Associate Professor Juliette Overland
Associate Dean, Student Life
Associate Professor, Discipline of Business Law

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The Australian Law Reform Commission
corporatecrime@alrc.gov.au

SUBMISSION ON DISCUSSION PAPER 87 ON CORPORATE CRIMINAL RESPONSIBILITY

Thank you for the opportunity to make a submission on the Proposals and Questions contained in the Discussion Paper. Having made a submission on the terms of reference for the Commission's Review into Australia's Corporate Criminal Responsibility Regime, and having participated in a consultation with members of the Commission in May 2019, I was interested to read the Discussion Paper on its release. Many of the comments made in this submission are drawn from my existing research and publications, as indicated in the footnotes.

I am an academic at the University of Sydney Business School, researching and teaching in the area of corporate crime, with a particular focus on securities market offences such as insider trading.[1] While I broadly agree with much of what is proposed in the Discussion Paper, two proposals in particular give rise to issues which I believe warrant additional consideration. While I have raised specific concerns in relation to the application of these proposals to the offence of insider trading, the issues are not necessarily limited to this context, and deserve further broader attention.

In summary, I believe that the following issues arising from proposals in the Discussion Paper warrant further consideration, as discussed in more detail below:

(a) The proposal that all forms of misconduct be reclassified, for corporations, as either a criminal offence or a civil penalty proceeding, but not both, should be reconsidered in respect of serious and complex criminal and civil offences such as insider trading, particularly in light of the fact that, despite the widely acknowledged seriousness of insider trading, there has never been a criminal conviction of a corporation for this form of market misconduct.

(b) The proposal, via a single attribution method for corporate criminal liability for Commonwealth offences, that conduct be attributed to a corporation where it is engaged in by an "associate", and a "state of mind" attributed to a corporation where the associate who engaged in the conduct had the relevant state of mind, needs some reconsideration in related to the proposed redrafted provisions, as the current drafting makes no reference to an associate "acting on behalf of a corporation". Further, the *Criminal Code* uses the more inclusive term "physical element" rather than conduct,

[1] Details of my work and publications in this area are available online: https://sydney.edu.au/business/about/our-people/academic-staff/juliette-overland.html

which is broad enough to include additional concepts such as the possession of information that are not easily classified as conduct.

(c) While the Discussion Paper refers to s 769B of the *Corporations Act* (the set of attribution mechanisms applicable to Part 7 of the *Corporations Act,* in which the prohibition against insider trading is located)[2] it makes no reference to s 1042G of the *Corporations Act,* the additional attribution mechanisms for corporate liability for insider trading. Is it also proposed that these mechanisms would be replaced by the new single attribution mechanism in accordance with Proposal 8? This needs to be considered and clarified in order to best determine whether the new proposed single attribution mechanism is appropriate for corporate liability for insider trading.

Proposal 1 – Recalibration of unlawful conduct into three categories

While the rationale for the proposal to recalibrate unlawful conduct into three categories (criminal offences, civil penalty proceeding provisions and civil penalty notice provisions) is understood, its application to complex forms of misconduct such as insider trading may create some significant difficulty.

Insider trading is prohibited under s 1043A of the *Corporations Act 2001* (Cth) and, as stated by the majority of the High Court in *Mansfield and Kizon v R*:[3]

> the *Corporations Act* prohibits trading in securities by persons who possess information that is not generally available and know, or ought reasonably to know, that, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of the securities.[4]

Insider trading has been a criminal offence under statute since the 1970s, and also became a civil penalty provision as a result of amendments to the *Corporations Act* under the *Financial Services Reform Act 2001* (Cth), which occurred primarily to address perceived difficulties in successfully prosecuting insider trading cases.[5] To date, most individuals pursued for insider trading have been the subject of criminal prosecutions[6] whereas the only Australian cases in which corporations have been pursued for insider trading have been civil penalty proceedings: In 2007, the Australian Securities and Investments Commission brought civil penalty proceedings for insider trading against the Australian subsidiary of the global investment bank, Citigroup, but those proceedings were unsuccessful,[7] and in 2016 ASIC brought civil penalty proceedings

[2] Pages 126, 134, 155 and 156 of the Discussion Paper, and pages 20 and 32 of the Appendices.
[3] *Mansfield and Kizon v R* (2012) 87 ALJR 20.
[4] *Mansfield and Kizon v R* (2012) 87 ALJR 20, 21.
[5] Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth), [2.79]-[2.80].
[6] The only individuals who have been subject to civil penalty proceedings for insider trading since were the two defendants *in ASIC v Petsas and Miot* [2005] FCA 88.
[7] *ASIC v Citigroup Global Markets Australia Pty Ltd* (2007) 160 FCR 35.

