

**DENTONS**

# **Laws and regulations governing corporations**

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# Laws and regulations governing corporations

## 1. Corporate governance

### Principles of good corporate governance

Australian law imposes a high standard of corporate governance on entities established in Australia, the directors who oversee their operation and on business conduct. These include the Corporations Act, various industry standards (which may be adopted voluntarily) and guidance issued by regulatory authorities (such as APRA's prudential standards).

For entities listed on the ASX, there are additional corporate governance requirements and guidelines, including the ASX Listing Rules and the Corporate Governance Council's Principles and Recommendations. The Corporate Governance Council's Principles and Recommendations set out eight principles as underlying good corporate governance.

#### The 8 Principles

- Lay solid foundations for management and oversight
- Structure the board to be effective and add value
- Instil a culture of acting lawfully, ethically and responsibly
- Safeguard the integrity of corporate reports
- Make timely and balanced disclosure
- Respect the rights of security holders
- Recognise and manage risk
- Remunerate fairly and responsibly

The ASX Corporate Governance Council has proposed a fifth edition of the Corporate Governance Principles and Recommendations (**Fifth edition**). The Fifth edition is expected to be published in early 2025 and ready for adoption in the financial year starting 1 July 2025. Key themes regarding the proposed changes in the Fifth edition include greater stakeholder engagement, disclosure of processes and targets related to corporate and financial reporting, and board diversity.

Listed entities are increasingly focused on governance of Environmental, Social and Governance (**ESG**) risks and are voluntarily reporting against international sustainability reporting frameworks, such as the Task Force on Climate-related Financial Disclosures recommendations. In early 2024, the Treasury released the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (Financial Climate Reporting Bill)*. The Financial Climate Reporting Bill introduces a proposed new climate-related financial disclosure regime which includes mandatory climate-related risks and opportunities disclosure requirements. Reporting obligations under the proposed regime will be phased in three groups, over a four-year period based on revenue, assets, number of employees and whether the entity has existing reporting obligations. The first phase for eligible large entities is planned to begin from 1 January 2025. Further details are at section 5.1.

## Duties of company directors and officers

Officers (which include directors) of Australian companies are subject to a range of duties imposed by the Corporations Act and at common law. The duties of directors and other officers include:

- A duty to act with due care, diligence and skill
- A duty to act in good faith in the best interests of the company, for a proper purpose, and not recklessly or dishonestly; a duty not to improperly use their position or information obtained during the course of their role
- A duty to prevent insolvent trading (directors only)
- Not to give a financial benefit to a related party without shareholder approval (public companies only)
- Fiduciary duties under the general law including to act with a reasonable degree of care and diligence, in good faith and for a proper purpose, not to personally profit without disclosure and/or shareholder consent, and not to have an undisclosed or unapproved conflict of interest

Directors and officers are also subject to duties under other laws. These include:

- To exercise due diligence to ensure compliance with occupational health and safety laws including having up-to-date knowledge of work health and safety matters, appropriate systems and resources and processes for risk minimisation.
- To ensure that the entity conducts a proper review of its finances and reports these to the regulators.

## 2. Disclosure obligations

### Financial and other reporting

All companies must keep accurate financial records. Certain Australian entities are required to lodge financial information with ASIC and, if listed, with the ASX.

The level of reporting depends on the size of the entity; for larger and listed vehicles, an annual audited financial report and a half-yearly audited report are required. There are rules surrounding the delivery of these reports to security holders and providing them electronically.

Small proprietary companies generally do not need to disclose financial reports to ASIC, whereas large proprietary companies do. If two of the following are satisfied, the proprietary company is a large proprietary company:

- Consolidated revenue for the financial year is  $\geq$ A\$50 million
- Value of the consolidated gross controlled assets at the end of the financial year is  $\geq$ A\$25 million
- The company and any entities it controls have more than 100 employees

For some smaller companies, there are financial disclosures that need to be made to ASIC, for example where the company is foreign owned.

Australia applies accounting standards which are consistent with international accounting standards. Directors are responsible for the financial reports.

## ASX continuous disclosure

All ASX listed entities have an obligation to continuously disclose price sensitive information to the market. Once an ASX listed entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately disclose that information to the ASX.

However, in accordance with the ASX Listing Rules, the continuous disclosure obligations mentioned above do not apply if:

- One or more of the following situations applies
- It would be a breach of law to disclose the information
- The information concerns an incomplete proposal or negotiation
- The information comprises matters of supposition or is insufficiently definite to warrant disclosure
- The information is generated for the internal management purposes of the entity
- The information is a trade secret
- The information is confidential and the ASX has not formed the view that the information has ceased to be confidential
- A reasonable person would not expect the information to be disclosed

## Other governance issues

Australia has strict laws and policies that prohibit insider trading in listed and unlisted securities and financial products. The ASX requires that a listed entity must have a securities trading policy in place which complies with the requirements set out in the ASX Listing Rules. The trading policy must include information on trading windows during which key management personnel (which would include and is not limited to all the directors of an entity and its senior executive) are generally prohibited from trading in its securities. Key management personnel is defined as persons who have the authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity. To keep the market fully informed, directors of listed entities are required to disclose their holdings in the entities and any trades that they undertake within a short period of the trade being done.

Australia has strict rules regarding insolvent trading. Directors need to be cautious not to breach these laws if an entity is in financial distress. Directors may face personal liability for certain debts which are incurred if they are a director at the time when the company incurs the debt, the company is insolvent at that time, or becomes insolvent by incurring that debt, and at that time there are reasonable grounds for suspecting that the company is insolvent or would become insolvent.

The Corporations Act contains safe harbour provisions which provide directors with a form of defence to insolvent trading if at a particular time after a person starts to suspect a company may become or be insolvent, they start developing one or more courses of action that are reasonably likely to lead to a better outcome for the company, and the debt is incurred directly or indirectly in connection with that course of action and during a specified time period.

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