Australian Government
Australian Law Reform Commission

DISCUSSION PAPER

CORPORATE CRIMINAL RESPONSIBILITY

Discussion Paper 87 (DP 87)
November 2019

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CORPORATE CRIMINAL RESPONSIBILITY

You are invited to provide a submission or comment on this Discussion Paper

Discussion Paper 87 (DP 87) November 2019

This Discussion Paper reflects the law as at 1 November 2019.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission (ALRC) seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is **31 January 2020.**

Providing a submission

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Terms of Reference

Review of Australia's corporate criminal liability regime

I, Christian Porter, Attorney-General of Australia, having regard to:

- the corporate criminal responsibility regime in Part 2.5 of the Commonwealth Criminal Code contained in Schedule 1 of the *Criminal Code Act 1995* (Cth) ('the Code'); and,
- the complexity of this regime and its challenges as a mechanism for attributing corporate criminal liability;

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime. In particular, the ALRC should review the following matters:

- the policy rationale for Part 2.5 of the Code;
- the efficacy of Part 2.5 of the Code as a mechanism for attributing corporate criminal liability;
- the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness, including mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct;
- the appropriateness and effectiveness of criminal procedure laws and rules as they apply to corporations; and
- options for reforming Part 2.5 of the Code or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime.

Scope of the reference

The ALRC should have regard to existing reports relevant to Australia's corporate accountability system, including reports on: corporate misconduct; corporate criminal law; corporate governance; court procedure which applies in corporate enforcement actions; and law enforcement arrangements relating to corporate misconduct/crime. The reports which the ALRC should consider should include but not be limited to the:

- 2019 Final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; and
- 2017 report of the ASIC Enforcement Review Taskforce.

This review would encompass consideration of:

- comparative corporate criminal responsibility regimes in relevant foreign jurisdictions;

- potential application of Part 2.5 of the Code to extraterritorial offences by corporations;
- consideration of possible alternatives to expanding the scope and application of Part 2.5 of the Code, such as introducing or strengthening other statutory regimes for corporate criminal liability;
- consideration of whether Part 2.5 of the Code needs to incorporate provisions enabling senior corporate officers to be held liable for misconduct by corporations;
- options for reforming Part 2.5 of the Code (or other corporate liability regimes) to facilitate implementation of the recommendations made by, or to address issues highlighted by, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and by the ASIC Enforcement Review Taskforce.

Noting the Federal Court of Australia's criminal jurisdiction, the review should consider the effectiveness of present Commonwealth criminal procedural laws with a focus on their interaction with state and territory criminal procedural law, particularly in relation to committal hearings.

Consultation

The ALRC should consult widely with: law enforcement authorities charged with policing and prosecuting corporate criminal conduct; courts; and other stakeholders with expertise and experience in the corporate law and white collar crime sectors. The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 30 April 2020.

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Proposals and Questions

4. Appropriate and Effective Regulation of Corporations

Proposal 1 Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness):

a) criminal offences;

b) civil penalty proceeding provisions; and

c) civil penalty notice provisions.

Proposal 2 A contravention of a Commonwealth law by a corporation should only be designated as a criminal offence when:

a) the contravention by the corporation is deserving of denunciation and condemnation by the community;

b) the imposition of the stigma that attaches to criminal offending is appropriate;

c) the deterrent characteristics of a civil penalty are insufficient; and

d) there is a public interest in pursuing the corporation itself for criminal sanctions.

Proposal 3 A contravention of a Commonwealth law by a corporation that does not meet the requirements for designation as a criminal offence should be designated either:

a) as a civil penalty proceeding provision when the contravention involves actual misconduct by the corporation (whether by commission or omission) that must be established in court proceedings; or

b) as a civil penalty notice provision when the contravention is prima facie evident without court proceedings.

Proposal 4 When Commonwealth legislation includes a civil penalty notice provision:

a) the legislation should specify the penalty for contravention payable upon the issuing of a civil penalty notice;

b) there should be a mechanism for a contravenor to make representations to the regulator for withdrawal of the civil penalty notice; and

c) there should be a mechanism for a contravenor to challenge the issuing of the civil penalty notice in court if the civil penalty notice is not withdrawn, with costs to follow the event.

Proposal 5 Commonwealth legislation containing civil penalty provisions for corporations should be amended to provide that when a corporation has:

a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or

b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition;

the contravention constitutes a criminal offence.

Proposal 6 The Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* should be amended to reflect the principles embodied in Proposals 1 to 5 and to remove Ch 2.2.6.

Proposal 7 The Attorney-General's Department (Cth) should develop administrative mechanisms that require substantial justification for criminal offence provisions that are not consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* as amended in accordance with Proposal 6.

6. Reforming Corporate Criminal Responsibility

Proposal 8 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.

7. Individual Liability for Corporate Conduct

Proposal 9 The *Corporations Act 2001* (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

Proposal 10 The *Corporations Act 2001* (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

Question A Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?

Question B Are there any provisions, either in Appendix I or any relevant others, that should not be replaced by the provisions set out in Proposals 9 and 10?

8. Whistleblower Protections

Proposal 11 Guidance should be developed to explain that an effective corporate whistleblower protection policy is a relevant consideration in determining whether a corporation has exercised due diligence to prevent the commission of a relevant offence.

Question C Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to provide a compensation scheme for whistleblowers?

Question D Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to apply extraterritorially?

9. Deferred Prosecution Agreements

Question E Should a deferred prosecution agreement scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or with modifications?

10. Sentencing Corporations

Proposal 12 Part IB of the *Crimes Act 1914* (Cth) should be amended to implement the substance of Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

Proposal 13 The *Crimes Act 1914* (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:

a) the type, size, internal culture, and financial circumstances of the corporation;

b) the existence at the time of the offence of a compliance program within the corporation designed to prevent and detect criminal conduct;

c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;

d) the involvement in, or tolerance of, the criminal activity by management;

e) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence;

f) whether the corporation self-reported the unlawful conduct;

g) any advantage realised by the corporation as a result of the offence;

h) the extent of any efforts by the corporation to compensate victims and repair harm;

i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:

   i. internal investigations into the causes of the offence;

   ii. internal disciplinary actions; and

   iii. measures to implement or improve a compliance program; and

j) the effect of the sentence on third parties.

This list should be non-exhaustive and should supplement rather than replace the general sentencing factors, principles, and purposes as amended in accordance with Proposal 12.

Proposal 14 The *Corporations Act 2001* (Cth) should be amended to require the court to consider the following factors when imposing a civil penalty on a corporation, to the extent they are relevant and known to the court, in addition to any other matters:

a) the nature and circumstances of the contravention;

b) any injury, loss, or damage resulting from the contravention;

c) any advantage realised by the corporation as a result of the contravention;

d) the personal circumstances of any victim of the offence;

e) the type, size, internal culture, and financial circumstances of the corporation;

f) whether the corporation has previously been found to have engaged in any related or similar conduct;

g) the existence at the time of the contravention of a compliance program within the corporation designed to prevent and detect the unlawful conduct;

h) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention;

i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;

j) the involvement in, or tolerance of, the contravening conduct by management;

k) the degree of cooperation with the authorities, including whether the contravention was self-reported;

l) whether the corporation admitted liability for the contravention;

m) the extent of any efforts by the corporation to compensate victims and repair harm;

n) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:

   i. any internal investigation into the causes of the contravention;

   ii. internal disciplinary actions; and

   iii. measures to implement or improve a compliance program;

o) the deterrent effect that any order under consideration may have on the corporation or other corporations; and

p) the effect of the penalty on third parties.

Proposal 15 The *Crimes Act 1914* (Cth) should be amended to provide the following sentencing options for corporations that have committed a Commonwealth offence:

a) orders requiring the corporation to publicise or disclose certain information;

b) orders requiring the corporation to undertake activities for the benefit of the community;

c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;

d) orders disqualifying the corporation from undertaking specified commercial activities; and

e) orders dissolving the corporation.

Proposal 16 The *Corporations Act 2001* (Cth) should be amended to provide the following non-monetary penalty options for corporations that have contravened a Commonwealth civil penalty provision:

a) orders requiring the corporation to publicise or disclose certain information;

b) orders requiring the corporation to undertake activities for the benefit of the community;

c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform; and

d) orders disqualifying the corporation from undertaking specified commercial activities.

Proposal 17 The *Corporations Act 2001* (Cth) should be amended to provide that a court may make an order disqualifying a person from managing corporations for a period that the court considers appropriate, if that person was involved in the management of a corporation that was dissolved in accordance with a sentencing order.

Question F Are there any Commonwealth offences for which the maximum penalty for corporations requires review?

Question G Should the maximum penalty for certain offences be removed for corporate offenders?

Question H Do court powers need to be reformed to better facilitate the compensation of victims of criminal conduct and civil penalty proceeding provision contraventions by corporations?

Proposal 18 The Australian Government, together with state and territory governments, should develop a unified debarment regime.

Proposal 19 The *Crimes Act 1914* (Cth) should be amended to permit courts to order pre-sentence reports for corporations convicted of Commonwealth offences.

Question I Who should be authorised to prepare pre-sentence reports for corporations?

Proposal 20 Sections 16AAA and 16AB of the *Crimes Act 1914* (Cth) should be amended to permit courts, when sentencing a corporation for a Commonwealth offence, to consider victim impact statements made by a representative on behalf of a group of victims and/or a corporation that has suffered economic loss as a result of the offence.

11. Illegal Phoenix Activity

Proposal 21 The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

a) provide that only a court may make orders undoing a creditor-defeating disposition by a company, on application by either the liquidator of that company or the Australian Securities and Investments Commission; and

b) provide the Australian Securities and Investments Commission with the capacity to apply to a court for an order that any benefits obtained by a person from a creditor-defeating disposition be disgorged to the Commonwealth, rather than to the original company, where there has been no loss to the original company or the original company has been set up to facilitate fraud.

Proposal 22 The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

a) provide the Australian Securities and Investments Commission and the Australian Taxation Office with a power to issue interim restraining notices in respect of assets held by a company where it has a reasonable suspicion that there has been, or will imminently be, a creditor-defeating disposition;

b) require the Australian Securities and Investments Commission and the Australian Taxation Office to apply to a court within 48 hours for imposition of a continuing restraining order; and

c) grant liberty to companies or individuals the subject of a restraining notice to apply immediately for a full de novo review before a court.

Proposal 23 The *Corporations Act 2001* (Cth) should be amended to establish a 'director identification number' register.

Question J Should there be an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor-defeating disposition provisions?

Question K Are there any other legislative amendments that should be made to combat illegal phoenix activity?

12. Transnational Business

Question L Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

Glossary

ACCC	Australian Competition and Consumer Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department (Cth)
AGD Guide to Framing Offences	Attorney-General's Department (Cth), *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Australian Consumer Law	*Competition and Consumer Act 2010* (Cth) sch 2
CDPP	Office of the Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
CFO	Chief Financial Officer
COAG	Council of Australian Governments
Criminal Code	*Criminal Code Act 1995* (Cth) sch
DPA	Deferred prosecution agreement
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
OECD	Organisation for Economic Co-operation and Development
Treasury	Department of the Treasury (Cth)

Figures and Tables

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1. Introduction

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The Inquiry

1.1 On 10 April 2019, the Attorney-General of Australia, the Hon Christian Porter MP, asked the ALRC to undertake a comprehensive review of the corporate criminal responsibility regime, emphasising the need for effective laws holding corporations to account for criminal misconduct. This Inquiry comes at a time of renewed focus on protecting Australian consumers from egregious conduct by corporations and increasing regulation in the area of corporate wrongdoing. It also follows the release of the Final Report of the ASIC Enforcement Review Taskforce in December 2017, and more recently, the Financial Services Royal Commission in February 2019.[1]

1.2 In the Final Report of the Financial Services Royal Commission, Commissioner Hayne made 76 recommendations concerning aspects of banking, lending, financial advice, and superannuation following findings of misconduct in the financial services

1 *ASIC Enforcement Review Taskforce Report* (2017); *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

industry. Importantly, Commissioner Hayne referred 24 cases of misconduct by financial services companies to financial regulators for civil or criminal proceedings.[2] The Royal Commission's findings suggest that corporations may be subject to greater legal and regulatory scrutiny than they have in the past — with a particular focus on litigating outcomes, rather than negotiating settlements.[3]

1.3 The Terms of Reference require the ALRC to consider whether reforms, and if so, what reforms, are necessary or desirable to improve Australia's corporate criminal responsibility regime, specifically Part 2.5 of the *Criminal Code*. Further, the ALRC was asked to consider the availability of other mechanisms for attributing corporate criminal responsibility including mechanisms that could be used to hold individuals, such as senior corporate officer holders, to account for corporate misconduct.

1.4 The ALRC was also asked to review Commonwealth criminal procedure laws and rules as they apply to corporations, including the interaction between Commonwealth and state and territory criminal procedure laws with a particular focus on committal hearings in criminal matters.

1.5 The Terms of Reference direct the ALRC to specifically consider a broad range of issues when examining Australia's corporate criminal responsibility regime, including:

- comparative corporate criminal regimes in relevant jurisdictions;
- the potential application of Part 2.5 of the *Criminal Code* to offences committed extraterritorially by corporations;
- consideration of possible alternatives to expanding the scope and application of Part 2.5 of the *Criminal Code*, such as introducing or strengthening other statutory regimes for corporate criminal responsibility;
- consideration of whether Part 2.5 of the *Criminal Code* needs to incorporate provisions enabling senior corporate officers to be held liable for misconduct by corporations; and
- options for reforming Part 2.5 of the *Criminal Code*, or other corporate liability regimes, to facilitate implementation of the recommendations made by, or to address issues highlighted by, the Financial Services Royal Commission and by the ASIC Enforcement Review Taskforce.

1.6 This Inquiry is being conducted contemporaneously with Commonwealth legislative reform initiatives concerning deferred prosecution agreements, foreign bribery offences,[4] and illegal phoenix companies.[5]

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2 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

3 Commissioner Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 'Banking in the Spotlight': 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, Queensland, 30 August 2019).

4 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth).

5 Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth).

Related inquiries

1.7 While this is the first comprehensive review of Australia's corporate criminal responsibility regime following the enactment of the *Criminal Code*, there have been various reviews on aspects of corporate behaviour and regulation, including corporate criminality and misconduct, over the past three decades both in Australia and internationally. These inquiries provide the important historical context for the way in which the legal framework for the attribution of criminal responsibility to corporations has evolved in Australia.

1.8 The relevant inquiries include:

- Financial Services Royal Commission Final Report (2019);[6]
- ASIC Enforcement Review Taskforce Report (2017);
- COAG Directors' Liability Reform Project (2008), culminating in the COAG Principles for the Imposition of Personal Liability for Corporate Fault (2009) and Guidelines (2012); [7]
- Corporations and Markets Advisory Committee Report on Personal Liability for Corporate Fault (2006);[8]
- Taskforce on Reducing the Regulatory Burdens on Business Report (2006);[9]
- ALRC Final Report 95 — Principled Regulation: Federal, Civil and Administrative Penalties in Australia (2002);[10]
- Corporate Law Economic Reform Program — Proposals for Reform: Paper No. 3 (1997);[11]
- Gibbs Committee Reports (1990, 1991)[12] and the Criminal Law Officers Committee Final Report (1992);[13] and

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6 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

7 Council of Australian Governments, *Personal Liability for Corporate Fault — Guidelines for Applying the COAG Principles* (2012).

8 Corporations and Markets Advisory Committee (Cth), *Personal Liability for Corporate Fault* (Report, September 2006).

9 Taskforce on Reducing Regulatory Burdens on Business (Cth), *Rethinking Regulation* (Report, January 2006).

10 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) ('*Principled Regulation*').

11 Department of Treasury (Cth), *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors* (Corporate Law Economic Reform Program, Proposals for Reform: Paper No 3, 1997).

12 The Rt Hon Sir H Gibbs, the Hon Justice RS Watson and ACC Menzies AM OBE, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (Interim Report, Commonwealth of Australia, July 1990); the Rt Hon Sir H Gibbs, the Hon Justice RS Watson and ACC Menzies AM OBE, *Review of Commonwealth Criminal Law* (Fifth Interim Report, Commonwealth of Australia, 1991).

13 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility* (Report, December 1992).

- Senate Standing Committee on Legal and Constitutional Affairs — Company Directors' Duties (1989).[14]

1.9 In addition to these inquiries, the ALRC has given consideration to developments in the application of the criminal law to corporations in comparable jurisdictions such as the US, Canada, the UK, and New Zealand. In particular, the ALRC has focused on the development of corporate 'failure to prevent' offences in the UK with respect to foreign bribery and, more recently, UK and foreign tax evasion. The ALRC has also had regard, in particular, to the evolution of corporate vicarious liability in the US.

Economic significance of corporations

1.10 As the Hon Chief Justice Bathurst AC has noted, 'the corporate form is a ubiquitous part of modern commercial life and has a significance to our economy which it is difficult to overstate.'[15] Moreover the benefits to the economy that corporations create are reliant on 'the fundamental elements of the commercial corporation, namely separate legal personality, perpetual existence, transferable shares and limited liability for members.'[16] Limited liability in particular is of critical importance to the taking of risk which is critical for innovation, for competitive markets, and to the ultimate success of Australia's economy.

1.11 According to the Australian Bureau of Statistics, as at 30 June 2018, there were 839,502 active businesses run by companies in Australia.[17] With respect to the largest corporate groups in Australia, the ATO has noted that: 'Large corporate groups make a significant contribution to the Australian economy and play a critical role in the tax system.'[18] According to the ATO:

> There are approximately 1,470 large corporate groups with over 5,300 income tax reporting entities in Australia. This represents around 27,500 active companies. These groups include Australian public, Australian private and majority foreign-owned businesses.[19]

1.12 In 2017, the top 1,000 companies in Australia earnt $1.94 trillion in revenue — equivalent to 28% of all trade in Australia.[20] The economic contributions of corporations to the living standards and prosperity of Australians must be taken into account when

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14 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties* (1989).

15 The Hon Chief Justice TF Bathurst AC, 'The Historical Development of Corporations Law' (2013) 37 *Australian Bar Review* 217, 217.

16 Ibid.

17 Australian Bureau of Statistics, *Counts of Australian Businesses, Including Entries and Exits, June 2014 to June 2018* (Catalogue No 8165.0, 21 February 2019).

18 Australian Taxation Office, 'Demographics of Large Corporate Groups (13 December 2018)' <www.ato.gov.au/General/Tax-and-Corporate-Australia/In-detail/Demographics-of-large-corporate-groups/?default>.

19 Ibid.

20 Jason Aravanis, 'IBISWorld Reveals Australia's Top 1000 Companies for 2017 | IBISWorld Industry Insider' (21 March 2018) <www.ibisworld.com/industry-insider/press-releases/ibisworld-reveals-australia-s-top-1000-companies-for-2017/>.

considering reforms to laws that affect corporations. That is not to say that because of the economic benefit of corporations they should be subject to less stringent regulation; rather, that the regulations that apply to corporations need to be effectively calibrated to ensure their effectiveness in achieving determined regulated behaviours for the health of the Australian economy as a whole.

Corporate regulation

1.13 Australia's corporate criminal responsibility regime forms a small part of the broader system of corporate regulation which seeks to promote compliance and ensure that corporate entities adhere to the norms of conduct prescribed by Parliament.

1.14 There are multiple tools available to regulators. One of these tools is the actual content of legislation — the setting of norms of conduct and the proscribing of unlawful conduct, whether through civil or criminal law. Enforcement of such standards is another tool. These can be enforced administratively, civilly, or criminally, depending on the particular prohibition and the practice of the regulator. Furthermore, much of the regulation is left to private actors through the law of tort, contract, principles of equity, and particular statutory causes of action.

1.15 The criminal law is, in theory, reserved for the most serious contraventions.[21] This approach underpins the pyramid of enforcement (see Chapter 2) that is the theoretical basis for contemporary corporate regulation in Australia.[22] Comino explains that

> the pyramid of sanctions has at its base the use of less punitive, less costly, and less intrusive compliance measures such as persuasion; as one rises to the apex, these methods become increasingly punitive, costly and intrusive. Under this model, the regulator ascends the pyramid through more severe and complex mechanisms, such as warning letters to civil penalties, leading to more costly and stigmatising actions, such as the use of criminal sanctions and to licence suspension and ultimately to licence revocation and [in the case of an individual] imprisonment.[23]

1.16 This Inquiry is focused on criminal responsibility and, in particular, its application to a corporation *itself* for conduct done *by the corporation*. A corporation, as a juristic entity, is clearly different from a human person. A corporation comprises individuals, but is itself a legal person.

1.17 The term 'person' has for some time been synonymous with both a human individual as well as a corporation.[24] As a fundamental aspect of statutory interpretation, unless the contrary intention appears, 'expressions used to denote persons generally

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21 Though see Ch 3.

22 Vicky Comino, *Australia's 'Company Law Watchdog': ASIC and Corporate Regulation* (Lawbook Co, 2015) 113, citing *Australian Securities and Investments Commission v HLP Financial Planning Pty Ltd* (2007) 164 FCR 487, 501 (Finkelstein J).

23 Ibid 129.

24 See, eg, *Royal Mail Steam Packet Co v Braham* (1877) 2 App Cas 381, 386: '"person" when used in a legal sense, is an apt word to describe a corporation as well as a natural person.'

… include a body politic or corporate as well as an individual.'[25] Even prior to the *Acts Interpretation Act 1901* (Cth), the common law had contemplated that statutory references to 'persons' may, upon contemplation of the object of the Act, have been 'intended to comprehend the company.'[26] Thus, where a 'person' is prohibited from doing something, that prohibition prima facie applies equally to corporations.[27]

1.18 Notwithstanding the rules of statutory interpretation, the application of the criminal law to a corporation *itself* may be problematic as a corporation has 'no soul to be damned and no body to be kicked'.[28] The appropriateness of applying the criminal law to a corporation, given its particular characteristics, is difficult. Making a judgment about whether a corporation should be criminally responsible at all and, subsequently, how such responsibility should be established is a complex question with strong arguments both in favour and against it (see Chapter 2). Moreover, the application of the Commonwealth criminal law to corporations themselves is relatively rare (see Chapter 3). There is a strong preference among investigative agencies and prosecutors for applying the criminal law to individuals, instead of corporations, from both principled and pragmatic perspectives.

1.19 Despite this, the criminal responsibility of a corporation *itself* for conduct that can be attributed to it has been, in various forms, part of the criminal law for decades. In a line of authority that culminated in *Tesco Supermarkets Ltd v Nattrass ('Tesco')*[29] and *Meridian Global Funds Management Asia Ltd v Securities Commission ('Meridian')*,[30] the common law answered the question of whether a corporation could be the subject of the criminal law and in what circumstances such responsibility would be attributed to it.[31] The United States Supreme Court, earlier in the twentieth century, adopted its own method based on vicarious liability.[32]

1.20 Under the law in Australia as it stands today, there are a multitude of criminal offences that can be applied to a corporation *itself* for conduct by it, ranging from minor regulatory infractions to conduct that involves significant moral culpability.[33]

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25 *Acts Interpretation Act 1901* (Cth) s 2C. This definition was in s 22 of the original version of the *Acts Interpretation Act 1901* (Cth), which followed the *Interpretation Act 1889* (Imp) (52 & 53 Vict c 63) (and also adopted some provisions from the *Interpretation Act 1987 (NSW)*: see AR Butterworth et al, 'Australasia' (1902) 4(2) *Journal of the Society of Comparative Legislation* 250, 250–1.

26 *Boyd v Croydon Ry Co* (1938) 4 Bing N C 669, 674 (Vaughan J). See also the earlier jurisprudence of *R v Gardiner* (1774) 1 Cowp 79. In applying the *Poor Relief Act 1601* (UK), the Court construed an obligation upon 'every inhabitant, parson, vicar, and occupier of any land or tenement' to contribute to the relief of the poor, as including a corporation.

27 Note, although the *Acts Interpretation Act 1901* (Cth) and the *Criminal Code* refer to 'bodies corporate', for simplicity, this Discussion Paper refers to 'corporations'.

28 As observed by Baron Thurlow LC: John C Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 386.

29 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

30 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 3 All ER 918.

31 See Ch 5.

32 *New York Central and Hudson River Railroad Company v United States* 212 US 481 (1909).

33 See Ch 3.

Civil v criminal regulation

1.21 While the focus of this Inquiry is on the criminal law, and in particular the application of the criminal law to corporations, the Discussion Paper necessarily considers the regulation of companies through civil law and administrative regulation. Civil and administrative regulation of corporations may be ancillary or conjunctive to criminal prosecution. A key consideration of this Inquiry is when and in what circumstances the criminal law should apply to corporations. This necessitates an examination of alternative regulatory approaches to the criminal law.

1.22 Chapter 2 examines the theoretical utility of applying the criminal law to corporations and the circumstances when it is both necessary and appropriate. The central questions are whether a corporation is capable of being morally blameworthy (such that criminal punishment is appropriate) and, critically, whether corporate criminal responsibility can be distinguished from liability for a civil penalty. Ultimately, the ALRC identifies that the distinctive role of corporate criminal responsibility lies in its ability to achieve objectives of retribution and condemnation. If the condemnatory force of the criminal law is not necessary for a particular contravention, then it is not appropriate to hold the corporation criminally responsible.

1.23 As set out in Chapter 3, conduct that is the subject of a criminal offence varies widely in its seriousness and the degree to which any condemnatory stigma could reasonably be perceived to attach to breach of those provisions. Moreover, the ALRC's research demonstrates that there is little distinction between the categories of misconduct that attract criminal liability and those that attract civil liability. This is consistent with academic research that has asserted that the Commonwealth criminal law currently lacks any unifying moral principle and, more specifically, that there is no principled distinction between civil penalty provisions and criminal offences.[34] This inconsistency is particularly concerning given that breaches of criminal law are intended to attract serious consequences. The consistency of Australia's criminal law goes to fairness and, ultimately, the rule of law.

1.24 Also analysed in Chapter 3 is the concurrent availability of civil and criminal sanctions for many breaches of the law. There is concern that this disincentivises criminal prosecution, given the higher standard of proof in criminal trials and the complex evidence that is often required to prove corporate misconduct. This creates the risk that regulators pursue civil remedies in circumstances where criminal convictions may be more appropriate.

1.25 The analysis in Chapters 2 and 3 forms the basis for a series of recommendations in Chapter 4 aimed at improving the calibration of the civil and criminal law as it applies to corporations.

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34 Mirko Bagaric, 'The "Civil-Isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 192.

1.26 When considering the appropriateness of applying the criminal law to corporations, a related question is the extent to which individuals acting on behalf of the corporation should be personally liable for their conduct or conduct that occurred with their approval (tacit or otherwise). Chapter 7 explores which individuals should be liable for criminal conduct by the corporation and in what circumstances. The ALRC explores the role of individuals within corporations and how accountability for misconduct must be necessarily balanced with the need to ensure that corporations continue to innovate and take risks.

The *Criminal Code*

1.27 The Terms of Reference for this Inquiry specifically ask the ALRC to examine Part 2.5 of the *Criminal Code*, which prescribes the methods by which a corporation may be liable for a criminal offence. The provisions in Part 2.5 are a recognition that the corporate form requires a different approach to ascribing conduct and intent for the purposes of the criminal law to that of an individual.[35]

1.28 The Commonwealth *Criminal Code* is a schedule to the *Criminal Code Act 1995* (Cth),[36] which commenced on 1 January 1997.[37] The Code is a result of a 'national initiative' to standardise the foundations of criminal law in Australia and to ensure consistency in the application of the principles governing criminal responsibility between states and territories.[38]

1.29 The *Criminal Code* arose from the work of a committee tasked with reviewing all Commonwealth criminal law, known as the 'Gibbs Committee', as it was chaired by the Hon Sir Harry Gibbs. At the same time, the states and territories were reviewing their criminal laws, resulting in the Standing Committee of Attorneys-General establishing the Model Criminal Code Officers Committee (MCCOC) to consider the development of a uniform criminal code.[39] Reports from these committees were instrumental in codifying the Commonwealth criminal law, particularly in relation to corporate criminal responsibility.

Attributing liability to a corporation under the *Criminal Code*

1.30 Part 2.5 of the *Criminal Code* sets out a statutory methodology for attributing criminal responsibility to bodies corporate for offences against Commonwealth

35 Part 2.5 of the *Criminal Code* applies to 'bodies corporate'. As mentioned above, although 'bodies corporate' encompasses a broad range of corporate entities (including, but not exclusively, corporations), for simplicity, this discussion paper refers to the application of Part 2.5 to 'corporations'.

36 Section 3(2) of the *Criminal Code* Act specifically provides that the Schedule may be cited as the 'Criminal Code'.

37 Chapters 1 and 2 of the *Criminal Code* came into effect on this date. General application of the Code to all criminal offences commenced on 15 December 2001.

38 Jennifer Norberry, Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 139 of 1994, 31 August 1994) 5.

39 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 13).

legislation. As is the case for individuals, the prosecution must prove beyond reasonable doubt that the corporations committed the offence (the physical act or omission) and had the requisite state of mind (mens rea). Chapter 5 of this Discussion Paper examines Part 2.5 in detail. By way of introduction, s 12.2 of the *Criminal Code* uses traditional agency principles to establish the liability of a corporation for the physical elements of an offence.[40] In order to determine, whether a corporation had the requisite state of mind to be liable, ss 12.3 and 12.4 of the *Criminal Code* outline the fault elements for an offence committed by a corporation.[41] Where an offence requires a state of mind of intention, knowledge, and recklessness, s 12.3 of the *Criminal Code* provides that

> that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

1.31 Section 12.3(2) of the *Criminal Code* provides an inclusive list of the ways a corporation may have 'authorised' or 'permitted' the commission of the offence, including the novel approach that a corporate culture existed within the corporation that directed, encouraged, tolerated, or led to non-compliance with the relevant provision. The *Criminal Code* provides a definition of corporate culture, however, it does not outline the factors which should be considered to determine an entity's corporate culture and there is very little judicial consideration of s 12.3(2). Concerns were raised during early consultations with the ALRC that proving that a corporate culture contributed to the commission of the offence would pose evidentiary challenges.

1.32 Nevertheless, Part 2.5 was welcomed by academics at the time of its enactment as reflecting law makers coming to grips with the ways in which corporations operate in practice and the relevance of organisational culture to compliance by the corporation with the law.[42]

1.33 Hill notes that these provisions are a significant departure from the common law at the time:

> The concept of 'corporate culture' focuses on blameworthiness at an organisational level, in the sense that the corporation's practices and procedures have contributed in some way to the commission of the offence.[43]

1.34 Part 2.5 of the *Criminal Code* sought to address perceived deficiencies in the common law and to incorporate emerging theories of the corporate and organisational blameworthiness.

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40 Australian Law Reform Commission, *Principled Regulation* (n 10) 285.

41 With the exception of strict liability offences — see s 12.5. See Chapter 5 for a discussion of corporate attribution under s 12.4 for offences where the fault element is negligence.

42 See, eg, Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277.

43 Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' [2003] (1) *Journal of Business Law* 1, 18.

Attribution by statute other than the *Criminal Code*

1.35 While the approach in Part 2.5 to attribution of criminal responsibility to corporations was novel, it has not been widely adopted across Commonwealth legislation. Many Commonwealth statutes dealing with corporate offences have expressly excluded the operation of Part 2.5. Financial Services, which are principally regulated by Chapter 7 of the *Corporations Act,* were a principle focus of the Financial Services Royal Commission.[44] Part 2.5 is expressly excluded from that chapter of the *Corporations Act*.[45]

1.36 As set out in Chapter 3, the ALRC's primary research suggests that for over 85% of offences that are likely to be committed by a corporation, attribution of liability is based on a methodology that first appeared in the Commonwealth statute book in s 84 of the *Trade Practices Act 1974* (Cth) (the 'TPA Model').[46] Under that provision, corporations are liable for both criminal offence and civil prohibitions, based on the state of mind and conduct of a director, employee, or agent.[47] While attribution in accordance with s 84 predominates in the Commonwealth statute book, there is not one statutory approach. Attribution varies slightly from statute to statute and there is inconsistency as to whether a due diligence defence applies. The statutory models operate in addition to the common law method of attribution.

1.37 While the method of attribution may be particularly important where proof of a particular state of mind is required, strict and absolute liability are common for regulatory offences. Accordingly, for many offences committed by a corporation the state of mind of the corporation (however ascribed or attributed) is not a relevant consideration.

1.38 The Attorney-General's Department *Guide to Framing Offences* states that strict or absolute liability should only be imposed where '[t]he punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct' and 'there are legitimate grounds for penalising persons lacking "fault" and for 'penalising a person who made a reasonable mistake of fact'.[48]

1.39 The ALRC's assessment of the current state of the Commonwealth law is that strict and absolute liability are applied in circumstances much wider than envisaged in the AGD Guide to Framing Offences. This contributes to the broader analysis in this Discussion Paper as to the appropriateness of applying the criminal law to corporations

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44 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 119–218.

45 Instead, s 769B provides its own model of attributing corporate criminal responsibility in the context of financial services offences.

46 The *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth). The relevant provision is therefore now s 84 of the *Competition and Consumer Act 2010* (Cth).

47 See Duke Arlen, *Corones' Competition Law in Australia* (Lawbook Co, 7th ed, 2019) 300.

48 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 23.

and the principles that must be considered and applied when determining corporate criminal responsibility is necessary and effective.[49]

Investigating corporate crime

1.40 In the course of this Inquiry to date, a range of concerns has been expressed about Australia's corporate criminal responsibility regime, including concerns about the process of investigation before charges can be laid. The ALRC considers that investigative processes are outside the scope of the current Inquiry which focuses primarily on a review of the substantive criminal law. Nevertheless, the ALRC considers, in light of the concerns raised, that an inquiry into criminal investigative processes would be appropriate. Such an inquiry could consider comparative approaches to the investigation of corporate crime including the Serious Fraud Offices in the UK and New Zealand.

1.41 Investigations into allegations of serious corporate malfeasance commonly involve long delays. As a result of such delays, trials often occur years after the events with which they were concerned. This has several consequences. First, and inevitably, documentary evidence is more likely to disappear and the memories of witnesses fade, making successful prosecution more difficult. If it is the corporate entity itself that is charged, there is a significant likelihood that the entity is in fact a different beast by this stage of the proceedings, with a new board, new management, and likely also new employees. Any action against the corporation at that time fails to sheet home liability to those individuals actively involved in the wrongdoing.

1.42 Further, the threat of a criminal trial hanging over the head of individuals for many years is an intolerable burden for most. Even if an acquittal is secured, the reputational damage is usually irreparable. There is the additional feature that the fact that a great deal of corporate crime seems to escape detection and/or successful prosecution serves only to encourage its growth. The consequences of this feature were made apparent by the Financial Services Royal Commission.[50]

Committal hearings

1.43 In the course of consultations, the issue of the on-going value of committal hearings, particularly in the context of the prosecution of corporations for Commonwealth offences, was raised with the ALRC.

1.44 Committal hearings are preliminary hearings traditionally held before a person can be tried on indictment.[51] Conducting a committal hearing is an administrative or

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49 This is discussed in Ch 4.

50 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 424–448.

51 LexisNexis, *Halsbury's Laws of Australia* (online at 1 November 2019) 130 Criminal Law, 'VII(6) Criminal Proceedings Before Justices and Magistrates' [130-13420].

ministerial, rather than a judicial function.[52] This is because the committal process arose out of the inquisitorial role played by justices of the peace.[53] As explained by Dawson J,

> Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555, they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.[54]

1.45 The conduct of a committal eventually became the responsibility of magistrates through the enactment of *The Indictable Offences Act 1948* (UK) — the 'Sir John Jervis Act'.[55] The committal is meant to provide a means for the prosecution's evidence to be tested in order to determine whether there is sufficient evidence for the accused to stand trial.[56] The rationale is said to be that an accused person should not have to go through the expense and stress of a criminal trial in relation to charges that were 'wanton and misconceived.'[57] At the conclusion of the hearing, the magistrate will determine whether there is a prima facie case that justifies the accused standing trial.

1.46 Committal processes have been the subject of reviews and reforms in many Australian states and territories, although there has not been uniformity as to how the reforms have manifested. Committal hearings have been abolished in Western Australia[58] and, to a large extent also, in Tasmania.[59]

1.47 In New South Wales, reforms were introduced in 2018 through the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW), the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) and the *Crimes (High Risk Offenders) Amendment Act 2017* (NSW), which made changes to the pre-trial criminal system. It is now a requirement of the pre-trial system that senior police officers and prosecutors review, at an early stage, the evidence relating to indictable offences. The Director of Public Prosecutions (DPP) must then file a 'charge certificate' confirming the charges that will proceed to trial.[60] The charge certificate must confirm that the evidence available to the prosecutor is capable of establishing each element of the offences that are charged.[61] Requiring the DPP to file a

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52 *Grassby v R* (1989) 168 CLR 1, 22, [1989] HCA 45.
53 Ibid 12
54 Ibid 10.
55 Ibid 11.
56 LexisNexis, *Halsbury's Laws of Australia* (online at 1 November 2019) 130 Criminal Law, 'VII(6) Criminal Proceedings Before Justices and Magistrates' [130-13420].
57 John Coldrey QC, 'Committal Proceedings: the Victorian Perspective' (Paper, Australian Institute of Criminology, The Future of Committals, 1–2 May 1990) 2.
58 *Criminal Law (Procedure) Amendment Act 2002* (WA).
59 *Justices Act 1959* (Tas) s 60; although there is limited option to run a preliminary proceeding in some circumstances.
60 *Criminal Procedure Act 1986* (NSW) ch 3, pt 2, div 4.
61 Ibid s 66(2).

charge certificate aims to ensure that the 'prosecutor will perform a gatekeeping role earlier in the process by certifying which charges will proceed.'[62]

1.48 Similarly, in South Australia, the DPP plays a central role in determining which charges are prosecuted. Committal proceedings may only be commenced once the DPP has reviewed the material in a preliminary brief and made a 'charge determination' as to the appropriate charge or charges to be prosecuted.[63]

1.49 Following the Moynihan Review,[64] Queensland amended the *Justices Act 1886* (Qld) to introduce two forms of committal hearings: (1) an oral hearing before a magistrate, including allowing the cross-examination of witnesses (when considered in the interests of justice); or (2) a full hand-up brief before a clerk of the court, without either party having to attend. The latter process is referred to as a registry committal and is subject to a number of conditions. The Queensland reforms are said to provide a balance between the hand-up brief, abolition, and running a full oral hearing.[65]

1.50 As from 28 May 2013, committal proceedings were abolished in England and Wales.[66]

1.51 The Victorian Law Reform Commission is currently reviewing Victoria's committal procedure,[67] which still requires indictable offences to go through a committal process in the Magistrates' Court, except in certain limited circumstances.

1.52 Despite the theoretical position that committals serve an important function in protecting the right of an accused person to a fair trial, there are also criticisms that committals are used by the defence as a 'fishing exercise' or as a means of obtaining a tactical advantage, and that they increase court delays and impose significant public cost. Conversely, it is also argued that a committal hearing assists the prosecution by providing it with an opportunity to identify weaknesses in its case.[68] Whether the perceived benefits to an accused person of a committal process apply equally to a corporation may also be questioned, provided appropriate requirements for disclosure by prosecutors remain in place.

1.53 On 24 July 2009, the Federal Court of Australia was invested with indictable criminal jurisdiction under Div 1 of Pt IVA of the *Trade Practices Act 1974* (Cth) in relation to criminal cartel conduct. This jurisdiction is in addition to its existing

62 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 7 (Mark Speakman, Attorney General).
63 *Criminal Procedure Act 1921* (SA) pt 5 div 3.
64 The Hon Martin Moynihan AO QC, *Review of the Civil and Criminal Justice System in Queensland* (Report for the Queensland Government, 2008).
65 Asher Flynn, 'A Committal Waste of Time? Reforming Victoria's Pre-Trial Process: Lessons from Other Jurisdictions' (2013) 37 *Criminal Law Journal* 175, 191.
66 By amendment to the *Crime and Disorder Act 1998* (UK) s 51.
67 Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019).
68 Flynn (n 65) 176.

summary criminal jurisdiction.[69] In 2009, a procedural framework for the Federal Court to exercise jurisdiction over these indictable offences was enacted.[70]

1.54 That Act did not change the procedures that apply to committal proceedings in Commonwealth matters. Section 68A of the *Judiciary Act 1903* (Cth) provides that if both the Federal Court of Australia and a court of a state or territory have jurisdiction to try a person on indictment for an indictable offence, then a state or territory court that has jurisdiction with respect to the examination and commitment for trial may commit the person before either the Federal Court of Australia or the superior state or territory court.

1.55 Section 68A(3) of the *Judiciary Act 1903* (Cth) provides that, upon an order for committal, the state or territory committal court must invite the Director of Public Prosecutions to suggest the court before which the person is to be tried or sentenced.

1.56 In March 2019, the Government announced the expansion of the jurisdiction of the Federal Court of Australia 'to include corporate crime'.[71] No Bill has, as yet, been introduced that would confer additional indictable criminal jurisdiction on the Federal Court of Australia. Nevertheless, were additional jurisdiction to be conferred, the consequence of s 68A of the *Judiciary Act 1903* (Cth) would be that Commonwealth offenders will be subject to different procedures based on where in Australia they are being prosecuted. The inconsistencies in committal processes throughout the states and territories is undesirable when parties are subject to a Commonwealth offence and have a legitimate expectation of consistency of approach in whichever jurisdiction the matter might proceed. Indeed, avoidance of such inconsistencies was put forward as a reason for investing the Federal Court with criminal jurisdiction.[72] Difficulties of inconsistency are exacerbated in circumstances where there is a low volume of Commonwealth offences brought before the courts and thus limited experience in dealing with offences of this type at the committal stage. This is a particularly pertinent consideration in respect of the prosecution of corporations, the number of which is not at all large.

1.57 The ALRC considers that harmonisation of the law relating to pre-trial process for Commonwealth corporate offences is inherently desirable. The state or territory in which the offending occurs, and so where the corporation is prosecuted, should not have an impact on the criminal justice processes that apply. The benefits of a committal for an accused corporation can be achieved through pre-trial-hearings,[73] pre-trial disclosure,[74]

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69 See, eg, *Copyright Act 1968* (Cth); *Fair Work Act 2009* (Cth); *Competition and Consumer Act 2010* (Cth); the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth); *Australian Energy Market Act 2004* (Cth).

70 *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth), relevantly amending the *Judiciary Act 1903* (Cth).

71 Attorney-General (Cth) and Minister for Industrial Relations, 'Media Release - $35 Million to Extend the Federal Court's Jurisdiction to Corporate Crime' (23 March 2019) <www.attorneygeneral.gov.au/Media/Pages/35-Million-to-extend-the-Federal-Courts-jurisdiction-to-corporate-crime.aspx>.

72 The Hon Justice Mark Weinberg AO QC, 'The Current and Proposed Criminal Jurisdiction of the Federal Court' (Paper, Federal Criminal Law Conference, Sydney, 5 September 2008) 15.

73 *Federal Court of Australia Act 1976* (Cth) ss 23CA, 23CB.

74 Ibid ss 23CD, 23CE.

and *Basha* inquiries,[75] matters which are all provided for in Div 1A of Part III of the *Federal Court of Australia Act 1976* (Cth) which was inserted by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2008* (Cth).

1.58 The ALRC invites views as to whether the requirement for a committal procedure in respect of Commonwealth offences by corporations should be removed in all states and territories.

Summary of proposals

A principled approach to regulating corporations

1.59 In Chapter 4, the ALRC proposes a new model for corporate regulation that aims to achieve appropriate and effective regulation of corporations. The model is informed by the theoretical and analytical conclusions in Chapters 2 and 3.

1.60 The ALRC proposes that provisions regulating unlawful conduct by corporations be divided into three categories of:

- criminal offences;
- civil penalty proceeding provisions; and
- civil penalty notice provisions.

1.61 The model recognises that there is a need for a principled distinction between criminal and civil regulation. It is proposed that the primary form of regulation would be civil rather than criminal. Criminalisation would be reserved for contraventions where denunciation and condemnation is required and where the deterrent effect of a civil penalty would be insufficient.

Attributing criminal responsibility to corporations

1.62 In Chapter 5, the ALRC examines the history of corporate criminal responsibility, international comparative approaches to corporate criminal responsibility, and provides an analysis of the current law. In Chapter 6, the ALRC proposes a single statutory methodology for attributing criminal responsibility to a corporation. The ALRC proposes that the single statutory methodology should provide the simplicity which is characteristic of the TPA Model while retaining the focus on corporate blameworthiness which is fundamental to Part 2.5.

1.63 In addition, the ALRC proposes that the range of humans, whose conduct and state of mind might be attributable to a corporation, should be broadened using a functional role approach, rather than an approach based on titles or designations. This broadening is counterbalanced with a proposed due diligence defence, which would ensure that corporations are only criminally responsible when they are blameworthy —

75 Ibid s 23CQ; *R v Basha* (1989) 39 A Crim R 337.

that is when they have failed to implement appropriate procedures and process to ensure their associates comply with the law.

Individual liability for corporate fault

1.64 In Chapter 7, the ALRC examines the statutory regime setting out personal liability in relation to corporate fault. The ALRC reviewed 18 Commonwealth Acts that make individuals liable for the conduct of corporations, or employees or agents of a corporation. In light of the undue complexity and inconsistency of this regime, the ALRC proposes a simplified method of attributing liability for corporate fault to individuals. Under the proposal, senior officers would be liable for the conduct of corporations where they were in a position to influence the relevant conduct and failed to take reasonable steps to prevent a contravention or offence. The proposal would enhance corporate compliance by simplifying the individual liability regime, which would promote and reward efforts at genuine compliance. The proposal would also assist regulators in the detection and prosecution of individuals who abuse the corporate vehicle.

Whistleblower protections

1.65 In Chapter 8, the ALRC proposes reforms to enhance protections for whistleblowers in the private sector. The proposals build on recent reforms passed by the Government in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). The requirement in that Act for large corporations to implement a whistleblower protection policy would be expanded to make the policy necessary for a corporation to demonstrate that it exercised due diligence in order defend any criminal offences in respect of which a due diligence defence applies. The ALRC also asks whether refinements are necessary to the compensation provisions for whistleblowers. Finally, in this chapter the ALRC asks whether the domestic corporate whistleblower protection laws should be amended to apply extraterritorially.

Deferred prosecution agreements

1.66 In Chapter 9, the ALRC examines deferred prosecution agreements (DPAs), which are one way in which some overseas jurisdictions have sought to overcome the difficulties associated with addressing corporate crime. DPAs or their equivalents are available in a number of foreign jurisdictions, including the US, the UK, Canada, France, and Singapore. While DPAs are not currently available in Australia, the Government sought to introduce such a scheme in 2017.[76] In Chapter 9, the ALRC outlines key arguments for and against the introduction of a DPA scheme in Australia and asks for views on whether such a scheme should be introduced.

76 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth).

Sentencing corporations

1.67 In Chapter 10, the ALRC makes proposals to improve the processes and outcomes of sentencing corporations. Limitations on the ability of courts to pursue relevant purposes when sentencing corporations blunt the force of the criminal law as a regulatory tool. The ALRC proposes to enhance the court's sentencing toolkit by providing for a range of non-monetary penalty options for corporations and strengthening the information base available to courts when sentencing corporations. It is proposed that court-imposed penalties should be supplemented by a national debarment regime, which would limit the involvement of criminally convicted corporations in government work.

1.68 Proposals in this chapter also aim to promote consistency between the processes of sentencing and making civil penalty orders for corporations, unless there are principled reasons for divergence. Accordingly, the ALRC proposes harmonised statutory guidance on the factors relevant to sentencing corporations and the making of civil penalty orders, and proposes the general availability of a similar suite of non-monetary penalty options for civil penalty provisions.

1.69 The ALRC poses questions on the desirability of reforms to maximum penalties for corporations and improving the availability of compensation for victims of corporate wrongdoing.

Illegal phoenix activity

1.70 In Chapter 11, the ALRC proposes a framework to curb illegal corporate restructuring otherwise known as phoenixing. While there is no existing express prohibition on phoenix activity enacted in Australian law,[77] the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 presently before Parliament would establish one. The proposals in this chapter build on the existing Bill.

Transnational business

1.71 In Chapter 12, the ALRC considers the role of the Commonwealth criminal law in regulating the activities of transnational business. In the first part of the chapter, the ALRC examines the extraterritorial application of the criminal law as it relates to corporations, for example where Australian corporations may be implicated in offshore instances of slavery, violation of foreign sanctions, or other crimes with extraterritorial jurisdiction. The ALRC asks whether the criminal law could be enhanced to better promote compliance by Australian corporations in the context of their overseas operations. The second part of this chapter considers the role of the domestic criminal law in regulating the conduct of foreign-registered corporations with business activities in Australia.

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77 Helen Anderson et al, 'Profiling Phoenix Activity: A New Taxonomy' (2015) 33 *Corporations and Securities Law Journal* 133, 133.

2. Rationale for Corporate Criminal Responsibility

Contents

Introduction

2.1 The application of the criminal law to corporations remains controversial. Some argue that it should not exist, as it adopts a talismanic conception of a corporation as a juristic entity that fails to have regard to its status as a collection of individuals. Others argue that it simply serves no purpose, and cannot be distinguished from civil regulation, mainly as a corporation cannot be imprisoned. There is also the issue of how to attribute liability to a corporation *itself*. All of these questions are interrelated. These are significant philosophical and jurisprudential debates that admit no easy answer. However, they have serious practical consequences for corporate regulation and the purported distinctiveness of criminal law from civil regulation.

2.2 Regard must also be had to the place of corporate criminal responsibility in contemporary corporate regulation. What role should it play? What role should civil and administrative remedies play? All of these mechanisms of regulation are currently used in Australian law, though whether they are used appropriately and effectively is an open question.

2.3 In constructing a rationale for corporate criminal responsibility, there are three main questions:

- Can a corporation as an entity be morally blameworthy, such that it can be liable *itself* for a criminal offence?

- What purpose does corporate criminal responsibility have that distinguishes it from liability for a civil penalty?
- How should conduct be attributed to a corporation to reflect its corporate fault?

2.4 This chapter seeks to identify a rationale for corporate criminal responsibility that draws upon the many different propositions that have been put forward to answer these questions. In doing so, it draws upon broader debates about the scope of the criminal law and about methods of corporate regulation in Australia.

2.5 Adopting a principled distinction between criminal and civil contraventions is difficult. The question of what should properly be considered to be criminal is controversial.[1] This issue has been raised frequently in regulatory contexts.[2] However, whether perfect or not, the Parliament regularly has to make a decision as to whether particular prohibitions on corporate behaviour are criminal or civil.

2.6 The ALRC's view is that a principled approach can reveal a distinct purpose for corporate criminal responsibility: one that reserves it for instances of corporate misconduct that cannot adequately be regulated by civil penalties. If a principled approach is implemented, as set out in Chapter 4, this approach would have the effect of reducing the exposure of corporations to criminal penalties compared with the current position whilst simultaneously improving the efficacy of criminal enforcement where it is indeed appropriate and necessary.

Methods of corporate regulation in Australia

2.7 Criminalisation is only one of the methods used to regulate corporate behaviour in Australia.[3] As the ALRC observed on an earlier occasion, regulation in Australia occurs through a combination of criminal offences and civil contraventions.[4] The volume of criminal offences and civil penalty provisions (and, in many cases, the duplication between them) that apply in regulatory contexts mean that regulators are unable to enforce all provisions. As a consequence, regulators must be selective as to what they enforce. This has implications for the rule of law, as enforcement decisions are left to discretionary decisions driven by resource constraints.

2.8 Penalties for contraventions can be divided between criminal penalties, civil penalties, and administrative penalties.[5] Criminal penalties are imposed only for criminal

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1 Glanville Williams, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107, 107; Jeremy Horder, 'Bureaucratic "Criminal" Law' in R A Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 101, 102–3.

2 See Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225; Horder (n 1); Law Commission (UK), *Criminal Liability in Regulatory Contexts* (Consultation Paper No 195, 2010).

3 See Ch 3 for the ALRC's analysis of the present state of the law.

4 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) [2.15]–[2.24] ('*Principled Regulation*').

5 Ibid [2.40]–[2.70].

offences and, in the case of the conviction of a corporation, principally consist of fines.[6] Other non-monetary penalties may be imposed, or may follow as a consequence of criminal conviction.[7]

2.9 Civil penalties for contravention of a civil penalty provision have become common in Australian regulatory law. A civil penalty is a pecuniary penalty imposed by a court following civil proceedings for contravention of a civil penalty provision. Thus, a civil penalty order is functionally distinct from a criminal fine. It exists to deter contravention and promote compliance with regulatory standards. Civil penalties have existed in Australian law, though for a limited number of contraventions, since Federation.[8] They were introduced into the *Trade Practices Act 1974* (Cth) upon its enactment.

2.10 In 1993, civil penalty provisions were introduced into the then *Corporations Law* as a penalty for contravention of directors' duties.[9] Prior to 1993, contraventions of the *Corporations Law* were solely criminal offences. Comino has observed that civil penalty provisions were introduced into the *Corporations Law* to reduce 'the role of the criminal law such that criminal sanctions applied only to the most serious contraventions.'[10] Civil penalty provisions have subsequently become widespread across the *Corporations Act 2001* (Cth), with a number of new civil penalty provisions being introduced following the ASIC Enforcement Review in 2017. Over the past thirty years, there has been a widespread adoption of civil penalty provisions across a range of Commonwealth regulatory statutes.

2.11 Administrative penalties are penalties for contraventions that are imposed by a regulator without the bringing of court proceedings.[11] They can be imposed for criminal offences and civil contraventions. The most common form of administrative penalty is an infringement notice.[12] Other administrative penalties include monetary penalties and charges imposed under taxation law, alterations or revocation of licences, banning orders made by regulators, and enforceable undertakings, among others.[13]

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6 Ibid [2.40].
7 Ibid. The sentencing of corporations is discussed in Ch 10.
8 Ibid [2.53].
9 Vicky Comino*, Australia's "Company Law Watchdog": ASIC and Corporate Regulation* (Lawbook Co, 2015) 15.
10 Ibid 15–16.
11 Australian Law Reform Commission, *Principled Regulation* (n 4) [2.64].
12 Ibid [2.129]–[2.134] and Ch 12.
13 Ibid [2.124]–[2.168].

What makes something criminal?

Aims of criminal law

2.12 Wells has observed that:

> At a very broad level criminal laws can be seen as either instrumental or symbolic (or ideological); that is, criminal laws can be seen as there to achieve a purpose or to make a (moral) statement.[14]

Instrumentalists focus on using the criminal law to reduce harm.[15] Criminalisation is useful for its deterrent effect.[16] It follows that:

> [T]here is no fundamental distinction between crimes and other branches of law that impose sanctions. The difference is one of degree: the criminal law exists to visit punishments such as imprisonment or fines in situations where other forms of disincentive make for an an insufficient deterrent. The point of punishment then becomes, like other forms of sanction, to foster compliance by creating strong prudential reasons for abiding by the law; and we should criminalise especially when other forms of regulation are ineffective to achieve that end.[17]

Alternatively, those propounding a 'symbolic conception' regard criminal law as 'representing a statement of moral or other values'.[18] According to Simester and von Hirsch:

> The truth is, we think, somewhere in between. The criminal law *is* a regulatory tool for influencing behaviour, and in some respects no more than that; but it is a special kind of tool. The essential distinction between criminal and civil law lies in the social significance of the former — in the way criminal laws, convictions, and sanctions are understood. The criminal law has a communicative function which the civil law does not. **It speaks with a distinctively moral voice, one that the civil law lacks**.[19]

Simester and von Hirsch themselves consider that criminalisation both denounces conduct as morally wrongful by making the conduct an offence, while also acting as a deterrent by providing that, if one engages in the conduct, punishment for commission of an offence will follow.[20] Criminal law is a 'morally loaded regulatory tool'.[21]

2.13 Like criminal law itself, the punishment that follows conviction of a crime has pluralist aims, including retribution, denunciation and condemnation, deterrence, and rehabilitation.[22] Legislative statements of sentencing principles have captured this. For example, s 9 of the *Penalties and Sentences Act 1992* (Qld) provides that:

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14 Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 14.
15 Ibid.
16 AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 4.
17 Ibid.
18 Wells (n 14) 15.
19 Simester and von Hirsch (n 16) 4.
20 Ibid 6–7.
21 Ibid 11.
22 See Wells (n 14) 19–21.

> (1) The only purposes for which sentences may be imposed on an offender are —
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or
>
> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
>
> (e) to protect the Queensland community from the offender; or
>
> (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

Similarly, s 142 of the *Criminal Justice Act 2003* (UK) sets out the following purposes of a criminal sentence:

> (1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing —
>
> (a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and
>
> (e) the making of reparation by offenders to persons affected by their offences.

2.14 Hodges explains how criminal punishment, as imposed pursuant to the *Criminal Justice Act 2003* (UK), is pluralist, and intended to achieve multiple goals:

> Thus, neither punishment nor deterrence are the sole focus of sentencing, but each are (only) one aspect of an integrated package of five purposes. This policy focuses not just on imposing punishment on the offender, but also on future prevention of crime and on restoring victims. The crime reduction goal focuses not just on the offender, or other offenders, through a deterrent approach, but also hints that the imposition of punitive sanctions might not be effective in affecting future behaviour of actual or potential offenders, since reformative, rehabilitative and other approaches may be needed.[23]

Justifying criminalisation

2.15 The principles that justify criminalisation of certain conduct are controversial as a matter of general criminal law. This is perhaps lessened by the fact that the State,

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23 Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing, 2015) 214–215.

through the legislature as elected representatives, makes the decision of whether to criminalise. This is important, given that, when the criminal law is applied, it has serious consequences. Historically, there was a strong moral element to criminalisation.[24] This was attenuated as society became more secular and, with the development of society during the Industrial Revolution, there emerged a need to regulate complex systems.[25] While it was easier to attach judgments of moral blameworthiness to life and liberty, it was a more difficult decision where the focus was on regulating functioning markets or business practices, for example. Horder describes how these changes explained:

> the significant expansion of regulatory criminal offences during the mid-nineteenth century. Amongst other catalysts for regulatory activity that proved potent in Victorian England, governments caught what Carolyn Steadman has aptly called 'inspection fever' … [At the same time] many criminal law writers of the seventeenth and eighteenth centuries, such as Blackstone or Hale, regarded the criminal law as having a narrower but distinctive morally legitimate field of operation.[26]

2.16 In defining a 'crime', theorists have adopted both procedural and normative definitions. Procedural definitions became prominent over the course of the twentieth century. These avoid the question of determining a principled basis for criminalisation. Glanville Williams offered the following definition:

> A crime [is] an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings.[27]

2.17 This definition rejects a normative approach to defining crime.[28] These had been more popular in the earlier history of criminal law,[29] and generally described a 'core case' of crime as conduct involving 'serious moral wrongdoing'.[30] Even in the middle of the twentieth century, Glanville Williams criticised the idea that there was any 'essence' to the criminal law, given the pervasiveness of regulatory offences.[31] As Horder has explained:

> The reformation view focused on the criminal law as … a field in which we can say that the norms are empty vessels into which any content could be poured by government or, increasingly, by its bureaucratic agencies. The field was thought to be made meaningful as such (in a way that has now become problematic) by the presence of certain key procedural elements: the need for proof of the facts beyond reasonable doubt, the fact that proceedings were undertaken – or could be taken over – by agents of the state, by the availability of punishment following a finding of guilt, and so on. It could, of course, be argued that these key elements themselves represent a distinctive morality of

24 Horder (n 1) 102–3.
25 Ibid. For a discussion of the historical transition from religious to more secular justifications for criminal law, see Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 23–31.
26 Horder (n 1) 102–3.
27 Williams (n 1) 123.
28 Horder (n 1) 102–5.
29 Ibid 103.
30 Ibid.
31 Ibid 103–4.