The University of Sydney Business School
Abercrombie Building **H70**
University of Sydney
NSW 2006 Australia

[redacted]
sydney.edu.au

ABN 15 211 513 464
CRICOS 00026A

against Hochtief Acktiengesellschaft, in which Hochtief admitted liability for insider trading - this was the first and only Australian case in which a corporation has been found liable for insider trading.[8]

This gives rise to a number of considerations. While insider trading is undoubtedly a serious criminal offence and would satisfy the proposed criteria in Proposal 2 of the Discussion Paper as a threshold for designation as a criminal offence by a corporation, there has never been a successful criminal prosecution of a corporation for insider trading. This may be because insider trading occurs in circumstances where a corporation could be found to have engaged in that conduct, but prosecutors and regulators may be reluctant to take enforcement action, or may prefer to take action against individual offenders instead. There have also been cases where an individual has been successfully prosecuted for insider trading, where a corporation may also have had potential liability for the offence.[9] Indeed, ASIC has noted, in the context of the general enforcement of corporate crime:

> We may take action against corporations, individuals, or both, depending on the circumstances of the case. For example, taking action against individuals who are directly responsible or in charge, instead of corporations, may reduce the incentive for those individuals and others in similar positions to engage in like misconduct given the potential impact on their reputation and livelihood. This approach is likely to have a greater deterrent effect.[10]

It would be somewhat illogical for a serious crime like insider trading to be treated as a criminal offence for individual offenders but a less serious civil penalty proceeding provision for corporations. However, if insider trading was to be a criminal offence only, the absence of any criminal conviction of a corporation for insider trading may result in a reduction in insider trading enforcement action, other than against individuals. ASIC (working with the Commonwealth Department of Public Prosecutions) may be unwilling to risk bringing an unsuccessful criminal prosecution against a corporation for insider trading if that is the only alternative in the absence of the continued availability of civil penalty proceedings. Corporations may therefore take the view that they are unlikely to be the subject of criminal proceedings for insider trading and may be less motivated to take action to try to prevent insider trading occurring. Many commentators have argued that, as corporate crimes are often hard to detect, corporations are more likely to take internal action to prevent the relevant criminal conduct occurring, if the

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[8] *ASIC v Hochtief Aktiengesellschaft* [2016] FCA 1489. See further, Juliette Overland, *Corporate Liability for Insider Trading* (Routledge, London, 2019), 4.

[9] For example, in *R v Rivkin* (2004) 184 FLR 365, Mr Rene Rivkin purchased and sold shares in Qantas through a private corporation which he controlled – it could be argued that the corporation, Rivkin Investments Pty Ltd, also engaged in insider trading but no action was taken against it.

[10] ASIC, *Report 387, Penalties for Corporate Wrongdoing,* 2014, 9. See further, Juliette Overland, *Corporate Liability for Insider Trading* (Routledge, London, 2019), 4-5.

The University of Sydney Business School
Abercrombie Building **H70**
University of Sydney
NSW 2006 Australia

[redacted]
sydney.edu.au

ABN 15 211 513 464
CRICOS 00026A

corporation itself is likely to have liability for any resulting crime.[11] As a result, the existence of corporate criminal liability can also act as a deterrent to those who would engage criminal conduct within an organisation. The continuing existence of both criminal and civil liability for corporations for insider trading makes it more likely that corporations will take steps to proscribe such conduct and prevent it from occurring within the organisation and that, where this does not occur, the regulator will have appropriate enforcement options available.[12]

The reform of corporate criminal responsibility should not result in the potential for reduced effectiveness in the application or enforcement of relevant laws. Accordingly, I suggest that the proposal that all forms of misconduct be classified, for corporations, as either a criminal offence or a civil penalty proceeding, but not both, be reconsidered in respect of serious and complex criminal and civil offences such as insider trading.

