



# Protecting your Position

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Commonwealth laws imposing  
personal liability on directors  
and officers

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MinterEllison

## About the Authors



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Steven has strong research skills which he has put to good use in the corporate governance context in preparing the *Protecting your Position* series with Bruce Cowley where he has undertaken a complete review of all laws imposing personal liability on directors and officers in Australia. Through that process he has gained a thorough understanding of different models of corporate governance used in Australia and in other jurisdictions.

Steven's practice involves advising both domestic and foreign investors on establishing businesses in Australia and undertaking acquisitions in Australia.

# Commonwealth laws imposing personal liability on directors and officers

Introduction	2	3 Summary of Types of Provisions	7
Overview	4	3.1 Type 1 Provision	7
1 Definitions	4	3.2 Type 2 Provision	8
2 How to Read this Publication	6	4 Aiding and abetting provisions	9
2.1 Provisions	6	Commonwealth laws imposing personal liability on directors and officers	10
2.2 Who is liable?	6		
2.3 Is the liability automatic?	6		
2.4 Defence of 'Due Diligence'	6		
2.5 Defence of 'Unable to Influence'	6		
2.6 Additional Defences	6		
2.7 Onus of Proof for Defence	6		
2.8 Type of Offence	6		

# Introduction

Welcome to the third edition of Protecting your Position in relation to the laws of the Commonwealth of Australia.

In recent years, there has been a growing concern by company directors and officers regarding the seeming explosion of legislation at Commonwealth, State and Territory level that imposes personal liability on directors and officers for failing to ensure that the corporate vehicles they manage comply with the law. Prior to the Council of Australian Governments (COAG) reform process, there were well over 700 laws at Commonwealth, State and Territory level imposing personal liability on company directors and officers for the actions of their companies. These were in addition to duties imposed by the *Corporations Act 2001* (Cth).

In the last few years we have seen the Commonwealth and a number of States announce the repeal or modification of many laws imposing personal liability on company directors and officers in response to the COAG review. So far, reforms to director liability laws have been announced or introduced in Queensland, New South Wales, Victoria, South Australia, Tasmania, the Australian Capital Territory and at a Commonwealth level.

The Commonwealth Government passed the *Personal Liability for Corporate Fault Reform Act 2012* (Cth). In broad terms, the Act amended some 15 statutes that imposed personal liability on directors and officers.

That being said, there are in excess of 30 Commonwealth statutes, which impose personal liability on directors and officers.

In addition, the differences in approach taken by each State and Territory and the fact that Western Australia and the Northern Territory have not proposed any amendments to laws imposing personal liability on directors and officers, means that three key policy issues remain.

The first is the desirability of a system which imposes personal liability on directors and officers (which allows for the imposition of various sanctions on those found guilty, ranging from imposition of fines to lengthy jail terms) in an ad hoc and inconsistent way across Australian jurisdictions. The extent of the inconsistency is considerable. MinterEllison research shows that although reforms may have reduced the number of types of provisions imposing personal liability within each State and Territory, there is still a substantial variation between the States and Territories which each have their own unique way of drafting its laws. Commonwealth law is different again. The consequence is that across Australia there are many hundreds of laws imposing personal liability on directors and officers, many of which are drafted in different terms, and with different defences available.

There is no doubt that this unnecessarily inconsistent legislative regime creates significant burdens for directors of companies carrying on businesses across a number of States or where their businesses are subject to significant regulation. Indeed, the Corporations and Markets Advisory Committee (CAMAC) in their Report entitled *Personal Liability for Corporate Fault*, released in September 2006, recommended substantial reform in the area, including that attempts be made to introduce a nationally uniform model provision which imposes personal liability on directors and officers.

## Introduction (cont'd)

The second issue of concern is that the classes of persons who can be liable for corporate statutory breaches can differ between statutes, and between laws in different jurisdictions. Under many Commonwealth laws, those who fall within the definition of 'Executive Officer' are made liable. This group includes not only directors, but also those who are concerned in or take part in management. This latter group can include a very wide group of personnel within a company and extend well beyond senior management.

The third significant area of concern for directors and officers is that some jurisdictions have retained provisions which impose strict liability on company directors and officers, thereby reversing the usual onus of proof in criminal proceedings by rendering directors and officers automatically liable if the corporation commits an offence, with the defendant having to prove that one of the statutory defences is available in order to escape from liability. As can be seen from a review of the legislation below, very few Commonwealth provisions provide any such defences. Where the provision does contain a defence, the defence often differs markedly between different statutes, so directors need to be aware that conduct which might exonerate them from liability under one Act may not provide protection from liability under another.

This means that although there has been significant reform in this area there is still some way to go in order for there to be a nationally consistent approach. The consequence of the current legislative approach is that, for the time being, in order to minimise liability, directors would be wise to:

- make an assessment of which Acts apply to the activities of their companies;
- understand what obligations the legislation imposes both upon the company and upon themselves;
- ensure adequate systems are in place so that the company does not contravene its obligations;
- take whatever steps they can to ensure that even if the company still breaches the law they can avail themselves of relevant defences (for example, setting up a robust due diligence process);
- identify which executives are likely to be exposed to personal liability under which Acts, ensure they are made aware of any potential risks and involve them in discussions about how to limit personal liability; and
- take appropriate steps to ensure that directors' and officers' insurance policies provide maximum protection for all those exposed to personal liability.

This publication is designed to assist directors in identifying those laws which may apply to their companies and which may expose them to personal liability, and to provide details of defences which might be available to them.

With the exception of environmental and occupational health and safety matters, regulators have not consistently prosecuted directors for corporate breaches. However, many laws allow them to do so and it is only likely to be a matter of time before we see an expansion in prosecutions of directors and other company officers.

# Overview

## 1 Definitions

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The following definitions are provided as an aid to understanding this publication.

**Yes, if a corporate breach is established** means liability is imposed on a person who is not the chief actor in respect of the offence but is nonetheless concerned with the perpetration of the offence by virtue of their position.

**agent** of a corporation means a person acting on behalf of a corporation.

**body corporate** means a corporation as defined in the *Corporations Act 2001* (Cth).

**chairperson** of directors means chairperson of the board of directors.

**company** means a company incorporated under the *Corporations Act 2001* (Cth).

**corporation** includes a body politic or corporate, and means:

- (a) a company; or
- (b) any body corporate (whether incorporated in this jurisdiction or elsewhere); or
- (c) an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose; and
- (d) not an exempt public authority; or
- (e) a corporation sole.

**director**, in relation to a corporation, means a person who:

- (a) is appointed to the position of a director; or
- (b) is appointed to the position of an alternate director and is acting in that capacity;

regardless of the name that is given to their position.