> the criminal law; but even if that were true, it would be … a morality of legal procedure, and not one of substantive law.[32]

2.18 Horder goes on to explain that the popularity of proceduralist definitions arose in part due to their ability to explain regulatory offences.[33]

2.19 Other more recent procedural definitions adopt some normative content. Lamond, for example, has defined crimes as 'public wrongs … that the community is responsible for punishing but not necessarily wrongs against the public itself"'.[34] This definition could also be applied to civil penalty provisions or other administrative penalties.[35] Lamond expands upon his definition, however, and suggests that such a wrong is susceptible to public prosecution because the wrong is serious enough to justify 'the condemnatory force of conviction in the name of the community as a whole'.[36]

2.20 Normative approaches have regained popularity amongst a number of writers in recent years. Ashworth has argued that criminalisation should be confined to instances of 'substantial wrongdoing'.[37] Bagaric has suggested crimes should reflect 'breaches of important moral principles'.[38] If a wrong must be 'serious' or 'substantial' in order to warrant criminalisation, the question becomes: what makes a wrong sufficiently serious? It has been argued that there must be a public quality to the wrong.[39] Criminal conduct is wrongdoing that is deserving of censure[40] or, as noted above, for which condemnation by the community is justified.[41] Again, there are differing views as to what makes conduct sufficiently wrongful so as to be criminal. It may require an assessment of both harm and culpability.[42]

2.21 Liberal approaches generally focus upon the harm caused.[43] Other liberal theorists do not consider actual harm to be required. Deviation from social duties may be enough.[44] Moralists, on the other hand, consider that there are certain moral duties that exist independent of harm or social norms.[45] Violation of these should be a crime. To the extent that a normative definition of crime is to be preferred for the reason that it distinguishes criminal law from civil regulation, value judgments are required as to what sort of conduct should be criminalised.

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32 Ibid 104–5.
33 Ibid 105.
34 Grant Lamond, 'What Is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609, 614.
35 See Ashworth (n 2) 230–2.
36 Lamond (n 34) 629.
37 Ashworth (n 2) 240.
38 Mirko Bagaric, 'The "Civil-Isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.
39 Emmanuel Melissaris, 'Theories of Crime and Punishment' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 355, 366.
40 Simester and von Hirsch (n 16) 11.
41 Lamond (n 34) 629.
42 Ashworth (n 2) 240.
43 Melissaris (n 39) 10–1.
44 Ibid.
45 Ibid 11.

2.22 Other theorists, such as Fletcher, have adopted a more 'pluralistic' conception of a crime.[46] As Husak explains, Fletcher considers that there are 'three patterns of liability' that may justify criminalisation:

> The first such pattern is named *manifest criminality.* External acts occupy the focus in crimes of this class, and mental states are relegated to a secondary status. Neutral third-parties would be able to recognize the activity as dangerous and harmful without knowing the actor's intention. The act must manifest the actor's criminal purpose and typically constitutes an unnerving threat to the order of community life. The second such pattern is labeled *subjective criminality.* Intentions to violate a protected interest are the essence of these crimes. Acts serve merely to demonstrate the firmness of the actor's resolve and to provide evidence of his mental state. The third and final pattern is described as *harmful consequences.* Here, neither acts nor intentions have the same significance as in previous patterns. Instead, liability is based on the objective attribution to a responsible person of a harmful event that is conceptually independent of human action or state of mind.[47]

2.23 In Husak's view, some offences may be 'hybrids' that 'exhibit features of more than one pattern simultaneously'.[48] It is also important to posit that there may be other patterns that justify criminalisation, in that some other aspect of the conduct justifies the pluralist response – marked by denunciation and condemnation – that the criminal law is able to provide. The patterns are therefore non-exhaustive. It should be appreciated, however, that Ashworth's approach to defining a crime by reference to 'substantial wrongdoing' is also pluralistic, as he considers that it requires both harm and culpability.[49]

Concerns about overcriminalisation

2.24 The recent resurgence in attempts to arrive at normative principles to justify criminalisation has been driven by concern about an increasing volume of criminal offences,[50] many of which are said not to capture any underlying concept of criminality.[51] Much of this concern has arisen in regulatory contexts.[52] In this context, this is not a new complaint.[53] The argument is that there are no discernible principles that differentiate criminal offences from civil regulation. This problem is exacerbated by the fact that, as a corporation cannot be imprisoned like a natural person, there is a less obvious difference

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46 George P Fletcher, *Rethinking Criminal Law* (Little, Brown & Co, 1978); see also Douglas Husak, 'Crimes Outside the Core' (2004) 39 *Tulsa Law Review* 755, 757.

47 Husak (n 46) 757 (emphasis in original).

48 Ibid 760.

49 Ashworth (n 2) 240.

50 This has been described as criminal law's 'counter-reformation': see Horder (n 1) 101–2; 105–21.

51 See Ashworth, (n 2); Bagaric (n 38); James Chalmers and Fiona Leverick, 'Tracking the Creation of Criminal Offences' [2013] *Criminal Law Review* 543; Vincent Chiao, *Criminal Law in the Administrative State* (Oxford University Press, 2018); Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *Yale Law Journal* 1795; John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models. And What Can Be Done about It' (1992) 101 *Yale Law Journal* 1875; cf Horder (n 1).

52 See, eg, Law Commission (UK) (n 2); Ashworth (n 2). The claim has been made more widely: see Bagaric (n 38).

53 Mann (n 51) 1861; Coffee (n 51) 1875, 1881.

in the consequences attaching to the different types of contravention. Indeed, the ALRC is not the first Law Reform Commission to recognise this. In its 2010 Consultation Paper on *Criminal Law in Regulatory Contexts*, the UK Law Commission proposed that:

> The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.[54]

2.25 Horder has criticised concerns that are solely about the volume of criminal offences.[55] He argues there have always been various regulatory offences in existence,[56] and questions whether there is an ideal number of offences. He also notes that such a question raises a further question of whether it is better to have a smaller number of broad offences or a greater number of specific ones.[57] For example, is a single general offence provision for not providing a report to a regulator better than multiple specific offences? Horder argues that such a reform would 'sacrifice a large measure of legal certainty'.[58] On the other hand, it could be argued that the existence of highly specific complex offences for conduct already covered by a general offence complicates the law and is potentially harder to explain to a court, and especially to a jury.

2.26 There has been less focus on the volume of criminal offences in Australia.[59] Furthermore, in relation to corporate regulation, the main impetus even in other jurisdictions for formulating a principled foundation for criminalisation has been a recognition of the need to differentiate criminal liability from civil regulation.[60]

Rationale for corporate criminal responsibility

Distinguishing criminal punishment from civil penalties

2.27 As a corporation cannot be imprisoned, fines imposed for crimes committed by a corporation are similar in nature to civil penalties. If corporate criminal responsibility is to be justified, there must be a principled reason for distinguishing a crime from a civil penalty provision. Critics of corporate criminal liability argue that the sole purpose of corporate criminal responsibility is to deter future wrongdoing. A civil penalty provision has the same purpose.[61]

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54 Law Commission (UK) (n 2) [1.28].
55 Horder (n 1) 109.
56 Horder (n 25) 36–7.
57 Horder (n 1) 109–10.
58 Ibid 110.
59 But see Bagaric (n 38) 192–3.
60 See, eg, Mann (n 51); Coffee (n 51).
61 See VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109(7) *Harvard Law Review* 1477, 1478; Daniel R Fischel and Alan O Sykes, 'Corporate Crime' (1996) 25 *Journal of Legal Studies* 319, 322; Gregory M Gilchrist, 'The Expressive Cost of Corporate Immunity' (2012) 64 *Hastings Law Journal* 1, 31.

2.28 While it may be difficult to distinguish a civil penalty from a criminal fine imposed on a corporation solely from a deterrence perspective, this analysis fails to appreciate that criminal law has additional aims of retribution and moral condemnation.[62] Criminal law is not directed to deterrence alone.[63] The High Court has endorsed such a purposive distinction between criminal and civil penalties.[64] It has observed that:

> [W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty … is primarily if not wholly protective in promoting the public interest in compliance.[65]

2.29 Mann, in contrast, argues that civil penalties are punitive in nature.[66] This differs from Australian law and makes it difficult to differentiate civil penalties from criminal punishment imposed on a corporation by way of a fine. Mann does, however, acknowledge that there is a difference between a criminal sanction and a civil penalty. He suggests that criminalisation should be reserved for particularly egregious wrongdoing:

> Criminal law has a distinctive normative role, and it should be reserved for the most damaging wrongs and the most culpable defendants. Middleground jurisprudence presents a special opportunity for reform, permitting the criminal law to be scaled back where it has been overextended – with respect to petty and middle-range crimes, regulatory and administrative offences, and some of the so-called victimless crimes where the use of criminal sanctions has long been controversial.[67]

2.30 If deterrence were the only justification for corporate criminal responsibility, it would be difficult to see why criminal responsibility should be preferred over liability for a civil penalty.[68] The justification must be more than mere deterrence by imposition of a pecuniary penalty. The distinctive normative function of criminal law exists because it has additional purposes of retribution and denunciation and, because of this, has a particular expressive role. This is not to downplay the deterrent effect of criminalisation. Clearly, making something an offence acts as a deterrent. The point, however, is that criminalisation has additional purposes. Relatedly, the expressive effect of the criminalisation, and the stigma that attaches to criminal conviction, also means that the deterrent effect of the criminal law is amplified beyond that provided by a civil penalty.

2.31 In order for corporate criminal responsibility to have a distinct purpose it must be possible to apply concepts of retribution and denunciation to a corporation. This in turn requires that a corporation must itself be capable of being morally blameworthy.[69]

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62 Lawrence Friedman, 'In Defence of Corporate Criminal Liability' (2000) 23 *Harvard Journal of Law and Public Policy* 833, 834.

63 Ibid 841; Gilchrist (n 61) 31.

64 See [1.24] above.

65 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [2015] HCA 46 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

66 Mann (n 51).

67 Ibid 1863.

68 W Robert Thomas, 'How and Why Corporations Became (and Remain) Persons under the Criminal Law' (2018) 45 *Florida State University Law Review* 479, 530.

69 Nick Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for

Moral blameworthiness of a corporation

2.32 Whether a corporation *itself* can be morally blameworthy is a complex theoretical question. It is also difficult in a pragmatic sense, as the difficulties associated with Part 2.5 of the *Criminal Code* reveal. The conclusion that the only purpose for corporate criminal responsibility is deterrence stems in many cases from the view that a corporation exists only as a grouping of individuals and so cannot be morally blameworthy.[70] Nick Friedman summarises the argument that 'corporations are not moral agents' as follows:

> First, corporations are abstract legal fictions lacking a real, independent existence. There is thus no distinct entity that could constitute a moral agent. Second, even if corporations are, in some way, distinct, real entities, a corporation has no body over which it can exercise causal powers of action. A corporation acts only through human beings who are causally, and therefore morally, responsible for all of what it does. Third, even if corporations are in some way distinct, real entities, and even if a corporation could itself perform acts and be causally responsible for them, a corporation does not have a unitary conscious mind and so cannot form even basic intentional states by which it could guide its actions, let alone the complex second-order moral judgments that could constitute it as a moral agent.[71]

2.33 Alschuler takes a similar line. He argues that corporate criminal responsibility exists only to ensure that the corporation takes action internally against errant individuals.[72] It is not possible to punish a 'fictional entity'.[73] Corporate criminal responsibility ineffectively directs community condemnation at 'a blameless thing' rather than the responsible individuals.[74] Alternative accounts place greater emphasis on the existence of corporate personality and of the corporation as a juristic entity. Thomas refutes the claim that corporations, as a creation of the law, lack sufficient moral agency to be held criminally responsible:

> More fundamentally, I disagree that legal personhood is insufficient to give rise to criminal liability. What it means to be a legal person is to be able to participate in the space of legal rights and obligations, which includes being held responsible for violating those legal obligations.[75]

2.34 The law affords corporations the status and privileges of separate personality and limited liability. There may well be consequences for those statuses and privileges. In addition, it has been argued that corporations can be seen to have an 'identifiable persona' in the form of their corporate culture and capacity to make moral judgments and express opinions and positions as a corporate entity.[76] Fisse and Braithwaite observe that

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Corporations' (2019) 82 *Modern Law Review* (advance), 2.

70 Friedman (n 62) 844.

71 Friedman (n 69) 9.

72 Albert W Alschuler, 'Two Ways to Think about the Punishment of Corporations' (2009) 46(4) *American Criminal Law Review* 1359, 1367, 1377–8.

73 Ibid 1367.

74 Ibid 1372–3.

75 Thomas (n 68) 504.

76 Friedman (n 62) 847.

a corporation exists as a sociological fact and '[a] corporation itself may be regarded as a blameworthy moral agent',[77] provided that the method of attribution adopted enables this corporate fault to be established.[78] Fisse and Braithwaite note that:

> [First,] organisations are capable of manifesting intent in the form of corporate policy. Second, the blameworthiness of organisational behaviour can be assessed by reference to patterns of behaviour and systems of control … Third, organisations are often held blameworthy by the community which in consequence demands corporate reform. …
>
> No one would disagree that civil rather than criminal process is typically the less drastic and more effective avenue for achieving compliance with the law through organisational change. The point is that, contrary to individualistic preconceptions, the corporate condition does not preclude corporations from being labelled and punished as wrongdoers.[79]

2.35 As noted by Friedman:

> Brent Fisse and John Braithwaite assert that corporations are moral agents because 'the corporation, like the individual human being … can give moral reasons for its decision-making', and because it 'has the capacity to change its goals and policies'.[80]

2.36 Rich suggests that corporate criminal responsibility is justified on the basis that:

> [A] corporation is an entity that can act from moral positions, and so when it acts wrongly, it is morally blameworthy as an entity. Some of the acts that corporations commit are of the sort that are truly blameworthy, and not simply economic choices that society wishes to disincentivize …[81]

2.37 As the US Supreme Court said in holding a corporation criminally responsible for the first time:

> If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.[82]

The distinct role of retribution and condemnation

2.38 If a corporation is capable of being morally blameworthy, then the retributive and condemnatory aims of the criminal law continue to have relevance to the criminal responsibility of corporations.[83] Corporations can, and have been found to, engage in

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77 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 50.

78 See Chs 5 and 6 below.

79 Fisse and Braithwaite (n 77) 35–6.

80 Friedman (n 69) 13; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468, 486.

81 Sylvia Rich, 'Corporate Criminals and Punishment Theory' (2016) 29 *Canadian Journal of Law & Jurisprudence* 97, 109.

82 *New York Central and Hudson River Railroad Company v United States* 212 US 481 (1909) 493.

83 Friedman (n 62) 834; Rich (n 81) 99.

conduct that is morally wrongful.[84] The real problem, once again, is finding a rationale to distinguish corporate criminal responsibility from liability to a civil penalty. In contrast to deterrence on its own:

> Retributivism holds … that we punish not because we want to create a deterrent for future behaviour, but because the offender deserves the punishment, in direct proportion to her moral blameworthiness in committing the offence.[85]

2.39 Alschuler has argued that the criminal conviction of a corporation is mere symbolism, given the corporation's fictional existence. He argues it is not possible to condemn or seek retribution against an entity that is not a natural person.[86] As Friedman explains, however, the concept of retribution applicable to corporate criminal responsibility is 'expressive retribution'.[87] Expressive retribution is a consequentialist form of retribution.[88] It 'reflects the sense that the commission of an act the community, through its laws, deems wrong should be met with disapprobation for the sake of the victim and the sake of the community'.[89] According to Friedman:

> Criminal liability … expresses the community's condemnation of the wrongdoer's conduct by emphasising the standards for appropriate behaviour – that is, the standards by which persons and goods should properly be valued.
>
> The aim of expressive retribution is the defeat of the wrongdoer's valuation of the worth of some person or good. Unlike deterrence, this objective cannot be accomplished more efficiently via a civil liability regime; indeed, it cannot be accomplished at all through civil liability. Notwithstanding the retributive character of some aspects of civil liability (a punitive damages award, for example), only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.[90]

2.40 The expressive force of the criminal law may be its signature feature in the corporate context. Drawing upon the work of Gilchrist, Crofts has proposed that '[o]ne key argument to justify criminalisation of collective wrongdoing is to emphasise the expressive power and role of the criminal law'.[91] As Crofts explains:

> The law routinely classifies conduct, defines action, interprets events and evaluates worth; it then sanctions these judgments with the force and authority of law. Criminal liability carries 'a formal and solemn pronouncement of the moral condemnation of the community'. Conviction carries with it serious consequences and social stigma. It expresses condemnation: it is not about just wearing a penalty for breaking the law but opprobrium. This expressive aspect of the law has value. Moreover, it has

84 Rich (n 81) 109.
85 Ibid 100.
86 Alschuler (n 72) 1380.
87 Friedman questions whether Kantian notions of retribution could properly be applied to a corporation: (n 62) 845.
88 Ibid 843.
89 Ibid 842.
90 Ibid 843, 854.
91 Penny Crofts, 'Criminalising Institutional Failures to Prevent, Identify or React to Child Sexual Abuse' (2017) 6 *International Journal for Crime, Justice and Social Democracy* 104, 116.

> been suggested by theorists that criminalising corporate conduct/failures has specific expressive value: '[d]eterring inefficient conduct is one socially desired objective, but repudiating the false valuations embodied in corporate wrongdoing is another'. Accordingly, the fact of condemnation is itself significant.[92]

2.41 Gilchrist himself suggests that a consideration of the absence of corporate criminal responsibility reveals its expressive value:

> Criminal liability is justified over mere civil liability because of its expressive value. That expressive value is most clear where we consider the alternative: corporate immunity. Immunizing corporations from criminal prosecution would serve as a statement that the legal system was pricing corporate crime and differentiating between powerful corporations and mere persons. While the differentiation between corporations and persons may be justifiable philosophically, it deviates too far from the fact that people do blame corporations when they commit crimes. Isolating corporations from this blame through immunity from criminal prosecution would create legitimacy costs. People would lose respect for a legal system that expressed values so contrary to their own.[93]

2.42 Thus:

> Understood in this way, the purpose of corporate criminal liability is deterrence and maintaining expressive consistency. **Maintaining expressive consistency is the distinctive reason to impose criminal, as opposed to mere civil, liability on corporations**.[94]

2.43 Therefore, a rationale for corporate criminal responsibility that is distinct from the deterrent role that criminal responsibility also shares with civil penalties can be seen to exist. This is the expressive power of the criminal law to express denunciation of particularly egregious conduct, engaged in by the corporation as an entity. The problem is that for this rationale to be reflected in the law, it is necessary for the criminalisation of corporate conduct to be directed at conduct that is sufficiently serious enough to be criminalised. If it is not, there may well be nothing that distinguishes it from liability to a civil penalty. The expressive force of the criminal law is required to give it its amplified power, both in terms of deterrence and condemnation, beyond that of civil regulation. As Rich has observed, '[a] strict focus on deterrence provides no way of keeping the criminal/civil distinction, and creates a tendency toward overcriminalisation.'[95] Consequently, the issues raised in the earlier part of this chapter regarding criminalisation and the proliferation of criminal offences are particularly pertinent to the rationale for corporate criminal responsibility.

2.44 If the complaint, on the other hand, is not with the particular conduct that is criminalised but with whether it is possible for a corporation to be blameworthy as an

92 Ibid 116–7 (citations omitted).
93 Gilchrist (n 61) 55–6.
94 Ibid 56 (emphasis added).
95 Rich (n 81) 102.

entity itself, then there may well be questions to be asked about the appropriateness of the liability of companies for certain civil penalties.

3. Application and Enforcement of Criminal Law against Corporations

Contents

Introduction

3.1 This chapter provides an overview of data collated by the ALRC regarding the current state of Commonwealth criminal law as it applies to corporations and the incidence of criminal prosecutions involving corporate actors under that law.

3.2 The data was collected in order to inform the ALRC's understanding of the challenges to attributing criminal liability to corporations under existing Commonwealth criminal law, as required under the Terms of Reference. The data is foundational to the ALRC's review of corporate criminal responsibility; it provides the evidence base for the proposals set out in this Discussion Paper.

3.3 The ALRC's research in this area remains ongoing. This chapter presents the ALRC's preliminary analysis of Commonwealth criminal law as it applies to corporations based on the research conducted to date. These conclusions will be expanded and updated for the final report.

About the data

3.4 This chapter uses two key datasets. The first is a dataset compiled by the ALRC of primary data relating to Commonwealth criminal law as it applies to corporations. The ALRC undertook a review of a cross-section of relevant Commonwealth legislation[1] – 25 statutes that are particularly relevant to the regulation of corporate conduct (contained in Appendix D)[2] – in order to:

- review the scope and scale of criminal offences potentially applicable to corporations; and
- determine how criminal liability for such offences is attributed to corporations.

3.5 The ALRC's review of this legislation is contained in summary form in Appendices E, F, G and I.

3.6 The second dataset that has informed the ALRC's findings is constituted by quantitative data provided to the ALRC by Commonwealth agencies that investigate and/or prosecute corporate crime. This data consists of three sub-datasets relating to the incidence of corporate prosecutions:

- data provided by the CDPP relating to the incidence of corporate prosecutions commenced in the ten-year period ending on 30 June 2019 (the 'CDPP Data');[3]
- data provided by ASIC relating to the incidence of corporate prosecutions commenced by ASIC and referred to the CDPP in the five-year period ending on 30 June 2019 (the 'ASIC Data');[4] and
- data provided by the ACCC relating to criminal cases referred to the CDPP in the ten-year period ending on 30 June 2019 (the 'ACCC Data').[5]

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1 The ALRC received data from the ATO and Treasury that informed the analysis of legislation within the portfolio of each.

2 These statutes were those identified by the ALRC in preliminary research and stakeholder consultations as the primary legislative sources of corporate criminal liability.

3 Advice Correspondence from Office of the Commonwealth Director of Public Prosecutions to Australian Law Reform Commission, 7 August–29 October 2019. This data does not include cases prosecuted by the CDPP that are ongoing.

4 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019.

5 Advice Correspondence from Australian Competition and Consumer Commission to Australian Law Reform Commission, 25 October 2019.

3.7 The ALRC's reform proposals are also informed by qualitative data obtained in the course of confidential consultations with stakeholders in the area. Thus far, the ALRC has undertaken consultations with more than 55 stakeholders. A list of consultations is presented in Appendix A. Consultation is a key part of the ALRC process; it informs the ALRC on the topic area and the need for reform.

3.8 The data presented in this chapter must be interpreted carefully. The data relied on has come from multiple sources and there may be gaps and omissions. In this chapter, the ALRC has provided detailed references to explain the source of data and the extent of any omissions or caveats. Interpreting data involves judgement and the ALRC has sought to explain the basis of interpretations made in this chapter. Further information is provided in the Appendices to this Discussion Paper. Importantly, the data presented in this chapter represents the ALRC's work to date and further analysis will be provided in the final report.

Commonwealth criminal law as it applies to corporations

3.9 The ALRC's preliminary conclusions are that:

- There is an over-proliferation of offences in the Commonwealth criminal law, which creates a significant regulatory burden while also diluting the rationale for criminal liability.
- Inconsistent approaches are evident in the legislation with regard to:
    - strict and absolute liability offences;
    - the availability of infringement notices;
    - the identification of offences intended to apply to corporations; and
    - the availability of concurrent civil and criminal liability.
- There is a lack of principled rationale for distinguishing between conduct subject to a civil penalty and conduct subject to a criminal offence.
- There are numerous and different methods for attributing criminal liability to corporations.

Proliferation of criminal offences

3.10 Across the 25 Commonwealth statutes reviewed by the ALRC, 2898 criminal offences were identified as potentially applicable to corporations.[6]

6 The ALRC has not reviewed the offences contained in the *Quarantine Act 1908* (Cth) because the Act is no longer in force. The Act was replaced by the *Biosecurity Act 2015* (Cth). Therefore this only includes offences contained in 24 of the 25 statutes that make up the ALRC's dataset.

3.11 The criminal offences in the legislation vary significantly in the seriousness of conduct regulated. In the *Corporations Act*, for example, there are a number of offences that criminalise serious misconduct such as market manipulation,[7] but also a substantial number of offences criminalising more trivial misconduct.

Example

Failure to place an ACN on certain company documents is currently a criminal offence under the *Corporations Act*,[8] as is a failure to notify ASIC of a change in company office hours.[9]

3.12 According to the AGD, one function of a penalty benchmark attaching to a Commonwealth offence is to indicate the 'kind' or 'seriousness' of an offence.[10] Of the 2898 criminal offences identified by the ALRC, 2272 attract maximum penalties of at least 60 penalty units for an individual.[11] On the other hand, approximately 22% (626)[12] of the offences have maximum penalties that do not meet this threshold. The proliferation of these offences suggests that the Commonwealth criminal law as it presently stands does not reflect the requirement that conduct only be criminalised where there is 'substantial wrongdoing'.[13]

3.13 Within those offences that do not meet the maximum penalty unit threshold of 60 penalty units for an individual, there is significant variation in the maximum penalty units attached to the offence. Some of the offences attract maximum penalties as low as one penalty unit.[14]

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7 *Corporations Act 2001* (Cth) s 1041A.

8 Ibid s 153.

9 Ibid s 145(3).

10 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 39.

11 60 penalty units has been chosen as a useful threshold for three reasons. First, the application of strict liability to all physical elements of an offence is generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate): Ibid 23. Secondly, unless the contrary intention appears, a term of 12 months imprisonment can be converted to a pecuniary penalty of 60 penalty units: *Crimes Act 1914* (Cth) s 4B. This is significant as, unless the contrary intention appears, an offence of 12 months imprisonment is an indictable offence: *Crimes Act 1914* (Cth) s 4G.

12 These figures do not add up as neatly as they may seem because of some complexity in determining the penalty applicable to corporations.

13 Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 240; see also Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 12.

14 See, eg, *Income Tax Assessment Act 1936* (Cth) ss 252(3), 252A(1).

Complexity and specificity of criminal offences

3.14 In the *Interim Report* of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Commissioner Hayne observed 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.[15]

3.15 Though many of the Commonwealth statutes reviewed by the ALRC suffer from this tendency, the problem is exemplified in the *Corporations Act*.

Example

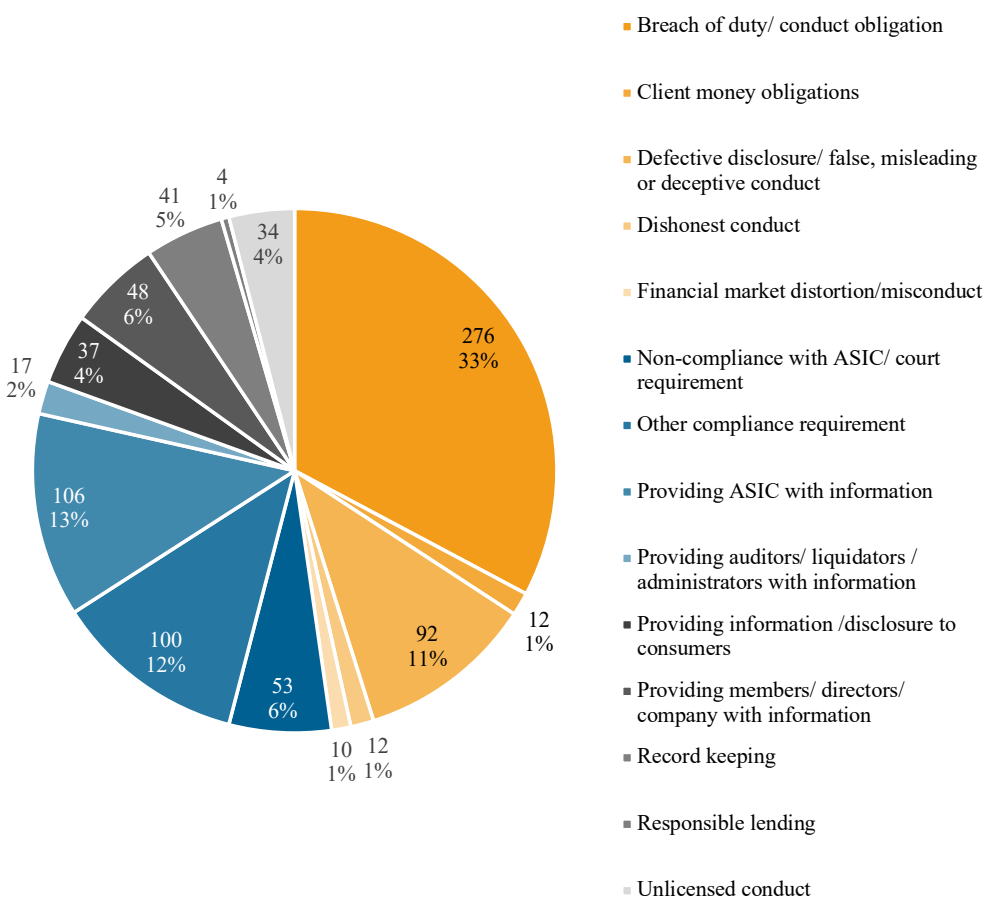
The first criminal offence contained in the *Corporations Act* relates to intentionally or recklessly contravening 'a condition to which an exemption under section 111AS or 111AT is subject'.[16]

15 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) 16 [1.5.3].

16 *Corporations Act 2001* (Cth) s 111AU.

3.16 Grouping offences in the *Corporations Act* by the type of misconduct regulated by the offence is illustrative of the magnitude and scale of the problem. Figure 3-1 shows that approximately one third of the offences contained within the *Corporations Act* relate to a breach of duty or conduct obligation.

Figure 3-1: Types of offences in the Corporations Act[17]



17 The data informing this graph is current only to February 2017.

3.17 The level of minutiae reflected in these offences explains, at least in part, the over-proliferation of offences within the Commonwealth criminal law. Effective regulation of corporate misconduct requires balancing the competing demands of achieving sufficient specificity in offence provisions with the complexity that ensues from excessive specificity therein. The Commonwealth criminal law as it applies to corporations does not currently reflect such a balance.

Identification of criminal offences intended to apply to corporations

3.18 A number of different approaches are taken to identifying offences that seem to contemplate a corporate offender. For example, of the 608 offences contained in the *Criminal Code*, the ALRC identified only 15 that explicitly detail how the offence applies to corporate offenders.[18] Of these, some are drafted in terms that seem to practically limit the offence to natural persons, notwithstanding that the offence is intended to also apply to corporations.

Example

Though s 119.4(4) of the *Criminal Code* explicitly envisages criminal liability attaching to corporations, the offence refers to the offender as 'himself or herself', creating confusion as to its application beyond natural persons.

3.19 In other legislation, the intended application of an offence to corporations is made more explicit. For example, some offences contain elements applicable only to corporations,[19] while others distinguish the penalties applicable to individuals from those applicable to corporations.[20] Other statutes refer to s 4B(3) of the *Crimes Act 1914* (Cth) in a way that appears intended to signal the offence's intended application to corporations.[21]

18 The ALRC included offences that explicitly refer to a body corporate, either in an element of the offence or in the specified penalty.

19 See, eg, *Criminal Code* (Cth) ss 80.1AA, 83.1.

20 See, eg, ibid ss 141.1(1), 474.34, 490.1, 490.2.

21 For example, of the 73 criminal offences contained in the *Banking Act 1959* (Cth), 14 offences (approximately 20%) contain a note acknowledging the operation of s 4B(3) of the Crimes Act (Cth). In the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), 47 offences (approximately 30%) contain such a note. The reviewed statutes are, however, inconsistent in their approach to this matter.

Approaches to strict and absolute liability offences

3.20 As the ALRC has previously observed, 'strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation'.[22] The AGD's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the 'AGD Guide to Framing Offences') states that such liability should be applied only to offences where:

- imprisonment is not available;
- the offence attracts a fine of up to:
    - 60 penalty units for an individual (300 for a body corporate) for strict liability offences; or
    - 10 penalty units for an individual (50 for a body corporate) for absolute liability offences;
- such liability 'is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct'; and
- there are 'legitimate grounds for penalising persons lacking fault'.[23]

3.21 Notwithstanding this guidance, the ALRC identified numerous strict liability offences that exceed the penalty unit benchmarks specified by the AGD Guide to Framing Offences.[24]

3.22 In six of the statutes, more than a quarter of the total criminal offences identified in the legislation attracting maximum penalties of 60 penalty units or above are strict liability offences. These are:

- the *Australian Consumer Law* (55.4%);[25]
- the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) (45.5%);
- the *Therapeutic Goods Act 1989* (Cth) (31.7%);
- the *Work Health and Safety Act 2011* (Cth) (29.2%);
- the *Excise Act 1901* (Cth) (27.1%); and
- the *Fisheries Management Act 1991* (Cth) (25.9%).

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22 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 129 (2016) [14.21].

23 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 23–24.

24 There is some ambiguity in the AGD Guide to Framing Offences in relation to whether a maximum of 60 penalty units is acceptable for strict liability offences. In its calculations, the ALRC has included strict liability offences with a maximum of 60 penalty units in the category of strict liability offences attracting maximum penalties exceeding the acceptable threshold under the Guide. This decision was informed by the observation that the threshold for an indictable offence is 12 months imprisonment (*Crimes Act 1914* (Cth) s 4G) and that 60 penalty units is equivalent to 12 months imprisonment (*Crimes Act 1914* (Cth) s 4B(2)). It has been assumed that a strict liability offence should be below rather than equivalent to this level.

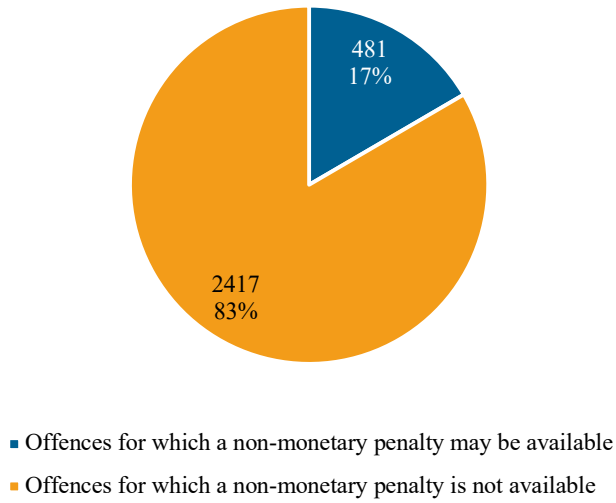
25 *Competition and Consumer Act 2010* (Cth).

3.23 The prevalence of such offences in each statute is contained in Appendix F.

Availability of non-monetary penalties

3.24 Some form of non-monetary penalty is available under eight of the 25 statutes (see Appendix G).[26] The ALRC identified 481 offences within the reviewed legislation for which some form of non-monetary penalty may be available, as depicted in Figure 3-2.

Figure 3-2: Proportion of offences with a non-monetary penalty option available



3.25 Most of the provisions providing for non-monetary penalties require that an application, usually by the regulator, be made to the court before such a penalty may be awarded. Only four of the 22 provisions identified by the ALRC as potentially allowing for a non-monetary penalty do not require an application to be made to the court.

26 The ALRC included as a 'non-monetary penalty': adverse publicity orders; disqualification orders; company deregistration orders; and any unique non-monetary order specific to the statute.

3.26 The most popular form of non-monetary penalty regime amongst these statutes is a combination of provisions that make available adverse publicity orders, disqualification orders, and a range of 'non-punitive orders' (including community service orders, probation orders, disclosure orders, and advertisement orders).[27] Examples are included in the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act)*, the *Australian Consumer Law*, and the *Competition and Consumer Act 2001* (Cth) (*CCA*).

3.27 None of the legislation reviewed allows for a court to order that a corporation be deregistered as a penalty for an offence.

Use of infringement notices

3.28 Infringement notices are administrative penalties, sometimes referred to as 'penalties payable instead of prosecution',[28] that are available for criminal offences and/or contraventions of civil penalty provisions. Under an infringement notice scheme, a non-judicial officer is empowered to give a notice to a suspected offender, alleging the offence and providing that the offender may pay a prescribed penalty to avoid prosecution.[29]

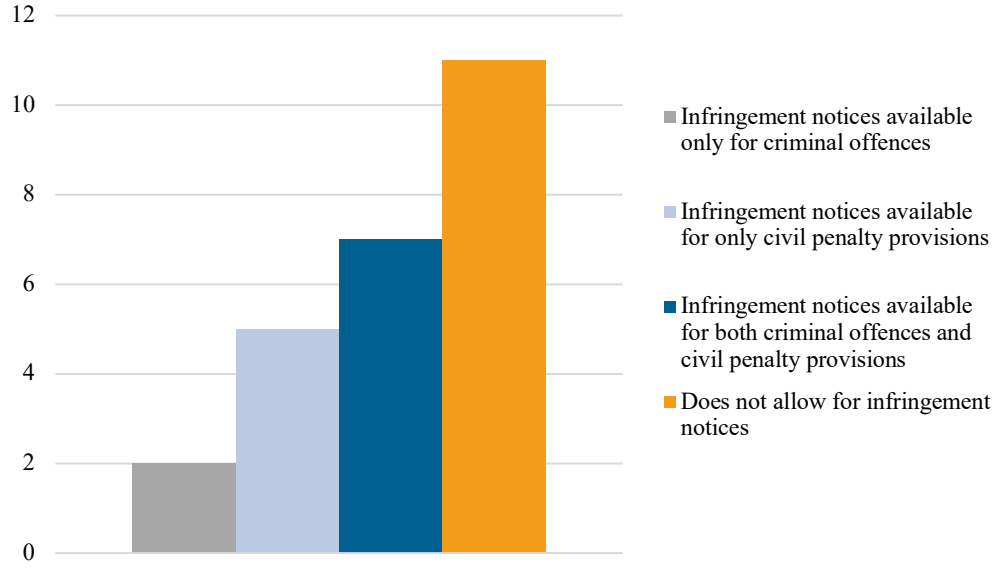
27 For a discussion of non-monetary penalties, see [10.52]–[10.79] below.

28 See, eg, *Excise Act 1901* (Cth) s 129B; *Telecommunications Act 1997* (Cth) s 453A.

29 See Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) 425–462 ('*Principled Regulation*').

3.29 Fifteen of the 25 statutes provide for infringement notice schemes.[30] Within these statutes, the provisions for which infringement notices are available vary. A significant portion of the legislation allows infringement notices to be issued as a penalty for certain civil penalty provisions and criminal offences (see Figure 3-3).

Figure 3-3: Availability of infringement notices across Commonwealth statutes[31]



30 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth); *Australian Consumer Law*; *Competition and Consumer Act 2010* (Cth); *Corporations Act 2001* (Cth); *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Excise Act 1901* (Cth); *Fair Work Act 2009* (Cth); *National Consumer Credit Protection Act 2009* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); *Telecommunications Act 1997* (Cth); *Therapeutic Goods Act 1989* (Cth); *Work Health and Safety Act 2011* (Cth).

31 Though the *Work Health and Safety Act 2011* (Cth) provides for an infringement notice scheme in s 243, the scheme is not operational as the Regulations currently do not prescribe any provision of the Act that is enforceable by infringement notice. For this reason, it is counted as 'legislation that does not allow for infringement notices' in Figure 3-13. Similarly, s 799 of the *Fair Work Act 2009* (Cth) provides that the regulations may prescribe offence provisions for which infringement notices are available. The latest Regulations do not do so, therefore the Act is counted as a statute with 'infringement notices available only for civil penalty provisions' (due to the operation of s 558 relating to civil penalty provision infringement notices).

3.30 Across the legislation containing infringement notice schemes, there is further variation in the volume of criminal offence provisions captured by infringement notices. For example, some statutes specify a limited number of offences for which infringement notices are available,[32] whereas others make infringement notices available for entire classes of offences.[33]

Example

As of March 2019, infringement notices are available under the *Corporations Act* for strict and absolute liability offences, 'other prescribed offences',[34] and 'prescribed civil penalty provisions'[35] (in addition to infringement notices available for breach of the continuous disclosure provisions[36]).

3.31 A number of the statutes allow for changes to the availability of infringement notices by regulation.[37]

3.32 The ALRC's review has also highlighted a number of instances in which infringement notices are available where establishing liability through court processes is arguably necessary or at least desirable.

Example

Contravention of the civil penalty provision relating to unconscionable conduct in the *ASIC Act*[38] can attract an infringement notice.[39] The appropriateness of utilising infringement notices to regulate unconscionable conduct has been questioned, principally because establishing unconscionable conduct involves an evaluative judgment.[40]

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32 See, eg, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 184; *Excise Act 1901* (Cth) s 129B.

33 *Corporations Act 2001* (Cth) s 1317DAN; *National Consumer Credit Protection Act 2009* (Cth) s 288K; *Therapeutic Goods Act 1989* (Cth) s 42YK.

34 *Corporations Act 2001* (Cth) s 1317DAN (c), generally, including failures to notify ASIC of certain matters.

35 *Corporations Act 2001* (Cth) s 1317DAN (d), covering a wide range of obligations, including obligations to provide documents to consumers and prohibitions on conflicted remuneration.

36 *Corporations Act 2001* (Cth) s 1317DAC.

37 Ibid s 1317DAN; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 497; *Fair Work Act 2009* (Cth) s 799; *Superannuation Industry (Supervision) Act 1993* (Cth) s 223A(3); *Therapeutic Goods Act 1989* (Cth) s 42YK(1)(a); *Work Health and Safety Act 2011* (Cth) s 243(4).

38 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA, 12CB.

39 Ibid s 12GXA.

40 *Australian Securities and Investments Commission v Kobelt* (2019) 93 ALJR 743, [2019] HCA 18 [47], [120]; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [2015] FCAFC 50 [259]–[306]; *Unique International College Pty Ltd v Australian Competition and Consumer Commission (ACCC)* (2018) 362 ALR 66, [2018] FCAFC 155 [156]–[157]. There has also been criticism of the availability of infringement notices for breach of continuous disclosure provisions in the *Corporations Act 2001* (Cth): see Rebecca Langley, 'Over Three Years on: Time for Reconsideration of the Corporate Cop's

Use of civil penalty provisions

3.33 Whether and when corporate conduct attracts civil or criminal penalties, or both, varies both within and between statutes.

Example

Under the Corporations Act, a civil penalty may be imposed for:

- failure to give fee disclosure statements to clients;[41]
- continuing to charge fees after an arrangement is terminated;[42] or
- a licensee accepting conflicted remuneration.[43]

However, failure to give a client a statement which sets out the terms of a loan is a criminal offence.[44]

The principled distinction, if any, warranting civil liability for the former and criminal liability for the latter is unclear.

Power to Issue Infringement Notices for Breaches of Continuous Disclosure' (2007) 25 *Corporations and Securities Law Journal* 439.

41 *Corporations Act 2001* (Cth) s 962S(1).

42 Ibid s 962P.

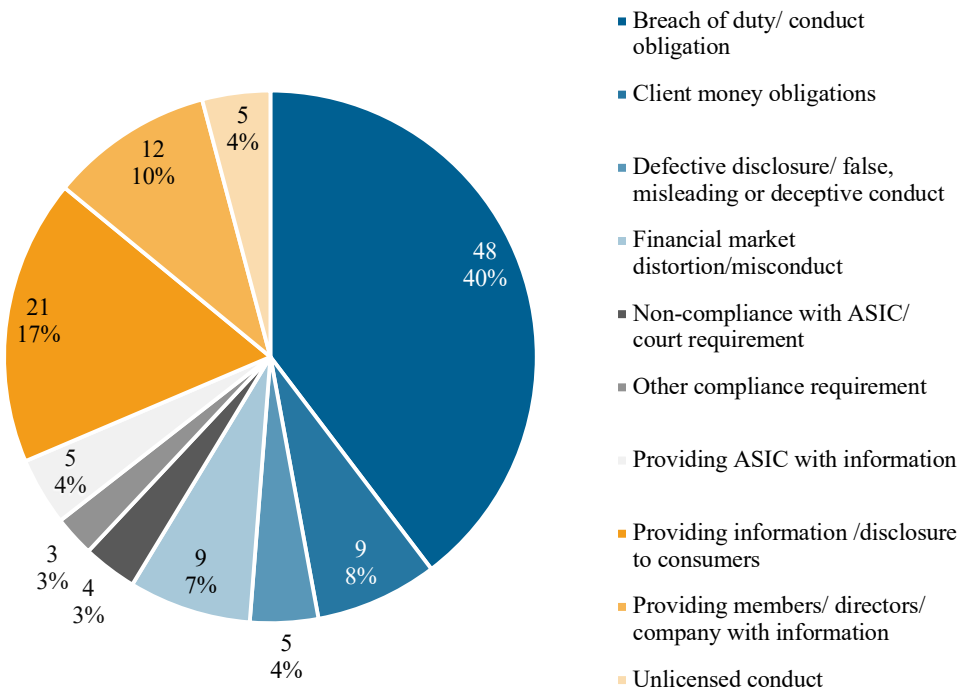
43 Ibid s 963E(2).

44 Ibid s 982C(1).

Types of conduct regulated by civil penalty provisions

3.34 Examining civil penalty provisions within the *Corporations Act* by type also reveals little distinction between the categories of misconduct that attract criminal liability (see Figure 3-1 above) and those that attract civil liability (see Figure 3-4 below).

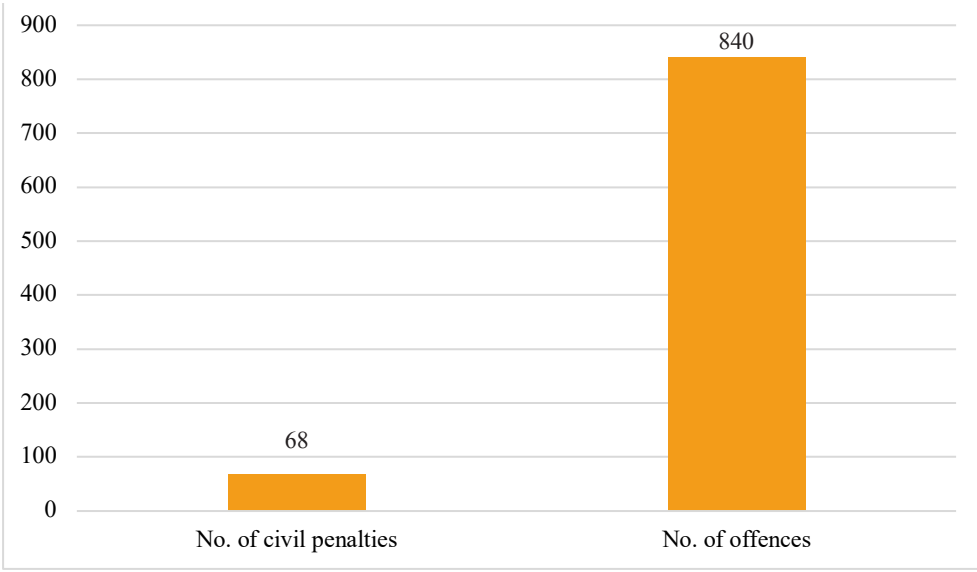
Figure 3-4: Types of civil penalty provision in the *Corporations Act*



Frequency of civil penalty provisions

3.35 There is also a significant difference in the number of civil penalty provisions and offences within the *Corporations Act*.

Figure 3-5: Frequency of civil penalty provisions and offences within the *Corporations Act*[45]



Use of civil penalty provisions as compared to criminal offences

3.36 There is a spectrum of approaches to regulation by civil penalty provision or criminal offence. Contraventions of some statutes are by general rule criminal offences,[46] but for others civil penalties.[47] While there may be legitimate policy reasons for a stronger penalisation regime under the *Work Health and Safety Act 2011* (Cth), for example, given the risk of serious harm to individuals, as a whole, the reviewed statutes do not differentiate between types of conduct and the penalty imposed, such as conduct that causes harm and other more prosaic regulatory requirements.

Dual-track regulation

3.37 The ALRC's review has highlighted an increasing preference for regulation of conduct through both civil penalty provisions *and* criminal offences. In some legislation, the misconduct regulated under each approach is virtually identical.

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45 This data is current to February 2017. The number of civil penalty provisions increased following the ASIC Enforcement Review (see further [3.38]). The ASIC Enforcement Review introduced 6 criminal offences to the *Corporations Act*.

46 See, eg, *Work Health and Safety Act 2011* (Cth).

47 See, eg, *Privacy Act 1988* (Cth).

Example

In the *Australian Consumer Law*, the offences relating to unfair practices contained in Part 4-1 generally mirror those under the equivalent civil penalty provisions in Part 3-1. Both are strict liability, and both attract the same maximum penalties. There is no gradation between civil and criminal liability, and, as such, prima facie the criminal law cannot be said to attach to more egregious conduct.

3.38 The increasing preference for dual-track regulation is evident in recent changes to the *Corporations Act* following the ASIC Enforcement Review between October 2016 and December 2017. Following that review, there are now 121 civil penalty provisions in the *Corporations Act*, 45 of which are also criminal offences. Previously, there were 63 civil penalty provisions, of which 12 were also criminal offences.

3.39 For these dual-track provisions in the *Corporations Act*, the content of the prohibition is the same for both the civil penalty and the criminal offence. The criminal offence requires proof of fault (*mens rea*) in accordance with the *Criminal Code*.[48]

3.40 A dual-track approach is also taken for the cartel conduct provisions in the *CCA*. However, unlike the *Corporations Act*, the *CCA* expressly provides what fault element must be proven for the criminal offence (rather than relying on the *Criminal Code*). There is no fault element for the cartel conduct civil penalty provisions.[49]

Legislative methods for attributing liability to corporations

3.41 Part 2.5 of the *Criminal Code* provides the default method for attributing criminal liability to body corporates under the Commonwealth criminal law. Notwithstanding this, the majority of legislation reviewed by the ALRC expressly excludes the operation of Part 2.5.[50] Instead, these statutes generally contain alternative legislative attribution methods, as shown in Figure 3-6. Only one statute contains an alternative attribution method without excluding Part 2.5,[51] making it possible to attribute liability under either regime.

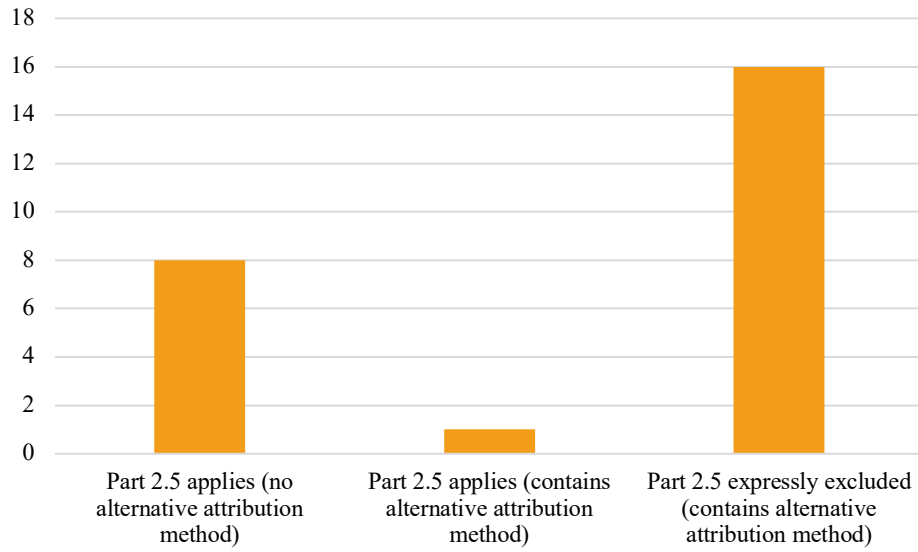
48 The *Criminal Code* ascribes particular fault elements to types of conduct where the provision is itself silent: see *Criminal Code* s 5.6.

49 Cf *Competition and Consumer Act 2010* (Cth) ss 45AF, 45AJ, 45AG, 45AK.

50 See Appendix E.

51 *Therapeutic Goods Act 1989* (Cth).

Figure 3-6: Approaches to attribution in legislation



3.42 The ALRC's consultations with stakeholders have confirmed that an effect of numerous alternative methods of attribution, alongside the proliferation of offences across the legislation, is uncertainty as to the circumstances in which a corporation will be liable for corporate misconduct. Where conduct is potentially caught by multiple legislative regimes, there is a risk that those regimes might provide for different methods of attribution and therefore, potentially different liability for the same conduct.[52]

3.43 An example is extended warranties, which may be subject to provisions of the *ASIC Act*, *Corporations Act* or *Australian Consumer Law*, depending on the circumstances. Though each of these statutes contain similar attribution methods, the provisions are not identical, and circumstances are conceivable whereby the attribution method might result in corporate liability under one Act but not another.

Alternative attribution methods

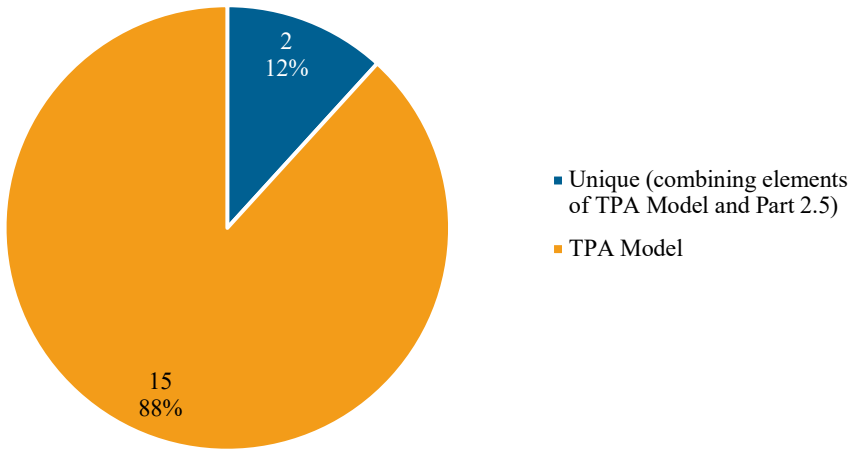
3.44 The ALRC's analysis of the alternative attribution methods has indicated that each 'alternative' method generally adopts the key characteristics of an approach to attribution taken in s 84 of the *Trade Practices Act 1974* (Cth) (the 'TPA Model'). The TPA Model pre-dates Part 2.5 by more than two decades.

3.45 The defining features of the TPA Model are outlined and analysed in Chapter 5.

52 Although this section focuses on legislative methods of attribution, common law attribution is also available (see Ch 5).

3.46 The proportion of alternative legislative attribution methods that reflect the TPA Model is illustrated in Figure 3-7.

Figure 3-7: Type of attribution method adopted in alternative legislative attribution methods



3.47 Appendix E analyses each alternative method by reference to the defining features of the TPA Model to reveal areas of consistency, even though the precise drafting of each attribution method might differ. For example, only one of the reviewed statutes that uses the TPA Model does not contain the words 'on behalf of', being the *Fisheries Management Act 1991* (Cth).

3.48 Part 2.5 (and Chapter 2 generally) of the *Criminal Code* became applicable to offences outside the Code on and after 15 December 2001.[53] In anticipation of that date, amendment bills were passed which dealt solely or primarily with either including or excluding Part 2.5 of the *Criminal Code*, for multiple Acts.[54] Scant explanation is provided for the choice to exclude Part 2.5 in favour of the existing (generally) TPA Model.

3.49 Anecdotal evidence obtained by the ALRC during consultations suggests that the reason for this proliferation of alternative legislative methods of attribution may be as simple as broad satisfaction amongst legislative drafters with the TPA Model at the time Part 2.5 was added to the Commonwealth criminal law.

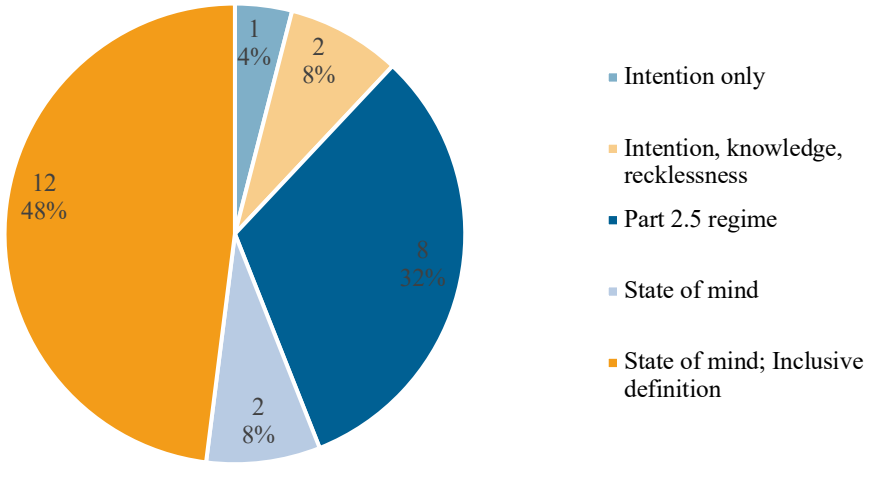
53 *Criminal Code* s 2.2(2).

54 For example, the Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001 (Cth).

Attributable fault elements

3.50 Each attribution provision that resembles the TPA Model applies to establish the 'state of mind' of the corporation. In addition, many of these provisions also contain a definition of 'state of mind' that makes explicit that the term is inclusive of fault elements such as intention, knowledge, or recklessness (see Figure 3-8). Indeed, of the reviewed statutes containing attribution provisions reflecting the TPA Model of attribution, only the attribution provisions contained in the *ASIC Act*, *Australian Consumer Law*, and the *Taxation Administration Act 1953* (Cth) do not contain such inclusive definitions. The attribution method provided for under the *Taxation Administration Act 1953* (Cth) is an additional outlier in that it uses the TPA Model, but applies only to establish a fault element of 'intention'.

