# ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-15254

Hon Kate Doust MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
WEST PERTH WA 6000

Dear Ms Doust

**DIRECTORS' LIABILITY REFORM BILL 2015**

Thank you for your letters dated 5 March 2015 regarding the Directors' Liability Reform Bill 2015 (Bill). I apologise that this information was not provided earlier.

I set out below responses to your requests.

(a) On 29 November 2008 the Council of Australian Governments (COAG) agreed to 'increased harmonisation in relation to directors' liability', as set out in the **enclosed** Communique.

In December 2008 the relevant intergovernmental agreement, the National Partnership Agreement to Deliver a Seamless National Economy, was entered into by the Commonwealth, the States of New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory, and Northern Territory. Directors' liability reform, which is one aspect of the overall Agreement, is referred to on page 6.

A copy of the National Partnership Agreement to Deliver a Seamless National Economy is **enclosed**. This Agreement was entered into subject to the provisions of the Intergovernmental Agreement on Federal Financial Relations, a copy of which is also **enclosed**.

The National Partnership Agreement to Deliver a Seamless National Economy has now ended and the Final Report on Performance, referred to at paragraph (c) below, was published on 6 February 2014.

On 25 July 2012, as set out in an **enclosed** COAG Communique, COAG agreed to specific principles and guidelines regarding directors' liability reform. The Communique states:

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> "In relation to directors' liability reform, to ensure the operation of directors' liability is applied in a nationally consistent and principle-based manner in future legislation, COAG agreed to a set of Principles and Guidelines, noting that this reform is still under consideration by the Queensland Government."

The Guidelines for Applying the COAG Principles (which also set out the Principles themselves) are also **attached**.

(b) N/A.

(c) Over the duration of the National Partnership Agreement to Deliver a Seamless National Economy, milestones were set for the completion of particular reforms. With respect to directors' liability, all jurisdictions were required to develop a legislative plan to implement agreed reforms and introduce legislation by December 2012.

Western Australia has been assessed as having partially met the directors' liability reform milestone. The COAG Reform Council released its final report on the Agreement on 6 February 2014. This report, *Seamless National Economy: Final Report on Performance*, notes on page 93 that:

> "'Western Australia and the Northern Territory have not introduced the required legislation. However, the Western Australian Attorney General has outlined the government's plan to bring forward a bill. The council has assessed this as amounting to a legislative plan. Western Australia has also reported that its bill is in an advanced state of drafting.
>
> . . .
>
> Western Australia has partially completed the milestone."

The *Seamless National Economy: Final Report on Performance* is **attached**.

(d) A copy of the Explanatory Memorandum is **attached**.

(e) You have requested a public statement of the Government's policy on the Bill. The policy was outlined in the Second Reading Speech, which is **attached.**

(f) The advantages to the State of participating in directors' liability reform lie in the fact that it constitutes microeconomic reform which will achieve consistency across all Western Australian legislation regarding the derivative criminal liability of directors or officers for offences committed by bodies corporate. The Bill will thus provide certainty and consistency as to the derivative liability of officers of bodies corporate in Western Australia under the various pieces of legislation that impose such liability.

I do not view participation in directors' liability reform as conferring disadvantages on the State of Western Australia. I acknowledge that, in general, intergovernmental agreements have the potential to reduce flexibility on the part of individual States and Territories, but it should be noted that the Bill is not a model Bill and therefore there has been room for flexibility to achieve the most advantageous and appropriate arrangement for Western Australia while still complying with the agreement to implement directors' liability reform in accordance with generally accepted cross-jurisdictional principles.

(g) The Bill does not raise constitutional issues.

(h) The Bill is made pursuant to an intergovernmental agreement signed by the Premier of Western Australia. I note that Part 6 of the National Partnership Agreement to Deliver a Seamless National Economy contains a provision stating that the Agreement may be amended at any time by agreement in writing by all the parties and under terms and conditions as agreed by the parties. The Agreement further provides that a party to the agreement may terminate its participation in the Agreement at any time by notifying all the other parties in writing. I point out, however, that the Agreement has now ceased.

(i) The Bill is not principal legislation but rather makes amendments to a number of existing Acts. Once the Bill has been enacted, the amendments it makes will all be capable of being amended by normal parliamentary processes. However, I expect that any amendments would remain faithful to the spirit of, and consistent with, the COAG Principles and Guidelines.

(j) There is no model Bill in relation to the directors' liability reform project.

(k) I understand that the names and contact details of officers who will be available to attend a private hearing on 16 March 2015 with the Standing Committee on Uniform Legislation and Statutes Review, including the Bill's drafter and the instructing officer, have already been provided to the Committee.

I trust that this information has been of assistance.

Yours sincerely

13 MAR 2015

Hon. Michael Mischin MLC
**ATTORNEY GENERAL; MINISTER FOR COMMERCE**

*Attach:* *Council of Australian Governments Meeting Canberra 29 November 2008 - Communique*
*National Partnership Agreement to Deliver a Seamless National Economy*
*Intergovernmental Agreement on Federal Financial Relations*
*Council of Australian Governments Meeting Canberra 25 July 2012 - Communique*
*Personal Liability for Corporate Fault - Guidelines for applying the COAG Principles*
*Seamless National Economy: Final Report on Performance*
*Explanatory Memorandum – Directors' Liability Reform Bill 2015*
*Second Reading Speech – Directors' Liability Reform Bill 2015*

**COUNCIL OF AUSTRALIAN GOVERNMENTS MEETING**

**CANBERRA**

**29 November 2008**

**COMMUNIQUE**

## Preamble

The Council of Australian Governments (COAG) held its 24th meeting today in Canberra. The Prime Minister, Premiers, Chief Ministers and the President of the Australian Local Government Association, were again joined by Commonwealth, State and Territory Treasurers.

The meeting was held against the backdrop of great uncertainty concerning the global economy and continuing turbulence in financial markets. Leaders and Treasurers resolved to meet the challenges of the global financial crisis head on.

COAG agreed to press forward with reforms necessary for Australia to weather the impact of the current international economic and financial difficulties, and to meet the longer term imperative for the nation of boosting productivity and workforce participation, and improving the delivery of services to the community. Many of the reforms that Leaders and Treasurers agreed upon today are about improving health and education and training outcomes. Significant additional resources have been allocated to these areas.

As well, a new era in federal financial relations was inaugurated with major reforms to specific purpose payments arrangements in particular. The Intergovernmental Agreement (IGA) and other documents giving effect to these new arrangements are to be finalised by COAG Senior Officials no later than 12 December 2008.

## Global Financial Market Conditions

COAG discussed the most recent developments affecting the global economy, in particular the continued turbulence in financial and equity markets that has seen a sharp drop in global growth in both advanced and emerging economies that is expected to be deeper and more prolonged than previously thought.

COAG acknowledged that the global financial crisis will affect the Australian economy through trade and financial linkages and its effects on confidence, and noted that official

forecasts for Australian economic growth have been revised down significantly as a result of the crisis. Leaders noted that Australia stands well placed to weather the fallout from the crisis, recognising the support from the Commonwealth's Economic Security Strategy, recent easing in monetary policy and the continued strong capital position of Australia's banks and other financial institutions.

COAG commended the coordinated international efforts to address the crisis, and urged all policy makers to continue to work cooperatively to resolve the crisis.

**Federal Financial Relations**

*Intergovernmental Agreement on Federal Financial Relations*

COAG has reaffirmed its commitment to cooperative working arrangements through an historic new IGA that provides an overarching framework for the Commonwealth's financial relations with the States and Territories (the States).

The IGA represents the most significant reform of Australia's federal financial relations in decades. It is aimed at improving the quality and effectiveness of government services by reducing Commonwealth prescriptions on service delivery by the States, providing them with increased flexibility in the way they deliver services to the Australian people. In addition, it provides a clearer specification of roles and responsibilities of each level of government and an improved focus on accountability for better outcomes and better service delivery. This is accompanied by a major rationalisation of the number of payments to the States for Specific Purpose Payments (SPPs), reducing the number of such payments from over 90 to five.

Central to these reforms is a substantial financial package that provides an additional $7.1 billion in SPP funding to the States over five years to improve services for all Australians. Commonwealth-State financial relations will be placed on a secure footing with the creation of five new national SPPs, including total funding of:

- $60.5 billion in a National Healthcare SPP;
- $18 billion in a National Schools SPP;
- $6.7 billion in a National Skills and Workforce Development SPP;
- $5.3 billion in a National Disability Services SPP; and
- $6.2 billion in a National Affordable Housing SPP.

Each National Agreement/SPP contains the objectives, outcomes, outputs and performance indicators, and clarifies the roles and responsibilities that will guide the Commonwealth and States in the delivery of services across the relevant sectors. The performance of all governments in achieving mutually-agreed outcomes and benchmarks specified in each SPP

will be monitored and assessed by the independent COAG Reform Council and reported publicly on an annual basis. COAG agreed that the new SPPs are central to achieving service delivery improvements and reforms.

COAG has previously agreed to a new form of payment - National Partnership (NP) payments - to fund specific projects and to facilitate and/or reward States that deliver on nationally-significant reforms. The financial arrangements will include incentive payments to reward performance, funding for which will be decided at a later date.

The first wave of NPs will begin in 2009, including:

- Hospitals and Health Workforce Reform;
- Preventative Health;
- Taking Pressure off Public Hospitals;
- Smarter Schools - Quality Teaching;
- Smarter Schools - Low Socio-economic Status (SES) School Communities;
- Smarter Schools - Literacy and Numeracy;
- Productivity Places Program;
- Early Childhood Education;
- Fee Waiver for Childcare Places;
- Indigenous Remote Service Delivery;
- Indigenous Economic Development;
- Remote Indigenous Housing;
- Indigenous Health;
- Social Housing;
- Homelessness; and
- Seamless National Economy.

This new federal financial framework is the culmination of extensive joint work by all levels of government. It will begin on 1 January 2009 and provides a solid foundation for COAG to pursue economic and social reforms to underpin growth, prosperity and social cohesion into the future.

COAG also agreed that the new National SPPs would be distributed among the States on an equal per capita basis phased in over five years (with the exception of the schools SPP which is to be distributed according to full-time student enrolments in government schools).

COAG agreed that shared investments will be matched by strong accountability. Each Agreement has robust transparency measures to achieve this. Strong, fair transparency

measures applied consistently across all sectors are a non-negotiable feature of the new Agreements.

**Health and Ageing**

COAG today agreed to an historic package of reform to the health and hospital system. The measures agreed will mean that the Commonwealth will provide $64.4 billion in funding over five years for the State health systems, an increase of $22.4 billion over the previous Australian Health Care Agreements. This includes an increase to the SPPs base of $4.8 billion over the forward estimates and a package of reforms under the new hospitals and health workforce reform NP of $1.7 billion, including a $1.1 billion health workforce package.

A further package to take the pressure off public hospitals has also been agreed. The package, which totals $750 million in 2008-09, will support emergency departments by providing funding for 1.9 million emergency department services.

In addition, the Commonwealth has committed to a more generous indexation formula which delivers 7.3 per cent per year compared to 5.3 per cent under the previous agreement.

Further details are provided at Attachment A to the communiqué.

**Reform of Roles and Responsibilities for Funding and Service Delivery between Governments**

COAG agreed to consider in 2009 an ambitious program of reforms to roles and responsibilities for funding and delivery of services to the community. The goals of such reforms will be to deliver more integrated and responsive services for individuals and families, to clarify accountabilities between governments and to improve performance of service systems. COAG requested officials to bring back specific proposals in relation to community mental health, disability services and aged care in the first half of 2009 as part of this program.

**Productivity Agenda**

High-quality schooling supported by strong community engagement is central to Australia's future prosperity and social cohesion. COAG agreed to a package of reforms to enable our school education system to pursue high-quality schooling for all Australian students. The measures agreed will mean that the Commonwealth will provide an additional $3.5 billion over five years in school funding.

