

Personal Liability for Corporate Fault - Guidelines for applying the COAG Principles

1. Objective

Guidelines have been developed to assist in achieving the commitment of the Council of Australian Governments (COAG) to deliver a nationally-consistent and principles-based approach to the imposition of personal criminal liability for directors and other corporate officers as a consequence of a corporate offence.

In particular, the purpose of the Guidelines is to ensure that all Australian jurisdictions, and all agencies within those jurisdictions, interpret and apply the COAG-agreed principles for assessment of directors' liability provisions (the **COAG Principles**) consistently and in accordance with the intentions of COAG.

To that end, the Guidelines flesh out the COAG Principles (which are set out in section 3 and Annexure A), providing detailed guidance as to what each Principle means, and how it should be applied, in the broad range of legislative and regulatory contexts in which Directors' Liability Provisions might currently exist.

The Guidelines are set out in Section 4 of this document and provide a practical step-by-step approach for applying the COAG Principles. They are to be used both to:

- (a) review existing Directors' Liability Provisions, and where necessary to identify those that need to be repealed or amended in order to ensure consistency with the COAG Principles; and
- (b) ensure that no new Directors' Liability Provisions are introduced except in accordance with those Principles.

2. Introduction

For the purposes of the Guidelines, **Directors' Liability Provisions** refer to provisions that impose individual criminal liability¹ on directors or other corporate officers as a consequence of the corporation having committed some offence (the **Underlying Offence**), beyond the normal liability that applies to a person who directly commits, or who is an ordinary accessory to, the Underlying Offence.

The COAG Principles on Directors' Liability Provisions were adopted in December 2009, amid concerns that there appeared to be an increasing tendency for such provisions to be introduced as a matter of course and without proper justification, and because of a concern that inconsistencies in the standards of personal responsibility both within and across jurisdictions were resulting in undue complexity and a lack of clarity about responsibilities and requirements for compliance.

2.1 Direct liability

Neither the COAG Principles nor these Guidelines are concerned with circumstances where directors and other officers may be held criminally liable directly, where they personally commit the Underlying Offence or some other offence. Whilst as a matter of regulatory best-practice governments should be circumspect before imposing any new criminal offences, the COAG Principles are concerned only with Directors' Liability Provisions that hold directors and other corporate officers liable because an offence has been committed by the corporation.

2.2 Accessorial Liability

The Principles and the Guidelines are also not concerned with circumstances where directors and other officers may be held criminally liable in relation to an Underlying Offence as an accessory in accordance with the usual rules regarding accessorial liability.

A variety of statutory provisions exist that provide for a director or other officer to be liable if they were personally and directly complicit as an accessory in the corporation's offence.

There are numerous variations in the drafting of these provisions, depending upon the particular words used. For example, some provisions require proof that the director "aided, abetted, counselled or procured" the corporation's offence; others that the director "knowingly authorised or permitted" or was "knowingly involved" or "knowingly concerned" in the offence.

What is common to all of these provisions is that, for the director to be held liable, the prosecution must prove that the individual personally participated in the corporate contravention as an accessory. This requires proof, beyond reasonable doubt, that the individual knew the essential facts that constitute the corporate offence and, through his or her own act or omission, was a participant in that offence.

Normal accessorial liability provisions of this type are not objectionable in principle, and these are not "Directors' Liability Provisions" with which the COAG Principles are concerned. Indeed, even in the absence of a specific accessorial liability provision such liability may apply in any event either:

- (a) as a matter of common law, as accessorial liability generally applies to all offences unless expressly or impliedly excluded; or
- (b) in those jurisdictions which have a codified criminal law, by operation of a general complicity provision in the criminal code.

¹ The COAG Principles only address personal liability for criminal offences, and not civil penalty provisions. Particularly where civil penalty provisions take the same form as offence provisions, and the same conduct may lead to both the contravention of an offence and a civil penalty provision, jurisdictions may wish to consider adopting a consistent approach.

Although the COAG principles do not prevent jurisdictions from introducing new accessorial liability provisions which merely replicate or clarify normal common law principles, consideration should be given to whether this is necessary if those principles would apply in any event (either as a matter of common law or under the applicable criminal code). In particular, as a matter of parsimony in the application of criminal sanctions, if a jurisdiction's criminal code already contains a generally-applicable complicity provision then it will usually be unnecessary and undesirable to introduce new specific complicity provisions in other statutes where those provisions do no more than duplicate the general provision.

