THE UNIVERSITY OF
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31st December 2019

Australian Law Reform Commission

Dear Justice Derrington,

Submission – Discussion Paper 87 (Corporate Criminal Responsibility)

This submission is a response to the ALRC's Discussion Paper 87 on *Corporate Criminal Responsibility* (released on 15 November 2019, with submissions closing on 31 January 2020.)

I am an academic at Melbourne Law School, specialising in all aspects of criminal justice and the author of *Modern Criminal Law of Australia* (2nd ed, Cambridge, 2017), which focusses on statutory criminal law, including the federal *Criminal Code*. I have participated in four previous ALRC inquiries related to the federal criminal justice system: as an advisory panel member of the *Protection of Human Genetic Information* and *Federal Sentencing* inquiries and as a submitter (and, in the latter case, ad hoc commentator on drafts) in the *Uniform Evidence* and *Traditional Rights and Freedoms* inquiries.

This time round, my submission is a critical one. In my view, the ALRC's inquiry into corporate criminal responsibility has gone awry. The majority of the Discussion Paper addresses matters that are outside the inquiry's Terms of Reference, and in doing so has generated some flawed proposals. All three proposals that are germane to the Terms of Reference are inadequately justified. My submission includes a suggested alternative to the Discussion Paper's central proposal, Proposal 8.

The Terms of Reference

The ALRC's inquiry is into 'corporate criminal responsibility'. The term 'criminal responsibility' refers to general matters that the prosecution must prove (or, more rarely, that the defence must fail to disprove) before someone can be convicted of any criminal offence, sometimes called the 'general part' of the criminal law. In federal law, most of the general rules of criminal responsibility are in Chapter 2 of the *Criminal Code* (the schedule to the *Criminal Code Act 1995*.) Additional or alternative general requirements appear in particular federal statutes, such as Division 7 of Part 7.1 of the *Corporations Act 2001*. These general rules of criminal responsibility are distinct from those about particular wrongdoings – how they should be defined, which ones should attract criminal punishment, what particular punishments should they attract – together sometimes called the 'special part' of the criminal law.

Unsurprisingly, three of the inquiry's five Terms of Reference are expressly about Chapter 2 of the *Criminal Code*, specifically 'Part 2.5 of the Code', titled 'corporate criminal responsibility. A fourth is about 'the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness', which is a reference to non-Part 2.5 general rules, like the accessorial liability rules in Part 2.4 and the regime in the Part 7.1 of the *Corporations Act*. This term expressly includes 'mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct', a matter that has always been dealt with separately from Chapter 2 of the Code and that, thanks to the COAG Principles from 2012, is now determined offence by offence. The remaining term is about 'the appropriateness and effectiveness of criminal procedure

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laws and rules as they apply to corporations', i.e. corporate criminal process. In short, the inquiry's Terms of Reference are about three things: corporate criminal responsibility, senior corporate office holder liability for corporate misconduct and corporate criminal process.

The Terms of Reference include a 'scope of reference' that directs the ALRC to various 'existing reports relevant to Australia's corporate accountability system' and identifies six things that such a review 'would encompass'. Three are expressly about 'Part 2.5 of the Code'. A fourth is about 'comparative criminal responsibility regimes'. A fifth is about 'alternatives to expanding the scope and application of Part 2.5 of the Code' and gives an example of 'introducing or strengthening other statutory regimes for corporate criminal liability', again a reference to things like accessorial, executive and vicarious liability. The sixth – in a separate paragraph at the end – is about 'criminal procedural laws with a focus on their interaction with state and territory criminal procedural law.' In short, the 'scope' of the Terms of Reference is about three things: corporate criminal responsibility, statutory regimes for corporate criminal liability and criminal procedure laws.

The ALRC addressees the inquiry's Terms of Reference and their 'scope', in the following parts of the Discussion Paper:

- Pages 28-36 of Chapter One
- Pages 49-50 of Chapter Two
- Pages 70-75 of Chapter Three.
- All (i.e. pp. 105-126) of Chapter Five.
- All (i.e. pp. 127-144) of Chapter Six, including Proposition 8.
- All (i.e. pp. 145-172) of Chapter Seven, including Propositions 9 & 10, and Questions A & B.

That's 85 pages. In other words, less than one third of the Discussion Paper's 285 pages concerns the inquiry's Terms of Reference. These pages generate only 3 out of 23 proposals and 2 out of 12 questions, i.e. one seventh of the combined proposals and questions in the Discussion Paper.

The ALRC doesn't explain why its Discussion Paper devotes over two-thirds of its pages and most of its proposals and questions to matters outside of the inquiry's Terms of Reference. However, I can imagine the ALRC giving the following explanation: "The rest of the Discussion Paper – that is, its other 185 pages, 20 proposals and 10 questions – is about 'corporate liability', which is a topic that is closely connected to corporate responsibility." But 'corporate liability' – what specific things a corporation may do that could make it liable to a penalty, and what sort and level of penalty – is also a much larger topic than corporate criminal responsibility and one that involves plenty of issues that have little or nothing to do with Part 2.5 of the Code and its statutory alternatives, officer liability or corporate criminal process. While the 'scope' does mention 'corporate criminal liability', it only does so as an 'alternative to strengthening or expanding the scope and application of Part 2.5' and specifically only refers to 'other statutory regimes for corporate criminal liability'. That inclusion is not about corporate liability at large – the vast set of particular rules that regulate what corporations, amongst others, can and cannot do, and what consequences can or should apply for contravening those rules – but instead about regimes that play an equivalent role to corporate criminal responsibility, setting out general rules exposing corporations to penalties, such as accessorial liability, executive liability and vicarious liability.

"But", the ALRC might respond, "the wider topic of all the particular rules that define whether or not a corporation may face a penalty for particular wrongdoings is an important topic that is worthy of law reform consideration." And it certainly is. There's no doubt that corporate liability, including

corporate criminal liability, ought to be looked at by an independent law reform agency like the ALRC. Indeed, most (but not all) of the non-Terms of Reference topics the Discussion Paper discusses are ones recommended by most (but not all) of the 11 (published) public submissions responding to the inquiry's Terms of Reference. But there's a rub: the inquiry's one-year timeline is not remotely long enough to look at all of corporate liability, or even all of corporate criminal liability, or indeed all or most of the more specific topics recommended by the eleven published submissions on the Terms of Reference.

The ALRC acknowledges as much in relation to some submissions' calls for the inquiry to include the issue of corporate criminal investigations (a topic that is obviously both very important and intimately related to the issue of corporate criminal responsibility):

> *The ALRC considers that investigative processes are outside the scope of the current Inquiry which focuses primarily on a review of the substantive criminal law. Nevertheless, the ALRC considers, in light of the concerns raised, that an inquiry into criminal investigative processes would be appropriate.*

However, precisely the same could (and ought to) be said of a 'review of the substantive criminal law', which is likewise outside the Terms of Reference and is similarly vast. "Eh", the ALRC might respond. "Venturing beyond our Terms of Reference won't hurt anyone." But I fear that it will. A broader inquiry, especially a much broader inquiry, is not necessarily a better inquiry and can easily be a worse, shallower one, especially when resources are constrained. The flawed proposals in the Discussion Paper addressed in this submission – most obviously, Proposal 5**,** the proposed removal of Ch 2.2.6 of the offence framing guide in Proposal 6, the definition of associate in Proposal 8 and Proposal 10 – are, I believe, instances of the downsides of excessive breadth.

A particular cost is that an overextended inquiry such as this one will leave the ALRC unable to do engage in sufficient public consultation on its proposals. Consider the contrast between seeking public feedback on 25 proposals over the summer months, rather than public feedback on the 3 proposals that are within the inquiry's Terms of Reference. At the end of its lengthy and thoughtful submission on the Terms of Reference, the Motor Vehicle Traders' Association writes:

> *MTAA strongly recommends, in line with the ToR and consultation best practice, that the ALRC release a Draft or Interim Report… in between the Discussion Paper… and the Final Report… which thus may necessitate a much earlier Discussion Paper.*

The MTAA's point is that, for an inquiry into core elements of the criminal law, it is not enough to seek public feedback on the kind of broad-brush proposals produced in discussion papers in general. Hence, the MTAA's recommendation that the ALRC make fully developed proposals available for public consultation before it settles on its final recommendations to the Attorney-General. (Indeed, I argue below that Proposals 5 and 10 are far too underbaked to be the subject of meaningful public consultation.) However, the ALRC has not followed the MTAA's recommendation. Why? I suspect it's because the ALRC considered the proposed three paper timeline impossible in a one-year inquiry. But wouldn't the MTAA's proposal have been much more achievable had the ALRC not opted to triple the scope of its Discussion Paper – a decision it didn't publicly reveal until 15th November – and instead pursued only its Terms of Reference?

