                                                                                                                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                       | ✗                                                                                                                                                                               |
| <b>Criminal—deemed</b>      | ✗                                                                                                                                                                                                                                                                                                                                   | ✓ (Can EPA s 280.1(3)) (disposal at sea offences <sup>242</sup> )                                                                                                                                                                                                                               | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                       | ✗                                                                                                                                                                               |
| <b>Criminal—accessorial</b> | ✓ (EPBC ss 495, 496) (imposed on executive officers, in relation to certain offences <sup>243</sup> )                                                                                                                                                                                                                               | ✓ (Can EPA s 280(1)) (applies to all directors, officers or agents; requires actual assent, authorisation etc <sup>244</sup> )                                                                                                                                                                  | ✓ (HK 358 s 10A(1), HK 311 s 47A(1)) (applies to directors and anyone concerned in the management of the company; requires consent, connivance or neglect)                                                        | ✓ (NZ RMA s 340(3)) (requires authority, permission or consent)                                                                                                                                                   | ✓ (UK EPA s 157(1) (requires consent, connivance or neglect)                                                                                                                                                            | ✗                                                                                                                                                                               |
| <b>Civil—direct</b>         | ✗                                                                                                                                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                       | ✗                                                                                                                                                                               |
| <b>Civil—deemed</b>         | ✗                                                                                                                                                                                                                                                                                                                                   | ✗                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                       | ✓ (eg, 42 USC § 9607(a)) (applies to any owner or operator; not a civil penalty provision but provides for civil recovery)                                                      |
| <b>Civil—accessorial</b>    | ✓ (EPBC ss 484 (imposed on all persons for involvement in civil penalty contravention), <sup>245</sup> 494, 496 (imposed on executive                                                                                                                                                                                               | ✗                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                       | ✗                                                                                                                                                                               |

<sup>240</sup> In preparing this section, we have focused only on federal Australian environmental law and a sample of environmental offences / statutes in Comparator Jurisdictions.

<sup>241</sup> 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.

<sup>242</sup> Director will be liable if they directed or influenced the corporation's policies or activities in relation to the offence committed by the corporation (whether or not the corporation has been prosecuted or convicted).

<sup>243</sup> 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),(2), 496.

<sup>244</sup> It is not necessary for the company to be prosecuted or convicted for a director to be liable under this provision.

<sup>245</sup> Where a civil penalty provision is contravened by the company, directors may be liable for 'involvement' in the contravention (aiding, abetting, inducing, knowingly being concerned in or conspiring to contravene civil penalty provisions).

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                         | Australia (federal)                                                                   | Canada                                                                                                                                                                           | Hong Kong <sup>241</sup>                             | New Zealand                                                                                                                                                                                                                                         | United Kingdom                  | United States (federal)                                                                              |
|-----------------------------------------|---------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------|------------------------------------------------------------------------------------------------------|
|                                         | officers in relation to civil penalty provisions; different elements <sup>246</sup> ) |                                                                                                                                                                                  |                                                      |                                                                                                                                                                                                                                                     |                                 |                                                                                                      |
| <b>Defences / exemptions</b>            |                                                                                       |                                                                                                                                                                                  |                                                      |                                                                                                                                                                                                                                                     |                                 |                                                                                                      |
| <b>Reasonable steps / due diligence</b> | ✓ <sup>247</sup> ( <a href="#">EPBC</a> ss 494, 495, 496)                             | ✓ ( <a href="#">Can EPA</a> s 283) (no person shall be found guilty of an offence under the Act where they establish they exercised all due diligence to prevent its commission) | ✗ <sup>248</sup>                                     | ✓ ( <a href="#">NZ RMA</a> s 340(3)) (where it cannot be proved that director knew, or could reasonably be expected to have known, that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it) | ✗ <sup>249</sup>                | ✗                                                                                                    |
| <b>Penalties</b>                        |                                                                                       |                                                                                                                                                                                  |                                                      |                                                                                                                                                                                                                                                     |                                 |                                                                                                      |
| <b>Criminal imprisonment</b>            | ✓ (7 years max <sup>250</sup> )                                                       | ✓ (3 years max <sup>251</sup> )                                                                                                                                                  | ✓ (2 years max <sup>252</sup> )                      | ✓ (2 years max <sup>253</sup> )                                                                                                                                                                                                                     | ✓ (5 years max <sup>254</sup> ) | ✗                                                                                                    |
| <b>Criminal fines</b>                   | ✓ (AU\$138,600 max <sup>255</sup> )                                                   | ✓ (CA\$2 million max (~AU\$2,249,000) <sup>256</sup> )                                                                                                                           | ✓ (HK\$1 million max (~AU\$195,500) <sup>257</sup> ) | ✓ (NZ\$300,000 max (~AU\$277,000) <sup>258</sup> )                                                                                                                                                                                                  | ✓ (unlimited <sup>259</sup> )   | ✗                                                                                                    |
| <b>Civil penalties</b>                  | ✓ (AU\$1.65 million max <sup>260</sup> )                                              | ✗                                                                                                                                                                                | ✗                                                    | ✗ <sup>261</sup>                                                                                                                                                                                                                                    | ✗                               | ✓ (US\$50 million max plus costs of response (AU\$76.5 million)) ( <a href="#">42 USC</a> § 9607(c)) |
| <b>Civil damages</b>                    | ✗                                                                                     | ✗                                                                                                                                                                                | ✗                                                    | ✗                                                                                                                                                                                                                                                   | ✗                               | ✗                                                                                                    |

<sup>246</sup> 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.

<sup>247</sup> No general due diligence defence, but liability requires failure to take all reasonable steps to prevent the contravention. General defences also available for certain contraventions, for example under [EPBC](#) s 24A offences relating to marine areas.

<sup>248</sup> No general defence, but defence available for certain contraventions, for example [HK 358](#) s 12 (where discharge was made under a licence or in an emergency), [HK 311](#) s 48 (where air pollutant was caused due to best practicable means or the contravention could not have been reasonably foreseen and reasonably prevented).