COAG today agreed to an additional $635 million as part of the National Schools SPP to align historical Commonwealth funding rates between primary and secondary government schools. It was also agreed the government schools component of the National Schools SPP will be adjusted each year using a composite growth factor comprising growth in average school recurrent costs and growth in enrolments in government schools. This will provide an estimated additional $412 million over the forward estimates period.

The government schools component of the National Schools SPP will be distributed among the States on the basis of full-time student enrolments in government schools.

The Agreement brings total SPP and funding for non-government schools to around $42 billion from 2009 to 2012, compared to $34.1 billion in the previous schools agreement (excluding Indigenous funding), an increase of more than $7.9 billion or 23.1 per cent over 2005-2008 funding.

Schools funding in the future will be complemented by over $2.2 billion comprising NPs for literacy and numeracy ($540 million), improving principal leadership development and teacher quality ($550 million), and improving educational outcomes in low SES school communities ($1.1 billion).

Additional Commonwealth funding of $807 million is provided for the legitimate additional costs of implementing the National Secondary Schools Computer Fund.

The Commonwealth has agreed to provide $970 million over five years for an Early Childhood Education NP. This includes providing $955 million to achieve universal access to early childhood education for all children in the year before school by 2013.

COAG agreed that the National Skills and Workforce Development Agreement would provide an estimated $6.7 billion over the forward estimates from 1 January 2009 to increase the skill levels of Australians. In addition, COAG agreed to the delivery of training under the productivity places program NP.

The reforms agreed today for the productivity agenda will deliver:

- universal access to early learning programs to improve children's school readiness;
- evidence-based teaching to ensure all children attain sound literacy and numeracy skills;
- strong school leadership and high-quality principals and teachers in all our schools, particularly our most disadvantaged schools; and

- increases in Year 12 or equivalent attainment to ensure young people make a more successful transition to work or further study;
- reforms to the delivery of vocational education and training, at school, for jobseekers and to current workers to ensure our current and future skill needs are met.

Further details are available at Attachment B to the communiqué.

**Affordable Housing**

Today, COAG agreed to a significant package of investment for housing, a total commitment of nearly $10 billion in the National Affordable Housing Agreement (NAHA) and its associated NPs. This includes additional funding towards:

- Homelessness - $800 million over five years;
- Remote Indigenous Housing - $1.94 billion over 10 years ($834.6 million over five years); and
- Social Housing - $400 million over two years;

These agreements commit governments to pursue reforms in social housing, homelessness and Indigenous housing. The package will provide relief for many Australians facing social housing stress or homelessness. Further details on the agreements are provided at Attachment C to the communiqué.

The Commonwealth and the States agreed to a new NAHA, commencing on 1 January 2009 and providing $6.2 billion over five years from 2008-09, an increase of $46 million over the current forward estimates. The NAHA will consolidate existing housing SPPs and fund a range of measures including social housing, assistance to people in the private rental market, support and accommodation for people who are homeless or at risk of homelessness, and home purchase assistance.

**Disability**

Under the new national disability agreement, the Commonwealth will provide approximately $5.3 billion in funding over five years to the States for specialist disability services, an increase of $408 million. Today, the States and Commonwealth committed to help people with a disability to achieve economic and social inclusion, enjoy choice, wellbeing and the opportunity to live as independently as possible, and to support their families and carers. To achieve these outcomes, States and the Commonwealth will support services that provide skills and support people with a disability to live as independently as possible. It will also provide services that assist people with disability to live in stable and sustainable living arrangements and assist families and their carers in their caring role.

In this National Agreement, the Commonwealth is giving the States an additional $1.3 billion in funding over five years, including $901 million from the Disability Assistance Package to be rolled into the base of the SPP, an additional $408 million to help with reform, and providing the highest ever level of indexation - around six per cent - making a $5.3 billion Commonwealth commitment over the next five years.

As part of the new disability reform, each State will improve access to disability care, including consideration of a single point of access. This, along with nationally-consistent assessment processes and a quality assurance system, will help to build end to end disability services systems within each State. A renewed focus on early intervention will be matched by more consistent access to disability aids and equipment. There will be greater flexibility in funding. Service providers will be better able to develop, train and employ care workers. Governments will also work together to measure better the level of unmet demand for disability services.

**Indigenous Reform**

COAG has previously agreed to six ambitious targets for closing the gap between Indigenous and non-Indigenous Australians across urban, rural and remote areas:

- to close the gap in life expectancy within a generation;
- to halve the gap in mortality rates for Indigenous children under five within a decade;
- to ensure all Indigenous four years olds in remote communities have access to early childhood education within five years;
- to halve the gap in reading, writing and numeracy achievements for Indigenous children within a decade;
- to halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020; and
- to halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

Since the targets were agreed in December 2007 and March 2008, all governments have been working together to develop fundamental reforms to address these targets. Governments have also acknowledged that this is an extremely significant undertaking that will require substantial investment. COAG has agreed this year to initiatives for Indigenous Australians of $4.6 billion across early childhood development, health, housing, economic development and remote service delivery.

In giving effect to this commitment to closing the gap on Indigenous disadvantage, COAG agreed to the first ever NP agreement in October 2008. This agreement comprises

$564 million of joint funding over six years to address the needs of Indigenous children in their early years. As part of the initiative, 35 Children and Family Centres are to be established across Australia in areas of high Indigenous population and disadvantage to deliver integrated services that offer early learning, child care and family support programs. The funding will also increase access to ante-natal care, teenage reproductive and sexual health services, and child and maternal health services.

This NP is now joined by a new National Agreement on Indigenous Reform and two new NPs which cover the areas of Economic Development ($228.8 million - $172.7 million Commonwealth funding and $56.2 million State funding over five years) and Remote Service Delivery ($291.2 million over six years). Further details are provided at Attachment D to the communiqué.

Taken together with the Indigenous Health NP and the Remote Indigenous Housing NP, these new agreements represent a fundamental response to COAG's commitment to closing the gap. Sustained improvement in outcomes for Indigenous people can only be achieved by systemic change. Through these agreements, all governments will be held publicly accountable for their performance in improving outcomes in these key areas.

*National Indigenous Reform Agreement*

COAG agreed to the National Indigenous Reform Agreement (NIRA) which captures the objectives, outcomes, outputs, performance measures and benchmarks that all governments have committed to achieving through their various National Agreements and NPs in order to close the gap in Indigenous disadvantage. The NIRA provides an overarching summary of action being taken against the closing the gap targets as well as the operation of the mainstream national agreements in health, schools, vocational education and training (VET), disability services and housing and several NPs. The NIRA will be a living document, refined over time based on the effectiveness of reforms in closing the gap on Indigenous disadvantage.

*Closing the Gap COAG Meeting in 2009*

In October 2008, COAG agreed to convene a dedicated meeting in 2009 on closing the gap on Indigenous disadvantage.

COAG has asked for advice on how the NPs and National Agreements will collectively lead to a closing of the gap and what further reforms are needed. In addition to this, COAG has asked for a Regional and Urban Strategy to coordinate the delivery of services to Indigenous Australians and examine the role that private and community sector initiatives in education, employment, health and housing can make to the success of the overall strategy.

COAG noted that it will work to develop a further reform proposal, including benchmarks and indicators for improvements in services and related outputs relevant to family and community safety, for consideration at the Closing the Gap COAG meeting to be held in 2009.

*Revised Framework of the Overcoming Indigenous Disadvantage Report*

In April 2002, COAG commissioned the Productivity Commission's Steering Committee for the Review of Government Service Provision to produce a regular report against key indicators of Indigenous disadvantage, with a focus on areas where governments can make a difference. The resulting Overcoming Indigenous Disadvantage (OID) Report has been published every two years since 2003.

COAG agreed to a new framework for the OID Report that is aligned with the closing the gap targets.

**Seamless National Economy**

COAG agreed to a new NP to deliver a seamless economy, with the Commonwealth committing to provide funding of $550 million over five years to facilitate the implementation of and reward the delivery of reform priorities. This NP draws together 12 months of intense efforts to deliver regulatory reforms which will benefit businesses and strengthen the economy.

An ambitious reform agenda including 27 priority areas for reform to reduce the costs of regulation and enhance the productivity and workforce mobility in areas of shared Commonwealth and State responsibility was agreed by COAG in March 2008.

In July 2008, COAG identified eight competition reforms for inclusion in the Business Regulation Competition Working Group work program, in addition to the reform of regulation-making and review processes. Over the course of the last 12 months, governments have moved from general commitments to reform to specific actions across the 27 areas to make a real difference to the economy.

Today COAG committed to a number of reforms, building on its already extensive business regulation and competition reform agenda to deliver a seamless national economy.

COAG agreed to examine further planning and zoning policies and processes from a competition perspective as recommended in July by the Australian Competition and Consumer Commission's inquiry into grocery prices. This will ensure COAG can better understand whether competition issues are adequately incorporated into planning and zoning regulation.

Recognising the need for greater coordination and oversight in chemicals and plastics regulation, COAG agreed to a new governance structure for chemicals and plastics reform. COAG also responded to the recommendations of the Productivity Commission Research Report on Chemicals and Plastics Regulation, with further reforms to be considered in 2009.

To progress food regulation reforms, COAG agreed to examine reforms to the voting arrangements of the Australia and New Zealand Food Regulation Ministerial Council. COAG also agreed to consider options to improve national consistency in the monitoring and enforcement of food standards and options to improve food labelling law and policy in early 2009.

COAG agreed that a national electronic conveyancing system would be implemented, which will establish a single electronic system for completing real property transactions and lodging land title dealings.

COAG also agreed to increased harmonisation in relation to directors' liability and asked the Ministerial Council for Corporations to report back to COAG on further reforms by mid 2009.

COAG agreed there would be continued progress on regulatory reform with the objective of all jurisdictions improving the efficiency of regulation.

**Infrastructure**

The National Public-Private Partnerships (PPP) package endorsed by COAG today is an important element of the Commonwealth's commitment to a long-term infrastructure strategy. It offers major reform gains in terms of consistency and harmonisation of PPP policy and practices across jurisdictions. The package aims to encourage the consideration of PPPs, ensure consistent application of best practice across Australia and encourage private sector investment in public infrastructure in Australia. More effective use of PPPs can benefit the community through improved services and better value for money, provide savings to governments and make it easier and less expensive for business to bid for PPP projects.

**Climate Change and Water**

*Climate Change*

COAG agreed to a set of national principles to apply to new Feed-in Tariff schemes and to inform the reviews of existing schemes. These principles will promote national consistency of schemes across Australia.

COAG also agreed that the determination of streamlined roles and responsibilities under the National Energy Efficiency Strategy and a proposed single overarching framework for accelerating energy efficiency reforms should be deferred for consideration until early 2009 to allow for a more informed strategy in consultation with industry.

COAG endorsed a set of principles and a process for jurisdictions to review and streamline their existing climate change mitigation measures, with the aim of achieving a coherent and streamlined set of climate change measures in 2009.

COAG noted progress on the development of the national expanded Renewable Energy Target and agreed to consider the final design of the scheme at its first meeting in 2009.

*Water*

COAG agreed to a number of initiatives to improve the operation of water markets and trading through faster processing of temporary water trades, and to coordinate water information and research through the development of a national water modelling strategy. COAG also agreed to the adoption of the enhanced national urban water reform framework to improve the security of urban water.

COAG released a report on progress with environmental water recovery in the Murray-Darling Basin, which was commissioned at its October 2008 meeting and that is now to be updated every six months. The report shows that the Commonwealth and Basin jurisdictions collectively recovered water entitlements for an average of 177 gigalitres of water per annum, at a cost of nearly $295 million.

**Inter-Jurisdictional Exchange of Criminal History Information for People working with Children**

Leaders agreed in principle at the April 2007 COAG meeting to a framework to improve access to inter-jurisdictional criminal history information by child-related employment screening schemes.