**employee** of a corporation means a person who is employed by a corporation.

**executive officer** of a corporation means:

- (a) each of the chairperson, managing director or other principal executive officer of the body corporate and every member of any executive, governing or management body of the body corporate (by whatever name called); and
- (b) every person concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

**manager** of a corporation means a person who is charged with the management or direction of a corporation.

**managing director** means a director of a company who is also its chief full-time executive employee.

**member of a governing body** means each of the persons composing a governing body.

## 1 Definitions (cont.)

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**officer** of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person;
  - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  - (ii) who has the capacity to affect significantly the corporation's financial standing; or
  - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation). or
- (c) a receiver, or receiver and manager, of the property of the corporation; or

- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

**onus of proof** means the legal obligation on a party who asserts a matter to adduce sufficient supporting evidence to satisfy the required standard of proof.

**primary liability** means liability is imposed directly on the person who is the chief actor in respect of the offence.

**public officer** of a company is the person who is the public officer of a company for the purposes of the *Income Tax Assessment Act 1936* (Cth).

**secretary**, in relation to a corporation, includes any person performing the duties of secretary of the corporation.



## 2 How to Read This Publication

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This document is divided into the following columns.

### 2.1 Provisions

This column lists the Commonwealth Acts imposing personal liability on directors and officers in alphabetical order with references to the relevant sections within each Act and a brief overview of the content of each section.

### 2.2 Who is liable?

This column details the person or party within the corporation who is liable under the relevant provision.

### 2.3 Is the liability automatic?

This column details whether the liability imposed is automatic, such that the person or party within the corporation is deemed to be liable when the corporation contravenes the relevant Act, part of the Act or section of the Act, or the liability is not automatic and arises only in prescribed circumstances.

### 2.4 Defences

This column notes whether there is a defence of 'due diligence', 'unable to influence' or any additional defences under the relevant provision.

#### (a) Defence of 'Due Diligence'

Whilst the wording of this defence may vary from Act to Act, the defence essentially applies where the relevant party was in a

position to influence the conduct of the corporation in relation to the offence and has exercised reasonable diligence to ensure the corporation complied with the provision.

#### (b) Defence of 'Unable to Influence'

A defence of being 'unable to influence' refers to provisions where it is a defence for the relevant party to prove that they were not in a position to influence the conduct of the corporation in relation to the offence. Note that the wording of this defence may vary from Act to Act.

#### (c) Additional Defence

Any defences to the relevant provisions, in addition to defence of 'due diligence' and being 'unable to influence' are listed under this heading.

### 2.5 Onus of Proof for Defence

The onus of proof refers to the legal obligation on a party who asserts a matter to adduce sufficient supporting evidence to satisfy the required standard of proof. In all of the provisions detailed in this publication, the onus of proof is on the accused to establish a defence.

### 2.6 Type of Provision

In this column, the provisions are categorised in accordance with the 'Summary of Types of Provisions' set out below.



## 3 Summary of Types of Provisions

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There are essentially two types of Commonwealth statutory provisions which impose personal liability on individuals in corporations.

### 3.1 Type 1 Provision

Type 1 provisions provide that directors and officers will be deemed liable where the corporation contravenes a provision of the Act. There are varying elements of the provisions and defences but broadly all the provisions are direct liability provisions.

An example of this type of provision is section 217 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*, which provides that:

#### **217 Civil penalties for executive officers of bodies corporate**

- (1) If:
- (a) a body corporate contravenes a civil penalty provision; and
  - (b) an executive officer of the body corporate knew that, or was reckless or negligent as to whether, the contravention would occur; and
  - (c) the officer was in a position to influence the conduct of the body corporate in relation to the contravention; and
  - (d) the officer failed to take all reasonable steps to prevent the contravention;
- the officer contravenes this subsection.

- (2) For the purposes of subsection (1), the officer is reckless as to whether the contravention would occur if:
  - (a) the officer is aware of a substantial risk that the contravention would occur; and
  - (b) having regard to the circumstances known to the officer, it is unjustifiable to take the risk.
- (3) For the purposes of subsection (1), the officer is negligent as to whether the contravention would occur if the officer's conduct involves:
  - (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
  - (b) such a high risk that the contravention would occur; that the conduct merits the imposition of a pecuniary penalty.

#### *Civil penalty provision*

- (4) Subsection (1) is a civil penalty provision.

### 3.2 Type 2 Provision

Type 2 provisions provide that directors and officers will be deemed liable where the corporation contravenes a provision of the Act and the officer has some level of direct involvement in the Act.

An example of this type of provision is section 201 of Schedule 1 (National Credit Code) of the National Consumer Credit Protection Act 2009, which provides that:



### 3 Summary of Types of Provisions (cont'd)

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#### **201 Offences by corporations**

- (1) If a corporation contravenes a provision of this Code or the regulations, each officer of the corporation is taken to have contravened the provision if the officer knowingly authorised or permitted the contravention.
- (2) An officer of a corporation may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.
- (3) Nothing in this section affects the liability imposed on a corporation for an offence committed by the corporation against this Code or the regulations.
- (4) In this section:  
“**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

## 4 Aiding and abetting provisions

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There are also a range of provisions which impose accessorial liability upon on those persons who are involved in an offence, for example, where they have aided or abetted the commission of the offence. These provisions are not specific to officers of corporations, rather they are general provisions and have not been included in this document. These provisions include the following:

- *Age Discrimination Act 2004*, section 56;
- *Australian Securities and Investments Commission Act 2001*, sections 12GB, 12GBA, 12GNB;
- *Competition and Consumer Act 2010*, section 76;
- *Crimes (Taxation Offences) Act 1980*, sections 5(1), 5(2), 6(1), 6(2), 7(1), 7(2), 8;
- *Customs Act 1901*, section 236,
- *Disability Discrimination Act 1992*, section 122;
- *Environment Protection and Biodiversity Conservation Act 1999*, section 484;
- *Environment Protection (Sea Dumping) Act 1981*, section 10F;
- *Fair Work Act 2009*, section 550;
- *Fuel Quality Standards Act 2000*, section 65B;
- *Great Barrier Reef Marine Park Act 1975*, sections 38FA, 35FD;
- *Health Insurance Act 1973*, section 129AA;
- *Illegal Logging Prohibition Act 2012*, section 71;
- *National Greenhouse and Energy Reporting Act 2007*, section 33;
- *National Vocational Education and Training Regulator Act 2011*, section 138;
- *Navigation Act 2012*, section 301;
- *Olympic Insignia Protection Act 1987*, section 37;
- *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*, section 65AB;
- *Paid Parental Leave Act 2010*, section 145;
- *Personal Property Securities Act 2009*, section 224;
- *Personally Controlled Electronic Health Records Act 2012*, section 90;
- *Product Stewardship Act 2011*, section 44;
- *Resale Royalty Right for Visual Artists Act 2009*, section 42;
- *Road Safety Remuneration Act 2012*, section 53;
- *Sex Discrimination Act 1984*, section 105;
- *Stronger Futures in the Northern Territory Act 2012*, section 86;
- *Superannuation Industry (Supervision) Act 1993*, section 194;
- *Telecommunications Act 1997*, section 139(2), 372B, 372C, 372E, 372F, 372G, 372H, 372L, 372NA;
- *Tertiary Education Quality and Standards Agency Act 2011*, section 116;
- *Therapeutic Goods Act 1989*, section 42YC;
- *Tobacco Advertising Prohibition Act 1992*, section 15A;
- *Tobacco Plain Packaging Act 1992*, section 15A;
- *Trade Marks Act 1995*, section 150;
- *Veterans' Entitlements Act 1986*, section 93D(6);
- *Water Act 2007*, section 149;
- *Water Efficiency Labelling and Standards Act 2005*, section 44M; and
- *Work Health and Safety Act 2011*, section 256.