<sup>249</sup> No general defence, but defence available for certain contraventions, for example under s 33 offences relating to the prohibition on unauthorised or harmful deposit, treatment or disposal of waste.

<sup>250</sup> For example, for breach of s 15A(1) of the [EPBC](#) (taking action which has an impact on the world heritage value of a World Heritage property), a director can be imprisoned for 7 years.

<sup>251</sup> 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)) (on conviction on indictment).

<sup>252</sup> For example, if the company commits an offence under [HK 358](#) s 9(1) by discharging poisonous waste into a communal sewer or drain, and the director also commits an offence, the director can be imprisoned for 1 year for a first offence or 2 years for a subsequent offence ([HK 358](#) s 11(2)).

<sup>253</sup> 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](#) ss 338 and 339.

<sup>254</sup> For example, for conviction on indictment for dumping controlled waste. See [UK EPA](#) s 33(8)(b).

<sup>255</sup> For example, for breach of s 15A(1) of the [EPBC](#) (taking action which has an impact on the world heritage value of a World Heritage property), a director can be fined \$138,600.

<sup>256</sup> For a repeat offender, per [Can EPA](#) s 272(2)(a)(ii).

<sup>257</sup> For example, if the company commits an offence under [HK 358](#) s 9(1) by discharging poisonous waste into a communal sewer or drain, and the director also commits an offence, the director can be fined on indictment up to \$400,000 (~AU\$78,400) for a first offence or \$1 million (~AU\$195,500) for a subsequent offence ([HK 358](#) s 11(2)).

<sup>258</sup> 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](#) ss 338 and 339.

<sup>259</sup> 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(3).

<sup>260</sup> For example, for breach of s 12(1), containing the requirement for approval of activities with a significant impact on a declared World Heritage property.

<sup>261</sup> 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.

## Criminal and Civil Frameworks for Imposing Liability on Directors

### 8.2 Duty to ensure compliance with sustainability reporting, assurance, and record-keeping obligations

|                                              | Australia                                                                                                                                                                                                                                                                                                                              | Canada                                                                                                                                               | Hong Kong                                                                                                                              | New Zealand                                                                                                                                                                                                                                                                                                                                                                | United Kingdom                                                                                                                                                                                                                                                                                                  | United States (federal; Delaware)                                                                                                          |
|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment<sup>262</sup></b>      |                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                      |                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                 |                                                                                                                                            |
| <b>Overall assessment</b>                    | <b>More burdensome</b> <ul style="list-style-type: none"> <li>Failure to secure compliance with a range of sustainability reporting, record-keeping and assurance obligations may attract liability.</li> <li>Long imprisonment and high criminal fine (requires dishonesty).</li> <li>CPOs and potential disqualification.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No mandatory sustainability reporting regime currently in place.<sup>263</sup></li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No mandatory sustainability reporting regime currently in place.</li> </ul> | <b>High-water mark<sup>264</sup></b> <ul style="list-style-type: none"> <li>Direct criminal liability for knowingly failing to comply with climate standards.</li> <li>Deemed civil liability for all directors for contravention of a range of climate-related disclosure obligations, with significant pecuniary penalties.</li> <li>Range of CPOs available.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Direct criminal liability for failure to take reasonable steps to comply with sustainability reporting obligations (sometimes requiring knowledge).</li> <li>Higher criminal fine.</li> <li>No CPOs, imprisonment or disqualification.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No mandatory sustainability reporting regime in place.<sup>265</sup></li> </ul> |
| <b>Modes of liability</b>                    |                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                      |                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                 |                                                                                                                                            |
| <b>Criminal—direct</b>                       | ✓ (CA s 344(2)) (requires dishonesty)                                                                                                                                                                                                                                                                                                  | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✓ (NZ FMCA ss 461ZG and 461ZHD) (applies to all directors <sup>266</sup> )                                                                                                                                                                                                                                                                                                 | ✓ (UK CA ss 414A and s 414D) (applies to all directors <sup>267</sup> )                                                                                                                                                                                                                                         | ✗                                                                                                                                          |
| <b>Criminal—deemed</b>                       | ✗                                                                                                                                                                                                                                                                                                                                      | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✗                                                                                                                                                                                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                          |
| <b>Criminal—accessorial</b>                  | ✗                                                                                                                                                                                                                                                                                                                                      | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✗                                                                                                                                                                                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                          |
| <b>Civil—direct</b>                          | ✓ (CA s 344(1))                                                                                                                                                                                                                                                                                                                        | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✗                                                                                                                                                                                                                                                                                                                                                                          | ✗                                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                          |
| <b>Civil—deemed</b>                          | ✗                                                                                                                                                                                                                                                                                                                                      | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✓ (NZ FMCA s 534(3) <sup>268</sup> )                                                                                                                                                                                                                                                                                                                                       | ✗                                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                          |
| <b>Civil—accessorial</b>                     | ✓ (CA s 1317E(4)) (imposed on natural persons generally)                                                                                                                                                                                                                                                                               | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✓ (NZ FMCA ss 486 and 533 <sup>269</sup> )                                                                                                                                                                                                                                                                                                                                 | ✗                                                                                                                                                                                                                                                                                                               | ✗                                                                                                                                          |
| <b>Defences / exemptions</b>                 |                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                      |                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                 |                                                                                                                                            |
| <b>Reasonable steps to secure compliance</b> | ✓ (CA s 344(1))                                                                                                                                                                                                                                                                                                                        | ✗                                                                                                                                                    | ✗                                                                                                                                      | ✓ (NZ FMCA s 501) (director took all reasonable steps to ensure that                                                                                                                                                                                                                                                                                                       | ✓ (UK CA ss 414A, s 414D <sup>274</sup> )                                                                                                                                                                                                                                                                       | ✗                                                                                                                                          |

<sup>262</sup> We note that each jurisdiction with a mandatory sustainability reporting regime in place imposes liability on directors for making or authorising false or misleading statements in a mandatory sustainability report. These civil liability and offence provisions vary across jurisdictions and have not been specifically surveyed.