COAG at this meeting affirmed the importance of an inter-jurisdictional exchange being put in place as soon as possible, and endorsed a set of implementation actions, the establishment of a project implementation committee under the auspices of COAG and an implementation plan. The implementation plan includes that jurisdictions will prepare, introduce and seek passage of legislative amendments within nine months, to enable the information exchange to commence in 12 months. COAG noted that all jurisdictions, with the exception of Victoria and the Australian Capital Territory, would

exchange information on non-conviction charges for screening of people working with children.

**Child Protection**

The development of the National Framework for Protecting Australia's Children, noted by COAG at its meeting in July 2008, is being progressed by the Commonwealth in close consultation with the Community and Disability Services Ministers' Conference and will be released in early 2009.

**Review of the Report on Government Services**

As requested at its July 2008 meeting, COAG agreed to the terms of reference for a review of the Report on Government Services, to be undertaken by a combined Senior Officials and Heads of Treasuries Working Group, to take place in the first half of 2009. This review will coincide with the first stage of the review of existing data collection and quality processes, also agreed at the July 2008 meeting. The reviews are aimed at improving data quality so that transparency and accountability in relation to government service delivery are improved.

**COAG Meetings in 2009**

Apart from its earlier commitment to hold a specific closing the gap COAG meeting in 2009, COAG agreed that there would be an opportunity over the next year to consider further the broad allocation of responsibilities within the federation.

## COAG Funding Package

| | 2008-09 ($m) | 2009-10 ($m) | 2010-11 ($m) | 2011-12 ($m) | 2012-13 ($m) | Total ($m) |
|---|---|---|---|---|---|---|
| **Healthcare Sector** | | | | | | |
| ***Healthcare SPP*** | ***500.0*** | ***674.5*** | ***913.5*** | ***1,190.9*** | ***1,500.1*** | ***4,779.0*** |
| Additional Base and Indexation | 500.0 | 674.5 | 913.5 | 1,190.9 | 1,500.1 | 4,779.0 |
| ***Healthcare NPs*** | ***1,286.5*** | ***212.4*** | ***401.2*** | ***566.0*** | ***593.9*** | ***3,059.9*** |
| Hospitals and Health Workforce Reform | 536.5 | 166.1 | 294.9 | 379.8 | 375.7 | 1,753.0 |
| Preventative Health | - | 17.6 | 67.05 | 145.2 | 218.2 | 448.1 |
| E-health (NEHTA) | - | 28.7 | 39.2 | 41.0 | - | 108.9 |
| Additional Investment in Emergency Departments | 750.0 | - | - | - | - | 750.0 |
| **Productivity Agenda Sector** | | | | | | |
| ***Schools SPP*** | ***868.1*** | ***171.4*** | ***213.1*** | ***268.1*** | ***333.8*** | ***1,854.5*** |
| Additional Indexation | - | 40.9 | 73.8 | 120.5 | 177.2 | 412.4 |
| 10 per cent AGSRC for Primary Schools | 61.1 | 130.5 | 139.3 | 147.6 | 156.6 | 635.1 |
| Upfront Payment including Digital Education Revolution | 807.0 | - | - | - | - | 807.0 |
| ***Productivity Agenda NPs*** | ***33.3*** | ***191.9*** | ***265.0*** | ***618.0*** | ***548.8*** | ***1,657.0*** |
| Smarter Schools - Quality Teaching | 22.0 | 40.0 | 60.0 | 243.0 | 185.0 | 550.0 |
| Smarter Schools - Literacy and Numeracy (a) | - | - | - | - | - | - |
| Smarter Schools - Low SES Schools | 11.3 | 151.9 | 205.0 | 375.0 | 363.8 | 1,107.0 |
| Universal Access (a) | - | - | - | - | - | - |
| **Skills and Workforce Development Sector** | | | | | | |
| ***Skills and Workforce Development SPP*** | ***-*** | ***4.2*** | ***9.8*** | ***11.3*** | ***11.4*** | ***36.7*** |
| Additional Indexation | - | 4.2 | 9.8 | 11.3 | 11.4 | 36.7 |
| ***Skills and Workforce Development NP*** | ***-*** | ***-*** | ***-*** | ***-*** | ***-*** | ***-*** |
| Productivity Places Program (a) | - | - | - | - | - | - |
| **Disability Services Sector** | | | | | | |
| ***Disability Services SPP*** | ***70.0*** | ***23.0*** | ***70.9*** | ***101.3*** | ***142.6*** | ***407.8*** |
| Additional SPP for Disability Reform | 70.0 | 23.0 | 70.9 | 101.3 | 142.6 | 407.8 |
| **Affordable Housing Sector** | | | | | | |
| ***National Affordable Housing SPP*** | ***-*** | ***1.3*** | ***7.4*** | ***14.9*** | ***22.7*** | ***46.4*** |
| Additional Indexation | - | 1.3 | 7.4 | 14.9 | 22.7 | 46.4 |
| ***Affordable Housing NPs*** | ***200.0*** | ***275.0*** | ***105.0*** | ***110.0*** | ***110.0*** | ***800.0*** |
| Homelessness Recurrent | - | 75.0 | 105.0 | 110.0 | 110.0 | 400.0 |
| Social Housing | 200.0 | 200.0 | - | - | - | 400.0 |
| **Indigenous Reform Sector** | | | | | | |
| ***Indigenous Reform NPs*** | ***439.5*** | ***213.7*** | ***245.2*** | ***494.1*** | ***574.2*** | ***1,966.8*** |
| Indigenous Economic Development | 15.0 | 39.8 | 39.8 | 38.9 | 39.2 | 172.7 |
| Indigenous Health | - | 82.7 | 157.2 | 247.6 | 318.0 | 805.5 |
| Indigenous Remote Service Delivery | 24.5 | 31.2 | 32.4 | 33.4 | 32.5 | 154.0 |
| Indigenous Housing | 400.0 | 60.0 | 15.8 | 174.2 | 184.5 | 834.6 |
| **Other Sectors** | | | | | | |
| ***Business Regulation and Competition NP*** | ***100.0*** | ***-*** | ***-*** | ***200.0*** | ***250.0*** | ***550.0*** |
| Seamless National Economy | 100.0 | - | - | 200.0 | 250.0 | 550.0 |
| **Total COAG Funding Package** | **3,497.4** | **1,767.5** | **2,231.2** | **3,574.6** | **4,087.5** | **15,158.1** |

(a) Funding already in Commonwealth forward estimates.

**ATTACHMENT A**

**HEALTH AND AGEING**

COAG agreed today to a landmark deal providing $64.4 billion over five years, including an additional $8.6 billion over current forward estimates. This includes $60.5 billion over five years for the National Healthcare Agreement, which reverses the cuts of the previous Agreement and provides $4.8 billion in additional base funding. In the fifth year of this Agreement, the base will increase by $1.5 billion. This means that States are, on average, better off by nearly $1 billion each year over the five years.

As part of this deal, the Commonwealth is offering a $500 million recurrent boost in base funding from 2008-09, increasing the starting point for the National Healthcare Agreement from $9.96 billion to $10.46 billion. The Commonwealth is also delivering a more generous indexation formula, which currently delivers indexation of 7.3 per cent per annum to put public hospital funding on a more sustainable footing.

*Additional Throughput in Hospitals*

This funding will ensure that free public hospital services continue for the Australian community. This equates to increased throughput in public hospitals over and above 2008-09 levels over four years, of 2.5 million extra outpatient services, 350,000 additional Emergency Department presentations, 200,000 additional same-day separations and 170,000 additional overnight separations.

Additional Commonwealth funding of $500 million in 2008-09 will provide the equivalent of an extra 1,600 sub-acute care beds (an increase in capacity of five per cent per year over four years). Sub-acute care services improve health outcomes, quality of life, productivity and reduce hospital readmission rates. This will enable many older people to leave hospital and help free up hospital beds.

*Health Workforce*

The Commonwealth and the States also committed to an unprecedented reform package of $1.6 billion – the single largest investment in the health workforce ever made by Australian governments – comprising $1.1 billion of Commonwealth funding and $540 million in State funding.

This will meet the future challenges of the health system through workforce reform by providing $500 million in additional Commonwealth funding for undergraduate clinical training, including increasing the clinical training subsidy to 30 per cent for all health

undergraduate places. The package also provides for an increase of 605 postgraduate training places, including 212 GP places, and the establishment of a national health workforce agency and health workforce statistical register to drive a more strategic long-term plan for the health workforce.

Investment of $175.6 million over four years in capital infrastructure will also be provided to expand teaching and training, especially at major regional hospitals to improve clinical training in rural Australia. This is vital because students who train in rural areas are more likely to practice in rural Australia.

The 212 additional ongoing GP training places will boost the total number of GP training places to over 800 from 2011 onwards, and 73 additional specialist training places in the private sector. Funding will also be provided to train approximately 18,000 nurse supervisors, 5,000 allied health and other supervisors, and 7,000 medical supervisors.

*Taking Pressure off Public Hospitals*

The Commonwealth is also investing an additional $750 million in 2008-09 to relieve pressure on public hospital emergency departments. This recognises that emergency departments are treating an increased number of patients who could otherwise be treated in the primary care sector. Treating primary care patients puts added pressure on emergency departments, resulting in longer waits for patients and adding avoidable costs to the public hospital system. This injection will fund the equivalent of 1.9 million emergency department presentations and relieve some of the pressure on public hospitals, while the primary care reforms the Commonwealth is undertaking are being implemented.

*Shared Accountability and Better Performance Reporting*

The Commonwealth and the States have also agreed to the following objectives and outcomes for the health and hospital system. These are:

- children are born and remain healthy;
- Australians manage the key risk factors that contribute to ill health;
- Australians have access to the support, care and education they need to make healthy choices;
- the primary health care needs of all Australians are met effectively through timely and quality care in the community;
- people with complex care needs can access comprehensive, integrated and coordinated services;
- Australians receive high-quality hospital and hospital related care;

- older Australians receive high-quality, affordable health and aged care services that are appropriate to their needs and enable choice and seamless, timely transitions within and across sectors;
- patient experience: Australians have positive health and aged care experiences which take account of individual circumstances and care needs;
- social inclusion and Indigenous health: Australia's health system promotes social inclusion and reduces disadvantage, especially for Indigenous Australians; and
- sustainability: Australians have a sustainable health system.

The Commonwealth and the States have also agreed to report against a number of performance measures to address these outcomes including: preventable disease and injuries; timely access to GPs, dental and other primary health care professionals; life expectancy, including the gap between Indigenous and non-Indigenous Australians; waiting times for services; and net growth in the health workforce. The COAG Reform Council will report progress against these performance measures annually, commencing in 2009-10.

In addition, the COAG Reform Council will report performance against a range of measures, including:

- reduced incidence and prevalence of sexually-transmitted infections and sentinel blood borne viruses (for example, Hepatitis C, HIV) for Indigenous and non-Indigenous Australians;
- increased immunisation rates for vaccines in the national schedule;
- reduced waiting times for selected public hospital services;
- a reduction in selected adverse events in acute and sub-acute care settings compared to 2008-09 levels;
- a reduction in unplanned/unexpected readmissions within 28 days of selected surgical admissions compared to 2008-09 levels;
- increased rates of services provided by public hospitals per 1,000 weighted population by patient-type compared to 2008-09 levels;
- timely access to GPs, dental and primary health care professionals; and
- a reduction in selected potentially avoidable GP type presentations to emergency departments.

The Commonwealth and the States have also agreed to provide a basis for more efficient use of taxpayer funding of hospitals, and for increased transparency in the use of those funds through the introduction of Activity Based Funding. It will also allow comparisons of efficiency across public hospitals.

*Health Prevention NP*

The Commonwealth and the States have agreed to a Health Prevention NP, with the Commonwealth providing funding of $448.1 million over four years, and $872.1 million over six years starting from 2009-10 to improve the health of all Australians. This funding could support the following elements:

- increased access to services for children to increase physical activity and improved nutrition;
- provision of incentives for workplaces and local communities to provide physical activity and other risk modification and healthy living programs;
- increased public awareness of the risks associated with lifestyle behaviour and its links to chronic disease;
- a national social marketing campaign; and
- enabling infrastructure, including a national preventative health agency, surveillance program, workforce audit, eating disorders collaboration, partnerships with industry and a preventative health research fund, leading to better oversight and research into prevention, leading to improved outcomes.