Proposals 1, 2 and 3

Before I get to the ALRC's proposals on corporate criminal responsibility and senior officer responsibility I will first address the proposals in Chapter 4 of the Discussion Paper. This chapter and

all of its seven proposals falls outside of the inquiry's Terms of Reference and scope. The only public submission that called for the ALRC to examine the 'enforcement pyramid' (amongst many other broad issues) was from the Law Council of Australia, which recommended asking the Attorney-General to widen the inquiry's Terms of Reference '[i]f you are of the view that any of these issues do not arise within the current Terms of Reference'.

Chapter 4 is titled 'the appropriate and effective regulation of corporations', which is poor title. The 'regulation' of corporations is about as large a legal topic that can be imagined, covering not only all of corporate law (including the entire *Corporations Act*) but also all of the general law – notably, commercial law and private law – that applies to corporations, amongst others. The words 'appropriate and effective' obviously don't narrow that down. Fortunately, the actual Chapter is a (somewhat) less ambitious discussion of penal policy:

> *In the Principled Regulation report (2002), the ALRC adopted the following statement of principle:*
>
> > *The distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.*
>
> *Nearly twenty years later, the analysis undertaken during the current inquiry has revealed a lack of a principled distinction between criminal and civil regulation as it applies to corporations.*

This passage makes it clear that Chapter 4 is a revisit of the ALRC's three-year inquiry from nearly two decades ago into 'federal civil and administrative penalties'. In its 2002 Report, the previous ALRC noted that '[t]he size of this Report' – 1044 pages! – 'emphasises the scale of the inquiry that these Terms of Reference required the ALRC to undertake'. The previous ALRC candidly admitted that it 'struggled to identify the issues and problems that the Terms of Reference directed it to consider'.

The previous ALRC's approach to its inquiry is a telling contrast to the current ALRC's approach. The 2002 Report said:

> *This is inherently a large and difficult task as it involves the imposition on these diverse schemes of an overriding structure that attempts, within broad limits, to impose some overall system or uniformity when those systems had developed in relative isolation over, in some cases, a considerable period of time. In that time, the older schemes had developed a robust and mature jurisprudence which has shaped regulatory schemes in Australia for the last generation. It would be unacceptable and counter-productive to sweep away that learning and experience in the name of a rigid uniformity.*
>
> *In any event, a rigid uniformity would be a hopeless ambition. It was clear from the outset that government regulation, and the penalties schemes used to reinforce it, cannot be generated from a single mould but must be adapted to meet the particular demands and communities which each scheme seeks to regulate. A recurrent theme in submissions and consultations is that one size does not fit all, a point readily conceded by the ALRC in this Report and in its Recommendations.*

By contrast, '[n]early twenty years later', Chapter Four declares, 'the analysis undertaken during the current inquiry has revealed a lack of principled distinction between criminal and civil regulation as it applies to corporations', and goes on to recommend 'a suite of reforms designed to establish a coherent model that emphasises a principled distinction between criminal and civil regulation of

corporations.' Not only has the current ALRC willingly gone beyond its Terms of Reference into a much vaster area of law and policy, but it has done so without any of its predecessor's humility and in a fraction of the time spent on the 2002 report. Unsurprisingly, this has led the current ALRC into pursuing 'a rigid uniformity… generated from a single mould' that the earlier ALRC wisely eschewed.

The current ALRC asserts that the analysis in Chapter 4 is specific to corporations and flows from Chapter 2's discussion of the rationale for corporate criminal responsibility:

> *Given the distinct rationale for the existence of corporate criminal responsibility, a principled approach to criminalisation is needed to ensure regulation of corporations is appropriate and effective. The attachment of corporate criminal responsibility must be justified.*

But criminal responsibility and penalisation are distinct topics. The (supposedly) 'controversial' question of whether and when the criminal law should apply at all to corporations (discussed in Chapter 2) is a different question to which sorts of penalties should apply to particular wrongdoings. While the wrongdoer's corporate nature is absolutely central to the first question, it is just one of myriad factors that affect the second question. There is nothing in Chapter 2 – or anywhere else – that supports the ALRC's claim that '[t]he attachment of corporate criminal responsibility must be justified' on an offence provision by offence provision basis, much less its various proposals directed to that end. The ALRC's confusion of penalisation and responsibility flows through to every proposal in Chapter 4.

The ALRC's Proposal 1 is that:

> *Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness):*
>
> *a) criminal offences;*
>
> *b) civil penalty proceeding provisions; and*
>
> *c) civil penalty notice provisions.*

The three categories – and hierarchy – set out in Proposal 1 are obviously sensible ones. But the idea that corporations should have a different hierarchy to human beings is an unusual – and, to my knowledge, unprecedented claim. Notably, it is entirely contrary to s. 12.1(2) of the *Criminal Code*, which states:

> *A body corporate may be found guilty of any offence, including one punishable by imprisonment.*

It is also contrary to s. 97 of the *Regulatory Powers (Standard Provisions) Act 2014*, which assumes that corporations can contravene any civil penalty provision, a provision the ALRC itself recommended in 2002. Remarkably, the Discussion Paper only mentions s12.1(2) once (in Chapter 5), without analysing it, and doesn't mention s. 97 at all.

Sections 12.1(2) of the Code and 97 of the Regulatory Powers Act are in no way outliers in the world of criminal law. Rather – aside from a small number of offences considered by some to be peculiar to humans, such as rape or bigamy – the position that corporations can commit any offence or contravene any penalty provision that humans can is followed throughout Australia's nine jurisdictions and, indeed, in all contemporary comparable justice systems I'm aware of. Certainly, the Discussion Paper provides not a single modern day counter-example. Surely, a proposal to depart from a ubiquitous multi-national principle like s. 12.1(2) of the Code needs clear and careful justification, rather than an assertion that the proposal flows from an earlier discussion of a distinct topic.

Indeed, the current ALRC seems to be under the incorrect impression that the federal criminal justice system already distinguishes between corporations and non-corporations on the question of whether criminal penalties are available. In Chapter 3, the Discussion Paper engages in a process of 'identifying offences that seem to contemplate a corporate offender'. This includes commenting that it could only identify fifteen offences in the Criminal Code itself 'that explicitly detail how the offence applies to corporate offenders'. This inquiry and comment make no sense, given the terms of s. 12.1(1) of the Code (again, mentioned only once in the Discussion Paper in Chapter 5):

> *This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.*

Part 2.5 of the Code – which ought to be the inquiry's centrepiece – 'explicitly detail[s] how [every] offence applies to corporate offenders'. And yet, the ALRC even muses that an offence that uses gendered pronouns 'himself or herself' 'practically limit[s] the offence to natural persons' or 'creat[es] confusion as to its application beyond natural persons. This is a complete non-issue that is explicitly and clearly dealt with in s. 2C and 23(a) of the *Acts Interpretation Act 1901*:

> *In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.*
>
> *In any Act: (a) words importing a gender include every other gender…*

The only 'confusion' here is the ALRC's.