<sup>263</sup> The [Canadian Sustainability Disclosure Standards \(CSDS 1 and CSDS 2\)](#) are in force on a voluntary basis only from 1 January 2025. The Canadian Securities Administrators announced in April 2025 that it is pausing its work on the development of a new mandatory climate-related disclosure rule – see [here](#).

<sup>264</sup> The New Zealand Government has recently conducted consultation regarding potential amendments to the climate-related disclosures regime. A key focus of the consultation was the liability framework for directors, including whether the current deemed liability provisions should be adjusted to reduce, but not remove, the potential liability of directors under the regime. One proposal under consideration involves amending the NZ FMCA to exclude the application of s 534 to climate-related disclosures. For further information, see [here](#).

<sup>265</sup> The United States has rolled back its support for proposed climate disclosure rules – see [here](#).

<sup>266</sup> A director commits an offence under s 461ZG if the entity's climate statements fail to comply with the climate standards and the director knows that the climate statements fail to comply with those standards. Section 461ZHD requires an entity to ensure that an assurance practitioner has continuous access to all relevant climate-related disclosure records and documents; if the entity fails to comply, each director commits an offence.

<sup>267</sup> In the case of failure to comply with the requirement to prepare a strategic report, s 414A provides that an offence is committed by every person who was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and who failed to take all reasonable steps for securing compliance with that requirement. Section 414D provides that if a strategic report is approved that does not comply with the requirements of the act, every director who knew that it did not comply, or was reckless as to whether it complied, and failed to take reasonable steps to secure compliance with those requirements or prevent the report from being approved, commits an offence.

<sup>268</sup> This defence applies to obligations under ss 461Z to 461ZC (climate statement obligations), 461ZH (assurance engagement obligations), and 461ZI (lodgement of climate statements).

<sup>269</sup> The court may make a declaration of contravention if a person has contravened, or been involved in a contravention of, a civil liability provision (including Part 7A climate-related disclosure obligations specified in s 461ZK(3)-(4), being: entities must keep proper CRD records (s 461V), entities must prepare and lodge climate statements (ss 461Z-461ZC, 461ZI), parts of climate statements must be subject to assurance (s 461ZH), and proper CRD records must be kept for seven years (s 461X)). See s 533 for when a person is involved in a contravention.

<sup>274</sup> In the case of failure to comply with the requirement to prepare a strategic report, s 414A provides that an offence is committed by every person who was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and who failed to take all reasonable steps for securing compliance with that requirement. Section 414D provides that if a strategic report is approved that does not comply with the requirements of the act, every director who knew that it did not comply, or was reckless as to whether it complied, and failed to take reasonable steps to secure compliance with those requirements or prevent the report from being approved, commits an offence.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                      | Australia                                                                                                       | Canada | Hong Kong | New Zealand                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | United Kingdom                                                | United States (federal; Delaware) |
|--------------------------------------|-----------------------------------------------------------------------------------------------------------------|--------|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|-----------------------------------|
|                                      |                                                                                                                 |        |           | <p>the contravening entity complied with the provision<sup>270</sup>)</p> <p>(<a href="#">NZ FMCA</a> s 461ZHD(3)) (entity / director took all reasonable steps to ensure that the contravening entity complied with the provision, or director could not reasonably have been expected to take steps to ensure that the entity complied<sup>271</sup>)</p> <p>(<a href="#">NZ FMCA</a> s 499(1)(a)) (general civil defence – director's contravention due to reasonable reliance on information supplied by another, or contravention due to cause beyond director's control and director took reasonable precautions and exercised due diligence to avoid contravention<sup>272</sup>)</p> <p>(<a href="#">NZ FMCA</a> s 503) (general defence for involvement in contravention – director's involvement was due to reasonable reliance on information supplied by another, or director took all reasonable steps to ensure that the entity complied with a civil liability provision<sup>273</sup>)</p> |                                                               |                                   |
| <b>No knowledge of contravention</b> | ✗                                                                                                               | ✗      | ✗         | ✓ ( <a href="#">NZ FMCA</a> s 461ZG)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | ✓ ( <a href="#">UK CA</a> s 414D)                             | ✗                                 |
| <b>Penalties</b>                     |                                                                                                                 |        |           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                               | ✗                                 |
| <b>Imprisonment</b>                  | ✓ (15 years max) ( <a href="#">CA</a> Sch 3)                                                                    | ✗      | ✗         | ✓ (5 years max) ( <a href="#">NZ FMCA</a> s 461ZG <sup>275</sup> )                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | ✗                                                             | ✗                                 |
| <b>Criminal fines</b>                | ✓ (the greater of AU\$1,485,000 or three times the benefit derived) ( <a href="#">CA</a> Sch 3, ss 1311B(1)(b)) | ✗      | ✗         | <p>✓ (NZ\$500,000 max (~AU\$456,000)) (<a href="#">NZ FMCA</a> s 461ZG<sup>276</sup>)</p> <p>(NZ\$50,000 max (~AU\$46,000)) (<a href="#">NZ FMCA</a> s 461ZHD(2))</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | ✓ (unlimited) ( <a href="#">UK CA</a> ss 414A(6) and 414D(3)) | ✗                                 |

<sup>270</sup> S 501 provides an additional defence for directors who are treated as contravening ss 461Z to 461ZC (climate statement obligations), 461ZH (assurance engagement obligations), and 461ZI (lodgement of climate statements).

<sup>271</sup> S 461ZHD(3) is a defence to a contravention under s 461ZHD(2), if the director proves that: the entity or director took all reasonable steps to ensure that the entity complied with that subsection; or the director could not reasonably have been expected to take steps to ensure that the entity complied with that subsection.

<sup>272</sup> Section 499(1)(a) is a defence if the contravention was due to reasonable reliance on information supplied by another (who is not a director, employee or agent), or the director took reasonable precautions and exercised due diligence to avoid the contravention where the contravention was due to the default of another person, or an accident, or some other cause beyond the director's control.