2.3 *Types of Directors' Liability Provisions*

The Directors' Liability Provisions that are relevant to applying the COAG Principles are those that go beyond normal accessorial liability.

Generally speaking these are provisions which extend liability by also holding directors liable where they have been negligent in relation to the corporation's contravention. While different language is sometimes used, what is common about these provisions is that they provide that a director or other officer will be liable if they were "negligent", or failed to take "reasonable steps", or failed to exercise "due diligence", to avoid or prevent the corporation's contravention.

Existing Directors' Liability Provisions can be broadly categorised into three types depending upon the extent to which the onus of establishing that the director was or was not negligent falls to the prosecution or the defence.

- **Type 1**

Generally, in any criminal offence the prosecution bears the legal burden of proving each element of the offence. This means that the prosecution must adduce sufficient evidence to prove each element of the offence beyond reasonable doubt.

Under Type 1 provisions, the failure of the director to take reasonable steps is an element of the offence which the prosecution must prove, beyond reasonable doubt, in order to secure a conviction. The director is presumed to be innocent (i.e. is presumed to have taken reasonable steps) unless the prosecution can prove otherwise.

- **Type 2**

Sometimes a statute will provide that a person is guilty of an offence if certain matters are proved by the prosecution, subject to one or more "defences". An accused who wishes to rely on the defence must produce at least enough evidence to suggest that there is a reasonable possibility that the defence applies. If they do this, then the defence is taken to apply and the accused is not convicted of the offence, unless the prosecution brings contrary evidence to prove (beyond reasonable doubt) that the defence does not, in fact, apply.

Some Directors' Liability Provisions take this form. In particular, Type 2 Directors' Liability provisions are those that deem the director to be criminally liable for a corporation's contravention of the Underlying Offence, but afford the director a defence if they have taken reasonable steps to avoid the contravention.²

Type 2 provisions differ from Type 1 provisions in that, if the director wishes to rely on the "reasonable steps" defence, he or she bears the onus of bringing evidence to show that he or she did, in fact, take reasonable steps to avoid the contravention. (In a *Criminal Code* jurisdiction the

² A Type 2 provision may also include other defences, such as that the director was not in a position to influence the company in relation to the offending conduct (*no influence defence*) or that the director did not know that the company was committing the activities which constituted the offence (*no knowledge defence*). To be considered a Type 2 provision, however, at least one of the defences must be 'reasonable steps' or 'due diligence'.

onus of adducing that evidence is known as the evidential burden (see, for example, section 13.3 of the *Criminal Code Act 1995 (Cth)*). In a non-Code jurisdiction the evidence is referred to as the “prima facie” case). Once the director has brought that evidence, the prosecution then bears the legal burden of proving (beyond reasonable doubt) that those reasonable steps were not taken, or that there were other reasonable steps that should also have been taken (and the legal burden of proving (beyond reasonable doubt) that each of the other elements of the offence are proved).

- **Type 3**

Type 3 provisions are similar to Type 2 provisions in that they deem the director to be liable for the corporation’s contravention, and afford the director a defence if they have taken reasonable steps to avoid the contravention. The difference, however, is that with Type 3 provisions the director has not only an evidential onus of establishing a *prima facie* case, but also bears the *legal* onus of proving the defence on the balance of probabilities.³ That is, these provisions reverse the onus of proof.

Under general principles of criminal law, where a statutory defence exists it is assumed that the defendant bears only an evidential (as in Type 2 provisions) and not a legal burden of proof, unless the statutory provision expressly or by necessary implication requires the defendant to bear a legal burden.

There are various ways that a statute could indicate that the defendant is to bear a legal and not merely an evidential onus. If, for example, the statutory provision says that the defendant must “prove” or “establish” a particular defence, or that the defendant must “satisfy the court” that the defence applies, then this will usually be read to mean that it was intended that the defendant bear the legal onus of doing so. Under the *Criminal Code*, a defendant only bears a legal burden of proof for a defence if the statute expressly specifies that the burden of proof is a legal burden, requires the defendant to prove the matter, or creates a presumption that a matter exists unless the defendant proves otherwise (see, for example, section 13.4 of the *Criminal Code Act 1995 (Cth)*).

It is important that careful consideration be given when drafting Directors’ Liability Provisions, therefore, to ensure that a Type 3 provision is not inadvertently created when only a Type 2 provision was intended.

