



CDPP

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The Hon Justice S C Derrington
President
Australian Law Reform Commission
PO Box 12953
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Dear Justice Derrington

ALRC Review of Corporate Criminal Responsibility

The office of the Commonwealth Director of Public Prosecutions (CDPP) welcomes the opportunity to make a submission to the Australian Law Reform Commission's (ALRC) review into Australia's corporate criminal responsibility regime.

2. By way of a preliminary comment I would like to congratulate the ALRC for the comprehensive review it has conducted so far, resulting in a very detailed Discussion Paper which will no doubt form the basis of further meaningful feedback from members of the legal profession, law enforcement agencies and the community at large, before the final report is presented to the Attorney-General.

3. As you know my office has assisted the ALRC by providing relevant data and responding to inquiries prior to the issuing of the Discussion Paper and is equally prepared to assist your officers in the next phase of the inquiry.

4. This submission does not seek to address every question and proposal contained in the Discussion Paper but focusses on those which are of particular interest or relevance to the CDPP.

Committals

5. At paragraphs 1.43 – 1.58 of the Discussion Paper there is a discussion about committal hearings, with the ALRC inviting views about whether the requirement for a committal procedure in respect of Commonwealth offences by corporations should be removed in all states.

6. Historically, the purpose of committals was to ensure defendants were not put to trial without sufficient cause. This was achieved by a Magistrate deciding, based on the evidence given by

prosecution witnesses, that there was a case to answer. Such a system provided an important safeguard against individuals being arbitrarily charged and tried by the State.

7. Developments in modern criminal procedure such as the appointment of independent prosecutors and the obligation on the prosecution to make full disclosure to the defence prior to committal, have resulted in some of the historical justification for committals no longer being relevant. This is also in the context of independent prosecutorial agencies such as the CDPP applying a strict test under relevant policies of only prosecuting cases which have a reasonable prospect of resulting in a conviction and being satisfied that, in all the circumstances, it is in the public interest to prosecute.

8. It should also be noted that a Magistrate's decision whether to commit has never been binding on the Prosecution as it has always had the power to overrule the Magistrate's decision by either directly indicting a defendant or filing a notice of discontinuance.

9. The CDPP recognises that many of the historical reasons which justified the retention of committal proceedings are no longer relevant, given the advent of various changes to the criminal justice process as outlined above.

10. The CDPP is keen for any pre trial or committal process to be an efficient one in dealing with cases in a timely manner. The close management of cases by the courts plays an integral part in such a system, ensuring the progress of cases through the various stages of the criminal trial process are closely monitored by the courts, resulting in cases remaining 'on track' and proceeding without delay. It will also ensure critical issues are identified early and managed appropriately as the case makes its way to possible trial.

Corporate Criminal Responsibility

11. Proposal 8 provides that 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.

12. In Chapter 5 of the Discussion Paper there is extensive discussion about the various methods of attributing criminal liability which currently apply in Australia, including under the common law and pursuant to statute, such as Part 2.5 of the *Criminal Code* and the 'Trade Practices Model', to name but two.

13. The CDPP strongly supports the adoption of a single method of attributing criminal liability to a corporation for the contravention of Commonwealth laws and is of the view that the current system, comprising of a number of different methods, is apt to lead to confusion and inconsistency.

14. The CDPP agrees with the ALRC observation (at paragraph 6.4) that "*a single statutory method will improve simplicity and certainty for corporations (and their directors and officers), as well as regulators and prosecutors*".

15. The model recommended by the ALRC in the Discussion Paper is the "TPA Model" and is based on section 84 of the *Trade Practices Act 1974*, with some modifications, most significantly the inclusion of a 'due diligence' defence. The ALRC observes that the TPA model forms the basis of many other

current statutory attribution methods and is relatively simple and based on well understood concepts. Subject to our observations below, the CDPP has no issues with the adoption of such a model.

16. The concept of 'corporate culture' as contained in Part 2.5 is discussed in considerable detail at paragraphs 5.53 to 5.68 of the Discussion Paper. However, it is not entirely clear whether the concept is proposed to be retained in some form under a new model.

17. As the Discussion Paper makes clear, there is little available judicial authority on Part 2.5. Accordingly, it is fair to say that the provision is largely 'untested'. This has also been the experience of the CDPP, although it should be observed that there are current cases being prosecuted by the CDPP where the concept is relied on.