<sup>273</sup> Section 503 provides a general defence for persons involved in contravention of a civil liability provision, including Part 7A climate-related disclosure obligations, if the person's contravention was due to reasonable reliance on information supplied by another (who is not a director, employee or agent), or the person took all reasonable steps to ensure that the entity complied with the civil liability provision.

<sup>275</sup> Directors may be liable to imprisonment and/or a fine pursuant to s 461ZG(2).

<sup>276</sup> Directors may be liable to imprisonment and/or a fine pursuant to s 461ZHD(2).

Criminal and Civil Frameworks for Imposing Liability on Directors

|                             | Australia                                                 | Canada | Hong Kong | New Zealand                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | United Kingdom | United States (federal; Delaware) |
|-----------------------------|-----------------------------------------------------------|--------|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-----------------------------------|
| <b>Civil penalty orders</b> | ✓ (see Directors' Duties CPOs)                            | ✗      | ✗         | ✓ (Maximum pecuniary penalty is the greatest of NZ\$1 million (~AU\$915,000) or if it can be readily ascertained, 3 times the amount of the gain made, or the loss avoided, by the contravention) ( <a href="#">NZ FMCA s 490<sup>277</sup></a> )<br><br>(Any order the Court thinks just to compensate for loss and damage) ( <a href="#">NZ FMCA s 495</a> )<br><br>(Declaration of contravention) ( <a href="#">NZ FMCA s 486</a> )<br><br>(Other civil liability order) ( <a href="#">NZ FMCA s 497</a> ) | ✗              | ✗                                 |
| <b>Disqualification</b>     | ✓ (Court determined period) ( <a href="#">CA s 206C</a> ) | ✗      | ✗         | ✗                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | ✗              | ✗                                 |
| <b>Common law remedies</b>  | ✗                                                         | ✗      | ✗         | ✗                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | ✗              | ✗                                 |

<sup>277</sup> Note that a contravention of s 461X (CRD records to be kept for 7 years) attracts a lower maximum pecuniary penalty which must not exceed NZ\$200,000 (~AU\$183,000).

## 9 Financial Accountability Regime

### 9.1 Liability for failure to comply with financial accountability framework obligations

|                             | Australia                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Canada                                                                                                                   | Hong Kong                                                                                                                                                                                                                                                                              | New Zealand                                                                                                              | United Kingdom                                                                                                                                       | United States (federal; Delaware)                                                                                        |
|-----------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| <b>Overall assessment</b>   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                          |                                                                                                                                                                                                                                                                                        |                                                                                                                          |                                                                                                                                                      |                                                                                                                          |
|                             | <b>Burdensome</b> <ul style="list-style-type: none"> <li>Primary penalties for failure to comply with accountability obligations are disqualification and reduction in remuneration. Regulators have expansive administrative powers including the power to issue directions and to reallocate responsibilities.</li> <li>Criminal offences attach to non-compliance with regulatory investigations / requests for information.</li> <li>Potential imposition of accessorial liability for civil penalties.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No comparable accountability regime for directors.</li> </ul> | <b>Burdensome</b> <ul style="list-style-type: none"> <li>Disciplinary measures may be levied against persons involved in the management of the business of a licensed corporation where that person is considered not fit and proper. This includes direct civil liability.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No comparable accountability regime for directors.</li> </ul> | <b>Burdensome</b> <ul style="list-style-type: none"> <li>Robust regime with potential for criminal and civil liability against directors.</li> </ul> | <b>No liability</b> <ul style="list-style-type: none"> <li>No comparable accountability regime for directors.</li> </ul> |
| <b>Application</b>          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                          |                                                                                                                                                                                                                                                                                        |                                                                                                                          |                                                                                                                                                      |                                                                                                                          |
| <b>In-scope entities</b>    | ✓ (applies to accountable persons (which includes <u>all</u> directors) of accountable entities <sup>278</sup> )                                                                                                                                                                                                                                                                                                                                                                                                       | ✗                                                                                                                        | ✓ (applies to managers in charge of SFC licensed corporations only <sup>279</sup> )                                                                                                                                                                                                    | ✗                                                                                                                        | ✓ (applies to senior managers of banks and financial institutions regulated by the FCA and PRA only <sup>280</sup> )                                 | ✗                                                                                                                        |
| <b>Modes of liability</b>   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                          |                                                                                                                                                                                                                                                                                        |                                                                                                                          |                                                                                                                                                      |                                                                                                                          |
| <b>Criminal—direct</b>      | ✓ ( <a href="#">FAR</a> ss 46(3), 47(3), 48 51(2), 53 and 92(2) (imposed on accountable entities and related persons generally); s 66(4) (imposed on officers)) <sup>281</sup>                                                                                                                                                                                                                                                                                                                                         | ✗                                                                                                                        | ✗                                                                                                                                                                                                                                                                                      | ✗                                                                                                                        | ✓ (for senior managers of banks only) ( <a href="#">UK FSA</a> s 36)                                                                                 | ✗                                                                                                                        |
| <b>Criminal—deemed</b>      | ✗                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | ✗                                                                                                                        | ✗                                                                                                                                                                                                                                                                                      | ✗                                                                                                                        | ✗                                                                                                                                                    | ✗                                                                                                                        |
| <b>Criminal—accessorial</b> | ✗                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | ✗                                                                                                                        | ✗                                                                                                                                                                                                                                                                                      | ✗                                                                                                                        | ✗                                                                                                                                                    | ✗                                                                                                                        |

<sup>278</sup> 'Accountable entity' is defined as authorised deposit-taking institutions and their authorised non-operating holding companies (NOHCs), insurers and their NOHCs and RSE licensees (ie, superannuation fund trustees) – FAR s 9.

