**The Regulation of Corporate Ethics: Governance in an Age of Inquiries**

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**Be Civil not Criminal: The Role of the Criminal law in the Regulatory Pyramid**

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* + I am also working on the Corporate Criminal Responsibility Terms of Reference: we are still early in the process and our discussion Paper will be published in November 2019.
  + At this stage, ALRC has not come to a position – we still need to consult our commissioners and advisory committee.
  + Today, I’ll set out some of my personal preliminary views, and provide an overview of the primary research undertaken by the ALRC on the Commonwealth criminal law as it applies to corporations.
* Fundamentally, the enforcement pyramid places criminal punishment at the apex, envisaging that the shadow of criminal law should encourage good behaviour, while applying to only the most reprehensible of conduct.
* Criminal law may indeed be useful as part of the pyramid of tools which can improve behaviour, be it by individuals or corporations.
  + From our initial consultations, there is support for using the criminal law as part of the regulatory framework
    - ***Language*** of the criminal law lends itself to properly condemning conduct, thereby providing vindication for victims
    - Forms an important part of the ***social recognition*** of particularly egregious conduct
    - Criminal prosecution has a more damaging impact on ***reputation***
    - Perhaps a corporation ***has a sort of personality*** – a corporate responsibility, corporate fault, and so should be treated as an entity, not a legal fiction
  + More recently someone said, that the question should not be *should corporations be held criminally responsible, but rather, given that corporations are held criminally responsible, what is the argument to remove that criminal liability.*

Great – so let’s keep criminal law in our pyramid.

* The reality we have found is that when you actually map the criminal laws which are applicable to corporations, what you find is much closer to a rhomboid than a neat pyramid. The scope and scale and pervasiveness of criminal offences which are potentially applicable to corporations, is shocking.

As part of our initial preliminary research, we have reviewed in excruciating detail 15 key pieces of legislation as they apply to corporations. These include:

* + *Corporations Act, ASIC Act, CCA and ACL,*
  + *EPBC Act*
  + *Criminal Code*
  + *Anti-Money Laundering and Counter-Terrorism Financing Act (AMLCTFA)*

The ALRC has identified 2320 criminal offences, in 15 Acts - one might say this evidences an over proliferation of criminal offences.

What this suggests that the Commonwealth criminal law as it presently exists does not reflect the notion that conduct only be criminal where there is “substantial wrongdoing”.[[1]](#footnote-1)

The dilution of the rationale of criminal liability is clearly evident in the *Corporations Act*, where as Matt said, the failure to place an ACN on certain company documents is a criminal offence,[[2]](#footnote-2) but more amusingly, the failure to notify ASIC of a change in company office hours.[[3]](#footnote-3)

Of the 2320 offences mapped, a quarter of the offences attract maximum penalties of less than 60 penalty units for an individual,[[4]](#footnote-4) which is said to be equivalent to one year imprisonment and is a ‘serious offence'.[[5]](#footnote-5)

some offences attract maximum penalties as low as a single penalty unit.[[6]](#footnote-6)

The number, specificity and complexity of criminal offences obscures the conduct they purport to regulate.

There is a lack of principled distinction between civil penalty provisions and criminal offences, and the use of each.

What seems apparent is that the existing Commonwealth criminal law as it applies to corporations lacks both coherence and consistency. This creates considerable difficulty for both those regulated by the criminal law and those enforcing it.

ALRC’s mapping confirms Commissioner Hayne’s observation that:

*much of the complication [of the current regulatory regime] comes from piling exception upon exception, from carving out special rules for special interests. And, in almost every case, these special rules qualify the application of a more general principle to entities or transactions that are not different in any material way from those to which the general rule is applied*.[[7]](#footnote-7)

At the end of the day, what we see is not a sparkling triangle of regulatory perfection, but a slumpy regulatory rhomboid. The pyramid has lost its peak.

So that’s scope and scale.

We should at this point consider, the methods of attribution. That is, how criminal liability is attributed to corporations.

In the early 1990, a group of starry-eyed minds attempted to standardise the foundations of criminal law in Australia – culminating in the C*riminal Code Act* *1995* (Cth), which commenced in January 1997.

Part of this was the creation of an innovative corporate attribution model – in Part 2.5.

Two decades on and I’m reviewing 15 Acts,

Only two of which apply Pt 2.5.

Most apply the model which was in the s 84 of the *Trade Practices Act 1974* (Cth) – or a variation of it – which loosely deems the conduct and mens rea of a director, employee or agent, acting in scope of authority, is the conduct or mens rea of the body corporate.

When I say ‘variation of it’, there are many aspect of the s 84 TPA test which vary:

* Does attribution of conduct includes acts under direction?
* Is state of mind broad or limited to intentional, knowledge or recklessness?
* Is there a defence?
* Is there a defence of due diligence?
* Does the defence require proof of due diligence ***and*** reasonable precautions?
* Or, just proof of either due diligence or reasonable precautions?

Where conduct is potentially caught by multiple legislative regimes, there is a risk that those regimes might provide for different tests of attribution and therefore, potentially different corporate liability for the same conduct.

So,

There are lots of offences

Lots of ways of attributing responsibility for lots of offences.

There may also be civil penalties for the same misconduct.

Does this encourage good behaviour?

This is a place for criminal law, but our pyramid requires a face lift.

The rhomboid needs to be a triangle.

How?

Be civil not criminal.

That is, perhaps remove the plethora of low-level infractions intermingled with civil liability.

1. \* Legal Officer, ALRC. I acknowledge the assistance of research associates Pheobe Tapley and the lengthy and diligent mapping work and insights collected by Sophie Ryan.

   Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225, 240. [↑](#footnote-ref-1)
2. *Corporations Act 2001* 153. [↑](#footnote-ref-2)
3. Ibid 145(3). [↑](#footnote-ref-3)
4. The Attorney-General Department’s *Guide to Framing Commonwealth Offences* provides that the penalty for a body corporate should be five times that applicable to an individual, meaning that the threshold for a serious offence for a corporation should be 300 penalty units. However, the penalty benchmarks specified across the legislation are inconsistent in their application of this rule. The figures cited by the ALRC on this point thus refer to the penalty benchmarks applicable to individuals. [↑](#footnote-ref-4)
5. Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 105–106. [↑](#footnote-ref-5)
6. For example, see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 395, 399; *Fair Work Act 2009* (Cth) s 702(5). These particular offences would, in practice, not be committed by corporations but nonetheless illustrate the incoherence of the criminal law. [↑](#footnote-ref-6)
7. Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report*, (September 2018) 16 [1.5.3]. [↑](#footnote-ref-7)