Commonwealth laws  
imposing personal liability  
on directors and officers

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Banking Act 1959</b>  <b>s 11CG(2):</b>                      Noncompliance with a direction.</p>	<p>An officer of an authorised deposit taking institution (ADI) or an authorised non-operating holding company (NOHC) who:</p> <p>(a) fails to take reasonable steps to ensure that the ADI or NOHC complies with a direction given to it under Subdivision A (Preliminary) or B (Declaration of ADI) or section 17 (APRA may remove an auditor of an ADI), 23 (APRA may remove a director or senior manager of an ADI or authorised NOHC) or 29 (Restrictions on issuing covered bonds—APRA directions); and</p> <p>(b) their duties include ensuring that the ADI or NOHC complies with the direction, or with a class of directions that includes the direction.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<p><b>s 13Q:</b>                      Noncompliance with a recapitalisation direction.</p>	<p>An officer who:</p> <p>(a) refuses or fails to take reasonable steps to ensure that the ADI complies with a recapitalisation direction given to the ADI; and</p> <p>(b) whose duties include ensuring that the ADI complies with the direction, or with a class of directions that includes the direction.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<b>s 14A:</b> ADI statutory manager's powers and functions.	A person who is or has been an officer of an ADI where: (a) there is an ADI statutory manager in relation to the ADI; (b) under section 14A(2), the ADI statutory manager requires the person to give information or to produce books, accounts or documents; and (c) the person fails to comply with the requirement.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>s 16AL(4):</b> Enforcing requirement for assistance or information.	An officer who: (a) fails to take reasonable steps to ensure that the ADI complies with a requirement made of it under section 16AJ (Requiring assistance) or section 16AK(1) (Obtaining information relevant to determining and paying entitlements); and (b) whose duties include ensuring that the ADI complies with the requirement.	No, the onus is on the prosecution to prove the required elements.	<i>Additional Defence:</i> Liability does not apply to an officer who is a liquidator (including a provisional liquidator) of the ADI.	Onus on the accused to establish a defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 16BA: Requirement for auditors to give information about ADIs.	<p>A director or senior manager of an ADI, an authorised NOHC or each of their subsidiaries, or if an ADI is a subsidiary of a foreign corporation (in certain circumstances) who:</p> <p>(a) knows that there are reasonable grounds for believing a thing referred to in section 16BA(2) (Matters requiring immediate notice) or 16BA(6) (Matters requiring notice as soon as practicable);</p> <p>(b) informs an auditor of the Body Corporate that the Body Corporate has informed APRA in writing of the thing; and</p> <p>(c) the Body Corporate has not done so.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 16E: Giving false or misleading information to auditor.	An officer of a Body Corporate that is an ADI or authorised NOHC who: <ul style="list-style-type: none"> <li>(a) gives information, or allows information to be given, to an auditor of the Body Corporate;</li> <li>(b) the information relates to the affairs of the Body Corporate; and either               <ul style="list-style-type: none"> <li>(i) the person knows that the information is false or misleading in a material particular or is missing something that makes the information misleading in a material respect; or</li> <li>(ii) the person did not take reasonable steps to ensure that the information was not false or misleading in a material particular or was not missing something that makes the information misleading in a material respect.</li> </ul> </li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
s 52E: Confidentiality requirement for company, company officers and employees and auditors.	A director or senior manager of the Body Corporate who discloses information which qualifies for protection under Part VIA (Protections in relation to information) Division 1 (Protection for whistleblowers) in the circumstances outlined.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1



## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Carbon Credits (Carbon Farming Initiative) Act 2011 s 217:</b> Civil penalties for executive officers of Bodies Corporate.</p>	<p>An executive officer who:</p> <ul style="list-style-type: none"> <li>(a) knew that, or was reckless or negligent as to whether, the contravention would occur;</li> <li>(b) was in a position to influence the conduct of the Body Corporate in relation to the contravention; and</li> <li>(c) failed to take all reasonable steps to prevent the contravention.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>Child Support (Registration and Collection) Act 1988 s 62:</b> Public officer of company.</p>	The public officer of a Company, who is appointed as such for the purposes of s 252 of the Income Tax Assessment Act 1936.	Yes, if a corporate breach is established.	N/A	N/A	Type 1
<p><b>Classification (Publications, Films and Computer Games) Act 1995 s 104:</b> Liability of Body Corporate managers.</p>	<p>Body Corporate managers and any State/Territory Body Corporate manager for the place in which the offence is committed where:</p> <ul style="list-style-type: none"> <li>(a) the Body Corporate commits an offence against this Part;</li> <li>(b) they knew that the offence would be committed;</li> <li>(c) they were in a position to influence the conduct of the Body Corporate in relation to the commission of the offence; and</li> <li>(d) failed to take all reasonable steps to prevent the commission of the offence.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> s 265-1:</p> <p>Care and diligence – civil obligation only.</p>	<p>Directors and other officers of an Aboriginal and Torres Strait Islander Corporation who fail to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if that reasonable person:</p> <p>(a) were a director or officer of an Aboriginal and Torres Strait Islander Corporation in the Corporation's circumstances; and</p> <p>(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.</p>	<p>No, the onus is on the prosecution to prove the required elements.</p>	<p><i>Additional Defence:</i></p> <p>The person who makes a business judgment is taken to meet the requirements this section, and the person's equivalent duties at common law and in equity, in respect of the judgment if he or she:</p> <p>(a) makes the judgment in good faith for a proper purpose;</p> <p>(b) does not have a material personal interest in the subject matter of the judgment;</p> <p>(c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and</p> <p>(d) rationally believes that the judgment is in the best interests of the Corporation.</p> <p>The person's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in the person's position would hold.</p>	<p>Onus on the accused to establish a defence.</p>	<p>Type 1</p>

Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
			<p>A person who is a director or other officer, or an employee, of an Aboriginal and Torres Strait Islander Corporation that is a registered native title Body Corporate does not contravene the section, and does not breach the person's equivalent duties at common law and in equity, merely because of doing (or refraining from doing) a particular act if the person does (or refrains from doing) the act:</p> <ul style="list-style-type: none"> <li>(a) in good faith; and</li> <li>(b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the Corporation complies with a Native Title legislation obligation.</li> </ul>		