<sup>279</sup> Corporations engaging in regulated financial activities, including dealing in securities, future contracts, leveraging foreign exchange trading, advising on securities future or corporate financing etc, must be to be licensed or registered with Hong Kong's Securities and Futures Commission (**SFC**). 'Managers in charge' are persons primarily responsible for managing a licensed corporation's operations or control functions such as compliance, risk management, finance, information technology and anti-money laundering. They include directors (including shadow directors), responsible officers and individuals appointed as a manager in charge. See [Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management](#) (16 December 2016)

<sup>280</sup> This includes banks, building societies, credit unions, insurers, reinsurers (including UK branches of foreign banks and insurers) and other financial services firms – [UK FSMA](#) s 22. Senior managers are persons who perform designated senior management functions in accordance with [SUP 10C](#).

<sup>281</sup> These offences would require personal misconduct and would be unlikely to be committed in the ordinary course of acting in an accountable person role.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                | Australia                                                                                                                                                                                                                                                                                                                                                                                             | Canada | Hong Kong                                                                                                                                                                                                   | New Zealand | United Kingdom                                                                                    | United States (federal; Delaware) |
|------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|---------------------------------------------------------------------------------------------------|-----------------------------------|
| <b>Civil—direct</b>                            | ✗                                                                                                                                                                                                                                                                                                                                                                                                     | ✗      | ✓ (all members of the senior management of a licensed corporation are considered regulated persons and may be subject to disciplinary measures <sup>282</sup> ) ( <a href="#">HK 571</a> ss 193(2), 194(3)) | ✗           | ✓ (for senior managers of financial institutions only) ( <a href="#">UK FSMA</a> ss 66, 66A, 66B) | ✗                                 |
| <b>Civil—deemed</b>                            | ✗                                                                                                                                                                                                                                                                                                                                                                                                     | ✗      | ✗                                                                                                                                                                                                           | ✗           | ✗                                                                                                 | ✗                                 |
| <b>Civil—accessorial</b>                       | ✓ ( <a href="#">FAR</a> s 81) (imposed on natural persons generally)                                                                                                                                                                                                                                                                                                                                  | ✗      | ✓ ( <a href="#">HK 571</a> s 390)                                                                                                                                                                           |             | ✓ (for senior managers of financial institutions only) ( <a href="#">UK FSMA</a> ss 66, 66A, 66B) | ✗                                 |
| <b>Key defences / exemptions</b>               |                                                                                                                                                                                                                                                                                                                                                                                                       |        |                                                                                                                                                                                                             |             |                                                                                                   |                                   |
| <b>Key defences</b>                            | ✓ ( <a href="#">FAR</a> s 102 – in relation to actions done in compliance with FAR or a direction given under FAR only; s 100 – where an individual is convicted for failing to take reasonable precautions / exercising due diligence to avoid misconduct; s 101 – for acts in good faith in exercise of duties under FAR; s 96 – where disclosure is for purpose of seeking legal advice or review) | ✗      | ✓ ( <a href="#">HK 571</a> s 380 – for misconduct <sup>283</sup> )                                                                                                                                          | ✗           | ✗ <sup>284</sup>                                                                                  | ✗                                 |
| <b>Penalties</b>                               |                                                                                                                                                                                                                                                                                                                                                                                                       |        |                                                                                                                                                                                                             |             |                                                                                                   |                                   |
| <b>Imprisonment</b>                            | ✓ (2 years max) ( <a href="#">FAR</a> , ss 48, 52, 68 (imposed on natural persons generally), 92(2), 94(5) (if the accountable person is an affected person under s 91))                                                                                                                                                                                                                              | ✗      | ✓ (10 years max) ( <a href="#">HK 571</a> , s 303)                                                                                                                                                          | ✗           | ✓ (7 years max, for senior managers of banks only) ( <a href="#">UK FSA</a> s 36)                 | ✗                                 |
| <b>Criminal penalties</b>                      | ✓ (AU\$66,000 max) ( <a href="#">FAR</a> , ss 53, 63, 68 (imposed on natural persons generally); s 66(4) (imposed on officers))                                                                                                                                                                                                                                                                       | ✗      | ✓ (HK\$10 million max) ( <a href="#">HK 571</a> s 303)                                                                                                                                                      | ✗           | ✓ (unlimited fine, for senior managers of banks only) ( <a href="#">UK FSA</a> s 36)              | ✗                                 |
| <b>Damages / Compensation / redress orders</b> | ✗                                                                                                                                                                                                                                                                                                                                                                                                     | ✗      | ✓                                                                                                                                                                                                           | ✗           | ✓ (for senior managers of financial institutions only) ( <a href="#">UK FSMA</a> s 71)            | ✗                                 |

<sup>282</sup> See [Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management](#) (16 December 2016).

<sup>283</sup> Misconduct includes an act or omission relating to the carrying on of any regulated activity for which a person is licensed or registered which, in the opinion of the SFC, is or is likely to be prejudicial to the interest of the investing public or to the public interest: see [HK 571](#) s 193(3).

<sup>284</sup> There are no statutory defences because the key offences are framed around taking 'reasonable steps to do certain things – eg to ensure that the business of the firm for which you are responsible is controlled effectively (see [COCON 4.2](#)). This means that to defend any proceedings, a senior manager would need to point to the reasonable steps they had taken.

## Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                        | Australia                                                                                                                                                                                          | Canada | Hong Kong                                                                                                                                                                                                         | New Zealand | United Kingdom                                                                                                                                       | United States (federal; Delaware) |
|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| <b>Civil penalty orders</b>                            | ✓ (the greater of AU\$1,650,000, or, if the court can determine the benefit derived or detriment avoided because of the contravention, that amount multiplied by 3) ( <a href="#">FAR</a> s 83(3)) | ✗      | ✓ (HK\$10 million max, or, if the Commission can determine the profit gained or loss avoided because of the contravention three times the value of that profit / loss avoided) ( <a href="#">HK 571</a> s 194(2)) | ✗           | ✓ (for senior managers of financial institutions only) ( <a href="#">UK FSMA</a> ss <a href="#">66</a> , <a href="#">66A</a> , <a href="#">66B</a> ) | ✗                                 |
| <b>Disqualification</b>                                | ✓ ( <a href="#">FAR</a> s 42)                                                                                                                                                                      | ✗      | ✓ ( <a href="#">HK 571</a> s 194(1)(i))                                                                                                                                                                           | ✗           | ✓ (for senior managers of financial institutions only) ( <a href="#">UK FSMA</a> s 63)                                                               | ✗                                 |
| <b>Reallocation of responsibilities</b>                | ✓ ( <a href="#">FAR</a> s 65)                                                                                                                                                                      | ✗      | ✗                                                                                                                                                                                                                 | ✗           | ✓ ( <a href="#">UK FSMA</a> s 71B)                                                                                                                   | ✗                                 |
| <b>Deferral and reduction of variable remuneration</b> | ✓ ( <a href="#">FAR</a> ss 25-30) <sup>285</sup>                                                                                                                                                   | ✗      | ✗                                                                                                                                                                                                                 | ✗           | ✗                                                                                                                                                    | ✗                                 |

<sup>285</sup> Prudential Standard CPS 511 Remuneration (**CPS 511**) issued by APRA sets out similar obligations relating to deferral and reduction of variable remuneration. For 'significant financial institutions' (as defined in CPS 511), the requirements under CPS 511 are more stringent when compared with the obligations under FAR.

## Criminal and Civil Frameworks for Imposing Liability on Directors

### 10 Glossary of abbreviations

|                      |                                                                                         |
|----------------------|-----------------------------------------------------------------------------------------|
| <b>ACL</b>           | <i>Competition and Consumer Act 2010 (Cth) sch 1</i>                                    |
| <b>CA</b>            | <i>Corporations Act 2001 (Cth)</i>                                                      |
| <b>CCA</b>           | <i>Competition and Consumer Act 2010 (Cth)</i>                                          |
| <b>DIN</b>           | <i>Director identification number</i>                                                   |
| <b>EPBC</b>          | <i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i>              |
| <b>FAR</b>           | <i>Financial Accountability Regime Act 2023 (Cth)</i>                                   |
| <b>FWA</b>           | <i>Fair Work Act 2009 (Cth)</i>                                                         |
| <b>TAA</b>           | <i>Taxation Administration Act 1953 (Cth)</i>                                           |
| <b>ACT CA</b>        | <i>Crimes Act 1900 (ACT)</i>                                                            |
| <b>NSW FTA</b>       | <i>Fair Trading Act 1987 (NSW)</i>                                                      |
| <b>NSW WHS</b>       | <i>Work Health and Safety Act 2011 (NSW)</i>                                            |
|                      |                                                                                         |
| <b>Can ASL</b>       | <i>Canada's Anti-Spam Legislation (Can)</i>                                             |
| <b>Can BCA</b>       | <i>Canada Business Corporations Act (Can)</i>                                           |
| <b>Can CA</b>        | <i>Competition Act (Can)</i>                                                            |
| <b>Can CC</b>        | <i>Criminal Code (Can)</i>                                                              |
| <b>Can EPA</b>       | <i>Canadian Environmental Protection Act (Can)</i>                                      |
| <b>Can ITA</b>       | <i>Income Tax Act (Can)</i>                                                             |
| <b>Can PP</b>        | <i>Canada Pension Plan (Can)</i>                                                        |
| <b>ON OHS</b>        | <i>Occupational Health and Safety Act (Ontario)</i>                                     |
|                      |                                                                                         |
| <b>HK 32</b>         | <i>Cap 32 Companies (Winding Up and Miscellaneous Provisions) Ordinance (Hong Kong)</i> |
| <b>HK 57</b>         | <i>Cap 57 Employment Ordinance (Hong Kong)</i>                                          |
| <b>HK 112</b>        | <i>Cap 112 Inland Revenue Ordinance (Hong Kong)</i>                                     |
| <b>HK 311</b>        | <i>Cap 311 Air Pollution Control Ordinance (Hong Kong)</i>                              |
| <b>HK 358</b>        | <i>Cap 358 Water Pollution Control Ordinance (Hong Kong)</i>                            |
| <b>HK 362</b>        | <i>Cap 362 Trade Descriptions Ordinance (Hong Kong)</i>                                 |
| <b>HK 485</b>        | <i>Cap 485 Mandatory Provident Fund Schemes Ordinance (Hong Kong)</i>                   |
| <b>HK 509</b>        | <i>Cap 509 Occupational Safety and Health Ordinance (Hong Kong)</i>                     |
| <b>HK 571</b>        | <i>Cap 571 Securities and Futures Ordinance (Hong Kong)</i>                             |
| <b>HK 619</b>        | <i>Cap 619 Competition Ordinance (Hong Kong)</i>                                        |
| <b>HK 622</b>        | <i>Cap 622 Companies Ordinance (Hong Kong)</i>                                          |
| <b>HKEX Guidance</b> | Hong Kong Companies Registry, <i>A Guide on Directors' Duties</i> (March 2014)          |