There are variations on each of the above types of provisions, including for example, where other defences are also available to the director. Generally, however, the most important element (or defence) will be whether the director has taken reasonable steps or exercised due diligence. This is the common element in all three of these types of Directors’ Liability Provisions, and it is the extent to which the onus of proof relating to this element falls on the prosecution or the defence which differentiates the types of provisions considered under these Guidelines.

The following table provides a summary of the onus and standard of proof applying to the element/ defence of “failed to take/ took reasonable steps to prevent the contravention”:

	Evidential onus	Legal Onus
Type 1	Prosecution	Prosecution (beyond reasonable doubt)
Type 2	Defence (prima face evidence)	Prosecution (beyond reasonable doubt)
Type 3	Defence	Defence (balance of probabilities)

³ In criminal proceedings, matters required to be proved by the prosecution must be established ‘beyond reasonable doubt’; matters required to be proved by the defendant need only be established ‘on the balance of probabilities’: see eg, section 141 *Evidence Act 1995 (NSW)*.

There are two other broad types of Directors' Liability Provisions that can exist:

- ***Designated Officer liability***

Designated officer liability provisions are those that require the corporation to designate an individual director or officer to be the “designated officer” in respect of certain of the corporation’s obligations, and then to provide that that director or officer will be liable should the corporation breach those obligations.

A designated officer provision will usually include defences (such as that the designated officer took reasonable steps to prevent the offence from occurring), and so in that sense may also be considered to be a special case of a Type 2 (or sometimes Type 3) Directors' Liability Provision.

- ***Absolute Liability***

Absolute liability Directors' Liability Provisions impose liability on directors for a corporation’s offence, without any need to prove that the director satisfied any mental element of the offence (for example, knowledge, intent or negligence) and without there being any “reasonable steps” type defences available.

While absolute liability may be imposed on occasions on a corporation, or as a form of direct liability in appropriate circumstances on a director, such provisions are an unacceptable form of Directors' Liability Provision under the COAG Principles. If any such provisions exist, they should be repealed and, if justified, replaced by an appropriate Type 1, 2 or 3 provision.

3. The COAG Principles

3.1 The Principles

The COAG Principles are as follows:

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
3. A “designated officer” approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
 - (a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
 - (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
 - (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
 - i. the obligation on the corporation, and in turn the director, is clear;
 - ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and
 - iii. there are steps that a reasonable director might take to ensure a corporation’s compliance with the legislative obligation.
5. Where principle 4 is satisfied and directors’ liability is appropriate, directors could be liable where they:
 - (a) have encouraged or assisted in the commission of the offence; or
 - (b) have been negligent or reckless in relation to the corporation’s offending.
6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation’s offending if they are not to be personally liable.

3.2 Interpreting the COAG principles

A detailed explanation of each of the COAG Principles and how they are to be interpreted is set out in Annexure A.

4. Guidelines

4.1 Guidelines for applying the COAG Principles in practice

Drawing together each of the COAG Principles (as explained in detail in Annexure A), the following practical approach should be taken to applying the Principles:

- (1) **Directors' Liability Provisions** refer to provisions that impose individual criminal liability on directors or other corporate officers as a consequence of the corporation having committed some offence (the **Underlying Offence**), beyond the normal liability that applies to a person who is directly responsible for or is an accessory to the Underlying Offence. The COAG principles are not concerned with legislative provisions that impose **direct liability** on directors or company officers or that provide for a director or other officer to be liable if they were personally and directly complicit as a knowing **accessory** in the corporation's offence.
- (2) The usual and default position is that there should be no Directors' Liability Provision. Accordingly, any existing Directors' Liability Provision that is not justified in accordance with the COAG Principles (see (4) below) should be repealed.
- (3) A single provision applying directors' liability across an entire Act is to be avoided. Instead, each corporate offence provision must be considered on a case-by-case basis (having regard to the provision's role within its regulatory context).
- (4) In determining whether a Directors' Liability Provision will be justified, the following criteria should be considered:
 - (a) The seriousness of the harm that the Underlying Offence is seeking to avoid.

A Directors' Liability Provision will only be justified under the COAG Principles if there are "compelling public policy reasons" for doing so. As an indication of a compelling public policy reason, the COAG principles provide the example of the potential for significant public harm that might be caused by the particular corporate offending.

Examples of significant public harm include:

- death or disabling injury to individuals (e.g. offences involving serious breaches of workplace health and safety obligations),
- serious damage to the environment and/or serious risk to public health and safety (e.g. offences concerned with preventing toxic contamination),
- undermining of confidence in financial markets (e.g. trading when insolvent), or
- otherwise highly morally reprehensible conduct (e.g. serious offences under child protection or animal welfare legislation).