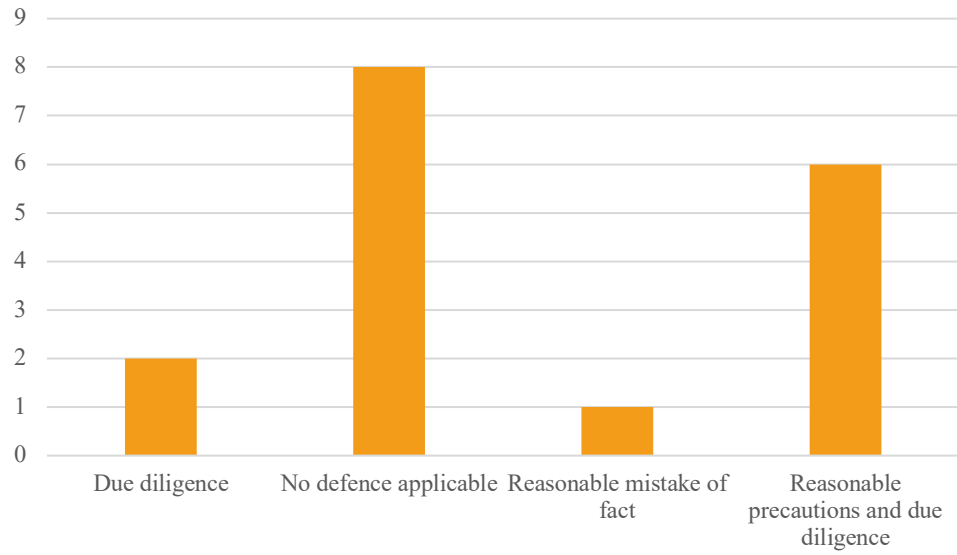
Figure 3-8: Fault elements covered by legislative attribution methods



Defences to corporate liability

3.51 Of the alternative attribution methods contained in the legislation, approximately half contain a defence. The most prevalent defence is that of 'reasonable precautions and due diligence'.

Figure 3-9: Defences in alternative legislative methods



Provisions holding individuals responsible for certain misconduct

3.52 As part of this inquiry, the ALRC also reviewed the individual liability provisions contained in 18 statutes (Appendix I). The focus of this review was to identify provisions where individuals could be made liable for the conduct of another actor, including a corporation, or an agent or employee of a corporation.

3.53 Across the 18 statutes, the ALRC identified 26 separate provisions that establish individual liability for corporate fault in certain circumstances. There are two main types of liability provided in these provisions: 'deemed' liability, where the individual is taken to have engaged in the relevant conduct as a result of their position in the corporation or capacity to influence the conduct, or 'failure to prevent' liability, where the individual commits a separate offence when they fail to prevent relevant conduct engaged in by another actor.

3.54 For the purposes of this analysis, the ALRC did not include directors' duties or accessorial liability provisions, nor provisions that establish direct liability consequent on the individual's personal involvement in the conduct.

3.55 As this analysis relates specifically to the proposals regarding individual liability contained in Chapter 7, the findings are discussed further in that chapter.

Criminal prosecutions of corporate actors

3.56 Based on the data available, the ALRC's key findings are that prosecutions against corporations are:

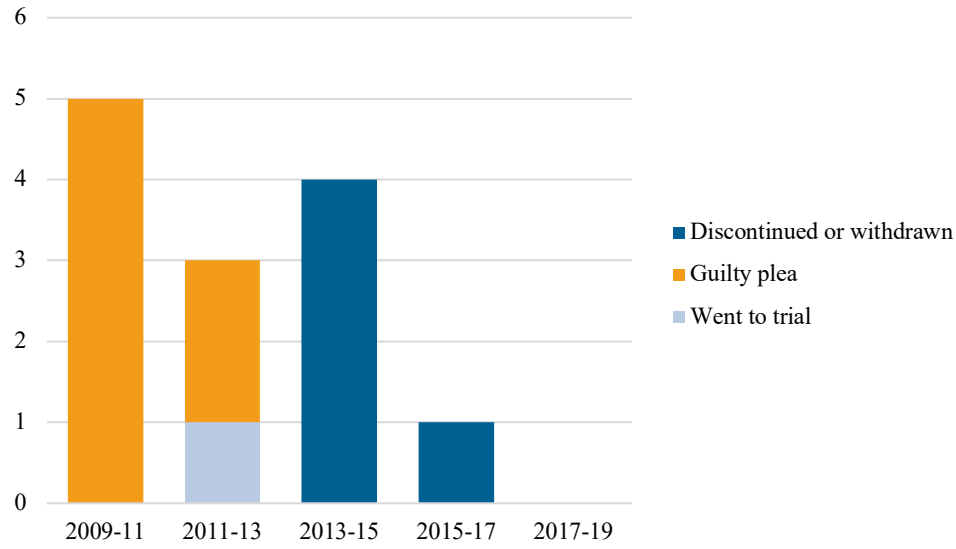
- relatively rare;
- typically long, complex, and contested by well-resourced defendants;
- often do not result in a conviction;
- often not pursued due to practical difficulties and perceived low prospects of success; and
- when pursued, are generally used as a broader strategy to pursue the responsible individuals behind the corporate misconduct and/or because a greater penalty is seen to be warranted.

The CDPP Data

Incidence of prosecutions under the Criminal Code

3.57 Between 30 June 2009 and 30 June 2019, the CDPP commenced a total of 13 prosecutions against corporations for offences under the *Criminal Code*. Seven prosecutions resulted in convictions, each after a plea of guilty was entered. Only one matter went to trial. These figures are presented in Figure 3-10 below.

Figure 3-10: Outcomes of prosecutions of corporations commenced by the CDPP for offences under the *Criminal Code*, between 30 June 2009 and 30 June 2019

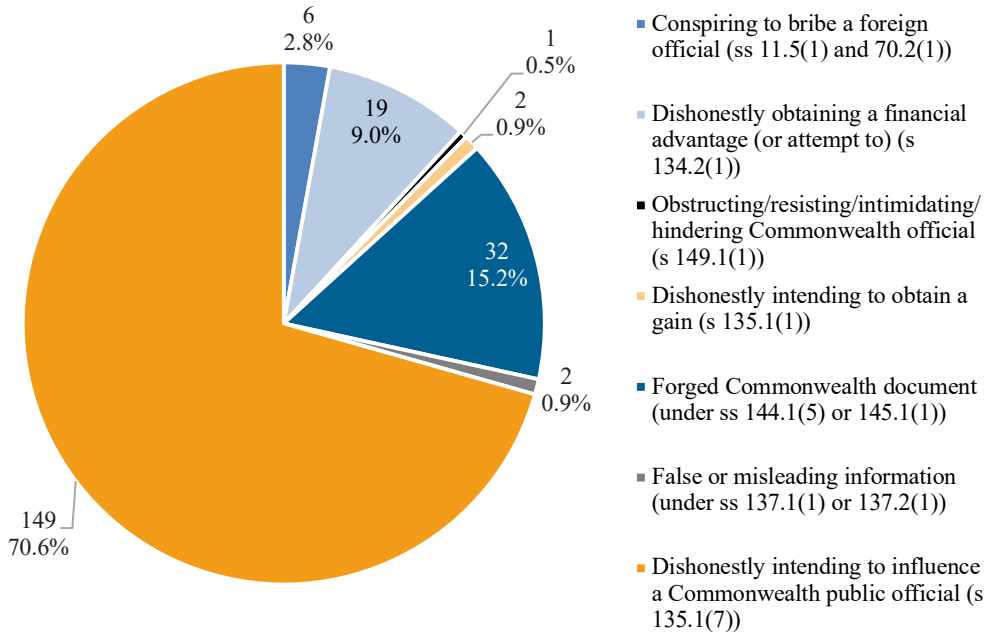


3.58 The matter that proceeded to trial involved two defendants (a captain of a fishing vessel and the corporation that owned the vessel), who both pleaded not guilty to 60 charges of dishonestly influencing a public official contrary to s 135.1(7) of the *Criminal Code*.[55] The corporation was acquitted following a directed verdict from the trial judge, Chief Justice Blow. The captain was found not guilty by the jury.

Types of Criminal Code offences prosecuted

3.59 Across the 13 cases in the CDPP Dataset, a total of 214 charges were brought, involving nine different offences under the *Criminal Code*. The main categories of offences are presented in Figure 3-11. In addition, three cases involved charges under other legislation in addition to charges under the *Code*.[56]

Figure 3-11: Types of *Criminal Code* offences in CDPP prosecutions of corporations from 30 June 2009 to 30 June 2019



Penalties imposed in sentencing for offences under the Criminal Code

3.60 Of the seven cases in the CDPP Dataset that resulted in a conviction of an offence under the *Criminal Code*, no sentence exceeded 50% of the maximum penalty that could have been imposed. A breakdown of the sentences imposed is contained in Table 3-1.

55 Pre-trial hearing: *R v Potter and Mures Fishing Pty Ltd* (2015) 25 Tas R 213, [2015] TASSC 44.
56 See Table 3-1.

Table 3-1: Comparison of sentences imposed and maximum penalty available in successful prosecutions commenced by the CDPP between 30 June 2009 and 30 June 2019 against corporations, for offences under the *Criminal Code*

Corporate Defendant	Successful convictions under the *Criminal Code*	Max penalty per offence under *Criminal Code*[57]	Total max penalty[58]	Sentence imposed	% of max
Securency International Pty Ltd [2012] VSC	3 x bribery of foreign officials: ss 11.5(1), 70.2(1).	100,000 PU[59]	$990,000	$480,000[60]	48.5%
Note Printing Australia Ltd [2012] VSC	3 x bribery of foreign officials: ss 11.5(1), 70.2(1).	100,000 PU[61]	$990,000	$450,000[62]	45.5%
Patience Bulk Haulage Pty Ltd [2011] Geraldton Magistrates Court	1 x obstructing Cth official: s 149.1(1)[63]	2 years = 600 PU	$66,000[64]	$3,500[65]	Approx 5%
Sarai Holdings Pty Ltd [2013] Perth Magistrates Court	2 x dishonestly intending to obtain a gain from Cth entity[66]	5 years[67] = 1,500 PU	$330,000[68]	$20,000	6%
Company Pty Ltd [2014] Brisbane District Court	29 x forgery[69]	10 years = 3,000 PU	$9,570,000[70]	$750,000[71]	Approx 8%

57 To calculate the maximum penalty which may be imposed (unless a contrary intention appears) on a corporation, expressed in penalty units (PU), the term of imprisonment, expressed in months, is multiplied by 25: see *Crimes Act 1914* (Cth) s 4B.

58 The maximum penalty is calculated using the prescribed value of a penalty unit as at the relevant time: Ibid s 4AA(1).

59 The maximum fine could be larger — under the *Criminal Code* s 70.2(5), the maximum is the greater of 100,000 penalty units, or 3 times the value of the benefit obtained by the body corporate, or if the value of the benefit cannot be determined, 10% of the body corporate's annual turnover.

60 Note, had there been no plea of guilty and no offer of future co-operation, the sentence would have been $800,000 (declaration made pursuant to the *Crimes Act 1914* (Cth) s 21E and the *Sentencing Act 1991* (Vic) s 6AAA).

61 *Criminal Code* s 70.2(5): see above.

62 Note, had there been no plea of guilty and no offer of future co-operation, the sentence would have been $750,000 (declaration made pursuant to the *Crimes Act 1914* (Cth) s 21E and the *Sentencing Act 1991* (Vic) s 6AAA).

63 This case also involved a charge under the *Child Support (Registration and Collection) Act 1988* (Cth) s 72A(2), the maximum penalty for which was $1,000.

64 This calculation is approximate as the exact time of the offending is not known by the ALRC. We have used the value of a penalty unit as at 2010 ($110), as this is when the CDPP received the matter.

65 This includes the charge under the *Child Support (Registration and Collection) Act 1988* (Cth).

66 *Criminal Code* s 135.1(1)

67 The maximum penalty has since increased to 10 years.

68 This calculation is approximate as the exact time of the offending is not known by the ALRC. We have used the value of a penalty unit as at 2012 ($110), as this is when the CDPP received the matter.

69 *Criminal Code* s 144.1(5): forging a Commonwealth document with intention that it is accepted as genuine. This case also involved a charge under the *Export Control Act 1982* (Cth) s 14(1), for which the maximum penalty is 5 years imprisonment (or 1,500 penalty units or $165).

70 As at the relevant time, applying penalty unit of $110.

71 Includes penalty for conviction of non-*Criminal Code* offence.

Corporate Defendant	Successful convictions under the *Criminal Code*	Max penalty per offence under *Criminal Code*[57]	Total max penalty[58]	Sentence imposed	% of max
Markwell Pacific Marketing Pty Ltd [2011] Brisbane Magistrates Court	1 x produce false or misleading documents[72]	12 months = 300 PU	$33,000[73]	$10,000	30%
Woods Grain Pty Ltd [2015] Brisbane District Court	68 x dishonestly intending to influence a Cth public official[74]	5 years[75] = 1,500 PU	$11,220,000	$680,000	6%

Incidence of CDPP prosecutions under Commonwealth legislation other than the Criminal Code

3.61 Between 30 June 2009 and 30 June 2019, the CDPP commenced a total of 567 prosecutions against corporations under statutes other than the *Criminal Code*. During this period, 423 of those cases resulted in a plea or guilty verdict.

Types of offences prosecuted by the CDPP under Commonwealth legislation other than the Criminal Code

3.62 Of the prosecutions involving offences under legislation other than the *Criminal Code*, the offences for which the CDPP prosecuted corporations are diverse. The CDPP communicated to the ALRC that many of these offences were regulatory in nature. Examples of the more significant offences for which corporations have been prosecuted by the CDPP are presented in Table 3-2 below.

Table 3-2: Prosecutions commenced by the CDPP under legislation other than the *Criminal Code*[76]

Legislation	Time period	No. of CDPP prosecutions commenced against corporations	No. of CDPP prosecutions commenced against individuals
Agricultural and Veterinary Chemicals legislation[77]	09/02/10 to 14/11/13	6	2
Export Control Act 1982 (Cth) and related regulations	23/05/13 to 07/07/16	4	7

72 *Criminal Code* s 137.2(1). This case also involved a charge under s 67(1) of the *Quarantine Act 1908* (Cth), for which the maximum penalty is 10 years (or 3,000 PU).

73 This calculation is approximate as the exact time of the offending is not known by the ALRC. We have used the value of a penalty unit as at 2011 ($110), as this is when the CDPP received the matter.

74 *Criminal Code* s 135.1(7).

75 The maximum penalty has since increased to 10 years.

76 Prosecutions are included in the table more than once when they involved charges under more than one Act.

77 This legislation consists of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) and the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth).

Legislation	Time period	No. of CDPP prosecutions commenced against corporations	No. of CDPP prosecutions commenced against individuals
Fisheries Management Act 1991(Cth)	14/04/10 to 05/05/15	16	446
Occupational health and safety enactments[78]	08/06/10 to 06/10/16	7	0
Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)	27/07/09 to 11/05/16	15	19
Quarantine Act 1908 (Cth)[79]	20/09/11 to 24/06/16	25	72
Therapeutic Goods Act 1989 (Cth)	27/01/09 to 22/08/17	10	8

3.63 Of the Acts contained in Table 3-2, the *Export Control Act 1982* (Cth) and the *Quarantine Act 1908* (Cth) rely on Part 2.5 of the *Criminal Code* as the applicable method of attribution. The *Therapeutic Goods Act 1989* (Cth) contains a corporate attribution provision based on the TPA Model but does not exclude attribution under Part 2.5. The Agricultural and Veterinary Chemicals legislation provides for a method of attribution that combines the TPA and Part 2.5 attribution methods.

The ASIC Data

Prosecutions commenced by ASIC

3.64 Between 30 June 2015 and 30 June 2019, ASIC internally conducted between 350 and 450 prosecutions annually. ASIC informed the ALRC that these 'high-volume prosecutions concern less serious, strict liability, summary regulatory offences.'[80]

3.65 Of these summary prosecutions conducted internally by ASIC, 90% to 95% concerned breaches by company officers relating to:

- s 475(9) of the *Corporations Act* for failing to provide a report as to affairs to a liquidator; and
- s 530A(6) of the *Corporations Act* for failing to assist a liquidator.

78 This legislation consists of the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) and *Work Health and Safety Act 2011* (Cth).

79 The ALRC has not reviewed the offences contained in the *Quarantine Act 1908* (Cth) because the Act is no longer in force. The *Quarantine Act 1908* (Cth) was replaced by the *Biosecurity Act 2015* (Cth). The last brief received by the CDPP under the *Quarantine Act 1908* (Cth) was received on 24 June 2016, with charges issued on 1 September 2017. As at 30 June 2019, the CDPP has not commenced any prosecutions of corporations under the *Biosecurity Act 2015* (Cth).

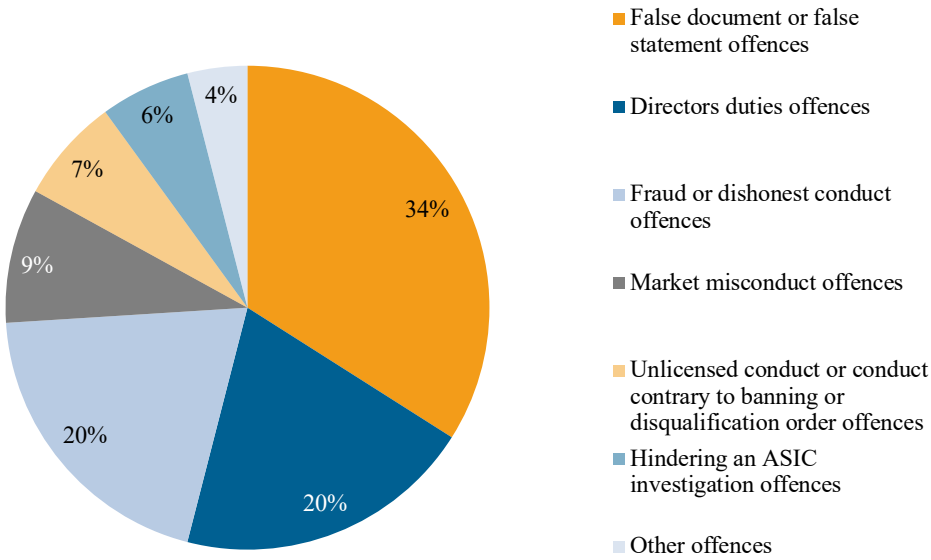
80 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019.

3.66 The remaining 5% to 10% of prosecutions conducted internally by ASIC generally concerned failures to lodge annual reports with ASIC under s 319 of the *Corporations Act*.[81]

Matters referred to the CDPP by ASIC

3.67 In the five-year period, ASIC referred between 35 and 50 briefs of evidence to the CDPP annually. The types of offences for which referrals were made to the CDPP are depicted in Figure 3-12 below.

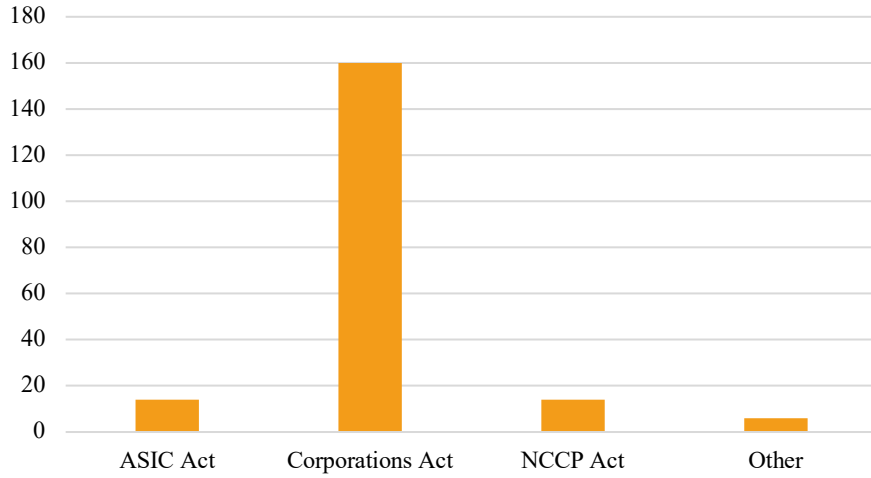
Figure 3-12: Types of offences for which referrals were made to the CDPP by ASIC



81 ASIC only takes criminal action for such offences 'as a last resort': ibid.

3.68 194 matters prosecuted by the CDPP on referral from ASIC were finalised in this period (see Appendix H). A significant proportion of these were for offences under the *Corporations Act*, as depicted in Figure 3-13.

Figure 3-13: Finalised prosecutions over the last five years referred to the CDPP by ASIC[82]



The ACCC Data

Cartel conduct matters referred to the CDPP

3.69 The ACCC has referred a total of 10 cartel matters to the CDPP. The first was referred in 2015. These referrals have resulted in seven prosecutions instituted by the CDPP against a number of corporate and individual defendants as set out in Table 3-3.

82 These figures include prosecutions finalised within the last 5 financial years and not matters currently in litigation or briefs of evidence still being assessed by the CDPP. Prosecutions are included in the table more than once when the prosecution included charges under different offence provisions. These figures do not include the offence provisions that ASIC prosecutes in-house, as those figures will overlap with ASIC's in-house prosecution figures due to the CDPP handling some contested prosecutions and all of the appeals for those matters. These figures are approximate due to the difference in offence provisions recommended at the time of a referral of a brief of evidence (as recorded by ASIC) to those proceeded with throughout the life of a prosecution, and other data limitations.

Table 3-3: ACCC referrals resulting in prosecutions by the CDPP in the last 10 years

Filing date	Proceedings	Status	Corporate defendants	Individual defendants
Jul 2016	*Nippon Yusen Kabushiki Kaisha*[83]	Conviction recorded Penalty: $25 m	1	-
Nov 2016	*Kawasaki Kisen Kaisha Ltd*[84]	Conviction recorded Penalty: $34.5 m	1	-
Feb 2018	The Country Care Group Pty Ltd	Ongoing	1	2
Jun 2018	Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) & Anor	Ongoing	1	1
Aug 2018	Australian and New Zealand Banking Group Ltd, Citibank Global Markets Australia Pty Ltd, Deutsche Bank Aktingesellschaft & Ors	Ongoing	3	6
Apr 2019	Vina Money Transfer Pty Ltd & Ors (joint investigation and referral with AFP)	Ongoing	1	5
Aug 2019	Wallenius Wilhelmsen Ocean AS	Ongoing	1	-

3.70 The CDPP may grant criminal immunity to the first party to report a cartel to the ACCC who fulfils the criteria for immunity under the *ACCC Immunity and Cooperation Policy for Criminal Conduct.*[85] The ACCC has made 24 recommendations to the CDPP to grant conditional criminal immunity in respect of applications under this policy, of which 22 were granted.

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83 *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876.

84 *Director of Public Prosecutions (Cth) v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575, [2019] FCA 1170.

85 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, Annexure B.

Consumer protection provisions

3.71 The ACCC has not referred any consumer protection matters to the CDPP with a recommendation for criminal prosecution in the past 10 years. The ACCC noted to the ALRC in this regard that:

- the criminal offences contained in Chapter 4 of the *Australian Consumer Law* are dual-track offences that 'broadly replicate most, but not all, of the civil consumer protection provisions dealing with unfair trading practices';[86] and
- there are 'substantial civil pecuniary penalties available for contraventions of the *Australian Consumer Law* and mechanisms available to achieve consumer redress and compliance on a civil basis'.[87]

Other offences

3.72 Over the past 10 years, the ACCC has referred three matters to the CDPP concerning failures to comply with notices issued by the ACCC. Two of these matters have been successfully prosecuted by the CDPP to date, both involving single individual defendants.

3.73 The ACCC has also in this time referred one matter against an individual defendant to the CDPP concerning alleged offences of providing false or misleading information or documents to a Commonwealth official or obstruction of a Commonwealth official under the *Criminal Code*.

86 Advice Correspondence from Australian Competition and Consumer Commission to Australian Law Reform Commission, 25 October 2019.

87 Ibid.

4. Appropriate and Effective Regulation of Corporations

Contents

Introduction

4.1 This chapter proposes a new model for corporate regulation that aims to achieve appropriate and effective regulation of corporations. Central to this is the adoption of a principled distinction between criminal and civil regulation of corporations. The model uses a combination of criminal offences, civil penalty proceedings, and civil penalty notices. The ALRC proposes that criminal offences be reserved for conduct where criminalisation is justified. The legislative framework would, however, provide for the capacity to escalate some civil contraventions across the divide into criminal where appropriate.

4.2 In the *Principled Regulation* report (2002), the ALRC adopted the following statement of principle:

> The distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed

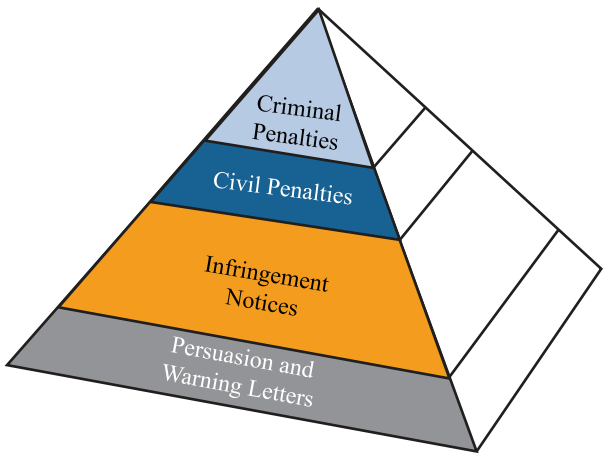
clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.[1]

4.3 Nearly twenty years later, the analysis undertaken during the current inquiry has revealed a lack of a principled distinction between criminal and civil regulation as it applies to corporations. Given the distinct rationale for the existence of corporate criminal responsibility, a principled approach to criminalisation is needed to ensure regulation of corporations is appropriate and effective. The attachment of corporate criminal responsibility must be justified.

Existing regulatory pyramid

4.4 Regulation of corporate behaviour is said to be based on the 'regulatory [or enforcement] pyramid'.[2] This approach is drawn from strategic regulation theory.[3] The existing regulatory pyramid can be seen in Figure 4-1.

Figure 4-1: Existing regulatory pyramid



4.5 Criminal sanctions sit at the uppermost level of the pyramid.[4] The key premise is that more serious contraventions should be met with a more serious response. In the

1 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) 25 ('*Principled Regulation*').

2 See [1.15]–[1.16] above; Vicky Comino, *Australia's "Company Law Watchdog": ASIC and Corporate Regulation* (Lawbook Co, 2015) 113, 129.

3 Ibid 114–6, 130; *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, [2010] NSWCA 331 [692].

4 Comino (n 2) 129; *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487, [2007] FCA 1868 [50]; *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, [2010] NSWCA 331 [692] cf [693]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, [2004] HCA 42 [101], [107]–[108], [111].

Report of the Financial Services Royal Commission, Commissioner Hayne observed that:

> The regulatory pyramid, to which so much reference has been made in evidence and submissions, reflects two very practical observations: not all contraventions of law are of equal significance; and regulators do not have unlimited time or resources. But it is wholly consistent with the analyses that are expressed by the metaphor of the regulatory pyramid, that serious breaches of law by large entities call for the highest level of regulatory response. And that is what has been missing. Too often serious breaches of law by large entities have yielded nothing more than a few infringement notices, an enforceable undertaking (EU) not to offend again (with or without an immaterial 'public benefit payment') or some agreed form of media release.[5]

4.6 In practice, it has been asserted that regulators have been unwilling to use 'the highest level of regulatory response'.[6] Criticism has now led ASIC to pursue a revised enforcement strategy of 'Why Not Litigate?'.[7] ASIC has also indicated it will consider referring a matter to the CDPP where it considers there is 'sufficient evidence to support the view that a criminal offence has been committed and that the circumstances of the matter warrant a criminal prosecution'.[8]

Lack of principled distinction and unnecessary complexity in the law

4.7 Much of the theory underlying the current 'regulatory pyramid' and the debate following the Financial Services Royal Commission has focused on the approach taken to enforcement by regulators. However, enforcement is only one component of a regulatory system.[9] The other component is the establishment of prohibitions or norms of conduct through the substantive law. A significant aspect of this is the classification of contraventions as civil or criminal. Of course, given the consequences that flow from that classification, it is true that it is not possible to wholly separate these questions.

4.8 The focus in this chapter is on developing a framework for charactersing regulatory provisions on a principled basis. This focus has derived from two strands of analysis:

- consideration of the theoretical foundation for the criminal responsibility of a corporation *itself* (if there is to be any justification for a prosecution of a corporation as an entity as opposed to pursuing civil penalties);[10] and
- analysis of a selection of key statutes that regulate corporate behaviour.

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5 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 433.

6 Ibid; see also Comino (n 2) 273.

7 Commissioner Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 'Banking in the Spotlight': 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, Queensland, 30 August 2019).

8 Ibid.

9 See [1.14]–[1.15] above.

10 See Ch 2 above.

4.9 As set out in Chapter 3, the ALRC's analysis of key statutes reveals a proliferation of offences that apply to corporations.[11] As has been observed, the volume of offences is not in itself a problem.[12] Instead, the issues are that:

- there is no principled distinction between criminal and civil prohibitions, even though criminalisation is meant to be reserved for the most serious misconduct;
- there is a great degree of complexity and duplication in the current offence provisions; and
- relatedly, there is an over-reliance on specific rather than general prohibitions.

4.10 Even though criminal offences are meant to be reserved for more serious conduct under the current model of corporate regulation, the great majority of offence provisions address low-level contraventions that could not properly be said to involve any true criminality. In the *Corporations Act 2001* (Cth), for example, there are more offences than there are civil penalty provisions. This has perverse results. For example, a failure to notify a change in office hours to ASIC is solely a criminal offence.[13] On the other hand, market manipulation is a civil penalty provision, though it may attract criminal responsibility if the appropriate fault elements are proved.[14]

4.11 Another problematic aspect of the current regulatory system is the complexity and duplication that exists in the offence provisions. Horder is correct to suggest that making a claim about overproliferation also involves a claim that more general prohibitions are preferable to multiple specific prohibitions.[15] Nonetheless, the ALRC's analysis reveals what appears to be a greater level of complexity than is necessary.[16] Figure 3-1 in Chapter 3 of this Discussion Paper shows the types of offences in the *Corporations Act 2001* (Cth) by category.[17] Out of 840 offences: 33% (276 offences) deal with breach of a duty or conduct obligation; 11% (92 offences) deal with defective disclosure or false, misleading or deceptive conduct; and, 13% (106 offences) deal with failing to provide information to ASIC. In the ALRC's assessment, failure to provide information to ASIC should not be criminalised in 106 separate offence provisions. This is not simply about the number of provisions. Rather, the preference for separate offences obscures any holistic sense of the operation of the law, preventing assessment of the overall utility of such provisions or the development of any body of principle.

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11 See [3.10]–[3.13] above.

12 Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in R A Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 101, 109; James Chalmers and Fiona Leverick, 'Tracking the Creation of Criminal Offences' [2013] *Criminal Law Review* 543, 546; cf Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225.

13 *Corporations Act 2001* (Cth) s 145(3).

14 Ibid ss 1041A, 1308A.

15 Horder (n 12) 109–10.

16 See [3.14]–[3.17] above.

17 See [3.16] above.

4.12 This analysis is consistent with Commissioner Hayne's observation that the current regulatory regime is overcomplicated.[18] According to Commissioner Hayne, the volume, complexity, and deconstructed nature of much of the current regulation makes compliance difficult and also makes it easier to engage in 'check-list' rather than principles-based compliance.[19] Before simplification can occur, the following steps must be taken:

- identification of the principles to which the law was intended to give effect;
- 'examination of how the law fits together'; and
- 'identification of the policies given effect by the law's various provisions'.[20]

4.13 In this context, Chief Justice Allsop has argued:

> Deconstruction and particularism plague our statutes, especially Commonwealth drafting. Corporations legislation, competition legislation and taxation legislation are living examples.
>
> Deconstruction and particularism also plague how we think about regulation and behaviour. An example most readily apparent in the travails of those participating in the Royal Commission is the deconstruction of whole ideas of human relationships such as trust and fiduciary duty into rules, and protocols and checklists, that are to be ticked off and placed in boxes. So much of the conduct that is being exposed is just unthinkable if one simply understood and enforced, with rigour, fiduciary duty and holistically applied it to the whole facts.[21]

4.14 Although the present system is commonly referred to as a 'regulatory pyramid', this can conceal the fact that it was not constructed in an integrated fashion by reference to principle. Incremental modification over time has led to a system that does not adopt a principled approach to the regulation of corporations. It is has not been a considered evolution. On this point, Commissioner Hayne stated:

> As Treasury pointed out, '[p]rinciples-based regulation requires a commitment from policy-makers to the regulatory architecture.' Legislative schemes have commenced with principles at the fore only to have the full suite of prescriptions such as those described here grafted over time.
>
> Lobbying for prescription, detail and tailoring has been a significant contributor to the current state of the law. Requests for greater certainty may be justified and often this can be achieved by regulations or other legislative or regulatory instruments rather than amendment to the principal Act.[22]

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18 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 290–291.

19 Ibid 290–1.

20 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 494–496.

21 The Hon Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Paper, Law Council of Australia and Federal Court of Australia Joint Competition Law Conference Dinner, Sydney, 30 August 2018) [18]–[19].

22 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 495.

Rebalancing criminal and civil regulation

4.15 The proposals contained within this chapter need to be read together, as they form a suite of reforms designed to establish a coherent model that emphasises a principled distinction between criminal and civil regulation of corporations. In outline:

- Proposal 1 sets out the overall model, with provisions regulating the conduct of corporations divided into criminal offences, civil penalty proceeding provisions (CPP provisions), and civil penalty notice provisions (CPN provisions).
- Proposal 2 sets out a statement of principles for legislative drafters in determining whether a particular contravention should be designated as a criminal offence.
- Proposal 3 sets out principles for legislative drafters in determining whether a particular contravention should be a CPP provision or a CPN provision.
- Proposal 4 sets out the procedure for how CPNs would operate in practice.
- Proposal 5 sets out a mechanism for dealing with repeat or flagrant civil contraventions.
- Proposals 6 and 7 set out recommendations for amendments to administrative procedures consequent upon the earlier proposals.

4.16 The effect of these proposals would be to reduce the number of criminal offences applicable to corporations. It would also change the nature of those offences as the overly specific offences would be replaced with more general offences of broad application. Criminalisation would be reserved for the most serious misconduct, to preserve the condemnatory force of the criminal law.

Recalibration of corporate regulation

Proposal 1 Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness):

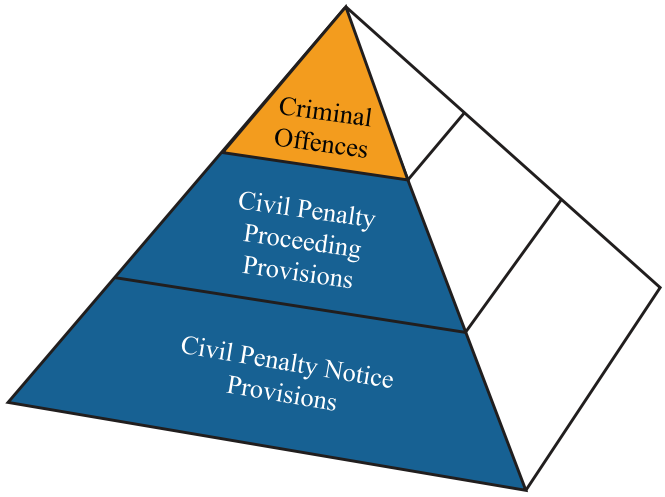
a) criminal offences;

b) civil penalty proceeding provisions; and

c) civil penalty notice provisions.

4.17 Proposal 1 sets out the new regulatory model proposed for corporations by the ALRC. It is elaborated on in Proposals 2 to 5 below. The new regulatory pyramid that is proposed is illustrated in Figure 4-2.

Figure 4-2: Proposed new regulatory pyramid for corporations



4.18 Under this model, the primary form of corporate regulation would be civil rather than criminal. Civil contraventions would be divided between CPP provisions and CPN provisions. CPP provisions and criminal offences would not apply to the same contraventions, unless the criminal offence captures a greater level of wrongdoing (such as by fault element). The majority of minor regulatory contraventions that are currently criminal offences would become CPN provisions and be removed from the court system. Furthermore, CPNs would replace infringement notices if appropriate under Proposal 3. The operation of the model is illustrated in Figure 4-3.

Figure 4-3 Operation of proposed regulatory model for corporations

Criminal offences	Reserved for contraventions where denunciation and condemnation is required and where the deterrent effect of a civil penalty would be insufficient	Would not apply to the same conduct, unless the criminal offence captures a greater level of wrongdoing (such as where the offence requires fault elements to be proven beyond reasonable doubt)
Civil penalty proceeding (CPP) provisions	Judicial process	
Civil penalty notice (CPN) provisions	Administrative process	Previous contravention of a CPP or CPN provision, or flouting or flagrant disregard for the prohibition, may constitute a criminal offence

Civil penalty proceedings and dual-track regulation

4.19 The model in Proposal 1 aims to establish a clear delineation between criminal offences, CPP provisions, and CPN provisions. Such a distinction addresses the increasing availability of civil penalties and criminal prosecution for substantially the same conduct.[23] In some statutes, such as the *Australian Consumer Law*, there is no difference between the content of civil penalty provisions and criminal offences, as the offences involve strict liability.[24] The ACCC has indicated that given the civil penalties available under the *Australian Consumer Law*, 'the ACCC has not referred any consumer protection matters to the CDPP with a recommendation for criminal prosecution over the past 10 years'.[25] Other statutory regimes require proof of a fault element beyond reasonable doubt to establish the offence.[26]

4.20 A dual-track between criminal and civil enforcement is favoured by regulators due to its flexibility. It is said to be supported by strategic regulation theory, as the regulator may select an appropriate sanction based on the seriousness of the conduct.[27] With respect to cartel conduct, the ACCC has a policy of referring 'all serious cartel conduct, of which it has evidence, to the CDPP'.[28] Classification as serious cartel conduct is based on a number of factors.[29] The ALRC recognises that dual-track regulation can facilitate effective enforcement. The need to prove a fault element beyond reasonable doubt may mean that, if only a criminal offence existed, no enforcement proceedings would be commenced at all.[30]

4.21 The ALRC's preliminary view, however, is that as a matter of principle, a CPP should not address identical conduct to that which would a constitute a criminal offence where a corporation is the respondent. If it does, there is no justification for corporate criminal responsibility. Where a criminal offence captures a greater level of wrongdoing (such as by requiring fault elements to be proven beyond reasonable doubt), the existence of dual-track regulation would be consistent with the model proposed.

Civil penalty notices, rather than infringement notices

4.22 The ALRC proposes replacing infringement notices with CPNs. CPNs would be a civil administrative penalty for a fixed number of penalty units. In contrast to infringement

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23 See [3.37]–[3.40] above.
24 See, eg, *Australian Consumer Law* pts 4–1, 5–1.
25 Advice Correspondence from Australian Competition and Consumer Commission to Australian Law Reform Commission, 25 October 2019.
26 *Corporations Act 2001* (Cth) s 1308A; *Competition and Consumer Act 2010* (Cth) ss 45AF, 45AG, 45AJ, 45AK.
27 Comino (n 2) 302–3.
28 Advice Correspondence from Australian Competition and Consumer Commission to Australian Law Reform Commission, 25 October 2019.
29 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct* (2014) [4.1]–[4.2].
30 *Australian Securities and Investments Commission v Whitebox Trading Pty Ltd* (2017) 251 FCR 448, [2017] FCAFC 100 [15].

notices, they would be available for only a confined subset of contraventions and not be available for any contravention that requires an evaluative judgment.

4.23 Infringement notices are presently available for a wide range of criminal and civil contraventions of varying seriousness.[31] This is despite the Government's policy position that they should be restricted to minor contraventions.[32] The removal of existing low-level criminal offences from the criminal sphere under the model means that infringement notices should not be available for the crimes that remain. Infringement notices have been criticised as trivialising crime and diminishing the imposition of stigma that should attend criminal responsibility.[33] As such, it is appropriate for the contraventions that attract any form of notice to be decriminalised.[34]

Principled criminalisation

Proposal 2 A contravention of a Commonwealth law by a corporation should only be designated as a criminal offence when:

a) the contravention by the corporation is deserving of denunciation and condemnation by the community;

b) the imposition of the stigma that attaches to criminal offending is appropriate;

c) the deterrent characteristics of a civil penalty are insufficient; and

d) there is a public interest in pursuing the corporation itself for criminal sanctions.

4.24 The current division of Commonwealth corporate regulation between civil contraventions and criminal offences is incoherent. If there is any area of law that requires consistent application on a sound theoretical basis, it is the criminal law, given the serious consequences that may flow from breach of a criminal offence provision, including to a corporation.

4.25 Currently, it is difficult to see why some contraventions of the law are categorised as civil and some as criminal. This blunts the potential force and utility of corporate criminal responsibility (see Chapter 2). This proposal aims to provide a principled basis

31 See [3.28]–[3.32] above.

32 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 59; Australian Law Reform Commission, *Principled Regulation* (n 1) [12.42].

33 Australian Law Reform Commission, *Principled Regulation* (n 1) [12.12], citing M Bagaric, 'Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot' (1998) 24 *Monash University Law Review* 231, 234.

34 Ibid.

for the criminal responsibility of corporations. It reduces the exposure of a corporation to criminal prosecution so that criminality will only attach where justified.

4.26 Settling upon the principles themselves is a difficult question because of the diversity of theoretical views as to what contraventions should be considered to be criminal.[35] Proposal 2 reflects the ALRC's view that the criminal responsibility of a corporation *itself* can only be justified if the contravention captured by the offence makes the condemnatory force of the criminal law appropriate. The role of stigma is important as the 'bad publicity and stigma of a conviction far outweighs the consequences of administrative sanctions or an adverse decision in civil proceedings and/or the making of civil penalty orders'.[36] Similar criteria have been proposed by the UK Law Commission.[37] The expressive force of the criminal law carries with it an additional deterrent effect over and above a civil penalty, and so criminalisation should also require the deterrent effect of a civil penalty to be insufficient.

4.27 The decision to criminalise conduct is a difficult policy choice. Such a decision should be taken with restraint. This proposal has been developed as guidance to the framers of legislation and legislators. It is necessarily a consideration of the proposed offence in the abstract. It is consistent with judgments as to the relative seriousness of offences made by Parliament when a maximum penalty is set for an offence.

4.28 These principles are necessarily broad. They are designed to guide decision making by drafters and not direct a particular outcome. As a result, they are open to interpretation. The ALRC accepts they may be perceived as somewhat vague. To a certain extent, this must be accepted. There will always be an element of value judgment in the question of policy of whether conduct should be criminalised.

4.29 The approach proposed is desirable as it focuses on the distinctive attributes of the criminal law. However, it has the benefit of not being overly essentialist as to what makes something sufficiently wrongful so as to warrant criminalisation.[38] It is also arguably preferable to an approach that seeks to define, by subject matter for example, an 'economic crime'.[39] Instead, the proposals leave it open to the framer of the legislation to consider what features of the conduct or its consequences may make a contravention deserving of denunciation such that a deterrent effect of a civil penalty is insufficient, and that the additional deterrence and condemnation provided by the criminal law is required. The principles operate as a restraint to ensure the framer has considered whether there is a real need for criminal (rather than civil) regulation of the particular conduct. Some of the considerations that might be relevant, in the context of misconduct by a corporation, include the following matters identified from existing offences:

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35 See [2.12]–[2.26] above.
36 Comino (n 2) 276.
37 Law Commission (UK), *Criminal Liability in Regulatory Contexts* (Consultation Paper No 195, 2010) [1.28]–[1.30].
38 See [2.12]–[2.26] above.
39 See, eg, HM Government and UK Finance, *Economic Crime Plan 2019-22* (2019) 10.

- fraud or dishonesty;[40]
- serious financial misconduct and/or would result in significant economic harm;[41]
- serious harm to individuals or the environment;[42]
- physical injury to an individual;[43]
- conduct repugnant to commonly accepted standards of decency;[44] or
- conduct representing a marked departure from accepted standards of commercial behaviour.[45]

4.30 Given the ALRC's concerns about the proliferation and complexity of offences, framers of legislation should have regard to whether the proposed offence should be so classified having regard to:

- how existing prohibitions are classified; and
- whether the conduct is already proscribed by an existing offence.

Existing guidance for legislators

4.31 Providing guidance for the framers of criminal offences is not a new idea. The AGD Guide to Framing Offences provides that:

> A criminal offence is the ultimate sanction for breaching the law and there can be far-reaching consequences for those convicted of criminal offences. Consequently, Ministers and agencies should consider the range of options for imposing liability under legislation and select the most appropriate penalty or sanction.[46]

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40 See, eg, *Criminal Code* pt 7.3.

41 See, eg, the offence of market manipulation: *Corporations Act 2001* (Cth) s 1041A. The rationale of the offence is tied to the importance of confidence in the honesty and integrity of financial markets: *Joffe v R; Stromer v R* (2012) 82 NSWLR 510, [2012] NSWCCA 277 [34].

42 See, eg, the provisions criminalising illegal trade in fauna and flora under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which are justified by 'the cruel nature of the trade' and its 'potential to devastate and endanger native faunal and floral populations': Samantha Bricknell, *Environmental Crime in Australia* (Australian Institute of Criminology, 2010) 49.

43 See, eg, *Work Health and Safety Act 2011* (Cth), contraventions of which are generally criminal offences because of the type of conduct regulated by the Act, conduct that risks harm to the 'health, safety and welfare' of workers and other persons arising from work: s 3(1)(a). Reckless conduct offences under s 31 of the *Work Health and Safety Act 2011* (Cth) are indicative in applying to 'conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness'.

44 See, eg, *Criminal Code* s 474.34, which makes it an offence for persons who provide content or hosting services not to expeditiously remove abhorrent violent material from the content service. The section is intended to 'reduc[e] the impact and reach of abhorrent violent material sought by perpetrators who intend to spread their violent and extreme propaganda': Explanatory Memorandum, Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 (Cth) 13 [2].

45 See, eg, the prohibitions on insider trading contained in the *Corporations Act 2001* (Cth) s 1043A (to the extent insider trading may be committed by a corporation). Contravention of these provisions warrants criminal responsibility because 'insider trading not only has the capacity to undermine the integrity of the market, it also has the potential to undermine aspects of confidence in the commercial world generally': *Hartman v R* (2011) 87 ACSR 52, [2011] NSWCCA 261 [94].

46 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 12.

4.32 The AGD Guide also states that:

> Factors that should be considered in determining whether to impose a criminal or civil (non-criminal) sanction include:
>
> - the nature of the conduct to be deterred
> - the circumstances surrounding the proposed provision
> - whether the proposed provision fits into the overall legislative scheme
> - whether the conduct causes serious harm to other people
> - whether the conduct in some way so seriously contravenes fundamental values as to be harmful to society
> - whether it is justified to use criminal enforcement powers in investigating the conduct
> - whether similar conduct is regulated in the proposed legislative scheme and other Commonwealth legislation
> - if the conduct has been regulated for some time, how effective existing provisions have been in deterring the undesired behaviour, and
> - the level and type of penalties that will provide deterrence.
>
> In determining whether a criminal or civil sanction should be applied, perhaps the most important factor to consider will be the effect of a criminal conviction. …[47]

4.33 These factors would continue to be relevant under the principles in Proposal 2. The ALRC's proposal simply puts forward a more straightforward principles-based justification for the criminalisation of particular conduct by a corporation.

47 Ibid 13.

Reform of civil penalty provisions

Proposal 3 A contravention of a Commonwealth law by a corporation that does not meet the requirements for designation as a criminal offence should be designated either:

a) as a civil penalty proceeding provision when the contravention involves actual misconduct by the corporation (whether by commission or omission) that must be established in court proceedings; or

b) as a civil penalty notice provision when the contravention is prima facie evident without court proceedings.

4.34 Proposal 3 sets out the principles for distinguishing between the two types of civil contraventions proposed in Proposal 1. Whether a prohibition is a CPP provision or a CPN provision determines whether a regulator must bring court proceeding in respect of a contravention of the provision or whether it must issue a CPN. CPNs would not be available for CPP provisions. The distinction between CPP provisions and CPN provisions is based on whether court proceedings are required to properly establish contravention – that is, whether contravention is prima facie evident. Many existing low-level offences are already framed this way (for example, failures to provide information or lodge documents).

Issues with infringement notices

4.35 The availability of infringement notices is widespread and expanding.[48] Infringement notices are available for both criminal and civil contraventions. They are also used to penalise alleged contraventions of complex and significant civil penalty provisions, such as unconscionable conduct,[49] misleading conduct,[50] and breach of continuous disclosure provisions.[51]

4.36 Infringement notices are attractive to regulators as they:

- enable a penalty to be imposed without the regulator having to prove the offence or contravention in court;
- 'provide a mechanism to encourage compliance by ensuring that the risk of detection of non-compliance is real'; and

48 See [3.28]–[3.32] above.
49 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GXA; *Competition and Consumer Act 2010* (Cth) s 134A; *Australian Consumer Law* s 224.
50 *Competition and Consumer Act 2010* (Cth) s 134A; *Australian Consumer Law* s 224.
51 *Corporations Act 2001* (Cth) pt 9.4AA.

- are a diversionary tool that prevent the criminal justice system being overwhelmed by low-level prosecutions.[52]

4.37 They may 'add to regulatory flexibility, can be proportionate to wrongdoing and may advantage both the regulated and the regulators in disposing of matters quickly and cheaply avoiding use of the courts'.[53] Nevertheless, the power to issue infringement notices for complex civil contraventions has been criticised.[54] It is also arguably inconsistent with the AGD Guide to Framing Offences.[55] Commissioner Hayne observed in his Final Report that:

> Infringement notices are a useful way to deal with lax administrative conduct such as failure to file a return on time. But their use beyond purely regulatory matters will rarely be appropriate. And **if the provision involves contestable matters of judgment** – for example, an alleged breach of the prohibition on false and misleading conduct or the duty of utmost good faith – **the issue of an infringement notice will rarely, if ever, be an appropriate regulatory response**.[56]

Distinguishing CPP provisions from CPN provisions

4.38 In the ALRC's assessment, a CPN would not be appropriate for contraventions that require an evaluative judgment. Unconscionable conduct is a signal example,[57] as is breach of a continuous disclosure provision. With respect to the latter, the ALRC has previously commented that it is

> not convinced that alleged contraventions of continuous disclosure provisions are appropriate contraventions to be dealt with by way of an infringement notice as they involve subjective judgments as to the materiality of information and are, therefore, contraventions involving a 'state of mind' element.[58]

4.39 Prohibitions such as these require a court proceeding to properly establish a contravention. CPNs should not be used simply for regulator convenience where the nature of the contravention means the matter should go before a court. Rather, CPNs should be available for low-level contraventions where liability may be evident prima facie. The proposed distinction between CPP provisions and CPN provisions is consistent

52 Australian Law Reform Commission, *Principled Regulation* (n 1) [12.6].

53 Anne Rees, 'Infringement Notices and Federal Regulation: Wolves in Sheep's Clothing?' (2014) 42 *Australian Business Law Review* 276, 276.

54 Rebecca Langley, 'Over Three Years On: Time for Reconsideration of the Corporate Cop's Power to Issue Infringement Notices for Breaches of Continuous Disclosure' (2007) 25 *Corporations and Securities Law Journal* 439; Michelle Welsh, 'Enforcing Contraventions of the Continuous Disclosure Provisions: Civil or Administrative Penalties' (2007) 25 *Corporations and Securities Law Journal* 315; Rees (n 53) 278.

55 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 59.

56 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 439 (emphasis added).

57 Rees (n 53) 278. This is because it requires an evaluative judgment: *Australian Securities and Investments Commission v Kobelt* (2019) 93 ALJR 743, [2019] HCA 18 [47], [120].

58 Australian Law Reform Commission, *Principled Regulation* (n 1) [12.35].

with the principles in the AGD Guide to Framing Offences for determining when an infringement notice should be available.[59]

4.40 The ALRC acknowledges the difficulties that can exist for regulators in successfully bringing civil penalty proceedings.[60] This does not make enforcement by CPN appropriate. There is a concern that overuse of CPNs for complex contraventions may reduce the quality of justice.[61] Overuse of notices as an enforcement tool may also give the appearance of effective regulation that is in fact illusory.

4.41 Furthermore, some complex contraventions require litigation in court proceedings to ensure the proper decision-making process required to find that a contravention has in fact occurred takes place. Lack of availability of a CPN for a particular contravention does not mean enforcement must always be by CPP. A regulator may enter into an enforceable undertaking or other settlement with the corporation.[62]

4.42 The combined effect of Proposals 2 and 3 can be illustrated as follows:

- Contraventions such as false or misleading representation or unconscionable conduct contrary to the *Australian Securities and Investments Commission Act 2001* (Cth)[63] would continue to be enforced by a CPP.
- CPNs would not be available, for example, for a contravention of a prohibition on unconscionable conduct, in contrast to the present position.[64]
- Other civil contraventions that presently attract a CPP or an infringement notice, such as the obligation to give a client a statement of advice,[65] would be enforced by a CPN only.
- A minor offence, such as failing to notify ASIC of a change in office hours,[66] would no longer be criminal. It would attract a CPN, rather than a CPP, as liability is prima facie evident.

59 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 59.
60 See, eg, Vicky Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37 *UNSW Law Journal* 195.
61 Australian Law Reform Commission, *Principled Regulation* (n 1) [12.12].
62 See, eg, *Telecommunications Act 1997* (Cth) s 572B; *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA; *Competition and Consumer Act 2010* (Cth) s 87B.
63 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DB(1), 12CA, 12CB.
64 Ibid s 12GXA(a).
65 *Corporations Act 2001* (Cth) s 946A(4).
66 Ibid s 145(3).

Operation of CPN provisions

Proposal 4 When Commonwealth legislation includes a civil penalty notice provision:

a) the legislation should specify the penalty for contravention payable upon the issuing of a civil penalty notice;

b) there should be a mechanism for a contravenor to make representations to the regulator for withdrawal of the civil penalty notice; and

c) there should be a mechanism for a contravenor to challenge the issuing of the civil penalty notice in court if the civil penalty notice is not withdrawn, with costs to follow the event.

4.43 Proposal 4 sets out the procedure by which CPNs would operate. It is broadly consistent with current procedures relating to infringement notices, with some modifications to reflect that issuing a CPN would be the sole response to certain contraventions.

Specified penalty

4.44 The penalty payable under an infringement notice is generally set as a percentage of the maximum penalty that a court could impose under the relevant offence or civil penalty provision.[67] If the infringement notice is not paid and the matter is taken to court, a higher penalty is likely.[68] As contravention of a CPN provision would not generally go to court at all, there would be a fixed quantum of penalty units payable under statute where a regulator identifies the existence of the relevant facts indicating a prima facie contravention. It would not be appropriate to give the regulator a discretion to set the penalty under a CPN.[69] Imposing a specified penalty would be consistent with administrative penalties imposed under certain statutes such as the *Taxation Administration Act 1953* (Cth).[70]

Withdrawal of, and challenges to, CPNs

4.45 At present, a corporation issued with an infringement notice may refuse to pay the infringement notice and require the regulator to bring proceedings against it in court for the contravention.[71] The lower penalty payable under the notice is an incentive not to

67 Australian Law Reform Commission, *Principled Regulation* (n 1) [12.6]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 60.

68 Rees (n 53) 289–90.

69 See Australian Law Reform Commission, *Principled Regulation* (n 1) [12.19].

70 Ibid [2.124] and see [2.11] above.

71 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices*

contest the matter.[72] Under the CPN scheme proposed, issue of the CPN is the default remedy for the particular contravention, rather than a choice of enforcement mechanism by the regulator. It is appropriate to:

- allow a contravenor to make representations to a regulator to withdraw the notice; and
- if the notice is not withdrawn, allow a contravenor to challenge the CPN in court.

4.46 The costs of a court challenge to issuance of a CPN would follow the event, with the possibility of cost consequences for both the alleged contravenor and the regulator. This would ensure there is a disincentive for contravenors to challenge a CPN, while also protecting a contravenor's interests if a regulator issues a CPN without a proper basis. It should be open to the court to impose costs on an indemnity basis where the court considers it appropriate.

Punishing repeat or flagrant offending

Proposal 5 Commonwealth legislation containing civil penalty provisions for corporations should be amended to provide that when a corporation has:

a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or

b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition;

the contravention constitutes a criminal offence.

4.47 Proposal 5 recognises that there is a need to be able to escalate a particular contravention within the pyramid, and across the civil/criminal divide, in appropriate circumstances. It addresses concerns that a corporation may treat civil liability as a mere cost of doing business. A repeated or flagrant contravention of a civil prohibition could be seen as deserving of criminal sanctions consistently with Proposal 2.

Repeated contraventions

4.48 The first limb of the proposal is directed to repeated conduct. It would require the corporation to have previously been found to have contravened the relevant CPP provision or to have had a CPN issued that has not been withdrawn or successfully challenged. The escalation of penalties for repeated misconduct already exists within Commonwealth criminal law. For example, s 74(2) of the *Anti-Money Laundering*

and Enforcement Powers (2011) 67.

72 Ibid 60.

and Counter-Terrorism Financing Act 2006 (Cth) criminalises the provision of certain remittance services by an unregistered person. The maximum penalty is 2,500 penalty units for a corporation. If a corporation has already given an undertaking to the Australian Transaction Reports and Analysis Centre ('AUSTRAC') in respect of such conduct, then the corporation commits an offence under s 74(4) and the maximum penalty is 5,000 penalty units. If a direction has previously been made by the CEO of AUSTRAC or the corporation has previously been convicted of an offence against s 74 then the maximum penalty becomes 10,000 penalty units.[73] As the conduct is repeated, the quantum of the maximum penalty for the offence increases.

Flouting or flagrant disregard

4.49 The second limb is directed to the flouting or flagrant disregard of a civil prohibition. This escalation mechanism covers circumstances where a corporation, although not necessarily having been found to have contravened a particular civil provision on a previous occasion, has contravened a particular civil provision to such a degree of magnitude that its conduct demonstrates contumelious disregard of the relevant prohibition. Such a contumelious attitude towards a CPN or CPP provision deserves the condemnatory force of the criminal law. A civil penalty is not enough.

4.50 The anti-money laundering context again provides an example of where the application of this escalation mechanism may be appropriate. In *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited*,[74] the Commonwealth Bank admitted 53,506 contraventions over a three-year period of the requirement in s 43(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to give reports of certain threshold transactions. This is a civil penalty provision. The Federal Court approved a civil penalty agreed by the parties of $700 million. The ALRC does not suggest that the conduct in that particular case would have warranted criminal prosecution. It arose from 'an inadvertent failure to update and configure' the relevant reporting processes.[75] However, civil contraventions of this scale and duration are the types of contraventions that could be captured by this proposed escalation mechanism.