This funding will lead to reductions in the proportion of people who smoke, are at unhealthy bodyweight, and/or do not meet national guidelines for physical activity and healthy eating.

Specifically, governments commit to:

- increase the proportion of adults and children with healthy body weight, reduce rates of obesity and avert new cases of diabetes in adults each year;
- increase the proportion of children and adults meeting national guidelines for physical activity and healthy eating; and
- reduce the proportion of adults smoking daily, averting premature deaths and ameliorating costs.

*Indigenous Health NP*

The Commonwealth and the States have agreed to an Indigenous Health NP worth $1.6 billion over four years, with the Commonwealth contributing $806 million and the States $772 million. This proposal will contribute to addressing the COAG-agreed closing the gap targets for Indigenous Australians, closing the life expectancy gap within a generation and halving the mortality gap for children under five within a decade. The proposal includes expanded primary health care and targeted prevention activities to reduce the burden of chronic disease.

This NP is a down payment on the significant investment needed by both levels of government to close the unacceptable gap in health and other outcomes between Indigenous and non-Indigenous Australians.

The NP will lead to:

- reduced smoking rate among Aboriginal and Torres Strait Islander peoples;
- reduced burden of diseases for Aboriginal and Torres Strait Islander communities;
- increased uptake of Medicare Benefits Schedule-funded primary care services to Indigenous people with half of the adult population (15-65 years) receiving two adult health checks over the next four years;
- significantly improved coordination of care across the care continuum; and
- over time, a reduction in the average length of hospital stay and reduction in readmissions.

This means that over a five-year period, around 55 per cent of the adult Indigenous population (around 155,000 people) will receive a health check with about 600,000 chronic disease services delivered. More than 90,000 Indigenous people with a chronic disease will be provided with a self-management program, while around 74,500 Indigenous people will receive financial assistance to improve access to Pharmaceutical Benefits Scheme medicines.

*E-Health*

COAG noted the progress of the National E-Health Transition Authority and agreed to the continued funding of $218 million (50:50 cost shared between the Commonwealth and the States) for the period July 2009 - June 2012 to enable it to continue its existing work program.

**ATTACHMENT B**

## PRODUCTIVITY AGENDA

Reform in the way education and training is delivered is critical to driving our future productivity and increasing social inclusion. COAG agreed that every child needs access to high-quality education and training, starting from an early age.

The new Agreements for Education and Skills and Workforce Development set out reform directions, specific deliverables, and roles and responsibilities. Under these Agreements the Commonwealth and the States will work in partnership to lift the quality of education and training and target resources to where they are most needed.

*National Education Agreement*

This funding ensures that the States can allocate resources more flexibly, while providing a set of definitive and measurable targets to provide the basis for accountability by governments to the community. The National Agreement will contribute to the following outcomes:

- all children are engaged in, and benefiting from, schooling;
- young people are meeting basic literacy and numeracy standards, and overall levels of literacy and numeracy achievement are improving;
- Australian students excel by international standards;
- schooling promotes social inclusion and reduces the education disadvantage of children, especially Indigenous children; and
- young people make a successful transition from school to work and further study.

COAG agreed that the National Education Agreement is critical to achieving the targets set by them earlier this year, to lift the Year 12 or equivalent attainment rate to 90 per cent by 2020, to halve the gap for Indigenous students in reading, writing and numeracy within a decade, and to at least halve the gap for Indigenous students in Year 12 or equivalent attainment by 2020.

Today, the States also agreed to implement the National Curriculum.

The Commonwealth and the States agreed to pursue further policy and reform directions through the National Education Agreement and NPs, focussing on:

- improving school leader and teacher quality, including support for school principals;
- setting high standards and expectations for all students;

- boosting parental engagement in schooling;
- implementing integrated strategies for low SES school communities;
- implementing modern teaching and learning environments;
- ensuring better directed resources;
- providing support to students with additional needs; and
- reviewing funding and regulation across government and non-government school sectors.

*Greater Transparency and Accountability*

COAG agreed that greater transparency and accountability for the performance of our schools is essential to ensure that every Australian child receives the highest quality education and opportunity to achieve through participation in employment and society.

All jurisdictions agreed to a new performance reporting framework. COAG agreed that high-quality accountability and reporting is important for students, parents, carers and the community. It is also important for tracking the achievement of the COAG targets.

The reporting agreed by all governments includes:

- streamlined and consistent reports on national progress, including an annual national report on the outcomes of schooling in Australia;
- national reporting on performance of individual schools to inform parents and carers and for evaluation by governments of school performance; and
- provision by schools of plain language student reports to parents and carers and an annual report made publicly available to their school community on the school's achievements and other contextual information.

COAG agreed to a set of performance indicators to indicate progress towards achieving the agreed outcomes, with particular reporting on outcomes for Indigenous students and students from low socio-economic status communities.

COAG noted that funding for the non-government school sector is being appropriated through separate Commonwealth legislation – the *Schools Assistance Bill 2008* and that the accountability framework for non-government schools and school systems will be consistent with that of the new National Education Agreement.

COAG agreed that the new Australian Curriculum, Assessment and Reporting Authority will be supplied with the information necessary to enable it to publish relevant, nationally-comparable information on all schools to support accountability, school

evaluation, collaborative policy development and resource allocation. The Authority will provide the public with information on each school in Australia that includes data on each school's performance, including national testing results and school attainment rates, the indicators relevant to the needs of the student population and the school's capacity including the numbers and qualifications of its teaching staff and its resources. The publication of this information will allow comparison of like schools (that is, schools with similar student populations across the nation) and comparison of a school with other schools in their local community.

*The National Secondary School Computer Fund*

COAG has agreed that the Commonwealth will provide $807 million to meet the additional costs incurred by the States in implementing the National Secondary School Computer Fund. The States agreed to report on their progress toward reaching a 1:1 student to computer ratio for Year 9 to 12 students; and to pass on the non-government sector share of these funds.

*Low Socio-Economic Status School Communities*

COAG agreed that addressing educational disadvantage arising from low socio-economic status (SES) requires sustained effort involving a suite of reforms to transform fundamentally the way schooling takes place.

This new low SES School Communities NP agreed by COAG directly addresses this challenge. Through this seven-year NP, the Commonwealth will provide $1.1 billion over five years (and a total of $1.5 billion over seven years) to address the needs of disadvantaged schools, while giving greater discretion to those school leaders and local school communities facing the greatest education disadvantage to employ strategies that address the particular issues they face.

The NP will fund a range of within school and out-of-school reforms that will support the educational and wellbeing needs of students and schools in low SES communities.

The States agreed that they will develop Implementation Plans, based on the reforms they propose to implement in identified schools within their jurisdictions, including non-government schools. The Commonwealth will negotiate a Bilateral Agreement and funding offer with each participating State, based on these plans.

The Implementation Plans may include:

- incentives to attract high-performing principals and teachers;

- adoption of best-practice performance management and staffing arrangements that articulate a clear role for principals;
- school operational arrangements which encourage innovation and flexibility;
- provision of innovative and tailored learning opportunities;
- strengthened school accountability; and
- external partnerships with parents, other schools, businesses and communities and provision of access to extended services (including through brokering arrangements).

COAG agreed that the Commonwealth funding of $1.1 billion over the five years to 2012-13 (a total of $1.5 billion over seven years) for the NP would be matched by State investment.

This level of funding will support significant reform initiatives in approximately 1,500 schools in low SES communities.

The States also agreed to invite non-government schools to participate in the NP and to support principals in participating schools in the development of whole-of-school plans. They will also provide regular reports to the Commonwealth on progress in implementing the agreed reforms.

*Literacy and Numeracy* NP

COAG agreed the necessity to deliver sustained improvement in literacy and numeracy outcomes for all students, especially those who are falling behind.

A new NP on Literacy and Numeracy will focus on:

- achieving sustainable improvements in literacy and numeracy, as a key indicator of the ability to go on and complete Year 12 for all students;
- improving literacy and numeracy for primary school students, especially Indigenous students; and
- developing a national understanding of what works and a shared accountability for the achievement of Australian students.

The Commonwealth has previously agreed to provide $540 million to support this NP. Of this, $150 million will facilitate reform initiatives and $350 million will reward measurable and ambitious improvement in literacy and numeracy outcomes for the schools and students targeted through this NP. Some $40 million will support research and data collection, including $13 million for the National Schools Assessment and Data Centre.

The States agreed to match the facilitation funding, including by using existing or redirected funding.

Governments will continue to share best practice in the key areas of teaching, leadership and the effective use of student performance information to deliver sustained improvement in literacy and numeracy as a critical part of achieving national outcomes.

*Smarter Schools - Quality Teaching NP*

Teacher quality is the single greatest in-school influence on student engagement and results. Improving teacher quality requires both improved school leadership by principals and new approaches to teacher recruitment, retention and reward. To ensure every student throughout Australia receives high-quality schooling, COAG agrees that this NP will deliver ambitious, nationally-significant reforms to target critical points in the teacher 'lifecycle' to attract, train, place, develop and retain quality teachers and school leaders. COAG also agreed that this NP will deliver, through a specific commitment of $50 million, world leading professional development and support which will empower principals to manage better their schools to achieve improved student results and higher quality to lead performance improvement at the local level.

The Commonwealth will commit $550 million to the Smarter Schools – Quality Teaching NP. The $200 million facilitation and $350 million reward payments provide a balanced investment to achieve significant gains in school leadership and teacher quality.

COAG agreed that the NP would contribute to critical reforms on:

- new professional standards to underpin national reforms;
- recognition and reward for quality teaching;
- a framework to guide professional learning for teachers and school leaders;
- national accreditation of pre-service teacher education courses;
- national consistency in teacher registration;
- national consistency in accreditation/certification of Accomplished and Leading Teachers;
- improved mobility of the Australian teaching workforce;
- joint engagement with higher education to provide improved pre-service teacher education; new pathways into teaching; and, data collection to inform continuing reform action and workforce planning; and
- improved performance management in schools.

The reform will be delivered on the basis of Implementation Plans to be concluded between participating States and the Commonwealth. Bilateral Agreements will set out the agreed facilitation payments and State co-investments to be made in support of these reforms. The States will also be rewarded for reforms that improve teacher remuneration structures, increase school-based decision-making and improve support for teachers in 'hard-to-staff' and disadvantaged schools.

COAG agreed that an important element of this NP is to build professional pathways for Indigenous people and Indigenous education workers who wish to progress to teaching. It will also improve reward structures for teachers and leaders who work in disadvantaged, Indigenous, rural/remote and hard-to-staff schools and provide support for Indigenous teachers' and school leaders' engagement with community members.

COAG agreed that non-government school sectors would be invited to participate appropriately in this NP.

COAG further agreed to the development and implementation of a National Professional Teacher Standards Framework and certification/accreditation process for teachers and school leaders.

*Early Childhood Education NP*

As a demonstration of all governments' commitment to increase children's early education opportunities, particularly for children from disadvantaged backgrounds, leaders agreed to an NP to give all children the opportunity to access quality early childhood education.

The Commonwealth has previously agreed to provide $970 million over five years, including $15 million for data development and evaluation, and $955 million through a five-year NP to States that have committed to achieving universal access to early childhood education for all children in the year before school by 2013. The significant under-representation of Indigenous children in preschool programs, especially Indigenous children in remote communities will be an area of particular focus. Funding will be provided through a National Agreement after 2012-13.

The pre-school program will be delivered by a four-year university-qualified early childhood teacher, in accordance with a national early years learning framework for 15 hours a week and 40 weeks a year. States will ensure it will be accessible across a diversity of settings, in a form that meets the needs of parents and in a manner that ensures cost does not present a barrier to access.