Proposal 8 – A single method for attributing criminal (and civil) liability to a corporation

The proposal to create a single attribution method across Commonwealth statutes has significant merit and it is agreed that the certainty this would provide for both corporations and regulators is highly desirable. However, the elements of the proposal which relate to attribution through "associates", and through references to "conduct" rather than a "physical element", may cause some difficulty in relation to offences such as insider trading.

It is proposed in the Discussion Paper that conduct be attributed to a corporation where it is engaged in by an "associate", and a "state of mind" attributed to a corporation where the associate who engaged in the conduct had the relevant state of mind, or where the corporation authorised or permitted the conduct. Noting, as acknowledged in the Discussion Paper, that the Commission is not a legislative drafting body, I have concerns over some aspects of this proposal.

It is proposed that an "associate" will be any person who performs services for or on behalf of a corporation. However, despite the Discussion Paper noting that the single

[11] See, for example, Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations,* (Oxford University Press, 2002) 7; John C Coffee, 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions' (1980) *American Criminal Law Review* 419, 421; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 469, 489. Indeed, in 1929, Winn argued for direct criminal liability for corporations on the basis that they are more powerful than individuals and therefore more likely to cause harm, as well as the fact that the existence of corporate criminal liability is more likely to deter agents within a corporation from engaging in criminal conduct: C R N Winn, 'The Criminal Responsibility of Corporations' (1929) 3 *Cambridge Law Journal* 398, 412-413, 415.

[12] Juliette Overland, *Corporate Liability for Insider Trading* (Routledge, London, 2019), 54.

The University of Sydney Business School
Abercrombie Building **H70**
University of Sydney
NSW 2006 Australia

[redacted]
sydney.edu.au

ABN 15 211 513 464
CRICOS 00026A

attribution mechanism will apply where associates are "acting on behalf of the corporation",[13] this limitation does not appear to be included in the suggested provisions.[14] In the form proposed, the redrafted section 12.2 would have the effect that any conduct engaged in by an associate of a corporation, whether or not it was done for or on behalf of the relevant corporation, would be attributed to it (except where a due diligence defence might apply) and this needs to be clarified.

The use of the terminology "conduct", rather than the broader "physical element" used elsewhere in the *Criminal Code*, is somewhat troublesome, as not all physical elements of offences can be classified as conduct. For example, the physical element for insider trading is not the conduct of trading or procuring trading in relevant financial products while in possession of inside information but rather, it is the possession of inside information, in accordance with s 1043A(3)(a) of the *Corporations Act.*

The Discussion Paper refers to s 769B of the *Corporations Act* (the set of attribution mechanisms applicable to Part 7 of the *Corporations Act,* in which the prohibition against insider trading is located)[15] and notes that they are based on the TPA model, but there is no discussion of s 1042G of the *Corporations Act,* the additional attribution mechanisms for corporate liability for insider trading. Those provisions are not identical to the TPA model, and include additional means by which matters such as the possession of information and knowledge of matter or things can be attributed to a corporation. These mechanisms have been the subject of little judicial commentary or analysis and many aspects of their application are unclear.[16] Despite not referring to these provisions in the Discussion Paper, it is assumed that the Commission intends that they be replaced by the new single attribution mechanism in accordance with Proposal 8. However, this needs to be considered and clarified in order to be able to best determine whether the new proposed single attribution mechanism is appropriate for corporate liability for insider trading.

I would be pleased to discuss these and other relevant issues with members of the ALRC. Thank you again for the opportunity to make a submission on the Discussion Paper.

Your sincerely

Associate Professor Juliette Overland
Discipline of Business Law
University of Sydney Business School
[redacted]

[13] Page 126 of the Discussion Paper.
[14] Page 129 of the Discussion Paper.
[15] Pages 126, 134, 155 and 156 of the Discussion Paper, and pages 20 and 32 of the Appendices.
[16] For a detailed discussion, please see Juliette Overland, *Corporate Liability for Insider Trading* (Routledge, London, 2019), 157-161.