**Joint Comment by T.A. Game SC[1] and Justice David Hammerschlag[2] on ALRC Discussion Paper 87 on Corporate Criminal Responsibility of November 2019**

## Introduction

1. For the reasons which follow, we have significant reservations as to the soundness of the current Proposals, both conceptually and in their proposed implementation.

## Proposals 1 and 2

2. We think the proposed recalibration is impractical and it introduces a level of unwieldy complexity. The general measurements specified in Proposal 2 are problematic. All contraventions of the law are deserving of denunciation and condemnation by the community. It is a question of the level.

3. The character of conduct does not depend only on the framing of the terms of a contravention, but also on the nature and circumstances of the conduct. For example, the character of a single contravention which may be minor is different to when it is deliberately and systematically repeated. Charging a client for no service once is different from systematically charging many clients for no service.

4. We are not aware of any empirical support for the proposition, in the context of corporations law, for the proposition that the deterrent characteristics of a strong civil penalty provision are less than those of a criminal penalty.

5. There is a public interest in being consistent in pursuing guilty parties for all contraventions of the law, not only those contraventions which are criminal.

## Proposals 3, 4 and 5

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[2] A Judge of the Supreme Court of New South Wales, Head of the Commercial List, Technology and Construction List and Commercial Arbitration List.

6. We think that the proposed bifurcation between civil penalty proceeding provisions and civil penalty notice provisions also introduces a level of unwieldy complexity.

7. Proposal 5 challenges the very distinction between civil and criminal liability. We think this is unsound.

**Proposal 8**

8. Proposal 8 seeks to attribute to a corporation criminal liability based on conduct of individuals described as associates.

9. We do not think that the Proposal sits easily with the concept which underlies why the "personhood" of a corporation is to be made liable for a penal provision. We also question the manner in which this Proposal seeks to achieve this outcome.

10. Under Proposal 1, only the most serious conduct should be made the subject of corporate criminal liability and lesser conduct will be the subject of either civil penalty proceedings or civil penalty notice provisions.

11. Proposal 2 conveys that the paradigm of seriousness for corporate criminal liability is supported by traditional notions of criminal responsibility which are well understood and extend well beyond the purely deterrent aspects of criminal liability.

12. "Attribution" is the (originally common law) process by which an endeavour is made to attribute to a corporation the wrongdoing of an individual in a substantive way.

13. Section 12.3 of the Criminal Code seeks to articulate the principles. Section 12.3 may not be without its flaws but the Discussion Paper does not examine it and related provisions, draw out any principled criticisms of them, or make suggestions for improvement of flaws which they may contain. Although this Proposal seeks to ensure that the proposed attribution accords with

"fundamental criminal law principles, importantly blameworthiness or culpability" (6.6), we do not think it succeeds in doing this; rather it "deems" conduct and state of mind of any so-called "associate" to be that of the company. This is an extended form of vicarious liability by another name.

14. The Discussion Paper does not explain how such a deeming process addresses in any way "moral blameworthiness" of a corporation.

15. Vicarious liability of this kind is normally reserved for circumstances where deterrence is paramount. Further, because it involves no actual "criminal conduct" by the corporate entity itself, this kind of provision is normally reserved for (deliberately graded) less serious offences; yet the Discussion Paper recommends that corporations will not be criminally liable for less serious "regulatory" type offences.

16. In addition, crimes which speak exclusively to corporations are often of the less serious regulatory kind. What would happen to this class of criminal proscription, often by way of summary offences, is not dealt with.

17. Subject to the question of "due diligence" (to which we refer below), the first proposition in the Proposal is that if any "associate" of a corporation commits a Federal crime then the corporation commits the same crime. The definition of "associate" is so wide that it extends beyond officers and employees to anyone who performs "services for or on behalf of the body corporate". This definition is said to be required to "prevent corporations from using the corporate structure to avoid criminal responsibility".

18. We think the definition is too wide and is not supported by principle. In practice it would make a corporation liable for a crime committed against it by a person, so long as the thing was done by the person, who was at the time "performing services for or on behalf of the corporation". Contrary to the Discussion Paper (6.18) the "associate" definition does make the corporation liable for the conduct of a "rogue employee", and more.

19. This leads to the critical question which lies at the heart of the theory of criminal responsibility of corporations, namely: what is it about the conduct of the "human" person or persons which makes for criminal liability of the corporation?

20. Attribution models such as s.12.3 seek to address this question. Who did the thing with the relevant state of mind? At what level in the corporation? Was it authorised, or directed, and who permitted that conduct? Was it one person or more than one person (aggregation), and so forth?

21. The extensive judicial and academic consideration of this subject involves serious attempts to grapple with the subject, as does s.12.3 of the Criminal Code. The Proposal seeks to penalise any conduct by any (one or more) "associate", (presumably in any temporarily connected circumstance) to be that of the company. This, we consider, is "attribution" of an extreme kind and in name only. It is difficult to know how corporations small or large would conduct their ordinary affairs in the face of such measures.

22. We do not think that it is a satisfactory answer that a corporation may have a defence of "due diligence".

23. An earlier version of the Proposal had as an element, the absence of due diligence. That is, to prove the crime it was necessary to prove that the corporation acted without due diligence. This meant that a corporation would be made criminally liable for serious criminal offences not because it committed them but because it failed to prevent them. The Proposal seeks to address this subject and problem by withdrawing the requirement altogether and by placing the onus on the corporation to exculpate itself. The onus is said to be appropriate because a corporation is "better placed" to "provide evidence" of it (6.25). In the matter of criminal liability for the most serious of offences, this is inconsistent with ordinary notions of criminal responsibility, including onus.

24. A central position of the Discussion Paper seems to amount to the following: any (temporarily connected) crime by an "associate" of any corporation is deemed to be the crime of the corporation which can only exculpate itself if it can prove that in the matter that crime the corporation was not negligent. Given the scope of the deeming provision and the definition of associate it is difficult to know how corporations (from very large to very small) would actually protect themselves in the matter of this or any "criminal liability". Inevitably, compliance would have to take on a very different character than as it is currently understood. Corporations faced with general liability provisions of the kind envisaged by the amendments to s.12.2 and s.12.3 would have to protect themselves both from within and from without. To many the benefits of incorporation would be questionable.

**Proposal 9**

25. We think Proposal 9 is even more problematic.

26. By it, any "officer" who was "in a position to influence the conduct" is guilty of a civil penalty provision. We have already pointed out the difficulties involved in eliding criminal with civil penalty proceedings. Here, "proof of the offence" would make officers liable if in a position to "influence the conduct".

27. The questions can properly be posed: how would a non-executive director ever guard against such a finding? How would she or he protect themselves on the subject of "reasonable measures to prevent the conduct"?

28. We think that the Proposal will stunt the acceptance by persons of appointment as non-executive directors and is not advantageous to corporate activity in general.

**Proposal 10**

29. Proposal 10 takes the "civil penalty provision" said to have been breached by Proposal 9 and makes this breach into a crime if the conduct in Proposal 9 was engaged with "intention, knowingly and recklessly".

30. But Proposal 9 has in mind the failure to prevent the offence committed by the corporation which was committed by the corporation because the corporation failed to prevent the conduct. Proposal 10 creates criminal responsibility, but as to what?

31. We find the Proposals to be difficult to understand and we question their workability.

32. Finally it is suggested in the Discussion Paper that these Proposals sit comfortably with statutory principles relating to accessorial liability (7.129-7.132). We respectfully disagree.

**Justice David Hammerschlag**

**T.A. Game SC**

**20 December 2019**