Criminal and Civil Frameworks for Imposing Liability on Directors

|                   |                                                                      |
|-------------------|----------------------------------------------------------------------|
| <b>NZ HSA</b>     | <i>Health and Safety at Work Act 2015 (NZ)</i>                       |
| <b>NZ CA</b>      | <i>Companies Act 1993 (NZ)</i>                                       |
| <b>NZ CoA</b>     | <i>Commerce Act 1986 (NZ)</i>                                        |
| <b>NZ ERA</b>     | <i>Employment Relations Act 2000 (NZ)</i>                            |
| <b>NZ ITA</b>     | <i>Income Tax Act 2007 (NZ)</i>                                      |
| <b>NZ FTA</b>     | <i>Fair Trading Act 1986 (NZ)</i>                                    |
| <b>NZ FMCA</b>    | <i>Financial Markets Conduct Act 2013 (NZ)</i>                       |
| <b>NZ MWA</b>     | <i>Minimum Wage Act 1983 (NZ)</i>                                    |
| <b>NZ RMA</b>     | <i>Resource Management Act 1991 (NZ)</i>                             |
| <b>NZ TAA</b>     | <i>Tax Administration Act 1994 (NZ)</i>                              |
|                   |                                                                      |
| <b>UK CA</b>      | <i>Companies Act 2006 (UK)</i>                                       |
| <b>UK CDA</b>     | <i>Company Directors Disqualification Act 1986 (UK)</i>              |
| <b>UK CDDA</b>    | <i>Company Directors Disqualification Act 1986 (UK)</i>              |
| <b>UK CPR</b>     | <i>Consumer Protection from Unfair Trading Regulations 2008 (UK)</i> |
| <b>UK DMCCA</b>   | <i>Digital Markets, Competition and Consumers Act 2024 (UK)</i>      |
| <b>UK EA</b>      | <i>Enterprise Act 2002 (UK)</i>                                      |
| <b>UK EPA</b>     | <i>Environmental Protection Act 1990 (UK)</i>                        |
| <b>UK FA 2007</b> | <i>Finance Act 2007 (UK)</i>                                         |
| <b>UK FA 2020</b> | <i>Finance Act 2020 (UK)</i>                                         |
| <b>UK FSA</b>     | <i>Financial Services (Banking Reform) Act 2013 (UK)</i>             |
| <b>UK FSMA</b>    | <i>Financial Services and Markets Act 2000 (UK)</i>                  |
| <b>UK HSW</b>     | <i>Health and Safety at Work Etc Act 1974 (UK)</i>                   |
| <b>UK IA</b>      | <i>Insolvency Act 1986 (UK)</i>                                      |
| <b>UK PA</b>      | <i>Pensions Act 2004 (UK)</i>                                        |
| <b>UK SSA</b>     | <i>Social Security Administration Act 1992 (UK)</i>                  |

## Schedule 2: Summary of comparison of reporting-related obligations

For ease of comparison, this table summarises the conclusions reached in Schedule 1 matrices regarding reporting-related obligations. As we have noted in the memorandum, Australian directors bear additional reporting and attestation requirements, including under the *Modern Slavery Act 2018* (Cth) and *Security of Critical Infrastructure Act 2018* (Cth).

| Obligation                                                                                          | Reference                  | Australia              | Canada                 | Hong Kong              | New Zealand                          | United Kingdom               | United States (Delaware)     |
|-----------------------------------------------------------------------------------------------------|----------------------------|------------------------|------------------------|------------------------|--------------------------------------|------------------------------|------------------------------|
| Duty to comply with financial record keeping obligations                                            | See Schedule 1, Table 1.3. | <b>High-water mark</b> | <b>Less burdensome</b> | <b>Less burdensome</b> | <b>Significantly less burdensome</b> | <b>Less burdensome</b>       | <b>No Liability</b>          |
| Duty to ensure compliance with sustainability reporting, assurance, and record-keeping obligations  | See Schedule 1, Table 8.2. | <b>Burdensome</b>      | <b>No liability</b>    | <b>No liability</b>    | <b>High-water mark</b>               | <b>Less burdensome</b>       | <b>No liability</b>          |
| Duty to cause the company to comply with its obligations to pay the superannuation guarantee charge | See Schedule 1, Table 5.1. | <b>Burdensome</b>      | <b>More burdensome</b> | <b>High-water mark</b> | <b>No specific liability</b>         | <b>Comparably burdensome</b> | <b>No specific liability</b> |
| Duty to cause the company to comply with its obligations to pay PAYG withholding liabilities        | See Schedule 1, Table 7.1. | <b>High-water mark</b> | <b>Less burdensome</b> | <b>No liability</b>    | <b>Less burdensome</b>               | <b>Less burdensome</b>       | <b>Less burdensome</b>       |

**Schedule 3: Summary of Corporate Criminal Liability Survey results**

|                                                                            | Australia (general mechanism)                                                                                                                                                                                                                                                                                      | Australia (failure to prevent bribery of foreign public officials <sup>286</sup> )                                                                                                                                                                                                                                                                        | Canada                                                                                                                                                                                                                                                                                                                                         | Hong Kong                                                                                                                                                                                                                                                                    | New Zealand                                                                                                                                                                                                                                                                  | UK (general mechanism)                                                                                                                                                                                                                                                    | UK (failure to prevent bribery, fraud and tax evasion offences <sup>287</sup> )                                                                                                                                                                                                                                                                                 | United States (federal)                                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                            | Overall assessment of likelihood of director entanglement in corporate criminal prosecution                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                   |
|                                                                            | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Unique statutory model allowing scrutiny of corporate culture.</li> <li>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.</li> </ul> | <b>High-water mark</b> <ul style="list-style-type: none"> <li>Deemed liability offence.</li> <li>Defence that a corporation maintained adequate prevention procedures.</li> <li>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.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Unique statutory model combining aspects of identification and vicarious liability models.</li> <li>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.</li> </ul> | <b>Far less burdensome</b> <ul style="list-style-type: none"> <li>Identification model.</li> <li>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.</li> </ul> | <b>Far less burdensome</b> <ul style="list-style-type: none"> <li>Identification model.</li> <li>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.</li> </ul> | <b>Less burdensome</b> <ul style="list-style-type: none"> <li>Identification model.</li> <li>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.</li> </ul> | <b>Similarly burdensome</b> <ul style="list-style-type: none"> <li>Deemed liability offences.</li> <li>Defence that a corporation maintained adequate prevention procedures.</li> <li>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.</li> </ul> | <b>Burdensome</b> <ul style="list-style-type: none"> <li>Vicarious liability model.</li> <li>However, director conduct nonetheless is potentially relevant to prosecution and sentencing decisions.</li> <li>Corporate culture relevant to prosecution and sentencing.</li> </ul> |
|                                                                            | Physical element (narrowest to broadest scope)                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                   |
| <b>A director or officer committed the physical element</b>                | ✓                                                                                                                                                                                                                                                                                                                  | ✓                                                                                                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                                                                                              | ✓                                                                                                                                                                                                                                                                            | ✓                                                                                                                                                                                                                                                                            | ✓                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                                                                                                               | ✓                                                                                                                                                                                                                                                                                 |
| <b>A high managerial agent (or similar) committed the physical element</b> | ✓                                                                                                                                                                                                                                                                                                                  | ✓                                                                                                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                                                                                              | ✗                                                                                                                                                                                                                                                                            | ✗                                                                                                                                                                                                                                                                            | ✗ (except for some economic offences <sup>288</sup> )                                                                                                                                                                                                                     | ✓                                                                                                                                                                                                                                                                                                                                                               | ✓                                                                                                                                                                                                                                                                                 |
| <b>An employee or agent committed the physical element</b>                 | ✓                                                                                                                                                                                                                                                                                                                  | ✓                                                                                                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                                                                                              | ✗                                                                                                                                                                                                                                                                            | ✗                                                                                                                                                                                                                                                                            | ✗                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                                                                                                               | ✓                                                                                                                                                                                                                                                                                 |
|                                                                            | Mental element (narrowest to broadest scope)                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                   |
| <b>The person who committed the</b>                                        | ✓ (directors and high managerial agents only)                                                                                                                                                                                                                                                                      | ✓                                                                                                                                                                                                                                                                                                                                                         | ✓ (directors and senior officers only)                                                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                            | ✓                                                                                                                                                                                                                                                                            | ✓                                                                                                                                                                                                                                                                         | ✓                                                                                                                                                                                                                                                                                                                                                               | ✓                                                                                                                                                                                                                                                                                 |

