

# Where director personal exposure comes from

The risks that attach to a director — not merely to the company.

One of the most misunderstood aspects of running a business is the assumption that the company structure completely protects the individuals behind it.

In reality, Australian directors carry a range of personal obligations and exposures that sit alongside the corporate structure. Some of these risks can be insured. Some can be mitigated operationally. Some cannot be transferred at all.

Understanding where director exposure originates is an important part of building a resilient business.

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## Duty

Every director owes a set of general legal duties that apply to virtually every decision they make.

These duties include:

- acting with care and diligence
- acting in good faith
- acting for a proper purpose
- avoiding improper use of position or information
- acting in the best interests of the company

These duties are codified under sections 180 to 184 of the Corporations Act and apply to every director regardless of company size.

## Evolving landscape for directors

The standard expected of directors continues to increase as businesses become more complex, more regulated, and more reliant on technology and governance systems.

Areas now regularly scrutinised include:

- cyber governance
- workplace culture
- financial oversight
- WHS governance
- ESG-related considerations
- regulatory compliance frameworks

Directors are increasingly expected to demonstrate not only that decisions were made, but that they were made thoughtfully, with appropriate information and oversight.

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*Importantly, director obligations are ongoing. They do not only arise during a crisis or insolvency event. They apply to everyday operational and strategic decisions alike. Good governance is no longer passive.*

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## Distress

When a company begins experiencing financial difficulty, the director's obligations evolve.

A director's focus can no longer be solely on the interests of shareholders or business growth. At a certain point, the interests of creditors become increasingly relevant. This is where insolvent trading risk emerges.

**Under Australian law, directors have a duty to prevent a company from incurring debts while insolvent, or where insolvency is reasonably suspected. This exposure is personal.**

The challenge is that insolvency is rarely a single moment. More often, it is a gradual deterioration:

- declining cash flow
- unpaid tax liabilities
- increasing creditor pressure
- inability to meet obligations as they fall due
- deteriorating forecasts
- reliance on extended payment arrangements

Many directors do not recognise the seriousness of the situation early enough.

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## Safe Harbour Framework

The Safe Harbour framework within the Corporations Act (2001) is a legal protection that can shield directors from personal insolvent trading liability if they take early, proactive steps to improve the company's financial position.

**Safe harbour protections depend heavily on:**

- taking advice from an appropriately qualified insolvency professional
- paying employee entitlements including superannuation on time
- keeping BAS and SGC lodgements current
- pursuing a course of action reasonably likely to lead to a better outcome.

**Silence and delay are rarely defensible strategies.**

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# Discipline

Some exposures bypass the corporate shield entirely

One of the most confronting realities for many directors is that certain liabilities can attach personally regardless of the company structure.

Director Penalty Notices (DPNs) are a significant example.

Under the DPN regime, unpaid obligations such as:

- PAYG withholding
- GST
- Superannuation Guarantee Charge (SGC)

can become personal liabilities of the director. Where company tax reporting is overdue, a lockdown DPN can attach personally to the director and is not extinguished by placing the company into administration

**Operational discipline.** No insurance policy can substitute for:

- accurate reporting
- timely lodgements
- strong financial controls
- cash flow awareness
- active oversight of obligations
- Record Keeping

Many director exposures do not arise from dishonesty or recklessness. They arise from:

- delay
- poor visibility
- lack of reporting discipline
- operational drift

The earlier governance weaknesses are identified, the more manageable the exposure usually becomes.

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## Documentation Is the Real Protection

Across all areas of director exposure, one principle consistently matters:

A defensible position is one that has been documented.

“Can the director demonstrate how and why decisions were made?”

Documentation is what transforms intention into evidence.

**In practice, this means:**

- board minutes
- records of decisions
- financial reporting
- evidence of advice received
- documented risk discussions
- governance frameworks
- escalation processes

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# Insurance plays a role – but not the only role

Insurance remains a vital component of director protection.

What Directors & Officers cover typically responds to:

- Defence costs
- Investigation costs
- Certain civil liabilities
- Regulatory proceedings

What sits outside any policy:

- Director Penalty Notices
- Criminal penalties
- Deliberate breaches of duty
- Certain regulatory fines

The strongest protection framework combines:

<b>Insurance</b>	<b>Governance</b>
<b>Financial discipline</b>	<b>Early escalation</b>
<b>Operational visibility</b>	<b>Documentation culture</b>

## In summary

The corporate structure remains an important protection mechanism. But it is not absolute.

Modern directors operate in an environment where accountability increasingly follows the individual, not merely the entity.

Understanding where personal exposure comes from is not about fear. It is about preparedness.

The directors who navigate risk best are rarely the ones who avoid difficult situations entirely.

They are usually the ones who:

- identify issues early
- seek advice early
- document decisions properly
- maintain operational discipline
- treat governance as an active responsibility rather than a passive formality

# Sources and further reading

The statistics and observations in this guide draw on the following sources. They are listed for readers who want to verify the figures or read further. All sources are publicly available.

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## AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS

### **Director Tools.**

The AICD publishes a free Director Tools series – short, plain-English summaries of the core director responsibilities, organised by topic (financial oversight, risk, governance, cyber, ESG, WHS). Particularly useful is the Risk management governance framework document and the AICD's annual Director Sentiment Index.

<https://www.aicd.com.au/tools-and-resources/director-tools/board.html>

## AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

### **Director Resources Hub.**

ASIC publishes a comprehensive set of plain-English director guidance covering the core duties under sections 180 to 184 of the Corporations Act, the insolvent trading regime, and the Safe Harbour framework. The guidance includes Regulatory Guide 217 (Duty to prevent insolvent trading: Guide for directors) which is the single most useful piece of regulator-published material on the topic and the one most cited in practice.

<https://www.asic.gov.au/for-business-and-companies/companies/company-officeholder-rules-and-changes/obligations-of-company-officeholders/>

## AUSTRALIAN TAX OFFICE

### **Director Penalty Notice - your obligations as a director.**

The ATO publishes specific guidance on the Director Penalty Notice regime – when notices are issued, what triggers a lockdown DPN versus a non-lockdown DPN, the 21-day remediation pathway, and the four statutory defences. This is the single best reference on the DPN-specific exposure named in the Discipline section of the document, and it is the regulator's own framing of the regime.

<https://www.ato.gov.au/individuals-and-families/paying-the-ato/if-you-don-t-pay/firmer-action-we-may-take/director-penalty-regime>

## SAFework NSW

### **Officer due-diligence under the Work Health and Safety Act.**

SafeWork NSW publishes guidance specifically on the officer due-diligence duty under section 27 of the WHS Act. Following the introduction of the NSW industrial manslaughter offence in June 2024, this material has been updated to reflect the personal criminal exposure now carried by officers of NSW-operating businesses.

<https://www.safework.nsw.gov.au/legal-obligations/employer-business-obligations/due-diligence>

General advice only. This guide is general information only. The sources above are publicly available and current at the time of publication.