73 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 74(6), (8).

74 *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited* [2018] FCA 930.

75 Ibid [15].

Improved administrative processes

Proposal 6 The Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* should be amended to reflect the principles embodied in Proposals 1 to 5 and to remove Ch 2.2.6.

Proposal 7 The Attorney-General's Department (Cth) should develop administrative mechanisms that require substantial justification for criminal offence provisions that are not consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* as amended in accordance with Proposal 6.

4.51 Proposals 6 and 7 seek to implement Proposals 1–5 within administrative mechanisms of Government.

Amendments to the AGD Guide for Framing Offences

4.52 Proposal 6 proposes amendments to the AGD Guide to Framing Offences. The key part of the proposal recommends amendments to make the Guide consistent with the model proposed in this chapter.

4.53 The following amendments should also be made. First, the removal of Ch 2.2.6, which imposes certain guidelines for strict and absolute liability offences, and which the ALRC has found are frequently departed from.[76] Second, the removal of Annexure A, which provides a comparison of offences based on penalty, and which is honoured more in the breach than in observance.

4.54 In addition, it is proposed that a specific principle be added to the AGD Guide to Framing Offences to combat the duplication and complexity that has been identified. This principle is already one of the listed factors to consider when determining whether to create an offence.[77] The ALRC suggests it needs to be given greater prominence.

Requiring drafters to justify creation of criminal offences

4.55 The success or otherwise of the principled approach to the appropriate and effective regulation of corporations proposed in this chapter depends upon its adoption by the framers of legislation and the legislature itself. In the main, the principles contained in the AGD Guide to Framing Offences are useful. The problem, identified by the ALRC, is that they are often departed from.

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76 See [3.20]–[3.23] above.

77 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 13.

4.56 The ALRC therefore proposes that the Attorney-General's Department (Cth) develop administrative mechanisms that require substantial justification for deviation from the AGD Guide to Framing Offences as amended in accordance with the proposals in this chapter. The AGD Guide to Framing Offences currently provides as follows:

> Where an offence, infringement notice scheme, or enforcement power proposal is novel, is not addressed by the advice in the Guide, or involves a departure from a fundamental principle of Commonwealth criminal law, you should contact the Criminal Justice Division. The Criminal Justice Division is also available to answer general questions in relation to this Guide.
>
> Instructing agencies should contact the Criminal Justice Division at an early stage in the legislative process if proposed provisions would depart from a fundamental criminal law principle.[78]

4.57 While the Criminal Justice Division may be consulted, that consultation is not leading to consistency. The ownership of particular legislation by other departments has resulted in inconsistent legislative schemes. This underpins the lack of principled coherence that has been identified. A principled approach to corporate regulation can only be maintained if there is some restraint upon the ability of legislative framers to depart from the principles — particularly in relation to the criminal law, where the full powers of the State should be enlivened appropriately. Such a restraint should be developed.

78 Ibid 8.

5. Current Approaches to Corporate Attribution

Contents

> This weed is called *corporate criminal liability (herba responsibilitas corporationis M*., for those who prefer the botanical term). Nobody bred it, nobody cultivated it, nobody planted it. It just grew.[1]

Introduction

5.1 There are currently multiple methods of attributing criminal and civil liability to a corporation.[2] Part 2.5 of the *Criminal Code* attempted to provide a single innovative and comprehensive method, however, the evidence collated in Chapter 3 demonstrates a preference for alternative statutory methods. In some cases, multiple methods may be applicable to the same conduct.

5.2 This chapter sets out the history of corporate criminal responsibility, comparative approaches and provides an analysis of the current law. It provides the context for Chapter 6 which sets out proposals for reform of the statutory approach to attributing criminal liability to companies.

Methods of attributing responsibility

5.3 'Historically, the attribution to a company of rights, duties and liabilities was conceived of entirely in terms of the principles of agency',[3] and indeed, at least in

1 Gerhard OW Mueller, 'Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability' (1957) 19 *University of Pittsburgh Law Review* 21, 21.

2 See Appendix E.

3 Ross Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 *Corporations and Securities Law Journal* 168, 169.

the fifteenth century, corporations could not be criminally responsible for an offence.[4] There are now multiple ways by which corporate persons may assume the burdens of individuals.

5.4 There are both common law and statutory methods for attributing liability to corporations. These embody different theories of corporate personality and therefore different ways in which attribution can occur — either directly (the company did the conduct and/or had the state of mind) or indirectly (derivative attribution — the company is responsible for an individual's conduct and/or state of mind).

5.5 However, both models of rendering corporations criminally liable 'share a desire to adapt and imitate the imposition of criminal liability on human beings', and they start with considering the behaviour and (if necessary) the mental state of a human, and then rely on an auxiliary legal structure to transfer the liability to a corporation.[5]

5.6 An alternative contemporary approach is 'organisational liability', or the 'holistic' model, which aims to reflect the nature of a corporation as a collection of systems and relationships.[6] This is also a form of direct liability – the corporation itself acts (or fails to act) thus committing criminal activity.

5.7 An entirely separate way of holding companies to account for criminal wrongdoing is through bespoke criminal offences, drafted with a corporate body as the intended actor. One such model of offence provision is a 'failure to prevent' offence.[7] Under this type of offence, a corporation is liable if:

- An offence is committed by a natural person who is relevantly connected[8] to the corporation; and
- The corporation failed to exercise due diligence or to take reasonable precautions/ measures to prevent the offence.

Vicarious liability

5.8 In Australia, there is a common law presumption against vicarious liability for criminal wrongs. Indeed, common law vicarious criminal liability has applied only in the crimes of public nuisance and criminal libel.[9]

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4 See LH Leigh, 'The Criminal Liability of Corporations and Other Groups' (1977) *9 Ottawa Law Review* 247, 247, fn 2.

5 Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4(1) *Buffalo Criminal Law Review* 641, 651.

6 See Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Sydney Law School Legal Studies Research Paper No 17/14, University of Sydney, February 2017) 3.

7 Discussed further in Ch 6.

8 See [5.84] and Table 5.1 below.

9 IM Ramsay, RP Austin and HAJ Ford, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) [16.120.3]; citing *R v Kellow* (1912) 18 ALR 170, [1912] VLR 162.

5.9 However, this immunity of employers from vicarious criminal liability, can be displaced by statute.[10] By 1921 in Australia, bodies corporate were being held vicariously liable not only for strict liability offences, but also for offences with a mens rea.[11]

5.10 The High Court of Australia, in *R v Australasian Films Ltd*, adopted the reasoning from the English expansion of vicarious liability in *Mousell Bros v London and North-Western Railway Co*,[12] stating:

> the intention was to make the principal responsible for an act done by his agent or servant in the course of his employment and for the state of mind of the agent or servant in doing that act. Adopting the language of Atkin J [in *Mousell*[13]] we think that the principal is liable in any case in which his servant or agent in the course of his employment 'commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No mens rea being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation.'[14]

5.11 In *Mousell*, Atkin J explained that whether the principle of vicarious liability was justifiably applied to offences requiring proof of *mens rea* required consideration of legislative intent:

> To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.[15]

5.12 Vicarious liability focuses purely on the relationship of principal and employee or agent. If the agent or employee is acting within the scope of the employment and for the benefit of the employer, it is unnecessary to consider the position the employee occupied, or the culpability of the principal.[16] In particular, at common law, it is not a defence for a corporation to prove that it exercised due diligence or reasonable measures to prevent the conduct.

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10 *Tiger Nominees v State Pollution Control Commission* (1992) 25 NSWLR 715, [1992] NSWCCA (17 February 1992) 718–9 (Gleeson CJ): where there is a clear intention to do so, based on the language and purpose of the statute, the nature of the offence and the nature of the obligation imposed by the statute.

11 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility* (Report, December 1992) ('MCCOC Report') 107, citing *R and Minister for Customs v Australasian Films Ltd* (1921) 29 CLR 195.

12 *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836.

13 Ibid 845–6.

14 *R and Minister for Customs v Australasian Films Ltd* (1921) 29 CLR 195, 217.

15 Ibid.

16 See Brent Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 *Adelaide Law Review* 285, 287: 'vicarious liability is a species of strict responsibility; it is not contingent on organisational blameworthiness'.

5.13 Consequently, it has been observed that, although the wide principles of vicarious liability may be appropriate to apply to civil wrongs, they may be out of place in criminal law.[17]

5.14 Moreover, vicarious liability is also criticised as being under-inclusive for failing to capture circumstances in which there is corporate blameworthiness but no underlying individual fault from which liability can be attributed.[18]

Comparative analysis

5.15 The vicarious liability method of attribution has been adopted in jurisdictions such as the United States and South Africa. The use of this method has the advantage of being efficient and expedient.[19]

5.16 As applied federally in the United States, the conduct of any agent or officer acting within the scope of his or her authority and, at least in part, for the benefit[20] of the company, can be attributed to the corporation. Under this approach 'the corporation may be criminally bound by the acts of subordinate, even menial, employees'.[21]

5.17 Despite the broad operation of this vicarious liability model for corporate attribution, there is no due diligence defence in the United States. That is, lack of culpability on the part of the corporation is not a defence.

5.18 Instead, compliance programs are considered as a mitigating factor when assessing culpability in sentencing.[22] This has led to criticisms of inefficiency resulting from the fact that firms with the most effective internal compliance and policing run a higher risk of exposing their own liability. Notably, the American Law Institute departed from this approach and included a due diligence defence in the Model Penal Code, adopted, at least in part, by most states.

5.19 Vicarious liability is popular among some stakeholders in the UK. For example, the Serious Fraud Office in the UK has proposed replacing the identification doctrine with a vicarious liability model — a position that is supported by Transparency International UK.[23]

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17 Ramsay, Austin and Ford (n 9) [16.180].

18 Eric Colvin, 'Corporate Personality and Corporate Crime' (1995) 6(1) *Criminal Law Forum* 1,8.

19 Reem Radhi, 'The Standard of Liability for Corporate Crime: What Can Other Jurisdictions Learn from Canada' (2017) 17 *Asper Review of International Business and Trade Law* 163.

20 Or with the intent to benefit: Dixon (n 6) 4.

21 *Standard Oil Co v United States* 307 F2d 120, 127 (5th Cir, 1962).

22 Dixon (n 6) 251.

23 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) 31 (fn 128). While there are also circumstances in which the vicarious liability model is employed in the UK, its application is normally restricted to strict liability offences: Law Commission (UK), *Criminal Liability in Regulatory Contexts* (Consultation Paper No 195, 2010) 187–8, 198, 207. For example, under s 2 of the *Health and Safety at Work etc Act 1974* (UK) an employer has a duty 'to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. It is an offence under s 33 'to fail to discharge' this duty.

5.20 However, other jurisdictions, like Canada, have expressly rejected the vicarious liability model because it imposes the stigma of a criminal offence on a corporation when its actions might not be morally blameworthy.[24]

Identification theory

5.21 The English courts developed an approach to attribution known as 'identification', 'alter ego', 'directing mind and will', or the 'organic approach'.[25] Under this methodology, the actions and state of mind of certain individuals are deemed to be the acts and state of mind of the company — that is, the corporation has direct liability, as if the acts and state of mind were the acts of the company.[26]

5.22 Since 1944, direct criminal responsibility could be attributed to a corporation for the conduct of very senior officers — acting *as* the company.[27]

5.23 This doctrine developed further, in particular in the leading case of *Tesco Supermarkets Ltd v Nattrass* (*Tesco*),[28] to look to 'whether the individual actor had been invested by proper authority with managerial power and responsibility over a significant aspect of the corporation's business.'[29]

5.24 A further key development in identification theory was the case of *Meridian Global Funds Management Asia Ltd v Securities Commission* (*Meridian*),[30] in which the test expanded[31] the potential persons whose conduct and state of mind could be attributed to the company, by reference to the nature of the offence and the policy of the enabling statute:

> [T]here is no one answer to the question whether the criminal actions of employees (or directors or contractors) of a company can be counted as the actions of the company. In some cases it is necessary to fashion a special rule of attribution. Depending on the scope of the rule, the actions of the employees may or may not be attributed to the company. The scope of the rule will depend upon the court's interpretation of the terms of the offence and the policy of the enabling statute.[32]

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24 Todd Archibald, Ken Jull and Kent Roach, 'Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer' (2013) 60 *Criminal Law Quarterly* 386, 386–7 (quoting the Government of Canada).

25 Grantham (n 3) 170.

26 Arlen Duke, *Corones' Competition Law in Australia* (Lawbook Co, 7th ed, 2019) 298.

27 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146.

28 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

29 LH Leigh, 'The Criminal Liability of Corporations and Other Groups: A Comparative View' (1982) 80(7) *Michigan Law Review* 1508, 1514.

30 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 3 All ER 918 ('Meridian').

31 See C*ommonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [2016] FCAFC 186 ('*Kojic*'). Justice Edelman at [97] referred to *Meridian* as a 'rejection of the "directing mind and will" rule as a universal rule of attribution.'

32 *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2006) 161 A Crim R 250, [2006] VSC 171 [8] ('*ABC v Wallace'*), citing Lord Hoffmann in *Meridian* (n 30) 507E.

5.25 The *Meridian* approach is a more nuanced manifestation of the identification theory in *Tesco*. As explained by Bell J, in *ABC Developmental Learning Centres Pty Ltd v Wallace*:[33]

> Where the employees are low-level, as in this appeal, the company can still be identified with their actions if this is required by the terms of the offence and the achievement of the policy objectives of the enabling statute.[34]

5.26 In situations where an express statutory method of attribution exists, either method can be relied upon.[35]

Comparative analysis

5.27 In the UK, the identification doctrine is interpreted narrowly.[36] The Privy Council attempted to address this in *Meridian*, where Lord Hoffman encouraged a more context-driven inquiry to corporate attribution. Instead of focusing solely on the 'directing mind and will' of the company, his Lordship concluded that the inquiry should be as to '[w]hose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?'[37] However, subsequent judicial treatment in the criminal law has largely maintained a commitment to the 'directing mind and will' approach and has treated *Meridian* as a re-statement of existing principles.[38]

5.28 The identification doctrine in the UK was recently modified in an express statutory method of attribution for the particular offences in the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).[39] Under this Act, an organisation can be held liable

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33 *ABC v Wallace* (n 32).

34 Ibid [10].

35 See for example *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [2000] FCA 1188 [59].

36 Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Springer, Netherlands, 2011) 3. It is anticipated that the UK High Court will have clarified its view of the impact of *Meridian* on identification theory and *Tesco* in a judgement delivered in 2018 dismissing charges brought by the Serious Fraud Office against Barclays Bank Plc and Barclays Plc in relation to capital raising arrangements with Qatar Holding LLC and Challenger Universal Ltd. The charges were dismissed by the Crown Court on 21 May 2018, and applications seeking to reinstate the charges were dismissed by the Crown Court on 23 July 2018, and by the High Court on 26 October 2018. The reasons for the Courts' decisions are suppressed, awaiting prosecutions of related individuals.

37 *Meridian* (n 30) 507. Despite the uncertainty to this approach, it was nevertheless commended by the UK Law Commission: Law Commission (UK) (n 23) 5.103–5.110; Jennifer Payne, 'Corporate Attribution and the Lessons of Meridian' in Paul Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing) 357, 363.

38 Payne (n 37) 364–5; *Attorney-General's Reference (No 2 of 1999)* [2000] EWCA Crim 90. This despite Lord Hoffman's statement in *Meridian* that it is a 'question of construction in each case' and will not always be necessary to inquire as to whether an individual could have been described as the 'directing mind and will' of the company: *Meridian* (n 30) 927–8. Note that *Meridian* is not binding on the UK, as it was a decision of the Privy Council, on appeal from New Zealand.

39 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19. The corporate manslaughter offence displaced gross negligence manslaughter for corporations and other organisations, but offences in the *Health and Safety at Work etc Act 1974* (UK) continue to play an important role in regulating corporate conduct. See *Crown Prosecution Service: Corporate Manslaughter* (2018) <https://www.cps.gov.uk/legal-

for manslaughter on the basis of the actions of its 'senior management' — as opposed to the more restrictive 'directing mind' test at common law.[40] In addition, there is no need for a specific individual to be identified amongst senior management.[41] While it is described as 'an improvement on the identification doctrine', the fact that there have only been 25 convictions over ten years indicates that '[t]he chances of any organisation being convicted of corporate manslaughter in relation to any death is only very marginally higher than it was under the common law'.[42]

5.29 Other common law jurisdictions, including Canada and New Zealand, have also adopted the identification doctrine. In Canada, the identification doctrine was adopted in the case of *Canadian Dredge & Dock Co v R*, where it was given fairly broad treatment insofar as the Supreme Court of Canada indicated a willingness to look to function over form when identifying the directing mind.[43]

5.30 The common law approach in Canada has been modified by statute. In 2003, Canada amended its Criminal Code.[44] The changes move the inquiry from the organisation's 'directing mind' and extends it to the organisation's 'senior officers'.[45] This extends to include 'a director, partner, employee, member, agent or contractor of the organization' provided they play 'an important role in the establishment of an organization's policies' or are 'responsible for managing an important aspect of the organization's activities'.[46] Courts have interpreted senior officers broadly — including independent agents and identifying the legislative intent as extending the scope of liability from the boardroom to the plant floor.[47]

Statutory methods of attribution

5.31 Alternative methods of attribution have been crafted by express statutory provisions. As explained in Chapter 3, the ALRC has reviewed several statutes and identified whether they include an express attribution provision or adopt (by default or expressly) the attribution method in Part 2.5 of the *Criminal Code.*

guidance/corporate-manslaughter>; Sentencing Guidelines Council (UK), *Corporate Manslaughter & Health and Safety Offences Causing Death Definitive Guideline* (UK Government, 2010).

40 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19 s 1(3).

41 Pieth and Ivory (n 36); *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 8(3); Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 — A 10-Year Review' (2018) 82(1) *The Journal of Criminal Law* 48.

42 Roper (n 41).

43 *Canadian Dredge & Dock Co v R* [1985] 1 SCR 662; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 92. See also Leigh (n 4) for a detailed overview of the development of identification theory, including its application in Canada.

44 Archibald, Jull and Roach (n 24).

45 *Criminal Code*, RSC 1985, c C-46 ss 22.1, 22.2.

46 Ibid s 2.

47 *R v Pétroles Global inc* (2013) QCCS 4262, 42. See also *R v Metron Construction Corporation* [2013] OJ No 3909 (QL), 2013 ONCA 541. The Ontario Court of Appeal found a construction company liable for the actions of a site supervisor who was hired by a project manager the company had retained — an individual who would be well beyond the scope of the traditional directing mind test.

5.32 It is possible for several approaches to attribution to be considered[48] and multiple methods to be applicable to the same conduct. This section considers Part 2.5 of the *Criminal Code* and an alternative statutory method of attribution, which we will refer to as the 'TPA Model'.

Part 2.5 of the *Criminal Code*

5.33 The purpose of Chapter 2 of the *Criminal Code* is to:

> codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.[49]

5.34 Chapter 2, which includes Part 2.5 - Corporate criminal responsibility, applies to all offences against the *Criminal Code*, and became applicable to all other Commonwealth offences on and after 15 December 2001.[50] The full text of Part 2.5 is reproduced at Appendix K.

5.35 Thus, unlike s 84 of the *Trade Practices Act 1974* (Cth) (discussed in detail below), the common law rules of attribution such as those in *Meridian* are displaced by Part 2.5, unless Part 2.5 is expressly excluded from operation.

5.36 Section 12.1, in Part 2.5 of the *Criminal Code,* states that:

> (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
>
> (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

5.37 The structure of Part 2.5 separates attribution into:

- General Principles (s 12.1);
- Physical elements (s 12.2);
- Fault elements other than negligence (s 12.3);
- Negligence (s 12.4);
- Mistake of fact (strict liability) (s 12.5); and
- Intervening conduct or event (s 12.6).

5.38 There has been very little judicial consideration of Part 2.5, and therefore much of the interpretation below is reliant on ordinary principles of statutory interpretation.

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48 See, eg, *Australian Securities and Investments Commission (ASIC) v Managed Investments Ltd* (No 9) (2016) 308 FLR 216, [2016] QSC 109 ('*ASIC v Managed Investments (No 9)*').

49 *Criminal Code* s 2.1.

50 Ibid s 2.2.

Physical elements

5.39 The *Criminal Code* uses traditional agency principles to establish the liability of a corporation for the physical elements of an offence.[51] Section 12.2 requires the physical element of the offence to be committed 'by an employee, agent or officer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority'.

5.40 This provision is broader than the identification doctrine;[52] all employees' conduct can be attributed directly to the corporation. It does not, however, extend to the conduct of persons *at the direction* (or with the consent or agreement) of an employee, officer or agent, as provided for in other Commonwealth legislation.[53] Although broad, this provision does not impose vicarious liability as the *Criminal Code* requires the establishment of fault directly on the part of the corporation.[54]

5.41 The inclusion of the word 'scope' in s 12.2 may broaden the category of persons whose conduct could establish the physical element of an offence attributable to a corporation because:

> the scope of a person's employment is not necessarily limited by what he or she has 'actual or apparent authority' to do. For if there was a limit, at least in the case of a junior employee, it frequently would be possible to exclude the operation of the criminal law by arguing that the employee did not have the 'actual or apparent authority' to commit an unlawful act. The inclusion of both terms arguably ensures that the individuals, with whose conduct can be attributed to the body corporate, must at least have been purporting to act in their capacity as officers of the body corporate.[55]

5.42 The use of the word 'apparent' in s 12.2 reflects the common law rules of ostensible or apparent authority in situations of corporate contracting, as well as aligning with the definition of 'officer' in s 9 of the *Corporations Act 2001* (Cth).[56]

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51 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) 285.

52 Tahnee Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 259.

53 For example, s 84(2) of the *Competition and Consumer Act 2010* (Cth). See Clough and Mulhern (n 43) 144.

54 MCCOC Report (n 11) 109. See also Woolf (n 52) 259.

55 Robert Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties, Policy Principles and Practice & Government Regulation, Sydney, 9 June 2001) 3.

56 Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40(3) *UNSW Law Journal* 25, 1186 referring to *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 and *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Address Co Pty Ltd* (1975) 133 CLR 72.

Fault elements

5.43 Sections 12.3 and 12.4 of the *Criminal Code* outline the fault elements for an offence committed by a corporation.[57]

5.44 The fault elements of intention, knowledge and recklessness for corporations are provided for in s 12.3 of the *Criminal Code*:

> If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

5.45 The Model Criminal Code Officers Committee (MCCOC) explained that this was intended to be a subjective test as to what the accused corporation knew, believed or intended at the time of the offending conduct.[58]

5.46 The Code provides an inclusive list of ways in which a body corporate may have 'authorised' or 'permitted' the commission of the offence in s 12.3(2):

> (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
> (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
> (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
> (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[59]

5.47 'High managerial agent' is defined 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.'[60]

5.48 Sections 12.3(2)(a) and (b) therefore allow criminal responsibility to be attributed to a corporation through the acts of its agents. These sections are almost identical to the corresponding provision in the US Model Penal Code,[61] and echo the identification theory approach to attributing corporate responsibility in *Tesco*,[62] while the definition of high managerial agent is reflective of the approach in *Meridian.* Drafters of the Code

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57 With the exception of strict liability offences.

58 MCCOC Report (n 11) 21.

59 While the word 'conduct' is used in these provisions, it is not defined in Part 2.5. Instead, guidance can be sought from earlier in the *Criminal Code* at s 4.1(2), which defines conduct as 'an act, omission to perform an act or a state of affairs'.

60 *Criminal Code* s 12.3(4).

61 US Model Penal Code s 2.07(1)(c). See MCCOC Report (n 11) 113.

62 Woolf (n 52) 261; Jennifer G Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) *Journal of Business Law* 1, 17.

envisaged that these sections would only be used in 'one-off situations where it cannot be said that there is any ongoing authorisation of the conduct'.[63]

5.49 Clough and Mulhern also acknowledge the 'obvious difficulty' in proving the fault element on the basis of the conduct of the board of directors as 'criminal acts are not usually made the subject of votes of authorization or ratification by corporate Boards of Directors'.[64] They argue that prosecutions are more likely to be based upon the conduct of a high managerial agent of the company.[65]

5.50 Where the conduct is that of a high managerial agent, the corporation can demonstrate that it exercised due diligence to prevent the conduct, authorisation or permission.[66] Woolf notes that this is a key difference between the Code and the traditional common law:

> This proviso is a safeguard to exonerate corporations in situations where a renegade senior officer has committed or authorised illegal conduct despite precautions taken by the board to prevent such behaviour. It thus alleviates the problems associated with the common law doctrine in situations where the directing minds of the company are in conflict.[67]

5.51 This defence could not be exercised if the board of directors was involved in the authorisation or permission of the commission of the offence,[68] demonstrating a significant distinction between the board of directors and high managerial agents.[69]

5.52 Clough and Mulhern are critical of s 12.3 of the *Criminal Code*, particularly the fact that the provision essentially requires corporate criminal responsibility to be dependent on the proof of the commission of the offence by an individual before it can be established that the corporation authorised or permitted the offence:

> It seems a backward step to make criminal liability contingent upon individual liability, particularly as the difficulty of prosecuting individuals is one of the justifications for proceeding against a corporation. Far simpler would be to attribute fault to the corporation if it authorised or permitted the relevant conduct.[70]

Fault elements: corporate culture provisions

5.53 Sections 12.3(2)(c) and (d) are considered to be the 'truly innovative' or 'more controversial' aspects of the Code,[71] as they deal with the 'more elusive situation of

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63 MCCOC Report (n 11) 113.
64 Clough and Mulhern (n 43) 141, referring to Spiegel J in *Commonwealth v Beneficial Finance Co* 275 NE 2d 33 (1971).
65 Ibid.
66 *Criminal Code* s 12.3(3).
67 Woolf (n 52) 261.
68 MCCOC Report (n 11) 113.
69 Attorney-General's Department, Ian D Leader-Elliott and Australian Institute of Judicial Administration, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 316 ('AGD Guide for Practitioners').
70 Clough and Mulhern (n 43) 144.
71 Ibid 141; Hill (n 62) 16–17; Woolf (n 52) 262.

implicit authorisation' where a company's 'corporate culture' encourages non-compliance or fails to encourage compliance.[72]

5.54 This is considered to be a 'more holistic' approach to corporate criminal responsibility than that of the common law, as it 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.[73] It is a mechanism for capturing the fault of the corporation itself as an entity.[74] Baxt notes that the concept of corporate culture or 'culture of compliance' became a feature in trade practices law in the early 1990s.[75]

5.55 The term 'corporate culture' is defined in s 12.3(6) as:

> an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

5.56 This definition allows for the scenario where the requisite fault element (that being intention, knowledge or recklessness) could be attributed to a corporation as a whole due to the unlawful actions of 'one mutinous branch or subdivision' in defiance of a broader corporate policy.[76]

5.57 The factors relevant in proving the application of the corporate culture provisions in ss 12.3(2)(c) or (d), are outlined in s 12.3(4) of the Code, including:

> a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
>
> (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

5.58 Chief Justice Blow observed that it was 'curious' that the definition of corporate culture is defined in terms of *aspects* of what one might ordinarily think of as the culture of a company:

> So, one rule amounts to corporate culture. One policy amounts to corporate culture. I say that because the definition begins 'Corporate culture means an attitude, policy, rule, course of conduct or practice.'[77]

5.59 The idea of corporate culture can be considered to be 'conceptually imprecise' and commentators have noted that there is 'little commonality' in its definitions.[78] It

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72 MCCOC Report (n 11) 113.
73 Baxt (n 55) 3.
74 See Ch 2 [2.33].
75 See Baxt (n 55) 6, referring to *TPC v CSR Limited* (1991) ATPR 41-076.
76 Ibid 7.
77 *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 464, 465.
78 John HC Colvin and James Argent, 'Corporate and Personal Liability for "Culture" in Corporations?'

has been argued that the definition in s 12.3(6) does not adequately capture the broader and more complex understanding of culture from an organisational theory perspective.[79] Commissioner Hayne, in the Financial Services Royal Commission *Final Report*, described this as 'the shared norms and values that shape behaviour and mindsets' and 'what people do when no one is watching.'[80]

5.60 The Code itself does not specifically outline the factors which should be considered to determine a company's corporate culture. Clough and Mulhern provide some practical guidance about what evidence would help establish this. They note that official policy may be located in official corporation documents, including minutes and memoranda of meetings, or policy directives. However, unofficial policy may require subjective evidence from individuals who are sufficiently familiar with the corporation's ethos and operations to testify as to the company's attitudes and expectations.[81]

5.61 The work of Pamela Bucy also outlines key factors as to what may constitute a corporate culture, including:

- the corporation's hierarchy*;* goals*;* educational policies for employees*;*
- monitoring compliance*;*
- reaction to past violations*;*
- incentives for lawful behaviour*;*
- policies regarding indemnification*;* and
- if relevant, the nature of the offence committed.[82]

5.62 The Attorney-General's Department provided an example of how it is envisaged that this provision would operate in practice:

> Take the simple example of a corporation engaged in the construction industry which fails to ensure that its workers maintain adequate safeguards against injury or death. It fails to maintain a culture of compliance with safety standards. A rigger is killed by a crane driver who breaches those standards. There is no doubt that the corporation could be held guilty of manslaughter in such a case.[83]

5.63 These provisions are a significant departure from the identification method:

> The concept of corporate culture focuses on the blameworthiness at an organisational level, in the sense that the corporation's practices and procedures have contributed in some way to the commission of the offence.[84]

(2016) 34 *Company and Securities Law Journal* 30, 36.

79 Ibid 38.

80 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 334.

81 Clough and Mulhern (n 43) 142; Dixon (n 6) 15.

82 Clough and Mulhern (n 43) 142; see Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 91.

83 AGD Guide for Practitioners (n 69) 309.

84 Hill (n 62) 18.

5.64 The MCCOC acknowledged that this section extended the common law of the *Tesco* identification theory (its report being prior to *Meridian*) by:

> allowing the prosecution to lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected.[85]

5.65 The MCCOC maintained that it is 'both fair and practical to hold companies liable for the policies and practices adopted as their method of operation' and reasoned that the concept of corporate culture was analogous to 'the key concept in personal responsibility – intent'.[86] To further justify their rationale for holding corporations responsible on the basis of corporate culture, the MCCOC referred to Field and Jorg, who asserted that:

> the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge that are not reducible to the aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any particular individual devised them, but because they have emerged from a decision-making process recognised as authoritative within the corporation. These regulations and standing orders are also evidence of corporate capacity to differentiate right from wrong and act accordingly, to think ethically in terms of the consequences of corporate actions for others and to give reasoned explanation as to the outside world.[87]

5.66 Woolf also explains that s 12.3(4)(b) in particular requires the court to look beyond official claims of compliance made by the board of directors and to consider 'unofficial corporate practices' and the corporation's hierarchy.[88] Such practices may include situations where official corporate policies prohibit illegal conduct but may be actively 'encouraged by management'.[89] This provision allows the court to focus on 'the perceptions of the middle and lower level employees by whom the external elements of corporate offences is typically committed'.[90]

5.67 The ALRC is aware of one case in which the corporate culture provisions have been relied upon. In *R v Potter & Mures Shipping*,[91] Blow CJ briefly considered these provisions in a legal ruling (absent the jury), which resulted in a directed acquittal. His Honour outlined the very limited evidence brought to prove the culture of Mures Shipping Pty Ltd, including evidence from only one witness regarding certain processes and lack of training procedures.

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85 MCCOC Report (n 11) 113.
86 Ibid 113.
87 Stewart Field and Nico Jorg, 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' (1991) 159 *Criminal Law Review* 1, 2.
88 Woolf (n 52) 263–264.
89 Clough and Mulhern (n 43) 142.
90 Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277, 287.
91 *R v Potter & Mures Fishing Pty Ltd* (n 77) 467.

5.68 Chief Justice Blow concluded that the prosecution had pointed to no evidence from which a reasonable inference could be drawn that:

> any aspect of Mures' corporate culture directed or encouraged the dishonest influence of any officials, or involved tolerating any such offence, or led to any such offence being committed. There's little or no evidence as to the corporate culture features of the corporation generally.[92]

Corporate negligence

5.69 The test for negligence outlined in s 5.5 of the *Criminal Code* applies to natural persons and bodies corporate equally.[93] That is, negligence requires 'a great falling short of a reasonable standard, in circumstances of high risk'.[94]

5.70 Section 12.4(2) allows for negligence to be proved on the part of a body corporate if 'the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).'[95]

5.71 The MCCOC explained that in some cases 'this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent'.[96]

5.72 Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

> (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
>
> (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.[97]

5.73 Baxt suggests that the practical implication of these provisions is that corporations could be held accountable for negligent corporate structures.[98] He states:

> Given that negligence in the Code depends not upon subjective questions concerning the defendant's actual awareness of risk, but upon the failure to take reasonable precautions, there is little reason to limit the inquiry into corporate negligence by demanding proof of the fault state of individual persons representing the 'directing mind and will' of the body corporate. Even more than in the case of offences involving non-negligence fault elements, the objective analysis of a body corporate's negligence demands an investigation into the way the body corporate operates as a whole. No longer will it

92 Ibid.
93 *Criminal Code* s 12.4(1).
94 Ibid s 5.5.
95 Looking at the company as a whole by aggregating the conduct of any number of a company's employees, agents or officers is a departure from the common law: Clough and Mulhern (n 43) 147; Dixon (n 6) 5; Woolf (n 52) 269.
96 MCCOC Report (n 11) 115.
97 *Criminal Code* s 12.4(3).
98 Baxt (n 55) 9.

> be necessary for the prosecution to prove criminal negligence on the part of any one individual within the body corporate. The focus of the inquiry is instead placed squarely upon the body corporate as a whole.[99]

5.74 Woolf explains that the court will need to examine whether the corporation met the standard of care as expected by a corporation of its kind.[100] Colvin also points out that 'the [corporate] standard of care can be adjusted in light of the resources available to the corporation'.[101] Woolf clarifies that:

> [b]y specifying that negligence may be proved on the part of the body corporate 'as a whole', the Code implicitly acknowledges that bodies corporate have a 'collective capacity' which can in some cases be far more powerful than that of any individual, and that they are subject to a distinctly corporate standard of care.[102]

5.75 Clough and Mulhern similarly express some reservations about s 12.4, namely that it could be interpreted in a way that the negligence of any individual employee, regardless of their seniority, could render the corporation liable for negligence.[103]

Defences

5.76 In addition to the due diligence defence afforded where the conduct and state of mind is that of a high managerial agent, s 12.5 of the Code provides a defence of mistake of fact for strict liability offences. The defendant corporation is to prove this on the balance of probabilities.[104] The defence has a second limb, requiring in addition that the corporation proves that it exercised due diligence:

> The fact that a corporate agent made a reasonable mistake is not sufficient to exculpate the corporation. The corporation must take the further step of proving that it exercised due diligence in the supervision of the agent. The due diligence limit is an expression, in yet another guise, of the pervasive principle of organisational blameworthiness.[105]

5.77 Guidance is given in s 12.5(2) as to what might amount to a failure to exercise due diligence, namely:

> the fact that the prohibited conduct was substantially attributable to:
>
> (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
>
> (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

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99 Ibid.
100 Woolf (n 52) 270.
101 Colvin (n 18) 27.
102 Woolf (n 52) 270.
103 Clough and Mulhern (n 43) 148. Woolf is of the view it is unlikely that the courts would take this approach, but maintains that s 12.4 lacks precision: Woolf (n 52) 271–272.
104 On the balance of probabilities: AGD Guide for Practitioners (n 69) 331.
105 Ibid.

The 'TPA Model'

5.78 As explained in Chapter 3, 65% (16 statutes) of the reviewed legislation expressly exclude Part 2.5 and instead include an alternative attribution method, and 15 of those attribution methods incorporate key features from s 84 of the *Trade Practices Act 1974* (Cth) (TPA Model), now renamed as the *Competition and Consumer Act 2010* (Cth). There is variance between them, however, broadly speaking, the TPA Model:

- deems the conduct and state of mind of certain individuals to be the conduct and state of mind of the corporation (this is a form of direct liability);
- attributes conduct from the conduct of directors, employees or agents, acting within the scope of their actual or apparent authority, to the corporation;
- generally includes an additional attribution limb for conduct, whereby conduct of any other person at the direction, or with the consent or agreement of a director, employee or agent is also deemed to be the conduct of the corporation (the 'at the direction of' limb);
- requires that the conduct is engaged in 'on behalf of' a corporation; and
- attributes fault from the person who engaged in the conduct (or, by virtue of other attribution sections, from the person who directed, or consented or agreed to the conduct).

5.79 There is little explanation as to the genesis of s 84 of the *Trade Practices Act* — the explanatory memorandum is silent as to the rationale behind the provision.[106]

5.80 Section 84 is an extension of the common law position but does not replace it; corporations may be held responsible by either the statutory attribution method or under the identification theory.[107]

5.81 The words 'on behalf of' in s 84(2) do not require that the conduct must have been authorised by the body corporate.[108] Something must be done 'for' the company, in the sense of 'in the course of the body corporate's affairs or activities'.[109]

5.82 The key variations between the TPA Model statutory attribution methods are whether:

- the relevant actors include 'officers', or just 'directors';
- the extension of conduct committed by persons is 'at the direction of or with the consent or agreement of' a director/officer, employee or agent;

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106 See Fisse (n 16) 289.

107 *TPC v Tubemakers of Australia Ltd* (1983) 47 ALR 719, 737–738. Although grounded in common law formulations of tortious liability based on agency and vicarious liability, s 84 does not make a corporations vicariously liable. Instead, consistent with the theory expressed in *Lennard's Carrying Co Ltd v Asiatic Petrolenum Co Ltd* [1915] AC 705 and *Tesco*, Toohey J held that the conduct of those persons is the conduct of the corporation. See also *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38.

108 Duke (n 26) 300.

109 *Walplan Pty Ltd v Wallace* (n 107) 38.

- the fault element is defined, limited to certain states of mind, or broad;
- Part 2.5 is expressly excluded; and
- a defence of due diligence or reasonable precautions or both is included.

5.83 While it may appear that there are many variations, the essence of attribution methods that fall within the TPA Model categorisation are all sufficiently similar that they warrant being grouped in this way.

Relevant actors

5.84 Table 5.1 provides a comparison of the variety of persons, or relevant actors, whose conduct and state of mind can be attributed to a corporation. Included is the position under specific offences for failure to prevent criminal conduct, which is discussed in further detail below.

Table 5-1: Comparison of persons whose conduct and state of mind can be attributed to a corporation

Method	Persons whose conduct can be attributed	Persons whose state of mind can be attributed
Part 2.5 *Criminal Code*	Employee, agent or officer acting within the actual or apparent scope of employment/ authority.	Board of directors; or High managerial agent: employee, agent or officer with duties of such responsibility that his/her conduct may fairly be assumed to represent the body corporate's policy; or Corporate culture limbs.
TPA Model	Director, employee, agent acting within scope of actual or apparent authority. Persons acting at the direction of, or with the consent or agreement of, a director, employee or agent.	Director, employee, agent engaged in conduct (acting within scope of actual or apparent authority).
Common law: identification theory	Persons who should be taken in the circumstances to represent the company, given the nature of the offence and the policy of the enabling legislation,[110] 'whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company'.[111]	

110 See, eg, *ABC v Wallace* (n 32).
111 *Meridian* (n 30) 507F (emphasis in original).

Method	Persons whose conduct can be attributed	Persons whose state of mind can be attributed
Common law: vicarious liability	Employees and agents, when acting in course of employment, where it is the intention of the statute to impose vicarious liability upon a principal.[112]	
Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) [113] s 70.5A	**Associates**: a person is an 'associate' if: a) they commit the relevant offence for the profit or gain of the body corporate; and b) are an officer, employee, agent or contractor; or c) are a subsidiary (within the meaning of the *Corporations Act*); or d) are controlled (within the meaning of the *Corporations Act*); or e) otherwise perform services for or on behalf of the corporation.	
Bribery Act 2010 (UK) s 8	**Persons associated** ('A') with a commercial organisation ('C') (where A is or would be guilty of bribery). Person associated means a person who performs services for or on behalf of C. The capacity in which A performs services for or on behalf of C does not matter. It is determined by reference to all relevant circumstances, and not merely the relationship between A and C, although A may be C's employee, agent or subsidiary. A rebuttable presumption arises that A is a person associated if A is an employee of C.	

112 *Mousell Bros Ltd v London and North Western Railway Co* (n 13) 844 (Viscount Reading CJ with whom Ridley and Atkin JJ agreed). Subsequently followed by the High Court of Australia in *R and Minister for Customs v Australasian Films Ltd* (n 11).

113 The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) lapsed at the end of Parliament on 1 July 2019. The ALRC understands that it will be reintroduced shortly.

Method	Persons whose conduct can be attributed	Persons whose state of mind can be attributed
Criminal Finance Act 2017 (UK) s 44(4)	'Acting in the capacity of a **person associated** with a relevant body' means: a) an employee of B who is acting in the capacity of an employee, or b) an agent of B (other than an employee) who is acting in the capacity of an agent, or c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services, to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between the person associated and B.	

Aggregation

5.85 The principles of vicarious liability, identification theory and the TPA Model require that, in order to prove an offence has been committed by a corporation, the conduct and mental elements be established from one individual, rather than looking to the corporation as a whole, and aggregating elements of an offence from the conduct and mental state of multiple people within an organisation. There is a general resistance at common law to aggregation; to prove an offence, it is generally necessary to show the relevant elements can be established through one person.[114]

> A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.[115]

5.86 The resistance to aggregation is not, however, absolute.[116] Clough and Mulhern explain that there are some circumstances where aggregation is possible. For example, where composite knowledge is held by two agents who are part of the company's directing mind and will, their combined knowledge will be known to the corporation.[117]

5.87 This is different to the aggregation of states of mind to create another, different state of mind. The Full Court of the Federal Court of Australia in *Commonwealth Banks of Australia v Kojic* (*Kojic*)[118] held (in a civil context) that the *knowledge* of two officers

114 See Clough and Mulhern (n 44) 106.
115 *R v HM Coroner of East Kent; ex parte Spooner* (1987) 88 Cr. App. R. 10, 16-17 (Bingham LJ).
116 Clough and Mulhern (n 44) 107.
117 See Ramsay, Austin and Ford (n 10) [16.230], citing *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 6 WAR 68; 5 ACSR 424 and *Krakowski v Eurolynx Properties Ltd* (1995) 130 ALR 1 at 16.
118 *Kojic* (n 29).

could not be aggregated to conclude that the company had engaged in unconscionable conduct, in circumstances where neither officer had themselves acted unconscionably and neither had a duty to communicate their knowledge to the other.[119]

5.88 Chief Justice Allsop in *Kojic* (who agreed with Edelman J in relation to aggregation) noted that '[t]he question of aggregation will generally arise in a particular statutory context or in the context of a particular substantive rule.'[120] His Honour went on to state that in the context of s 84 of the *Trade Practices Act* (which was the relevant attribution method in *Kojic*):

> I would not necessarily see s 84 as limiting the application of any relevant general law principle concerning aggregation or attribution of knowledge.[121]

5.89 This is so even though the language of s 84 (and the TPA Model of attribution) refers to state of mind being attributed from a person who engaged in the conduct:

> If … it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, employee or agent of the body corporate engaged in that conduct and … had that state of mind.[122]

5.90 There is a tension between the general resistance towards aggregation and notions of organisational fault. If a corporation's state of mind should be representative of corporate blameworthiness, then considering the acts and knowledge of the various people who make up that organisation is an important part of assessing fault. The counterargument is that:

> the culling and joining of various elements into one offence and, as a result, the imposition of criminal liability on the corporation … may actually turn innocent activities of agents or employees into corporate acts or omissions of a criminal character.[123]

Aggregation in Part 2.5

5.91 Section 12.3 does not require the mental element to have been held by the same individual who satisfied the conduct element. Instead, the question is simply whether the body corporate 'authorised or permitted the conduct'.

5.92 If the relevant actor for the conduct element is a 'high managerial agent' and that person had the relevant state of mind, then that state of mind is taken to be the state of mind of the company.[124] Equally, if a high managerial agent had the relevant state of mind (irrespective of whether they committed the conduct) then that is taken to be the state of mind of the company.

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119 Ibid [66]–[67] (Allsop CJ), [112] (Edelman J).
120 *Kojic* (n 31) [63].
121 Ibid [64].
122 *Trade Practices Act 1974* (Cth) s 84.
123 Lederman (n 5) 663.
124 *Criminal Code* s 12.3(2)(b).

5.93 Section 12.3 also contemplates aggregation if the fault element is proved by way of the 'corporate culture' provisions or the actions of the board of directors. That is, although the conduct element is directly referential to a particular person (an officer, employee or agent), the fault element may be proven by more broad reference to the company as a whole.

Extensions of liability and the innocent agent doctrine

5.94 Aggregation should be contrasted with extensions of liability.[125] Under these well-established (and codified) principles, conduct and fault elements need not be satisfied by the same person where one person (who has the relevant state of mind) has directed another person to engage in the conduct.

5.95 Persons whose conduct may be attributed to a company under statutory methods often also include persons acting at the direction of, or with the consent or agreement (expressed or implied) of a director, employee or agent. There are also provisions which deem that conduct undertaken by an employee or agent of a person to be the conduct of that person.[126] Thus, if the relevant conduct is that of another person acting at the direction or with the consent or agreement of an employee or agent of the person, that other person is treated as the person's agent for these purposes.[127]

5.96 For example, if B's agent A, acting within his or her authority, is shown to have had knowledge of relevant facts, B is also taken to have had that knowledge.

5.97 Another well-established method of extending liability (which does not amount to aggregation) is the innocent agent doctrine which applies to extend primary liability (not derivative liability) to a person who intentionally causes the physical elements of an offence to be committed by someone else, who will themselves be innocent of the offence.[128]

5.98 Thus it is already well accepted that persons who influence the conduct of another may themselves be liable or responsible for that conduct. Proposal 8, discussed in Chapter 6, uses the language 'for or on behalf of' in defining 'associate', which is consistent with these doctrines as it reflects the substantive nature of the relationship between an individual and the corporation.

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125 In particular, under s 11.3 of the *Criminal Code*, entitled 'Commission by Proxy', which deems the person to have 'committed that offence', rather than to have committed the conduct or to have the requisite state of mind. Thus, it is possible that in circumstances where a person might have committed an offence by proxy, Part 2.5 might not be capable of attributing that commission of offence to the corporation.

126 See, eg, *Competition and Consumer Act 2010* (Cth) s 84.

127 This is explicitly stated in the *Corporations Act 2001* (Cth) s 769B(3).

128 *White v Ridley* (1978) 140 CLR 342, [1978] HCA 38.

6. Reforming Corporate Criminal Responsibility

Contents

Introduction

6.1 As set out in Chapter 5, there are currently multiple methods of attributing criminal and civil liability to a corporation. In this chapter, the ALRC considers options for reforming the way in which the criminal law attributes responsibility to corporations. The ALRC proposes that across Commonwealth statutes there should be a single method for attribution to corporations.

6.2 Under that single attribution method, the ALRC proposes expanding the individuals whose conduct may be attributed to the corporation from 'officers, employees, and agents'[1] to 'associates' acting on behalf of the corporation. This is a functional approach that looks at the substance of the relationship between the person and the corporation rather than their formal title. To balance this expansion, the ALRC proposes that a due diligence defence should be available to corporations. The absence of due diligence is a critical element in criminal liability for corporations under the model proposed by the ALRC.

6.3 Finally, in this chapter, the ALRC looks at alternatives to attribution methods, with a particular focus on failure to prevent offences. The ALRC concludes that with

1 Acting within the actual or apparent scope of employment, or within actual or apparent authority.

the reform proposed in this chapter to the attribution methodology, the liability of corporations is such that such specific offences are not required.

Single legislative attribution method for corporations

Proposal 8 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.

> The development of corporate criminal liability represents tension and synthesis in legal concepts. It also represents a response to economic and social fact. It does not represent the application of a developed theoretical response to social problems.[2]

6.4 A single statutory method will improve simplicity and certainty for corporations (and their directors and officers), as well as regulators and prosecutors.

6.5 The single approach necessitates the repealing of all other statutory models of attribution, and the ALRC suggests that the single method should apply to both criminal offences and civil contraventions.

6.6 The overarching aims of this proposal are to:

- ensure attribution accords with fundamental criminal law principles, importantly blameworthiness or culpability;
- achieve simplicity;
- reflect the reality of corporate action and behaviour;
- recognise the existing legal environment, including the *Criminal Code*; and
- be pragmatic. The proposal recognises a strong preference amongst regulators for corporate attribution models based on the 'TPA Model' (see Chapter 5 for an explanation of this legislative method of corporate attribution).

6.7 The ALRC is not a legislative drafting body. However, to aid in conceptualising the proposals, a draft of the revised key sections of Part 2.5 of the *Criminal Code* is provided below.

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2 LH Leigh, 'The Criminal Liability of Corporations and Other Groups' (1977) 9 *Ottawa Law Review* 247, 247 citing LH Leigh, *The Criminal Liability of Corporations in English Law* (Weidenfeld Nicholson, 1969) 1–29.

Proposed redrafted Part 2.5

12.2 Physical elements

Any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in also by the body corporate, unless the body corporate proves that it exercised due diligence to prevent the conduct.

Note: A defendant bears a legal burden in relation to the defence of exercising due diligence: see section 13.4.

12.3 Fault elements other than negligence

(1) If, in respect of conduct that is engaged in by a body corporate, it is necessary to establish the state of mind, other than negligence, of the body corporate, it is sufficient to show that:

(a) one or more associates of the body corporate who engaged in the conduct had that state of mind; or

(b) the body corporate authorised or permitted the conduct.

Note: Section 12.3(1)(a) does not limit the application of section 11.3 Commission by Proxy or exclude extensions of liability.

Rationale for a single method

6.8 Currently, it is possible for multiple attribution methods to be applicable to the same conduct, which runs contrary to the precept of the criminal law that the attachment of criminal responsibility should be coherent and consistent.[3] In addition, there does not appear to have been a principled basis for the exclusion of Part 2.5 from various statutes, and as such, there does not appear to be a sound theoretical justification for retaining these multiple statutory attribution methods.[4]

6.9 The proposed redraft of Part 2.5 has taken into account the different corporate structures that exist and therefore unique attribution models would not be required to accommodate these.[5]

6.10 In other jurisdictions that have been reviewed, there is far greater uniformity in corporate attribution. For example, in New Zealand, corporate criminal liability relies exclusively on the common law identification doctrine as an attribution method.[6] The situation is similar in Canada, where the power to make criminal laws is vested in the

3 For example, a fraud offence might be prosecuted under the generic offence in the *Criminal Code* as well as under a dishonesty offence in the *Corporations Act 2001* (Cth).

4 As discussed in Ch 2.

5 For example, the proposed new investment structure of '*corporate collective investment vehicles*'.

6 There is also an offence for failing to prevent foreign bribery: *Crimes Act 1961* (NZ) s 105C.

federal parliament. In Canada, however, the common law identification doctrine has been broadened by the *Criminal Code* (Canada).[7] The UK also relies on the common law identification doctrine with one exception — that being a broader version of the identification doctrine adopted in the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).[8]

Amending Part 2.5

6.11 The ALRC did consider that a pragmatic solution could be to have a single attribution method based on the TPA Model. By the weight of inertia, it has preeminent status, and to remove it would impose a significant burden upon the various departments responsible for different federal criminal law legislation. However, attribution under the TPA Model varies in its application in different statutes, both in the language used in attributing the conduct and state of mind elements, as well as whether a due diligence defence is available or not.

6.12 Thus, even though the TPA Model is dominant throughout the Commonwealth statute book, it predominates in variations, rather than consistently. Therefore, amendments would be necessary to provide consistency.

6.13 In the ALRC's assessment, if the TPA Model were adopted as the single attribution method in Commonwealth legislation, it would also be necessary to include a due diligence defence. Without this, the important principle of corporate blameworthiness would be missing.

6.14 The current drafting of s 12.3(2) of the *Criminal Code* provides a non-exhaustive list of four ways by which a prosecutor might ask a jury to find that the corporation authorised or permitted the conduct. The ALRC considers these to be unnecessary.

6.15 It is appropriate for a jury to decide, given the totality of the evidence and the circumstances of the case, whether the corporation permitted or allowed the conduct. That is, whether the corporation should be culpable for the conduct. However, the specificity of the options in s 12.3(2) and the uncertainty of the 'corporate culture'

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7 Under the *Criminal Code* (Canada), a corporation can be held liable for the actions of its 'senior officers', which includes not only a representative 'who plays an important role in the establishment of an organization's policies' but also one that 'is responsible for managing an important aspect of the organization's activities': *Criminal Code*, RSC 1985, c C-46 ss 22.1, 22.2. 'Representative' extends to include 'a director, partner, employee, member, agent or contractor of the organization': Ibid s 2.

8 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK). Under s 1(3), an organisation can be held liable for manslaughter on the basis of the actions of its 'senior management' — as opposed to the more restrictive 'directing mind' test at common law. In addition, under this statutory regime there is no need for a specific individual to be identified amongst senior management. The Corporate Manslaughter offence displaced gross negligence manslaughter for corporations and other organisations, but offences in the *Health and Safety at Work etc Act 1974* (UK) continue to play an important role in regulating corporate conduct. See *Crown Prosecution Service: Corporate Manslaughter* (2018) <https://www.cps.gov.uk/legal-guidance/corporate-manslaughter>; Sentencing Guidelines Council (UK), *Corporate Manslaughter & Health and Safety Offences Causing Death Definitive Guideline* (UK Government, 2010).

concept do not appear to have aided prosecutions (though, as stated above,[9] there is very little judicial consideration of these sections).

6.16 Consequently, the ALRC suggests amending Part 2.5 in a way that provides the simplicity which is characteristic of the TPA Model, while retaining the focus on corporate blameworthiness which is fundamental to Part 2.5.

Relevant actors — whose conduct and state of mind should be attributable?

> ***associate*** means any person who performs services for or on behalf of the body corporate, including:
>
> (a) an officer, employee, agent or contractor; or
>
> (b) a subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate; or
>
> (c) a controlled body (within the meaning of the *Corporations Act 2001*) of the body corporate.

6.17 Under the current smorgasbord of statutory attribution methods, described in Chapter 5, corporations may be liable for the conduct and mental state of all employees,[10] as well as conduct from persons *at the direction of* directors, employees and agents. In addition, a corporate defendant may be responsible under common law principles.

6.18 Corporate defendants do not necessarily have recourse to a defence.[11] Thus, a corporation may be held to be culpable for the actions of, say, a rogue employee. This sits at odds with notions of culpability in the criminal law.[12] It also fails to provide incentives and rewards for genuine preventative regimes implemented by corporations.

6.19 However, a broad definition of associates is appropriate to prevent body corporates using the corporate structure to avoid criminal responsibility, either through wilful blindness or the deliberate use of third party agents or intermediaries.

6.20 This is a principled approach of substance over form; instead of the primary consideration being the person's role or title, the definition of 'associates' directs the inquiry to the substance of the relationship between the individual and the corporation.

6.21 This broad definition should be counterbalanced by a due diligence defence, which allows the body corporate to prove a lack of culpability. This would ensure

9 See [5.38].
10 Acting within the scope of actual or apparent authority.
11 See Appendix E.
12 See Ch 2.

that the criminal law regime captures the notion of corporate fault, or organisational blameworthiness.

State of mind

6.22 The reviewed attribution methods disclose an inconsistent approach to the attribution of fault elements to corporations. The ALRC considers that the fault element in the attribution method should be referred to broadly as 'state of mind' to ensure that all fault elements are captured by the section. Although the *Criminal Code* is structured around specific fault elements (knowledge, intention, recklessness and negligence), this may create unnecessary difficulties when applying Part 2.5.

6.23 For example in *R v Potter & Mures Shipping,*[13] the Court considered that 'dishonestly influencing' in s 135.1(7) of the *Criminal Code* did not equate to any of the three states of mind enumerated in s 12.3 because

> the fault element in a s 135.1(7) offence is dishonestly influencing, not intention to influence, or any other sort of intention, and the fault element certainly isn't knowledge or recklessness.
>
> So, the opening words of s 12.3(1) aren't satisfied. Section 12.3 only applies if intention, knowledge or recklessness is a fault element.[14]

Due diligence

6.24 As set out above, a due diligence defence incorporates notions of organisational blameworthiness into the attribution method, which the ALRC consider necessary for imposing criminal responsibility.[15] Including a due diligence defence in the single attribution method also improves consistency in the law, as currently some, but not all, statutes include a similar defence.

6.25 The corporation is in the better position to provide evidence of its preventative procedures (due diligence) than the prosecution, and as such it is appropriate for the corporation to bear the legal burden of proving the defence.

6.26 Currently a corporation may be either vicariously or directly liable for the actions of its employees, without necessarily having recourse to a due diligence (or like) defence. Thus the arguments against corporations having a legal burden to prove this defence should be weighed against the current state of law in which corporations may have no recourse to a defence at all.

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13 *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 464.

14 Ibid 465.

15 See the work of Brent Fisse generally, and most recently: Brent Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 *Adelaide Law Review* 285, 291.

6.27 Due diligence is an elastic concept that takes its meaning from the context in which it must be exercised. Accordingly, it might, for example, be reasonable to expect a corporation to take greater measures with respect to those associates with whom it has more contact or over whom it can exercise greater control.

6.28 It is suggested that guidelines be provided, similar to that which has been proposed in relation to the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) (Combatting Corporate Crime Bill), and to those which have been provided for failure to prevent offences in the UK.[16] In some cases, guidance is already provided for in legislation that has a due diligence defence.[17]

6.29 Similar defences can be found in the UK, where two failure to prevent offences have been enacted. Section 7(2) of the *Bribery Act 2010* (UK) creates a defence where 'adequate procedures' are in place to prevent bribery. The Combatting Corporate Crime Bill also proposed a defence of 'adequate procedures'.[18]

6.30 The defence in the *Criminal Finances Act 2017* (UK) is available where the relevant body 'had in place such prevention procedures as it was reasonable in all the circumstances to expect [it] to have in place'.[19]

6.31 While it may be appropriate for clear domestic guidance, corporations would be aware that there are many forms of existing guidance provided by various bodies as to what amounts to due diligence in particular industry sectors.

6.32 For example, the OECD has published a variety of industry specific guidance documents (each in excess of 100 pages):[20]

- due diligence guidance for responsible business conduct;
- due diligence guidance for responsible mineral supply chains;
- due diligence guidance for supply chains of minerals from conflict-affected and high risk areas;

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16 Section 9 of the *Bribery Act 2010* (UK) requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place. The 'adequate procedures' are to be informed by six principles: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training) and monitoring and review: Ministry of Justice, *The Bribery Act 2010 - Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing* (2012).

