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The Hon Justice R J Bromwich
Federal Court of Australia
Commissioner, Australian Law Reform Commission
Review of Corporate Criminal Liability
By email: corporatecrime@alrc.gov.au

Dear Judge (Commissioner),

Review of Corporate Criminal Liability, Comments on the Terms of Reference (10 April 2019)

Thank you for the opportunity to comment at this early stage on your review of Australia's corporate criminal responsibility regime. I welcome the Terms of Reference, which are broad in scope and raise key issues with respect to the effective and just functioning of this area of law. Thus, I limit myself to three comments on the interpretation of the terms that are drawn from my research.

Substantive and procedural challenges

First, the Terms of Reference are right to focus on the complexity of the regime in Part 2.5 Code and to suppose that this complexity is itself a challenge to the attribution of criminal liability to bodies corporate (Ivory & John 2017). That said, consideration of the barriers to litigating these provisions must be complemented by an appreciation of the barriers to the detection and proving of misconduct, especially in larger and more complex organisations. Such difficulties have been discussed in recent Commonwealth documents and the academic literature (Pieth & Ivory 2011; Ivory forthcoming). They include issues arising from corporate control of incriminating information, the complexity of serious corporate criminal matters, and the capacity of relevant government agencies to prosecute within the law and without delay. Hence, I suggest that the substantive complexity of Part 2.5 is best considered alongside potential institutional and procedural challenges to enforcing those provisions.

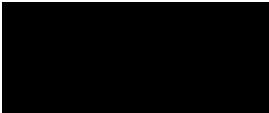
Utility of a compliance-based approach

Second, consideration of the challenges presented by Part 2.5 Code should not obscure the potential utility of some of the provisions' underlying approaches and objectives. Part 2.5 signals to corporations the importance of undertaking 'due diligence' to prevent high-level misconduct (s. 12.3(3)) and of maintaining a law-abiding 'corporate culture' within the organisation and its units (s. 12.3(2)(c)–(d)). The emphasis on encouraging compliance activities through corporate criminal laws would seem to align with emerging cross-national trends and other Commonwealth statements about desirable change in the area of corporate foreign bribery reform (Pieth & Ivory 2011; Ivory forthcoming). In short, to improve Australia's corporate criminal liability regime, it is necessary, in my view, to consider both the barriers to prosecution and the ability of that regime to incentivise appropriate and effective corporate compliance practices.

Global sources and challenges

Third, the Code's corporate criminal liability regime must be considered against the backdrop of an increasingly global corporate regulatory environment. As presented in the Model Penal Code (Cth), Part 2.5 was addressed to the problem of enterprises that operate through 'flatter' (less hierarchical) structures and drew on developments in the US and UK (Ivory & John 2017; Ivory forthcoming). However, in subsequent decades, corporate accountability movements have extended in two additional ways. On the one hand, they have turned to the problems of multinational corporate groups and supply chains, which are not adequately addressed by the current provisions (Ivory & John 2017; Ivory & John 2018). On the other hand, international forums and civil law countries have become (or been recognised as) important sites of legal change (Pieth & Ivory 2011; Ivory forthcoming). Hence, to adequately consider its extraterritorial and comparative law questions, the Commission should, in my view: (1) review a range of international sources on corporate criminal liability law; and (2) probe the application of Part 2.5 to multinational enterprises, as well as to individual companies.

I look forward to following the work of the Commission and remain yours sincerely,



Dr Radha Ivory
Senior Lecturer

Reference list

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