Proposal 2 expands on Proposal 1 for criminal offences as follows:

> *A contravention of a Commonwealth law by a corporation should only be designated as a criminal offence when:*
>
> *a) the contravention by the corporation is deserving of denunciation and condemnation by the community;*
>
> *b) the imposition of the stigma that attaches to criminal offending is appropriate;*
>
> *c) the deterrent characteristics of a civil penalty are insufficient; and*
>
> *d) there is a public interest in pursuing the corporation itself for criminal sanctions.*

Here, the ALRC proposes a test for criminalisation that is only for alleged corporate offenders. However, none of the factors in Proposal 2 – desert, stigma, alternatives and public interest - are or should be specific to corporations. The ALRC supports its approach by observing that '[s]imilar criteria have been proposed by the UK Law Commission', but fails to note that the Law Commission's proposal is not specific to corporate defendants:

> *The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.*

The ALRC's 2002 Report likewise placed stigma at the centre of its approach to penalisation, again without any references to a supposed difference between corporations and non-corporations. Its 'statement of principle' is:

> *The distinction between criminal and non-criminal (civil) penalty law and procedure is*

> *significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.*

Indeed, apart from a single reference to 'stigma' – without any explanation of why that factor works differently for corporations and non-corporations – Chapter 4's discussion of how the ALRC anticipates Proposal 2 will operate proceeds without <u>any</u> mention of the corporate nature of the offender:

> *The decision to criminalise conduct is a difficult policy choice. Such a decision should be taken with restraint. This proposal has been developed as guidance to the framers of legislation and legislators. It is necessarily a consideration of the proposed offence in the abstract. It is consistent with judgments as to the relative seriousness of offences made by Parliament when a maximum penalty is set for an offence.*
>
> *These principles are necessarily broad. They are designed to guide decision making by drafters and not direct a particular outcome. As a result, they are open to interpretation. The ALRC accepts they may be perceived as somewhat vague. To a certain extent, this must be accepted. There will always be an element of value judgment in the question of policy of whether conduct should be criminalised.*
>
> *The approach proposed is desirable as it focuses on the distinctive attributes of the criminal law. However, it has the benefit of not being overly essentialist as to what makes something sufficiently wrongful so as to warrant criminalisation. It is also arguably preferable to an approach that seeks to define, by subject matter for example, an 'economic crime'. Instead, the proposals leave it open to the framer of the legislation to consider what features of the conduct or its consequences may make a contravention deserving of denunciation such that a deterrent effect of a civil penalty is insufficient, and that the additional deterrence and condemnation provided by the criminal law is required. The principles operate as a restraint to ensure the framer has considered whether there is a real need for criminal (rather than civil) regulation of the particular conduct.*

The ALRC lists a set of specific factors that for the 'framer of the legislation' on criminal offences to consider:

- *fraud or dishonesty;*
- *serious financial misconduct and/or would result in significant economic harm;*
- *serious harm to individuals or the environment;*
- *physical injury to an individual;*
- *conduct repugnant to commonly accepted standards of decency; or*
- *conduct representing a marked departure from accepted standards of commercial behaviour.*
- *how existing prohibitions are classified; and*
- *whether the conduct is already proscribed by an existing offence.*

None of which has any apparent link to whether or not an alleged offender is a corporation or a human and, indeed, with the possible exception of the first factor, anything about the alleged wrongdoer at all. Nor does the Discussion Paper suggest a <u>single</u> example of a wrongdoing that ought to be criminal for humans but not corporations (or vice versa.) I suggest that's because there are <u>no</u> such examples.

There is no doubt that the corporate or non-corporate nature of an alleged offender is relevant to what penalty should be pursued in relation to an alleged wrongdoing. But that factor is already considered at several places in the criminal justice system, in discretionary decision-making by investigators, regulators, prosecutors and sentencers, all of whom take account of an alleged offender's characteristics. Notably, all of the factors in Proposal 2 are ones that must be considered by public prosecutors under the public interest test of their guidelines. In assessing public interest, public prosecutors must determine whether prosecuting the particular alleged offender for the particular alleged offending is in the public interest, taking account of questions of desert, stigma, alternatives and any other public interest factor. That consideration will certainly often include (amongst many other factors) the significance of the corporate or non-corporate nature of the offender. And yet, the Discussion Paper does not address prosecutorial discretion at all, again a telling contrast to Chapter 9 of the ALRC's 2002 Report.

If implemented, Proposal 2 would shift part of the decision-making process about whether particular offenders should be exposed to criminal penalties from investigators and prosecutors to legislatures. That is the effect of barring any prosecution of corporate offenders unless the legislature has 'designated' an offence as one that is applicable to corporate offenders. Proposal 2 gives the legislature – and, in practice, the framers of criminal law legislation – a new role in federal criminal justice: determining whether each criminal offence in the statute book ought to be 'designated' or not as capable of being committed 'by a corporation'. While prosecutors would (presumably) still retain their discretion on whether or not to charge a corporation with a 'designated' offence, they will, under Proposal 2, lose that discretion in the case of corporations accused of committing non-'designated' offences, regardless of any other details of the alleged crime or criminal. The ALRC provides no reason whatsoever why, for non-'designated' offences, prosecutors should have full discretion on whether or not to charge humans but no discretion at all on whether to charge corporations.

The fact that Proposal 2 is a radical and unprecedented change to how federal criminal law currently operates is not itself a reason to reject it. But it is definitely a reason to expect that the ALRC, in proposing it, will clearly identify the change it is proposing, detail how and why it alters the present approach, explain what existing or future problem the change is designed to solve, spell out how the change will solve that problem and assess what other effect the change might have. The Discussion Paper does none of these things. Proposal 3, while otherwise proposing a sensible approach to questions and levels of civil penalisation, suffers from the same flaw, assuming without explanation that those questions can potentially turn on the corporate or non-corporate nature of a civil wrongdoer and, this time, partly shifting decision-making relating to penalties from civil regulators to the federal parliament without justification. Proposals 4 and 7 fortunately lack this problem, because they happen to be expressed generally for contraventions by anyone, corporate or not. That leaves two further proposals arising from Chapter 4 that merit specific comment.

Proposal 5

Proposal 5 is an exception to the ALRC's proposed (corporate) enforcement pyramid, allowing a shift between levels of the pyramid despite the constraints proposed by Proposal 2. Specifically, it proposes that every civil penalty provision become a criminal offence ('for corporations') in one of two circumstances:

> *Commonwealth legislation containing civil penalty provisions for corporations should be amended to provide that when a corporation has:*

a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or

b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition;

the contravention constitutes a criminal offence.

Like Proposals 1, 2 and 3, Proposal 5 is limited to corporations, a limitation that (I guess) would be justified if the limitation of the other three proposals to corporations were justified (which they aren't.) But, even then, Proposal 5 would still be a wrong-headed provision.

Proposal 5 is a vast criminalisation provision, potentially expanding the scope of the criminal law to cover the entire federal civil penalty system. I suspect it is the largest proposal for the expansion of the scope of federal criminal law ever. Notably, it would undermine the many occasions where Australia's parliaments have expressly distinguished between criminal and civil penalties in a variety of regulatory fields. For instance, the Australian Consumer Law carefully makes its Chapters 2 and 3 – a huge set of general and specific consumer protections that impose broad tests like unconscionability – the subject of pecuniary penalties but not criminal offences – leaving the criminal law to Chapter 4, which sets out a narrower range of criminal offences. Proposal 5, by contrast, would criminalise all of the pecuniary penalty provisions in Chapters 2 and 3 ('for corporations') in the case of repeat or flagrant contraventions. Likewise, the different line drawn by the federal parliament for the Corporation Act's market misconduct provisions - which create a range of criminal offences, but specifically provide only for a civil penalty for 'conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive' – would be removed by Proposal 5 for repeat or flagrant violations ('for corporations').

There's a good argument that repeat or flagrant wrongdoing can justify the criminalisation of some civil wrongs – indeed, such a proposal is reportedly under consideration by the federal government in relation to the civil wrong of 'wage theft' (a proposal the ALRC does not discuss.) But the Discussion Paper identifies no instances where this approach is followed in the current statute book. Rather, it sets out a single current example concerning repeat remittance offences that is only about the escalation of criminal penalties, not a shift from the 'deterrent' function of civil penalties to the 'expressive' function of criminal ones proposed by Proposal 5. And it cites a single past case – a civil penalty matter involving thousands of breaches of a bank reporting law – albeit one it 'does not suggest... would have warranted criminal prosecution' because it 'arose from an inadvertent failure'.

So, what is the ALRC's argument for Proposal 5?