17 See, eg, *Fisheries Management Act 1991* (Cth) s 164(2A) and the *Criminal Code* s 12.5(2).

18 The terminology 'adequate procedures' has been criticised in the UK as potentially depriving the defence of any substance. If the offence is proved, then in one sense any procedures the corporate put into place were necessarily inadequate. For this reason, the post-legislative review preferred 'reasonable procedures': House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) 58–9. However, the Committee concluded that '"adequate" does not mean, nor was it intended to mean, anything more stringent than "reasonable in all the circumstances"': Ibid 62 [211].

19 *Criminal Finances Act 2017* (UK) ss 45(2)(a), 46(3)(a).

20 See OECD, 'Due Diligence - Organisation for Economic Co-Operation and Development' <www.mneguidelines.oecd.org/duediligence/>.

- due diligence guidance for meaningful stakeholder engagement in the extractive sector;
- due diligence guidance for responsible supply chains in the garment and footwear sector; and
- due diligence guidance for responsible agricultural supply chains.

6.33 Transparency International has created an 18 module online guidance tool to 'help corporations tackle bribery and corruption'.[21] Transparency International Australia has also developed various tools to assist corporations to better manage risk and undertake adequate due diligence in areas such as combating corruption in mining.[22]

Attribution for civil penalties

6.34 The ALRC is of the preliminary view that the proposed attribution method should also be applied to civil contraventions by corporations, subject to some caveats outlined below. As with attribution of criminal responsibility, there is no single unified statutory approach to attribution in respect of civil contraventions, and common law attribution is also available. Some statutes use the same TPA Model for civil contraventions as for criminal offences by corporations.[23] The ALRC endorses its previous observations:

> 7.91 The ALRC sees benefit in stating a default position in relation to the attribution of liability for physical elements of non-criminal contraventions to corporate bodies for the conduct of individuals. The difficulties in distinguishing clearly between conduct which is criminal and conduct which attracts civil consequences identified in chapter 11 of this Report have directed the ALRC to consider the criminal liability models outlined above.
>
> 7.92 There are strong reasons why the mechanism that attributes liability to a body corporate should be the same when determining liability for criminal and non-criminal penalties. …
>
> 7.93 The ALRC notes that the approach taken in the *Criminal Code* to liability for the physical elements of an offence does not differ greatly from the traditional common law tests of primary liability of a body corporate for the conduct of agents where those agents have acted within the scope of their authority, or vicarious liability for the conduct of employees where those employees have acted in the course of their employment. …
>
> 7.155 … The ALRC sees no reason for using one mechanism to attribute liability for fault elements to a corporation in relation to a civil penalty provision, and another in relation to criminal penalties, particularly where both criminal and civil penalty liability require proof of the same physical elements and the same and additional fault elements.
>
> …

21 See Transparency International, 'Anti-Bribery Guidance' <www.antibriberyguidance.org/>.

22 See Michael Nest, *Mining Awards Corruption Risk Assessment Tool* (Transparency International and Transparency International Australia, 2nd ed, 2017).

23 *Corporations Act 2001* (Cth) ss 769A, 769B; *Competition and Consumer Act 2010* (Cth) s 84.

> 7.158 … It is the ALRC's view that the [adoption of a single attribution method] would not blur the distinction between criminal and civil penalty liability. It is not the ALRC's intention that these sections, if adapted and enacted in a Regulatory Contraventions Statute, would import features of criminal liability such as a higher standard of proof.[24]

6.35 There is an argument that having the same attribution method might blur the distinction between civil regulation and criminal law. The current position across Commonwealth legislation is that the method is largely the same for both civil proceedings and criminal offences. In addition, the model of corporate regulation proposed in Chapter 4 creates a clearer distinction between civil regulation and criminal law, reducing the 'blurring' between the two.

6.36 More importantly, for a civil contravention, attribution should not be narrower than attribution for criminal offences. The proposed attribution method both widens the actors from whom the physical elements can be attributed to a corporation and also potentially reduces liability because of the availability of a defence of due diligence. It would be incongruous with the ALRC's theoretical justification for corporate criminal responsibility if the existing, more narrow, civil attribution method was retained.

6.37 There should, however, be some modifications to the proposed attribution method for civil contraventions by corporations. It is not proposed to add fault elements onto a civil penalty provision, in the same way as occurs for criminal offences. Therefore, s 12.3 (or s 12.4) would only apply to a civil contravention where a fault element arises from the text of the provision.[25]

6.38 Furthermore, the ALRC considers that a due diligence defence should not be available for civil proceedings, unless it is currently available. The due diligence defence exists to ensure that criminal responsibility only attaches where there is moral blameworthiness on the part of the corporation. This approach is consistent with the common law principles discussed above, where a corporation may be vicariously liable without recourse to a defence. A similar approach for civil contraventions would seem appropriate, given that some would seem to be analogous to a tort or equitable wrong, such as misuse of market power or unconscionable conduct.

6.39 Some existing attribution methods — that may apply to both civil and criminal contravention — such as s 84 of the *Competition and Consumer Act 2010* (Cth), are accompanied by a defence provision where a person 'other than a body corporate', has 'acted honestly fairly and reasonably and, having regard to the all the circumstances of the case, ought fairly to be excused' from any liability.[26] The approach taken by the ALRC continues this policy choice, though it should be noted that the approach taken across Commonwealth law as in force is not uniform.

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24 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) [7.91]–[7.158].

25 See *Australian Securities and Investments Commission v Whitebox Trading Pty Ltd* (2017) 251 FCR 448, [2017] FCAFC 100.

26 *Competition and Consumer Act 2010* (Cth) s 85.

Specific offences

6.40 An alternative methodology to attribution under the criminal law is to craft offences to deal specifically with offending by a corporation itself.

6.41 In developing Proposal 8, the ALRC considered whether specific corporate offences were a more appropriate application of the criminal law to corporations. It was considered that this would require a more substantial review of corporate criminal law; one which exceeds the current Terms of Reference.

6.42 The ALRC also considered whether a suitable alternative to attribution would be to enact 'failure to prevent' offences for categories of primary offences (the 'Failure to Prevent model'). This would be accompanied by a defence of exercising due diligence or taking reasonable measures.

6.43 The Failure to Prevent model is not an attribution method. It is a standalone offence, under which a corporation can be convicted of the offence of failing to prevent an offence. It provides a simple method for holding corporations strictly liable for the conduct of their employees and other associates, if those individuals have committed a crime. It is generally reserved for serious crimes.

6.44 The due diligence defence then allows a corporation to show that it lacks organisational culpability if it can prove that reasonable procedures (or similar) were in place to prevent the offence.

6.45 'Failure to act' is a well-established basis of liability in the area of workplace safety.[27] There have also been moves internationally, and in the UK in particular, to adopt the Failure to Prevent model more broadly to address the unique difficulties of corporate crime.

6.46 The overarching argument in favour of this type of offence is that the nature of corporate bodies (including their potential size, power, and cross-jurisdictional operation) is such that they have the capacity to do significant harm, and to easily conceal criminal offending. Therefore, there is a significant social benefit to ensuring successful prosecutions of corporations where they have been involved in serious criminal activity. It has been argued that a Failure to Prevent model creates a strong positive incentive to encourage corporations to improve their corporate culture and to adopt measures to prevent the commission of serious crimes.[28]

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27 Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57, 58.

28 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) 8. A proposed area of inquiry is to interrogate further empirical evidence that a Failure to Prevent offence does change corporate culture.

6.47 The Combatting Corporate Crime Bill was introduced in the Senate on 6 December 2017 and lapsed on 1 July 2019.[29] The Bill sought to

- replace the existing foreign bribery offences in the *Criminal Code* with new provisions designed to remove evidentiary barriers faced in proving foreign bribery; and
- introduce a new offence of 'failure to prevent bribery' by an 'associate'. Under this offence, corporations would face strict liability for bribery by 'associates' (including subsidiaries) if they did not have 'adequate procedures' in place designed to prevent bribery of foreign public officials by their 'associates'.

Comparative analysis — UK, New Zealand, and Canada

6.48 The first failure to prevent offence was introduced in the UK through s 7 of the *Bribery Act 2010* (UK), which creates a strict liability offence for the failure to prevent bribery by a person associated with a commercial organisation.[30] In its post-legislative review report, the House of Lords Bribery Act Committee concluded that on the whole the offence had been 'remarkably successful'.[31] More recently, a failure to prevent offence was included in the *Criminal Finances Act 2017* (UK). The *Criminal Finances Act* makes it an offence to fail to prevent a person associated with the relevant body from engaging in the facilitation of UK or foreign tax evasion.[32]

6.49 On 11 May 2016, then Prime Minister David Cameron noted that in addition to existing failure to prevent offences for bribery and tax evasion, the UK would 'consult on extending the criminal offence of "failure to prevent" to other economic crimes such as fraud and money laundering so that firms are properly held to account for criminal activity that takes place within them'.[33] The move to extend the failure to prevent offence for economic crimes more broadly is supported by the Serious Fraud Office.[34] Government consultations on the issue were conducted in 2017; however, the work of the Ministry of Justice on Economic Crime has since stalled.[35]

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29 Parliament of Australia, 'Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017' <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1108>.

30 *Brib*ery *Act 2010* (UK) s 7(1).

31 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) [171].

32 *Criminal Finances Act 2017* (UK) ss 45, 46.

33 The Guardian - Opinion, 'David Cameron: The Fight against Corruption Begins with Political Will' (12 May 2016) <https://www.theguardian.com/commentisfree/2016/may/11/fight-against-corruption-begins-with-political-will>.

34 UK Treasury Committee Economic Crime Report 2019. This sentiment is shared by some academic commentators. See, eg, Campbell (n 27) 66; Dr Nicholas Ryder, Submission No ECR0031 to Treasury Committee, United Kingdom Parliament, *Economic Crime Inquiry Anti-Money Laundering Supervision and Sanctions Implementations* (March 2019).

35 Note, the release earlier this year of the UK Economic Crime Plan: HM Government and UK Finance, *Economic Crime Plan 2019–22* (2019).

6.50 The UK adopts the Failure to Prevent model in part to address difficulties with common law attribution — the UK does not have a comparable statutory attribution method such as the TPA Model. It relies instead on common law identification theory.

6.51 Variations on the Failure to Prevent model have also been adopted in Canada and New Zealand.

6.52 Under the Canadian *Criminal Code*, a failure to prevent provision operates in respect of offences that require the prosecution to prove fault.[36] The provision is somewhat limited as the offence only applies where a senior officer '*knowing* that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence'.[37]

6.53 In New Zealand, where an employee, agent, director, or officer commits a bribery offence within the scope of their authority (and the corporation benefits), the corporation may be liable.[38] A reasonable steps defence is provided in the statute; however, there is an initial presumption that the corporation did not take reasonable steps to prevent the offence.[39]

6.54 There are some difficulties with the Failure to Prevent model:

- Which offences should be included? While failing to prevent foreign bribery seems an uncontroversial choice, failing to prevent 'serious economic offences' (as is suggested in the UK[40]) leads to the difficult decision of what offences are serious enough to attract failure to prevent liability.
- Proving the underlying offence. The nature of a failure to prevent offence being committed is that an individual must still have committed an offence. While there will be cases where this is not problematic, the model does not deal with situations where the corporation itself should be held directly responsible for conduct due to the conduct of the corporation as a whole.

6.55 Notwithstanding the positive perceptions of the efficacy of the Failure to Prevent model, there is little empirical evidence from the UK supporting the theory that a failure to prevent offence will improve corporate culture and substantive compliance; given that both UK regimes are relatively new, there is little data to consider.[41] However, the UK tax evasion provisions are just two years old and bribery was not a 'volume crime' prior

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36 *Criminal Code*, RSC 1985, c C-46 s 22.2(c).

37 Ibid (emphasis added).

38 *Crimes Act 1961* (NZ) s 105C(2A)–(2C).

39 Ministry of Justice (NZ), *Saying No to Bribery and Corruption — a Guide for New Zealand Business* (2015) 5 <www.justice.govt.nz/assets/Documents/Publications/Ministry-of-Justice-Anti-Corruption-Guide.pdf>. The presumption is rebutted upon the production of evidence: *Crimes Act 1961* (NZ) s 105C(2C).

40 To illustrate the difficulty of determining a useable definition, see HM Government and UK Finance, *Economic Crime Plan 2019–22* (2019) [1.11], which defines 'economic crime' broadly as 'activity involving money, finance or assets, the purpose of which is to unlawfully obtain a profit or advantage for the perpetrator or cause loss to others.'

41 Campbell (n 27) 63. There have been few prosecutions under failure to prevent offences (five under the *Bribery Act 2010* (UK) and none under the *Criminal Finances Act 2017* (UK)).

to the enactment of the offence.[42] Moreover, the limited number of prosecutions does not necessarily reflect any possible deterrent effect.

6.56 One clear benefit of the Failure to Prevent model is that it provides a corporation with a defence which imports notions of corporate blameworthiness — the corporation *itself* failed to take reasonable measures to prevent the conduct.

6.57 In addition, the group of persons whose conduct the corporation should have taken reasonable measures to prevent is broad. 'Associates' includes a person performing services for or on behalf of the company.[43]

> The definition of associate is also intended to have broad application to a person who provides services for or on behalf of another person. Such a person would not necessarily need to be an officer, employee, agent, contractor, subsidiary or controlled entity.[44]

6.58 This expansion properly recognises the nature of corporate structures and corporate offending. As was identified in the Explanatory Memorandum to the Combatting Corporate Crime Bill,

> [t]he opaque and sophisticated nature of serious corporate crime can make it difficult to identify and relatively easy to conceal. Investigations into corporate misconduct can be hampered by the need to process large amounts of complex data and conduct lengthy negotiations over claims of legal professional privilege. Evidence may be located overseas and therefore require investigators to engage with mutual assistance processes. Court proceedings can be long and expensive, particularly against well-resourced corporate defendants.[45]

6.59 Some types of offending (for example foreign bribery) by their very nature involve the use of third party agents or intermediaries. Under the current law, the body corporate may therefore be protected by the wilful blindness of senior management to activities occurring within their corporations and a lack of readily available written evidence.[46]

Australian approach — Failure to Prevent model in the proposed Combatting Corporate Crime Bill

6.60 As stated above, in 2017, a new corporate offence of failing to prevent foreign bribery was proposed in Australia in the Combatting Corporate Crime Bill.

6.61 Section 70.2 of the *Criminal Code*, the offence of bribing a foreign public official, seeks to give effect to Australia's obligations under Article 1 of the *OECD Convention on*

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42 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) 34.

43 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) ('Combatting Corporate Crime Bill') sch 1 item 8 (the new s 70.5A of the *Criminal Code*).

44 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) [51].

45 Ibid [2].

46 Ibid [8].

Combating Bribery of Foreign Public Officials in International Business Transactions, to which Australia has been a state party since 1999.[47] Section 70.2 provides that a person commits an offence if:

- the person provides, offers, or promises a benefit to Person B (or causes the benefit to be given or offered to Person B);
- the benefit is not legitimately due to Person B; and
- the person intends to influence a foreign public official (who may be Person B or someone else) in the exercise of their official duties, in order to obtain or retain business or a business advantage that is not legitimately due.

6.62 The offence applies to both individuals and corporations.

6.63 In recent years, the Government has 'taken steps to strengthen enforcement of foreign bribery laws'.[48] In the lead up to the Combatting Corporate Crime Bill, four key challenges were identified in investigating and prosecuting the foreign bribery offence:

> Firstly, the offence requires the prosecution to establish intention by the alleged offender – both in relation to the conduct of providing, offering or promising a benefit to Person B, and in relation to the influence of a foreign public official. These fault elements can be difficult to prove. …
>
> Secondly, the construction of the offence can create issues. The prosecution needs to show that both the benefit offered/provided/promised (the bribe) and the business advantage sought were 'not legitimately due' (paragraphs 70.2(1)(b) and 70.2(1)(c)). In some cases, the threshold of 'not legitimately due' presents challenges. …
>
> Thirdly, particular elements of the offence cannot be proven without obtaining detailed information from foreign jurisdictions. For example, proving that a benefit or advantage was not legitimately due, or that a foreign official was working within their official duties, requires prosecutors to obtain evidence about foreign laws and the duties of the official in the country where bribery allegedly took place. This means that investigators are reliant on international legal assistance processes, which may take time or be unsuccessful.
>
> Finally, it is possible that the offence may be interpreted in ways which are not consistent with the intended policy objectives. The Government seeks to clarify that the foreign bribery offence applies where a person provides a benefit to obtain business for another person, regardless of whether the person does have a specific business or business advantage in mind.[49]

6.64 Noting that s 70.2 applies to corporations through the operation of Part 2.5, the Commonwealth Attorney-General's Department stated that 'due to the complex nature of foreign bribery, it can be challenging to establish criminal liability for companies'.[50]

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47 Attorney-General's Department (Cth), *Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (Public Consultation Paper, 2017).

48 Ibid 1.

49 Ibid 3–4.

50 Ibid 8.

6.65 The Combatting Corporate Crime Bill sought to address these difficulties by:

- amending s 70.2 of the *Criminal Code*;
- introducing a new 'failure to prevent foreign bribery by associates' offence (proposed s 70.5A of the *Criminal Code*); and
- introducing deferred prosecution agreements ('DPAs').

6.66 A discussion regarding DPAs appears in Chapter 9.

6.67 The amendments to the existing offence of bribing foreign officials (s 70.2) sought to 'remove undue impediments to successful investigation and prosecution of foreign bribery offending by broadening the offence, removing restrictive requirements and clarifying some requirements.'[51] The key changes proposed in the Combatting Corporate Crime Bill were:

> - the definition of foreign public official is extended to include a candidate for office;
> - the requirement that the foreign official must be influenced in the exercise of the official's duties is removed;
> - the requirement that a benefit and business advantage must be 'not legitimately due' is removed and replaced with the concept of 'improperly influencing' a foreign public official. Instructive factors for determining this concept are provided; and
> - the offence to cover bribery to obtain a personal (i.e. non-business) advantage is extended.[52]

6.68 These amendments may go a long way to making proof of bribery of a foreign public official significantly easier.

Failure to prevent foreign bribery

6.69 Under proposed s 70.5A, an Australian corporation would commit an offence if an 'associate' of the corporation commits bribery for the 'profit or gain' of the company. The bribe by the associate may be paid anywhere in the world and does not itself have to be the subject of prosecution.

6.70 This is a strict liability offence, but the corporation would have a defence if it could prove that it had in place 'adequate procedures' designed to prevent the commission of the offence by any of its associates.[53] Guidance would be published by the Minister 'on the steps that a body corporate can take to prevent an associate from bribing foreign public officials' (that is, what amounts to 'adequate procedures').[54]

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51 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) [19].
52 Ibid [5].
53 Combatting Corporate Crime Bill sch 1 item 8 (inserting s 70.5A(5) of the *Criminal Code*).
54 Combatting Corporate Crime Bill sch 1 item 8 (inserting s 70.5B of the *Criminal Code*).

6.71 'Associate' would be defined as follows:

> a person is an associate of another person if the first-mentioned person:
>
> (a) is an officer, employee, agent or contractor of the other person; or
>
> (b) is a subsidiary (within the meaning of the *Corporations Act 2001*) of the other person; or
>
> (c) is controlled (within the meaning of the *Corporations Act 2001*) by the other person; or
>
> (d) otherwise performs services for or on behalf of the other person.[55]

6.72 This definition of 'associate' is similar to the equivalent UK failure to prevent offences,[56] which also focus on the nature of the relationship between the corporation and the associate, rather than the associate's formal status.[57]

Interaction with Proposal 8

6.73 The ALRC's Proposal 8 incorporates a key aspect of the way failure to prevent offences are formulated: a broad definition of the relevant actors whose conduct and fault can be attributed to a corporation, counterbalanced with a due diligence defence, that allows a corporation to establish a lack of blameworthiness.

6.74 It is the ALRC's view that there is power in the argument that being convicted of a failure to prevent offence imposes a lower level of culpability than being directly responsible for the offence, because attribution means the corporation itself is criminally responsible for the offence, not just for failing to prevent someone else committing it. Consequently, it is preferable to improve the attribution method such that a corporation can be made directly responsible for its role in committing offences, such as foreign bribery, where appropriate.

6.75 Table 6-1 compares Proposal 8 with the failure to prevent offence proposed in the Combatting Corporate Crime Bill. It is the ALRC's position that the difficulties which the Combatting Corporate Crime Bill sought to remedy would be addressed more broadly under the proposed redraft of Part 2.5, and that a failure to prevent offence would be superfluous.

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55 Combatting Corporate Crime Bill sch 1 item 2 (amending s 70.1 of the *Criminal Code*).
56 *Bribery Act 2010* (UK) s 8; *Criminal Finances Act 2017* (UK) ss 45, 46.
57 See Table 5-1 in Ch 5.

Table 6-1: Three methods of holding corporations criminally responsible for bribing foreign officials

	Proving physical elements	Proving fault elements	Defence
Pursuant to current Part 2.5 and existing offence in s 70.2 ***Offence of bribery***	Officer, employee, agent acting within the actual or apparent scope of employment, or within actual or apparent authority Commits conduct elements of s 70.2: - provides benefit etc - the benefit not legitimately due to the other person [No conviction of individual required]	Fault element: intention (s 70.2) Pursuant to s 12.3(1): Body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence (see s 12.3(2)) [Do not need to prove that an individual had the particular state of mind]	Due diligence defence if fault attributed from a high managerial agent (corporation has legal burden) Conduct lawful in country (s 70.3) (corporation has evidential burden) Facilitation payments (s 70.4) (corporation has evidential burden)
Pursuant to Combatting Corporate Crime Bill (amended s 70.2 and new s 70.5A) ***Offence of failing to prevent bribery***	Associate (person who/ that performs services for or on behalf of the corporation) Commits conduct elements of proposed s 70.2(1)(a): - provides benefit etc - for the profit or gain of the corporation [No conviction of individual required]	Associate (person who/ that performs services for or on behalf of the corporation) Has fault element of proposed s 70.2(1)(a): - ***intention*** of improperly influencing a foreign public official in order to obtain or retain business or an advantage	Adequate procedures designed to prevent the commission of the offence (corporation has legal burden)

	Proving physical elements	Proving fault elements	Defence
Pursuant to the proposed attribution method and existing offence in s 70.2 ***Offence of bribery***	Associate (person acting for or on behalf of a company) Commits conduct elements of s 70.2: - provides benefit etc - benefit is not legitimately due to the other person [No conviction of individual required]	Fault element: intention (s 70.2) Pursuant to proposed s 12.3(1): Body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence [Do not need to prove that an individual had the particular state of mind]	Due diligence exercised to prevent the offence (corporation has legal burden)

7. Individual Liability for Corporate Conduct

Contents

Introduction

7.1 Where corporate officers have clear responsibilities to prevent corporate misconduct, and where the relevant individuals fail to take reasonable measures to do so, they should be personally liable. In this chapter, the ALRC considers proposals to strengthen individual liability for corporate conduct in appropriate circumstances. This chapter responds to the Terms of Reference, which specifically request the ALRC to consider alternative mechanisms for attributing liability for corporate misconduct to individuals, including senior office holders. The focus of this chapter is on the liability of senior management (CEOs, CFOs, etc.) rather than the board of directors per se. The ALRC is of the view that the legal framework for director liability is generally not in need of reforms within the purview of this Inquiry.

7.2 Submissions to an ALRC inquiry in 2002 were generally supportive of the principles of individual liability and particularly the importance of the accountability of senior management. The ALRC agreed, noting that, as a result of the regime for individual liability based on corporate conduct, 'Human agents of prohibited conduct will thus face the legal ramifications of their acts and will not be able to abuse or hide behind the corporate structure.'[1]

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1 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in*

7.3 Corporate criminal responsibility is one means of addressing the conduct that constitutes an offence. Individual liability is a necessary accompaniment to that, as it reflects the reality that while corporations are distinct legal entities capable of committing an offence, they are also ultimately composed of individuals. Additionally, while corporate penalties may achieve deterrence and retribution at a company or industry level, the 'punishment' impact of criminal sanctions will not necessarily be borne by those individuals who caused or permitted the conduct that constituted the wrongdoing.[2] The effects of penalties are easy to displace onto third parties who may not have been involved in (or have been in a position to influence) the conduct, including employees, shareholders, or consumers. This 'spillover' effect has been criticised previously by the ALRC and others.[3]

7.4 The proposals made in this chapter aim to clarify the potential liability of senior officers on the basis of their capacity to influence the conduct of the body corporate. This includes individuals who were not directly involved in the conduct that constituted the wrongdoing, but were otherwise in a position to prevent it. The proposals would therefore augment the accessorial liability provisions found in s 79 of the *Corporations Act 2001* (Cth) and Part 2.4 of the *Criminal Code*, which would continue to cover officers directly involved in a contravention.[4] The proposals are targeted at senior executives in charge of business units and divisions who have responsibilities for delivering particular business outcomes, and the capacity to direct and control aspects of a corporation's business on a day-to-day basis.

7.5 These proposals have two key aims. First, where the statutory regime currently provides that senior officers will only be liable for conduct to which they were accessories, or where they have personally contravened a director's duty, the proposals will ensure that senior officers can also be held liable where they were in a position to prevent corporate misconduct, and failed to take reasonable measures to do so. Second, where the statute already has that effect (overwhelmingly the case, as shown below), the proposals aim to simplify and streamline the various methods currently employed to achieve this, in order to facilitate compliance by executives and corporations, as well as enforcement by regulators.

Australia (Final Report No 95, 2002) ('*Principled Regulation*') [8.6].

2 Individuals who personally engaged in or were accessories to the misconduct may be separately liable under accessorial liability provisions, such as s 79 of the *Corporations Act 2001* (Cth). This chapter, in contrast, is concerned with senior officers who may not have been directly or indirectly involved in the conduct, but otherwise failed in their responsibility to prevent the conduct.

3 Australian Law Reform Commission, *Principled Regulation* (n 1) 311; S Chesterman, 'The Corporate Veil, Crime and Punishment; *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch'* (1994) 19 *Melbourne University Law Review* 1064, 1070; G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 146–7.

4 In practice, a case may arise in which an officer could be potentially liable under both the proposed provision (as a result of their capacity to influence the conduct) and one of the existing accessorial liability provisions. The purpose of the proposals, however, is to fill the gap in liability where accessorial liability ceases to reach — that is, where an officer does not come within the meaning of accessory, but should otherwise be liable in light of their capacity to influence (and prevent) the conduct.

7.6 In this way, the proposals aim to promote corporate compliance by more accurately reflecting the ways in which authority and control are exercised in practice in modern corporations.

Previous inquiries into personal liability for corporate conduct

Treasury: Directors' Duties and Corporate Governance (1997)

7.7 In 1997, an inquiry by Treasury found that personal liability regimes in the context of corporate law typically aim to:

> provide a significant incentive for directors to put in place effective risk-management arrangements to ensure the corporation complies with its obligations. While the imposition of financial penalties on corporations for breaches of legislation provides some incentive towards compliance, it is considered that in certain key areas there is a need to place additional personal responsibility on directors who, in contrast with the shareholders who ultimately bear the costs of the financial penalty, have it within their means to seek to ensure compliance.[5]

7.8 Treasury was concerned that directors may be overburdened by liability regimes that threaten personal criminal culpability for corporate conduct in cases where directors were not at fault personally, or even where a director had taken all reasonable steps to prevent any such breach.[6]

ALRC: Principled Regulation (2002)

7.9 The ALRC previously considered the issue of corporate officer liability in the context of an inquiry into federal and civil administrative penalties in Australia. The ALRC did not recommend any amendment to the deemed liability provisions relating to officers canvassed in that report,[7] finding that:

> Each of the mechanisms … are proving equally effective in the context of their particular legislative and regulatory schemes. The ALRC's view is that it is unnecessary to propose one as a default provision in a Regulatory Contraventions Statute as this matter is better dealt with separately in each particular regulatory scheme.[8]

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5 Department of Treasury (Cth), *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors* (Corporate Law Economic Reform Program, Proposals for Reform: Paper No 3, 1997) [6.6].

6 Ibid [6.6].

7 In *Principled Regulation* (n 1), the ALRC considered a narrower subset of the deemed liability provisions than those included in the current Inquiry. This subset consisted of: *Taxation Administration Act 1953* (Cth) s 8Y; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 495; *Corporations Act 2001* (Cth) s 188; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 40B; *Life Insurance Act 1995* (Cth) s 230F; *Income Tax Assessment Act 1936* (Cth) div 9, pt VI; *Banking Act 1959* (Cth) s 11CG.

8 Australian Law Reform Commission, *Principled Regulation* (n 1) [8.39].

7.10 However, the ALRC also recommended that any statutory provisions creating deemed individual liability for the conduct of a corporation should consistently include:

> '…a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur'; and
>
> A threshold test that:
>
> a) 'The individual failed to take all reasonable steps to prevent the contravening conduct'; and
>
> b) 'The individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct.'[9]

CAMAC: Personal Liability for Corporate Fault (2005)

7.11 The Corporations and Markets Advisory Committee (CAMAC) formerly provided independent advice to the Australian Government on legal and practice issues relating to corporations and financial markets.[10] In a 2005 report, CAMAC warned that under some of the statutory schemes for individual liability, corporate officers may be 'deemed liable, and subject to penalties, for corporate conduct that they could not reasonably have influenced or prevented.'[11]

7.12 The CAMAC Report further insisted that individuals should not be held liable for corporate misconduct unless they were directly involved in or accessories to the contravention.[12]

The COAG Principles (2012)

7.13 The COAG Principles effectively aim to codify (and limit) the circumstances under which personal liability for corporate conduct can be imposed on directors. The Principles were adopted in 2009 'amid concerns that there appeared to be an increasing tendency for [director liability provisions] to be introduced as a matter of course and without proper justification'.[13] The COAG Principles were enshrined in the *Personal Liability for Corporate Fault Reform Act 2012* (Cth).

7.14 In 2012 COAG also published *Guidelines for Applying the COAG Principles,* with the objective of reducing inconsistencies in the standard of personal responsibility imposed on directors.[14] The Guidelines for applying the Principles set out three types of deemed liability of officers in relation to corporate conduct:

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9 Ibid Recs 8–2, 8–4.
10 CAMAC was abolished in 2018.
11 Corporations and Markets Advisory Committee (Cth), *Personal Liability for Corporate Fault* (Report, September 2006) ('*Personal Liability for Corporate Fault'*).
12 Ibid.
13 Council of Australian Governments, *Personal Liability for Corporate Fault — Guidelines for Applying the COAG Principles* (2012) [2].
14 Ibid.

- **Type 1** Where a director is deemed liable for an offence by the corporation, the prosecution bears the onus of adducing sufficient evidence to prove each element of the offence beyond reasonable doubt. Under Type 1, a failure by a director to take reasonable steps, or any other fault element, is an element of the offence that the prosecution must prove.
- **Type 2** A director is deemed liable for an offence by the corporation subject to one or more 'defences' provided in the statute, such as that the director took reasonable steps to prevent the offence. To rely on the defence, the defendant must adduce enough evidence to suggest that there is a reasonable possibility that the defence applies. This is known as the 'evidential burden' under the *Criminal Code*, or the 'prima facie case' otherwise. The prosecution, in turn, must then adduce sufficient contrary evidence to prove beyond reasonable doubt that the defence does not apply.
- **Type 3** The director is deemed liable for the corporation's offence unless they can 'prove' or 'establish' a particular defence. This language indicates that, under the *Criminal Code*, the defendant bears a legal burden in relation to the defence (on the balance of probabilities) rather than the (lower) evidentiary burden.[15]

7.15 The Principles aim broadly to limit personal liability for corporate fault to Type 1 offences, and prevent the proliferation of Type 2 or 3 offences unless clearly justified by legislators.[16]

7.16 Principle 4 provides that officers should not be deemed personally criminally responsible for corporate misconduct unless:

a) there are compelling public policy reasons to do so;
b) the liability of the corporation alone is insufficient to promote compliance; and
c) it is reasonable to hold the officer liable because of their:
    i. role in the corporation;
    ii. capacity to influence the corporation's conduct; and
    iii. failure to take reasonable steps to prevent the contravention.[17]

7.17 While the Principles refer to 'directors' rather than 'officers', Principle 3 also provides that 'A "designated officer" approach to liability is not suitable for general application.' The Principles as a whole thereby endorse a functional approach rather than

15 Ibid [2.3].
16 Stakeholders in previous inquiries have expressed opposition to any reversal of the onus of proof in relation to individual liability. See, eg, Australian Institute of Company Directors, *Submission to the Australian Law Reform Commission's Inquiry into Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (2015); Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974* (11 July 2002); Institute of Public Affairs, *Submission to the Review of the Trade Practices Act 1974* (4 July 2002); Law Council of Australia, *Submission to the Review of the Trade Practices Act 1974* (30 July 2002).
17 Council of Australian Governments (n 13) Principle 4.

a formal approach to identifying persons who may be held liable for the conduct of a body corporate.[18]

7.18 Finally, Principle 6 provides that, 'in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.' In effect, this Principle permits a reverse onus on the defendant in some cases, but the Principles as a whole emphasise that this measure should be used sparingly, if at all.

Individual liability under the current law

7.19 Notwithstanding the findings and recommendations of these earlier reviews, commentators have continued to debate the circumstances under which individuals ought to be held liable for corporate conduct.[19] It is, however, widely agreed that individual liability plays a key role in ensuring corporate compliance.[20] Welsh and Anderson argue that 'the best way to ensure that companies comply with [regulations] is to impose liability on the directors and managers personally as well as on the company.'[21] They further argue that the use of civil penalties against corporate officers should be considered where the objective of regulation is to ensure compliance.[22] Chesterman, in turn, has argued that the objective of deterrence is undermined when the corporate structure is allowed to shield individuals from penalties.[23]

7.20 Despite widespread support for individual accountability, however, there is also a perception that individuals are not properly held accountable in practice. Professor Fisse has lamented that 'individual accountability is frequently displaced by corporate liability, which serves as a rough-and-ready catch-all device.'[24] While the imposition of penalties against a body corporate itself is an important part of a holistic approach to promoting corporate compliance, as argued throughout this Discussion Paper, it should not replace individual liability where officers have clear responsibilities in relation to preventing corporate misconduct.

7.21 Directors and senior officers have legal obligations under both the common law and statute in Australia. Under the common law, they may be liable for breach of fiduciary obligations, tort, breach of contract, or for personal involvement in criminal offences. Under statute, directors and officers have responsibilities relating to the directors' duties set out in Ch 2D of the *Corporations Act 2001* (Cth), in addition to specific personal

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18 This distinction is discussed below at [7.98].

19 For a good overview of this debate, see Brent Fisse, 'Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions' (Paper presented at Penalties, Policy Principles and Practice & Government regulation, Sydney, 9 June 2001).

20 Michelle Welsh and Helen Anderson, 'Directors' Personal Liability for Corporate Fault: An Alternative Model' (2005) 26 *Adelaide Law Review* 299, 301; Chesterman (n 3) 1065; Acquaah-Gaisie (n 3) 146.

21 Welsh and Anderson (n 20) 301.

22 Ibid 300.

23 Chesterman (n 3) 1065.

24 Fisse (n 19) 2.

obligations regarding particular corporate offences and civil penalty provisions, such as insolvent trading, taxation offences, cartel conduct, capital raising, environmental regulation, and occupational health and safety laws.[25]

7.22 Where a body corporate is capable of committing a criminal offence or contravening a civil penalty provision, corporate officers may also be individually liable in relation to that conduct.

7.23 In *Principled Regulation*, the ALRC identified three key forms of individual liability in relation to corporate conduct:

- Concurrent liability — where both the individual and the body corporate may be separately liable as principals in respect of the same offence or contravention (a form of direct liability);
- Accessorial liability — where the individual is liable as an accessory to an offence or contravention for which the body corporate is principally liable (a form of indirect liability); and
- Managerial liability — where the individual is deemed to be liable as a principal for an offence or contravention because of that individual's role and status in the management of the body corporate (a form of deemed liability).[26]

7.24 Karen Wheelwright further delineated five categories of individual liability for corporate conduct, which are: lifting the corporate veil by statute; accessorial (participatory) liability; deemed liability; responsible officer liability; and personal (primary) liability.[27]

7.25 A separate potential category of individual liability for corporate conduct is 'stepping stone' liability, a term coined by Herzberg and Anderson and borrowed from Keane CJ's description in *ASIC v Fortescue Metals Group*.[28] This denotes a:

> two-step device for establishing officers' liability. The first stepping stone consists of a finding that a corporation contravened the law. The establishment of corporate fault then leads to the second stepping stone, pursuant to which a finding may be made that, by failing to prevent the corporate contravention, the relevant officer failed to discharge one or more of the general statutory duties [under the *Corporations Act 2001* (Cth)].[29]

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25 For a good overview of these duties, both at common law and under statute, see Karen Wheelwright, 'Australia' in Helen Anderson (ed), *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (Wolters Kluwer, 2008) 45.

26 Australian Law Reform Commission, *Principled Regulation* (n 1) 312–13.

27 Wheelwright (n 25) 53–5.

28 *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd* (2011) 190 FCR 364, [2011] FCAFC 19 [10]; Abe Herzberg and Helen Anderson, 'Stepping Stones — From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 *Federal Law Review* 181, 181–2.

29 Alice Zhou, 'A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability' (2019) 47(1) *Federal Law Review* 151, 153; see also Rosemary Langford, 'Corporate Culpability, Stepping Stones and Mariner — Contention Surrounding Directors' Duties Where the Company Breaches the Law' (2016) 34 *Corporations and Securities Law Journal* 75.

7.26 This chapter, however, is concerned with deemed or managerial liability. This form of liability arises from a person's functional role in the body corporate, rather than from any direct involvement in the contravention, or from their formal position in the corporation (and any attendant duties arising from that formal position).

7.27 As Wheelwright notes:

> Deemed liability departs from the principles of accessorial liability because proof of knowledge of or involvement in the contravention is not an essential element; generally, involvement in the management of the body corporate will be sufficient.[30] …
>
> However, these provisions generally protect individuals who may be deemed liable in one of two ways — (1) by requiring the prosecution to establish, for example, that the director was reckless or negligent, or failed to take all reasonable steps to prevent the contravention by the company, or (2) by providing for a statutory defence (with the evidentiary burden on the individual charged), such as a lack of involvement in management, lack of knowledge, or the exercise of due diligence.[31]

7.28 CAMAC identified four classes of individuals who could be subject to liability under Commonwealth statutes that establish deemed or managerial liability, which they categorised as:

- Positional liability: individuals who hold certain formal positions in the corporation, being directors (in all instances) and company secretaries and chief executive officers (in some instances)
- Managerial liability: individuals who are concerned or take part in the management of the corporation, whether or not they are formally appointed as directors or officers of that corporation. This category may in practice include corporate group executives who play a part in relation to group companies of which they are not, strictly speaking, officers. It is based on the definition of 'executive officer' as it appeared in the Corporations Act prior to the repeal of that definition in 2004
- Designated officer liability: individuals who are designated as having organizational or operational responsibility for the specific conduct dealt with in the legislation
- Participatory liability: individuals who promote, authorise, permit, instigate, suffer, acquiesce in, consent to, approve of, connive in or neglect to prevent, a breach by the corporation. This category overlaps ordinary accessorial liability.[32]

7.29 The ALRC noted in *Principled Regulation* that provisions based on managerial liability had become increasingly popular among legislators in recent years.[33] It is

30 Wheelwright (n 25) 54.
31 Ibid.
32 Corporations and Markets Advisory Committee (Cth) (n 11) 16–17.
33 Australian Law Reform Commission, *Principled Regulation* (n 1) [8.28].

now used in the fields of occupational health and safety, taxation, and environmental regulation, among others.

7.30 The reason for the ALRC's current focus on managerial liability, rather than the liability of directors per se, is based on the perception among consultees and commentators that, in many cases, directors may not be the most appropriate target for responsibility in relation to misconduct arising from the day-to-day management of a corporation.

7.31 A corollary of this perception is that the senior executive team — composed of the CEO, CFO, and heads of department, etc. — has been too often shielded from responsibility in relation to conduct over which they had significant influence or supervision. This perception stems, in part, from the historically low rate of prosecution against senior corporate officers compared to directors or bodies corporate in Australia. In the limited instances in which senior individuals have been prosecuted, it has typically been on the basis of breach of directors' duties, rather than seeking to hold senior management responsible for the conduct of companies.[34]

7.32 Writing in the US, Garrett has shown that the prosecution of individuals far outstrips prosecution of bodies corporate in that jurisdiction.[35] However, he has also found that those individuals are more likely to be middle-managers or lower-level employees, rather than senior office holders.[36] The limits of prosecuting low-level employees in terms of deterrence are self-evident. As Garrett notes, however, 'while prosecuting higher officers may change the culture and affect industry practices, doing so is difficult and can take years.'[37] The same can be said in the Australian context.

7.33 In agreement with the literature, consultations by the ALRC indicate that the current regime setting out individual liability for corporate conduct provides too many opportunities for senior executives to evade personal liability. Unclear obligations and an assortment of (often untested) statutory liability provisions enable corporate executives to create opaque reporting structures and shield themselves from liability. Executives can strategically generate a 'fog of diffused accountability', as one academic put it.[38] Garrett described this as the 'Where's Waldo' problem, in which it is difficult or impossible to sort out who knew what in a company when misconduct occurs:

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34 Brent Fisse and John Braithwaite, 'The Allocation Of Responsibility For Corporate Crime: Individualism, Collectivism And Accountability' (1988) 11 *Sydney Law Review* 468, 470.

35 Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014) 83.

36 Brandon Garrett, 'Individual and Corporate Criminals' in Jennifer Arlen and Norma Z Paige (eds), *Research Handbook on Corporate Crime and Financial Misdealing* (Edward Elgar Publishing, 2018) 46, 50; see also John C Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386.

37 Garrett (n 35) 84.

38 See, eg, Brent Fisse, 'The First Cartel Offence Prosecution in Australia: Implications and Non-Implications' (2017) 45 *Australian Business Law Review* 482, 490; Garrett (n 36); Fisse and Braithwaite (n 34) 470.

> In a large corporation, there is a lot of sand for ostriches to bury their heads in. The lack of any single villain may enable the largest and most complex organizations to commit the most substantial and damaging crimes.[39]

7.34 In an effort to address this problem, while ensuring that liability falls only where an individual was in a position to influence or prevent the relevant conduct, the ALRC has focused its attention on managerial liability for the purposes of this inquiry.

7.35 It should also be noted, however, that the common practice of corporations indemnifying their officers against liability can undermine any managerial liability regime, and this must be held in mind when considering the proposals as set out below.

Individual liability for corporate conduct under statute

7.36 As part of this Inquiry, the ALRC reviewed the individual liability provisions contained in 18 Commonwealth Acts relating to corporations. Across those 18 Acts, 26 separate provisions establish individual liability for corporate conduct.[40] The table of legislation is included in Appendix I.

7.37 Specifically, the review aims to capture statutory provisions that establish liability for officers who were not directly or indirectly involved in the conduct that constituted an offence (that is, they were not accessories), but are deemed liable on the basis of their position within the corporation, including their capacity to influence the conduct in question, and their failure to take reasonable measures to prevent the conduct.

7.38 The review therefore does not include statutory directors' duties or liability that expressly attaches to a formal role in the company (such as director or secretary) other than 'officer'.[41] Nor does it include accessorial liability provisions such as that provided by s 79 of the *Corporations Act 2001* (Cth).

7.39 The review retains the language used in the relevant Act where practicable, including in the use of the terms 'corporation' or 'body corporate'.

Category of persons who may be liable

7.40 The scope of individuals who may be liable in practice for the conduct of a corporation varies according to different statutes. The most common class of individuals

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39 Garrett (n 35) 84, 88.

40 The legislative review includes provisions that make an individual liable for conduct by an 'agent or employee' or similar, as well as conduct by a body corporate, on the basis that any conduct by an agent or employee is potentially attributable to the corporation on the basis of Pt 2.5 of the *Criminal Code* (Cth), or, where the operation of that provision has been displaced by the statute, on the basis of the unique corporate attribution method provided in a given Act. In the ALRC's view, both of these approaches in effect attribute conduct by a corporation to an individual, and as such fall within the scope of this Inquiry.

41 The ALRC acknowledges that provisions establishing the liability of 'officers' can sometimes be applied against directors, and vice-versa. As stated above, however, the focus of this chapter is on the liability of senior officers *other than* the board of directors.

liable under the reviewed provisions is 'a person other than a body corporate [or corporation]'.[42] A handful of acts also refer simply to 'an individual'.[43]

7.41 In other Acts, the relevant provisions apply to 'executive officers', which is defined to mean 'a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.'[44] Among them is the *Taxation Administration Act 1953* (Cth). It uses the term 'officer' rather than 'executive officer' but adopts the same definition. It goes on to provide an inclusive list of roles within the corporation that may be identified as an officer.[45]

Type of liability — Failure to prevent

7.42 The majority of the provisions reviewed set out one of two kinds of liability: some deem the individual directly liable for an offence committed by another actor as if the individual had personally committed it; others create a new offence that typically consists of a failure by the individual to prevent certain conduct by another actor.

7.43 An example of the failure to prevent category can be found in ss 494 and 495 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBCA*'). These sections of the Act create new offences where an executive officer, who was in a position to influence the conduct of the body corporate in relation to conduct that contravened a civil penalty provision or offence provision under the Act, failed to take 'all reasonable steps to prevent' the contravention. These sections also include a fault element, requiring that the individual had knowledge of the contravening conduct, or was reckless or negligent as to whether the conduct would occur.

7.44 Other Acts adopt a modified form of the failure to prevent model. Section 40B(2) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), for example, additionally requires that the contravention injured or damaged (or was likely to injure or damage) human beings or the environment.

Type of liability — Deemed liability

7.45 Many of the Acts reviewed contain provisions that establish deemed liability, in which individuals are deemed (or taken) to have committed the same offence (or

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42 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 223; *ASIC Act 2001* (Cth) s 12GH(3); *Australian Consumer Law* s 139C; *Banking Act 1959* (Cth) s 69C; *Competition and Consumer Act 2010* (Cth) s 84(3)-(4A); *Corporations Act 2001* (Cth) s 769B(5); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 498B(3); *Excise Act 1901* (Cth) s 145A(4); *Fisheries Management Act 1991* (Cth) s 164; *National Consumer Credit Protection Act 2009* (Cth) s 325; *Privacy Act 1988* (Cth) s 99A; *Telecommunications Act 1997* (Cth) s 576; *Therapeutic Goods Act 1989* (Cth) s 55(3)–(6).

43 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EU(3); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1, s 151(3)–(5); *Superannuation Industry (Supervision) Act 1993* (Cth) s 388(4)–(6).

44 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) ss 4, 69EJR; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 493; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 40B(6); *Taxation Administration Act 1953* (Cth) s 8Y; *Therapeutic Goods Act 1989* (Cth) s 54B(5).

45 *Taxation Administration Act 1953* (Cth) s 8Y(1).

civil penalty contravention) as the body corporate (or other relevant actor). While these provisions all set out some form of direct liability, they nonetheless differ substantially in their construction.

7.46 To facilitate comparison, the ALRC has identified three models of deemed liability that occur commonly in the reviewed legislation. These models did not necessarily originate in the legislation — the naming here is used solely to assist analysis.

ACL method

7.47 The individual liability method adopted in the *Australian Consumer Law* provides that an individual (within a category set out in the particular Act) will be deemed (or taken) to have engaged in any conduct that was engaged in by:

a) an employee or agent of the individual acting within the scope of their actual or apparent authority; or

b) any other person acting at the direction of, or with the consent or agreement (whether express or implied) of an employee or agent of the individual, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent.[46]

CCA method

7.48 The liability method adopted in the *Competition and Consumer Act 2010* (Cth) provides that an individual (within a category set out in the particular Act) will be deemed (or taken) to have engaged in any conduct engaged in by the relevant actor (employee or agent, or body corporate), when that second person was acting within the scope of their actual or apparent authority.[47]

AVCAA method

7.49 The liability method adopted in the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) ('*AVCAA*') provides a relatively unique form of deemed liability.

7.50 Section 69EU(3) provides that an individual (within the category set out in the particular Act) will be deemed (or taken) to have engaged in any conduct engaged in by an agent or employee who:

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46 This method is also found in the *Australian Securities and Investments Commission Act 2001* (Cth) s 12GH(3); *Australian Consumer Law* s 139C; *Corporations Act 2001* (Cth) s 769B(5); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 498B(3); *Excise Act 1901* (Cth) s 145A(4).

47 This method is also found in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 233; *Banking Act 1959* (Cth) s 69C; *Competition and Consumer Act 2010* (Cth) s 84(3)–(4A); *National Consumer Credit Protection Act 2009* (Cth) s 325; *Privacy Act 1988* (Cth) s 99A; *Superannuation Industry (Supervision) Act 1993* (Cth) s 338(4)–(6); *Telecommunications Act 1997* (Cth) s 576; *Therapeutic Goods Act 1989* (Cth) s 55(3)–(6).

a) engaged in the conduct within the actual or apparent scope of their employment or authority;

b) had 'duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the individual'; and

c) the agent or employee acted 'intentionally, knowingly or recklessly' or 'expressly, tacitly or impliedly authorised or permitted the relevant conduct to be engaged in'.[48]

Other unique provisions

7.51 A number of Acts include unique provisions that were not easily categorised. These include the deemed liability provision under the *Taxation Administration Act 1953* (Cth), which is a strict liability provision that effectively reverses the onus of proof in relation to fault. Section 8Y(1) provides that:

> Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.

7.52 The burden of proof is reversed by subsection (2), which provides that it is a defence if the person proves that they did not 'aid, abet, counsel or procure' the relevant conduct, *and* that they were not 'in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.' The provision states that the reversed burden is a legal one, adopting the definition in the *Criminal Code*.[49] Section 8Y(3) further provides that an officer of the corporation shall be presumed to be concerned in and take part in the management of the corporation unless the contrary is proved. The defendant therefore has a legal burden in proving they do not fall within this definition.[50]

7.53 Other unique individual liability provisions are found in the *Corporations Act 2001* (Cth) and the *Fisheries Management Act 1991* (Cth). Provisions in the *Corporations Act 2001* (Cth) relating to insolvent trading create a separate offence, under which directors may be liable even if the corporation itself did not commit an offence. Section 588G sets out the elements for a civil penalty contravention (s 588G(2)) and a separate criminal offence (s 588G(3)) in relation to trading while insolvent.

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48 This method is found in the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EU(3); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1, s 151(3)–(5).

49 *Taxation Administration Act 1953* (Cth) Note 1 to s 8Y(2); *Criminal Code* s 13.4(a).

50 *Criminal Code* s 13.4.

Fault elements

7.54 While some of the provisions reviewed are strict liability offences, requiring no fault element to be proved,[51] the majority require the prosecution to prove a fault element. Most provisions state that, where the underlying offence requires a certain state of mind, and the relevant actor who engaged in the conduct had that state of mind, then the individual to be held liable will be 'taken' or 'deemed' to have also had that state of mind.

7.55 Significantly, only a minority of the provisions reviewed require proof of a fault element on the part of the individual to be held liable.[52] In all of the provisions that do, the fault element is knowledge, recklessness, or negligence. These are the 'failure to prevent model' provisions in the table.

7.56 The 'deemed liability' provisions, on the other hand, typically require only that the relevant actor who engaged in the relevant conduct had the requisite state of mind.

Defences

7.57 Many of the reviewed provisions provide defences in the legislation. These defences require the defendant to 'prove' or 'establish' that, for example, they took reasonable precautions and exercised due diligence in preventing the contravention. Where a defence uses this language of 'prove' or 'establish', it imposes a legal burden on the defendant to prove the matter on the balance of probabilities.[53]

7.58 As an example of how this operates in practice, s 99A of the *Privacy Act 1988* (Cth) provides that a 'person other than a body corporate' (Person A) will be taken to have engaged in any conduct engaged in by an agent or employee of that person (Person B) acting within the scope of their actual or apparent authority, where the conduct was engaged in on behalf of Person A. Section 99A(3) further provides that, where the offence requires a certain state of mind, and Person B had that state of mind, Person A is also taken to have had that state of mind.

7.59 Accordingly, Person A does not need to have had a particular state of mind or otherwise be at fault (for example, by having knowledge of the offence, or being reckless or negligent as to the commission of the offence).

7.60 The *Privacy Act 1988* (Cth) provides a defence where the defendant can prove that they took reasonable precautions and exercised due diligence in preventing the commission of the offence. The defendant has a legal burden to prove that they were not at fault, by proving, on the balance of probabilities, that they took reasonable precautions and exercised due diligence.

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51 *Taxation Administration Act 1953* (Cth) s 8Y is an example of this.

52 In Appendix I, these provisions are coloured pale blue.

53 *Criminal Code* ss 13.4, 13.5. For a good overview of the operation of reverse legal and evidentiary burdens in the criminal law, see Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) [11.10].

7.61 As a safeguard, the *Privacy Act 1988* (Cth) (like many of those reviewed) also provides that if the defendant would not have been liable for imprisonment but for the operation of that deeming provision, they shall not be imprisoned for an offence under s 99A. This safeguard addresses one of the most significant criticisms of reversing the onus of proof in relation to individual criminal prosecutions, which is that a conviction can result in the most serious deprivation of liberty available to the state as a means of punishment. The reverse onus is rendered more justifiable by removing that possible outcome.

7.62 Provisions that provide a defence that imposes a legal burden on the defendant are indicated in dark blue in the table. When the burden of proof is reversed, the standard of proof for a defendant is only 'on the balance of probabilities'. This is a lower standard than that imposed on the prosecution in proving the elements of the offence, which is 'beyond reasonable doubt'.[54]

A simplified individual accountability regime

7.63 The legislative review illuminates a number of inconsistencies in the imposition of individual liability for corporate conduct. These inconsistencies have also been highlighted by various academics, as noted throughout this chapter.

7.64 In a comparative analysis, Wheelwright notes that under the common law, the separate legal identity of corporations provides broad protection from individual liability to corporate officers. Individual liability under statute, however, 'is a different matter entirely. There are numerous provisions in both state and federal legislation that expose directors to civil and criminal liability for defaults of their companies.'[55]

7.65 The proliferation of different statutory liability provisions for corporate officers in relation to corporate conduct presents challenges for both officers and law enforcement. On the one hand, the diverse character of the individual liability provisions across multiple statutes, as shown in the ALRC's review, makes it unnecessarily complex for officers to comply fully with their obligations, ultimately undermining the objective of promoting compliance, and instead creating additional and counterproductive regulatory burden for corporations.[56] As CAMAC reported in 2006:

> These differences in legislative approach, even in the same areas of regulation, and the consequential lack of harmony result in complexity and lack of clarity for individuals in considering their responsibilities… This very lack of harmony can impair ready communication of statutory requirements and effective compliance efforts.[57]

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54 *Criminal Code* div 13.

55 Wheelwright (n 25) 75.

56 See generally Corporations and Markets Advisory Committee (Cth) (n 11) 1; Australian Government, Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006).

57 Corporations and Markets Advisory Committee (Cth) (n 11) 6.

7.66 At the same time, the variety and complexity of individual liability models under statute renders the task of regulatory enforcement more difficult, as agencies like ASIC must understand and apply several different legal mechanisms, many of which may be untested in court because they only apply to one statute or provision.

7.67 The following section examines some of the key inconsistencies of the statutory regime, and considers how they may be remedied by a simplified individual accountability regime.

Overview of the proposed regime

Proposal 9 The *Corporations Act 2001* (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

Proposal 10 The *Corporations Act 2001* (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

7.68 There is widespread agreement in the literature and among consultees of the importance of personal accountability in ensuring corporate compliance.[58] As Acquaah-Gaisie put it, 'corporate wrongdoing would indicate a prima facie case of failure by the management to perform its duties effectively.'[59] These proposals respond to consultations and literature indicating that individual liability is not adequately enforced in Australia, and the insight revealed by the tangle of overlapping and diverging individual liability provisions identified in the ALRC's legislative review.

7.69 The proposals are also consistent with the literature on the moral blameworthiness of corporations justifying the existence of corporate criminal responsibility.[60] Corporations are considered to be capable of expressing policies, making moral judgments, and taking actions.[61] Though these are rightly seen as expressions of distinct corporate personality, the existence of individual liability recognises that corporate action arises from the combined activities of officers and the relationships between them.

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58 See, eg, Lim Wen Ts'ai, 'Corporations and the Devil's Dictionary: The Problem of Individual Responsibility for Corporate Crimes' (1990) 12 *Sydney Law Review* 311, 313; N Hawke, *Corporate Liability* (Sweet and Maxwell, London, 2000); *Principled Regulation* (n 1) 310; Fisse (n 19) 2; Chesterman (n 3) 1065.

59 Acquaah-Gaisie (n 3) 226.

60 See Chapter 2, [2.24]–[2.26].

61 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 35–6; Nick Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' (2019) 82 *Modern Law Review* (advance), 13.

7.70 Proposals 9 and 10 would adopt a single deemed liability model that would replace (and streamline) the various provisions under current law. The proposals aims to combine the best elements of the existing models in one consistent approach, to be applied where appropriate. Under such a model, liability would be based on capacity to influence the conduct of the corporation, and would focus on the senior or executive management team, rather than directors per se. Influence, in this sense, refers to the capacity of an individual to make decisions and direct behaviour in the course of their role in the business. This is distinct from more general notions of influence, such as that enjoyed by majority shareholders, for example.

7.71 The proposed amendment does not create a form of stepping stone liability, though it may have some cosmetic similarities.[62] While stepping stone liability often uses similar language of a 'failure to prevent' misconduct, that form of liability uses the statutory regime of officers' duties to make individuals liable for offences or contraventions committed by a corporation.[63]

7.72 The proposals are different in two ways. First, they establish specific provisions dealing with this type of liability, rather than relying on the existing duties. They therefore do not seek to broaden directors' duties to widen the scope of contraventions that might be brought against an officer under those provisions. Secondly, the proposed provisions would require the proof of additional elements before individual liability of the officer is established. A mere breach of the law by the corporation is not sufficient.

7.73 The proposals create a separate offence for failing to prevent the misconduct of the corporation. Under the proposals as currently formulated, it would not be necessary to secure a conviction against the corporation before prosecuting an individual. While the elements of the offence engaged in by the corporation would need to be made out during the prosecution of the individual, there are practical reasons why it may not be preferable to pursue the corporation (where it has already wound up, for example).[64]

7.74 The proposals are designed to ensure that senior officers can be held liable when serious crimes are committed by the company. They aim additionally to ensure that individual liability cannot be pushed too far down to middle-management, shielding the most senior officers, but instead accurately reflect where authority resides in corporations of any size or complexity. The proposals therefore seek to reduce corporate misconduct and increase individual accountability for wrongdoing.

