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est. 1966

31 January 2020

The Australian Law Reform Commission
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By email: corporatecrime@alrc.gov.au

Submissions on the Australian Law Reform Commission's Review into Australia's corporate criminal responsibility regime

Nyman Gibson Miralis

This submission is made to the Australian Law Reform Commission ('**ALRC**') with respect to its review into Australia's corporate criminal responsibility regime.

Nyman Gibson Miralis is a leading Australian criminal law firm with specialist expertise in 'white collar' and corporate criminal law. We have acted and advised in many matters involving corporate criminal investigations and litigation.

Nyman Gibson Miralis regularly engages with various Australian authorities and departments concerning varying aspects of matters where corporate criminal responsibility is potentially engaged.

Our submission draws on that experience as a criminal defence firm working in this aspect of the legal landscape.

Part 2.5 of the Commonwealth Criminal Code ('the Code')

Simplification

We endorse the ALRC's proposed focus on simplification of the Commonwealth corporate criminal liability scheme.

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It is our belief that Part 2.5 of the Code suffers from ambiguity in relation to how fault is attributed to body corporates for the criminal conduct of individuals. This ambiguity has been a contributing factor to an identifiable past deficiency of effective enforcement and prosecution. The difficulties do not arise solely in relation to the rapidly developing concepts of 'corporate culture', which have thus far largely escaped judicial consideration and scrutiny in Australia, but rather of the form and structure of the existing provisions.

In its existing form, the Code provides under s. 12.2 that the physical element of the offence must be 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."*

In its existing form, the Code provides under s. 12.3 that if intention, knowledge or recklessness is a fault element of an offence, then the fault element must be attributed to a body corporate where it *"expressly, tacitly or impliedly authorised or permitted the commission of the offence"*.

Outside authorisation or permission granted by a body corporate's board of directors, corporate liability can alternatively be proven in instances where the commission of an offence is authorised or permitted by a 'high managerial agent' under s. 12.(2)(b) of the Code. The term high managerial agent is defined under s. 12(6) of the code as *"an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy."*

While the cumulative evidentiary burden these provisions creates is not insurmountable in instances of clear misconduct by senior officers of a body corporate, the ambiguity of scope of Part 2.5 of the Code creates clear conceptual difficulties in less-linear cases involving non-Australian subsidiaries and corporate bodies operating under and less hierarchical model of management.

This conceptual difficulty is clear in instances where a jury is required to make factual findings and ultimately, reach a conclusion as to criminal wrongdoing, on the basis of overlapping and potentially elusive legislative constructs.

The need for simplification should however be clearly distanced from any call for a lowering of the threshold for the attribution criminal responsibility or a reformulated regime which attributes corporate liability for conduct inconsistent with the principles of criminal law more generally. Difficulties in application born from the existing regime should not be considered a proper basis for an expansion of corporate criminal liability to encompass concepts such as strict liability and civil negligence. A clear distinction should be maintained between conduct warranting criminal prosecution and conduct more appropriately dealt with by way of non-criminal contravention.

We wish to re-iterate to observations of others that criminal prosecution and sanction for corporate entities should be reserved for serious instances of misconduct where sound policy imperatives justify proceedings in the criminal justice system.

Consolidation

Corporate criminal liability can presently be established by various legislative provisions (and common law principles) external to Part 2.5 of the Code, including offence provisions found within the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). As a result, the existing landscape for corporate criminal liability is not uniform or consistent in relation to questions including, amongst others, accessorial liability and extra-territorial application.

The proposed *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) seeks to introduce criminal liability for the offence of foreign bribery committed by 'associates' of a body corporate. The proposed extended definition includes an *"employee, agent, contractor or subsidiary of the other person, [a person] controlled by the other person or [who] performs services for or on behalf of another person"*. Such a definition is consistent with the recommendation of Transparency International who have called on Australia to widen the scope of the foreign bribery offence provision.

We endorse such a definition in the context of foreign bribery and would ask that consideration should be made as to whether Part 2.5 of the code should be amended on similar terms to extend liability to the conduct of associates of a body corporate for all offences for which the regime concerns.

It is also of concern that Chapter 7 of the *Corporations Act 2001* (Cth) presently excludes the application of Part 2.5 of the Code to various financial services offences, by virtue of 769A of the *Corporations Act 2001* (Cth). As a consequence, there is a manifest discrepancy between principles of criminal responsibility applying with respect to the relevant offences under the *Corporations Act 2001* (Cth) and those that are founded on the basis of corporate culture failures set out under ss. 12.3(2)(c) and 12.3(2)(d) of the Code.

There is a clear utility in actively encouraging a compliance-based, due diligence approach to promote corporate entities that are resilient to criminal wrongdoing. Given Australia's existing role as a leader in the regulation of serious financial crime both internationally and within the APAC region, the existing interaction between Part 2.5 of the Code and the *Corporations Act 2001* (Cth) would appear undesirable, contrary to best policy and necessitating review.

Enforcement

The findings of the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry have emphasised that there have been many instances where the conduct of banks, financial institutions and related corporate bodies has fallen well below the expected standards of acceptable corporate culture and due diligence

Despite such evidence of non-compliance, there has been a distinct lack of prosecutions under ss. 12.3(2)(c) and 12.3(2)(d), being the corporate culture provisions of the Code, since their introduction. The Australian Securities and Investments Commission (ASIC) in particular has been criticised for a lack of past enforcement action for conduct which would appear to fall squarely within the scope of the provisions.

In response, ASIC has recently established a dedicated Office of Enforcement, responsible for carrying out ASIC's key enforcement activities for market, corporate and financial sector misconduct. The Office of Enforcement is comprised of analysts, investigators and legal practitioners and there are plans for continued growth. The most recent ASIC Enforcement Update Report indicates an increase in the total number of criminal proceedings and convictions secured by the agency.

The AFP and CDPP have also received an increase of funding to deal with a greater number of corporate criminal prosecutions and further the maximum financial penalties have been markedly increased for criminal or civil wrongdoing, by way of legislative amendments introduced under the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

What can subsequently be observed is an increased appetite for enforcement of corporate criminal matters and this shift towards litigation has been evident as part of our representation of corporate clients and individuals subject to criminal investigation. Ultimately it must be acknowledged that past deficiencies in enforcement action has been a notable contributing factor to an observable deficiency in successful convictions under Part 2.5 of the Code.

Conclusion

While the shift towards more aggressive enforcement action has already commenced, reform focussing on simplification of Part 2.5 of the Code and consolidation of the presently diverse corporate liability regulatory landscape in Australia will further strengthen the overall means by which the regime can be used to attribute corporate criminal liability and create and environment hostile to criminal contraventions on the part of corporate bodies.

We take this opportunity to thank the ALRC for this opportunity to make submissions on this important area of law reform in Australia.

Should we be able to provide anything further, please contact the writer on

Yours faithfully,

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