<sup>286</sup> Australian Criminal Code s 70.5A.

<sup>287</sup> *Bribery Act 2010* (UK) s 7; Economic Crime and Corporate Transparency Act s 199, sch 13; *Criminal Finance Act 2017* (UK) Pt 3.

<sup>288</sup> Under s 196 of the Economic Crime and Corporate Transparency Act, a corporation is guilty of certain economic offences – those listed in sch 12 of the Act, including theft and bribery – if committed by a 'senior manager' of the corporation in their actual or apparent authority. A Bill is currently in the House of Commons which, if passed, would expand this provision to all offences: Crime and Policing Bill 2025 (UK) s 165.

Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                                                                                       | Australia (general mechanism) | Australia (failure to prevent bribery of foreign public officials <sup>286</sup> ) | Canada | Hong Kong | New Zealand | UK (general mechanism) | UK (failure to prevent bribery, fraud and tax evasion offences <sup>287</sup> ) | United States (federal) |
|-----------------------------------------------------------------------------------------------------------------------|-------------------------------|------------------------------------------------------------------------------------|--------|-----------|-------------|------------------------|---------------------------------------------------------------------------------|-------------------------|
| <i>physical act had the requisite mental state</i>                                                                    |                               |                                                                                    |        |           |             |                        |                                                                                 |                         |
| <i>Irrespective of whether the person who committed the physical element had the requisite mental element;</i>        | ✓                             | N/A                                                                                | ✓      | ✗         | ✗           | ✗                      | N/A                                                                             | ✗                       |
| • <i>a director or high managerial agent (or similar) directed the physical element;</i>                              | ✓                             | N/A                                                                                | ✓      | ✗         | ✗           | ✗                      | N/A                                                                             | ✗                       |
| • <i>a director had knowledge that the physical element would occur but did not take reasonable steps to stop it;</i> | ✓                             | N/A                                                                                | ✗      | ✗         | ✗           | ✗                      | N/A                                                                             | ✗                       |
|                                                                                                                       | ✓                             | N/A                                                                                | ✗      | ✗         | ✗           | ✗                      | N/A                                                                             | ✗                       |
| • <i>a director otherwise expressly, tacitly or impliedly permitted the physical element;</i>                         |                               |                                                                                    |        |           |             |                        |                                                                                 |                         |
| • <i>the corporation had a culture that encouraged non-compliance; or</i>                                             |                               |                                                                                    |        |           |             |                        |                                                                                 |                         |

Criminal and Civil Frameworks for Imposing Liability on Directors

|                                                                                                                          | Australia (general mechanism) | Australia (failure to prevent bribery of foreign public officials <sup>286</sup> ) | Canada | Hong Kong | New Zealand | UK (general mechanism)                                | UK (failure to prevent bribery, fraud and tax evasion offences <sup>287</sup> ) | United States (federal) |
|--------------------------------------------------------------------------------------------------------------------------|-------------------------------|------------------------------------------------------------------------------------|--------|-----------|-------------|-------------------------------------------------------|---------------------------------------------------------------------------------|-------------------------|
| <ul style="list-style-type: none"> <li>the corporation had a culture that failed to discourage non-compliance</li> </ul> |                               |                                                                                    |        |           |             |                                                       |                                                                                 |                         |
|                                                                                                                          | Additional requirements       |                                                                                    |        |           |             |                                                       |                                                                                 |                         |
| The physical element was committed within the relevant person's actual or apparent scope of employment (or similar)      | ✓                             | ✓                                                                                  | ✓      | ✗         | ✗           | ✗ (except for some economic offences <sup>289</sup> ) | ✓                                                                               | ✓                       |
| The physical element was committed for benefit of corporation                                                            | ✗                             | ✓                                                                                  | ✓      | ✗         | ✗           | ✗                                                     | ✓ (except for tax evasion offences)                                             | ✓                       |
| The relevant person was acting as directing mind and will of company                                                     | ✗                             | ✗                                                                                  | ✗      | ✓         | ✓           | ✓ (except for some economic offences)                 | ✗                                                                               | ✗                       |
| Adequate prevention procedures defence                                                                                   | ✗                             | ✓                                                                                  | ✗      | ✗         | ✗           | ✗                                                     | ✓                                                                               | ✗                       |

<sup>289</sup> Economic Crime and Corporate Transparency Act s 196(1).  
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