7.75 In the course of this Inquiry, the ALRC considered whether an approach modelled on the Banking Executive Accountability Regime could be appropriate in the broader

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62 For the current position on stepping stone liability, see *Australian Securities and Investments Commission (ASIC) v Mariner Corp* (2015) 241 FCR 502, [2015] FCA 589 from [444]; The Hon T F Bathurst AC, Chief Justice of New South Wales, 'Directors' and Officers' Duties in the Age of Regulation' (at the Conference in Honour of Professor Baxt AO, 26 June 2018).

63 See generally Zhou (n 29) 152–3; Langford (n 29); Herzberg and Anderson (n 28).

64 On the aim of finding the proper mix of individual and corporate responsibility, see Fisse (n 19) 2.

corporate law context.[65] Given that the regime is still relatively untested, however, and also taking into account reservations expressed by consultees, the ALRC did not pursue this option.

7.76 The proposals would simplify multiple pieces of legislation and provide clarity and certainty to both officers and regulators regarding the attribution of individual liability for corporate conduct under those regimes.

7.77 The ALRC acknowledges that the imposition of personal liability for corporate conduct may be perceived to conflict with the separate legal personhood of corporations and the associated objective of limited liability for corporations. Acknowledging this, the ALRC nonetheless maintains the position reached in *Principled Regulation*, that:

> in some circumstances individual liability is an important adjunct to corporate liability to ensure that individuals are appropriately penalised and to ensure that penalties imposed in respect of corporate misconduct cannot be displaced.[66]

7.78 Moreover, this position is consistent with the views of consultees and academics who have argued that individual liability is an important complement to corporate liability in ensuring compliance by corporations.[67]

7.79 The proposals (along with regulatory guidance that should accompany the new regime, as outlined below) would clarify the standards of conduct and accountability expected of senior corporate officers by the community and regulators.

A failure to prevent model

7.80 As the legislative review in Appendix I shows, there is considerable diversity in the approaches taken in legislation to establishing liability of officers for corporate conduct. While the ALRC attempted to categorise these different approaches according to common themes, several provisions fall outside these categories, presenting entirely unique formulations.

7.81 The variety of different models means that officers have different (and sometimes overlapping) responsibilities in relation to different legislation. The inherent complexity of this regime as a whole undermines the aim of corporate compliance, as the tangled web of obligations serves to simultaneously obfuscate genuine compliance efforts and provide cover for those who might seek to abuse the corporate vehicle.

7.82 The proposals adopt the failure to prevent model that is commonly found in existing individual liability provisions. The proposals therefore aim to harmonise the current law, rather than impose any radical change. The ALRC has adopted this model over the others on the basis that it sets clear responsibilities for senior officers to

65 The regime was introduced by the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth).

66 Australian Law Reform Commission, *Principled Regulation* (n 1) 312.

67 See above at [7.19]–[7.20].

ensure corporate compliance throughout the parts of the company over which they have influence, as opposed to merely ensuring that their personal conduct is compliant.

7.83 The ALRC agrees with stakeholders who argued that directors may not be the most appropriate target where the objective is to ensure corporate compliance at all levels of a corporation, across all lines of business, in the course of day-to-day operations. Directors, in particular non-executive directors, have a governance role rather than a managerial one. As such, the ALRC considers that senior officers such as the CEO, CFO, general managers, or other heads of department are in a better position to influence and manage the day-to-day affairs of a corporation, particularly with regard to compliance.

7.84 The approach reflects this by imposing a clear obligation on officers in a position to influence the conduct of the corporation to ensure corporate compliance. The standard expected in performance of this obligation is 'reasonable measures', which is another common feature of the existing liability provisions.

7.85 The proposals would therefore protect officers who have behaved appropriately by providing a clear avenue to avoid any personal liability ('reasonable measures'), and by limiting criminal responsibility to cases where the prosecution can prove that an individual officer acted with the requisite fault element.

The 'reasonable measures' defence

7.86 Several of the Acts reviewed already provide guidance as to the meaning of 'reasonable measures'. Section 496 of the *EPBCA*, for example, calls for consideration of whether the individual:

- took steps to ensure regular compliance monitoring;
- took steps to implement recommendations from such assessment;
- took steps to ensure adequate training and understanding of obligations for employees, agents, and contractors; and
- took any action after becoming aware of the contravention of a relevant Act, or of a relevant compliance management policy or procedure.

7.87 Based on preliminary consultations, the ALRC considers that it may be preferable to provide such guidance in a regulatory form, rather than in the statute. As consultees pointed out, community standards change over time, as do the practical and strategic approaches to preventing misconduct in corporations. Such guidance must also be capable of being adapted to suit corporations of different characters and sizes, and different types of conduct. What is a reasonable measure for a large multinational may be cost prohibitive and unreasonable for a small company. Likewise, what is reasonable for a small company may be inadequate in the context of transnational business (see Chapter 12).

7.88 As such, the ALRC considers that regulatory guidance can more flexibly meet these needs than statutory requirements. On the other hand, noting the advantages in

terms of certainty and consistency that may be provided by enshrining the standard of reasonable measures in statute, the ALRC invites comment on the matter.

Fault

7.89 In some cases, Proposal 9 would lower the burden for establishing civil liability by removing the fault element (for example, under s 494 of the *EPBCA*, which currently requires that an officer 'knew' or 'was reckless or negligent' regarding the conduct). It could therefore be argued that the proposal undermines fundamental principles of civil justice as it imposes a reverse onus in civil proceedings for individuals who have been identified as being in a position to influence the conduct of the corporation in relation to a contravention.

7.90 This is balanced, however, by retaining a clear defence (reasonable measures), and also retaining a fault element for criminal proceedings in relation to the same conduct (Proposal 10).

7.91 The retention of a fault element as a precursor to any criminal liability for individuals is a fundamental aspect of the proposals. The legislative review showed that many of the provisions that impose a reverse onus on officers to prove a defence include a safeguard to the effect that the person cannot be imprisoned as a result of that provision, if such a penalty would not otherwise be available.

7.92 As noted above, this safeguard aims to justify the imposition of a reverse onus by precluding the possibility of imprisonment. However, a variety of serious consequences may flow from a criminal conviction other than imprisonment, including reputational damage and restrictions on a person's ability to engage in certain activities or obtain certain licences, such as a permit for working with children. As such, the safeguard as presently formulated in many of the statutes is a relatively blunt instrument that does not go far enough to protect the rights of individuals.

7.93 Instead, Proposals 9 and 10 would ensure that corporate officers only face criminal liability where the prosecution proves that they personally contravened the relevant provision with the necessary mental element of knowledge, intention, or recklessness. The proposals are therefore consistent with the COAG Principles in that they would limit criminal liability for officers in relation to corporate wrongdoing to cases in which the officer was at fault, and would retain the onus on the prosecution to prove this (Type 1 liability).[68] The threshold requirement for civil liability — that the officer was in a position to influence the conduct and failed to take reasonable steps to prevent it — is also broadly consistent with the Principles.

7.94 The CAMAC Report went further than others, by arguing that individuals should not be held liable for corporate misconduct unless they are directly involved in or accessories to the contravention.[69] The ALRC considers that this limited view is

68 Council of Australian Governments (n 13).
69 Corporations and Markets Advisory Committee (Cth) (n 11) 9.

not capable of accounting properly for the way many modern corporations operate in practice, particularly large multi-national corporations with potentially thousands or tens-of-thousands of employees. In such companies, the potential for harm (to employees, consumers, the environment, the economy, or the wider public) can be immense and irremediable.

7.95 The responsibilities of those officers who take on senior management positions should accurately reflect this, in order to ensure that those officers utilise their position of influence in the corporation appropriately to ensure corporate compliance. The position taken in the CAMAC Report is also inconsistent with many existing individual liability provisions.

7.96 Importantly, the proposals do not expose senior officers to any and all misconduct by a corporation; liability is carefully limited to conduct that the individual was in a position to influence, and could reasonably have prevented by taking reasonable measures.

7.97 Some stakeholders to this inquiry suggested that any form of personal liability for corporate conduct may make people reluctant to take on senior management roles, in light of the potential exposure to civil or criminal liability, particularly in problematic companies that are most in need of skilled remediation.[70] This may have further impacts on remuneration of senior officers and insurance premiums. However, the ALRC considers that the proposals may in fact encourage skilled officers to take up roles in problematic companies given that the proposed provisions offer a clear defence to liability for officers who take reasonable measures to ensure compliance.

Category of persons who may be liable

> **Question A** Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?

7.98 In the Discussion Paper to the *Principled Regulation* report, the ALRC asked whether, 'given the complexity of modern corporate structures, formal delegation is the appropriate test for corporate liability' as compared to a test based on 'functional authority'.[71] The ALRC concluded, in agreement with the unanimous response received in submissions, that functional authority is the more appropriate test.[72]

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70 This was put to the ALRC during consultations, but there is a lack of evidence to support the argument. It seems more likely that corporations could simply adjust the remuneration of executives to reflect any perceived increase in risk.

71 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* (DP 65 2002) Question 16–2.

72 Australian Law Reform Commission, *Principled Regulation* (n 1) [8.54]–[8.55].

7.99 The ALRC maintains this position, but notes that the diversity of categories of individuals who may be liable under the current personal liability regime requires further consideration of the issue.

7.100 The ALRC's review of individual liability provisions in relation to corporate conduct overwhelmingly applied to 'a person other than a body corporate [or corporation]', or simply 'an individual'. Five of the Acts reviewed, however, provide a definition based on functional authority, which applies to 'a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.'[73] This category is typically denoted as 'executive officer'.[74]

7.101 In the absence of any clear justification for the divergence, it appears unhelpfully inconsistent — for both officers and regulators — to maintain these distinct categories of persons who may be liable for the conduct of a corporation.[75] This is particularly true where different categories are used within the same Act, as is the case under both the *AVCAA* and the *EBPCA*, for example.[76]

7.102 The ALRC seeks the views of stakeholders as to the most appropriate category of persons to which the individual liability provisions should apply.

7.103 As the provisions aim to regulate the conduct of senior management, rather than the board, the term 'director' is not appropriate. While some of the existing legislation refers simply to an 'individual', the ALRC anticipates that this term may be considered too broad. The term 'officer' may attract similar criticism.

7.104 On the other hand, the ALRC is concerned that the 'executive officer' formulation may be too narrow or restrictive in practice. In *Barac v Farnell*, the Full Court of the Federal Court considered the meaning of 'taking part in the management of a business' in the context of a worker's compensation claim.[77] The Court held that:

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73 This definition is used in the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) ss 4, 69EJR; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 493; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 40B(6); *Taxation Administration Act 1953* (Cth) s 8Y; *Therapeutic Goods Act 1989* (Cth) s 54B(5).

74 Of the five Acts that use this definition, the *Taxation Administration Act 1953* (Cth) alone does not use the term 'executive officer'.

75 This is exacerbated by extensive state-based legislation covering similar subject matter, which in turn applies to similar but slightly varied categories of persons. See, for example, the state-based environmental protection Acts: LexisNexis, *Halsbury's Laws of Australia* (at 31 October 2019) 180 Environment, 'Environmental Litigation' [180-7040].

76 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EJR is a civil penalty provision that applies to an 'executive officer', while s 69EU(3) is a criminal offence provision that applies to an 'individual', which is not defined; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 498B(3) refers to a 'person other than a body corporate', while ss 494 and 495 refer to an 'executive officer'.

77 *Barac (trading as Exotic Studios) v Farnell* (1994) 53 FCR 193.

> Not all employees in a business are concerned in its management. Management of a business is generally regarded as involving something in the nature of the exercise of a discretionary power of control and direction of the business…[78]

7.105 This reference to 'direction of the business' sounds rather more akin to the role of a director than of a day-to-day manager. The case of *Holpitt v Swaab* considered when a person is 'concerned in the management of a company' for the purposes of s 556 of the *Companies (New South Wales) Code 1981* (no longer in force).[79] Burchett J of the Federal Court held that the secretary in that case was not such a person on several grounds, including that the company documents stated that the directors would 'manage' the company, and that the NSW *Companies Code* stated that 'the office of secretary does not, in itself, involve management'.[80]

7.106 That judgement also relied on, and saw no reason to depart from, the 1875 case of *Gibson v Barton,* which held that:

> A manager would be, in ordinary talk, a person who had the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is intrusted with power to transact the whole affairs of the company.[81]

7.107 The hard line drawn between agents and servants and a person empowered to 'transact the whole affairs of the company' seems manifestly ill-suited to accurately describing the nature of modern corporations. The prospect of prosecutors today trying to identify such a 'supreme leader' figure in large multinational outfits with multiple lines of business across numerous jurisdictions is nonsensical. Moreover, the conclusion that responsibility for corporate conduct should lie only with such an individual would be a dramatic shift in the statutory regime for individual liability that has developed to reflect changes to the nature of corporations over the last century and a half.

7.108 The broader term 'officer' as used in the *Corporations Act 2001* (Cth) is defined to include, in addition to a director, any person 'who makes or participates in making decisions that affect the whole, or a substantial part, of the business of the corporation' or 'who has the capacity to affect significantly the corporation's financial standing'.[82] According to Hinchliffe:

> Participation must be real and direct, but not necessarily in a role in which ultimate control is exercised, although it must be more than the administrative carrying out of the orders of others responsible for a company's management.[83]

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78 Ibid [6].

79 *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474.

80 *Companies (New South Wales) Code 1981* (NSW) s 556; *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474, 476–7.

81 *Gibson v Barton* [1875] 10 QB 329, 336.

82 *Corporations Act 2001* (Cth) s 9(2)(a)–(b).

83 LexisNexis, *Halsbury's Laws of Australia* (online at 31 October 2019) 120 Corporations, 'Internal Administration of Corporations' [120-7200]; *Corporate Affairs Commission (Vic) v Bracht* (1988) 14 ACLR 728, [1989] VR 821; *Australian Securities and Investments Commission (ASIC) v Macdonald*

7.109 The relative lack of prosecutions against individuals for corporate conduct (and the corresponding lack of systematic analysis of those few existing cases) exacerbates the risk of uncertainty in this regard.

7.110 Ultimately, the most appropriate formulation must balance the need for clarity and certainty, acknowledging the existing (if limited) case law, while ensuring that it targets a sufficiently high level of management to promote corporate compliance, without being unduly restrictive so as to be self-defeating.

7.111 Noting these unresolved issues, the proposals currently adopt the broad term 'officer' to avoid any arbitrary restriction. This broad approach is in turn narrowed by the qualifier that the officer must be 'in a position to influence the conduct of the body corporate in relation to the contravention'.

7.112 In formulating the proposals in this chapter, the ALRC has acknowledged the concern of previous inquiries — and of consultees — who argued that directors may not be the most appropriate target of liability for corporate conduct.[84] As directors are typically not in a position to influence the day-to-day operations of corporations, the imposition of liability at this level offers limited potential in ensuring compliance throughout a corporation. Acknowledging this concern, and recognising that directors are already subject to an extensive statutory regime of duties, the proposals aim to remedy this imbalance by ensuring that senior executives *other than the board of directors acting in that capacity* can be held liable where it was within their capacity to prevent a contravention.

7.113 This is reflected in the use of the term 'influence' in the proposals, which better lends itself to the role of senior or executive management, such as the CEO or CFO. Where directors are not in a position to influence day-to-day operations, they will not be captured by the provision. The proposals are therefore consistent with the recommendations of the Treasury report and the CAMAC report in aiming to locate personal responsibility for corporate conduct precisely with those officers who *are* in a position to prevent contraventions by the corporation, and who fail to take reasonable measures in fulfilment of that role.[85] It also adopts the language of the previous ALRC report, which called for a threshold test for liability based on capacity to influence the conduct, and a failure to take reasonable measures in doing so.[86]

7.114 While the term 'influence' attracted some debate in consultations, it is a relatively common term used in this context. It is already used in several of the Acts creating individual liability for corporate conduct.[87] The *Therapeutic Goods Act 1989* (Cth), for

(No 11) (2009) 256 ALR 199, [2009] NSWSC 287; *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 247 CLR 465, [2012] HCA 18; *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd* (2002) 168 FLR 253.

84 Department of Treasury (n 5) [6.6]; Corporations and Markets Advisory Committee (Cth) (n 11) 9.

85 See Department of Treasury (n 5); Corporations and Markets Advisory Committee (Cth) (n 11).

86 Australian Law Reform Commission, *Principled Regulation* (n 1) Rec 8–4.

87 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EJR; *Environment Protection*

example, makes an executive officer liable for an offence by the body corporate where that officer was in a position to influence the conduct of the body in relation to the contravention and failed to take all reasonable steps to prevent it.[88]

7.115 The term was used in the COAG Principles, which include considerations of whether 'the director has the capacity to influence the conduct of the corporation in relation to the offending' as a factor in determining whether it is reasonable for the director to be liable.[89] The term 'influence' was also used by the ALRC in its earlier report *Principled Regulation*, where it recommended that any individual liability provision include a threshold test for liability that:

a) The individual failed to take all reasonable steps to prevent the contravening conduct; and

b) The individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct.[90]

7.116 As such, the ALRC considers that this term is appropriately suited and understood in this context.

Relevant conduct

7.117 The legislative review revealed that individuals may be held liable for the conduct of a variety of other persons, including:

- A body corporate (or 'corporation');
- An employee or agent acting within the actual or apparent scope of their employment or authority;
- An employee or agent acting within the actual or apparent scope of their employment or authority, who had 'duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the individual'; or
- Any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent.

7.118 As with other inconsistencies, the complexity created by this divergence undermines corporate compliance by making it difficult for officers to understand and fulfil their responsibilities. The ALRC is not presently aware of any reason for the different scope applied in these provisions, but welcomes any clarification on this point. Absent any clear reason for distinction, the ALRC considers that these provisions should be consistent across the Acts reviewed.

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and Biodiversity Conservation Act 1999 (Cth) ss 494, 495(1), 495(2); *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) ss 40B(1), 40B(2); *Therapeutic Goods Act 1989* (Cth) ss 54B, 54BA.

88 *Therapeutic Goods Act 1989* (Cth) ss 54B, 54BA.

89 Council of Australian Governments (n 13) Principle 4(c)(ii).

90 Australian Law Reform Commission, *Principled Regulation* (n 1) Rec 8–4.

7.119 In light of the language used in the proposals, the ALRC considers that it would be appropriate to apply the provision to a broad category of persons on the basis that the scope will be limited in practice to persons within the scope of 'influence' of the individual to be held liable. This safeguard will ensure that, if the relevant actor is so far removed that the individual could not influence the conduct through reasonable measures, they will not be liable for that conduct.

Overlapping provisions within the same Act

7.120 Some of the Acts reviewed appear to provide separate provisions for general and specific operation, or separate provisions for civil and criminal offences that are incongruous. The *EPBCA*, for example, provides one general deemed liability provision that may render 'a person other than a body corporate' liable for 'any conduct for the purposes of this Act', where that conduct is engaged in by an agent or employee of the person, or someone acting at the direction or with the consent or agreement of an agent or employee of that person.[91] The Act provides a defence where the person must prove (imposing a reverse legal burden) that they took reasonable precautions and exercised due diligence to prevent the conduct.

7.121 In addition to this very broad provision, the *EPBCA* also contains three specific provisions that create a separate offence where an executive officer fails to prevent a contravention of a civil penalty provision or criminal offence as listed under those sections. These specific provisions require a fault element on the part of the defendant, consisting of one or more of knowledge, recklessness, or negligence. As such, these specific provisions present a higher bar for prosecutors.

7.122 The specific provisions apply to conduct by the body corporate, rather than an agent or employee. However, conduct by an employee or agent may also be attributed to the body corporate under s 498B(1), which sets out a unique attribution method for corporate liability regarding offences under the Act. It follows that any conduct covered by these specific provisions could also be the subject of a prosecution brought under the more general (and easier to establish) deemed liability provision in s 498B(3).

7.123 In a different example, the *AVCAA* contains separate provisions relating to civil penalties (s 69EJR) and criminal offences (s 69EU3). These provisions expressly apply to separate parts of the Act and adopt different models. The provision relating to criminal liability is a deemed liability provision that provides a defence of due diligence, which the defendant must prove under a legal burden of proof.

7.124 Curiously, the provision relating to civil penalties retains the burden of proof on the prosecution to establish personal fault, thereby making it much more difficult to attribute liability for a civil contravention than for a criminal offence. This is inconsistent

91 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 498B(3).

with the core principle of criminal law that any criminal liability should require a higher standard of proof, in light of the serious consequences that apply.[92]

7.125 These inconsistencies create uncertainty and undue complexity for both officers and regulators, and would be remedied by application of a common formulation such as that set out in the proposals.

Application of the proposed changes

7.126 The ALRC has not yet determined which of the personal liability provisions identified in the review should be replaced by the proposed liability model. While the objective of simplicity and consistency calls for as many of the provisions as appropriate to be replaced, there may be important justifications for retaining distinctive formulations in some legislation based on the scope and purpose of that legislation.

Question B Are there any provisions, either in Appendix I or any relevant others, that should not be replaced by the provisions set out in Proposals 9 and 10?

7.127 The ALRC maintains the position of its earlier report that, where there are clear justifications for unique individual liability provisions in particular statutes, that distinction should be maintained.[93] Where there is no clear reason for distinction, on the other hand, the ALRC proposes that the various provisions should adopt a common form.

7.128 The ALRC therefore particularly welcomes submissions from the public as to whether a unified officer liability provision such as that proposed here should apply to each of the Acts identified in Appendix I (or any others), or whether there are particular reasons for maintaining distinct provisions in any of those regimes.

Relationship between the proposals and accessorial liability

7.129 The amendment will supplement the accessorial liability provisions contained in s 79 of the *Corporations Act 2001* (Cth) and Part 2.4 of the *Criminal Code*, which set out the attribution of liability for individuals who were indirectly involved in the conduct that constituted an offence. Under the *Criminal Code*, an individual will be liable for an offence committed by another person (including a body corporate) if that individual aided, abetted, counselled, or procured the commission of the offence.[94]

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92 See generally Chapter 2.

93 Australian Law Reform Commission, *Principled Regulation* (n 1) [8.39]. It was noted that the *Principled Regulation* report did not recommend any change to the individual liability provisions canvassed in that report. However, that report only considered a limited subset of those covered in the present inquiry (see above). Moreover, that report also recommended a number of key aspects that should be consistent across all provisions establishing personal liability for corporate fault. In the context of the present inquiry then, the ALRC considers that, absent any justification for the divergence, the best way to achieve this consistency is by replacing those disparate provisions with a single common formulation wherever appropriate.

94 *Criminal Code* s 11.2, which codifies the common law definition of accessorial liability; see also Joachim

7.130 Under s 79 of the *Corporations Act 2001* (Cth), a person is 'involved' in a contravention by another person only if they have 'aided, abetted, counselled or procured' the contravention; 'induced' the contravention; been, directly or indirectly, knowingly concerned in or party to the contravention; or conspired to effect the contravention.[95] An officer may 'aid and abet what the company speaking through his mouth or acting through his hand may have done'.[96]

7.131 Accessorial liability generally requires knowledge or awareness of the offence. In *Tabe* the High Court upheld the positions that:

> [K]nowledge is not limited to knowledge gained from personal observation, or certainty based on belief in information obtained from a third party, although those states of mind would suffice. The word "awareness" is sometimes used as a synonym. A belief in the likelihood, "in the sense that there was a significant or real chance", of the fact to be known, will suffice.[97]

7.132 The effect of these provisions is that where a senior officer of a corporation was not an accessory, a conspirator, or otherwise knowingly involved in the contravention, even though they may have been in a position to influence the conduct and therefore prevent the contravention, they will not be liable as an accessory. The proposals therefore aim to complement the accessorial liability regime by ensuring that senior officers who were in a position to influence, and therefore prevent, misconduct, can be liable if they fail to take reasonable measures to ensure compliance.

Dietrich, 'Liability of Accessories under Statutes, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions' (2010) 34 *Melbourne University Law Review* 106.

95 The wording of s 79 of the *Corporations Act 2001* (Cth) was borrowed in full from s 75B(1) of the *Trade Practices Act 1974* (Cth). See also *Yorke v Lucas* (1985) 158 CLR 661, [1985] HCA 65 and *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217, [1988] HCA 57 for the contemporary civil law interpretation of s 79. For criminal authorities, see for example *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1, [2017] FCAFC 74 and *Gore v Australian Securities and Investments Commission (ASIC)* (2017) 341 ALR 189, [2017] FCAFC 13.

96 *Hamilton v Whitehead* 166 CLR 121, [1988] HCA 65, 128; note, however, that following *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56 some uncertaintly remains as to whether an offence speaks to a corporation, or to accessorial liability.

97 *Tabe v The Queen* (2005) 225 CLR 418, [2005] HCA 59 [10], citing *Saad v The Queen* [1987] HCA 14, (1987) ALJR 243, 244; see also *Bahri Kural v The Queen* (1987) 162 CLR 502, [1987] HCA 16.

8. Whistleblower Protections

Contents

Introduction

8.1 One of the key challenges that characterise the investigation and prosecution of corporate crime is the significant information asymmetry between corporations and regulators. This is particularly true in the case of large multinational corporations and corporate groups. Whistleblowers therefore play an integral role in the identification and investigation of corporate crime. Proposal 11 responds to the Terms of Reference, which request the ALRC inquire into options for reforming Part 2.5 of the *Criminal Code* or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime.

8.2 Strong whistleblower protections are a prerequisite for effective identification and investigation of corporate misconduct. Accordingly, effective whistleblower policies should be developed by corporations as part of ensuring their compliance with the law.

8.3 Chaikin has argued that:

> There is substantial evidence indicating that whistleblowers in Australia cannot obtain justice when they are victims of retaliation by corporations.[1]

8.4 In 2017, an OECD report noted that 'there is a perception among the Australian public that any form of external whistleblowing will almost definitely result in reprisals.'[2] That report also included a comment from one participant who summarised the current law in Australia as providing 'no incentive for whistleblowers to speak up and no protection for them if they do'.[3]

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1 David A Chaikin, 'Blowing the Whistle: A Critical Analysis of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act (Cth) 2019' (2019) 47 *Australian Business Law Review* 162, 164.

2 OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia* (2017) 29.

3 Ibid.

8.5 In the report of its recent Foreign Bribery Inquiry, the Senate Economics References Committee noted that whistleblowers 'play an important role in exposing foreign bribery and corruption'.[4] Submissions to that inquiry supported the finding, noting for example that 'tips or whistleblowing are the most common means by which fraud is detected'.[5]

8.6 However, that inquiry also concluded (in agreement with a large number of submissions) that;

> Australia's whistleblower protection regime is insufficient, particularly for employees of private companies. Given the significant harm generated by foreign bribery and corporate corruption and the key role insiders can play in exposing such conduct, the committee considers it essential that Australia take immediate action to adequately protect whistleblowers.[6]

Recent reforms

8.7 The Australian Government has sought to address the concerns that have been raised. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) passed both houses of parliament on 19 February 2019 and received Royal Assent on 12 March 2019. It includes significant reforms to whistleblower protections in the private sector,[7] and has been characterised as a 'substantial improvement'.[8] The Explanatory Memorandum to the Bill explained that:

> Criminal conduct can be difficult to detect or prove satisfactorily in a court. It can be concealed by a complex web of transactions and falsified or misleading corporate records, and a proliferation of entities in corporate structures can make responsibility opaque.
>
> Often such wrongdoing only comes to light because of individuals who are prepared to disclose it, sometimes at great personal and financial risk.[9]

8.8 The Act is therefore designed to reduce the risk of adverse action against whistleblowers and thus remove impediments to disclosure. The Explanatory Memorandum further stated that:

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4 Senate Economic References Committee, Parliament of Australia, *Foreign Bribery* (2018) xiv.
5 Ibid 117.
6 Ibid 130.
7 The existing provisions had been heavily criticised. Some commentary even suggested that private sector whistleblowers would have been better served by relying on corporate codes of conduct enforced through the private law than seeking to rely on the whistleblower protection provisions in statute: Olivia Dixon, 'Honesty Without Fear? Whistleblower Anti-Retaliation Protections in Corporate Codes of Conduct' (2016) 40 *Melbourne University Law Review* 168.
8 Though not without limitations: Chaikin (n 1) 162.
9 Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) [1.2]–[1.3].

> The existence of strong statutory protections to encourage whistleblowing can improve compliance with the law and promote a more ethical culture because individuals know there is a higher likelihood that misconduct will be reported.[10]

8.9 The Act included two key sets of amendments. The first amends the current whistleblower protection in Part 9.4AAA of the *Corporations Act*. The second amends the *Taxation Administration Act 1953* (Cth) and provides protection for whistleblowers in relation to tax matters in a new Part IVD.

8.10 In relation to the first set of amendments, the Act was designed, in part, to achieve simplification and consistency. Whistleblowers in the corporate and financial services sectors previously had to navigate a number of different schemes in the *Corporations Act*, the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth), and the *Superannuation Industry (Supervision) Act 1993* (Cth). While each scheme was broadly similar there were important differences that could be determinative as to whether a whistleblower was protected. For example, disclosures relating to misconduct in the *National Consumer Credit Protection Act 2009* (Cth) or the *Data Collection Act 2018* (Cth) were not protected.

8.11 Chaikin explains that:

> The Act makes a number of positive changes to private sector whistleblowing legislation:
>
> - widening the category of person who can gain protection for reporting of wrongdoing, such as former employees;
> - replacing the good faith requirement with the requirement that the whistleblower has 'reasonable grounds to suspect' that the alleged wrongdoing has occurred;
> - extending to anonymous disclosures…;
> - expanding protections and remedies available to whistleblowers who suffer reprisals...;
> - broadening the type of wrongdoing to which protections apply;
> - creating new offences in relation to the disclosure of the identity of a whistleblower; and
> - imposing a mandatory obligation on public companies and large proprietary companies to implement a whistleblower policy.[11]

8.12 Under the Act, public companies, large proprietary companies, and corporate trustees of registrable superannuation entities must implement and make public their whistleblower polices from 1 January 2020. In August 2019, ASIC released a draft regulatory guide for consultation. The guide would require entities to establish a robust and clear whistleblower policy that is supported by processes and procedures for

10 Ibid [1.4].
11 Chaikin (n 1) 166.

effectively dealing with disclosures received under the policy. Entities would be required to ensure that the policy is implemented appropriately and consistently carried out in practice, and have arrangements in place for periodically reviewing and updating their whistleblower policy to ensure issues are identified and rectified.

8.13 Submissions in response to the draft regulatory guide were mixed. A number of submitters raised concerns about the level of prescription in the guide. For example, the Australian Institute of Company Directors submitted:

> we are concerned that if the draft regulatory guide (RG) is adopted in its current form it will compel entities to adopt policies that are inflexible, lengthy and hard to digest. Further, we are concerned that it risks promoting a 'tick a box' approach to compliance and undermining the board's ability to adopt policies and procedures that are tailored to their organisation, and accessible for users of the policy (including whistleblowers).[12]

8.14 As yet, ASIC has not released a final regulatory guide that addresses submitters' concerns, though one is expected shortly.

8.15 Although it has been argued that further reform of both public and private sector whistleblower laws is necessary,[13] the ALRC considers that the recent amendments are a significant improvement upon the previous position, and can be incorporated into the approach to corporate criminal responsibility proposed in this discussion paper.

Ensuring appropriate whistleblower protections as an aspect of due diligence

Proposal 11 Guidance should be developed to explain that an effective corporate whistleblower protection policy is a relevant consideration in determining whether a corporation has exercised due diligence to prevent the commission of a relevant offence.

8.16 Proposal 11 requires a corporation to implement an effective whistleblower policy in order to demonstrate that it exercised due diligence in order defend any criminal offences in respect of which a due diligence defence applies.

8.17 Research highlights that:

> Whistleblowing processes – or processes for encouraging and protecting staff to speak up about wrongdoing concerns and integrity challenges – are vital to integrity and good governance systems in organisations.[14]

12 Australian Institute of Company Directors, Submission on Australian Securities and Investments Commission, *Consultation Paper 321: Whistleblower Policies* (18 September 2019) 1–2.

13 AJ Brown, 'Safeguarding Our Democracy: Whistleblower Protection after the Australian Federal Police Raids' (130th Henry Parkes Oration, Tenterfield, 26 October 2019).

14 AJ Brown and Sandra A Lawrence, *Strength of Organsiational Whistleblowing Processes - Analysis from*

8.18 Given the link between effective whistleblower policies and greater corporate integrity, it is appropriate to link the availability of a due diligence as a defence to the attribution of criminal responsibility to a corporation as set out in Proposal 8 with the requirement to have a whistleblower policy under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). Such a link will further incentivise corporations to adopt suitable whistleblowing procedures.

8.19 As set out above, the requirement to have a whistleblower policy is not universal and is limited to large corporations. This recognises that the implementation of a whistleblowing policy, although desirable for all companies, is only formally required when the scale of the corporation is such that the benefits clearly outweigh the added regulatory burden. Similarly, the ALRC recommends that Proposal 11 only apply to large corporations. For smaller corporations, the exercise of due diligence would be assessed on the totality of the policies and procedures of the company having regard to its size and the complexity of its operations.

8.20 Proposal 11 should not be limited by causation. That is, it should not be necessary to demonstrate that the absence of a whistleblower policy or the failure to implement a whistleblower policy caused or was directly relevant to the commission of a crime by the corporation. Rather, these policies are designed to assist in improving the integrity and compliance orientation of the corporation generally, and so their absence should be a factor in determining whether a due diligence defence can be made out.

Whistleblower compensation scheme

Question C Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to provide a compensation scheme for whistleblowers?

Limitations in recent amendments

8.21 The recent *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) made it an offence to reveal the identity of a whistleblower without their consent.[15] The law also clarified that a whistleblower is not subject to any civil, criminal or administrative liability for making a disclosure, nor can any action be taken against them under a contract (ensuring that a whistleblower's employment cannot be terminated in response to the disclosure, for example).[16] However, the decision to make a disclosure may nonetheless have serious and ongoing consequences for an individual,

Australia & New Zealand. Further Results of the Whistling While They Work 2 Project (2017) i.

15 See, eg, *Corporations Act 2001* (Cth), s 1317AAE.

16 See, eg, ibid s 1317AB.

in terms of future employability and dealing with any potential legal action and media attention.

8.22 While the amendments aim to facilitate access to a remedy where whistleblowers have suffered 'victimisation',[17] there is no general compensatory scheme for whistleblowers who have not been specifically victimised but have nonetheless suffered detriment as a result of the disclosure. Under the amended provisions, there remains a need to prove detrimental conduct that causes detriment to the whistleblower and for that conduct to have been engaged in because the person believes the whistleblower 'made, may have made, proposed to make or could make a disclosure'.[18] There is a gap where specific detrimental conduct cannot be proven, but the interests of the whistleblower have nonetheless been affected. It has been argued that:

> We must amend the anti-detriment protections in [the *Corporations Act* and the *Public Interest Disclosures Act*], to match international best practice, by removing what is a de facto requirement for a deliberate, knowing intention to cause harm before civil or employment remedies can be accessed. This may be appropriate for a criminal offence of victimisation, but not for civil or employment remedies for the types of detrimental conduct by organisations – both acts and omissions – which can foreseeably result in damage to whistleblowers.[19]

8.23 The limitations of a scheme that requires proof of specific detrimental conduct have been described by Pascoe and Welsh:

> Requiring whistleblowers to prove that reprisals have taken place without the benefit of a favourable onus of proof can be difficult and the level of difficulty will be exacerbated in situations where the conduct comprising the reprisal is subtle. Reprisals may take the form of petty harassment, the spreading of rumours, ostracism or the setting up of employees for failure. Demotions or transfers may be justified by changes in the working environment.[20]

8.24 Negative labelling of whistleblowers as 'naïve, idealistic, feared, loathed, vengeful, troublemakers, malcontents, betrayers' or as 'psychologically disturbed, unbalanced, unstable and vindictive' and somehow deserving of reprisals may also indicate the subtle psychologically-based reprisals that may occur subsequent to whistleblowing.[21]

8.25 A broader whistleblower compensation scheme could strengthen the corporate criminal responsibility regime by ensuring that whistleblowers are compensated for loss arising from detrimental personal consequences of making a disclosure. Therefore such

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17 See, eg, ibid ss 1317AC, 1317AD, 1317ADA, 1317AE.

18 See, eg, ibid s 1317AD.

19 Brown (n 13) 18.

20 Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review* 144, 154.

21 Inez Dussuyer, Stephen Mumford and Glenn Sullivan, 'Reporting Corrupt Practices in the Public Interest: Innovative Approaches to Whistleblowing' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Edward Elgar Publishing, 2011) 433.

a scheme could be expected to improve enforcement of, and compliance with, corporate criminal laws.

Options for a broader scheme

8.26 Adoption of a broader whistleblower compensation scheme would be consistent with a recommendation of the Parliamentary Joint Committee on Corporations and Financial Services, which called for some form of compensation or rewards scheme for whistleblowers:

> The committee acknowledges that there were strong arguments put forward by both proponents and opponents of financial reward and bounty systems. However, it considers that a reward system would motivate whistleblowers to come forward with high quality information. This information would otherwise be difficult to obtain. The committee considers that a reward system will motivate companies to improve internal whistleblower reporting systems and to deal more proactively with illegal behavior.[22]

Bounty system as an alternative model

8.27 In the United States, the *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010* (Pub.L. 111–203) establishes a bounty system whereby the Securities and Exchange Commission will pay a whistleblower (out of public funds) a percentage of the penalty recovered from the corporation on conviction, or of the value of the harm of the crime.[23] Such schemes also exist under other US legislation.

8.28 The Parliamentary Joint Committee did not support a US style bounty system. It accepted arguments from submitters that there were risks with the US approach, particularly in relation to the creation of unethical incentives to engage in whistleblowing.[24] Instead, the committee proposed a bespoke scheme that

> would place a cap on the reward being paid to a whistleblower, be reflective of the information that is disclosed and be determined against a number of criteria so as to mitigate against perceived negative consequences of a US style bounty system.[25]

8.29 The ALRC also considered, but rejected, such a bounty system. Such a scheme suffers from two salient flaws:

- the value of the harm done by the misconduct, or the size of the penalty imposed against the corporation, bears no relation to the level of detriment suffered by a whistleblower; and
- there may be some concern that a 'reward' scheme could encourage vexatious or false whistleblowing.

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22 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (2017) [11.55].

23 *Securities Exchange Act 1934* (US, Pub.L. 73–291) s 21F.

24 Parliamentary Joint Committee on Corporations and Financial Services (n 22) [11.56].

25 Ibid [11.57].

8.30 The second argument is less relevant, given the overwhelming non-monetary disincentives against whistleblowing, and the reality that any such reward is conditional on a conviction of the corporation. Thus, there will be no reward if a false whistleblowing complaint is made.

Other matters for discussion

8.31 Even without adopting a bounty system, questions arise as to the form a broader compensation scheme may take.

8.32 First, there is the question of at what point in time the whistleblower should become eligible for compensation. Under the recent amendments, the whistleblower is required to prove to the court the actual detrimental conduct and the resulting detriment.[26] Under the Dodd-Frank system, the whistleblower is not entitled to a reward until successful enforcement action has been taken against the corporation.[27] This would not seem to be appropriate for a non-bounty scheme, as the focus should be on the effect upon the whistleblower rather than the enforcement outcome. It may be enough for compensation to be available once the disclosure has been made and the whistleblower can prove detriment.

8.33 Secondly, there is a question as to what principles should guide the availability of compensation and the quantum of that compensation. The broad definition of detriment that exists in the amended provisions may be sufficient guidance for the sort of detriment that may be compensable.[28] It should also be necessary for the whistleblower to prove that they made a disclosure.

8.34 Determining the proper quantum of compensation is difficult. Given that a broader compensation scheme would not require a causal link between a particular act by the corporation and the detriment suffered by the whistleblower, ordinary principles of compensatory remedies may not be relevant. One option may be to impose a fixed amount of compensation depending on the presence of certain factors that could be set out in legislation. As noted, the ALRC does not support some sort of percentage-based award based on the penalty obtained against the errant corporation.

8.35 Thirdly, there is a question as to whether such a scheme should be government funded or require the errant corporation itself to compensate the whistleblower. If the scheme is to be funded by the corporation itself, there may be difficulties associated with attributing liability to the corporation without proof of a direct causal nexus between its conduct and the detriment to the whistleblower.

8.36 If the government is to compensate the whistleblower, it could be questioned why the taxpayer should pay for something which effectively arises out of the corporation's own misconduct. These issues may suggest answers to the first and second questions in

26 See, eg, *Corporations Act 2001* (Cth) s 1317AD.
27 See *Securities Exchange Act 1934* (US, Pub.L. 73–291) s 21F.
28 See, eg, *Corporations Act 2001* (Cth) s 1317ADA.

this section. It may mean a fixed sum is preferable because under both of these funding models it would not be appropriate for compensation to be uncapped. Additionally, if a corporation is to pay, it may mean it is appropriate for a contravention to be proven before compensation is to be paid.

8.37 If the scheme is government funded, it should further be considered whether the broader compensation scheme should extend also to public sector whistleblowing. Brown has recently argued that that there are weaknesses and inconsistencies in the protections added by the recent amendments, that a single coherent set of private sector whistleblower provisions would have been preferable, and that these should have been aligned with public sector public interest disclosure protections.[29]

8.38 Finally, it must be investigated whether there are other measures that could be taken to support and encourage would-be whistleblowers, and to reduce the significant disincentives they continue to face.[30]

8.39 These are all matters in respect of which the ALRC would be assisted by submissions from interested stakeholders.

Extraterritorial application of corporate whistleblower protection laws

Question D Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to apply extraterritorially?

8.40 Chapter 12 of this report examines specific issues with respect to transnational crime. In that context, the ALRC is specifically interested in the views of stakeholders as to whether the existing whistleblower protection regime should apply extraterritorially.

8.41 This issue was considered by the Senate Economics References Committee in its 2018 report on the failure to prevent foreign bribery offence proposed in the Crimes Legislation (Combatting Corporate Crime) Bill 2017. In that report, the Committee recommended that

> the government request the expert advisory panel on whistleblowers to consider whether the scope of Australia's whistleblower protections provides sufficient coverage in foreign bribery cases.[31]

29 Brown (n 13) 14–15.

30 See, eg, Dussuyer, Mumford and Sullivan (n 21) 433–4.

31 Senate Economics References Committee, *Foreign Bribery Report* (Commonwealth Parliament of Australia, 2018) rec 16.

8.42 While the recent *Treasury Laws Amendment* widened the scope of whistleblower protections, it was silent as to the potential extraterritorial application of the amended whistleblower protections, causing some commentators to ask whether they are adequate to protect disclosures in relation to transnational offences such as foreign bribery and human trafficking.[32]

8.43 A proposal to extend whistleblower protections extraterritorially (or clarify the extraterritorial application of the existing protections) may strengthen the corporate criminal responsibility regime by ensuring that whistleblowers are still adequately protected in making disclosures in relation to crimes of a transnational nature, such as foreign bribery or trafficking. Such an approach would be consistent with the OECD Guidelines on Multinational Enterprises, which require transnational corporations to:

> Refrain from discriminatory or disciplinary action against workers who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies.[33]

32 Ibid [6.84]

33 OECD, *OECD Guidelines for Multinational Enterprises* (2011) 20, Principle 9.

9. Deferred Prosecution Agreements

Contents

Introduction

9.1 The detection, investigation, and prosecution of corporate crime is subject to a number of impediments, including information asymmetries, and the inherent complexity of crime in the corporate context. Deferred prosecution agreements (DPAs) are one way in which some overseas jurisdictions have sought to overcome the difficulties associated with addressing corporate crime.

9.2 Agreements to defer prosecution are collectively and commonly known as DPAs, although this label does not accurately capture the diversity in how DPAs (and their variants) are legally conceived and applied in practice. At their simplest, DPAs are agreements between prosecutors and a corporation that provide for the suspension of criminal proceedings against the corporation in exchange for compliance with agreed conditions. DPAs or similar agreements are available in a number of foreign jurisdictions, including the US, UK, Canada, France, and Singapore.[1]

9.3 DPAs are not currently used in Australia. However, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 ('Combatting Corporate Crime Bill') would amend the *Director of Public Prosecutions Act 1983* (Cth) to introduce a DPA scheme in Australia. This Bill lapsed at the end of Parliament on 1 July 2019 and the ALRC understands it is likely to be reintroduced shortly.

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1 A recent OECD study reported that DPA-like resolutions were available for legal persons in 16 parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019) 49.

9.4 It is opportune to reassess the utility and appropriateness of introducing a DPA scheme in Australia, within the framework of reforms to the corporate criminal responsibility regime being considered in this inquiry. This reassessment can also benefit from insights from recent developments under the UK's DPA scheme.

9.5 In this chapter, the ALRC outlines key arguments for and against the introduction of a DPA scheme in Australia and asks for views on whether such a scheme should be introduced. It does so against a backdrop of a summary of the five DPAs that have been approved since the introduction of the UK's scheme in 2014.

9.6 It is apparent that, while DPAs may assist prosecutors to overcome barriers to the detection and investigation of corporate crime and secure expeditious outcomes, there are principled concerns about their use, which are informed by observations from comparative jurisdictions, primarily the UK, on whose legislation the Combatting Corporate Crime Bill was modelled.

Background to DPAs

9.7 DPAs are emerging as a preferred tool for addressing corporate crime in a number of overseas jurisdictions.

United States

9.8 The most prolific and longstanding use of DPAs (and Non-Prosecution Agreements (NPAs)) for corporate offenders has occurred in the US. DPAs first developed in the US in the 1930s as a means of diverting juvenile offenders from the criminal justice system. However, since the 1990s they have also been used by prosecutors as a means of sanctioning and rehabilitating corporations.[2] There has also been a corresponding rise in the use of plea agreements in relation to relatively less serious offences than those associated with DPAs or NPAs.[3]

9.9 In the US, there is no statutory framework for the use of DPAs or NPAs, though their legitimacy is implicitly acknowledged by the *Speedy Trial Act 1974*, 18 USC § 3161 (1974), which provides for an exception to the rule for setting trial dates in respect of any

> period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.[4]

2 In the US DPAs are available to natural persons, as well as corporations. This also applies to NPAs.

3 Cindy R Alexander and Mark A Cohen, 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (2015) 52 *American Criminal Law Review* 537, 591–2.

4 *Speedy Trial Act 1975*, 18 USC § 3161(h)(2).

9.10 However, as Bronitt observes

> the Act itself does not create or define DPAs, with the result that the purpose, principles and restrictions on their use are not to be found in positive law, but rather are governed by prosecution discretion, policy and administrative practice.[5]

9.11 All US federal criminal cases are settled at the discretion of the US Department of Justice (DOJ). There is very little judicial oversight.[6] DPAs (but not NPAs) are filed with the courts to comply with the *Speedy Trial Act 1974*, so that the court can approve any exception to the Act's requirement that trials begin within 70 days of bringing charges. That does not, however, preclude judicial oversight. In *United States v HSBC Bank*, the District Court observed that by 'placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority'.[7]

9.12 Generally, criminal settlements for corporations in the US contain the following elements: an admission of facts, an agreement of cooperation, a specified duration for the agreement, and an agreement to monetary and non-monetary sanctions.[8] Common sanctions include restitution, fines, probation, appointment of monitors, and termination of responsible individuals,[9] although it has been observed that the scope of terms of DPAs is limited only by prosecutorial imagination. DPA terms have also included public apology, forfeiture of illicit assets and profits, waiving of speedy trial rights and statute of limitation defences, and undertakings to make ongoing disclosure to authorities and regulators.[10]

9.13 In 2018, the DOJ entered into at least 24 agreements, 13 of which are NPAs and 11 are DPAs. Of those 24 agreements, 13 were agreed with financial institutions for conduct including violations of the *Bank Secrecy Act*, tax fraud and other tax related violations, *Racketeer Influenced and Corrupt Organization Act* offences, and wire fraud.[11] The empirical study undertaken by Alexander and Cohen reports 66 DPAs and 91 NPAs for the period 1997–2011. There were 329 plea agreements in the same time period.[12]

9.14 Alexander and Cohen draw attention to the vibrant, and continuing, policy debate surrounding the efficacy of NPAs and DPAs relative to traditional plea agreements in settling criminal investigations.[13] The ALRC does not propose to explore the issues

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5 Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 212, 212.

6 A matter which US Senator Elizabeth Warren has been attempting to address though her Bill, 'Ending Too Big to Jail Act', first introduced on 14 March 2018 and reintroduced on 3 April 2019.

7 *United States v HSBC Bank USA, NA and HSBC Holdings PLC*, 12-CR-763, 2013 WL 3306161 (ED NY, 1 July 2013).

8 Alexander and Cohen (n 3) 538.

9 Ibid.

10 Bronitt (n 5) 213.

11 Joseph Warin, Kendall Day and Melissa Farrar, 'Trends in DOJ Nonprosecution, Deferred Prosecution Deals' (Law360, 29 January 2019).

12 Alexander and Cohen (n 3) 562 (Table 1).

13 Ibid 553–8.

of this debate given the very different corporate regulatory environment in the US as compared with Australia.

France

9.15 In December 2016, France inserted arts 41-1-2 and 180-2 into its *Code of Criminal Procedure* (*Code de procédure pénal*) to permit prosecutors to enter into DPA-like agreements (called 'Convention Judiciaire d'Interet Public' – CJIP (Judicial Public Interest Agreements)) with companies suspected of international or national corruption offences, including tax fraud and money laundering. This reform, known as Sapin II,[14] extends the extraterritorial reach of French anti-corruption laws, established a new French Anti-Corruption Agency (AFA), introduces an obligation to implement anti-corruption corporate compliance programs, and also improves protection of whistleblowers under certain circumstances.

9.16 Pursuant to the scheme introduced by Sapin II, French prosecutors are permitted to offer a CJIP only as long as no public proceedings have been initiated, without any admission of guilt on the part of the company. Similar to the UK model and that proposed for Australia, but unlike the US model, CJIPs are not available to individuals.

9.17 A CJIP must include one or more of the following:

- payment of a fine to the French Treasury, capped at 30% of turnover;
- implementation of an AFA monitored compliance program for up to 3 years; and
- payment of additional compensation to identified victims.

9.18 Such an agreement is subject to validation by a judge and is subject to a public hearing that may be attended by victims of the act of corruption.

9.19 Sapin II indicates that CJIPs should be used when they are 'in the public interest' but does not define what is meant by the public interest. On 26 June 2019, the State Financial Prosecutor's Office (PRF) and the AFA jointly published guidelines governing the use of CJIPs.[15] The Guidelines describe the 'value of the CJIP for the legal person' in the following way:

> The main effect of a CJIP is to bring an end to prosecution proceedings against the legal person.
>
> This person thus **avoids being ordered to pay a fine that could be of up to five times** that for which natural persons would be liable (for an offense of active corruption for example, the maximum fine that could be incurred is 5,000,000 Euros or an amount equivalent to twice the proceeds arising from the offense).

14 *Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* (Loi n° 2016-1691, 9 décembre 2016).

15 French National Financial Prosecutor's Office and French Anti-Corruption Agency, *Guidelines on the Implementation of the Convention Judiciaire D'Interet Public (Judicial Public Interest Agreement)* (26 June 2019) https://www.agence-francaise-anticorruption.gouv.fr/fr/document/guidelines-implementation-convention-judiciaire-dinteret-public-judicial-public-interest-agreement.

Furthermore, the **additional penalties that could be faced in a criminal court cannot be provided for in the CJIP**, in particular:

- confiscation of the proceeds or the object of the offense, an automatic penalty and, in cases of offenses against probity, may be the amount of the fraudulently obtained contract; or, in cases of offenses against probity that are liable to a sentence of imprisonment of 5 years or more, confiscation of all goods belonging to the convicted persons or freely available to them, subject to the rights of third parties of good faith;
- prohibition on carrying on certain activities;
- closure of one or more establishments;
- inability to seek or compete for public contracts;
- prohibition on making a public offering of or introducing financial securities in negotiations on a regulated market.

Under a CJIP, the **compliance obligation period is for a maximum of three years, instead of five years** of additional penalty that can be imposed in the event of legal proceedings. As a CJIP does not require a declaration of guilt, it does not entail debarment of the legal person from national public contracts.

There being no conviction also makes it **possible, in the majority of cases, to continue to respond to calls for tenders related to international public contracts**.

The frequently very lengthy duration of proceedings and their aleatory nature are **destabilizing for a legal person, and for its image and governance**, with a long-term distraction from management of its business. Implementing negotiated proceedings **speeds up the handling of the criminal proceedings and mitigates the randomness** of their outcome. A CJIP in this respect offers the legal person the advantage of making provision of the sums relating to the public interest fine and to keep informed its shareholders.

The speed of the proceedings, reinforced by the cooperation of the legal person in the investigation, **mitigates the damage to the reputation of the company**. It also **limits the negative effect of criminal proceedings on the financing capacity** of the legal person, and on its business relations, in particular when third-party due-diligence measures are being carried out by its co-contractors.

When the legal person agrees to a compliance program, the CJIP also **helps appease the social environment of the company** by **demonstrating the commitment** of its top executives **with regard to prevention and detection of offenses** against.

Lastly, where the legal person is the subject of simultaneous prosecutions by several authorities, a CJIP (or its equivalent in foreign law) **facilitates coordination** among these authorities and **allows for the simultaneous acceptance of parallel resolution agreements** … [16]

9.20 The Guidelines are silent about the value of CJIPs to the broader public interest.

16 Ibid 4–5 (emphasis added).

Canada

9.21 In September 2018, Canada introduced 'remediation agreements' by Part XXII.I of the *Criminal Code* (RSC, 1985, c. C-46). Canadian remediation agreements follow a similar model to that of the UK. They are voluntary agreements between a prosecutor and an organisation accused of committing an offence, which require judicial approval.[17] As is the case in the UK, the judge must be satisfied that the agreement is in the public interest and that it is fair, reasonable and proportionate.[18]

9.22 Unlike the UK provisions enacting the DPA scheme, the Canadian legislation stipulates the purpose of remediation agreements. Section 715.31 provides that the Part establishing the remediation agreement regime has the following objectives:

> (a) to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
>
> (b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
>
> (c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
>
> (d) to encourage voluntary disclosure of wrongdoing;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

9.23 No remediation agreements have as yet been approved under the Canadian regime.

United Kingdom

9.24 The enactment of the *Crime and Courts Act 2013* (UK) introduced DPAs to England and Wales, but not Scotland or Northern Ireland. The relevant provisions entered into force on 24 February 2014. Pursuant to Schedule 17 of that Act, DPAs are available for a wide range of economic crimes including the common law offences of conspiracy to defraud and cheating the public revenue, and offences under named provisions of a large number of statutes including the *Bribery Act 2010*, the *Theft Act 1968*, the *Forgery and Counterfeiting Act 1981*, the *Financial Services and Markets Act 2000*, the *Proceeds of Crime Act 2002*, the *Fraud Act 2006* and, after a recent amendment, the *Criminal Finances Act 2017*.

17 *Criminal Code*, RSC, 1985, c. C-46, s 715.37(1).
18 Ibid s 715.37(6).

9.25 Under the UK model, only the Director of Public Prosecutions (DPP) and the Director of the Serious Fraud Office (SFO) are 'designated prosecutors' who can authorise a DPA. They must 'exercise personally the power to enter into a DPA'.[19]

9.26 Paragraph 6(1) of Schedule 17 to the *Crime and Courts Act 2013* (UK) provides:

> The Director of Public Prosecutions and the Director of the Serious Fraud Office must jointly issue a Code for prosecutors giving guidance on —
>
> a) the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case, and
>
> b) the disclosure of information by a prosecutor to P [an organisation] in the course of negotiations for a DPA and after a DPA has been agreed.

Paragraph 2 lists other matters on which the Code of Practice may give guidance, including the use of information obtained by a prosecutor in the course of negotiations for a DPA.

9.27 The DPA Code of Practice was published on 14 February 2014.[20] It sets out the factors of which the prosecutor should be satisfied before initiating DPA negotiations; the factors the prosecutor should take into account when deciding to enter a DPA; the process for inviting a company to enter into DPA negotiations; the conduct of the negotiations; and the terms which should be included in the agreement, including the financial terms.

9.28 A critical difference between the US model of DPAs and that of the UK is the role played by the courts in overseeing a DPA. Following the conclusion of negotiations, but before the terms of a DPA are agreed, the prosecutor must apply to the court at a 'preliminary' hearing held in private for a declaration that entering into a DPA is 'likely' to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate. The court must give reasons for its decision and, if a declaration is declined, a further application is permitted.[21] This procedure is designed to ensure the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings were public.[22]

9.29 If the first declaration is granted, and the DPA is finalised on the terms previously identified, the prosecutor must apply to the Crown Court at a 'final' hearing for a declaration that the DPA is not just 'likely' to be, but in fact is in the interests of justice, and that the terms of the DPA are indeed fair, reasonable and proportionate. The court must give reasons for its decision. The hearing may be held in private but, if the DPA

19 *Crime and Courts Act 2013* (UK) sch 17, para 3.
20 SFO and CPS, *Deferred Prosecution Agreements Code of Practice*: Appendix J.
21 *Crime and Courts Act 2013* (UK) sch 17, para 7.
22 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) [241].

is approved, the reasons must be given in open court.[23] The prosecutor will then prefer an indictment, which will however be immediately suspended pending the satisfactory performance, or otherwise, of the DPA.[24] The prosecutor must then publish the DPA, the declaration of the court and the court's reasons, unless the court orders postponement of publication to avoid prejudicing proceedings.[25]

9.30 The role of judicial oversight is seen as critically important within the UK context. In evidence given to the House of Lords Select Committee on the Bribery Act 2010 ('the Select Committee'), Sir Brian Leveson said:

> I think [judicial oversight] is absolutely critical, because we do not do plea bargains in this country, as others do. This has to be conducted in public, so that, in other words, everybody can see what is being done in their name. Therefore, there is no private deal between a prosecutor and a company that nobody ever hears anything about … The disinfectant of transparency in this area is absolutely critical.[26]

9.31 Although not required by either the *Crime and Courts Act 2013* (UK) or the CPS and SFO Code of Practice, the practice that has been adopted in the UK of having the same judge, Sir Brian Leveson (at least until his recent retirement) be responsible for hearing the applications for declarations in relation to DPAs, has allowed the jurisprudence to develop in a coherent manner and has given consistent guidance to prosecutors in the early phase of the use of DPAs in England.

9.32 Five DPAs have been agreed to date in relation to the following companies: Standard Bank plc, Sarclad Ltd, Rolls-Royce plc, Tesco plc, and Serco Geographix Ltd. The table in Appendix L compares the approach taken in each of the cases, the first four by Sir Brian Leveson and the fifth by Mr Justice Davis. The final judgment in each of these cases is available on the SFO website.