> *Proposal 5 recognises that there is a need to be able to escalate a particular contravention within the pyramid, and across the civil/criminal divide, in appropriate circumstances. It addresses concerns that a corporation may treat civil liability as a mere cost of doing business. A repeated or flagrant contravention of a civil prohibition could be seen as deserving of criminal sanctions consistently with Proposal 2.*

The concern about commercial penalties being seen 'as a mere cost of doing business' is a familiar one in public discourse (and some sentencing discourse.) But it is never analysed at all in the Discussion Paper. Is the concern real? What is its extent? Is it limited to corporations? What are the options for dealing with it? (For example, confiscating profits arising from wrongdoing? Lifting the amount of penalties? Barring the use of insurance to pay for penalties? Changing the tax status of penalties? Reducing corporations' limited liability for such penalties?) Crucially, the ALRC doesn't

explain why criminalising all repeat or flagrant contraventions of civil penalty provisions ('for corporations.) is either an 'appropriate or effective' way of dealing with this concern.

Indeed Proposal 5's terms are left wholly undefined. Consider the first limb, on civil penalties 'found' to have been contravened after having previously been 'found' to be contravened? What does 'found' mean in each instance? Is an uncontested penalty notice or a negotiated penalty or deferred enforcement agreement a 'finding'? What if the second wrongdoing occurs while the first finding is under appeal? Indeed, does the alleged second wrongdoing have to occur after the first finding, or just the first wrongdoing? The second limb is still more uncertain. When exactly is a contravention done 'in such a way as to demonstrate' flouting or flagrant disregard? What is 'flouting'? What is 'disregard'? When is disregard 'flagrant'? How (and why) does the 'way' it is done matter? 'Demonstrate' how? And to who? Most importantly, are any of these concepts appropriate additions to the federal criminal law?

Nor does the ALRC discuss how Proposal 5 will work procedurally. If a corporation is prosecuted under the first limb, will the prosecution have to prove the second breach to the criminal standard (and according to criminal evidence and process rules) or the civil standard? What if the corporation disputes the first breach in the later criminal proceeding, arguing that the evidence of the first finding would not satisfy a criminal standard of proof? Will the fact that the contravention is a 'repeat' one attract the fault elements in Chapter 2 of the Code? And how will this work for the alternative limb of 'flagrant' breach? Will that have to be proved to the criminal standard? What fault element applies to 'flagrancy' How will double jeopardy apply to this regime? Will investigative tools designed for civil penalties be able to be used for repeat or flagrant breaches? Most importantly, what practical consequences will arise from Proposal 5 for the kinds of disclosure, negotiation and bargaining that are essential to the operation of any enforcement system? Will corporations become reluctant to concede civil breaches because of the prospect of criminalisation of repeat or flagrant breaches? Could a settlement include an indemnity for such a future prosecution? There's no sign that the ALRC has given any of this the slightest thought.

In short, Proposal 5 is a classic thought bubble, the kind of idea that I can imagine getting written on a piece of butchers' paper at a workshop somewhere. Maybe it's a good idea, maybe not. But what it isn't is a thought-out proposal. How can the public – or stakeholders – comment usefully on Proposal 5 without knowing what it is even intended to achieve, let alone how it is expected to operate? How will the ALRC assess submissions on Proposal 5 (for example, from government agencies who say they 'support' this addition to their 'toolbox')? If the ALRC includes this proposal in its final report, will it remain in its current underbaked form? If the ALRC adds new details to it, how will the public be consulted on those? Proposal 5 illustrates well the problem the MTAA raised (and the ALRC seemingly dismissed) about proceeding straight from a Discussion Paper to a Final Report on proposals for criminal law reform.

Proposal 6

And then there's Proposal 6*:*

> *The Attorney-General's Department (Cth) Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers should be amended to reflect the principles embodied in Proposals 1 to 5 and to remove Ch 2.2.6.*

The first half of this proposal makes sense if Proposals 1 to 5 made sense (which they don't.) If adopted, Proposals 1 to 4, would require a dramatic change to how every federal civil penalty and

criminal offence provision is drafted, with each one having to 'designate' whether or not it applies to corporations or not (despite the existing rules in s12.1(2) of the *Criminal Code* and s. 97 of the *Regulatory Powers Ac*t.) The inclusion of Proposal 5 here is a bit odd, though. Proposal 5 is expressed to be a criminalisation of (repeat or flagrant) contraventions of all civil penalty provisions ('by corporations'). Given the generality of this proposal, it's not clear why it needs separate consideration every time a new civil penalty provision is drafted, rather than just being addressed by a general criminal offence – say in the *Corporations Act*? – for repeat or flagrant (corporate) breach of any civil penalty provision.

But the second half of Proposal 6 – the ALRC's proposal 'removal' of Ch. 2.2.6 of the federal offence/penalty framing guide – is another matter. This part of Proposal 6 is that the Commonwealth government 'remove' a three-page section of its drafting guidelines that begins:

> *The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and where there is adequate justification for doing so. This justification should be carefully outlined in the explanatory material.*
>
> *The Criminal Justice Division should be consulted at an early stage on any proposal to apply strict liability to all elements of an offence that is punishable by imprisonment.*

Unlike the rest of Chapter 4, the second part of Proposal 6 is clearly about criminal responsibility. Strict and absolute liability are general regimes for criminal responsibility that are less protective than the Code's default requirement for the prosecution to prove fault elements corresponding to every physical element of a criminal offence. The federal *Criminal Code*'s greatest innovation is to require parliament (and hence drafters) to expressly state that strict or absolute liability applies to an offence, rather than leaving it to the courts to decide that some offences can be proven in this way. Ch 2.2.6 is the chief mechanism (other than Parliament itself, which rarely closely scrutinises questions of criminal responsibility) to ensure that such legislative decisions are made in a principled, thoughtful manner. This part of Proposal 6 is to remove that mechanism entirely. Proposal 6 has nothing to do with the enforcement pyramid that is the subject of the rest of Chapter 4 and is also not specific to corporations.

So, why does the ARLC propose removing Ch. 2.2.6?:

> *The following amendments should also be made. First, the removal of Ch 2.2.6, which imposes certain guidelines for strict and absolute liability offences, and which the ALRC has found are frequently departed from. Second, the removal of Annexure A, which provides a comparison of offences based on penalty, and which is honoured more in the breach than in observance.*

Where do I start?[1]

I'll begin with the ALRC's supposed finding that the guidelines in Ch 2.2.6 'are frequently departed from'. A footnote indicates that this finding was made in a four-paragraph discussion in Chapter 3. The first paragraph of that discussion paraphrases just one paragraph of Ch 2.2.6:

> *The AGD's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the 'AGD Guide to Framing Offences') states that such liability should be applied only to offences where:*

[1] For some reason, the recommendation to remove Annexure A doesn't appear in the text of Proposal 6, so I won't discuss it further here in the hope that everyone just forgets about it.

- *imprisonment is not available;*
- *the offence attracts a fine of up to:*
    - *60 penalty units for an individual (300 for a body corporate) for strict liability offences; or*
    - *10 penalty units for an individual (50 for a body corporate) for absolute liability offences;*
- *such liability 'is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct'; and*
- *there are 'legitimate grounds for penalising persons lacking fault'*

The ALRC's paraphrasing misstates the actual guideline in Ch 2.2.6 in three ways: first, this bit of Ch 2.2.6 is limited to the application of strict or absolute liability to '*all*' physical elements of an offence, not just some of them; second, the relevant guideline is expressed to be about when such an application is 'generally only considered appropriate'; third, a footnote to the specific requirement about fines states:

> *A higher maximum fine may be used where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.*

None of these things are addressed in the ALRC's analysis in Chapter 3 or elsewhere.