The distribution of funding across the States in the first four years will have an emphasis on assisting those jurisdictions that are further behind in the delivery of pre-school services, but that also recognises the primary responsibility of States for pre-school provision and improving performance. Funding from the final year will be on a four year old population basis.

Bilateral agreements for implementing the reform are being finalised between each jurisdiction and the Commonwealth. States and the Commonwealth will have responsibility for implementing these bilateral agreements.

## NATIONAL SKILLS AND WORKFORCE DEVELOPMENT

*Vocational Education and Training – National Skills and Workforce Development Agreement*

COAG agreed to a new National Skills and Workforce Development Agreement which sets out the commitment between the Commonwealth and the States to work towards increasing the skill levels of all Australians, including Indigenous Australians.

COAG agreed that, through this National Agreement, it would monitor progress towards achieving the following outcomes:

- the working age population have gaps in foundation skill levels reduced to enable effective educational, labour market and social participation;
- the working age population has the depth and breadth of skills and capabilities required for the 21st century labour market;
- the supply of skills provided by the national training system responds to meet changing labour market demand; and
- skills are used effectively to increase labour market efficiency, productivity, innovation and ensure increased utilisation of human capital.

COAG agreed that progress toward achieving these outcomes would be measured by:

- proportion of the working age population at literacy level 1, 2 and 3;
- proportion of 20-64 year olds who do not have a qualification at or above Certificate III;
- proportion of graduates employed after completing training, by previous employment status;
- percentage of graduates with improved employment status after training;
- the number of hard-to-fill vacancies; and
- the proportion of people employed at or above the level of their qualification, by field of study.

As part of this National Agreement, the States will ensure the effective operation of the training market, including in relation to market information. The Commonwealth agreed to provide national information to clients and potential clients in all jurisdictions.

Under the Skills and Workforce Development SPP, the Commonwealth will provide an estimated $6.7 billion over the forward estimates from 1 January 2009 to 2012-13, including $37 million in skills and workforce development funding. The States will deliver up to 1.15 million VET course completions nationally over this funding period.

The States acknowledged that the base funding provided includes the Commonwealth's contribution to capital development and maintenance in the training sector. In addition, the base funding will include funding previously provided to the States for VET through Indigenous-specific funding elements, and also include VET in Schools funding. To ensure that non-government schools are not disadvantaged by this change, the States agreed to ensure that VET in Schools funding levels for non-government schools is to be maintained.

COAG agreed that funding of $47.4 million annually (plus indexation) for management of the National Training System be quarantined from the Agreement and that Training Ministers and Senior Officials monitor and advise on how this funding is allocated.

The Agreement also sets out agreed COAG targets to halve the proportion of 20-64 year olds without qualifications at Certificate III level by 2020, and to double the number of higher qualification completions by 2020.

*Productivity Places Program NP*

Today COAG agreed to an NP for the delivery of training under the Productivity Places Program that will target areas of current skill shortage and emerging skill needs. Delivery of these training places will help to make training more flexible and responsible to the needs of industry, employers and individuals. Through this Agreement (and a separate agreement with Victoria), the States agreed to deliver an additional 506,750 qualifications commencements for job seekers and existing workers over four years.

The Commonwealth agreed to fund 100 per cent of places for job seekers and 50 per cent of places for existing workers. The States agree to fund 40 per cent of places for existing workers, with the remaining 10 per cent to be funded by private contributions. The Commonwealth has previously committed $1.2 billion over four years for this NP.

The NP will commence on 1 January 2009 and expire on 30 June 2012. States entering into the NP will be required to develop implementation plans which demonstrate how they will manage and implement the training places and meet the conditions of the NP.

Implementation plans are to be provided to the Commonwealth for approval by 12 December 2008.

To support the NP, the Commonwealth agreed to provide data and information to Skills Australia to assist it in identifying industries, occupation and regions that are experiencing skill shortages, and to establish a national priority list based on advice, including from Skills Australia. Further, it was agreed to ensure a role for Industry Skills Councils in the brokerage of training.

COAG also agreed to the development of a national data portal by 2012 for all government funded training delivery, encompassing the Australian Vocational Education and Training Management Information Statistical Standard (AVETMISS) reporting requirements and allows for the tracking of individual students. Prior to this, reporting will occur through AVETMISS.

The States have agreed to provide details of when the additional training will be delivered on an annual and monthly basis.

The States also agreed that all training delivered under this Agreement will be in addition to their current training effort.

The Commonwealth extended an offer to the States that move to an entitlement-based student demand-driven training system, so that Productivity Places Program funding could be treated in a similar way as base funding for the purposes of accountability and reporting. This is similar to an offer already in place between the Commonwealth and Victoria.

*TAFE Fee Waivers for Childcare Qualification NP*

COAG today agreed to support delivery of the Commonwealth commitment to fund States to remove fees for the Diplomas and Advanced Diplomas of children's services courses delivered at Technical and Further Education institutions and other government training providers. The estimated funding is $8.5 million for 2009.

A longer term arrangement will be negotiated by the parties to this agreement for the period 2010-12.

The Commonwealth funding is part of its Early Childhood Education Workforce Strategy.

**ATTACHMENT C**

## AFFORDABLE HOUSING

The National Affordable Housing Agreement (NAHA) agreed today will be complemented by a commitment to three significant NPs to address homelessness, social housing and Indigenous housing.

The NAHA will provide a framework for governments to work together to improve housing affordability, reduce homelessness and reduce Indigenous housing disadvantage. It will include consideration of taxes and charges relating to housing as well as the planning, urban development and regulatory environment.

As part of the new Agreement, governments have committed to undertake reforms in the housing sector, including to improve integration between the homelessness service system and mainstream services, to reduce concentrations of disadvantage that exist in some social housing estates, improve access by Indigenous people to mainstream housing, including home ownership, enhancing the capacity and growth of the not-for-profit housing sector, and planning reforms for greater efficiency in the supply of housing.

*Homelessness NP*

The Commonwealth and the States have agreed to an additional $800 million for an NP on homelessness. The Commonwealth will provide an additional $400 million over four years from 2009-10, and the States will match this with a $400 million commitment, recognising efforts of the States in their most recent Budget. The Homelessness NP provides a significant first step to achieve a 50 per cent reduction in homelessness, an end to rough sleeping by 2020, and implementing a policy of 'no exits into homelessness' from statutory or custodial care for those at risk of homelessness.

Under the NP, the Commonwealth and the States will work together to reduce significantly homelessness by 2013, through a national strategic approach focused on prevention and early intervention, breaking the cycle of homelessness and creating a new outcomes-focussed service model. This will be achieved by improving the service response to homelessness, with the aim to end homelessness by driving integration between mainstream and homeless specific services and improving service quality.

The NP aims to address individual and structural causes of homelessness, provide people at risk of experiencing homelessness with sustainable housing and improve the social and economic participation of people experiencing homelessness. In addition, governments are committed to a genuine reduction in the number of people who experience multiple periods of homelessness.

The NP and relevant implementation plans will be finalised by 1 April 2009.

*Social Housing NP*

The Commonwealth and the States have agreed to a Social Housing NP, commencing 1 January 2009, with the Commonwealth providing $400 million over two years, $200 million in 2008-09 and $200 million in 2009-10 for capital investment for social housing and homelessness.

Under this NP, the States will increase the supply of social housing through new construction, providing approximately 1600 to 2100 additional dwellings by 2009-10. Implementation plans will be finalised by 1 April 2009. Governments have also agreed to consider further social housing reforms, supply shortfalls and possible payment of Commonwealth funding assistance through a per dwelling subsidy, such as Commonwealth Rent Assistance.

*Remote Indigenous Housing*

All States and the Northern Territory have agreed to a new 10-year NP on remote Indigenous housing, in which the Commonwealth will provide an additional $1.94 billion over 10 years ($834.6 million over five years) to address significant overcrowding, homelessness, poor housing conditions and the severe housing shortage in remote Indigenous communities. Improving housing conditions will provide the foundation for lasting improvements in health, education and employment and make a major contribution towards closing the gap in Indigenous disadvantage.

The total package of $1.94 billion over 10 years will provide:

- up to 4,200 new houses to be built in remote Indigenous communities; and
- upgrades to around 4,800 existing houses with a program of major repairs commencing in 2008-09.

The NP also clarifies the responsibilities of the Commonwealth, the States and the Northern Territory, with the States the main deliverer of housing in remote Indigenous communities, providing standardised tenancy management and support consistent with public housing tenancy management.

The States and the Commonwealth will work towards clearer roles and responsibilities and funding with respect to municipal services and ongoing maintenance of infrastructure and essential services in remote areas.

The NP will commence on 1 January 2009 with implementation plans to be finalised by 1 April 2009.

**ATTACHMENT D**

## INDIGENOUS REFORM

To progress the targets for closing the gap between Indigenous and non-Indigenous Australians, all governments have been developing fundamental reforms recognising that substantial investment is required.

Governments will develop Implementation Plans in consultation with Indigenous people.

COAG has agreed this year to targeted initiatives for Indigenous Australians of $4.6 billion across early childhood development, health, housing, economic participation and remote service delivery.

This major investment is supported by a strong focus on better Indigenous outcomes through the new National Agreements and general NPs, aimed at assisting disadvantaged groups, including in education, health and housing.

In this way, COAG is ensuring that the closing the gap targets are being supported across the range of reformed financial arrangements between the Commonwealth and the States.

*Indigenous Economic Development NP*

COAG agreed to a new five year NP on Indigenous Economic Development. The Commonwealth and the States will invest $228.8 million ($172.7 million Commonwealth funding and $56.2 million State funding over five years) to assist up to 13,000 Indigenous Australians into employment.

Being employed leads to improved wealth and asset creation for Indigenous families and communities, which in turn has a positive influence on health and the education of children. It also enhances self-esteem, increases opportunities for self development, influences interaction at the family and community levels and reduces social alienation.

In a tangible contribution to COAG's commitment to halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade, COAG agreed on an NP for Indigenous Economic Development. Plans to implement the agreement will be developed cooperatively by all jurisdictions within three months.

As part of the initiative, jobs will be created in areas of government service delivery that have previously relied on subsidies through the Community Development Employment Projects program. Public-sector Indigenous employment and career development strategies

will also be reviewed to increase Indigenous public sector employment to reflect Indigenous working age population share by 2015, and governments will also strengthen current procurement policies to maximise Indigenous employment, skills development and business creation.

The Commonwealth and the States are investing significantly in capital development, procurement and service delivery through the full range of COAG reforms. Indigenous workforce strategies will be built into implementation plans for all reforms contributing to the closing the gap targets.

*Indigenous Remote Service Delivery NP*

COAG agreed to a new NP on Indigenous Remote Service Delivery to improve the delivery of services in 26 remote Indigenous locations. Through this NP the Commonwealth and States will provide a total of $291.2 million over six years in joint funding to improve access to services by Indigenous Australians in remote areas.

The 26 remote Indigenous locations are comprised of 15 communities in the Northern Territory, four locations in the Cape York and Gulf regions in Queensland, three in Western Australia (at least two would be in the Kimberley), two in the Anangu Pitjantjatjara Yankunytjatjara Lands in South Australia and two remote locations in the Murdi Paaki region in western New South Wales.

Benefits will include:

- improved outcomes through improved access to health, education, employment and other services in remote areas;
- revitalised Indigenous organisations with capacity to assist individuals and families to engage with all the opportunities associated with a better serviced region;
- greater economic opportunities (business investment and home ownership) as a result of resolution of land tenure and land administration issues; and
- over time, a reduced reliance on government transfer payments by individuals in remote communities.

*Wider Reforms*

The National Agreements and NPs on health, education and housing will also make a significant contribution to closing the gap. The National Healthcare Agreement commits to Indigenous Australians achieving better health outcomes, comparable to the broader population, with the Indigenous Health NP providing an additional $1.6 billion over four

years to expand primary health care and targeted prevention activities to reduce the burden of chronic disease on Indigenous Australians.