Unless such serious consequences flow, then a Directors' Liability provision is unlikely to be justified.

The test for "compelling public policy reason" is a matter for rigorous assessment and must be sufficiently transparent to withstand public scrutiny.

The matters set out in paragraphs (b) to (g) below will also be relevant in determining whether there are any such compelling public policy reasons.

- (b) The penalties applying to the Underlying Offence.

The size and nature of the penalty applying to an offence may provide an indication of the seriousness with which it is viewed by the legislature, with relatively minor financial penalties indicating that a Directors' Liability Provision is unlikely to be justified.

- (c) The centrality of the Underlying Offence to the relevant regulatory regime.

Where a regulatory regime is concerned with protecting against serious public harm, such as the examples given at 4.1(a) above, the centrality of the Underlying Offence to that regime will be important in determining whether it is reasonable to apply a Directors' Liability Provision. For example, where legislation imposes a licensing regime for companies engaged in potentially dangerous activities, the offence relating to the need for the company to hold a licence may be one for which a Directors' Liability Provision could be justified, given that it is a core element of the public policy rationale underlying the regulatory regime and a failure to hold a licence (and consequently a failure to be subject to its conditions) could result in serious public harm.

- (d) The extent to which Directors can directly control the relevant corporate conduct.

It cannot always be assumed that directors are responsible for running the day to day operations of the business. Therefore it would generally not be reasonable to impose a Directors' Liability Provision for offences which concern day to day business operations, for example: failing to display a licence at all business premises; failing to respond to a regulator's or inspector's requests; failure of staff to wear appropriate identification; and operational breaches of licence conditions.

Similarly, it may not be justified to impose a Directors' Liability Provision in respect of offences which would generally be triggered by employees in respect of whom Directors may not have direct supervisory control. These might include, for example, employees divulging confidential information or hindering an inspector.

Where directors are involved in a very "hands on" way (for example as owners and sole directors of a small private company) it is likely that the usual rules regarding accessorial liability would generally be adequate (as they will have been "knowingly concerned in" the corporation's offence). A Directors' Liability Provision for an offence concerning day to day business operations would need to be demonstrated to be clearly justified.

- (e) The effectiveness of enforcement against the corporation alone.

A Directors' Liability Provision will only be justified if liability of the corporation is not likely on its own to sufficiently promote compliance. In the case of existing offences, evidence of non-compliance, or past prosecutions against directors, may be relevant in considering whether this criterion applies. (Before concluding that corporate liability is not itself a sufficient deterrent against non-compliance, consideration would generally be given to whether the penalty for the Underlying Offence is appropriate or should be increased.)

- (f) The extent to which similar offences in the same jurisdiction and other jurisdictions are subject to a Directors' Liability Provision.

If corresponding offences in other jurisdictions or similar offences in the same jurisdiction are not currently subject to a Directors' Liability Provision, then it may suggest that the offence does not justify the imposition of a Directors' Liability Provision. In this regard it is noted that one of the core aims of the COAG Principles is to secure national consistency in the application of Directors' Liability Provisions.

Obviously, many of the above criteria overlap to a certain extent. However, they should each be applied against the presumption that a Directors' Liability Provision should generally not apply to an offence, unless clearly justified.

- (5) Careful thought should be given to the particular form in which a Directors' Liability Provision is to be drafted, to achieve a result that is equitable and does not impose any unfair burden on the defendant. The COAG Principles recognise that, where a Directors' Liability Provision is justified, it may *in some instances* be appropriate to adopt a provision that allows the prosecution and the Court to assume certain matters to be true (for example, that a director did not take any reasonable steps to avoid the corporation contravening the Underlying Offence) unless the director adduces evidence, or proves on the balance of probabilities, to the contrary.