The ALRC declares that is 'identified numerous strict liability offences that exceed the penalty unit benchmarks specified', which are then set out in Appendix F. But there are at least two problems with the analysis summarised in Appendix F. First, there's the question of whether the guidelines allow strict liability for offences carrying a maximum 60 penalty unit fine (a very common maximum fine in federal criminal law.) The ALRC, in a footnote, claims that the guidelines – by referring to a fine of 'up to' 60 penalty units – is ambiguous on this point. I can't see the ambiguity myself – the term 'up to' is an inclusive term – but the ALRC nevertheless opts to read the guidelines as more restrictive, based on a baffling reference to a completely different rule about indictable offences and imprisonment. In doing so, the ALRC ignores the Senate Scrutiny of Bills Committee's conclusion in 2002 that:

> *strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ($6,600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum.*

As well, it ignores the even clearer summary in the ALRC's own 2002 Report on civil and administrative penalties:

> *Under the guidelines, strict liability offences should not include imprisonment as part of the penalty and the maximum penalty should be no more than 60 penalty units for an individual or 300 penalty units for a corporation*

Second, the ALRC miscalculates the current value of federal penalty units, presently set at $210 under s. 4AA(1) of the *Crimes Act 1914*. In particular, Appendix F claims that the Australian Consumer Law has no sub-60 penalty unit ($12,600) offences. However, the ACL has several dozen offences that carry a maximum $10,000 penalty (and $50,000 penalty for corporations, which is less than 300 penalty units), and a number that carry still lower penalties. In short, the ALRC's own research –

seemingly not subject to peer review – may tilt towards overstating the number of 'breaches' of this bit of Ch 2.2.6.

Next, the ALRC observes:

> *In six of the statutes, more than a quarter of the total criminal offences identified in the legislation attracting maximum penalties of 60 penalty units or above are strict liability offences. These are:*
>
> - *the Australian Consumer Law (55.4%);*
> - *the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth) (45.5%);*
> - *the Therapeutic Goods Act 1989 (Cth) (31.7%);*
> - *the Work Health and Safety Act 2011 (Cth) (29.2%);*
> - *the Excise Act 1901 (Cth) (27.1%); and*
> - *the Fisheries Management Act 1991 (Cth) (25.9%).*

The implication here is that these six statutes are typical of the federal statute book, but the ALRC's own Appendix F shows that they are atypical. Ten of the twenty-four statutes the ALRC examined had no departures at all from Ch 2.2.6. Those ten include the *Criminal Code*, the principal federal criminal statute, which has over 600 60+ penalty unit offences. An eleventh, the *Corporations Act*, is compliant for 582 out of 585 such offences. Moreover, the most egregious non-compliant statute, the Australian Consumer Law, isn't a federal law, but rather is part of national uniform scheme developed by COAG, and hence a poor litmus test of compliance with a guide about the drafting of 'Commonwealth offences' and directed to 'Commonwealth departments'. Moreover, the three next highest non-compliant statutes involve pollution, health and safety, which happen to be the three subject-matters expressly nominated in the guide itself as permitting a higher maximum penalty.

Indeed, if you add up the ALRC's figures across all 24 statutes the ALRC examined, there are 288 non-compliant offences out of 2272 60+ penalty unit offences, or 12.6%. 173 of those 288 non-compliant offences come from just three federal statutes, with the bulk of those (82 according to the ALRC, 72 on my count) coming from a single health law statute and nearly all carrying a maximum penalty of 100 penalty units. Do such figures contradict a guideline about what is 'generally' acceptable? Do they merit a finding that the guidelines are 'frequently' departed from? And, most importantly, why didn't the ALRC set out these details in its Discussion Paper, rather than non-representative counts for just six of the federal statutes it examined? The discussion in Chapter 3 looks less like a finding and more like advocacy.

Even if the ALRC's finding was correct, why does a finding of even 'frequent' non-compliance justify a proposal to remove all of Ch 2.2.6? For starters, the ALRC's count only looked at a single requirement of one part of Ch 2.2.6 and didn't test whether any of the remaining requirements are complied with. As well, the ALRC's analysis didn't look at the whole federal statute book or anything like it, but rather the '25 statutes that are particularly relevant to the regulation of corporate conduct' And yet, the ALRC's proposal to remove Ch 2.2.6 is not limited to those statutes or even to corporate criminal law, but instead covers the entirety of federal law. Most importantly, why would a finding of frequent non-compliance with a guideline support a proposal to 'remove' the guideline altogether? Why wouldn't the ALRC recommend increased compliance? Or altering the guideline in some way? The ALRC doesn't even discuss alternative ways of dealing with the compliance problem it has supposedly discovered.

Nor does the ALRC discuss the consequences of removing Ch 2.2.6 from the framing guide. The obvious effect of removing the guidelines is that Commonwealth government departments will no longer:

- consider all of the other guidelines in Ch 2.2.6, including the ones 'generally' barring absolute liability for offences of less than 10 penalty units, the bar on strict or absolute liability for offences punishable by imprisonment, or considerations of deterrence or notice;
- consult with the Criminal Justice Division of AGD at an early stage, or perhaps at all;
- consider the tighter protections in the Scrutiny of Bills Committee's 2002 report; and
- be required to explain their use of strict or absolute liability in the explanatory memorandum.

In what possible world is any of this a good thing, let alone all of it?

This part of Proposal 6 demonstrates well the folly of the ALRC's excursion beyond its Terms of Reference. Based purely on (flawed) counts of compliance with a (misdescribed) single dot point in a 3-page guideline across a (narrow) survey of corporate-focussed statutes, the ALRC proposes the complete removal of a major pillar of the federal criminal responsibility regime that has been in place for two decades, not just for corporations but for everyone. It makes this proposal without: a detailed study of the purpose of strict/absolute liability in general or Ch 2.2.6 in particular; any consideration of alternative remedies to the single problem it perceives; or any plausible justification for why removal of the whole guideline is a sensible remedy, much less what positive things it would achieve.

Proposal 8

Moving on from Chapter Four, here is the ALRC's principal response to its Terms of Reference:

> *There should be a single method for attributing criminal (and civil) liability to a corporation for the contravention of Commonwealth laws, pursuant to which:*
>
> *a) the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation; and*
>
> *b) a due diligence defence is available to the corporation.*

Below, I'll propose an alternative to this. But first I have some comments to make about Proposal 8.

First, recall Chapter 2 of the Discussion Paper, which is titled 'Rationale for Corporate Criminal Responsibility'. It concludes:

> *Therefore, a rationale for corporate criminal responsibility that is distinct from the deterrent role that criminal responsibility also shares with civil penalties can be seen to exist. This is the expressive power of the criminal law to express denunciation of particularly egregious conduct, engaged in by the corporation as an entity.*

Remarkably, this rationale goes undiscussed in Chapter 5, titled 'Current Approaches to Corproate Attribution') and Chapter 6, which is titled 'Reforming Corporate Criminal Responsibility'. (One footnote in Chapter 5 and two in Chapter 6 simply state 'See Ch 2.') Does the current Part 2.5 of the Code support this rationale or not? Does the 'TPA model' support it? Are there better ways to support it? Does Proposal 8 fulfil 'the expressive power of the criminal law to express denunciation of particularly egregious conduct, engaged in by the corporate as an entity'? The ALRC doesn't discuss any of this.

(Perhaps the ALRC will respond: "We've already ensured that rationale is achieved through Proposals 1 to 7!" But the ALRC says absolutely nothing about the interaction between Proposals 1 to 7 and

Proposals 8. Even if Proposals 1 to 7 are good ones or are effective in promoting the rationale in Chapter 2 (which they're not), Proposal 8 is not expressed as contingent on the implementation of Proposals 1 to 7. There is every likelihood that the government will respond to a final Report recommending these eight things by speedily implementing Proposal 8 (through a single amendment to Part 2.5 of the Code), while leaving Proposals 1 to 7 (which require a massive offence-by-offence consideration and amendment programme) as a much longer-term project. The ALRC should expressly address whether its Proposal 8 should be adopted ahead of the implementation of Proposals 1 through 7.)

Second, here is the ALRC's rationale for ditching the current Part 2.5 of the Code (specifically its key provision, s. 12.3(2)):

> *It is appropriate for a jury to decide, given the totality of the evidence and the circumstances of the case, whether the corporation permitted or allowed the conduct. That is, whether the corporation should be culpable for the conduct. However, the specificity of the options in s 12.3(2) and the uncertainty of the 'corporate culture' concept do not appear to have aided prosecutions (though, as stated above, there is very little judicial consideration of these sections).*

It's true that the Code's corporate culture provisions have not been used. But the ALRC's claim that this is because s. 12.3(2) and 'the 'corporate culture' concept' 'do not appear to have aided prosecutions' is just supposition. As the ALRC itself notes, Part 2.5, including s. 12.3(2), has been excluded from two-thirds of the statutes that the ALRC identified as 'particularly relevant to the regulation of corporate conduct'. While this may (or may not) indicate a lack of confidence amongst some regulators in s12.3(2) (or, alternatively, a preference for other corporate criminal responsibility regimes, or alternatively some other unexplained policy-decision within government), it is no basis for a conclusion that Part 2.5 wouldn't aid prosecutors if it was applicable to the most common criminal offences for which corporations are prosecuted.

