

Proposal 1 - 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.

Standard of Proof

The burden of proof requires the prosecution to prove a criminal matter. This functions to limit charges being laid which have weak evidence, as well as to adjust the balance of power between the State and a defendant at trial. A well resourced defendant may have excellent representation, but they will never have the same investigatory and coercive powers as the State. An imbalance of power will therefore always exist and the burden of proof should never be reversed. The standard of proof is beyond a reasonable doubt in a criminal matter. I do not accept there is a justification for this high standard of proof where a defendant is a corporate entity. Where the elements of an offence are supported by sufficient evidence, charges should be laid and the matter prosecuted in the relevant jurisdiction. The discretion for a Prosecutor to certify and pursue a charge is distinct from the role of the judge or jury to test evidence.

In primitive times, criminal penalties were often forms of torture or death. As civilisations evolved so have penalties from capital punishment and hard labour, to therapeutic and community based treatment programs. The requirement to prove criminal charges beyond a reasonable doubt has endured and that is because liberty is the ultimate human right. Should liberty ever be improperly infringed or restricted there is no way that adequate reparation can ever be ordered. Reparation in the context of execution, imprisonment or restrictions on liberty such as parole are impossible to quantify or deliver. The maxim that it is better ten guilty men walk free than one innocent man be punished is fundamental to the Commonwealth system of criminal law. A corporate entity cannot have their liberty infringed or face imprisonment. Where any supervision or other conditions are wrongly ordered financial restitution would always be available and suitable.

The 'balance of probabilities' is often referred to as a the 'civil standard' but these terms are not synonymous. Civil law does not ordinarily allow a privilege against self incrimination and the 'self' in a corporate entity may be fluid where the actors change. In criminal matters the privilege against self incrimination does not apply to corporate entities (noting the exception for where a corporation only consists of one or two individuals who could also face personal criminal liability). Exercising the right to silence then facilitates a

unilateral determination of probabilities. While a criminal charge gives rise to a privilege against self incrimination, other privileges such as client privilege could be diminished (s 123 Uniform Evidence Act) and so the circumstances where a brief of evidence would cause a matter to be appropriate for prosecution in both jurisdictions is limited. A prior conviction could never have relevance to criminal sentencing when assessing the appropriateness for a term of imprisonment should a future offence occur because a corporate entity cannot be imprisoned. There is therefore no possibility that waiving the privilege against self incrimination could infringe liberty at any time. Maintaining the burden of proof but lowering the standard of proof would adjust the overall evidentiary threshold in a fair and appropriate manner whilst preserving other procedural protections.

Some cogent evidence should be required for serious allegations where appropriate (*Briginshaw v Briginshaw* (1938) 60 CLR 336). Where individuals are also being prosecuted in connection with a corporate crime differing standards of proof would require separate trials, or, a discretion to enable the parties to apply to join the corporate entity's trial at the higher standard. Any criminal trials for individuals should always proceed a matter for a corporate entity because an individual may be on remand or bail and therefore liberty would always be paramount.

Proposal 17 - Question H - Do court powers need to be reformed to better facilitate the compensation of victims of criminal conduct and civil penalty proceeding provision contraventions by corporations?

Penalties and Compensation

The criminal system has historically been reactive, but has evolved to where there are now rehabilitative considerations in both sentencing and for discretionary decisions to prosecute. When considering penalties it is important to consider not what the criminal system was or is, but what it could or will be in the future. The system is not yet and may never be preventative or fully therapeutic for the individual but this should be a goal. There is no reason this should not be the same goal for corporate entities.

A corporate entity doesn't start with the same kinds of risks for vulnerability as an individual. A company can't have a drug problem, disadvantaged childhood or many of the other mitigating factors that may affect an individual. A company already begins with a

higher expectation of literacy and social responsibility once they engage in incorporation with ASIC or register with the ATO. This results in a sentencing outcome where the ordinary justification for not making compensation orders does not apply. There is far less chance that a compensation order will interfere with rehabilitation for a company than an individual. Compensation is a very important part of punishment and exposure is likely to prevent crime and facilitate responsible corporate culture. Current criminal legislation allows for the making of compensation orders to within the cap of the criminal jurisdiction for which the proceedings are filed in. It is important that these orders are utilised, not only for accountability but to reduce the pressure on other courts who may otherwise have civil proceedings filed at the conclusion of criminal proceedings.

A civil court should not make an order for punishment, indemnity orders are available to put the party in the position they had been in but for the incident, exemplary orders are ordinarily only made in exceptional circumstances and for deterrence. Fines in civil matters should only prevent a subject from profiting from a behaviour, fines may be punitive in the criminal system. Compensation orders should be standard for corporate entities in criminal matters and can be ordered in addition to fines. Two criminal systems should be preserved for corporate entities with summary type offences and limited fines and compensation orders, as well as indictable offences which enliven a right to a jury and harsher penalties with higher compensation orders. Compensation to the State for the cost of the investigation and prosecution of an offence should never be recoverable as this is an important public service, but where the Commonwealth is a victim compensation should be available to the relevant agency including for costs relating to agency's internal investigation, preparation of evidence and loss.

Proposal 18 The Australian Government, together with state and territory governments, should develop a unified debarment regime.

Conviction Histories

A tribunal of fact could be forced into conjecture to try and determine what extra-curial affect a criminal conviction has on a corporate entity. We could assume that investors or financial institutions would be less likely to loan funds, and that many clients would not wish to engage in business with a convicted entity but these are assumptions and not facts. Deterrence is always hard to quantify and evaluate. For an individual there is a

threshold where if the punishment is too harsh then recidivism will be more likely. These issues are not necessarily transferable to a corporate entity, fines and compensation orders could be crushing and still achieve deterrence and protection of the community.

I reject that there is an 'imposition of stigma attaching to a criminal offence'. A criminal record attaches to an individual and may be accessible to a future employer or other entity for the protection of the community but this is unhelpful when applied to a corporate entity. As an alternative to a criminal record, corporate officers could have a corporate conviction record and this could be maintained by ASIC showing convictions which arose at relevant times where individuals held office as directors or officers who could bind the company at convicted companies. This record could then made available to shareholders, investors, funders, investigators and prosecutors. This would function the same way as how employers can currently pay a fee to check the sex offender registry or criminal record of a prospective employee before deciding whether to hire them. This does not interfere with a free market in the same way that disbarment or disqualification does. This also promotes rehabilitation for office holders, better corporate responsibility and protection of the community; without unnecessarily breaching privacy, duplicity or impeding innovation.