The National Education Agreement includes a focus on outcomes for Indigenous students, with a particular focus on improving literacy and numeracy and Year 12 or equivalent attainment. The literacy and numeracy NP has a particular focus on Indigenous students. The NP on improved teacher quality will also have an emphasis on building professional pathways for Indigenous people and Indigenous education workers who wish to progress to teaching. Many Indigenous students will also benefit from implementation of the NP directed to low-socio-economic communities. These build on commitments to achieve universal action to early childhood education, especially for Indigenous children in remote communities and the $564 million previously committed in October 2008 for the Indigenous Early Childhood Development NP.

The NAHA has as a key outcome improving housing amenities for Indigenous people and reducing overcrowding. In addition, the NP on Remote Indigenous Housing will provide an additional $2 billion over 10 years for major reforms to Indigenous housing and essential services in remote Australia.

# NATIONAL PARTNERSHIP AGREEMENT TO DELIVER A SEAMLESS NATIONAL ECONOMY

Council of Australian Governments

An agreement between

- the **Commonwealth of Australia** and
- the **States and Territories**, being:
  - The State of New South Wales;
  - The State of Victoria;
  - The State of Queensland;
  - The State of Western Australia;
  - The State of South Australia;
  - The State of Tasmania;
  - The Australian Capital Territory; and
  - The Northern Territory of Australia.

An agreement between the Commonwealth and the States and Territories to facilitate the implementation and reward the delivery of reforms that assist in the creation of a seamless national economy.

# National Partnership Agreement to Deliver a Seamless National Economy

## PRELIMINARIES

1. This agreement is created subject to the provisions of the Intergovernmental Agreement on Federal Financial Relations and should be read in conjunction with that Agreement and subsidiary schedules. In particular, the schedules include direction in respect of performance reporting and payment arrangements.

2. The Parties are committed to addressing the issue of social inclusion, including responding to Indigenous disadvantage. That commitment is embodied in the objectives and outcomes of this agreement. However, the Parties have also agreed other objectives and outcomes - for example, in the National Indigenous Reform Agreement - which the Parties will pursue through the broadest possible spectrum of government action. Consequently, this agreement will be implemented consistently with the objectives and outcomes of all National Agreements and National Partnerships entered into by the Parties.

3. In March 2008, the Council of Australian Governments (COAG) endorsed a far-reaching reform agenda, oversighted by the Business Regulation and Competition Working Group (BRCWG), for reducing the costs of regulation and enhancing productivity and workforce mobility in areas of shared Commonwealth, State and Territory responsibility.

4. In July 2008, COAG agreed that the seamless national economy initiatives were amongst the most significant and far-reaching of the potential reforms identified by COAG.

5. This National Partnership (NP) Agreement to Deliver a Seamless National Economy (the Agreement) recognises the implementation of the reforms progressed through the BRCWG. The NP payment model involves:

   (a) 'facilitation' payments that recognise the net set-up costs and revenue forgone by the States and Territories as a result of implementing the reforms set out in paragraph 14(a) of this Agreement; and

   (b) a 'reward' component, with payment contingent on independent assessment that clearly defined key milestones have been achieved.

6. The COAG reform agenda is intended to deliver more consistent regulation across jurisdictions and address unnecessary or poorly designed regulation, to reduce excessive compliance costs on business, restrictions on competition and distortions in the allocation of resources in the economy.

# PART 1 – FORMALITIES

## Parties to this Agreement

7. In entering this Agreement, the Commonwealth and the States and Territories (the Parties) recognise that they have a mutual interest in the creation of a seamless national economy and need to work together to achieve this objective.

## Term of the Agreement

8. This Agreement will commence as soon as the Commonwealth and one other Party signs the Agreement and will expire on 30 June 2013, or earlier as agreed in writing by the Parties.

# PART 2 – OBJECTIVES, OUTCOMES AND OUTPUTS

## Objectives

9. Through this Agreement, the Parties commit to:

   (a) continuing to reduce the level of unnecessary regulation and inconsistent regulation across jurisdictions;

   (b) delivering agreed COAG deregulation and competition priorities; and

   (c) improving processes for regulation making and review.

## Outcomes

10. The Agreement will contribute to the following outcomes:

   (a) creating a seamless national economy, reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions;

   (b) enhancing Australia's longer-term growth, improving workforce participation and overall labour mobility; and

   (c) expanding Australia's productive capacity over the medium-term through competition reform, enabling stronger economic growth.

## Implementation Plan

11. The Parties agree to the Implementation Plan (Attachment A) to achieve the objectives of this Agreement. The Implementation Plan will be reviewed by the Parties on an annual basis to ensure that it reflects any new commitments made by COAG in this area.

   (a) The Commonwealth will maintain the Implementation Plan and will be responsible for updating the Implementation Plan with the agreement of the States and Territories, as progress is reviewed.

   (b) The Implementation Plan will include the timelines for achieving the key milestones.

   (c) In addition to the annual review of the Implementation Plan, amendments to the Implementation Plan can be requested by COAG or any of the Parties to the Agreement at any time, to accommodate emerging issues. These amendments will be agreed with the other Parties.

## Outputs

12. The objectives and outcomes of this Agreement will be achieved by implementing the following detailed, substantive reform agenda agreed by COAG in March 2008 and set out in the Implementation Plan.

13. The Implementation Plan articulates the policy outcomes sought in each reform area and, where possible, also identifies key milestones for jurisdictions in progressing each reform.

14. The Implementation Plan comprises three streams:

    (a) the 27 deregulation priorities agreed by COAG in March 2008;

    (b) the eight priority areas for competition reform agreed by COAG in July 2008, comprising:

        (i) five new priority areas: review of Australia's anti-dumping and countervailing system; review of parallel importation of books; rationalisation of occupational licences; further national transport policy reform; and further reforms to infrastructure access, and

        (ii) implementation of reforms agreed through previous COAG processes, and endorsed by the BRCWG, in the three areas of energy, transport and infrastructure; and

    (c) regulatory reform that continues to develop and enhance existing processes for regulation making and review to increase the efficiency of regulation. These processes will continue to have regard to the regulatory management principles agreed by COAG in April 2007 as part of the National Reform Agenda, and subsequently endorsed by the BRCWG.

15. Under this Agreement, the Commonwealth will provide funding only in respect of those elements of the Implementation Plan described in paragraph 14(a).

16. In relation to key milestones that are yet to be agreed in any of the 27 deregulation priorities or the eight competition reform priorities in the Implementation Plan, these will be subject to COAG agreement and assessment of the costs and benefits of next stage reforms.

# PART 3 – ROLES AND RESPONSIBILITIES OF EACH PARTY

17. To realise the objectives and commitments in this Agreement, each Party has specific roles and responsibilities, as outlined below.

## Role of the Commonwealth

18. The Commonwealth will have responsibility for a national regulatory system in the areas of:

    (a) trade measurement;

    (b) regulation of trustee companies;

    (c) regulation of mortgage broking, margin lending, non-deposit taking institutions and the remaining areas of consumer credit;

    (d) registering business names;

    (e) personal property securities; and

(f) standard business reporting.

19. The Commonwealth will have primary responsibility, in co-operation with States and Territories, for implementing competition reform in the two priority areas of anti-dumping and countervailing system and parallel importation of books.

20. The Commonwealth and States and Territories will have shared responsibility for implementing competition reform in the remaining six priority areas.

## Role of the States and Territories

21. The States and Territories will have responsibility to work together, and for many specific reforms to work jointly with the Commonwealth, to implement a coordinated national approach in areas of:

(a) uniform occupational health and safety laws;

(b) environmental assessment and approvals;

(c) payroll tax;

(d) electronic conveyancing;

(e) licensing of tradespeople;

(f) consumer policy framework;

(g) product safety regulation;

(h) health workforce;

(i) rail safety regulation;

(j) development assessment;

(k) a new National Construction Code;

(l) chemicals and plastics regulation;

(m) food regulation;

(n) mine safety;

(o) oil and gas regulation;

(p) maritime safety;

(q) wine labelling; and

(r) directors' liability.

22. The States and Territories will also have shared responsibility with the Commonwealth for regulatory reform.

# PART 4 – PERFORMANCE BENCHMARKS AND REPORTING

## Performance benchmarks and indicators

23. The Commonwealth, the States and Territories agree to meet the following key milestones (set out in detail in the Implementation Plan). This will involve the Commonwealth, States and Territories:

    (a) implementing all 27 deregulation priorities in the specified timeframes, as set out in Part 1 of the Implementation Plan;

    (b) implementing all eight competition reform items in the specified timeframes, as set out in Part 2 of the Implementation Plan; and

    (c) implementing, by 30 June 2009, respective jurisdictional commitments to improve processes for regulation making and review outlined in Appendix C to the COAG Regulatory Reform Plan of April 2007, and subsequently endorsed by the BRCWG, as referred to in Part 3 of the Implementation Plan.

24. Achievement of these key milestones will be assessed annually for the Commonwealth and each State and Territory by the COAG Reform Council (CRC).

## Reporting

25. The reporting requirements under this Agreement should be read in conjunction with the provisions in Schedule C to the Intergovernmental Agreement on Federal Financial Relations.

26. Each party will provide a detailed report to the CRC on its progress against the key milestones for each financial year of the Agreement as detailed in the Implementation Plan.

27. The reports will be provided within three months of the end of the financial year, or as otherwise specified in the Implementation Plan.

# PART 5 – FINANCIAL ARRANGEMENTS

## Funding

28. The Commonwealth will make National Partnership payments to the States and Territories pursuant to this Agreement.

29. The total amount of funding available to the States and Territories in each financial year will be:

    (a) 2008-09 — a facilitation payment of $100 million;

    (b) 2009-10 — zero;

    (c) 2010 11 — zero;

    (d) 2011-12 — a reward payment of $200 million; and

    (e) 2012-13 — a reward payment of $250 million.

30. Distribution of these funding allocations will be on an equal per capita basis among the States and Territories as set out in the following table:

**Table 1: Distribution of Funding between the States and Territories based on per capita distribution**

| | 2008-09 $m | 2009-10 $m | 2010-11 $m | 2011-12 $m | 2012-13 $m | Total $m |
|---|---|---|---|---|---|---|
| NSW | 32.552 | 0.0 | 0.0 | 64.212 | 79.910 | 176.673 |
| Vic | 24.774 | 0.0 | 0.0 | 49.554 | 61.943 | 136.272 |
| Qld | 20.104 | 0.0 | 0.0 | 41.010 | 51.582 | 112.697 |
| WA | 10.133 | 0.0 | 0.0 | 20.683 | 26.021 | 56.838 |
| SA | 7.477 | 0.0 | 0.0 | 14.725 | 18.316 | 40.518 |
| Tas | 2.322 | 0.0 | 0.0 | 4.533 | 5.621 | 12.476 |
| ACT | 1.610 | 0.0 | 0.0 | 3.220 | 4.026 | 8.856 |
| NT | 1.028 | 0.0 | 0.0 | 2.062 | 2.580 | 5.671 |
| **Total** | **100.0** | **0.0** | **0.0** | **200.0** | **250.0** | **550.0** |

## Payment schedule

31. The Commonwealth will provide facilitation payments to the States and Territories in 2008-09 as set out in Table 1 above.

32. The Commonwealth will provide reward payments to the States and Territories following CRC advice as to the achievement of key milestones, as set out in the Implementation Plan for the 27 deregulation priorities. The maximum distribution of funds to be paid is set out in Table 1 above.

33. Progress in relation to the eight competition reform items and in relation to further regulatory reform as set out in Parts 2 and 3 of the Implementation Plan will not be the subject of reward payments.