(The need for the ALRC to actively explore why Part 2.5 has been excluded from some federal statutes was emphasised in several submissions to the Terms of Reference. For example, Associate Professor Overland writes:

> *Accordingly, while the ALRC has been asked to review the policy rationale for Part 2.5 of the Criminal Code, I also urge the ALRC to consider the policy rationale for excluding Part 2.5 of the Criminal Code from application to the offences in Chapter 7 of the Corporation Act, and to consider the efficacy of the various Corporations Act provisions concerning corporate criminal liability. These issues are of particular interest in light of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Report), since Chapter 7 of the Corporations Act relates to financial services and markets. In particular, the Hayne Report emphasises "culture" as a contributing factor to misconduct in the banking and financial sector, but the only applicable mechanism for using culture for the attribution of criminal liability exists in Part 2.5 of the Criminal Code, which does not apply to Chapter 7 offences.*

Professor Campbell – a welcome but belated appointee to the ALRC's advisory panel for this inquiry – makes a similar point:

> *I suggest that the interaction of Part 2.5 with the Corporations Act 2001 should be reviewed and reconsidered. Chapter 7 of the Corporations Act excludes the culture provision from application to finance offences. This means that Part 2.5 of the Code does not encompass individual directors or senior managers such as were criticized by Commissioner Hayne in the Royal Commission Report, even if they presided over a problematic corporate culture.*

And yet, the Discussion Paper only mentions the relevant section of the Hayne Report in a single paragraph in Chapter 5, and does not address it in its rationale for Proposal 8.)

Third, here is the ALRC's rationale for inserting vicarious liability into Part 2.5 of the Code:

> *The overarching aims of this proposal are to:*
>
> - *ensure attribution accords with fundamental criminal law principles, importantly blameworthiness or culpability;*
> - *achieve simplicity;*
> - *reflect the reality of corporate action and behaviour;*
> - *recognise the existing legal environment, including the Criminal Code; and*
> - *be pragmatic. The proposal recognises a strong preference amongst regulators for corporate attribution models based on the 'TPA Model' (see Chapter 5 for an explanation of this legislative method of corporate attribution).*

Only the last of these factors is expanded upon. That is, beyond nebulous claims of simplicity and reality, the sole specific rationale for applying a vicarious liability model to all corporate criminal responsibility for federal offences is 'a strong preference amongst regulators'. The ALRC doesn't explain how it discerned this preference or who holds it and indeed concedes that '[t]here is little explanation as to the genesis of s 84 of the Trade Practices Act — the explanatory memorandum is silent as to the rationale behind the provision.'[2] (The ALRC also later disclaims a different pragmatic concern, regulators' familiarity with the TPA model, because 'even though the TPA Model is dominant throughout the Commonwealth statute book, it predominates in variations, rather than consistently.') Of course, regulators' strong preference for the broadest possible model of liability is no surprise, but nor is it – on its own – any justification for introducing that model into the Code.

(Chapter 5's brief description of the vicarious liability models used in South Africa and the United States includes a statement that '[t]he use of this method has the advantage of being efficient and expedient'. The ALRC does not define either term but simply cites a 2017 article, which merely describes what others have asserted:

> *Regulating corporations using criminal law was justified by its expediency and effectiveness in responding to these problems that could not be solved through the private remedies that existed.*

Radhi's article is actually a vehement rejection of this view, arguing that it 'in practice fails to take into account the differences between corporations. In sum, corporations should not be held responsible for unauthorized decisions made by employees.'[3] The two articles she cites are likewise vehement rejections of that view.[4] In short, the ALRC makes an assertion that the use of vicarious liability is efficient and expedient without any evidence basis whatsoever.)

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[2] Although Fisse's 2019 article is cited for this claim, I can't find where he makes it. In any case, it is wrong. There is a detailed rationale for the current version of s. 84 in the explanatory memorandum to the Trade Practices Amendment Bill 1985.

[3] Rahdi instead favours the Canadian approach, which the ALRC describes as having 'expressly rejected the vicarious liability model because it imposes the stigma of a criminal offence on a corporation when its actions might not be morally blameworthy.' Stigma, of course, is central to the ALRC's own rationale for corporate criminal responsibility set out in Chapter 2 of the Discussion Paper.

[4] William Robert Thomas writes: "Next, close attention to prior judicial reasoning shines new light on how to reform the worst feature of our modern doctrine of corporate-criminal liability: the continued willingness to use vicarious liability as

Fourth, the ALRC explains that its particular model of vicarious liability:

> *is a principled approach of substance over form; instead of the primary consideration being the person's role or title, the definition of 'associates' directs the inquiry to the substance of the relationship between the individual and the corporation.*

But the definition of 'associate' the ALRC sets out (seemingly drawn from the 2017 and 2019 proposed changes to the foreign bribery offences) doesn't fit this description at all:

> ***associate*** *means any person who performs services for or on behalf of the body corporate, including:*
>
> *(a) an officer, employee, agent or contractor; or*
>
> *(b) a subsidiary (within the meaning of the Corporations Act 2001) of the body corporate; or*
>
> *(c) a controlled body (within the meaning of the Corporations Act 2001) of the body corporate.*

This definition is not limited to the terms of Proposal 8, which are about 'persons (individual or corporate) acting on behalf of the corporation'. Rather, it also covers anyone who 'performs services for' a corporation, whether or not they are acting on the corporation's behalf. The ALRC asserts:

> *This definition of 'associate' is similar to the equivalent UK failure to prevent offences, which also focus on the nature of the relationship between the corporation and the associate, rather than the associate's formal status.*

But the ALRC's definition doesn't fit the terms of the UK bribery offence, which specifically provides:

> *Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.*)

By contrast, none of the terms in para (a) are limited to the 'nature' or 'substance of the relationship between the individual and the corporation', but simply capture anyone in any contractual relationship with the corporation. Notably, the ALRC's definition seems to capture all independent contractors, professional service providers (e.g. lawyers, accountants, plumbers, advertisers) and, of course, absolutely any employee. Whatever sense that makes in defining the scope of a specific offence like foreign bribery – where Parliament is considering dealing with an intractable regulatory issue by imposing an extremely strict form of responsibility on corporations – it is a wholly inapt way of defining attributions of criminal responsibility for all offences. In short, the scope of the ALRC's proposed vicarious liability model is as broad as can be imagined and goes beyond all comparable models. Subject to the due diligence defence (discussed below), it is quite literally liability by association.

(The ALRC draft of Proposal 8 also lacks some key features of s. 12.2 of the Code, which states:

> *If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.*

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a substitute for genuine corporate mens rea." Likewise, Miriam Baer writes: "respondeat superior liability does not perform either of these functions. Instead, it leaves corporations entirely dependent on unaccountable, highly powerful government actors who have their own personal and institutional interests."

Instead, the ALRC draft covers '[a]ny conduct engaged in by one or more associates of a body corporate'. This formulation seems to pick up wholly private conduct by an associate that has no actual or apparent connection to corporation, at an extreme even covering offences committed by the associate at home, or on holiday, or against the corporation itself. The ALRC's sole justification for this is that:

> *a broad definition of associates is appropriate to prevent body corporates using the corporate structure to avoid criminal responsibility, either through wilful blindness or the deliberate use of third party agents or intermediaries.*

But, by removing any requirement beyond 'perform[ing] services for' the corporation, the ALRC's proposal goes far beyond the limits of even tort-based vicarious liability, or indeed any common sense limits on the doctrine. Indeed, even the proposed reformulated federal foreign bribery offence will only impose liability on corporations for bribery by their associates if the associate engaged in that bribery 'for the profit or gain of the' corporation. Proposal 8 would go much further.)