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 265-5: Good faith – civil obligations.	Directors and other officers of an Aboriginal and Torres Strait Islander Corporation who fail to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation and for a proper purpose.	No, the onus is on the prosecution to prove the required elements.	<p><i>Additional Defence:</i></p> <p>A person who is a director or other officer, or an employee, of an Aboriginal and Torres Strait Islander Corporation that is a registered native title Body Corporate does not contravene the section, and does not breach the person's equivalent duties at common law and in equity, merely because of doing (or refraining from doing) a particular act if the person does (or refrains from doing) the act:</p> <ul style="list-style-type: none"> <li>(a) in good faith; and</li> <li>(b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the Corporation complies with a Native Title legislation obligation.</li> </ul> <p>A Director of an Aboriginal and Torres Strait Islander Corporation that is a wholly-owned subsidiary of a Body Corporate is taken to act in good faith in the best interests of the subsidiary if:</p> <ul style="list-style-type: none"> <li>(a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding Body Corporate;</li> </ul>	Onus on the accused to establish a defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
			<ul style="list-style-type: none"> <li>(c) the director acts in good faith in the best interests of the holding Body Corporate; and</li> <li>(d) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.</li> </ul>		
<p><b>s 265-10:</b> Use of position – civil obligations.</p>	<p>Directors, secretaries and other officers and employees of an Aboriginal and Torres Strait Islander Corporation who improperly uses their position to:</p> <ul style="list-style-type: none"> <li>(a) gain an advantage for himself or herself or someone else; or</li> <li>(b) cause detriment to the corporation.</li> </ul>	<p>No, the onus is on the prosecution to prove the required elements.</p>	<p><i>Additional Defence:</i> A person who is a director or other officer, or an employee, of an Aboriginal and Torres Strait Islander Corporation that is a registered native title Body Corporate does not contravene the section, and does not breach the person's equivalent duties at common law and in equity, merely because of doing (or refraining from doing) a particular act if the person does (or refrains from doing) the act:</p> <ul style="list-style-type: none"> <li>(a) in good faith; and</li> <li>(b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a Native Title legislation obligation.</li> </ul>	<p>Onus on the accused to establish a defence.</p>	<p>Type 1</p>

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 265-15: Use of information – civil obligations.	Directors, secretaries and other officers and employees of an Aboriginal and Torres Strait Islander Corporation who improperly use information to: (a) gain an advantage for himself or herself or someone else; or (b) cause detriment to the corporation.	Directors, secretaries and other officers and employees of an Aboriginal and Torres Strait Islander Corporation who improperly use information to: (a) gain an advantage for himself or herself or someone else; or (b) cause detriment to the corporation.	A person who is a director or other officer, or an employee, of an Aboriginal and Torres Strait Islander Corporation that is a registered native title Body Corporate does not contravene the section, and does not breach the person's equivalent duties at common law and in equity, merely because of doing (or refraining from doing) a particular act if the person does (or refrains from doing) the act: (a) in good faith; and (b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a Native Title legislation obligation.	Onus on the accused to establish a defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 265-25(1): Good faith – Directors and other officers.	Directors and other officers of an Aboriginal and Torres Strait Islander Corporation who is: (a) is reckless; or (b) is intentionally dishonest; and (c) fails to exercise his or her powers and discharge his or her duties: (i) in good faith in the best interests of the Corporation; or (ii) for a proper purpose.	No, the onus is on the prosecution to prove the required elements.	<i>Additional Defence:</i> A director or other officer of an Aboriginal and Torres Strait Islander Corporation that is a registered native title Body Corporate does not contravene the section merely because of doing (or refraining from doing) a particular act if the director or other officer does (or refrains from doing) the act: (a) in good faith; and (b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a Native Title legislation obligation.	Onus on the accused to establish a defence.	Type 1
s 265-25(3): Use of position – Directors, other officers and employees.	Directors, other officers or employees of an Aboriginal and Torres Strait Islander Corporation who uses his or her position dishonestly: (a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the corporation; or (b) recklessly as to whether the use may result in him or her or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 265-25(4): Use of information – directors, other officers and employees.	Directors, other officers or employees of an Aboriginal and Torres Strait Islander Corporation who uses company information dishonestly: <ul style="list-style-type: none"> <li>(a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the corporation; or</li> <li>(b) recklessly as to whether the use may result in him or her or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
s 265-40: Responsibility of secretaries for certain contraventions.	Secretary of an Aboriginal and Torres Strait Islander Corporation if the Corporation contravenes: <ul style="list-style-type: none"> <li>(a) section 69-20(1) or (2) (requirement to lodge copy of constitutional changes);</li> <li>(b) section 88-1 (requirement to lodge material about change of name);</li> <li>(c) section 112-5(5), (6) or (7) (requirements about registered office);</li> <li>(d) section 180-35 (requirement to give copy of register of members or register of former members);</li> <li>(e) section 304-5(1), (3), (5) or (6) (requirement to lodge details of Directors and secretaries);</li> <li>(f) section 330-10 (requirement to lodge general report); or</li> <li>(g) section 348-1 (requirement to lodge annual report).</li> </ul>	Yes, if a corporate breach is established.	<i>Defence of 'Due Diligence':</i> A person does not contravene the section if they show that they took all reasonable steps to ensure that the corporation complied with the section.	Onus on the accused to establish a defence.	Type 1



## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 265-50: Responsibility for actions of delegate.	Directors of an Aboriginal and Torres Strait Islander Corporation for the improper exercise of power by a delegate under section 274-10 (Delegation).	Yes, if a corporate breach is established.	<i>Defence of 'Due Diligence':</i> A person is not responsible under the section if: (a) the person believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on Directors of the Corporation by this Act and the Corporation's constitution (if any); and (b) the person believed: (i) on reasonable grounds; (ii) in good faith; and (iii) after making proper inquiry if the circumstances indicated the need for inquiry; that the delegate was reliable and competent in relation to the power delegated.	Onus on the accused to establish a defence.	Type 1
s 268-1: Material personal interest – director's duty to disclose.	Directors of an Aboriginal and Torres Strait Islander Corporation who has a material personal interest in a matter that relates to the affairs of the corporation and fails to give the other directors' notice of the interest unless section 268-1(3) (Material personal interest – director's duty to disclose) or section 268-5 (Interest as common law holder of native title) says otherwise.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 268-20: Restrictions on voting.	A director of an Aboriginal and Torres Strait Islander Corporation who has a material personal interest in a matter being considered at a directors' meeting and: (a) is present while the matter is being considered at the meeting; or (b) votes on the matter.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
s 271-1: Directors liable for debts and other obligations incurred by corporation as trustee.	Directors of an Aboriginal and Torres Strait Islander Corporation when it incurs a liability while acting, or purporting to act, as trustee, are liable to discharge the whole or a part of the liability if the Corporation: (a) has not discharged, and cannot discharge, the liability or that part of it; and (b) is not entitled to be fully indemnified against the liability out of trust assets solely because of one or more of the following: (i) a breach of trust by the Corporation; (ii) the corporation's acting outside the scope of its powers as trustee; (iii) a term of the trust denying, or limiting, the Corporation's right to be indemnified against the liability.	Yes, if a corporate breach is established.	<i>Additional Defence:</i> The person is not liable under the section if the person would be entitled to have been fully indemnified by one of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred. The person is not liable under section 271-1(1) merely because of doing (or refraining from doing) a particular act if the director does (or refrains from doing) the act: (a) in good faith; and (b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a Native Title legislation obligation.	Onus on the accused to establish a defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<b>s 304-10(1):</b> Director, alternate director, secretary and contact person must give information to corporation.	Directors, alternate directors and secretary of an Aboriginal and Torres Strait Islander Corporation who fails to give the corporation any information the corporation needs to comply with section 304-5(1) (Notice of name and address of directors and secretaries to the Registrar – New directors or secretaries) or 304-5(3) (Notice of name and address of directors and secretaries to the Registrar – New alternate directors) within 14 days after his or her initial appointment unless he or she has previously given the information to the corporation.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>s 304-10(2):</b> Director, alternate director, secretary and contact person must give information to corporation.	Directors, alternate directors and secretary of an Aboriginal and Torres Strait Islander Corporation who fails to give the corporation any information the corporation needs to comply with section 304-5(5) (Notice of name and address of directors and secretaries to the Registrar – Changes in details) within 14 days after any change in his or her personal details.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>s 345-1:</b> Directors and officers of controlled entity to give information.	If a an Aboriginal and Torres Strait Islander Corporation has to prepare a consolidated financial report, directors and officers who fail to give the corporation all information requested that is necessary to prepare the consolidated financial report.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Dental Benefits Act 2008</b> s 51:</p> <p>Strict liability offence – false or misleading statements by employees etc.</p>	<p>Every Director, Secretary or Manager of the Corporation, a receiver, receiver and manager, liquidator appointed in a voluntary winding up (first person) who:</p> <ul style="list-style-type: none"> <li>(a) is an employee, associate or agent of another person (second person);</li> <li>(b) the second person makes an oral or written statement (claim statement);</li> <li>(c) the claim statement is false or misleading in a material particular;</li> <li>(d) the claim statement is capable of being used in connection with a claim for dental benefit;</li> <li>(e) the material particular in respect of which the claim statement is false or misleading is substantially based upon another statement (the employee statement);</li> <li>(f) the employee statement was made by the first person: <ul style="list-style-type: none"> <li>(i) to the second person; or</li> <li>(ii) to an agent of the second person; and</li> </ul> </li> <li>(g) the employee statement was false or misleading in a material particular.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 53: Offence – statement based on statement that employee etc. knows is false or misleading.	<p>Every Director, Secretary or Manager of the Corporation, a receiver, receiver and manager, liquidator appointed in a voluntary winding up (first person) where:</p> <ul style="list-style-type: none"> <li>(a) the first person is an employee, associate or agent of another person (second person);</li> <li>(b) the second person makes an oral or written statement (claim statement);</li> <li>(c) the claim statement is false or misleading in a material particular;</li> <li>(d) the claim statement is capable of being used in connection with a claim for dental benefit;</li> <li>(e) the material particular in respect of which the claim statement is false or misleading is substantially based upon another statement (employee statement);</li> <li>(f) employee statement was made by the first person: <ul style="list-style-type: none"> <li>(i) to the second person; or</li> <li>(ii) to an agent of the second person;</li> </ul> </li> <li>(g) the first person knew that the employee statement was false or misleading in a material particular; and</li> <li>(h) the first person knew that, or was reckless as to whether, the employee statement would be used in the preparation of the claim statement.</li> </ul>				

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Environment Protection and Biodiversity Conservation Act 1999</b></p> <p><b>s 494:</b></p> <p>Civil penalties for executive officers of Bodies Corporate.</p>	<p>Executive officers where a Body Corporate contravenes a civil penalty provision and who:</p> <p>(a) knew that, or was reckless or negligent as to whether, the contravention would occur;</p> <p>(b) was in a position to influence the conduct of the body in relation to the contravention; and</p> <p>(c) failed to take all reasonable steps to prevent the contravention.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>s 495:</b></p> <p>Criminal liability of executive officers of Bodies Corporate. Applies to offences against the following provisions:</p> <p>(a) section 15A (Offences relating to declared World Heritage properties);</p> <p>(b) section 15C (Offences relating to National Heritage places);</p> <p>(c) section 17B (Offences relating to declared Ramsar wetlands);</p> <p>(d) section 18A (Offences relating to threatened species etc);</p> <p>(e) section 20A (Offences relating to listed migratory species);</p>	<p>An executive officer where they:</p> <p>(a) knew that, or was reckless or negligent as to whether, the contravention would occur;</p> <p>(b) were in a position to influence the conduct of the body in relation to the contravention; and</p> <p>(c) failed to take all reasonable steps to prevent the contravention.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
(f)	section 22A (Offences relating to nuclear actions);				
(g)	section 24A (Offences relating to marine areas);				
(h)	section 27A (Offences relating to Commonwealth land);				
(i)	section 27C (Offences relating to Commonwealth Heritage places overseas);				
(j)	section 142A (Offence of breaching conditions on approval);				
(k)	section 390SB (Offence – declared commercial fishing activities);				
(l)	section 489 (Providing false or misleading information to obtain approval or permit);				
(m)	section 490 (Providing false or misleading information in response to a condition on an approval or permit); or				
(n)	section 491 (Providing false or misleading information to authorised officer etc).				

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><i>Fair Work (Registered Organisations) Act 2009</i>  <b>s 285:</b>                      Care and diligence – civil obligation only.</p>	Officers of an organisation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise.	No, the onus is on the prosecution to prove the required elements.	<p><i>Additional Defence:</i>                      An officer will meet the requirements for any judgement call made if they:</p> <ul style="list-style-type: none"> <li>(a) make the decision in good faith for a proper purpose;</li> <li>(b) do not have a material personal interest in the subject matter of the decision;</li> <li>(c) inform themselves about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and</li> <li>(d) rationally believe that the judgment is in the best interests of the organisation.</li> </ul>	Onus on the accused to establish a defence.	Type 1
<p><b>s 286:</b>                      Good faith – civil obligations.</p>	An officer of an organisation or branch who does not discharge their duties in good faith in the best interests of the organisation and for a proper purpose.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>s 287:</b>                      Use of position – civil obligations.</p>	An officer of an organisation or a breach who improperly uses their position to gain an advantage for themselves or someone else or causes detriment to the organisation or another person.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1



## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<b>s 288:</b> Use of information – civil obligations.	An officer who obtains information through the course of their position, and uses the information to gain an advantage for themselves or someone else or cause detriment to the organisation or to another person.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>s 293:</b> Responsibility for actions of other person.	An officer who delegates a power is responsible for the exercise of that power by the delegate.	No, the onus is on the prosecution to prove the required elements.	<p><i>Additional Defence:</i> An officer is not responsible if:</p> <ul style="list-style-type: none"> <li>(a) the officer believed on reasonable grounds at all times that the person to whom the power was delegated would exercise the power in conformity with the duties imposed on officers of the organisation or the branch by this Act or the Fair Work Act; and</li> <li>(b) the officer believed: <ul style="list-style-type: none"> <li>(i) on reasonable grounds; and</li> <li>(ii) in good faith; and</li> <li>(iii) after making proper inquiry if the circumstances indicated the need for inquiry;</li> </ul> </li> </ul> <p>that the person to whom the power was delegated was reliable and competent in relation to the power delegated.</p>	Onus on the accused to establish a defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<b>s 297:</b> Order or direction applying to organisation – civil obligation.	An officer or employee of the organisation who causes the organisation to contravene the order or direction made under the Act, knowing, or reckless as to whether the act would result in the contravention.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>s 299:</b> Order or direction applying to officer – civil obligation.	An officer who knowingly or recklessly contravenes the order or direction made under the Act.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>s 300:</b> Prohibition order or direction applying to officer – civil obligation.	Where there is an order in place prohibiting an officer from doing something, officers who do an act that would contravene the order or direction knowing or reckless as to whether the act would result in the contravention.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>Financial Sector (Collection of Data) Act 2001</b> <b>s 14:</b> Principal executive officer of financial sector entity (other than a superannuation entity) to notify the entity's governing body of a failure to provide reporting documents to APRA.	A principal executive officer of a financial sector entity who fails to notify the governing body of a failure to comply with reporting requirements.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><i>Foreign Acquisitions and Takeovers Act 1975</i>                      s 102(1):                      Liability of Officers of Corporations authorising or permitting contraventions.</p>	An Officer of a Corporation that authorised or permitted the commission of the offence by the Corporation.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<p>s 102(2):                      Liability of Officers of Corporations authorising or permitting contraventions.</p>	An Officer of a Corporation is liable to a civil penalty if: <ul style="list-style-type: none"> <li>(a) a civil penalty order under the Regulatory Powers Act is made against the Corporation in relation to a contravention of a civil penalty provision of this Act; and</li> <li>(b) the Officer authorised or permitted the contravention of the civil penalty provision by the Corporation.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>s 103:</b> Civil penalties for Officers of Corporations failing to prevent contraventions.</p>	<p>An Officer of a Corporation is liable to a civil penalty if:</p> <ul style="list-style-type: none"> <li>(a) the Corporation contravenes a civil penalty provision of this Act; and</li> <li>(b) the Officer knew that, or was reckless or negligent as to whether, the contravention would occur; and</li> <li>(c) the Officer was in a position to influence the conduct of the Corporation in relation to the contravention; and</li> <li>(d) the Officer failed to take all reasonable steps to prevent the contravention.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>Geneva Conventions Act 1957 s 15(6):</b> Use of Red Cross and other emblems, signs, signals, identity cards, insignia and uniforms.</p>	A director, manager, secretary or other officer of the Body Corporate, or a person purporting to act in any such capacity who consents to or connives to commit an offence.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Hazardous Waste (Regulation of Exports and Imports) Act 1989 s 40B(3):</b></p> <p>Liability of executive officers of Bodies Corporate – Offence –knowledge or recklessness. Applies to offences against the following provisions:</p> <p>(a) section 39 (Regulation of import of hazardous waste);</p> <p>(b) section 40 (Regulation of export of hazardous waste);</p> <p>(c) section 40A (Regulation of transit of hazardous waste); or</p> <p>(d) section 40AA (Regulation of sale of hazardous waste).</p>	<p>An executive officer who:</p> <p>(a) knew that, or was reckless as to whether, the contravention would occur;</p> <p>(b) was in a position to influence the conduct of the body in relation to the contravention; and</p> <p>(c) failed to take all reasonable steps to prevent the contravention.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>Health Insurance Act 1973 s 23DZZIN:</b></p> <p>Application of Division 2 (Civil penalty provisions involving requesters, providers and connected persons) to an executive officer of a Body Corporate.</p>	<p>Where the Body Corporate contravenes a civil penalty provision an executive officer who:</p> <p>(a) knew that the contravention would occur;</p> <p>(b) was in a position to influence the conduct of the body in relation to the contravention; and</p> <p>(c) failed to take all reasonable steps to prevent the contravention.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p>s 23DZZIT: Application of Division 3 (Offences involving requesters, providers and others) to an executive officer of a Body Corporate.</p>	<p>Where the Body Corporate commits an offence against the division, an executive officer who:</p> <ul style="list-style-type: none"> <li>(a) knew that the contravention would occur;</li> <li>(b) was in a position to influence the conduct of the body in relation to the contravention; and</li> <li>(c) failed to take all reasonable steps to prevent the contravention.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p>s 128A(2): False statements relating to Medicare benefits etc.</p>	<ul style="list-style-type: none"> <li>(a) A Director, Secretary, Manager or Employee;</li> <li>(b) a receiver and manager of any part of the undertaking of the Corporation appointed under a power contained in any instrument; or</li> <li>(c) a liquidator of the Corporation appointed in a voluntary winding up, where: <ul style="list-style-type: none"> <li>(a) the Company makes a statement (whether oral or in writing) that is false or misleading in a material particular;</li> <li>(b) the statement is capable of being used in connection with a claim for a benefit or payment under this Act;</li> <li>(c) the material particular in respect of which the statement is false or misleading is substantially based upon a statement made, either orally or in writing, to the Company or to their agent by a Director; and</li> <li>(d) the last-mentioned statement is false or misleading in a material particular.</li> </ul> </li> </ul>	No, the onus is on the prosecution to prove the required elements.	<p><i>Additional Defence:</i> The person did not know, and could not reasonably be expected to have known, that the statement was:</p> <ul style="list-style-type: none"> <li>(a) false or misleading in a material particular; or</li> <li>(b) capable of being used in connection with a claim for a benefit or payment under this Act.</li> </ul>	Onus on the accused to establish a defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 128B(2): Knowingly making false statements relating to Medicare benefits etc.	<ul style="list-style-type: none"> <li>(a) A Director, Secretary, Manager or Employee;</li> <li>(b) a receiver and manager of any part of the undertaking of the Corporation appointed under a power contained in any instrument; or</li> <li>(c) a liquidator of the Corporation appointed in a voluntary winding up.</li> </ul> <p>where:</p> <ul style="list-style-type: none"> <li>(a) the Company makes a statement (whether oral or in writing) that is false or misleading in a material particular;</li> <li>(b) the statement is capable of being used in connection with a claim for a benefit or payment under this Act;</li> <li>(c) the material particular in respect of which the statement is false or misleading is substantially based upon a statement made, either orally or in writing, to the Company or to their agent by the Director;</li> <li>(d) the last-mentioned statement is false or misleading in a material particular; and</li> <li>(e) the Director knew, or had reasonable grounds to suspect, that the last-mentioned statement would be used in the preparation of a statement of the kind referred to in paragraph (b).</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 130: Officers to observe secrecy.	An officer who, either directly or indirectly, divulges or communicates to any person, any information with respect to the affairs of another person acquired by him or her in the performance of his or her duties, or in the exercise of his or her powers or functions.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<i>Higher Education Funding Act 1988</i> s 78: Secrecy.	<p>An officer who, either directly or indirectly, and either while the person is, or after the person ceases to be, an officer:</p> <p>(a) makes a record of any information in relation to the affairs of a second person; or</p> <p>(b) divulges or communicates to a second person any information in relation to the affairs of a third person;</p> <p>being information disclosed or obtained under or for the purposes of this Chapter 4 (Higher Education Contribution Scheme) and acquired by the person:</p> <p>(a) because of the person's appointment or employment by the Commonwealth or in the course of such employment;</p> <p>(b) because of the delegation to the person of powers or functions by the Commissioner or in the course of the exercise of such powers or performance of such functions; or</p> <p>(c) because of the person's office in or employment by an institution or in the course of the performance of the duties of such an office or in the course of such employment.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1



## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Higher Education Support Act 2003</b>  <b>s 179-10</b>                      Use of personal information.</p>	<p>An officer commits an offence if:</p> <ul style="list-style-type: none"> <li>(a) the officer either:                             <ul style="list-style-type: none"> <li>(i) discloses information; or</li> <li>(ii) makes a copy or other record of information;</li> </ul> </li> <li>(b) the information is personal information;</li> <li>(c) the information was acquired by the officer in the course of the officer's official employment; and</li> <li>(d) the disclosure did not occur, or the copy or record was not made, in the course of that official employment.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>Income Tax Assessment Act 1936</b>  <b>s 252:</b>                      Public officer of company.</p>	Public officers upon default of Company.	Yes, if a corporate breach is established.	N/A	N/A	Type 1
<p><b>Insurance Contracts Act 1984</b>  <b>s 11DA:</b>                      Supervisory powers – liability of Directors, employees and agents of insurers.</p>	Directors, employees and agents of an insurer who permits or authorises the insurer to engage in conduct and that conduct constitutes an offence against section 11C(2) or 11D(2) or (3).	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Life Insurance Act 1995</b>  <b>s 48:</b>                      Duty of Directors in relation to statutory funds.</p>	<p>Directors who do not exercise a duty to take reasonable care, and use diligence to see that the investment, administration and management of the assets of the fund, the life company:</p> <ul style="list-style-type: none"> <li>(a) complies with Part 4 (Statutory funds of life companies); and</li> <li>(b) gives priority to the interests of the owners and prospective owners of policies referable to the fund (over the interests of shareholders).</li> </ul>	<p>No, the onus is on the prosecution to prove the required elements.</p>	<p><i>Additional Defence:</i>                      An approval may be given under section 48(8) (Duty of directors in relation to statutory funds) subject to conditions relating to the complainants.                      A Director cannot be liable both under this section and section 50 (Liability of directors).</p>	<p>Onus on the accused to establish defence.</p>	<p>Type 1</p>
<p><b>s 50:</b>                      Liability of Directors.</p>	<p>Directors of the Company when the contravention occurred where:</p> <ul style="list-style-type: none"> <li>(a) APRA has given notice under section 49 of a contravention of Part 4 (Statutory funds of life companies);</li> <li>(b) the contravention resulted in a loss to the statutory fund; and</li> <li>(c) the Company has failed to comply with the notice within the period specified, or within the extended period under section 49(4) (APRA may give notice).</li> </ul>	<p>Yes, if a corporate breach is established.</p>	<p><i>Defence of 'Due Diligence':</i>                      It is a defence if the Director proves that he or she used due diligence to ensure that the Company complied with the notice.</p>	<p>Onus on the accused to establish defence.</p>	<p>Type 1</p>