Whether such a provision can be justified will depend, on a case-by-case basis, on consideration of the following factors:

- the nature and seriousness of the particular public policy reasons that justify the imposition of a Directors' Liability Provision;
 - all of the other elements of the offence that the prosecution is required to prove, both in respect of the Underlying Offence and under the Directors' Liability Provision; the particular matter that is being considered as something the director (rather than the prosecution) might be required to bring evidence about, or to actually prove or disprove;
 - the evidence that is likely to be available in respect of that matter, who will readily have access to that evidence, and the difficulty of adducing evidence and/or proving or disproving that matter;⁴
 - the difference between requiring a director to meet an evidential onus as opposed to a legal onus of proof (see section 2 of the document *Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles*);
 - the different standards of proof that apply depending on which party bears the legal onus (see section 2 of the document *Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles*); and
 - fairness to the accused person - noting in particular that accused persons should not bear the burden of proving (or disproving) a matter if it is a matter which is not peculiarly within their own knowledge or in respect of which evidence would not readily be available to them.
- (6) The imposition of a Type 2 or Type 3 Directors' Liability Provision must be supported by rigorous and transparent analysis and assessment, so as to clearly demonstrate why it is considered that such a provision is justified from a public policy perspective. It is noted that imposing a Type 2 or Type 3 provision does not increase the substantive *standard* of behaviour expected of directors. Rather, the type of provision affects the procedural requirements that apply when enforcement action is taken because the relevant substantive standard has not been met. As such, Type 2 and Type 3 provisions should not be applied merely as an attempt to indirectly increase (or to be seen to increase) the standard of behaviour expected of directors. Rather, the justification for imposing a Type 2 or Type 3 provision needs to be transparently documented (including against the considerations set out in (5) above) so that it may be subject to appropriate public scrutiny by affected stakeholders, parliamentary committees and independent review bodies (such as the COAG Reform Council).
- (7) If officers other than directors are to be subject to a Directors' Liability Provision, the officer should only be held liable if they were in a position to influence the conduct of the corporation in relation to the contravening conduct.
- (8) A designated officer approach should generally be avoided. If the criteria in (4) for the use of a Directors' Liability Provision are satisfied, then a Type 1 or Type 2 Directors' Liability Provision should be used, as appropriate – as a general rule, directors should not be able to avoid liability by loading responsibility onto one individual. If the criteria in (4) are not met, then a designated

⁴ The conclusion that a Type 2 or Type 3 provision is appropriate because of such prosecutorial difficulties should not, however, be too quickly made (see Annexure A).

officer approach is also unlikely to be appropriate. If a designated officer approach is being considered, refer to the further discussion of relevant issues set out in Annexure A.

- (9) While absolute liability may be imposed on occasions on a corporation, or as a form of direct liability in appropriate circumstances on a director, absolute liability provisions (deemed liability provisions) are an unacceptable form of Directors' Liability Provision under the COAG Principles.

Checklist

Without limiting the COAG Principles (see section 3.1 of these Guidelines), the following factors are relevant to consider in deciding whether a Directors' Liability Provision is justified:

1. There is a serious risk of potential significant public harm resulting from the offence, such as:
 - a) death or disabling injury to individuals (e.g. offences involving serious breaches of workplace health and safety obligations),
 - b) catastrophic damage to the environment and/or serious risk to public health and safety (e.g. offences concerned with preventing toxic and irreparable contamination),
 - c) undermining of confidence in financial markets (e.g. trading when insolvent),
 - d) otherwise highly morally reprehensible conduct (e.g. serious offences under child protection or animal welfare legislation), or
 - e) public harm of a similar level of seriousness.
2. The size and nature of the penalties indicate a very serious offence.
3. The offence a core element of the relevant regulatory regime.
4. Liability of the corporation unlikely on its own to sufficiently promote compliance.
5. Directors could reasonably be expected to directly control the conduct of the corporation in respect of the offence.
6. There are likely to be reasonable steps the directors should take to ensure compliance by the corporation.
7. Similar offences in the jurisdiction are subject to a Directors' Liability Provision and/or corresponding offences in other jurisdictions are subject to a Directors' Liability Provision?

Annexure A

Interpreting the COAG Principles

Annexure A – Interpreting the COAG Principles

Principle No. 1 – Corporation to be held liable in the first instance

Principle 1 states that: where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.

When considering the question of whether a Directors' Liability Provision should be included in legislation, this Principle reinforces that the usual and default position should be that there is no Directors' Liability Provision applying to a corporate offence. That is, there is a presumption against Directors' Liability Provisions, and any proposed Directors' Liability Provision must be justified.

Principle No. 2 – No automatic or blanket imposition of liability

Principle 2 states that: Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.

Principle 2 reinforces the first Principle by confirming that Directors' Liability Provisions should not be applied automatically or as a matter of course, that the starting point should be that there will be no such provision, and that any proposal to include such a provision must be justified in the particular case.

It also means that whether a Directors' Liability Provision is to be applied must be determined on a case-by-case basis by reference to the circumstances of each individual Underlying Offence. Directors' Liability Provisions which provide for directors to be criminally liable for *any and all* corporate offences under a particular Act or instrument should be avoided.