Fifth, the only effective limit on liability in Proposal 8 is the proposed due diligence defence:

> *This broad definition should be counterbalanced by a due diligence defence, which allows the body corporate to prove a lack of culpability. This would ensure that the criminal law regime captures the notion of corporate fault, or organisational blameworthiness.*

Given how broad the ALRC's model of vicarious liability is, the due diligence defence is effectively the only test for corporate fault under Proposal 8. Such a corporate due diligence defence is already provided for in Part 2.5 of the Code, but only for managerial liability (via s.12.3(3)) and strict liability (via s. 12.5(1)(b)). The main effect of Proposal 8 is to treat all federal criminal offences as strict liability ones (or to treat every associate's offence as if it is engaged in by a corporation's high managerial agent) for the purposes of imposing corporate criminal responsibility. This is a complete flattening of the Code's current approach to criminal responsibility, which imposes a tougher test for prosecution of subjective liability offences attributed to the corporation via its board or culture (s. 12.3) and for offences requiring proof of negligence (s. 12.4) and a milder test for prosecution of absolute liability offences (which are not covered by s. 12.5) and for those federal offences where Part 2.5 is excluded and no defence to vicarious liability is available. Chapter 6 only provides a blanket rationale for these various changes.

(Chapter 6 also does not address how Proposal 8 interacts with other criminal defences, including general ones in the Code or specific ones in particular offence statutes. Section 12.5(1)(a), for instance, provides that a corporation will still be criminally responsible for a strict liability element even if it proves that it exercised due diligence if it wasn't operating under a reasonable mistake of fact.[5] Section 12.6 bars a corporation from relying on the defence of intervening conduct or event in the case of employees, agents or officers. It is not clear whether or not these provisions will be retained under Proposal 8 and, more generally, whether defences to any criminal offence will be available only if they are satisfied by the relevant 'associate' or by the corporation itself or both or neither.)

Finally, here is the Discussion Paper's justification for requiring every corporate defendant to prove its innocence of a crime committed by any of its 'associates':

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[5] The Discussion Paper wrongly states that the corporation must prove the absence of mistake on the balance of probabilities, relying on an obviously incorrect statement in the Guide for Practitioners. It is only the absence of due diligence that must be proved by the corporation, not the absence of mistake: see ss. 13.3 & 13.4.

> *The corporation is in the better position to provide evidence of its preventative procedures (due diligence) than the prosecution, and as such it is appropriate for the corporation to bear the legal burden of proving the defence.*

The ALRC does not substantiate this claim, specifically its assertion of a relative advantage of corporations over prosecutors. The burden of proof in criminal matters is by default imposed on prosecutors because they are representatives of the state, a body that is almost invariably more powerful and better resourced than any criminal defendant, including corporate defendants. Indeed, the state's power is significantly enhanced when prosecuting corporate defendants, because they cannot claim the privileges against compelled self-incrimination or compelled self-exposure to penalties. While it is true that corporate employees may be able to claim such privileges personally, the state can also offer those same employees (and any other associate of a corporation) incentives (including immunity from personal prosecution) to cooperate with the investigation of the corporation. As well, in many commercial fields, corporate regulators have been given unusual statutory powers permitting them to compel material witnesses to answer questions on oath and provide documents (including self-incriminatory information) that can then be used to prosecute corporations. Moreover, while humans can commit their knowledge of crimes to memory (protected by the right to silence), corporations operate largely through documents, which can be subject to search warrants and, via the corporation's proper officer, interrogatories and discovery. While legal professional privilege may provide corporations with some protection from such searches, it only does so for documents which satisfy the 'dominant purpose' test and were not made for the purpose of an offence, fraud or a civil penalty offence. Chapter 6's justification for imposing a reverse onus on all corporations accused of crimes ignores all of these points.

(Nor is the ALRC's claim that a 'corporation is in the better position to provide evidence of its preventative procedures' necessarily correct. It is true that the 'due diligence' is a topic that is often within the knowledge of the person asserting diligence, human or corporate. However, while corporations – or, at least, large, well-resourced ones – have significant advantages over humans in terms of record-keeping, they are also susceptible to some unique disadvantages. Corporations can suffer a significant loss of memory in ways humans cannot, via the loss of documents, the changeover of relevant personnel or even the misconduct of criminal officers or employees. No doubt, it is appropriate to expect corporations to make, maintain and locate relevant records of its diligence on particular topics, such as bribery, market misconduct, consumer protection or work safety; however, that assumption doesn't necessarily hold for every one of the thousands of federal criminal offences, such as those in the Criminal Code. As the offence framing guide observes:

> *The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust.*

Or, as the ALRC itself put it just three years ago:

> *Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.*

The ALRC does not discuss – or even acknowledge – the risk that placing a reverse onus on corporations in relation to an essential element of corporate criminal responsibility may result in wrongful convictions in some cases.)

My alternative to Proposal 8

All up, Proposal 8:

- has not been assessed against the ALRC's own rationale for imposing corporate criminal responsibility
- rejects the *Criminal Code*'s s. 12.3(2) for all offences for a weak reason
- adopts a vicarious liability model for all offences for a weak reason
- adopts an incredibly broad version of that model without adequate justification
- fails to explain why the Code's existing approach to corporate criminal responsibility for strict liability and high managerial agent offences should be extended to other offences, including subjective fault and absolute liability offences
- imposes a reverse onus on corporations for all offences without adequate justification

The cause of most of these flaws in Proposal 8 is the ALRC's insistence on a 'single method for attributing criminal (and civil) liability for a corporation', replacing the existing approach under the Code and federal criminal law more broadly of imposing different methods of corporate criminal responsibility for different sorts of offences.

Here is the ALRC's rationale for its 'single method':

> *A single statutory method will improve simplicity and certainty for corporations (and their directors and officers), as well as regulators and prosecutors.*

However, while it is true that the federal statute book suffers from far too many different and often incompatible methods of determining corporate criminal liability for largely similar corporate wrongdoings, it doesn't follow that imposing a single method for every wrongdoing is the correct solution, much less one that 'will improve simplicity and certainty' for anyone, let alone criminal defendants.

After all, the federal Code itself – which is rightly feted for simplifying tests for criminal responsibility in federal law – does not impose a 'single method for attributing criminal' liability, but rather sets out three tiered levels of responsibility, drawing on decades of common law development of a similar approach. In section 5.6, the Code sets out a protective default test for criminal responsibility and then, in ss. 6.1 and 6.2, provides for Parliament to easily nominate two other pre-defined less protective tests for criminal responsibility. Parliament's choice between these (or other) options is guided by the Ch 2.2.6 of the offence framing guide (which Proposal 6 suggests should be removed), supervised by various parliamentary committees and unambiguously expressed in each offence provision. In this way, the Code allows the needs of regulators and prosecutors in particular areas of law (or particular offences) for both clarity and suitability to be met in a principled way, without imposing a single method of determining criminal responsibility for all offences or leaving the determination of which method applies to courts to discern via uncertain statutory interpretation (as currently occurs at common law where some offences may be read as imposing vicarious liability.)

So, here's my suggestion for an alternative to Proposal 8. My suggestion doesn't reject either Proposal 8 or Part 2.5 of the Code or the TPA model, but rather makes each of them one of three tiers of corporate criminal liability, analogous to the existing three tiers in the Code for all criminal

responsibility. It uses the same approach as the Code's existing tier, by setting a protective default that applies unless Parliament specifies otherwise, and by expressly providing for the two alternative approaches.