9.33 Despite almost universal agreement that if corruption has occurred within a company, the individuals involved must be prosecuted, no individual has been convicted for conduct the subject of the five DPAs.

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23 *Crime and Courts Act 2013* (UK) sch 17, para 8.
24 Ibid para 2.
25 Ibid para 8.
26 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) [268].

9.34 In *SFO v Serco Geografix Ltd*, Mr Justice Davis said:

> There may be cynicism in some quarters about the process by which a corporate entity can take advantage of a DPA. This cynicism is not well-founded. On the previous occasions when a DPA has been approved the point has been made that approval will only be given where there is the clearest possible demonstration of integrity on the part of the company concerned once the criminal activity has become apparent. This will require early self-reporting to the authorities, full co-operation with the investigation, a willingness to learn lessons and an acceptance of an appropriate penalty. The willingness to learn lessons must be shown via real, substantial and continuing remedial measures. All of that has been demonstrated by Serco Group PLC in this case.[27]

9.35 The Select Committee reported that it had a received a resounding 'yes' to the question of whether the introduction of DPAs had been a positive development in relation to offences under the *Bribery Act 2010* (UK) (although only three of the five DPAs have involved offences under that Act).[28] The SFO provided evidence to the Select Committee that 'DPAs represent an outcome which ensures justice can be done, whilst protecting the interests of innocent employees and shareholders as far as possible'.[29] PwC said:

> The introduction of DPAs has certainly been a positive development. Key benefits include: the powerful incentive on companies to self-report; the resulting potential increase in prosecutions of corporates and individuals, as the authorities are made aware of additional instances of offending, and potential for quicker and less costly resolution of criminal cases (albeit that this point must not be over-exaggerated since in complex cases conclusion of a DPA can still require significant time and resource, particularly as the authorities seek confirmation that no further wrongdoing is likely to be uncovered).[30]

Proposed introduction of DPAs in Australia

9.36 In March 2016, the AGD released a consultation paper that asked for public views on the introduction of a DPA scheme in Australia.[31] The consultation paper suggested that an

> Australian DPA scheme for serious corporate crime may improve agencies' ability to detect and pursue crimes committed by companies and help to compensate victims of corporate crime. It may help avoid lengthy and costly investigations and prosecutions, and provide greater certainty for companies seeking to report and resolve corporate misconduct.[32]

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27 *SFO v Geografix Ltd* (unreported, Crown Court at Southwark, Case No: U20190413, 4 July 2019) [47].
28 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 303, 14 March 2019) [325].
29 Ibid [326].
30 Ibid [327].
31 Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Public Consultation Paper, 2016).
32 Ibid 3.

9.37 Fifteen of seventeen submissions received in response to the initial consultation paper endorsed, or conditionally endorsed, the introduction of such a scheme.

9.38 A second consultation paper, released in March 2017, invited feedback on a proposed model for a DPA scheme in Australia.[33] The Combatting Corporate Crime Bill would have implemented a DPA scheme in accordance with the model proposed in the consultation paper.

9.39 On 28 March 2018, the Senate Economics References Committee recommended that the government introduce a DPA scheme for corporations.[34]

9.40 A consultation draft of a Deferred Prosecution Scheme Code of Practice was released by the Attorney-General's Department in May 2018.[35]

9.41 One feature of the Combatting Corporate Crime Bill that is worth noting is that it provides, in effect, for the implementation of an NPA scheme, rather than a DPA scheme. Unlike the UK scheme, which provides in the Code of Practice that where the court approves a DPA, the prosecutor will prefer an indictment which will then be immediately suspended,[36] neither the Bill nor the draft Code of Practice makes any suggestion that an indictment will be preferred at any stage of the process.

9.42 Under the model provided for by the Combatting Corporate Crime Bill, the CDPP would agree not to commence proceedings in respect of the relevant offence, provided the corporation complies with the terms of the agreement. These agreements would not be filed with a court. Rather, the proposed Australian model would require the approval of the agreement by an authorised person (a retired judge). The model therefore might be seen to sit somewhere in between the purer forms of NPAs and DPAs.

Revisiting the introduction of a DPA scheme in Australia

Question E Should a deferred prosecution agreement scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or with modifications?

33 Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, 2017).

34 Senate Economics References Committee, Parliament of Australia, *Foreign Bribery* (Report, March 2018) rec 11.

35 Attorney-General's Department (Cth), *Deferred Prosecution Agreement Scheme Code of Practice* (Consultation Draft, 2018).

36 SFO and CPS, *Deferred Prosecution Agreements Code of Practice* [1.6]; the Canadian DPA model is to similar effect: *Criminal Code*, RSC, 1985, c. C-46, s 715.37(7).

9.43 The adoption of DPA schemes in various overseas jurisdictions reflects their perceived value in deterring corporate crime. However, the use of DPAs is not without controversy. This section outlines the prospective benefits of a DPA scheme in Australia, while also highlighting some key concerns surrounding the use of DPAs.

The rationale for DPA regimes

Greater accountability for corporate crime

9.44 It is suggested that DPAs may strengthen the ability of prosecutors to hold corporations and related individuals accountable for criminal conduct in a number of respects. Arlen argues that there should be three goals to the structure of a corporate liability regime to ensure that corporations do not profit from their employees' crime:

- ensuring companies want to prevent misconduct;
- inducing corporate self-reporting, full cooperation and remediation; and
- deterring individuals from committing corporate misconduct.[37]

9.45 A suggested approach to achieving the first goal, through an appropriate model of attribution to companies of individual corporate misconduct, coupled with appropriate sanctions imposed with sufficient probability as to render misconduct unprofitable, is discussed in Chapters 6 and 10.

9.46 The achievement of the second and third goals may be assisted by DPAs.

9.47 In order to deter corporate misconduct, there needs to be incentives for companies to detect it, self-report and fully co-operate with investigative agencies about the extent of the misconduct and the identity of those who have participated in the misconduct. There must be different consequences for companies that self-report as compared with those who do not. The DPAs agreed to date in the UK between the SFO and the five companies as described above are examples of this approach. In all but one, the first, a 50% discount on the financial penalty that would have otherwise been dictated by the Sentencing Guidelines was agreed. In those four cases, it could have reasonably been expected that, had the companies been convicted after trial, the maximum discount that would have been applied to the financial penalty would have been 30%. In the context of penalties ranging up to £239,082,645, a 20% difference might be considered a significant incentive to self-report and fully co-operate.

9.48 The prospect of incentivising remediation is also a significant feature of DPAs — a means of addressing issues within the corporation that may be linked to the commission of the misconduct. As Bronitt observes, 'From a crime prevention perspective, the DPA

37 Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US* (NYU School of Law, Public Law Research Paper No 19-30; NYU Law and Economics Research Paper No 19-29, 29 July 2019).

provides an enforceable (not merely voluntary) mandate for the corporation to introduce organisational reform, and enhanced governance and compliance programs.'[38]

9.49 Again, all five of the DPAs entered into thus far in the UK are examples of the importance of remediation, both prior to commencing negotiations with the prosecutor, and on an on-going basis, often under the supervision of a 'monitor', or some other entity, that may also be required to report back to the court periodically during the term of the DPA. As can be seen from the UK case studies, the court placed significant emphasis on the change in senior management in all of the companies and the extent of the compliance programs that had been implemented by the time approval of the DPA was sought.

9.50 Whilst it is true that, at least in the Australian context, this goal might readily be thought to be already achievable within the civil remedial framework, a DPA model would strengthen the remedial framework by acknowledging the requirement for rehabilitation without sacrificing the denunciatory and deterrent purposes of the criminal law.

9.51 The achievement of the third goal is premised on the assumption that prosecutors will use the information that corporations provide them to actively pursue, and successfully convict, the individuals responsible for the criminal conduct. Individual criminal liability is needed to deter the people who actually commit corporate crime, be they employees or agents. Again, the DPAs agreed to date in the UK provide some, albeit limited, evidence as to the effectiveness of DPAs in assisting to achieve this goal. The fact that no individual has been successfully prosecuted through to conviction in any of the five cases perhaps suggests that DPAs are of limited utility in bringing individuals to account. Nevertheless, the trials of six individuals (albeit unsuccessful), three in the Sarclad case and three in the case of Tesco, will have raised some awareness at least in the corporate sector that individuals will be pursued in cases where information has been provided to the prosecutors in the course of negotiating a DPA, and pursuant to the ongoing obligation to co-operate during the (usual) 3-year duration of a DPA.

Expeditious outcomes

9.52 In addition to the perceived ability of DPAs to enhance corporate accountability, DPAs also provide a public interest 'pay-off'. Entering into a DPA offers substantial savings for all parties involved, not least the taxpayer, in avoiding the uncertainties, delays, and high costs of criminal litigation. The UK case studies reveal the magnitude of the costs incurred by the SFO just in the investigatory stage of proceedings. Those costs would be considerably higher were the matters to be prosecuted to trial.

Additional matters of public interest

9.53 Section 7(1) of Schedule 17 to the *Crime and Courts Act 2013* (UK) provides that the prosecutor must apply to the court for a declaration that the DPA 'is likely to be in the

38 Bronitt (n 5) 217.

interests of justice'.[39] The SFO and CPS Code of Practice provides that, having regard to the UK's commitment to the OECD *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*, investigation and prosecution of the bribery of a foreign public official should not be influenced by considerations of, inter alia, national economic interest.[40]

9.54 Clause 2.8 of the UK Code of Practice provides, however, that factors which may be taken into account in determining whether or not to prosecute include whether a conviction is likely:

- to have disproportionate consequences for the corporation, under domestic law, the law of another jurisdiction including but not limited to that of the European Union;[41] and
- to have collateral effects on the public, the corporation's employees and shareholders or the corporation's and/or institutional pension holders.[42]

9.55 The Australian draft Code of Practice provides similarly.[43]

9.56 The manner in which these factors have been assessed by the approving judges can be seen in the UK case studies. The line between the 'national economic interest' and the other interests of third parties was very fine in the Rolls-Royce case and it is not unreasonable to suppose that the guidelines could well be interpreted in some cases as providing protection for those companies deemed 'too big to fail'.[44]

Multi-jurisdictional alignment

9.57 During consultations, it was suggested that Australia ought to be in alignment with overseas jurisdictions that have DPA regimes. In the absence of a DPA regime in Australia, the prospect of prosecution in Australia may impede the entry of a multinational company into a DPA in, for example, the UK or US in respect of misconduct that spans multiple jurisdictions.

9.58 The importance of international alignment is a matter that was considered particularly important to the French Government when introducing Sapin II.[45]

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39 The Canadian legislation is in similar terms: *Criminal Code*, RSC, 1985, c. C-46, s 715.37(6).
40 SFO and CPS, *Deferred Prosecution Agreements Code of Practice* [2.7].
41 Ibid cl 2.8.2(vi).
42 Ibid cl 2.8.2(vii).
43 Attorney-General's Department (Cth), *Deferred Prosecution Scheme Code of Practice* (Consultation Draft, May 2018) [7.1](o), (q), [7.2].
44 Bronitt (n 5) 217.
45 See Part 5 of the French National Financial Prosecutor's Office and French Anti-Corruption Agency, *Guidelines on the Implementation of the Convention Judiciaire D'Interet Public (Judicial Public Interest Agreement)* (26 June 2019) https://www.agence-francaise-anticorruption.gouv.fr/fr/document/guidelines-implementation-convention-judiciaire-dinteret-public-judicial-public-interest-agreement.

Principled objections to DPA regimes — rule of law, equality before law

9.59 DPAs may be objected to on a principled basis. DPAs enable corporations to use their bargaining power with prosecutors to circumvent the opprobrium and practical consequences of a conviction. While the conditions of a DPA may be consistent with court-imposed penalties, the corporation is not made subject to the expressive function of the criminal law, nor the objective fact-finding function of a criminal trial. Victims of misconduct are denied the validation of their wrongdoer's conduct being identified and condemned as criminal. It has been claimed, at least in the US context, that the use of DPAs 'erodes the most elementary protections of the criminal law, by turning the prosecutor into judge and jury, thus undermining our principles of separation of powers'.[46]

9.60 From an ethical standpoint, concerns have been expressed about the corrosive effect of legitimising state-sanctioned 'legal bribes' to close down enforcement action, with undue pressure placed on public officials to settle matters rather than proceed to trial.[47] It has been asserted that, with diminishing moral force associated with this bargaining process, there is a risk that corporations may come to view settlements in transactional terms as simply a 'cost of doing business' rather than as acts of genuine redress or commitment to prevention and governance reform. [48]

9.61 Improperly designed DPA arrangements can 'undermine deterrence if they operate primarily to reduce the sanctions imposed on companies for corporate crime', in which case, they could also 'weaken the public's faith in the criminal justice system'.[49] This is particularly so if there is a lack of transparency in the administration of DPAs and insufficient detail in the guidance given to prosecutors and corporations who might avail themselves of DPAs.[50]

9.62 Another source of concern at the systemic level arises from the interaction between the DPA and other concurrent legal processes that may lead to the imposition of civil penalties, civil forfeiture orders, and/or, ultimately, criminal conviction by a court. Bronitt points to the unresolved question that relates to the relationship between civil and criminal enforcement actions that arise 'on the same facts' and the extent to which 'concurrence' of a parallel proceeding has the potential to prejudice or undermine the fairness of the other proceeding.[51]

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46 Richard A Epstein, 'The deferred prosecution racket', *The Wall Street Journal* (New York, 28 November 2006), cited in Alexander and Cohen (n 3) 538 fn 7. See also Bronitt (n 5) 218.
47 Bronitt (n 5) 218.
48 Ibid.
49 Arlen (n 37) 2.
50 Bronitt (n 5) 218–9.
51 Ibid 219.

The theoretical underpinnings of DPA regimes

9.63 In considering the question about the appropriateness of a DPA regime for Australia, it may be helpful to consider the theoretical basis for such regimes. Neither the UK nor the US models purport to centre their regimes within any particular statements of principle. Canada has adopted a different approach with a clear statement of objectives. Braithwaite has observed:

> What formal western law lacks when it applies techniques such as deferred prosecution is a philosophy of why allowing justice as repair and redemption should be the mainline response even when doing so involves a breach of the principle of proportional punishment. A restorative justice philosophy allows us to accept that if a victim wishes to forgive in return for some other dimension of justice beyond proportional sanctioning, after discussing the option with other stakeholders, this can be just. [52]

9.64 DPAs are not instruments of punishment; nevertheless, they have quasi-punitive elements. Bronitt has observed that the UK model, which requires that a DPA be approved only if the judge considers the terms and conditions proportionate to the degree of culpability and harm caused by the corporation, exhibits 'the twin core ideas central to the retributive philosophy of "just deserts".' [53]

9.65 An alternative approach is

> to view the DPA as an administrative tool for regulating executive leniency, mitigating potential 'penalties' in proportion to the extent to which the corporation promptly notified authorities of suspected criminality, cooperated fully with investigators and assisted to identify other parties responsible. [54]

9.66 Bronitt suggests that the better approach is to view DPAs as neither civil nor pecuniary penalty schemes,

> but as diversionary tools of preventive justice. In this way, a DPA has the potential to prevent and repair harms caused by corporate wrongdoing: reparation may involve asset forfeiture and restitution, as well as prevention of ongoing and future harm through education and monitoring programs. Framed around this preventive justice paradigm, DPAs have much greater potential for transforming organisational cultures that perpetrate, facilitate or condone corporate crime.[55]

52 John Braithwaite, 'Cultures of Redemptive Finance' in Justin O'Brien and George Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart Publishing, 2013) 269, 282.
53 Bronitt (n 5) 222.
54 Ibid.
55 Ibid 222–3.

10. Sentencing Corporations

Contents

Introduction

10.1 In this chapter, the ALRC makes proposals to improve the process and outcomes of sentencing corporations.

10.2 As discussed in Chapter 2, the criminal law has an expressive function that is seen to operate independently of the imposition of sanctions or punishment. The labelling of conduct as criminal serves a denunciatory and retributive function in and of itself. The realisation of the pluralist aims of the criminal justice system is also premised, however, on the imposition of appropriate sanctions through the sentencing process. Sentencing is thus a critical aspect of Australia's corporate criminal responsibility regime, and warrants consideration in the context of this Inquiry.

10.3 The most commonly cited purposes of sentencing are denunciation, retribution, deterrence, rehabilitation, incapacitation, and, more recently, restoration.[1] Although these

1 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) [4.27] ('*Same Crime, Same Time*').

purposes developed in respect of natural persons, they may be translated appropriately to corporate offenders.

10.4 In this chapter, the ALRC explores limitations on the ability of courts to pursue relevant purposes when sentencing corporations. These limitations blunt the force of the criminal law as a regulatory tool for addressing corporate wrongdoing. The proposals in this chapter are intended to address these limitations, and to promote consistency between the processes of sentencing and the making of civil penalty orders against corporations.

10.5 In particular, the ALRC makes proposals to:

- provide harmonised statutory guidance on the factors relevant to sentencing corporations and making civil penalty orders;
- provide a range of non-monetary penalty options for corporate offenders;
- develop a national debarment regime; and
- provide courts with a greater information base when sentencing corporations by introducing pre-sentence reports for corporations and expanding the scope of victim impact statements to better accommodate corporate offences.

10.6 The ALRC also invites views on maximum penalties for corporate offenders, seeking input on which maximum penalties are in need of review, and asking whether Australia should explore the removal of maximum penalties for corporations for certain offences, as has been done in the UK and Canada.

10.7 Stakeholder views are also sought on whether reforms are needed to improve the availability of compensation for victims of corporate crime and civil contraventions.

Sentencing corporations: purposes and principles

Purposes of sentencing

10.8 Sentencing purposes describe the goals or objectives that a sentence should aim to achieve. The purposes of sentencing are related to, though distinguishable from, the principles of sentencing, which are the overarching legal rules that should be applied when sentencing a federal offender. They may also be distinguished from sentencing factors, which identify the specific matters that the court must consider when sentencing an offender, where they are relevant and known.[2] These factors will inform the court's assessment of how sentencing purposes and principles should apply in each case.

10.9 There is currently no legislative statement of the purposes of sentencing in Commonwealth criminal legislation.[3] Accordingly, the ALRC has previously

2 See ibid [5.1].

3 Some of the purposes of sentencing are currently reflected in the list of sentencing factors in s 16A(2) of the *Crimes Act 1914* (Cth) (see, eg, paras (j)–(k), (n)), while others are exclusively supplied by common law. By contrast, a number of state and territory statutes contain a comprehensive statement of the purposes of sentencing: *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW)

recommended that federal sentencing legislation should provide that the purposes of sentencing are:

> (a) to ensure that the offender is *punished justly* for the offence;
>
> (b) to *deter* the offender and others from committing the same or similar offences;
>
> (c) to promote the *rehabilitation* of the offender;
>
> (d) to protect the community by *limiting the capacity of the offender to re-offend*;
>
> (e) to *denounce* the conduct of the offender; and
>
> (f) to promote the *restoration* of relations between the community, the offender and the victim.[4]

10.10 The considerations relevant to pursuing these purposes in respect of a corporate offender will inevitably differ from those relevant to sentencing a natural person. However, these purposes remain broadly applicable to sentencing corporations, as outlined below.

Just punishment and denunciation

10.11 Ensuring that an offender is 'punished justly for the offence' reflects notions of retributive justice — that is, those who engage in criminal activity deserve to be punished; though in accordance with 'just deserts', that punishment should be proportionate to the offending conduct.[5]

10.12 The imposition of a sentence for the purpose of denunciation reflects the view that a sentence can be used to express community disapproval of the conduct.[6] This function of sentencing was articulated by Underwood J in *Inkson v The Queen*:

> the community delegates to the Court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct.[7]

10.13 As discussed in Chapter 2, there is divergence among theorists on whether the purposes of retributive punishment and denunciation are relevant to corporations, given their status as artificial entities. However, it has been suggested that the rationale for applying the criminal law to corporations relates to the power of the criminal law to express denunciation of particularly egregious conduct, in circumstances where the corporation itself may be described as 'blameworthy'. If this premise is accepted, it would seem to

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s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5(1).

4 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) rec 4–1 (emphasis added).

5 Ibid [4.4]–[4.5].

6 Ibid [4.18].

7 *Inkson v The Queen* (1996) 6 Tas R 1, 16, [1996] TASSC 13 [50].

follow that denunciation and ensuring just punishment represent legitimate sentencing purposes for corporations. Indeed, this is consistent with current sentencing practices.[8]

10.14 The pursuit of these purposes through sentencing manifests in tailoring sanctions to reflect assessments of the gravity of the offence and the corporation's culpability, and to reflect 'informed public opinion' on the nature of the offending conduct, having regard to all the circumstances of the offence.

Deterrence

10.15 Deterrence encompasses concepts of general and specific deterrence. General deterrence relates to the effect of the sentence on other would-be offenders, while specific deterrence relates to the effect of the sentence on the offender.

10.16 There are differing views on how, and if, corporations are deterred from engaging in criminal conduct. The neo-classical economic model posits that actors, including corporations, will only be deterred effectively where the costs of engaging in criminal conduct outweigh the expected benefits.[9] The "expected punishment cost" is calculated by multiplying the expected penalty by the risk of apprehension and conviction. However, this account of deterrence has been subject to critique, including on the basis that an accurate cost/benefit analysis will rarely be feasible, and even if it were, it should not be assumed that corporations are rational actors.[10]

10.17 A behavioural account of deterrence of corporations emphasises the complexity of organisational behaviour, rejecting the conception of 'the corporation as a "black box" which responds in a wholly amoral fashion to any net difference between expected costs and benefits.'[11] Behavioural theorists focus on the human actors within corporations, noting, for example, that employees' interests may conflict with those of the corporation.[12] This perspective suggests that effective deterrence of corporate crime relies, in part, on addressing internal incentives for individuals to engage in criminal conduct in the corporate context.

10.18 Clough reconciles the insights from these two accounts of corporate deterrence in the following terms:

> Economic theory tells us that we must increase the cost to a corporation of engaging in illegal conduct so that it outweighs the benefits. However contrary to economic theory a corporation will not always act rationally and more complex factors may be at work

8 See, eg, *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [289], [300].

9 See generally Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, 9th ed, 2014) ch 7.

10 See, eg, John C Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 393–4. See also generally Christopher Hodges and Ruth Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart Publishing, 2017) ch 3.

11 Coffee (n 10) 393.

12 Ibid.

> than a simple cost/benefit analysis would suggest. Behavioural theory tells us that we must also consider the individuals within the corporation and ensure that they are deterred as well as adequately supervised. There is a need to ensure alignment between the interests of the corporation and its employees and a more sophisticated approach to sentencing is required if such behaviour is to be addressed.[13]

Rehabilitation

10.19 Rehabilitation relates to addressing underlying factors that contributed to a person's offending, with the aim of reducing the likelihood of recidivism. While rehabilitation may be most readily associated with behavioural modification and drug treatment programs, the goal of addressing underlying causes of offending to reduce recidivism is adaptable to corporate offenders. For corporations, rehabilitation may involve reforms aimed at reforming the internal structures, processes and organisational culture that may have facilitated, encouraged or permitted the criminal conduct in question.

Incapacitation

10.20 Limiting the capacity of an individual offender to re-offend may be achieved through imprisonment or other curtailments of the offender's freedom — such as disqualification from driving, curfews, or electronic surveillance.[14] While corporations have 'no body' to imprison, the same purpose may be pursued by imposing constraints on the privileges they enjoy as legal persons. This might involve placing restrictions on their ability to trade or, at the most extreme, stripping the corporation's status as a legal person through deregistration.

Restoration

10.21 The restoration of relations between the community, the offender and the victim reflects ideas of 'restorative justice', an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour.[15] Restorative initiatives, such as inclusive decision-making processes, are

> based on the rationale that those involved in, and affected by, criminal activity should be given a real opportunity to participate in the process by which the response to the crime is decided.[16]

10.22 The pursuit of restoration in respect of corporate crime may manifest, for example, in orders for compensation of victims, reparation of environmental harm, and public correction of misinformation. Equally restoration may inform efforts to give voice to victims of corporate crime in the sentencing process.[17]

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13 Jonathan Clough, 'Sentencing the Corporate Offender: The Neglected Dimension of Corporate Criminal Liability' [2003] *Corporate Misconduct eZine* 1, 7.

14 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [4.14].

15 Ibid [4.20].

16 Ibid.

17 See, for example, the use of restorative justice conferences by the NSW Land and Environment Court. The use of this process in respect of an organisation (the Clarence Valley Council) can be seen in the recent case of *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205.

Principles of sentencing

10.23 The sentencing of corporations for federal offences is also subject to the common law principles of sentencing, in the same way as sentencing of individual offenders.

10.24 In 2006 the ALRC recommended that the common law principles of sentencing be codified in federal sentencing legislation in the following terms:

> (a) a sentence should be proportionate to the objective seriousness of the offence, which includes the culpability of the offender (proportionality);
>
> (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
>
> (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);
>
> (d) where possible, a sentence should be similar to sentences imposed on like offenders for like offences (consistency and parity); and
>
> (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).[18]

10.25 The ALRC endorsed the codification of the principles and purposes of sentencing federal offenders in the interests of promoting transparency and consistency in the sentencing process.[19]

18 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) rec 5–1.
19 See ibid [4.32]–[4.36], [5.24].

Sentencing factors

Proposal 12 Part IB of the *Crimes Act 1914* (Cth) should be amended to implement the substance of Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

Proposal 13 The *Crimes Act 1914* (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:

a) the type, size, internal culture, and financial circumstances of the corporation;

b) the existence at the time of the offence of a compliance program within the corporation designed to prevent and detect criminal conduct;

c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;

d) the involvement in, or tolerance of, the criminal activity by management;

e) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence;

f) whether the corporation self-reported the unlawful conduct;

g) any advantage realised by the corporation as a result of the offence;

h) the extent of any efforts by the corporation to compensate victims and repair harm;

i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:

   i. internal investigations into the causes of the offence;

   ii. internal disciplinary actions; and

   iii. measures to implement or improve a compliance program; and

j) the effect of the sentence on third parties.

This list should be non-exhaustive and should supplement rather than replace the general sentencing factors, principles, and purposes as amended in accordance with Proposal 12.

Proposal 14 The *Corporations Act 2001* (Cth) should be amended to require the court to consider the following factors when imposing a civil penalty on a corporation, to the extent they are relevant and known to the court, in addition to any other matters:

a) the nature and circumstances of the contravention;

b) any injury, loss, or damage resulting from the contravention;

c) any advantage realised by the corporation as a result of the contravention;

d) the personal circumstances of any victim of the offence;

e) the type, size, internal culture, and financial circumstances of the corporation;

f) whether the corporation has previously been found to have engaged in any related or similar conduct;

g) the existence at the time of the contravention of a compliance program within the corporation designed to prevent and detect the unlawful conduct;

h) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention;

i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;

j) the involvement in, or tolerance of, the contravening conduct by management;

k) the degree of cooperation with the authorities, including whether the contravention was self-reported;

l) whether the corporation admitted liability for the contravention;

m) the extent of any efforts by the corporation to compensate victims and repair harm;

n) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:

   i. any internal investigation into the causes of the contravention;

   ii. internal disciplinary actions; and

   iii. measures to implement or improve a compliance program;

o) the deterrent effect that any order under consideration may have on the corporation or other corporations; and

p) the effect of the penalty on third parties.

10.26 Proposals 12 to 14 are aimed at the provision of harmonised statutory guidance on sentencing and making civil penalty orders for corporations. Complexities in the design of these proposals arise as a result of gaps in the existing legislative framework, which have been the subject of previous ALRC recommendations.

Sentencing corporations

Current legislative framework and common law factors

10.27 There is currently no specific statutory guidance on the factors that are relevant to sentencing a corporation for a federal offence.

10.28 Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of factors that the court must take into account when sentencing any person for a federal offence, to the extent that those factors are relevant and known to the court. This section has been subject to criticism. Wholesale reforms were recommended by the ALRC in 2006.[20]

10.29 A number of the factors listed in s 16A(2) will be relevant to sentencing a corporation, such as 'the nature and circumstances of the offence',[21] and procedural factors in relation to cooperation and pleas. However, other factors will not apply, such as 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependents'.[22] More critically, there are a number of factors relevant to sentencing a corporation that are not included in s 16A(2). As previously noted by the ALRC, factors that may indicate the culpability of a corporation in the commission of an offence will differ from those that indicate the culpability of a natural person.[23]

10.30 The courts have drawn on the case law relating to imposing civil penalties on corporations to fill the gaps in s 16A(2) for corporate offenders. For example, in *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha,* Wigney J observed that the factors that have emerged from civil penalty cases will generally be relevant to sentencing corporations for criminal offences, in addition to the s 16A(2) factors from the *Crimes Act.*[24]

10.31 Commonly cited factors include: the size and financial position of the company; whether senior officers were involved in the contravention; the existence of compliance programs or systems within the corporation; and whether the corporation had a culture of compliance.[25]

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20 See, eg, ibid recs 4–1, 5–1, 6–1 and 6–8.

21 *Crimes Act 1914* (Cth) s 16A(2)(a).

22 Ibid s 16A(2)(p).

23 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [30.28].

24 *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [220].

25 For a particularly influential statement of relevant factors (referred to as the 'French factors') see *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153, [1990] FCA 762, 45 (French

Introducing statutory guidance on sentencing corporations

10.32 Introducing statutory guidance on the factors relevant to sentencing corporations would address an unprincipled gap in the current legislative provisions on sentencing federal offenders. The ALRC and NSW Law Reform Commission have both previously recommended the provision of statutory guidance on the factors relevant to sentencing corporations.[26] The list of factors proposed above incorporates and expands upon the factors previously recommended by the ALRC.

10.33 While the proposed list is generally consistent with the case law, the ALRC is of the view that there is value in a statutory statement of relevant factors. The provision of a non-exhaustive list of factors for sentencing corporations would promote consistency in sentencing without unduly limiting judicial discretion by, for example, imposing prescriptive formulae,[27] or excluding the consideration of additional factors.

10.34 Furthermore, the proposed statutory guidance would highlight the relevance of certain factors that have not been consistently cited in the case law — namely, whether the company has undertaken any internal investigations or disciplinary actions; any advantage realised by the corporation; and the effect of the sentence on third parties.[28]

10.35 The explicit inclusion of 'measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence' and 'the extent of any efforts by the corporation to compensate victims and repair harm' as mandatory considerations may incentivise good corporate behaviour in response to offences.[29] The inclusion of 'the effect of the sentence on third parties' draws the court's attention to the issue of 'overspill', and promotes consideration of how to limit the extent to which the burden of the penalty may be passed on to innocent third parties, such as employees and consumers.[30]

10.36 The inclusion of 'any advantage realised by the corporation' would promote greater consideration of the profits or other benefits obtained by a corporation as a

J). See also *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2016) 118 ACSR 124, [2016] FCA 1516 [86]–[89]; *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243, [2018] FCAFC 73 [254].

26 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) rec 30-2; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Report 102, 2003) rec 3 ('*Sentencing: Corporate Offenders*'). See also Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) [10.38] ('*Compliance with the TPA*'). An example of a statutory list of factors for sentencing corporations can be found in the Canadian Criminal Code: *Criminal Code*, RSC 1985, c C-46 s 718.21

27 See, eg, the prescriptive approach in United States Sentencing Commission, *Guidelines Manual* (2018) ch 8.

28 None of these factors feature in French J's list of factors in *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, [1990] FCA 762; though they have been considered in some cases.

29 See Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 500.

30 This issue was not considered, for example, in *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876. See critique in Brent Fisse, 'The First Cartel Offence Prosecution in Australia: Implications and Non-Implications' (2017) 45 *Australian Business Law Review* 482, 486.

result of the offence. In relation to the case law on civil penalties for consumer law contraventions, Paterson and Bant have observed that:

> While courts have acknowledged the need for penalties to be set at a level that removes contravening behaviour from traders' desired business model, they have yet fully to embrace the critical role played by defendant's profit in this calculation.[31]

10.37 The utility of long legislative lists of factors to be considered by courts is open to debate. Relevant concerns include that such lists may increase the complexity and length of judgments.[32] However, as the proposed list of factors largely reflects the existing case law on setting civil penalties and sentencing corporations this seems an unlikely result of this proposal.

10.38 The list in Proposal 13 attempts to highlight key factors that will typically be relevant to assessment of the culpability of a corporation and the seriousness of the offending conduct. However, it does not attempt to exhaustively identify relevant factors from the case law. The ALRC invites stakeholder views on whether this proposal strikes an appropriate balance.

The need for broader reform of sentencing factors

10.39 It seems preferable that the list of factors for sentencing corporations would supplement rather than displace the general list of factors applicable to sentencing federal offenders. This would maintain consistency between corporate and individual offenders where appropriate, and avoid unnecessary duplication in the legislation. However, the ALRC has previously concluded that the existing list of general factors for sentencing federal offenders (s 16A(2) of the *Crimes Act 1914* (Cth)) is flawed.[33] Fisse recently observed that 'Part IB of the *Crimes Act* has been criticised for complexity, poor drafting, inflexibility, limited scope and impracticality.'[34] As Proposal 13 would build upon the foundations laid by s 16A(2), it is pertinent to reiterate the ALRC's prior calls for reform.[35]

10.40 Recommendations 4–1, 5–1, 6–1 and 6–8 of the *Same Crime, Same Time* report would revise and restructure legislative guidance on sentencing federal offenders:

- Recommendations 4–1 and 5–1 would introduce separate provisions setting out the purposes and principles of sentencing (see above).

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31 Jeanne Marie Paterson and Elise Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*' in Prue Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) 154, 168.

32 See, eg, the discussion of the overly complex list of factors relevant to determining the best interests of the child in Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [5.36]–[5.41].

33 Australian Law Reform Commission, *Same Crime, Same Time* (n 1).

34 Fisse (n 30) 484.

35 See also Beaton-Wells and Fisse (n 29) 529, suggesting that the ALRC's recommendations on reform of Pt IB 'should be acted on without further delay'.

- Recommendation 6–1 would provide a non-exhaustive list of eight broad categories of factors relevant to the purposes and principles of sentencing, with examples of the types of factors under each category.
- Recommendation 6–8 would introduce a separate provision requiring the court to consider factors pertaining to the administration of the federal criminal justice system — guilty pleas and cooperation with authorities — where relevant and known to the court.[36]

10.41 These recommendations contemplated the inclusion of these provisions in a federal sentencing act. However, as such legislation has not been enacted, Proposal 12 is premised on amendments to Pt IB of the *Crimes Act 1914* (Cth).

Making civil penalty orders for corporations

10.42 There is no general statutory provision for the factors applicable to making civil penalty orders, for individuals or corporations.

10.43 The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) provides a list of four matters that courts must take into account in determining a pecuniary penalty in civil penalty proceedings.[37] However, this list has limited application as there has been limited uptake of the provisions of the Act, which must be activated by a statute to apply.

10.44 Some statutes separately provide for equivalent, though not identical lists of general factors relevant to setting pecuniary penalties.[38] There is no provision for factors specific to corporations.

10.45 Guidance on the factors relevant to civil penalties for corporations has instead developed at common law, as outlined above.

10.46 Proposal 14, in conjunction with Proposal 13, would promote consistency between sentencing corporations for criminal offences and the imposition of civil penalties. It would promote certainty for corporations and permit the continued parallel development of principles at common law with reference to the analogous statutory factors proposed here.

10.47 As the case law has indicated, the same types of factors are often relevant to the assessment of penalties for corporations in respect of criminal offences and civil penalty contraventions. There is, however, a distinction in the purposes of imposing penalties in these contexts. As discussed in Chapter 2, civil penalty provisions are primarily directed to deterrence and promoting compliance, while the criminal law has pluralist aims, including denunciation and retribution.[39] In the absence of an appropriate legislative statement of the general purposes of civil penalty provisions, the ALRC proposes that deterrence should be included in the list of relevant 'factors'.

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36 The ALRC also recommended further statutory guidance on how these factors should be considered: Recommendations 11–2 and 11–3.

37 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 82(6).

38 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 481(3); *Australian Consumer Law* s 224(2).

39 Cf Paterson and Bant (n 31). Paterson and Bant suggest that punitive purposes should also be acknowledged as relevant in the civil penalty context.

10.48 The provision of a generally applicable list of factors for civil penalty provisions, rather than statute-by-statute guidance, is consistent with the case law. Paterson and Bant have observed that:

> Courts have been willing to allow cross-fertilisation of the ideas between the various civil pecuniary penalty provisions in … different statutes on the ground that they share the common feature of being directed at regulating economic behaviour rather than 'crimes of passion'.[40]

10.49 In some statutes it may be appropriate to provide further factors to meet the objectives of that statute or parts of it.

10.50 The list of factors in Proposal 14 provides for all of the factors identified in Proposal 13 in respect of sentencing corporate offenders, but also provides for the types of general factors that are currently furnished by s 16A(2) in the criminal context. This is necessary as there is currently no general statutory guidance on the imposition of civil penalties. Providing a list that merely mirrors Proposal 13 would require courts to have regard to the common law principles on general civil penalty factors in addition to the statutory list of corporate-specific factors.

10.51 Proposal 14 would bring civil penalty setting for corporations and individuals out of step, as the process for individuals would remain primarily governed by the common law. This is undesirable. However, in the absence of an effective legislative scheme for civil penalties, it is beyond the scope of the ALRC's current inquiry to recommend a statutory provision that would govern both individuals and corporations. Nonetheless, the ALRC has previously recommended the introduction of such a legislative scheme, which would have incorporated a provision governing the civil penalty setting process for individuals and corporations.[41] This would be a sensible approach.

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40 Ibid 160.

41 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) rec 29-1 ('*Principled Regulation*').

Non-monetary penalties

Proposal 15 The *Crimes Act 1914* (Cth) should be amended to provide the following sentencing options for corporations that have committed a Commonwealth offence:

(a) orders requiring the corporation to publicise or disclose certain information;

(b) orders requiring the corporation to undertake activities for the benefit of the community;

(c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;

(d) orders disqualifying the corporation from undertaking specified commercial activities; and

(e) orders dissolving the corporation.

Proposal 16 The *Corporations Act 2001* (Cth) should be amended to provide the following non-monetary penalty options for corporations that have contravened a Commonwealth civil penalty provision:

(a) orders requiring the corporation to publicise or disclose certain information;

(b) orders requiring the corporation to undertake activities for the benefit of the community;

(c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform; and

(d) orders disqualifying the corporation from undertaking specified commercial activities.

Proposal 17 The *Corporations Act 2001* (Cth) should be amended to provide that a court may make an order disqualifying a person from managing corporations for a period that the court considers appropriate, if that person was involved in the management of a corporation that was dissolved in accordance with a sentencing order.

10.52 In respect of most Commonwealth criminal offences, the only available sentencing option for a convicted corporation is a fine.[42] This stands in contrast to the array of sentencing options available for individual offenders, which may include imprisonment, community service orders, and probation.[43]

10.53 It has long been observed that fines are an inadequate penalty for corporate offenders.[44] Key limitations include that:

- the costs of monetary penalties are generally borne by parties who were not involved in the wrongdoing — namely shareholders and, in some cases, employees and consumers;
- monetary penalties will not necessarily trigger internal investigations, disciplinary actions and appropriate reform measures;
- monetary penalties may convey the impression that offences are purchasable commodities or a 'cost of doing business'; and
- the level of monetary penalty required to sufficiently deter and punish misconduct will generally exceed the financial means of the corporation (the so-called 'deterrence and retribution trap').[45]

10.54 In view of these limitations, the ALRC has previously recommended that non-monetary penalty options be made generally available for corporate offenders, in respect of both civil penalty contraventions and criminal offences.[46]

10.55 The availability of non-monetary penalties, in conjunction with monetary penalties as appropriate, would strengthen the ability of the courts to pursue relevant sentencing purposes. The alignment of each of the proposed penalty options with relevant sentencing purposes is discussed below.

10.56 Currently, certain alternative penalties are available on a statute-by-statute basis for civil penalty provision contraventions and criminal offences. For example, some statutes provide for adverse publicity orders,[47] as well as a range of 'non-punitive orders',

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42 See [3.24]–[3.27] of this Discussion Paper.

43 Corporations can, however, be discharged on condition without conviction, like individuals, pursuant to s 19B of the *Crimes Act 1914* (Cth). See *John C Morish Pty Ltd v Luckman* (1977) 16 SASR 143; *Sheen v Geo Cornish Pty Ltd* [1978] 2 NSWLR 162; *Lanham v Brambles-Ruys Pty Ltd* (1984) 37 SASR 16.

44 For a recent discussion see Brent Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 *Adelaide Law Review* 285.

45 See further Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.3]; Australian Law Reform Commission, *Sentencing: Penalties* (Discussion Paper No 30, 1987) [290] ('*Sentencing: Penalties*').

46 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) rec 30-1; Australian Law Reform Commission, *Principled Regulation* (n 41) recs 27-1, 28-3. See also New South Wales Law Reform Commission (n 26) rec 4; Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.9], [10.17], [10.22].

47 *Australian Consumer Law* s 247; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB; *Competition and Consumer Act 2010* (Cth) s 86D; *National Consumer Credit Protection Act 2009* (Cth) s 182; *Work Health and Safety Act 2011* (Cth) s 236.

including community service orders, probation orders and orders to disclose information or publish an advertisement.[48]

10.57 However, there is no general power for the court to impose non-monetary penalties, and there are concerns that the existing 'non-punitive orders' provisions are not fit for purpose.[49] In particular, the court is unable to make these orders of its own initiative. The orders must first be applied for by the regulator,[50] or prosecutor.[51] Furthermore, the explicit characterisation of the orders as 'non-punitive' limits their application for the pluralist purposes of sentencing.

10.58 A centralised list of non-monetary penalty options for corporations in respect of both criminal offences and civil penalty provision contraventions would promote consistency in respect of the availability and form of non-monetary penalty options, limiting unnecessary duplication across statutes and addressing unjustified discrepancies. If necessary, modifications or additions to the general powers could still be made on a statute-by-statute basis.

10.59 The imposition of non-monetary penalties does not provide the same level of transparency and certainty as monetary penalties, because the costs of complying, for example, with community service and probation orders may not be ascertainable at the time of sentencing.[52] This may make it more difficult to assess whether sentences meet the principles of proportionality, consistency, and parity. However, it would still be possible to make qualitative assessments with respect to the imposition of like orders for like circumstances, for example.[53] The availability of the same types of non-monetary penalties in respect of corporations in all cases would facilitate the development of jurisprudence concerning the imposition of the different types of orders.

Overview of proposed penalty options

10.60 Each of the following penalty options has been previously canvassed and recommended by the ALRC. The purposes and key features of each penalty option are briefly revisited below.[54]

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48 *Australian Consumer Law* s 246; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA; *Competition and Consumer Act 2010* (Cth) s 86C.

49 See, eg, Brent Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (2018) 37(1) *University of Queensland Law Journal* 85, 91–3; Beaton-Wells and Fisse (n 29) 455–460.

50 *Competition and Consumer Act 2010* (Cth) s 86C(1); *Australian Consumer Law* s 246(1); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB(1).

51 *Competition and Consumer Act 2010* (Cth) s 86C(1A).

52 See, eg, Andrew Burke, 'Fairness, Justice and Repairing Environmental Harm; Reconciling the Reparative Approach to the Sentencing of Environmental Crimes with Sentencing Principles' (2018) 35 *Environmental and Planning Law Journal* 529 critiquing orders made by the NSW Land and Environment Court.

53 See discussion in Australian Law Reform Commission, *Principled Regulation* (n 41) [27.15]–[27.17].

54 For further discussion see Australian Law Reform Commission, *Sentencing: Penalties* (n 45) [292]–[307]; Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.5]–[10.24]; Australian Law Reform Commission, *Principled Regulation* (n 41) [28.19]–[28.58]; Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [30.13]–[30.25].

Publicity/disclosure orders

10.61 Publicity or disclosure orders would require corporations to publicise, or otherwise disclose, information about their unlawful conduct to specific groups of people or to the community at large.

10.62 These orders may be designed to have a punitive effect on corporations by inflicting reputational damage, as well potentially furthering general deterrence by alerting other corporations to the consequences of the misconduct in question, and facilitating consumer choice by alerting consumers to bad corporate behaviour and allowing them to respond accordingly (which may, in turn, have a punitive effect on corporations).

10.63 These orders may also have a corrective, or restorative, function by requiring the corporation to publish or disclose information that rectifies erroneous material previously published by the corporation (for example, where the corporation has engaged in misleading and deceptive conduct).

10.64 Currently, the *Australian Consumer Law*, *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) distinguish between information disclosure orders,[55] advertisement orders,[56] and adverse publicity orders.[57] The primary distinction between these orders is that adverse publicity orders are purportedly imposed for the purposes of punishment, while the other types of orders are intended to be corrective.[58] The ALRC proposes to provide a general power to make orders requiring publication or disclosure of information, which may be imposed for any relevant purpose, rather than providing for particular purposes separately.

Community service orders

10.65 Community service orders require corporations to expend time and effort to undertake activities for the benefit of the community.[59]

10.66 As currently provided for under the *Competition and Consumer Act 2010* (Cth) and *Australian Securities and Investments Act 2001* (Cth):

> ***community service order,*** in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:
>
> (a) is specified in the order; and
>
> (b) relates to the conduct;

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55 *Australian Consumer Law* s 246(2)(c); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA(2)(c); *Competition and Consumer Act 2010* (Cth) 86C(2)(c).

56 *Australian Consumer Law* s 246(2)(d); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA(2)(d); *Competition and Consumer Act 2010* (Cth) s 86C(2)(d).

57 *Australian Consumer Law* s 247; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB; *Competition and Consumer Act 2010* (Cth) 86D.

58 See also the discussion of the purposes of publication orders in the employment and industrial relations context in *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56 [366]–[379].

59 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [30.19].

> for the benefit of the community or a section of the community.
>
> Example: The following are examples of community service orders:
>
> (a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and
>
> (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.[60]

10.67 The general availability of community service orders would strengthen the ability of the courts to promote restoration through sentencing by facilitating the remediation of harm or performance of a socially useful program that relates to the offending conduct. Community service orders may also satisfy the sentencing purposes of punishment, denunciation and deterrence.[61]

10.68 Fisse and Beaton-Wells suggest that a punitive community service order would be an apt penalty for cartel conduct in some situations, offering the following example:

> Assume that two pharmaceutical companies, V1 and V2, agree to restrict the production of a new wonder drug in order to increase profits. They alone have the patent rights necessary to be able to manufacture the drug. Instead of or in addition to fining the companies for committing the cartel offence by agreeing to reduce output, a punitive community service order could be used to require the corporations to supply a quantity of the drug (e.g. 10 per cent of the quantity affected by the cartel conduct) at no charge to public hospitals for a specified period (e.g. a period corresponding to the period during which the parties gave effect to their reduction of output arrangement). A community service order of this kind would be more likely to make a punitive impact in such a case than a monetary penalty or a fine. The main punitive impact would be a short-term restraint on autonomy and an institutional shock over and above mere monetary loss.[62]

10.69 The ALRC has recommended that community service orders be available at the discretion of the court and that where court supervision would be inappropriate, an independent monitor (e.g. a lawyer, accountant, auditor, receiver or other appropriately qualified person) should be appointed to supervise compliance with the project and prepare pre-service and post-service reports as requested by the court. The costs of supervision would be paid by the corporation.[63]

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60 *Competition and Consumer Act 2010* (Cth) s 86C(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA(4). See also *Australian Consumer Law* s 246(2)(a), (aa).

61 Though currently the imposition of community service orders is limited to 'non-punitive' purposes in some statutes: *Australian Consumer Law* s 246; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA; *Competition and Consumer Act 2010* (Cth) s 86C. See discussion in Beaton-Wells and Fisse (n 29) 458–9.

62 Beaton-Wells and Fisse (n 29) 458–9.

63 Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.17].

Probation/corrective orders

10.70 Corporate probation orders could require the corporation to investigate the offence; take internal disciplinary action; and, implement organisational reforms. Examples of probation orders provided for under the *Competition and Consumer Act 2010* (Cth) and *Australian Securities and Investments Act 2001* (Cth) include:

> (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
>
> (b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
>
> (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.[64]

10.71 Probation orders are also available as general sentencing options for corporations in the US,[65] as well as Canada.[66]

10.72 These types of orders are primarily directed to the rehabilitation of a corporation. However, as probation orders constrain the autonomy of the corporation's officers in the conduct of the corporation's internal affairs, they may also have a punitive and deterrent effect.[67] Corrective orders could also take the form of 'punitive injunctions'. These may incorporate a more explicitly punitive element, for example in relation to the timeframe for implementing reforms, or in requiring that particular members of the senior management take an active role in reforms.[68] Punitive injunctions may be inappropriate in respect of civil penalty contraventions,[69] but are consistent with the purposes of retribution and denunciation in the criminal justice system.[70]

10.73 The ALRC has previously recommended that corporate probation orders should be available at the discretion of the court. Furthermore, when making a probation order, the court should be able to impose whatever conditions are reasonably related to the

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64 *Competition and Consumer Act 2010* (Cth) s 86C(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA(4). See also *Australian Consumer Law* s 246(2)(b).

65 United States Sentencing Commission (n 27) §8D1.1–4.

66 *Criminal Code*, RSC 1985, c C-46 ss 731, 732.1(3.1).

67 Coffee (n 10) 452. However, as noted above, the use of probation orders is currently restricted under some statutes to non-punitive purposes.

68 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [30.18]; Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.22]. See also Brent Fisse, 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

69 Australian Law Reform Commission, *Principled Regulation* (n 41) [28.31].

70 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [30.25].

nature and circumstances of the contravention or the history and characteristics of the organisation and are necessary to achieve relevant sentencing purposes.[71]

10.74 Supervision of probation orders, like community service orders, could be undertaken by a court-appointed independent monitor whose expenses would be paid by the corporation. In some cases, depending on the terms of the order, it might be appropriate for the court to supervise the order.[72]

Disqualification orders

10.75 Disqualification orders are designed to restrain the activities of corporations. They could include orders: to cease certain commercial activities for a particular period; to refrain from trading in a specific geographic region; to revoke or suspend licences for particular activities; or to freeze the corporation's profits.[73]

10.76 The imposition of such restrictions would satisfy the sentencing purposes of punishment, denunciation and deterrence, as well as limiting the capacity of the offender to re-offend.

10.77 The ALRC does not propose that courts should be given the power to disqualify a corporation from government contracts. Instead, the ALRC proposes the development of a national debarment regime (Proposal 18). This would make disqualification from government contracts a possible consequence of conviction, rather than a court-imposed penalty. The ALRC has previously noted the 'undesirability of a court distributing government largesse'.[74]

Dissolution

10.78 Dissolution is the 'corporate equivalent of capital punishment'. This is an extreme penalty, which is liable to have a significant impact on third parties — namely, employees, shareholders and consumers. It would therefore be rightly confined to the most serious offending, or where the offending corporation was operated primarily for a criminal purpose. As the ALRC has previously noted, the imposition of a dissolution order would be inappropriate in response to a contravention of a civil penalty provision, given the lower standard of proof and lower level of corporate fault involved in a civil contravention.[75]

10.79 Dissolution purports to permanently remove the capacity of the offender to re-offend — removing 'from the community a corporate entity which has flagrantly

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71 Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.9].
72 Ibid [10.10].
73 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [30.13]; New South Wales Law Reform Commission (n 26) [8.2].
74 Australian Law Reform Commission, *Sentencing: Penalties* (n 45) [293]. Similar observations were recently made by Davies J in *SFO v Geografix Ltd* (unreported, Crown Court at Southwark, Case No: U20190413, 4 July 2019).
75 Australian Law Reform Commission, *Principled Regulation* (n 41) rec 28-2.

violated the rules of society'.[76] However, in order to prevent those who were involved in managing a dissolved corporation recommencing activities through a new corporate entity it is pertinent to provide for disqualification of such individuals in conjunction with a dissolution order (Proposal 17).[77]

Maximum penalties

Question F Are there any Commonwealth offences for which the maximum penalty for corporations requires review?

Question G Should the maximum penalty for certain offences be removed for corporate offenders?

10.80 The penalties imposed on corporate offenders in Australia are typically low when compared to overseas jurisdictions. For example, a recent OECD report on penalties for competition law infringements described Australia as an 'outlier in how low the pecuniary penalties it imposes are by comparison to all other systems.'[78]

10.81 Corporations convicted of a federal offence are generally subject to a maximum pecuniary penalty equal to five times the maximum penalty applicable to individuals.[79] However, this general rule may be displaced by offence-creating statutes. A number of statutes specifically provide for the maximum penalty applicable to body corporates, as well as the maximum penalty for individuals.

10.82 Some statutes also provide for alternative bases of calculating maximum penalties for corporations. These statutes allow for calculation of the maximum penalty with reference to the total value of the benefits attributable to the commission of the offence (or, in some provisions, detriment avoided because of the offence); or 10% of the corporation's annual turnover.[80]

10.83 Revision of maximum penalties for corporations inevitably occurs on an ad hoc basis. This is a consequence of the breadth of the Commonwealth statute book, and the diffusiveness of administrative responsibility for offence-creating statutes.

10.84 Maximum penalties for offences and civil contraventions in ASIC-administered statutes were recently revised in response to findings from the ASIC Enforcement Review.[81] These amendments included increases in the maximum penalties for a range

76 Australian Law Reform Commission, *Sentencing: Penalties* (n 45) [292].
77 See also Clough (n 13) 23.
78 OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018) 71.
79 *Crimes Act 1914* (Cth) s 4B(3).
80 See, eg, *Competition and Consumer Act 2010* (Cth) ss 45AG(3), 56CC(2); *Corporations Act 2001* (Cth) s 1311C(3).
81 *ASIC Enforcement Review Taskforce Report* (2017) ch 7.

of offences, as well as providing for maximum penalties based on turnover or benefit/detriment.[82]

10.85 The ALRC recognises that there is likely a number of maximum penalties for corporations that have not been reviewed for many years, and may no longer be fit for purpose. For example, in relation to prescribed taxation offences, the maximum penalty has not been updated since 1984.[83] This maximum penalty is also expressed as a fixed dollar amount, rather than with reference to penalty units.[84] The ALRC invites stakeholder views on offences for which the maximum penalty for corporations is in need of review.

Removal of maximum penalties?

10.86 Given that the financial circumstances of corporate offenders and the scale of offending conduct may vary significantly, setting a maximum penalty that will 'deter' misconduct inevitably involves a certain level of arbitrariness. Provisions that allow for maximum penalties to be calculated with reference to a corporation's annual turnover or the benefits gained from the offending conduct go some way to addressing this issue. However, there is concern that these alternative bases for calculation may be of limited utility in practice, given difficulties in determining the value of relevant benefits or detriment, and the complexity in applying turnover provisions.[85]

10.87 Empirical research also suggests that the penalties imposed by courts on corporate offenders rarely approach the maximum penalty.[86] Accordingly, raising the maximum penalty may not be an effective way to facilitate higher penalties. Further, there is limited evidence to support the supposition that the imposition of more severe sanctions leads to greater general deterrence.[87]

10.88 In the UK, there is no maximum limit for fines for corporate offenders convicted of certain offences, including corporate manslaughter, fraud, bribery, and money laundering. Instead, there are mandatory guidelines, prepared by the Sentencing Council, which detail how a fine should be calculated.[88]

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82 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

83 *Taxation Administration Act 1953* (Cth) s 8ZJ(9)(b); as introduced by the *Taxation Laws Amendment Act 1984* (Cth). The 'prescribed amount' for corporations is $25,000.

84 This is contrary to recommended legislative practice. See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [3.2.1]. Cf. section 4AB of the *Crimes Act 1914* (Cth) provides for the conversion of pecuniary penalties expressed in dollar amounts to penalty units.

85 See Beaton-Wells and Fisse (n 29) 447–453.

86 See Caron Beaton-Wells and Julie Clarke, 'Deterrent Penalties for Corporate Colluders: Lifting the Bar' (2018) 37(1) *University of Queensland Law Journal* 107, 107 in relation to cartel conduct. See also Elise Bant and Jeannie Marie Paterson, 'Should Specifically Deterrent or Punitive Remedies Be Made Available to Victims of Misleading Conduct under the Australian Consumer Law?' (2019) 25 *Torts Law Journal* 99, 104.

87 Hodges and Steinholtz (n 10) 27.

88 Sentencing Council (UK), *Corporate Offenders: Fraud, Bribery and Money Laundering* (Definitive Guideline, 2014) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-offenders-fraud-bribery-and-money-laundering/>; Sentencing Council (UK), Corporate Manslaughter (Definitive

10.89 The Canadian Criminal Code also provides that the quantum of fines for corporations convicted of indictable offences is 'in the discretion of the court', except where otherwise provided by law.[89]

10.90 Removal of maximum penalties for corporations, and the provision of sentencing guidelines, for appropriate federal offences could provide the courts with greater flexibility to impose a penalty that is proportionate to the financial circumstances of the offender and the seriousness of the conduct. This would also assist with addressing inconsistencies across the Commonwealth statute book that arise as a result of ad hoc reviews of penalty levels.

10.91 Maximum penalties offer an important indication of the relative seriousness of different offences, reflecting Parliament's perception of community expectations. However, community views, to the extent that they are known, could instead be appropriately expressed in penalty guidelines. Further, the removal of a maximum penalty would provide greater scope for the court to respond to the seriousness of the particular offending in question, having regard to aggravating factors, such as the impact of the offending on vulnerable parties, that would likely influence community expectations on penalty levels.

10.92 The UK provides a model for how guidelines could be drafted to appropriately guide judicial discretion in imposing monetary penalties for corporations in the absence of a predetermined maximum. These guidelines provide for determination of a starting point and category range based on assessment of culpability and harm, and adjustment based on mitigating or aggravating features, and a final assessment of whether the penalty meets relevant objectives in 'a fair way'.[90] While the guidelines are detailed, they retain far greater scope for judicial discretion than the US Sentencing Guidelines, which, for example, prescribe the weight given to different factors when assessing culpability.[91] The ALRC has previously rejected the 'grid sentencing' approach taken in the US.[92]

10.93 The feasibility of introducing appropriate guidelines in Australia would require greater consideration. In the UK, the Sentencing Council has statutory authority to prepare sentencing guidelines.[93] Australia has no equivalent body. Careful drafting and consideration of the legal basis for the proposed guidelines (for example, whether the guidelines are included in regulations) would also be necessary to ensure the guidelines

Guideline, 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/>.

89 *Criminal Code*, RSC 1985, c C-46 (n 66) s 735(1)(a).

90 The desirability of structured guidelines (for the ACCC and/or the courts) in the assessment of penalties in cartel cases in Australia has been previously canvassed. See Beaton-Wells and Clarke (n 86) 125; OECD (n 78) 73–4. See also Beaton-Wells and Fisse (n 29) 440–3 on the utility of providing for the calculation of 'base fines' for cartel conduct.

91 United States Sentencing Commission (n 27) §8C2.5.

92 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) [21.53].