Principle No. 3 – A “designated officer” approach is not generally appropriate

Principle 3 states that: a “designated officer” approach to liability is not suitable for general application.

In cases where a Directors' Liability Provision *is not* justified, it is unnecessarily burdensome to impose liability on any individual. In cases where a Directors' Liability Provision *is* justified, it is unfair that only a particular designated individual should be subject to liability, and seeking to do so may be perceived to be a way of shielding other individuals within the company who may have at least as much influence and/or culpability as the designated individual.

Accordingly, designated officer liability provisions should rarely, if ever, be used. They should be avoided in almost all cases.

A designated officer approach might be considered if all of the following circumstances apply:

- (a) imposing liability on the corporation would not be sufficient to compel compliance;
- (b) the penalty to be imposed on the designated officer for the offence is relatively minor, and does not include imprisonment;
- (c) an individual corporate officer could be expected to be required to perform the specific administrative tasks that discharge the corporation's statutory obligations;
- (d) there is no, or at most only limited, judgment required to be exercised to perform those tasks or obligations; and
- (e) there would be practical difficulties for the prosecution if a standard Type 1 or Type 2 Directors' Liability Provision were adopted, in so far as it would be practically difficult to identify an individual Director or officer personally responsible for the corporation's breach unless the corporation itself designated that individual officer in advance.

As mentioned above, there will be very few, if any, circumstances in which all of the above would apply such as to justify a designated officer approach to liability.

One example might be a provision relating to traffic offence penalties for dangerous driving which, in respect of company-owned or leased vehicles, requires the company to notify authorities of the identity of the driver of the vehicle so that that person may be issued with an infringement notice and incur the relevant demerits from their drivers' licence.

In that case, there are compelling public policy reasons of public safety why it is important for speeding or otherwise dangerous drivers to be subject to applicable penalties. For that reason, it is important that authorities be able to ascertain the identity of the driver of a vehicle, and it is appropriate that corporations be under an obligation to disclose the identity of the driver of its vehicle at the time at which a driving offence took place. Imposing the applicable financial penalty on the company if it fails to provide this information may be insufficient to compel compliance. The corporation may choose simply to pay the fine and treat it as part of a "cost of doing business". Because demerit points cannot be imposed on the company, holding the company alone liable could therefore operate to shield the individual driver from the penalty that should properly apply to them under the law. Even increasing the penalty for the corporation may be insufficient to secure compliance.

In those circumstances, consideration could be given to requiring the company to nominate a designated officer to take responsibility for ensuring that the company complies with its obligation to inform authorities of the driver of its vehicle, and to hold that designated officer liable if the company fails to fulfil that obligation.

Principle No. 4 – Criteria for applying Directors' liability

Principle 4 states that the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

- (a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that is likely to be caused by the particular corporate offending); and
- (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
- (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
 - (i) the obligation on the corporation, and in turn the director, is clear;
 - (ii) the director has the capacity to influence the conduct of the corporation in relation to the offending; and
 - (iii) there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

Principle 4 reiterates that the starting position should always be that there is *no* Directors' Liability Provision.

If a Directors' Liability Provision is to be adopted, it must be justified on a case-by-case basis by reference to the criteria set out in this principle. If the criteria in this principle do not apply, then a Directors' Liability Provision should not be included.

It is important to note that all of the criteria in Principle 4 should be satisfied before a Directors' Liability Provision will be justified.

Criterion 4a – Compelling public policy reasons

There must be "compelling public policy reasons" to justify imposing criminal liability on directors for offences committed by corporations.

The very fact that something has been made a criminal offence points to the fact that there must be important public policy issues at stake. However, COAG Principle 4 means that this alone does not

justify applying a Directors' Liability Provision on top of the Underlying Offence. Rather, there must be some sufficient public policy reason for exposing directors to personal criminal liability for the offence which the corporation has committed.

- *Seriousness*
Of course, the public has a right to expect that directors will take all reasonable steps to ensure that corporations do not commit *any* criminal offence. However, some offences are clearly more serious than others. One of the justifications for imposing Directors' Liability on some, but not all, Underlying Offences, is that it gives greater focus to those particular offences and signals to directors that they should take even greater than usual diligence to ensuring that the corporation complies with those obligations.