18. As highlighted in the Discussion Paper Chief Justice Blow of the Supreme Court of Tasmania held in *R v Potter and Mures Fishing Pty Ltd (2015) 25 Tas R 213, [2015] TASSC 44* that s 12.3 applies to a particular offence if intention, knowledge or recklessness is a fault element in relation to a physical element of the offence. As the offence in question in that case was one of 'dishonestly influencing' contrary to s 135.1(7) of the *Criminal Code*, it was held that 'dishonesty' was the relevant intention. Accordingly, as this was not one of the states of mind enumerated in s.12.3, the concept of corporate culture was held not to apply to the offence. In these circumstances, the CDPP agrees with the ALRC proposal that a future corporate attribution model should be based around 'state of mind' rather than specific fault elements.

19. The CDPP is also of the view that the concept of 'corporate culture' contained in Part 2.5 of the *Criminal Code* should be retained in some form under a new model of corporate criminal responsibility. The concept is a novel one and was viewed as such at the time of its introduction. In circumstances where the provision has remained largely untested there does not appear to be a sound basis to abandon it.

20. On the contrary, it is the CDPP view that the underlying rationale for the concept of corporate culture, as discussed in some detail in the Discussion Paper, is worth retaining. Of particular significance is the fact that corporate culture, as pointed out at paragraph 5.54 does not rely on conduct of an individual employee (or other relevant actor) being used to establish both physical and fault elements of the offence and is a mechanism for capturing the fault element of the corporation itself as an entity. While certain modifications to the current form of the provision may be required, such as, for example, making the definition of 'corporate culture' an inclusive one and also pluralizing the reference to 'policy', 'rule' and 'practice' it is the CDPP view that the overall tenor of the concept of corporate culture is one worth preserving in an endeavour to hold corporations responsible for their criminal conduct.

Deferred Prosecution Agreements (DPA)

21. Question E asks whether a DPA scheme for corporations should be introduced in Australia, as proposed by the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017*, or with modifications.

22. On 2 December 2019, the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019* was introduced into Parliament, a bill which has now been referred to the Senate Legal and Constitutional Affairs committee. Schedule 2 of the Bill would establish a (DPA) scheme in Australia.

23. The CDPP has worked very closely with the Attorney General's Department and key law enforcement and investigative agencies such as the AFP and ASIC over the course of the past three years in relation to the proposed introduction of a DPA scheme. Such schemes are now in place in many overseas jurisdictions such as the United Kingdom, Canada and the United States and provide investigators and prosecutors with an additional tool for addressing serious corporate crime. Ultimately, however, it is a matter of policy as to whether it is still thought to be an appropriate scheme in the current Australian environment.

Sentencing Corporations

24. The CDPP is broadly supportive of the ALRC's proposals contained in Chapter 5 to improve the process and outcomes of sentencing corporations. In particular, the CDPP welcomes Proposal 15 which would result in a number of new sentencing options becoming available to courts sentencing corporations. Consideration should also be given by the ALRC to including as additional sentencing options some of the options which exist under the proposed DPA scheme; options such as compensating victims, donating money to a charity or other third parties and paying the costs of the investigation.

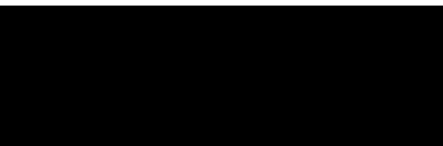
25. In relation to all the sentencing proposals contained in the Discussion Paper the CDPP observes that the preferable course would be for these to be implemented by way of a new comprehensive *Federal Sentencing Act*, a recommendation which was made by the ALRC in 2006 arising from its *Same Crime Same Time* inquiry. Such an approach would ensure a systematic collation of Federal sentencing law and principle could occur, and changes relating to the sentencing of corporations could be introduced as part of a full, coherent and easily-located package of measures. This would be preferable to ad hoc amendments to the *Crimes Act 1914*, a process which would add only more complexity to an already difficult-to-navigate piece of legislation.

26. Question G asks whether the maximum penalty for certain offences should be removed for corporate offenders, pointing out that in the United Kingdom and Canada certain offences committed by corporations do not carry any maximum penalties. Such an approach would obviously be novel from an Australian perspective and while the CDPP does not have a strong view, on balance it prefers the maintenance of the 'status quo', whereby maximum penalties are not removed.

27. The applicable maximum penalty for any offence is a very important part of the process of sentencing and, as highlighted in paragraph 10.91, it offers an important indication of the relative seriousness of different offences, reflecting Parliament's perception of community expectations. An additional problem the CDPP foresees with the removal of maximum penalties is the offences to which this would apply and the basis for differentiating between such offences.

28. The CDPP thanks the ALRC for the opportunity of making this submission.

Yours sincerely,

A large black rectangular redaction box covering the signature of Sarah McNaughton SC.

Sarah McNaughton SC

Commonwealth Director of Public Prosecutions