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Comment on ALRC Discussion paper 87

I am a judge of appeal of the NSW Supreme Court and one of the authors of the Lexis Nexis Service "Federal Criminal Law". This submission is made in my personal capacity and does not reflect the views of the NSW Supreme Court or my co-authors of that Service.

I commend the ALRC for the prompt and detailed consideration of the issues the subject of the reference.

I harbour grave concerns, however, about the proposed changes to the attribution of corporate criminal liability and proposed changes relating to the liability of directors and officers reflected in Proposals 8-10. The proposed rewriting of the attribution of corporate responsibility principles to introduce absolute liability together with what are effectively negligence concepts, by deeming criminal conduct by an "associate" to have been committed by a corporation, subject to proof of due diligence, seems to me to be unwarranted.

To deem the criminal conduct of every associate to be the criminal conduct of a corporation, as suggested in Proposal 8, will fundamentally recast corporate criminal liability. I see no compelling reason for this change. Certainly none is suggested in the Discussion Paper other than a perceived need to produce a unified test for the attribution of corporate criminal liability. Assuming for the moment this is a desirable aim, the proposed model is not the answer.

Proposal 8 will introduce incoherence. On the facts of *Macleod v The Queen* [2003] 214 CLR 24; HCA 24, for example, the company which was the victim of the crime would be guilty of that same crime, subject only to the company proving "due diligence", which would in that case not be possible given Mr McLeod's position and activities in the company.

The suggestion of a unified test for attribution to a corporation of criminal liability ignores the history of corporate regulation, which is diverse. Rules for attribution in different fields of regulation have been developed to address the policy objectives of particular legislation. In the absence of any demonstrated reason to think that the policy choices which informed that legislation are now inappropriate, I do not accept that uniformity for uniformity's sake is desirable.

If the test in Proposal 8 is introduced, senior managerial agents of companies (of all sizes) will have no choice but to spend considerable additional sums on accountants and lawyers to assure them that they have taken "all reasonable steps" to prevent any reasonably foreseeable crime being committed by an "associate". Those costs will inevitably be passed on to consumers.

The breadth of the definition of "associate", together with the deeming of criminal liability proposed, will make all companies responsible for all crimes committed by, for example, a contractor performing services for a subsidiary of a listed entity, unless the company concerned can

prove the suggested due diligence defence. That will involve an ongoing investigation and documentation of all of the operations of all contractors of all subsidiary companies and creating and keeping a record of all steps taken so as to be able to prove that "due diligence" has been exercised by the company.

I see no analysis of any benefits to Australia from this proposed reform. There is no coherent explanation of why it is that corporate criminal liability of this kind will lead to effective improvements in corporate behaviour, let alone benefits for Australia as a whole.

Long involvement in prosecuting, defending and adjudicating about corporate misbehaviour leads me to conclude that the introduction of Proposal 8 will ensure much more extensive "box ticking" by directors and officers of corporations and the professionals they engage, of the kind rightly deprecated by the ALRC at paragraphs 4.12-4.13. I see no evidence that corporate behaviour or compliance with the law more generally will be improved.

The history of the introduction of the Commonwealth Criminal Code and in particular Chapter 2 should be carefully considered. Chapter 2 of the Criminal Code introduced significant changes to the criminal law which, many years later, are still being addressed. Whilst improvements to Chapter 2 of the Criminal Code can and should be made, particularly to the "corporate culture" provision, any changes should be carefully considered and cogent reasons advanced for the abandonment of fundamental principles of criminal law of the kind here advocated**.**

I am not aware of any compelling reason for such a significant change in the attribution of criminal liability to a corporation. There are no case studies identified in which difficulties with the existing test for the attribution of criminal liability to a corporation have been an obstacle to a prosecution which should have been conducted in accordance with the test for criminal prosecution the ALRC itself suggests in Proposal 2. The foreign bribery case studies which are discussed do not meet this description. There is no suggestion that a problem with the attribution of individual conduct to a corporation has delayed or prevented a prosecution of a corporation which should otherwise have been brought. The suggestion in paragraph 3.56 that prosecutions against corporations are often not pursued "due to practical difficulties" is not evidenced by a single example.

The problem with Proposals 9 and 10 is perhaps even more acute. Proposal 9 would make any person who has the "capacity to influence the corporation's conduct" in relation to the contravention subject to a civil penalty, unless the person proves that he or she took reasonable measures to prevent the contravention. Proposal 10 makes a person criminally liable if he or she intentionally, knowingly or recklessly engages in such conduct (which no doubt includes intentionally, knowingly or recklessly failing to act). Put together with the deeming effected by Proposal 8, these suggested changes fundamentally recast criminal liability for every person who, after the event, may be found to have had "capacity to influence the corporation's conduct".

These proposals will be tested after the event where, by hypothesis, a crime has been committed by an "associate" of the company. Every person the subject of Proposals 9 and 10 (and in some corporations that may amount to hundreds of people) will potentially have the legal burden to prove that he or she took reasonable measures to prevent the contravention. This reversal of the onus of

proof in such a significant area would be one of the most dramatic erosions of civil liberties in Australia in my legal lifetime.

The comparison suggested between these Proposals and some occupational heath and safety offences is inapposite. Without reciting the history of those provisions and tracing the decisions leading up to the subsequent abandonment of virtually the entire jurisdiction in NSW, it is sufficient to note that the maximum penalties were relatively small, a fine was the usual outcome of a successful prosecution and all offences were tried summarily: s 47 *Occupational Health and Safety Act 1983* (NSW). The offences the subject of these Proposals include the most serious corporate offences and s 80 of the Constitution requires trial by jury of all indictable offences. These differences make any comparison between occupational heath and safety prosecutions and these Proposals inappropriate.

To make criminal liability for a broad cross-section of individuals in corporate Australia dependent upon proof of an absence of "influence" and the existence of "reasonable measures" will introduce real uncertainty for individuals at all levels of corporate activity, yet the Discussion Paper does not identify any likely benefits in changes in corporate behaviour or compliance with the law more generally which could justify such an outcome.

What is clear is that if these Proposals are introduced, all properly advised high managerial agents will spend a great deal of time and money investigating and documenting all of the steps they have taken so as to be able to prove that "due diligence" has been exercised by them individually. Those costs will no doubt be passed on to consumers. The likely cost to the Australian economy of introducing these changes will be significant and ongoing.

There is no reason to think that the outcomes for Australia will be improved by the enactment of Proposals 8-10.

Tony Payne

13 January 2020