The ability of Directors' Liability Provisions to achieve this outcome – a heightened incentive on directors to engage in hands-on risk-management arrangements in respect of particular offences – depends in part on Directors' Liability Provisions *only* being imposed on a relatively small number of offences. If Directors' Liability is imposed on too many offences, some of which are serious and some of which are not, then the imposition of such liability fails to serve as an effective signal to directors as to the few particular offences which society considers to be of such seriousness as to justify a higher level of personal diligence and risk-avoidance behaviour on the part of corporate boards.

- *Centrality*
Where a regulatory regime is concerned with protecting against particularly serious consequences, the centrality of the Underlying Offence to that regime will be important in determining whether it is reasonable to apply a Directors' Liability Provision. For example, where legislation imposes a licensing regime for companies engaged in potentially dangerous activities, the offence relating to the need for the company to hold a licence may be one for which a Directors' Liability Provision could be justified, given that it is a core element of the public policy rationale underlying the regulatory regime, and it follows that it is a core responsibility of directors to ensure compliance.
- The following are examples of Underlying Offences where compelling public policy reasons exist for imposing liability on directors. Non-compliance will create a real risk of serious public harm, such as:
 - is likely to result in death or disabling injury to individuals (e.g. offences involving serious breaches of OHS obligations),
 - is likely to result in serious damage to the environment and/or serious risk to public health and safety (e.g. offences concerned with preventing toxic contamination),
 - is likely to undermine confidence in financial markets (e.g. trading when insolvent); or
 - would otherwise be highly morally reprehensible (e.g. serious offences under child protection or animal welfare legislation).

Criterion 4b – Corporate liability insufficient to promote compliance

Even if there are compelling public policy reasons for imposing Directors' Liability, a Directors' Liability Provision should not be included if corporate liability in respect of the Underlying Offence is sufficient to promote compliance.

It is sometimes said that a corporation has “no soul to damn and no body to kick”.⁵ It should not simply be assumed, however, that the threat of criminal liability on the company will not of itself be an adequate deterrent to wrongdoing.

⁵ Edward, First Baron Tharlow (the aphorism was popularised by JC Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 386).

The effect of a financial penalty on a corporation can be a significant driver of behaviour; the damage to reputation and public opprobrium for being convicted of a criminal offence may be an even more important incentive when imposed on a corporation. Appropriate monetary or other penalties imposed on the corporation can have an impact on shareholders and others who have a stake in the success of the company. These stakeholders may be in a position to ensure that those within the company responsible for the breach are disciplined, and that appropriate steps are taken to prevent future breaches. Where a corporation is convicted of a criminal offence, this can also have indirect impacts on the reputation and employment prospects of its directors and officers.

Further, if the penalty for an Underlying Offence is too low to provide a sufficient deterrence against wrongdoing, consideration should first be given to whether the penalty should be increased, before consideration is given to adopting a Directors' Liability Provision.

Where this criterion may be particularly important, however, is where the penalty for an offence is necessarily incommensurable with the possible harm that may arise from a breach. Offences for serious occupational health and safety obligations are an example, where even a massive financial penalty imposed on the corporation could arguably be insufficient of itself to promote compliance. The criterion may also be important in the case of extremely serious offences, where the financial penalty for non-compliance is very high and the limited liability of a company could attenuate the deterrence effect of the penalty. (That said, the risk that a penalty might lead to insolvency may itself be a significant deterrence that should not be underestimated.)

The criterion may have particular application in respect of laws dealing with corporations that operate in specialised areas whose activities have the potential, if those laws are broken, to cause extremely serious and irremediable injury to the public. For example, the criterion might apply in respect of laws concerning the transportation and handling of extremely dangerous chemicals by companies that are authorised to undertake such activities. It is reasonable that the board of such companies should be expected to exercise a higher degree of attention and diligence in ensuring that the corporation complies with those particular obligations above and beyond the usual diligence that they would be expected to apply in ensuring compliance with the law generally.

Criterion 4c – Reasonable in all the circumstances

The third criterion – that directors' liability is reasonable in all the circumstances – is in some respects a catch-all that duplicates the other criteria. One element of this criterion, however, is that it means that Directors' Liability will not be appropriate if it would be unreasonable to hold directors liable, for example, because the offence is not one for which directors would normally be expected to play a role or have direct oversight.

This criterion is also important where liability may be extended to officers who are not directors. In those circumstances it would not be reasonable to impose liability on an officer unless it can be established that the officer was in a position to influence the conduct of the corporation in relation to the contravening conduct, and accordingly for provisions other than Type 1, this should be included as an express element of the offence which the prosecution is required to prove in order to secure a conviction.