34. In advising the Commonwealth on its assessment of progress against key milestones as set out in paragraph 32, the CRC must have regard to the following:

    (a) notwithstanding clause 32, States and Territories will continue to be eligible for their full reward payment in accordance with the timetable set out in Table 1 in relation to the 27 deregulation priorities, if one of the 27 priorities has not met the nominated key milestone for that year, provided that the priority is not in relation to:

        (i) occupational health and safety,

        (ii) licensing of tradespeople,

        (iii) trade measurement,

        (iv) consumer policy framework,

        (v) product safety regulation,

        (vi) regulation of trustee companies,

        (vii) regulation of mortgage broking, margin lending, non-deposit taking institutions and the remaining areas of consumer credit,

(viii) registering business names,

(ix) personal property securities, and

(x) standard business reporting;

(b) States and Territories will be eligible for full or partial reward payments in accordance with the timetable set out in Table 1 above, reflecting an assessment by the Commonwealth of the overall level of progress by each individual jurisdiction against all of the key milestones in respect of the 27 deregulation priorities set out in Part 1 of the Implementation Plan, based on the advice of the CRC; and

(c) the Commonwealth will ensure, in consultation with the States and Territories, that the Implementation Plan is amended prior to any CRC review to reflect any delays by the Commonwealth in the achievement of its milestones that impact on State and Territory capacity to meet milestones.

35. Any reward payments which are not allocated by the Commonwealth in any particular year because of underperformance in one or more jurisdictions will be retained by the Commonwealth and made available to the relevant jurisdiction in the subsequent year, subject to performance.

# PART 6 – GOVERNANCE ARRANGEMENTS

## Dispute resolution

36. Any Party may give notice to other Parties of a dispute under this Agreement.

37. If a dispute is unable to be resolved between the Parties, it may be referred by a Party to COAG for consideration.

## Review of the Agreement

38. The Commonwealth will review the Agreement, in consultation with the States and Territories, in 2011. The review will consider matters including CRC reports and advice and the progress made by the Parties against the Implementation Plan.

## Variation of the Agreement

39. The Agreement may be amended at any time by agreement in writing by all the Parties and under terms and conditions as agreed by all the Parties.

40. A Party to the Agreement may terminate its participation in the Agreement at any time by notifying all the other Parties in writing.

The Parties have confirmed their commitment to this agreement as follows:

**Signed** *for and on behalf of the Commonwealth of Australia by*

**The Honourable Kevin Rudd MP**
Prime Minister of the Commonwealth of Australia

February 2009

**Signed** *for and on behalf of the State of New South Wales by*

**The Honourable Nathan Rees MP**
Premier of the State of New South Wales

December 2008

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February 2009

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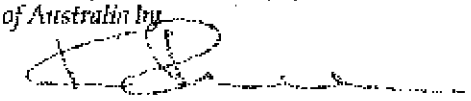

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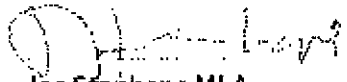

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Chief Minister of the Northern Territory of Australia

December 2008

# INTERGOVERNMENTAL AGREEMENT ON FEDERAL FINANCIAL RELATIONS

Council of Australian Governments

An agreement between

- the Commonwealth of Australia and
- the States and Territories, being:
  - the State of New South Wales;
  - the State of Victoria;
  - the State of Queensland;
  - the State of Western Australia;
  - the State of South Australia;
  - the State of Tasmania;
  - the Australian Capital Territory; and
  - the Northern Territory of Australia.

This Agreement implements a new framework for federal financial relations which will provide a robust foundation for collaboration on policy development and service delivery and facilitate the implementation of

economic and social reforms in areas of national importance.

# Intergovernmental Agreement on Federal Financial Relations

COUNCIL OF AUSTRALIAN GOVERNMENTS

## PRELIMINARIES

1. This Agreement implements a new framework for federal financial relations which will provide a robust foundation for the Parties to:

   (a) collaborate on policy development and service delivery; and

   (b) facilitate the implementation of economic and social reforms;

   in areas of national importance.

2. In signing this Agreement, the Parties acknowledge that coordinated action is necessary to address many of the economic and social challenges which confront the Australian community.

## PART 1 — TERMS

3. The Parties to this Agreement (the Parties) are:

   (a) The Commonwealth of Australia (the Commonwealth); and

   (b) The States and Territories, being:

   The State of New South Wales;

   The State of Victoria;

   The State of Queensland;

   The State of Western Australia;

   The State of South Australia;

   The State of Tasmania;

   The Australian Capital Territory; and

   The Northern Territory of Australia.

4. This Agreement will operate indefinitely from 1 January 2009 unless the Parties by unanimous agreement in writing revoke it.

# PART 2 — OBJECTIVES

5. The objective of the framework for federal financial relations is the improvement of the well-being of all Australians through:

   (a) collaborative working arrangements, including clearly defined roles and responsibilities and fair and sustainable financial arrangements, to facilitate a focus by the Parties on long term policy development and enhanced government service delivery;

   (b) enhanced public accountability through simpler, standardised and more transparent performance reporting by all jurisdictions, with a focus on the achievement of outcomes, efficient service delivery and timely public reporting;

   (c) reduced administration and compliance overheads;

   (d) stronger incentives to implement economic and social reforms;

   (e) the on-going provision of Goods and Services Tax (GST) payments to the States and Territories equivalent to the revenue received from the GST; and

   (f) the equalisation of fiscal capacities between States and Territories.

# PART 3 — PRINCIPLES

## *Primary responsibility for service delivery*

6. The Parties recognise that the States and Territories have primary responsibility for many of the service sectors covered by the National Agreements appended as schedules to this Agreement. The primacy of State and Territory responsibility in the delivery of services in these sectors is implicit in the Constitution of the Commonwealth of Australia and it is not the intention of the Parties to alter the Constitutional responsibility or accountability of the Commonwealth, States and Territories.

7. Notwithstanding that, the Parties acknowledge that coordinated action is necessary to address many of the economic and social challenges which confront the Australian community. The intent of the Parties is that the National Agreements should clarify the responsibilities and accountabilities of the Commonwealth and the States and Territories.

## *Focus on improving the well-being of Australians*

8. The intent of the Parties in implementing the financial framework is to improve the well-being of all Australians through improvements in the quality, efficiency and effectiveness of government service delivery by:

   (a) reducing Commonwealth prescriptions on service delivery by the States and Territories;

   (b) clarifying the roles and responsibilities of the Parties in the delivery of government services that are the subject of National Agreements set out in schedules to this Agreement; and

   (c) enhancing accountability to the public for the outcomes achieved or outputs delivered under National Agreements or National Partnerships.

9. The Parties agree that there will be a rigorous focus on the achievement of outcomes — that is, mutual agreement on what objectives, outcomes and outputs improve the well-being of Australians.

## *Coordinated federal action*

10. The Parties have recorded their mutually agreed objectives, outcomes and outputs and performance indicators for each of the service sectors covered in National Agreements appended as schedules to this Agreement.

11. Federal financial relations will be underpinned by a shared commitment to genuinely cooperative working arrangements.

12. The Council of Australian Governments (COAG) will monitor progress on all aspects of the framework for federal financial relations.

13. The Parties acknowledge the need to pursue on-going reform of federal financial relations.

## *Accountability*

14. As improved accountability is a key objective to the framework for federal financial relations, the Parties commit to improve service delivery by ensuring that the appropriate government is accountable to its community — not just for its expenditure in delivering services, but more importantly for the quality and efficiency of the services it delivers and the outcomes it achieves.

15. The Parties commit to enhancing the accountability of governments to the community through simpler, standardised and more transparent public performance reporting for all jurisdictions, underpinned by clearer roles and responsibilities.

16. The Parties are committed to on-going performance reporting and to working together to improve performance reporting for the sake of enhanced public accountability.

17. The performance reporting framework will focus on the achievement of results, value for money and timely provision of publicly available performance information.

18. The COAG Reform Council will report to the Prime Minister, as chair of COAG, on National Agreements and National Partnerships, as set out in Schedule A of this Agreement. To assist the COAG Reform Council in its role, the Productivity Commission will also report to COAG on the economic impacts and benefits of COAG's agreed reform agenda every two to three years.

## *Financial support*

19. The Commonwealth commits to the provision of on-going financial support for the States' and Territories' service delivery efforts, through:

    (a) general revenue assistance, including the on-going provision of GST payments, to be used by the States and Territories for any purpose;

    (b) National Specific Purpose Payments (SPPs) to be spent in the key service delivery sectors;

    (c) National Health Reform (NHR) Funding; and

    (d) National Partnership payments to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms.

20. National SPPs may be associated with National Agreements, but there is no provision for National SPPs to be withheld in the case of a jurisdiction not meeting a performance benchmark specified in a National Agreement.

21. National Agreements will not include financial or other input controls imposed on service delivery by the States and Territories.

22. The Parties agree to review periodically, and at least every five years, the level of Commonwealth funding support to ensure its on-going adequacy.

23. All intergovernmental financial transfers other than for Commonwealth own-purpose expenses will be subject to this Agreement. However, Commonwealth own-purpose expenses may form part of National Agreements or National Partnerships where they contribute to mutually agreed objectives.

### *Greater incentives for economic and social reform*

24. The Commonwealth will provide National Partnership payments to the States and Territories to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms or service delivery improvements.

## PART 4 — Provision OF GST REVENUE to the States

25. The Commonwealth will make GST payments to the States and Territories equivalent to the revenue received from the GST, subject to the arrangements in this Agreement. GST payments will be freely available for use by the States and Territories for any purpose.

26. The Commonwealth will distribute GST payments among the States and Territories in accordance with the principle of horizontal fiscal equalisation.

## PART 5 — INSTITUTIONAL ARRANGEMENTS

27. This Agreement replaces the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*.

28. The schedules to this Agreement may be amended or revoked, and new schedules added, by agreement of the Parties. Where noted in this Agreement, some GST policy issues require unanimous agreement.

29. The Ministerial Council for Commonwealth-State Financial Relations will be renamed the Standing Council for Federal Financial Relations and, within the framework established by COAG, will oversee the operation of this Agreement. The Standing Council will comprise the Treasurers of the Commonwealth, the States and Territories (or their designated representatives) and will be chaired by the Commonwealth.

30. The Parties have confirmed their commitment to this agreement as follows:

**Signed** *for and on behalf of the Commonwealth of Australia by*

**The Honourable Julia Gillard MP**

Prime Minister of the Commonwealth of Australia

July 2011

**Signed** *for and on behalf of the State of New South Wales by*

**The Honourable Barry O'Farrell MP**

Premier of the State of New South Wales

July 2011

**Signed** *for and on behalf of the State of Victoria by*

**The Honourable Ted Baillieu MP**

Premier of the State of Victoria

July 2011

**Signed** *for and on behalf of the State of Queensland by*

**The Honourable Anna Bligh MP**

Premier of the State of Queensland

July 2011

**Signed** *for and on behalf of the State of Western Australia by*

**The Honourable Colin Barnett MLA**

Premier of the State of Western Australia

July 2011

**Signed** *for and on behalf of the State of South Australia by*

**The Honourable Mike Rann MP**

Premier of the State of South Australia

July 2011

**Signed** *for and on behalf of the State of Tasmania by*

**The Honourable Lara Giddings MP**

Premier of the State of Tasmania

July 2011

**Signed** for and on behalf of the *Australian Capital Territory by*

**Katy Gallagher MLA**

Chief Minister of the Australian Capital Territory

July 2011

**Signed** for and on behalf of the *Northern Territory by*

**The Honourable Paul Henderson MLA**

Chief Minister of the Northern Territory of Australia

July 2011

# SCHEDULES TO THE INTERGOVERNMENTAL AGREEMENT

*A INSTITUTIONAL ARRANGEMENTS*

*B TAXATION REFORM*

*C PUBLIC ACCOUNTABILITY AND PERFORMANCE REPORTING*

*D PAYMENT ARRANGEMENTS*

*E POLICY AND REFORM OBJECTIVES*

*F NATIONAL AGREEMENTS*

# Council of Australian Governments Meeting–Communiqué Canberra, 25 July 2012

The Council of Australian Governments (COAG) held its 33rd meeting in Canberra today. The Prime Minister, Premiers, Chief Ministers and the President of the Australian Local Government Association (ALGA) attended. The Leaders acknowledged this was the final COAG meeting for Councillor Genia McCaffery, President of ALGA, and thanked her for her contribution.