My suggested draft is based on existing ss. 6.1, 6.2 and 9.2 of the Code, and incorporates the ALRC's draft of its Proposal 8, as follows:

> ***12.7 Strict corporate liability***
>
> *If a law that creates an offence provides that the offence is an offence of strict corporate liability:*
>
> *(a) sections 12.2, 12.3 and 12.5 do not apply to the offence;*
>
> *(b) any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in also by the body corporate;*
>
> *(c) if, in respect of that conduct, it is necessary to establish a state of mind, other than negligence, of the body corporate, it is sufficient to show that:*
>
> *(i) one or more associates of the body corporate who engaged in that conduct had that state of mind; or*
>
> *(ii) the body corporate authorised or permitted the conduct; and*
>
> *(d) the defence of corporate due diligence under section 12.9 is available.*
>
> ***12.8 Absolute corporate liability***
>
> *If a law that creates an offence provides that the offence is an offence of absolute corporate liability:*
>
> *(a) sections 12.2, 12.3, and 12.5 do not apply to the offence;*
>
> *(b) any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in also by the body corporate;*
>
> *(c) if, in respect of that conduct, it is necessary to establish a state of mind, other than negligence, of the body corporate, it is sufficient to show that:*
>
> *(i) one or more associates of the body corporate who engaged in that conduct had that state of mind; or*
>
> *(ii) the body corporate authorised or permitted the conduct;and*
>
> *(d) the defence of corporate due diligence under section 12.9 is not available.*
>
> ***12.9 Corporate due diligence (strict corporate liability)***
>
> *(1) A body corporate is not criminally responsible for an offence of strict corporate liability if the body corporate proves that it exercised due diligence to prevent the criminal conduct engaged in by one or more of its associates.*
>
> *Note: A defendant bears a legal burden in relation to the matter in subsection (1) (see section 13.4).*
>
> *(2) A body corporate's failure to exercise due diligence may be evidenced by…*
>
> *(3) A body corporate's exercise of due diligence may be evidenced by…*

This approach, in contrast to Proposal 8, preserves the Code's approach to corporate criminal responsibility, but also reflects the reality that, in many regulatory fields, other approaches can and should be applied (as the Code itself recognises in its existing tiers of strict and absolute liability.) Unlike Proposal 8, my proposal allows Parliament to opt to preserve the full TPA model (which lacks

a due diligence defence) for some offences, while overcoming the problem of the myriad of variations on that model in the current statute book. Despite my earlier criticisms, my draft incorporates that ALRC's preferred broad approach to vicarious liability by reference to a corporation's 'associates', but I trust that the ALRC will, in its final report, place sensible limits on that approach, as discussed above.

Analogously to Ch 2.2.6 of the offence framing guide (assuming it survives the misguided Proposal 6), a new section should be inserted into that guide setting out guidelines on when strict or absolute corporate responsibility should apply. These could include the considerations set out in Discussion Paper's Proposal 2 (and its accompanying discussion) and should also include consideration of the risk of wrongful conviction arising from either a reverse onus (under strict corporate responsibility) or a lack of due diligence defence (under absolute corporate responsibility.) As the three tiers in my proposal are very similar to the three tiers created by the Supreme Court of Canada in *R v Sault Ste Marie*, that nation's premier case on criminal responsibility for regulatory offences (as applied in that case to a corporate defendant), the guidelines ought to take account of relevant Canadian cases, guidelines and research on its approach, which is now in its fifth decade. For civil penalties, either strict or absolute corporate liability should be the default.

Proposal 10

Having already topped 10,000 words in this submission several pages ago, I will confine myself to three brief comments on Chapter 7 of the Discussion Paper.

First, the ALRC has again failed to make its case for reform of officer liability. This time, it's because the ALRC's case for reform entirely ignores the 2012 COAG Principles, a major law reform effort developed by a joint effort of the federal, state and territory governments, and partly implemented in every jurisdiction. While the Paper duly sets out the COAG principles at [7.13]-[7.18] (albeit neglecting their implementation by states and territories), it thereafter refers almost exclusively to pre-2012 critiques of federal law. For example, at [7.19], the ALRC writes:

> *Notwithstanding the findings and recommendations of these earlier reviews, commentators have continued to debate the circumstances under which individuals ought to be held liable for corporate conduct.*

But the footnote to this sentence is to Brent Fisse's 'good overview of this debate' from 2001, over a decade before the COAG Principles were developed. The ALRC then describes academic commentary from 1994, 2000 and 2005, and cites Fisse again from 2001 for 'a perception that individuals are not properly held accountable in practice.' How can any of these papers have anything to say about the success or otherwise of the 2012 COAG Principles? Following its review of existing law, the ALRC adds: "These inconsistencies have also been highlighted by various academics, as noted throughout this chapter." It doesn't specify which academics, or when they made their assessments. (Chapter 7's discussion of a handful of post-2012 papers by Australian academics (at [7.25] and n38) does not appear to support this claim.) The ALRC has, quite simply, completely failed to justify the need for any reforms beyond the existing COAG Principles.

Second, the ALRC proposes a new civil penalty offence for officers:

> ***Proposal 9*** *The Corporations Act 2001 (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in*

relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

This proposal, like Proposal 8, again imposes a reverse onus. Despite Chapter 5's brief discussion of South Africa's vicarious liability scheme, the ALRC fails to note that South Africa's Constitutional Court struck down a reverse onus for officer liability under that nation's scheme in 1997's *S v Coetzee and Others* (CCT50/95) [1997] ZACC 2. Proposal 9 differs from the South African provision because it only imposes a civil penalty, not a criminal one. However, as the ALRC observed in its inquiry into Traditional Rights and Freedoms, 'Where there is such a blurring of distinctions between criminal and civil penalties, careful scrutiny of any reversals of the burden of proof is merited.' There is no such careful scrutiny in relation to Proposal 9.

Third, the ALRC proposes a new criminal offence for reckless breaches of the civil penalty provision in Proposal 9:

> ***Proposal 10*** *The Corporations Act 2001 (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.*

The major problem with Proposal 10 is that it refers to 'conduct the subject of a civil penalty provision as set out in Proposal 9'. But Proposal 9 does not describe <u>any</u> conduct <u>by the officer</u>. Instead, it consists of three parts:

- 'a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision', a description of the body corporate's conduct, not the officer's.
- 'any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty', which doesn't describe any conduct at all. It just defines a status of the officer. (Technically, that status is a 'state of affairs' and hence counts as 'conduct' for the purposes of Chapter 2 of the Code, but it's trivial conduct in this instance. If this is what is meant by 'conduct' in Proposal 10, then the fault element will always be satisfied.)
- 'unless the officer proves that the officer took reasonable measures to prevent the contravention.', which isn't conduct, but rather the absence of proof of conduct.

Chapter 7 states:

> *Proposals 9 and 10 would ensure that corporate officers only face criminal liability where the prosecution proves that they personally <u>contravened the relevant provision</u> with the necessary mental element of knowledge, intention, or recklessness.*

This implies that the relevant conduct is the breach of the offence provision that the corporation breached. If that is correct then, except for offences that can only be committed by corporations, it is not clear what, if anything, Proposal 10 adds to the existing law. In any case, Proposal 10 is scarcely clear about this. (Indeed, absent the above quote, I would have read Proposal 10's reference to 'conduct the subject of a civil penalty provision as set out in Proposal 9' as a reference to the officer's 'omission to take reasonable measures to prevent the contravention'.) In short, Proposal 10, like Proposal 5 before it, is so unclear that it cannot usefully be the subject of public consultation. It should not be included in the final Report unless the ALRC finds a way to clarify its proposal and then properly consult with the public on it.

Concluding remarks

In my view, the Discussion Paper is a highly flawed document, greatly exceeding the inquiry's Terms of Reference and making a series of poorly justified and, in several instances, poorly described proposals. The ALRC should give serious thought to seeking a significant extension in its timeline to remedy the flaws in the Discussion Paper and release fresh proposals for public consultation. If the extension is not granted, the ALRC should give serious thought to informing the Attorney-General that is unable to properly fulfil its Terms of Reference.

If the ALRC nevertheless publishes a final Report as scheduled in April, it should:

- abandon Proposals 1, 2, 3, 5 and 6, in favour of renewing the ALRC's recommendations from its 2002 Inquiry into Principled Regulation
- revise Proposal 8 to provide for tiered corporate liability (for example, my suggestion above), and to place appropriate limits on its suggested definition of 'associate'
- either abandon Proposal 10 (in favour of recommending a full implementation of the 2012 COAG Principles) or reframe it to clarify precisely what acts or omissions the prosecution must prove.

For all recommendations, the final Report should expressly setting out: whether and how the proposal is consistent with the rationale for corporate criminal responsibility in Chapter 2; cogent evidence-based analysis of the flaws (if any) in the existing law; a clear description and rationale for any reform recommendations; and a comprehensive account of how those proposals will operate and the various expected benefits and costs they will bring.

Finally, after the inquiry is complete, the ALRC should review the processes that led to the publication of the Discussion Paper.

Yours Sincerely,

Jeremy Gans