Principle No. 5 – Bases of liability

Principle 5 states that: where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:

- (a) have encouraged or assisted in the commission of the offence; or
- (b) have been negligent or reckless in relation to the corporation's offending.

Paragraph (a) refers to ordinary accessory liability. Paragraph (b) refers to Type 1 Directors' Liability Provisions. Principle No. 5 therefore indicates that, where a Directors' Liability Provision is justified (by reference to Principle No. 4), a provision may be adopted which

- (a) holds a director liable under normal accessory liability rules; or
- (b) holds a director liable in accordance with Type 1 liability; or
- (c) holds a director liable in accordance with both normal accessory liability rules and Type 1

liability.

In other words, Type 1 should be the default position for directors' liability provisions. The imposition of Type 2 or Type 3 liability must be supported by rigorous and transparent analysis and assessment and clearly warrant the conclusion that such liability is justified from a public policy perspective.

As Sections 2.1 and 2.2 of these Guidelines explain in more detail, the Principles and the Guidelines are not concerned to limit the circumstances in which:

- (i) directors and other officers may be held criminally liable directly, where they personally commit the Underlying Offence or some other offence (direct liability) or
- (ii) directors and other officers may be held criminally liable in relation to an Underlying Offence as an accessory in accordance with the usual rules regarding accessorial liability (that is the director knew the essential facts that constitute the corporate offence and, through his or her own act or omission, was a participant in that offence).

Principle No. 6 – Type 2 and 3 provisions may be appropriate in some instances

Principle 6 states that, *in some instances*, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.

This principle allows consideration of where the onus of proving "due diligence" or "reasonable steps" should lie. It contemplates that Type 2 or Type 3 provisions may be appropriate *in some instances*.

Principle 6 itself provides little guidance as to what might constitute an appropriate instance in which a Type 2 or Type 3 liability provision might be warranted. Clearly, at a threshold level, a Type 2 or Type 3 provision will only be justified if a Directors' Liability Provision is justified (see Principle No. 4 and No. 5).

As discussed in section 2, Type 1, Type 2 and Type 3 liability provisions differ in terms of who bears the evidential and legal onus of proving that reasonable steps were or were not taken:

	Evidential onus	Legal Onus
Type 1	Prosecution	Prosecution (beyond reasonable doubt)
Type 2	Defence (prima face evidence)	Prosecution (beyond reasonable doubt)
Type 3	Defence	Defence (balance of probabilities)

Placing the initial evidential onus on a director to point to the reasonable steps that he or she has taken to prevent the corporate offence (Type 2 provisions) may be appropriate in circumstances where it would otherwise be extremely difficult or impossible as a practical matter for the prosecution to identify and disprove the possible steps that the director might have taken. For example, this may be the case where the steps that a director has taken, or might reasonably be expected to have taken, in relation to a particular offence are matters which are peculiarly within the knowledge of the director and where it would be significantly more costly and difficult for the prosecution to disprove than for the director to establish.⁶

The conclusion that a Type 2 provision is appropriate because of such prosecutorial difficulties should not, however, be too quickly made. It would be unreasonable to reverse the usual onus for no other reason than that it would be easier to secure a conviction.

⁶ See Australian Government, *Guide to framing Commonwealth offences, civil penalties and enforcement powers* (2006), section 4.6 (Appropriate use of defences).

Whether a provision that imposes an evidential and/or legal onus on the accused director is justified will depend, on a case-by-case basis, on consideration of the following factors:

- the nature and seriousness of the particular public policy reasons that justify the imposition of a Directors' Liability Provision;
- all of the other elements of the offence that the prosecution is required to prove, both in respect of the Underlying Offence and under the Directors' Liability Provision;
- the particular matter that is being considered as something the director (rather than the prosecution) might be required to bring evidence about, or to actually prove or disprove;
- the evidence that is likely to be available in respect of that matter, who will readily have access to that evidence, and the difficulty of adducing evidence and/or proving or disproving that matter;
- the difference between requiring a director to meet an evidential onus as opposed to a legal onus of proof (see section 2 of the document *Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles*);
- the different standards of proof that apply depending on which party bears the legal onus (see section 2 of the document *Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles*); and
- fairness to the accused person - noting in particular that accused persons should generally not bear the burden of proving (or disproving) a matter if it is a matter which is not peculiarly within their own knowledge or in respect of which evidence would not readily be available to them.