## National Disability Insurance Scheme

COAG noted progress in establishing the first stage of a National Disability Insurance Scheme (NDIS) from July 2013, and that the Commonwealth has reached in-principle agreement with South Australia, Tasmania and the Australian Capital Territory for a launch to commence from July 2013. These jurisdictions agreed to engage closely in the implementation of the first stage, noting this will inform the move to a national insurance-based approach to disability care and support.

These jurisdictions agreed to work together on the development of Commonwealth legislation to establish both the scheme and a national launch agency to administer the scheme during the launch phase. The agency will be responsible for managing Commonwealth and State funds in a single national pool, and undertaking planning, assessment and approval of individual support packages.

The Commonwealth, South Australia, Tasmania and the Australian Capital Territory welcomed the opportunity to establish launch sites so that, from July next year, governments will start the first stage of an NDIS and improve the quality of support for people with a disability and their carers. These jurisdictions agreed that participants in the launch sites will receive ongoing support until a decision is taken to move to a full NDIS. All governments also agreed that the funding and governance arrangements agreed for launch do not create a precedent for the full scheme.

COAG welcomed a report from the Select Council on Disability Reform on progress with establishing an NDIS. First Ministers discussed funding and governance options for an NDIS and agreed to consider these issues further at their next meeting in 2012.

As part of its report, the Select Council has proposed an approach to defining eligibility and reasonable and necessary support under an NDIS, building on the work of the Productivity Commission. COAG agreed that, as a first step to settling the design of an NDIS, consultation with people with a disability, their families and carers, the workforce

and disability sector and peak bodies would commence from late August on this approach. These consultations would occur through Commonwealth and State Advisory Groups that have been established to support government consideration of an NDIS. The consultations will inform the final approach to eligibility and reasonable and necessary support to be agreed by COAG, as well as further work on how these definitions would work in practice, and how they would be reflected in legislation, regulations or guidelines.

## Future Competition and Regulatory Reform

COAG noted the progress report from its inter-jurisdictional Taskforce which was set up to advise COAG following the successful Business Advisory Forum meeting in April. The Taskforce has been consulting with peak business bodies and other organisations interested in specific reforms, including conservation groups which have an interest in environmental regulation reforms.

COAG reiterated its commitment to reducing duplication and double-handling of environmental assessment and approval processes while maintaining high environmental standards that are risk- and outcomes-based. In line with the timing agreed at the COAG meeting in April, consultations are underway and negotiations for bilateral agreements are about to commence.

The Taskforce has worked with the Select Council on Climate Change to examine options to expand and expedite planned reviews into the complementarity of climate change measures with a carbon price. Significant progress has been made in establishing the scope for reform and in identifying measures for review. This process will be largely completed by late 2012.

On energy market reform, considerable work is already in train through the Standing Council on Energy and Resources. COAG expressed concern over the recent substantial electricity price increases arising from factors including increases in transmission and distribution charges and requested energy ministers to focus current reviews of market regulation in the interconnected market on achieving efficient future investment which does not result in undue price pressures on consumers and business. COAG noted the Taskforce's advice that the current program of work is consistent with its original vision for an interconnected national electricity market. Nonetheless, noting the interest of governments, business and consumers in competitive markets, COAG asked the Taskforce to undertake further work and advise COAG in late 2012 on any additional action required to deliver a regulatory framework that promotes a competitive retail electricity market, including appropriate support for vulnerable customers, and efficient

investment.

Work to develop best-practice approaches to lift regulatory performance and policy initiatives to meet the red tape challenge is also being advanced.

COAG noted that a report would be provided to the next meeting of the Business Advisory Forum and recommendations to COAG in late 2012.

## Progress on Seamless National Economy Reforms

COAG has released two report cards on the implementation of its deregulation priorities and competition reforms under the National Partnership Agreement to Deliver a Seamless National Economy.

COAG welcomed completion of the business names reform and noted that 17 of the 27 deregulation priority reforms are now operational and three of the eight competition reforms are complete.

In relation to directors' liability reform, to ensure the operation of directors' liability is applied in a nationally consistent and principle-based manner in future legislation, COAG agreed to a set of Principles and Guidelines, noting that this reform is still under consideration by the Queensland Government.

COAG welcomed the release last week for consultation of the Regulation Impact Statement (RIS) for electrical occupations, under the National Occupational Licensing Scheme reform, and noted the three remaining RISs are about to be released for consultation.

COAG welcomed the progress on infrastructure reform, the National Construction Code, chemicals and plastics reform, e-conveyancing reform, legal professions reform and trades licensing.

## Construction Industry Costs and Productivity

COAG agreed to establish an independent review panel to conduct a broad ranging investigation into cost, competitiveness and productivity challenges in the commercial, civil and large scale residential construction industry. COAG will appoint three eminent persons with relevant expertise to conduct the review over the next 12 months and report back to COAG. A secretariat within the Department of the Prime Minister and Cabinet, comprising Commonwealth and State representatives, will support and report directly to the review panel. The panel will undertake analysis and consider reforms that could be pursued nationally or by individual Commonwealth, State, Territory and Local governments. Terms of reference are attached.

## Expiring National Partnerships

COAG noted that a number of programs under National Partnerships have supported increased service levels. COAG recognised the importance of a coordinated approach to the consideration of ongoing funding for National Partnerships. It endorsed the criteria developed by Heads of Treasuries to determine the treatment of expiring National Partnerships. COAG also agreed to establish a working group to report back to COAG in September, to provide early identification of those agreements expiring on or before 30 June 2013 that have led to increased service levels, and options for their treatment if they were continued, noting that any Commonwealth funding decisions are contingent on Commonwealth Budget processes.

## Improving Funding Arrangements

COAG discussed ongoing concerns about the proliferation of National Agreements, National Partnership Agreements and Project Agreements. COAG is committed to ensuring that only matters of truly national significance will be progressed as new multilateral National Partnership Agreements, with consideration of existing or alternative funding mechanisms before any new funding agreements are entered into. To support this, the working group which will consider expiring agreements will also consider and recommend measures to streamline the development and administration of selected funding agreements, for reporting to COAG at its December 2012 meeting.

## National Response to Organised Crime and Firearms

COAG acknowledged that organised crime and firearms-related issues are of considerable concern to all governments and the community, and noted the initiatives agreed through the Standing Council of Police and Emergency Management (SCPEM). COAG agreed that the Commonwealth will continue to work with the States on a coordinated approach to organised crime, and firearms-related crime, in line with the work agreed by SCPEM.

## Not-for-Profit Reform

COAG reconfirmed the objective of minimising regulatory compliance costs to the not-for-profit sector and requested further advice from Senior Officials on any legislative and regulatory changes required to achieve this objective. This includes legislative impacts of the proposed Australian Charities and Not-for-profits Commission Bill. Senior Officials will finalise this work within a month and before the Bill is settled for introduction to the Commonwealth Parliament in August 2012.

COAG agreed to consider before the end of 2012, the results of a regulatory impact assessment on governance and reporting standards in the not-for-profit sector, in light of the proposed Bill.

## Royal Succession

Leaders confirmed Australia's support for changes to the rules for Royal Succession agreed by leaders of the Realms on 28 October 2011 which would: allow for succession regardless of gender; and, remove the bar on succession for an heir and successor of the monarch who marries a Catholic.

## New Zealand Engagement in COAG Fora

COAG welcomed New Zealand's move from long-term observer to a member of the National Counter-Terrorism Committee and the National Emergency Management Committee to ensure the closest possible coordination and cooperation on counter-terrorism and emergency management issues.

Canberra
25 July 2012

**ATTACHMENT A**

## Terms of Reference: COAG Review Panel on Construction Costs and Productivity

The construction sector is a significant industry for Australia. Constraining cost growth and improving productivity has the potential to deliver economic benefits nationally. Accordingly, COAG is establishing an independent Review Panel to conduct a broad ranging investigation into cost pressures, competitiveness and productivity in the commercial, civil and large-scale residential construction industry.

The Review Panel will consist of three eminent independent people with relevant legal, industry, workplace relations and economic expertise. The membership of the Panel will be agreed by COAG, with all jurisdictions able to nominate potential candidates. A secretariat comprised of expertise seconded from Commonwealth, State and Territory departments, will support and report directly to the Review Panel. The Secretariat will be located in the Department of the Prime Minister and Cabinet, given its role as the COAG Secretariat.

The Review will undertake analysis and develop findings on the following issues:

- *Market structure*: The level of concentration in the various sectors of the construction industry; how this has changed over time; the drivers of these trends and what effect has this had on construction costs; and the openness of the market to domestic and foreign suppliers of goods and services, including barriers to market entry. The relationship between public sector demand for construction (in terms of level and timing) and costs.
- *Regulations and compliance*: Assessing and identifying opportunities to reduce the costs of compliance in the construction sector while maintaining quality and safety standards; patchwork regulatory arrangements across jurisdictions and associated risk mitigation costs; impacts of building energy efficiency standards.
- *Taxation and other charges*: The impact of taxes, duties and developer charges on overall construction costs, and the appropriateness and efficiency of these taxes and charges.
- *Labour costs, skills and workplace relations*: The availability of suitably skilled labour in the construction sector, including: options for improving skills development; labour mobility including trades licensing and mutual recognition; attracting and retaining skilled workers in the industry; the current and future role of Australia's migration program. The role played by industrial relations, noting the current and recent reviews of workplace relations legislation. The role that innovative management, new technology, project management and business practices could play in improving efficiency in the delivery of projects.
- *Other arrangements*: Examining issues and costs associated with the allocation of risk, regional market structure and labour force differences, availability of finance,

contracting arrangements and delivery models for construction projects. Examining the factors impacting on new technology uptake. Examining the rate of insolvency in the sector.

The Panel will consider reforms that could be pursued nationally or by the Commonwealth Government or individual State, Territory and Local governments. Where appropriate, the Panel will use suitably comparable international or jurisdictional benchmarks to assess performance, identify the factors driving regional differences, and develop recommendations.

The Panel will draw on any relevant existing reviews and work being undertaken that have implications for the construction sector. This includes the work being undertaken as a part of the Seamless National Economy reforms, such as the work on a National Construction Code, a national trade licensing system, national work health and safety laws, and work being undertaken as part of priorities identified by the COAG Business Advisory Forum including major project approvals and development approvals.

The Panel will consult with any stakeholders it sees fit and that it determines are relevant to the inquiry.

The Panel will be established in September 2012 and release a discussion paper by the end of the year; and a final report provided directly through COAG Senior Officials to COAG around July 2013.

Funding arrangements for the review panel and Secretariat will be settled by Senior Officials following today's COAG meeting.

| Date | Event |
|---|---|
| **July to August 2012** | COAG determines terms of reference and panel appointments. |
| **September 2012** | Panel and secretariat in place. |
| **November to December 2012** | Discussion paper prepared and issued publicly to construction industry stakeholders. |
| **April 2013** | Submissions received from States and Territories and construction industry stakeholders. Panel conducts meetings with key construction industry stakeholders. |
| **May to June 2013** | Final report prepared. |
| **31 July 2013** | Final report delivered to COAG for public release. |

# *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 liability[1] 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.

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[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

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[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 irremediable 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 <u>all</u> of the criteria in Principle 4 should be satisfied before a Directors' Liability Provision will be justified.

### <u>Criterion 4a – Compelling public policy reasons</u>

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.

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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 accessorial 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 accessorial 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 accessorial 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.

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[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.

# *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 liability[1] 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.

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[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 irremediable 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 <u>and/or</u> 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 <u>all</u> of the criteria in Principle 4 should be satisfied before a Directors' Liability Provision will be justified.

**<u>Criterion 4a – Compelling public policy reasons</u>**

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.

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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 accessorial 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 accessorial 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 accessorial 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.

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[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.