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 88: Obligations of auditors of certain bodies to report to bodies and APRA.	Directors or senior managers of a Body Corporate that is a life company, registered NOHC or their subsidiary who: (a) know that: (i) there are reasonable grounds for believing that the body or a director of the body may have contravened this Act or any other Act; and (ii) the contravention is of such a nature that it may affect significantly the interests of the owners of policies issued by the body, if it is a life company, or by a life company that is related to the body; (b) inform an auditor of the body that the body has informed APRA in writing of the contravention; and (c) the body has not done so.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<b>s 98:</b> Actuary's obligation to report to APRA.	Directors or senior managers of a life company who: (a) know that: (i) there are reasonable grounds for believing that the Company or a Director of the Company may have contravened this Act or any other Act; and (ii) the contravention is of such a nature that it may affect significantly the interests of the owners of policies issued by the Company; (b) inform the appointed actuary of the Company that the Company has informed APRA in writing of the contravention; and the body has not done so.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<b>s 188:</b> Liability of Directors for loss to statutory fund.	Directors of the Company when the contravention occurred where: (a) a life company contravenes the Act in relation to a statutory fund; (b) the contravention results in a loss to the statutory fund; and (c) the Company is wound up.	Yes, if a corporate breach is established.	<i>Defence of 'Due Diligence':</i> It is a defence if the Director proves that he or she used due diligence to prevent the occurrence of such a contravention. <i>Additional Defence:</i> A Director cannot be made liable both under this section and under Division 2 (Registration of NOHCs of life companies) of Part 4 in respect of the same contravention.	Onus on the accused to establish defence.	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>National Consumer Credit Protection Act 2009</b></p> <p>Schedule 1: National Credit Code</p> <p>s 201:</p> <p>Offences by Corporations.</p>	Each Officer knowingly authorised or permitted the contravention by the Corporation.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<p><b>National Greenhouse and Energy Reporting Act 2007</b></p> <p>s 47:</p> <p>Civil penalties for executive officers of Bodies Corporate.</p>	<p>Where a Body Corporate contravenes a civil penalty provision, an Executive Officer who:</p> <ul style="list-style-type: none"> <li>(a) knew that, or was reckless or negligent as to whether the contravention would occur;</li> <li>(b) was in a position to influence the conduct of the Body Corporate in relation to the contravention; and</li> <li>(c) failed to take all reasonable steps to prevent the contravention.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>National Vocational Education and Training Regulator Act 2011</b> s 133: Personal liability of an Executive Officer of a registered training organisation – general.</p>	<p>Where a Corporation commits an offence an Executive Officer of a registered training organisation who:</p> <ul style="list-style-type: none"> <li>(a) knew that the offence would be committed;</li> <li>(b) was in a position to influence the conduct of the organisation in relation to the commission of the offence; and</li> <li>(c) failed to take all reasonable steps to prevent the commission of the offence.</li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>Primary Industries Research and Development Act 1989</b> s 76: Duties.</p>	An executive director of a Research and Development Corporation who does not act in accordance with policies or directives given by the corporation in conducting its affairs.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<p><b>Private Health Insurance Act 2007</b> s 84-5: Offence: Directors and Chief Executive Officers liable if systems not in place to prevent breaches.</p>	Directors and Chief Executive Officer of private health insurers who failed to exercise due diligence to ensure that adequate systems were in place to prevent the insurer from committing the offence under s84-1.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
s 152-10: Liability of Directors in relation to non-compliance with notices.	Directors of private health insurers where: <ul style="list-style-type: none"> <li>(a) the Council has given a notice to a private health insurer under section 152-5 (Notices to remedy contraventions) in respect of a contravention of Part 4-4 (Health benefits funds);</li> <li>(b) the contravention has resulted in a loss to a health benefits fund; and</li> <li>(c) the insurer has failed to comply with the notice within the period specified in it or within that period as extended under section 152-5(4) (Notices to remedy contraventions).</li> </ul>	Yes, if a corporate breach is established.	<i>Defence of 'Due Diligence':</i> A person is not liable under section 152-10(1) (Liability of directors in relation to non-compliance with notices) if the person proves that the or she used due diligence to ensure that the insurer complied with the notice.	Onus on the accused to establish a defence.	Type 1
s 293-1: Directors etc. to help managers.	Directors of private health insurers who fail to comply with the following: <ul style="list-style-type: none"> <li>(a) as soon as practicable after the external management or terminating management of a health benefits fund begins: <ul style="list-style-type: none"> <li>(i) deliver to the manager all records in the Director's possession that relate to the business of the fund, other than records that the Director is entitled to retain as against the manager and the insurer; and</li> <li>(ii) tell the manager of other existing locations;</li> </ul> </li> </ul>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
	<ul style="list-style-type: none"> <li>(b) within 7 days after external management or terminating management begins, give the manager a statement about the business and its financial circumstances; or</li> <li>(c) attend on the manager and give the manager information as they reasonably require.</li> </ul>				
<p><b>Private Health Insurance (Prudential Supervision) Act 2015</b> s 89: Liability of Directors in relation to non-compliance with notices.</p>	<p>If:</p> <ul style="list-style-type: none"> <li>(a) APRA has given a notice to a private health insurer under section 88 in respect of a contravention of Part 3 (Health Benefits Fund);</li> <li>(b) the contravention has resulted in a loss to a health benefits fund; and</li> <li>(c) the insurer has failed to comply with the notice within the period specified in it, or within that period as extended under subsection 88(2),</li> </ul> <p>the persons who were the Directors of the insurer when the contravention occurred are jointly and severally liable to pay the insurer an amount equal to the amount of the loss.</p>	Yes, if a corporate breach is established.	<p><i>Defence of 'Due Diligence'</i></p> <p>A person does not contravene the section if they prove that he or she used due diligence to ensure that the insurer complied with the notice.</p>	Onus on the accused to establish a defence.	Type 1



## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Renewable Energy (Electricity) Act 2000</b></p> <p><b>s 154N:</b></p> <p>Civil penalties for executive officers of Bodies Corporate.</p>	<p>An executive officer of a Body Corporate who:</p> <p>(a) knew that, or was reckless or negligent as to whether, the contravention would occur;</p> <p>(b) was in a position to influence the conduct of the Body Corporate in relation to the contravention; and</p> <p>(c) failed to take all reasonable steps to prevent the contravention.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p><b>Shipping Registration Act 1981</b></p> <p><b>s 74(5):</b></p> <p>Offences – general.</p>	A Director, Manager, Secretary or other Officer of the Corporation who is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the offence.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 2
<p><b>Superannuation Guarantee (Administration) Act 1992</b></p> <p><b>s 57:</b></p> <p>Public Officer of Company.</p>	The Public Officer of the Company is jointly liable with the Company for any penalty imposed.	Yes, if a corporate breach is established.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<p><b>Taxation Administration Act 1953</b> s 8Y: Liability of Officers etc. of Corporations.</p>	A person (by whatever name called and whether or not the person is an Officer) who is concerned in, or takes part in, the management of the Corporation.	Yes, if a corporate breach is established.	<p><i>Additional Defence:</i> The person:</p> <p>(a) did not aid, abet, counsel or procure the act or omission of the Corporation concerned; and</p> <p>(b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the Corporation.</p>	Onus on the accused to establish a defence.	Type 2
<p><b>Therapeutic Goods Act 1989</b> s 54B(1): Personal liability of an executive officer of a Body Corporate – general.</p>	<p>An executive officer of a Body Corporate who:</p> <p>(a) knew that the offence would be committed;</p> <p>(b) the officer was in a position to influence the conduct of the body in relation to the commission of the offence; and</p> <p>(c) the officer failed to take all reasonable steps to prevent the commission of the offence.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<p>s 54B(3): Personal liability of an executive officer of a Body Corporate – general.</p>	<p>An executive officer where:</p> <p>(a) the Body Corporate contravenes a civil penalty provision;</p> <p>(b) the officer knew that the contravention would occur;</p> <p>(c) the officer was in a position to influence the conduct of the body in relation to the contravention; and</p> <p>(d) the officer failed to take all reasonable steps to prevent the contravention.</p>	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

## Commonwealth laws imposing personal liability on directors and officers

Provision	Who is liable?	Is the liability automatic?	Defences	Onus of Proof for Defence	Type of Offence
<b>Veterans' Entitlements Act 1986</b> s 93E(6): Prohibited practices in relation to the rendering of pathology services.	An Officer, including: (a) a Director, Secretary, Manager or employee of the Corporation; (b) a receiver and manager of any part of the undertaking of the Corporation appointed under a power contained in any instrument; or (c) a liquidator of the Corporation appointed in a voluntary winding up, who intentionally authorised or permitted the commission of the offence.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1
<b>Water Act 2007</b> s 168: Civil penalties for executive officers of Bodies Corporate.	An executive officer of the Body Corporate who: (a) knew that, or was reckless or negligent as to whether, the contravention would occur; (b) the officer was in a position to influence the conduct of the body in relation to the contravention; and (c) the officer failed to take all reasonable steps to prevent the contravention.	No, the onus is on the prosecution to prove the required elements.	N/A	N/A	Type 1

***The information contained in this publication is intended only to provide a summary and general overview and is not intended to be comprehensive nor does it constitute legal advice. You should seek legal or other professional advice before acting or relying on any of the information contained in this publication.***