93 *Coroners and Justice Act 2009* (UK) pt 4, ch 1.

do not infringe on the exercise of judicial discretion in a constitutionally impermissible, or practically undesirable, manner.

10.94 The ALRC invites stakeholder views on whether the removal of maximum penalties and the introduction of sentencing guidelines for corporations should be further explored for certain offences.

Facilitating compensation of victims

Question H Do court powers need to be reformed to better facilitate the compensation of victims of criminal conduct and civil penalty proceeding provision contraventions by corporations?

10.95 Corporate misconduct may cause harm or loss on a significant scale, and there is often a public perception that accountability for corporate wrongdoing should result in compensation. Yet, consistent with the traditional aims of the criminal justice system, the focus of state responses to corporate wrongdoing is typically on punishment, deterrence and rehabilitation of the corporation, rather than the compensation of victims.

10.96 Monetary penalties imposed on corporations flow to the state, providing no direct benefits to victims of the misconduct. A particularly perverse feature of monetary penalties for consumer protection offences is that the costs of the corporation meeting the penalties may be passed onto the consumers that the law purports to protect.[94]

10.97 The availability of compensation or remediation orders in criminal or civil penalty proceedings provides a mechanism for access to justice that does not necessitate follow-on civil litigation, which can be prohibitively costly and time consuming. While not within the traditional purview of the criminal law, the availability of compensation or redress facilitation orders is consistent with the sentencing purpose of restoration. Compensation orders in the criminal context are also consistent with broader changes to regulatory approaches internationally that prioritise compensation and redress.[95]

10.98 The US, UK and Canada each provide for compensation (or restitution) orders, and for the prioritisation of payment of those orders over the payment of fines, in respect of corporations convicted of criminal offences.[96]

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94 See, eg, Fisse (n 30) 486; Coffee (n 10) 402.

95 See, eg, Christopher Hodges and Stefaan Voet, *Delivering Collective Redress: New Technologies* (Hart Publishing, 2018).

96 See Sentencing Council (UK), *Corporate Offenders: Fraud, Bribery and Money Laundering* (n 85) step 1; Sentencing Council (UK), *Corporate Manslaughter* (n 85) step 7; United States Sentencing Commission (n 27) § 8B1.1; *Criminal Code*, RSC 1985, c C-46 (n 66) ss 737–8, 740.

Compensation and reparation orders: key statutory provisions

10.99 There are currently limited statutory provisions for the award of compensation to victims in respect of corporate crime or civil penalty provision contraventions. Key provisions are outlined below.

10.100 Compensation may also be secured by regulators as part of negotiated settlements in respect of alleged breaches of the law ('enforceable undertakings').[97] ASIC has reported, for example, that it secured $22.8 million of 'agreed' compensation or remediation in 2018-19. However, the ALRC has previously observed that that there are

> differences in the extent to which regulators prioritise compensation as opposed to preventing future breaches. Moreover, where compensation is secured by a regulator as part of enforcement actions it is typically a refund as opposed to full compensation which includes consequential loss.[98]

10.101 Alternative mechanisms for obtaining compensation include industry based dispute resolution schemes,[99] and class action proceedings.

Crimes Act 1914 (Cth)

10.102 Section 21B(1)(d) of the *Crimes Act 1914* (Cth) empowers the court to order that a person who has been convicted of a federal offence

> make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the person by reason of the offence.

10.103 Subsection (1)(c) of this provision provides for reparation to the Commonwealth or to a public authority under the Commonwealth.

10.104 Orders under this section are 'ancillary orders' that may be made in addition to the imposition of penalties, and are enforceable as civil debts.[100] The making of such orders obviates the need for separate civil proceedings.

10.105 The power to make orders under section 21B(1)(d) has been exercised, for example, to require reparation of losses incurred by the Commonwealth arising from welfare and tax offences,[101] and to require reparation of losses incurred by an airline as a result of an offence by a passenger that required diversion of a flight.[102]

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97 See, eg, *Telecommunications Act 1997* (Cth) s 572B; *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA; *Competition and Consumer Act 2010* (Cth) s 87B.

98 Australian Law Reform Commission, *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [8.17].

99 See ibid [8.11]–[8.14].

100 *Crimes Act 1914* (Cth) s 21B(3).

101 See, eg, *Gould v Federal Commissioner of Taxation* [1998] WASCA 260; *Hookham v The Queen* (1994) 181 CLR 450, [1994] HCA 52; *R v McMahon* [2019] ATSC 25.

102 *Donovan v Wilkinson* [2005] NTSC 8.

10.106 The ALRC is not aware of any cases where s 21B(1)(d) has been used to compensate victims of corporate crime on a large scale.

10.107 Beaton-Wells and Fisse have observed that while it is theoretically possible that the power under this section could be exercised in favour of victims of cartel offences, it is not well suited to this purpose. Practical difficulties may arise in respect of 'identifying the victims, quantifying the loss and determining causality'.[103]

10.108 It should be noted, however, that the bar for causality has been lowered, as s 21B(1)(d) was amended in 2013 to replace the expression 'as a direct result of the offence' with the expression used in paragraph (c), 'by reason of the offence'.[104] Prior to this amendment the court had held that 'a closer connection between the offence and the loss' was required for paragraph (d) than paragraph (c).[105]

10.109 In respect of paragraph (c) the expression 'by reason of the offence' has been interpreted as requiring 'a cause and effect relationship, although there might be a number of steps along the way, and more than one cause might contribute'.[106]

Other statutes

10.110 There is also statute-specific provision for compensation orders in respect of specific offences or civil penalty provision contraventions. Some provide only for compensation orders in respect of civil penalty provision contraventions,[107] while others also cover offences.[108]

10.111 Many of these provisions make the availability of compensation orders contingent on the application of the regulator, prosecutor or the persons seeking compensation,[109] though some are available on the court's own initiative.[110] Some provisions allow applications for compensation to be made independently of enforcement proceedings,[111] while others are contingent on conviction or the making of a civil penalty order.[112]

10.112 Some Acts also provide for the prioritisation of the payment of a compensation order over the payment of a pecuniary penalty if the contravening party does not have the financial means to meet both.[113]

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103 Beaton-Wells and Fisse (n 29) 526.
104 *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth).
105 *R v Foster* [2008] QCA 90 [71].
106 *Liaver v Errington* [2003] QCA 5 [49].
107 *Corporations Act 2001* (Cth) ss 1317H, 1317HA, 1317HB, 1317HC, 1317HE.
108 *Privacy Act 1988* (Cth) ss 25, 25A; *Competition and Consumer Act 2010* (Cth) s 87(1A)(c); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GM(2)(c); *Australian Consumer Law* ss 237, 239.
109 *Privacy Act 1988* (Cth) ss 25, 25A; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GM(2)(c); *Competition and Consumer Act 2010* (Cth) s 87(1A)(c); *Australian Consumer Law* ss 237, 239.
110 *Corporations Act 2001* (Cth) ss 1317H, 1317HA, 1317HB, 1317HC, 1317HE.
111 *Australian Consumer Law* s 242.
112 *Privacy Act 1988 (*Cth) ss 25, 25A.
113 *Competition and Consumer Act 2010* (Cth) s 79B; *Australian Securities and Investments Commission Act*

Need for reform?

10.113 The ALRC is seeking views from interested stakeholders as to whether reforms to court powers to make orders in respect of corporations as part of the sentencing process are warranted to better provide for the compensation of victims of corporate crime.

10.114 One option for reform may be the amendment of s 21B of the *Crimes Act 1914* (Cth) to provide for compensation orders in respect of a 'class of persons', as currently provided for by s 239 of the *Australian Consumer Law*.

10.115 It may be desirable to provide for a general power to make compensation orders, exercisable at the court's own discretion, in respect of both criminal offences and civil penalty contraventions, to limit unnecessary duplication and inconsistencies across the Commonwealth statute book. These powers could be located in the *Crimes Act 1914* (Cth) and the *Corporations Act 2001* (Cth) respectively. If necessary, specific guidance on how compensation orders should work in relation to particular civil penalty provisions or offences could still be appropriately provided on a statute-by-statute basis.

10.116 Another option for reform is the introduction of a general power to make 'redress facilitation orders' as part of the sentencing process. A redress facilitation order

> means an order that facilitates the compensation or other redress of loss caused by the contravening conduct in a separate civil or administrative proceeding or under a collective victim redress scheme …[114]

10.117 Fisse has put forward a model for how redress facilitation orders could be provided for in the context of the *Competition and Consumer Act 2010* (Cth).[115] This model could be extended to a power of general application which could be included in the *Crimes Act 1914* (Cth), in conjunction with the non-monetary penalty orders in Proposal 15. Under Fisse's model, a redress facilitation order would include:

> (a) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
>
> (b) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order; and
>
> (c) an order requiring the person to cooperate by providing access to employees for interview and providing documents or data and explanations of those documents or data, in the way and to the persons specified in the order; and
>
> (d) an order requiring the person to establish a collective redress scheme.[116]

2001 (Cth) s 12GCA; *Corporations Act 2001* (Cth) s 1317QF.

114 Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (n 49) 87.

115 See Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (n 49).

116 Ibid 95–6. Note there is overlap between order (b) under this model and publication orders in Proposal 15.

Debarment

Proposal 18 The Australian Government, together with state and territory governments, should develop a unified debarment regime.

10.118 For individuals, a criminal conviction carries consequences that extend beyond the sentence imposed by a court. For example, a criminal conviction may affect an individual's ability to find employment, secure housing and travel overseas. Yet corporations with a criminal conviction typically only face the possibility of reputational damage, and payment of a monetary penalty.

10.119 Allowing criminally convicted corporations to enter into government contracts — at both the Commonwealth and state and territory level — may undermine public trust in government, endanger public health and safety, and increase the risk of misuse of public funds. Implementation of a unified debarment regime would limit the involvement of criminally convicted corporations in government work.

10.120 A unified debarment regime would promote consistency and provide greater certainty for corporations in respect of the consequences of criminal misconduct. The prospect of debarment may represent a significant deterrent for corporations with an interest in government work. Commercial organisations could also voluntarily 'sign on' to remove debarred corporations from their supply chains, further strengthening the value of any debarment regime. A public debarment register could also be used by superannuation funds to inform investment decisions, which would further extend the consequences of criminal conviction for corporations.

10.121 It might be argued that development of a debarment regime is unnecessary as criminal convictions can already be taken into account in government and private sector procurement processes. Yet there is no clear guidance on the relevance of criminal convictions to Commonwealth procurement decisions in the Procurement Rules.

10.122 Debarment of a corporation may penalise employees and directors who were not involved in the misconduct, as debarment would attach to the corporation, even if all of the management personnel involved in the misconduct have left the corporation. However, if the prosecution of corporations and individuals is approached on a principled basis, corporate convictions would only be pursued in circumstances where responsibility for the offending was not readily attributable to individual personnel.

10.123 The World Bank, European Union, Canada and US all have debarment regimes in place. The regimes vary in respect of a number of key features, including:

a. triggers for debarment;
b. the level of discretion involved in debarment decisions;
c. periods of debarment;

d. whether the regime is statutory or policy-based; and

e. whether debarment can be lifted in the event that a corporation can demonstrate it has remedied relevant deficiencies (known as 'self-cleaning').[117]

10.124 The details of a national debarment regime in Australia could be developed through COAG.

Informed sentencing

Proposal 19 The *Crimes Act 1914* (Cth) should be amended to permit courts to order pre-sentence reports for corporations convicted of Commonwealth offences.

Question I Who should be authorised to prepare pre-sentence reports for corporations?

Proposal 20 Sections 16AAA and 16AB of the *Crimes Act 1914* (Cth) should be amended to permit courts, when sentencing a corporation for a Commonwealth offence, to consider victim impact statements made by a representative on behalf of a group of victims and/or a corporation that has suffered economic loss as a result of the offence.

Pre-sentence reports

10.125 The court would be greatly assisted in its task of imposing a sentence that is fit for purpose if it had detailed information addressing matters such as:

- the financial circumstances of the corporation; and
- what steps the corporation has taken to improve its internal controls, discipline relevant personnel, and compensate victims or repair harm caused by the offence.

10.126 However, there is limited scope for courts to require the provision of this type of information in respect of corporate offenders. Fisse has suggested, for example, that s 86C of the *Competition and Consumers Act 2010* (Cth), which empowers courts to make certain non-punitive orders, 'leaves courts in the dark about the factual basis of sentencing, assessment of penalty or design of remedy'.[118]

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117 For a discussion of the policy implications of the design of debarment regimes, see Erling Johan Hjelmeng and Tina Søreide, 'Debarment in Public Procurement: Rationales and Realization' in Gabriella Margherita Racca and Christopher Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant, 2014) 215; Emmanuelle Auriol and Tina Søreide, 'An Economic Analysis of Debarment' (2017) 50 *International Review of Law and Economics* 36.

118 Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (n 49) 93.

10.127 Provisions governing the use of pre-sentence reports in state and territory statutes are directed to individual offenders.[119] There is no provision for pre-sentence reports in the *Crimes Act 1914* (Cth).

10.128 The power to require pre-sentence reports in respect of corporate offenders would provide courts with a formal means of obtaining information that will assist in imposing an appropriate sentence, in accordance with the factors listed in Proposal 13.

10.129 Detailed information on these matters would be particularly critical to the court's ability to assess the appropriateness and design of non-monetary sentencing options, such as probation and community service orders (Proposal 15).

10.130 The preparation of pre-sentence reports will inevitably increase the time and expense involved in sentencing corporations. However, there is a strong argument that the utility of the information that could be provided by pre-sentence reports outweighs any concerns about expense and delay. Furthermore, provision could be made for the corporation to meet the costs of preparing the report.

10.131 Appropriate persons who might be authorised by the court to prepare pre-sentence reports might include independent experts, such as management consultants, organisational psychologists and lawyers.

10.132 The ALRC and NSW Law Reform Commission have both previously recommended that pre-sentence reports be made available for corporate offenders.[120]

Victim impact statements

10.133 In accordance with s 16AAA of the *Crimes Act 1914* (Cth), victim impact statements may only be made for an individual victim of an offence. However, victims of corporate crimes might include other corporations,[121] as well as 'victims who may be identified more readily as a group'[122] (for example, consumers of a particular product, or residents of an area affected by an environmental offence). Individual victim impact statements may be inappropriate or impractical where the harm is spread across a number of individuals, who may not be readily identifiable.

10.134 Many corporate criminal offences may be 'victimless'. However, this does not negate the utility of making amendments to better accommodate the provision of victim impact statements in respect of corporate crimes that are not 'victimless'.

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119 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 40A; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 17B, 17D; *Sentencing Act 1991* (Vic) s 8A.

120 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) rec 14-2; New South Wales Law Reform Commission (n 26) rec 22. See also Australian Law Reform Commission, *Compliance with the TPA* (n 26) [10.40].

121 Victims of corporate crime might also include other entities, such as trusts and incorporated associations. A legislative amendment to implement Proposal 20 could appropriately provide for victim impact statements by representatives for these types of entities, in addition to corporations.

122 New South Wales Law Reform Commission (n 26) [14.22].

10.135 Provision of a group victim impact statement may assist the court in assessing: the impact and nature of the offence; the corporation's efforts to compensate victims; and the suitability of a compensation order (see Question H). Consumer rights groups and other NGOs might be well placed to provide the court with information on the impact of a corporate criminal offence on a broad class of individuals.

10.136 Questions may arise about the authority of a particular representative to prepare a victim impact statement on behalf of a group. However, principles or procedural requirements could feasibly be developed to address issues of this nature; perhaps in court practice notes.

10.137 The ALRC has previously recommended that federal sentencing legislation permit the making of victim impact statements by corporations.[123] However, it did not contemplate their use on behalf of a group of victims.

10.138 State and territory legislation does not make provision for victim impact statements on behalf of groups; though South Australia makes provision for the preparation of 'community impact statements' by the Commissioner for Victims' Rights or the prosecutor.[124] Victoria notably provides for victim impact statements by legal persons who have been the victim of an offence.[125]

123 Australian Law Reform Commission, *Same Crime, Same Time* (n 1) rec 14–1.
124 *Sentencing Act 2017* (SA) s 15. These reports appear to be rarely used.
125 *Sentencing Act 1991* (Vic) ss 3, 8K(3)(c).

11. Illegal Phoenix Activity

Contents

Introduction

11.1 Illegal phoenix activity has a significant negative impact upon the Australian economy. The ATO estimated in 2011 that there were about 6,000 phoenix companies operating in Australia.[1] A 2018 report by PwC commissioned by the ATO, the Fair Work Ombudsman and ASIC found that the direct cost of illegal phoenixing on Australian businesses, employees and government is in the order of $2.85 to $5.13 billion.[2] The breakdown of this direct cost can be seen in Table 11-1:[3]

Table 11-1: Direct Cost of Illegal Phoenixing in Australia

Victim	Type of Loss	Direct Cost
Businesses	Unpaid trade creditors	$1.16-$3.17 billion
Employees	Unpaid entitlements	$31-$298 million
Government	Unpaid taxes and compliance cost	$1.66 billion

1 Helen Anderson, Ian Ramsay and Michelle Welsh, 'Illegal Phoenix Activity: Quantifying Its Incidence and Cost' (2016) 24 *Insolvency Law Journal* 95, 97.

2 PricewaterhouseCoopers Consulting (Australia) Pty Limited, 2018 *Taskforce Report–The Economic Impacts of Potential Illegal Phoenix Activity* (2018) iii ('PwC Taskforce Report').

3 Ibid.

11.2 Illegal phoenix activity also has broader systemic and economy-wide impacts. The same report estimates the 'net effect … to the Australian economy of potential illegal phoenix activity is $1.8 billion to $3.5 billion lost gross domestic product (GDP). This represents approximately 0.11 per cent to 0.21 per cent of GDP in 2015-16'.[4] These statistics indicate the economic imperative for regulators to effectively detect and prosecute illegal phoenix activity.

11.3 Illegal phoenix activity generally comes to light in the context of a liquidation of a company. It is one type of criminality that may be identified by a liquidator. A significant proportion of ASIC's summary prosecution work relates to various matters arising out of liquidations:

> The vast majority of these summary prosecutions [conducted by ASIC] concern breaches by company officers of: s 475(9) of the Corporations Act for failing to provide a Report as to Affairs to a liquidator; and s 530A(6) for failing to assist a liquidator. These prosecutions represented 90% to 95% of all the prosecutions conducted inhouse by ASIC over the last 5 financial years and typically arise out of the Liquidator Assistance Program run by ASIC. ASIC receives between 1300 to 1500 requests annually for assistance from liquidators or other external administrators under this program. Prosecution action is only commenced after both the liquidator and ASIC have written to a former officer of the entity that is under liquidation and sought compliance with their obligations to assist in the liquidation. The books and records of a company and information about its financial affairs are fundamental to the work of liquidators in ascertaining the causes of an entity's failure and locating assets that may be available to creditors.[5]

11.4 Illegal phoenix activity involves an abuse of the limited liability afforded to a corporation and the misuse of the legal facilities available for legitimate restructuring attempts that are undertaken to preserve an operating business. The corporation, as a structure, including the separate legal entity and limited liability principles, developed to encourage entrepreneurial risk and protect individual shareholders and directors from personal liability. The failure of business ventures is an accepted feature of this model. While unsecured creditors will be harmed by the liquidation or closure of a business in the ordinary course of the market, this is justified against the overall goal of economic efficiency and wealth maximisation.

11.5 'The predominant key indicator of phoenix activity is the deliberate abuse of the corporate form to avoid legal responsibility'.[6] Where the corporate structure is abused for personal gain, the rationale for the protection of shareholders and directors is eroded. Instead, the goal of encouraging economic activity must yield to the need to protect those adversely affected by the corporation. This is effectively a rebalancing between the

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4 Ibid.

5 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019.

6 Anne Matthew, 'The Conundrum of Phoenix Activity: Is Further Reform Necessary?' (2015) 23 *Insolvency Law Journal* 116, 124.

benefits and costs of protecting the independent corporate personality. Suitable tools to detect and combat illegal phoenix activity are needed in order to achieve this.

11.6 In this chapter, the ALRC proposes improvements to the framework that exists to curb illegal phoenix activity. While there is no specific prohibition on phoenix activity enacted in Australian law,[7] it is currently captured by provisions of the *Corporations Act 2001* (Cth) (‘*Corporations Act’*). An express prohibition is also contained within the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (‘Combating Illegal Phoenixing Bill’) which is presently before Parliament. These proposals build on that Bill.

Phoenixing in the Australian context

Identifying illegal phoenix activity

11.7 Phoenix activity may cover a range of practices but is typically concerned with the replacement of a failing company with a second (generally new) company, typically with the same controllers and business activities.[8] Phoenix activity may be legal or illegal.[9] It is not necessarily illegal for individuals involved in a failed venture to start over by creating a new company that might retain some or all of the remaining assets of the failed venture; in fact, in many such circumstances this may be in the interests of preserving some return to creditors. Moreover, the restructure may preserve jobs, encourage innovation and promote overall economic growth.[10]

11.8 Illegal phoenix activity occurs where there is a deliberate liquidation of a company with the *intent* to avoid paying the creditors of the failing company and continue operating the business through other trading entities.[11] Part of the difficulty in combating illegal phoenixing arises from the fact that it may closely mirror legally permitted corporate restructuring. Often, the distinction lies in the intention or other state of mind of the perpetrator.[12] This deliberate misuse of the corporate structure moves the liquidation from the realm of the benign to that of the criminal.

11.9 Table 11-2 shows the typology of phoenix activity proposed by Anderson et al.[13]

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7 Helen Anderson et al, ‘Profiling Phoenix Activity: A New Taxonomy’ (2015) 33 *Corporations and Securities Law Journal* 133, 133.
8 Ibid.
9 Anderson et al (n 7).
10 Murray Roach, ‘Combating the Phoenix Phenomenon: An Analysis of International Approaches’ (2010) 8(2) *eJournal of Tax Research* 90, 91–4.
11 Anderson et al (n 7) 134; PricewaterhouseCoopers Consulting (Australia) Pty Limited (n 2) 1.
12 PricewaterhouseCoopers Consulting (Australia) Pty Limited (n 2) 2.
13 Anderson et al (n 7) 135–7.

Table 11-2: Typology of Phoenix Activity

Type of Phoenix	Description
Legal Phoenix	No intention to defraud creditors, though some creditors may not recover all they are owed.
Problematic Phoenix	Where a failing company is phoenixed and yet it likely should not be, as the resurrection of the company 'is not beneficial to creditors or wider society'.
Illegal Phoenix Type 1	Where controllers form the intention, at the time of or immediately prior to insolvency, to phoenix the company with the intention of avoiding paying creditors.
Illegal Phoenix Type 2	Where the company is never intended to be successful and the phoenixing occurs 'deliberately with the intent of separating the business from its obligations'.
Complex Illegal Phoenix	Same as Illegal Phoenix Type 2, but 'is also likely to coincide with other forms of illegality, such as false invoices, including Goods and Services Tax fraud, false identities, fictitious transactions, money laundering, or visa breaches and the misuse of migrant labour'.

Regulation of illegal phoenix activity

11.10 Currently, phoenix activity may be regulated indirectly through existing legal provisions such as those outlining directors' duties and the prohibition on insolvent trading.[14] The provisions of the *Corporations Act* that are most relevant are:[15]

- s 180 – the duty of care and diligence;
- s 181 – the duty to act in good faith in the best interests of the corporation and for a proper purpose;
- s 182 – the duty not to improperly use one's position to gain an advantage for oneself or someone else or to cause detriment to the corporation;
- s 183 – the duty not to improperly use information to gain advantage for oneself or someone else or to cause detriment to the corporation; and

14 Helen Anderson et al, 'Illegal Phoenix Activity: Is a "Phoenix Prohibition" the Solution?' (2017) 35 *Corporations and Securities Law Journal* 184, 193–5.

15 Ibid 193–4.

- s 588G – the duty to prevent insolvent trading by the company.

11.11 Sections 180–183 apply to both directors and officers of a corporation, while s 588G applies only to directors. Criminal prosecutions may also be brought where the mental elements prescribed by s 184 of the *Corporations Act* can be proved.

11.12 Employees and advisors can be held civilly liable for breaches of these provisions through s 79 of the *Corporations Act*, which extends liability to those 'involved in' contraventions of the Act.[16] The ability to hold advisors accountable may well be crucial. Indeed, consultations have emphasised the role advisors play in this space. Particular emphasis has been placed on the role of unlicensed 'pre-insolvency advisors', though it has been noted that licensing is not a panacea,[17] as the enforcement statistics indicate.[18]

11.13 Some of these issues are illustrated in the case law. *Australian Securities and Investments Commission v Somerville*[19] shows the potential liability of advisors. The respondent (a solicitor) was found to have been involved in contraventions of ss 181, 182 and 183 of the *Corporations Act* by giving advice to the directors of companies under threat of insolvency to phoenix companies into new ones with similar names. The assets of the old companies were transferred to the new companies.

11.14 The earlier case of *Jeffree v National Companies and Securities Commission*[20] concerned a director who was found to have improperly used his position as a director of a company in contravention of s 182 by authorising the transfer of assets to a phoenix company in order to defeat an arbitration claim against the company.

11.15 Transactions undertaken during the process of phoenixing may also come within the voidable transaction provisions of the *Corporations Act.* This is illustrated by *ACN 093 117 232 Pty Ltd (in liq) v Intelara Engineering Consultants Pty Ltd (in liq)*.[21] In that case, the company was advised that it should restructure its affairs 'by doing a "legal phoenix"' and establishing 'a new corporation to which the assets of the existing business would be transferred'.[22] The Court declared that the sale by which the assets were transferred was:

- an uncommercial transaction pursuant to s 588B of the *Corporations Act*;
- an insolvent transaction pursuant to s 588FC of the *Corporations Act*;
- an unreasonable director related transaction pursuant to s 588FDA of the *Corporations Act*; and

16 *Corporations Act 2001* (Cth) s 79.
17 See Helen Anderson and Jasper Hedges, 'Catching Pre-Insolvency Advisors: The Hidden Culprits of Illegal Phoenix Activity' (2017) 35 *Corporations and Securities Law Journal* 486.
18 See [11.17].
19 *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110, [2009] NSWSC 934.
20 *Jeffree v National Companies and Securities Commission* [1990] WAR 183.
21 *ACN 093 117 232 Pty Ltd (in liq) v Intelara Engineering Consultants Pty Ltd (in liq)* [2019] FCA 1489 ('*Intelara*').
22 Ibid [7].

- a voidable transaction pursuant to s 588FE of the *Corporations Act*.

Detection of illegal phoenix activity

11.16 It is notoriously difficult to detect and prosecute illegal phoenix activity. Because of the intention requirement, it is 'virtually impossible' to identify illegal phoenixing following a single company failure. More often it requires multiple failed ventures over a period of time.[23]

11.17 In 2015, the Government established the Phoenix Taskforce, which works to tackle illegal phoenix activity. Since its implementation, the Taskforce has worked with ASIC to prosecute 25 illegal phoenix operators and take action against 12 registered liquidators and 79 company directors.[24] The evidence indicates, however, that enforcement action only occurs in a small number of instances.[25]

Current proposed legislative response to phoenixing

Express prohibition of creditor-defeating dispositions

11.18 In a further effort to tackle illegal phoenixing, the Government has put forward a bill to deal with illegal phoenix activity.[26] The Combating Illegal Phoenixing Bill sets out a number of measures to deal with illegal phoenixing, which relevantly include:

- creation of a new type of voidable transaction, the 'creditor-defeating disposition';
- provisions providing powers for liquidators to apply to the court or ASIC, and for ASIC to make certain orders to recover, for the benefit of a company's creditors, company property disposed of or received under a voidable creditor-defeating disposition;
- creation of a criminal offence and a civil penalty provision for directors engaging in conduct that results in a company making a creditor-defeating disposition; and
- creation of a criminal offence and civil penalty provision for a person that procures, incites, induces, or encourages a company to enter into a creditor-defeating disposition.

11.19 The ALRC supports the approach of creating specific provisions and prohibitions dealing with illegal phoenix activity. A specific prohibition on illegal phoenixing will ensure that directors and advisors are clearly aware of the prohibition. Company directors and advisors who engage in phoenixing might at first instance object to the new provisions; however, a clear prohibition will assist directors and advisors in knowing what is permissible and what is not. Greater clarity will reduce concerns that prohibitions

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23 Anderson et al (n 7) 134.

24 Australian Taxation Office, 'Phoenix Taskforce Outcomes' <www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce-outcomes/>.

25 Anderson, Ramsay and Welsh (n 1) 107.

26 Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth) ('Combating Illegal Phoenixing Bill'). The Bill was first introduced in February 2019 but lapsed with the dissolution of Parliament. It was reintroduced in largely the same form in July 2019.

on illegal phoenix activity hamper legitimate attempts to restructure a business, and make directors and advisors less willing to undertake such attempts to keep businesses alive.

11.20 By specifically prohibiting illegal phoenixing, the Government may also increase commitment to compliance by influencing behavioural norms.[27] In the ALRC's assessment, the expressive role of a prohibition should not be underestimated. An express prohibition will contribute to a clearer understanding of the delineation between acceptable business conduct and illegal phoenix behaviour in the context of failed ventures. The civil sanctions will serve to deter misuse of the corporate structure while criminalisation will add a layer of denunciation to this illegal conduct.

11.21 There is some scepticism in industry and academic commentary as to whether a specific prohibition of illegal phoenix activity is required or whether enforcement reform would be more effective.[28] Consultations revealed concerns around the high evidentiary burden, lack of appetite for prosecution, and absence of clarity as to the underlying phoenix behaviour targeted by officials.

11.22 While it is possible that illegal phoenix activity can be addressed through existing general provisions, the ALRC believes the clarity and expressive power afforded by specific legislative proscription offers the most compelling way in which to regulate this type of corporate malfeasance. The new provisions are not a duplication of existing regulation, but are about ensuring the conduct involved in illegal phoenix activity is appropriately captured.

11.23 Moreover, the proposals advanced by the ALRC below, which place considerable emphasis on creating a stronger enforcement model, may go some way to address concerns of critics of a specific prohibition on illegal phoenix activity.[29] In addition, 'new laws would send a message to ASIC that enforcement in the area of illegal phoenix activity is important and will achieve significant and beneficial outcomes'.[30]

Enforcement powers

11.24 Under the new s 588FGAA proposed by the Combating Illegal Phoenixing Bill, ASIC may make an order:[31]

- directing the person to transfer to the company property that was the subject of the disposition;

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27 Anderson et al (n 14) 197.

28 See, eg, Australian Restructuring Insolvency and Turnaround Association, *Submission 6 on Terms of Reference*; Anderson et al (n 14) 194; Matthew (n 6) 134–5.

29 Anderson et al (n 14) 198–200.

30 Ibid 197.

31 Combating Illegal Phoenixing Bill sch 1 item 25 (proposed 588FGAA of the *Corporations Act*), which is entitled 'ASIC may order undoing of effect of creditor-defeating dispositions by company being wound up'.

- requiring the person to pay to the company an amount that, in ASIC's opinion, fairly represents some or all of the benefits that the person has received (directly or indirectly) because of the disposition; and
- requiring the person to transfer to the company property that, in ASIC's opinion, fairly represents the application of proceeds of property that was the subject of the disposition.

11.25 The Court would have the power to make an order voiding a creditor-defeating disposition.[32] It does not provide ASIC with a distinct power to restrain the use of assets or freeze assets.

11.26 The powers in s 588FF and proposed s 588FGAA are desirable as they establish a procedure for the unwinding of, and disgorgement of benefits arising from, a transaction that amounts to illegal phoenix activity. A prohibition alone does not come with the power to unwind the transaction, and so the Combating Illegal Phoenixing Bill's establishment of a creditor-defeating disposition could be seen to have utility. The recent reported use of voidable transaction provisions in relation to phoenix activity illustrates how this could be so.[33] The Combating Illegal Phoenixing Bill would arguably simplify matters, as there would be a specified type of voidable transaction to be used in the case of phoenix activity, rather than having to choose between multiple different types of voidable transaction.

Potential constitutional implications

11.27 The ALRC is concerned that the procedure established in the Combating Illegal Phoenixing Bill for unwinding such transactions may confer judicial power on ASIC and therefore be unconstitutional. This is also the view of the Law Council of Australia.[34] The issue arises from the Combating Illegal Phoenixing Bill giving ASIC the power to unwind a creditor-defeating disposition. The proposed s 588FGAA(4) in the Bill provides:

> However, ASIC must not make an order under subsection (3) if ASIC has reason to believe that, if it were a court, section 588FG would prevent it from making a corresponding order under section 588FF.

11.28 This is potentially problematic as it requires ASIC to place itself in the position of a court. Similar provisions of the *Bankruptcy Act 1966* (Cth) have been found to not confer judicial power on the Official Receiver.[35] However, the provision in question provided for de novo review of the decision. Proposed s 588FGAE(3) appears to provide for a narrower right of review:

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32 As the creditor-defeating disposition would be a type of voidable transaction: *Corporations Act* s 588FF.

33 *Intelara* (n 21).

34 Law Council of Australia, Submission No 3599 to Senate Standing Committees on Economics, Treasury Law Amendment (Combating Illegal Phoenixing) Bill 2019 (13 March 2019) [2.1]–[2.4].

35 See *Re McLernon*; *Ex parte SWF Hoists & Industrial Equipment Pty Ltd v Prebble* (1995) 58 FCR 391, [1995] FCA 539.

> The Court may set the order aside if satisfied, on the basis of the written reasons for the order, that section 588FGAA did not apply.

11.29 The Law Council of Australia has observed:

> The proposed new section 588FGAA confers a broad discretion on ASIC as to whether to issue a notice (subsection 588FGAA(5)), and specifically limits ASIC's discretion if it believes that the court would not make an order (subsection 588FGAA(4)). Furthermore, ASIC may determine what it believes represents the benefits received by the person or fairly represents the application of proceeds of the transferred property. These are powers that are far beyond the powers conferred on the [Official Receiver] under the equivalent Bankruptcy Act provision. Furthermore, the Court may only overturn the notice if it determines that section 588FGAA does not apply (subsection 588FGAE(3)). In the Committee's view, these elements not only make the proposed new power inappropriate as being too broad, but render it open to a constitutional challenge for improperly conferring judicial power on ASIC.[36]

Refining the statutory prohibition and enforcement mechanisms

11.30 The ALRC largely supports the approach to regulating illegal phoenixing adopted by the Combating Illegal Phoenixing Bill. In particular, the ALRC supports the proposed amendments setting up a new voidable transaction known as a creditor-defeating disposition and associated criminal offences and civil penalty provisions for directors, officers, and advisors. The ALRC believes this will further both the rationale of providing greater clarity with regard to the prohibited conduct and communicate denunciation through the potential of criminal sanction.

11.31 The ALRC is particularly supportive of the proposal to establish an offence and civil penalty provision relating to 'procuring, inciting, inducing or encouraging' a creditor-defeating disposition,[37] given the role misconduct by advisors in illegal phoenix activity plays.[38] The ALRC therefore suggests a number of proposals to improve on the legislative approach taken in the Combating Illegal Phoenixing Bill.

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36 Law Council of Australia, Submission No 3599 to Senate Standing Committees on Economics, Treasury Law Amendment (Combating Illegal Phoenixing) Bill 2019 (13 March 2019) [2.3].

37 Combating Illegal Phoenixing Bills sch 1 item 33 (proposed s 588GAC of the *Corporations Act*).

38 See Anderson and Hedges (n 17).

Improving enforcement provisions in the Combating Illegal Phoenixing Bill

Proposal 21 The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

a) provide that only a court may make orders undoing a creditor-defeating disposition by a company, on application by either the liquidator of that company or the Australian Securities and Investments Commission; and

b) provide the Australian Securities and Investments Commission with the capacity to apply to a court for an order that any benefits obtained by a person from a creditor-defeating disposition be disgorged to the Commonwealth, rather than to the original company, where there has been no loss to the original company or the original company has been set up to facilitate fraud.

11.32 Proposal 21 improves the enforcement mechanism proposed in the Combating Illegal Phoenixing Bill for the unwinding of creditor-defeating dispositions and the disgorgement of benefits in two key ways. First, it addresses concerns about the constitutionality of the provision contained within the Bill by proposing the removal of the power for ASIC itself to make orders unwinding a creditor-defeating disposition as currently contained within the Bill. If Proposal 21 were adopted, such orders could only be made by a court. Secondly, the Proposal adds a mechanism through which benefits may be disgorged to the Commonwealth where it is not appropriate for them to be disgorged to the original company.[39]

39 Anderson et al (n 14) 200–1. This may be the case where the original company has suffered no loss or where the original company is a vehicle for fraud, such as in an Illegal Phoenix Type 2 situation. The aim is to ensure the stripping of all gains from the illegal activity from the controller.

Power to issue restraining notices

Proposal 22 The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

a) provide the Australian Securities and Investments Commission and the Australian Taxation Office with a power to issue interim restraining notices in respect of assets held by a company where it has a reasonable suspicion that there has been, or will imminently be, a creditor-defeating disposition;

b) require the Australian Securities and Investments Commission and the Australian Taxation Office to apply to a court within 48 hours for imposition of a continuing restraining order; and

c) grant liberty to companies or individuals the subject of a restraining notice to apply immediately for a full de novo review before a court.

11.33 Proposal 22 is designed to counter-balance Proposal 21, which proposes removing ASIC's proposed power to make orders unwinding creditor-defeating dispositions. It also addresses concerns that illegal phoenixing occurs too quickly for regulators or liquidators to act. This proposal provides a means for ASIC or the ATO to prevent the dissipation of assets. The proposal has some similarities to the restraining orders available under the *Proceeds of Crime Act 2002* (Cth), save that ASIC or the ATO may first issue an interim restraining notice without the intervention of a court.

11.34 Some may argue that giving ASIC the power to impose restraining notices is draconian. In addition, concerns may be raised about conferring a power to issue notices upon the ATO given that it is usually the significant creditor of phoenix companies but also has Model Litigant obligations.[40] However, the ATO already has significant statutory powers that make it different from a normal government litigant, including its compulsory information gathering powers. In respect of all these potential criticisms, it must also be emphasised that these are only an interim measure that operate for a maximum of 48 hours. Continuation requires a court order and those subject to an order are entitled to immediate de novo review. Thus, any concerns about the constitutionality of this proposal should be attenuated by these features.

40 See *Legal Services Directions 2017* (Cth).

Regulation of directors and advisors

Proposal 23 The *Corporations Act 2001* (Cth) should be amended to establish a 'director identification number' register.

11.35 Proposal 23 puts forward an additional amendment to those outlined in the Government's existing Combating Illegal Phoenixing Bill. It seek to improve the ability of regulators to detect illegal phoenixing.

11.36 The proposal addresses problems with tracking individuals who are repeatedly involved in illegal phoenix activity by providing a means to identify individual directors through director identification numbers (DINs). Proponents of a DIN scheme argue that it would also overcome obstacles in detecting directors who manage corporations while disqualified and also prevent the use of fictitious identities.[41] Submissions to numerous government consultations in recent years have supported the introduction of DINs.[42] Consultations also suggested that DINs would address concerns relating to serial shadow directors involved in illegal phoenixing schemes.

11.37 DINs were originally part of the Combating Illegal Phoenixing Bill but were not part of the Bill that was reintroduced in July 2019. DINs were also among the recommendations put forward by the Senate Standing Committee on Economics in its 2015 report on *Insolvency in the Australian Construction Industry*.[43]

Question J Should there be an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor-defeating disposition provisions?

11.38 Question J asks whether, given the potential involvement of both registered and unregistered insolvency advisors in encouraging illegal phoenix activity, there is a need for a specific power of disqualification in respect of such persons where they are found to have facilitated illegal phoenix activity. No such power is needed for disqualification of directors, as they would be captured by the existing provisions of the *Corporations Act* upon being convicted of a creditor-defeating disposition offence.

11.39 Providing specifically for the disqualification of advisors recognises that directors often engage in phoenixing on the advice of insolvency and restructuring advisors. As Anderson and Hedges have observed:

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41 See, eg, Jasper Hedges et al, 'Harmful Phoenix Activity and Disqualification from Managing Corporations: An Unenforceable Regime?' (2018) 36(2) *Company and Securities Law Journal* 169, 174; Productivity Commission, *Business Set-up, Transfer and Closure* (2015) 28, 426–9.

42 See, eg, Productivity Commission (n 41) 28, 40; Senate Economic References Committee, *'I Just Want to Be Paid' Insolvency in the Australian Construction Industry* (2015) 186–8.

43 Senate Economic References Committee (n 42) 186–8.

> Improvements could also be made to licensing and professional sanctions. There are two separate dimensions here: the licensing itself and sanctions for failure to adhere to the code of conduct or regulations that apply to holders of those licences. Being licenced does not automatically make a person behave better; it simply gives them more incentive to do so because they have more to lose if they are caught and if they are sanctioned. …
>
> The low hanging fruit here is the sanctioning of those who are already licensed or members of a professional organisation in their capacity as lawyers, accountants, insolvency practitioners, turnaround specialists or holders of financial services licences.[44]

11.40 The additional issue of how to regulate individuals offering pre-insolvency advice who are not admitted lawyers or registered insolvency practitioners was identified in consultations.[45] Imposing a licensing or regulatory scheme upon unregulated pre-insolvency advisors may be difficult, as there are difficulties in ascertaining the proper scope of such a scheme because there are multiple types of professionals acting in this space.[46]

11.41 In addition to the foregoing, the ALRC seeks input from stakeholders on the following:

- What should be the coverage of any express disqualification power?
- What would be the legislative criteria for a disqualification order? Would a better approach be to prohibit provision of insolvency advice without a licence?
- Should the power to make a disqualification order only be vested in a court, or should a separate administrative scheme that is administered by ASIC also be enacted? If so, how should the different powers differ?

11.42 As to the last point, in the context of directors, the *Corporations Act* currently contains provisions for disqualification automatically,[47] by order of a court,[48] or by an administrative notice issued by ASIC.[49] The statutory schemes for each type of disqualification are different, and this would likely need to be the case for any disqualification power directed at advisors. If there is a capacity for ASIC to disqualify, there would likely need to be provision for full merits review.

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44 Anderson and Hedges (n 17) 500.
45 See Australian Restructuring Insolvency and Turnaround Association, *Submission 6 on Terms of Reference* (n 28).
46 Anderson and Hedges (n 17) 501.
47 *Corporations Act 2001* (Cth) s 206B.
48 Ibid ss 206C, 206D, 206E.
49 Ibid 206F.

Evaluating the proposals in context

Question K Are there any other legislative amendments that should be made to combat illegal phoenix activity?

11.43 The ALRC seeks the views of stakeholders as to whether further measures are required to combat illegal phoenix activity, given the complexity of identifying and taking action against this type of conduct.

11.44 There is no best practice model to point to in terms of international comparisons. Countries such as the UK, Canada, New Zealand, and the US identify illegal phoenixing as a significant concern, but regulate it predominantly through general provisions. One feature adopted by regulators in New Zealand and the UK is a prohibition on directors of a failed company serving as directors of a corresponding phoenix company within a certain period of time without leave of the court.[50]

11.45 However, given the interests of the corporate structure that allow for iterative learning and contemplate failed ventures, it is not clear this approach strikes the appropriate balance in the Australian context. Moreover, the proposed DIN scheme may offer an alternative means of achieving a similar objective of dissuading individual directors from engaging in cyclical liquidations by making it easier for regulators to track this type of abuse of the corporate structure.

50 *Companies Act 1993* (NZ) s 386A; *Insolvency Act 1986* (UK) ss 216–7.

12. Transnational Business

Contents

Introduction

12.1 In the past half century, advances in communications technology and reductions in the cost of shipping and transport have driven the globalisation of many industries. Bilateral and multilateral trade agreements between nations have proliferated, alongside the rise of the World Trade Organisation, which aims to facilitate open trade globally. States have endeavoured to grow their national economies by engaging in foreign export markets, while also achieving reductions in the domestic cost of living through cheaper imports.

12.2 Corporations have taken advantage of globalisation by sourcing their raw materials, labour, finance, technical expertise, manufacturing, and consumers from different countries to maximise profitability. As Clough has noted, the conditions that may be most favourable to profit maximisation are often found in the developing world, where weak regulatory systems can be vulnerable to capture by powerful multinational corporate entities:

> While the foreign investment associated with global trade is undoubtedly beneficial for many developing countries, there is also the clear potential for transnational corporations to be involved, whether directly or indirectly, in human rights abuses in those countries. Corporations may find themselves dealing with governments that are either directly responsible for human rights abuses or unwilling or unable to stop them. There is also the danger that in seeking lower regulatory standards, corporations may exploit vulnerable developing countries without due regard for the human rights of citizens in those countries. The relative power of many transnational corporations

> allows them to operate more and more independently of host governments, which may be reluctant to impose obligations for fear of discouraging investment.[1]

12.3 As many corporations have increasingly spread their business activities across multiple jurisdictions, corresponding regulatory challenges have emerged. Corporations may have significant activities or operations in jurisdictions where they are not registered, and potentially have no or few assets. Corporations may also evade strict manufacturing regulations in countries like Australia by producing or procuring products in countries with laxer laws or enforcement, and only importing finished products into stricter jurisdictions. 'Secrecy jurisdictions' may facilitate the hiding of crimes such as illegal tax evasion, money laundering, or other involvement in transnational crime, including the financing of terrorism, for example.[2]

12.4 The effective regulation of large multinational corporations often depends on close cooperation between states and their respective law enforcement agencies, which is not always forthcoming. As a result, most initiatives to address overseas crimes such as slavery and foreign bribery consist of voluntary efforts by corporations that are committed to doing business in a way that is socially and environmentally responsible.[3]

12.5 In recent years, the finance industry has also responded to calls for more ethical and responsible business, with the proliferation of ethical investment funds. In part, this has been driven by Australia's unique superannuation program, which distributes shareholder influence throughout the general population in a way that is unprecedented in comparable jurisdictions. These funds have been powerful drivers of ethical corporate behaviour, including through shareholder actions such as that against BHP, discussed below.

12.6 In light of the seriousness of the crimes in question, however, and the public interest in ensuring that Australian corporations do not engage in such crimes offshore, the apparent over-reliance on voluntary commitments by private actors and shareholders is an inadequate approach to enforcement of the criminal law.[4] Perversely, it also punishes the many Australian corporations who make these voluntary commitments,

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1 Jonathan Clough, 'Not-so-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses' (2005) 11(1) *Australian Journal of Human Rights* 1, 2; SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 461–5.

2 On the role of secrecy jurisdictions in facilitating international corruption, see, eg, David Chaikin, 'Corrupt Practices Involving Offshore Financial Centres' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Edward Elgar Publishing, 2011) 203.

3 Such programs are known by a variety of labels, including sustainability programs, corporate social responsibility (CSR), business commitment to human rights, or the 'triple bottom line' approach: Australian Human Rights Commission, *Corporate Social Responsibility & Human Rights* (2008) <https://Www.Humanrights.Gov.Au/Our-Work/Corporate-Social-Responsibility-Human-Rights>. See, eg, the Minderoo Foundation's 'Walk Free' campaign to end modern slavery.

4 See, eg, Justine Nolan and Nana Frishling, 'Australia's Modern Slavery Act: Towards Meaningful Compliance' (2019) 37 *Company & Securities Law Journal* 104 in which the authors note that 'Globally, a majority of business efforts to tackle modern slavery and the broader human rights impacts of supply chains have, to date, utilised fairly superficial techniques such as codes of conduct and social auditing'.

often putting themselves (and their shareholders) at a financial disadvantage compared with their competitors.

12.7 As inherently cross-jurisdictional and often global problems, these issues necessarily involve questions of international law, foreign policy, and international cooperation, which are well beyond the scope of this inquiry. The ALRC acknowledges that some of the solutions to these challenges may reside outside the criminal law.

12.8 However, the Commonwealth criminal law also applies to both the activities of Australian corporations offshore,[5] and foreign-registered companies operating in Australia. Moreover, the magnitude and extent of the offshore crimes in which Australian companies have been implicated, and the lack of successful domestic criminal prosecution in relation to these alleged crimes, warrants consideration as to whether the Commonwealth criminal law can be strengthened to improve corporate compliance in this regard.

12.9 The Terms of Reference specifically request that the ALRC investigate the potential application of Part 2.5 of the *Criminal Code* to extraterritorial offences by corporations. The first part of this chapter responds to that direction by examining the implications of reforming Part 2.5 as proposed in Chapter 6, as well as exploring other avenues in the criminal law to improve corporate compliance with existing obligations to refrain from the commission of crimes offshore.

12.10 The Terms of Reference request additionally that the ALRC consider 'options for reforming Part 2.5 of the Code or other relevant legislation' to strengthen the corporate criminal liability regime. The ALRC has responded to that direction in the context of transnational business by exploring, in the first part of this chapter, possible changes to the due diligence obligations of Australian companies in relation to avoiding involvement with offshore crimes. In the second part of this chapter, the ALRC examines the capacity of the Commonwealth criminal law to regulate the domestic activities of foreign-registered corporations.

Regulating the offshore activities of Australian corporations

12.11 Despite the extraterritorial application of many serious offences under the Commonwealth criminal law, there persist examples of Australian corporations that have been implicated in — but ultimately never held responsible for — alleged offshore crimes.[6] These scandals undermine the commitments made by both the Australian Government and many Australian corporations to responsibly and transparently manage

5 This depends on the scope of jurisdiction applied to the particular offence, as discussed in more detail below.

6 Several examples are described in paras [12.65]–[12.80] below. For a number of recent case studies on this point, see also Human Rights Law Centre, *Nowhere to Turn: Addressing Australian Corporate Abuses Overseas* (2018).

the risk of engaging in or facilitating corruption, environmental crimes, labour crimes, and other offences.

12.12 A key barrier to the enforcement of extraterritorial offence provisions under the *Criminal Code* is the significant information asymmetry between multinational businesses and investigators. Prosecutors face considerable difficulty in obtaining sufficient evidence to establish the elements of an offence, particularly where it takes place offshore. This is compounded by jurisdictional restraints and barriers to effective international cooperation between law enforcement agencies.

12.13 This challenge could be mitigated by clarifying or expanding the standard of due diligence required by Australian corporations in order to comply with their obligations to refrain from engaging in extraterritorial offences. Such measures could improve the prevention, detection, and enforcement of offshore crimes by requiring corporations to take greater measures to identify and address risks in their overseas operations, and to make this information available to regulators where appropriate.

12.14 This would have the dual effect of both ensuring that underperforming corporations improve their practices, while also rewarding the many corporations that already expend time and resources on voluntarily addressing these issues. It could effectively 'level the playing field' between Australian corporations in a way that promotes greater compliance with the criminal law.

Question L Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

12.15 The ALRC does not propose any amendment to the existing obligations and liabilities of corporations in relation to substantive offences (such as slavery), as these offences are already comprehensively prohibited under Commonwealth criminal law. Rather, this chapter explores options for clarifying or expanding the standard of due diligence that is required by Australian corporations in relation to avoiding any involvement in the commission of extraterritorial offences, including by their offshore subsidiaries, employees, and agents.

12.16 Clarifying or expanding the due diligence requirements of corporations in relation to offshore crimes would be consistent with the existing prohibitions on engaging in these crimes. Moreover, it would both promote compliance and enhance enforcement of these obligations by clarifying the expectations of Australian corporations in their offshore activities.

Extraterritorial reach of domestic criminal law

12.17 Under the *Criminal Code*, the default jurisdiction of most offences is territorial, known as 'standard geographical jurisdiction'.[7] Unless otherwise stated, offences under the Code only apply where the offence is committed within an Australian state or territory, or where the result of overseas conduct occurs within Australia. There are, additionally, four categories of extraterritorial jurisdiction:

- **Extended geographical jurisdiction — category A**

  Applies to conduct that occurs in Australia, or conduct the result of which occurs in Australia, or conduct by an Australian citizen or body corporate registered in Australia that occurs outside Australia.

- **Extended geographical jurisdiction — category B**

  As for category A, in addition to conduct engaged in by a person who is a resident of Australia. Local law defence available.

- **Extended geographical jurisdiction — category C**

  The offence applies to any person, whether or not the conduct occurred in Australia. Local law defence available for Australian citizens and bodies corporate only.

- **Extended geographical jurisdiction — category D**

  The offence applies to any person, whether or not the conduct occurred in Australia. Local law defence not available.[8]

12.18 A 'local law defence' applies to categories A, B, and (partially) C. The defence provides that where an offence is committed outside Australia, and the person is not an Australian citizen, resident, or body corporate, and there is not a corresponding local law prohibiting the same conduct in the country or part of the country where the conduct occurs, no offence is committed.[9]

12.19 Various offences adopt one of these categories of extraterritorial jurisdiction. Additionally, as a party to the major international human rights frameworks and anti-crime conventions, the Australian Government is obligated to implement domestic laws that effectively criminalise a number of international offences, such as bribery of public officials, slavery, and crimes against humanity, regardless of where they occur.[10]

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7 *Criminal Code*, s 14.1.

8 Ibid, ss 15.1–15.4.

9 Ibid, ss 15.1–15.4; Radha Ivory and Anna John, 'Australian Report on Prosecuting Corporations for Violations of International Criminal Law' in S Gless and S Broniszewska-Emdin (eds), *Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues* (RIDP, 2017) 81, 91.

10 Specifically, Australia has obligations deriving from its ratification of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Rome Statute of the International Criminal Court*, Rome, 17 July 1988, in Force 1 July 2002, 2187 UNTS 3, Ratified by Australia 9 December 1998 ('*Rome Statute*'); *Convention on Combating Bribery of Foreign Public Officials in International Business*

12.20 Australia has fulfilled these commitments by introducing legislation that criminalises war crimes,[11] crimes against humanity,[12] bribery of foreign public officials,[13] financing of terrorism,[14] involvement in criminal organisations,[15] and money laundering.[16]

12.21 These offences typically apply one of the broader categories of extraterritorial jurisdiction. Involvement in criminal organisations, for example, attracts category C jurisdiction, while financing of terrorism attracts the broad category D jurisdiction.

12.22 Slavery and other slavery-like offences (such as forced labour or child labour) are prohibited under Div 270 of the *Criminal Code*. Slavery proper attracts category D jurisdiction, which means that any person can be prosecuted for slavery by Australian courts, whether or not they are an Australian citizen or body corporate, and whether or not the conduct took place in Australia.[17]

12.23 The remainder of slavery-like offences under Div 270 attract category B extraterritorial jurisdiction, which applies to Australian citizens, residents, and bodies corporate, regardless of whether the conduct took place in Australia.[18] Accordingly, Australian corporations can be held responsible both for slavery and slavery-like offences in Australia, and also potentially in their offshore supply chains.

12.24 It is also an offence for Australian citizens or bodies corporate to engage in trade or other commercial activities with governments, individuals, or other named entities as set out under the relevant Australian sanctions regimes:

- United Nations Security Council sanctions, which Australia must impose as a member of the UN, are implemented via the *Charter of the United Nations Act 1945* (Cth).
- Australian autonomous sanctions, which are imposed as a matter of Australian foreign policy, are implemented via the *Autonomous Sanctions Act 2011* (Cth) and the *Autonomous Sanctions Regulations 2011* (Cth).

Transactions, Paris, 17 December 1997, in Force 15 February 1999, ILM, 37 (1998), Ratified by Australia 18 October 1999; *United Nations Conventions against Corruption*, New York, 31 October 2003, in Force 14 December 2005, 2349 UNTS 41, Ratified by Australia 7 December 2005; *United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, in Force 19 September 2003, 2225 UNTS 209, Ratified by Australia 27 May 2004.

11 Anthony Cassimatis, Rosemary Rayfuse et al, *An Australian Companion to Harris: Cases and Materials on International Law* (Lawbook Co, 2nd ed, 2011) 435.

12 *International Criminal Court Act 2002* (Cth); *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

13 *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth); Simon Bronitt, 'Policing Corruption and Corporations in Australia: Towards a New National Agenda' (2013) 27 *Criminal Law Journal* 283.

14 *Criminal Code* ss 102.6–103.2.

15 Ibid s 390.

16 *Proceeds of Crime Act 1987* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

17 *Criminal Code* ss 270.3A, 15.4.

18 Ibid, ss 270.9, 15.2.

12.25 These Acts provide that the jurisdiction of foreign sanctions offences is to be set by regulation, which generally adopts extraterritorial jurisdiction category A or B.

Effect of Proposal 8 on extraterritorial offences

12.26 There are two key ways in which Proposal 8 would impact the application of extraterritorial offences.

12.27 Under the revised corporate liability attribution method set out in Chapter 6, the conduct of an employee, agent, or associate can be attributed to a corporation, even if the conduct may not amount to an offence by the associate personally. For example, a corporation can be liable for an offence if the associate who engaged in the relevant conduct (the *actus reus*) did not possess the necessary mental element (*mens rea*), and therefore the conduct would not amount to an offence by the associate. Similarly, the corporation can be liable for an offence if the associate who engages in the conduct constituting the offence does not commit an offence because the conduct is beyond the jurisdiction of the provision (because it took place overseas, for example, or the associate is not an Australian citizen).

12.28 For offences with standard geographical jurisdiction (territorial), an Australian corporation will only be liable for the conduct of an associate if it takes place within Australia.[19] Where an offence attracts extraterritorial jurisdiction, the corporation may also be liable for conduct that occurs overseas.

12.29 All slavery-like and human trafficking offences under the *Criminal Code* attract category B extraterritorial jurisdiction, which applies to Australian citizens, residents, and bodies corporate; conduct that occurs in Australia; and overseas conduct the effect of which occurs in Australia.[20] While a non-Australian individual outside the territory of Australia is not subject to category B offences, the revised Part 2.5 could make the conduct of that individual relevant to the criminal responsibility of an Australian corporation if that individual is an associate of the corporation under the proposed changes. That is because the impugned conduct is deemed to be that of the corporation, and therefore it is, by operation of the revised Part 2.5, an Australian body corporate engaged in the conduct that is the subject of a relevant offence provision.

12.30 For example, under the proposed revisions, if an associate acting on behalf of an Australian corporation engaged in forced labour as defined under s 270.6A of the *Criminal Code*, even if the conduct occurred in a foreign jurisdiction where the conduct is not prohibited, the Australian corporation can be prosecuted under s 270.6A because the offence has category B jurisdiction.

12.31 An Australian corporation would be similarly liable for breaches of foreign sanctions offences under the *Autonomous Sanctions Act 2011* (Cth) and the *Charter of*

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19 Ibid s 14.1

20 Ibid s 15.2. Slavery proper, however, is an offence with unlimited (category D) jurisdiction (s 15.4), as it was imported from the *Rome Statute*.

the United Nations Act 1945 (Cth). These offences are typically category A jurisdiction, which is similar to category B but excludes Australian residents who are not citizens.[21]

International legal framework on business and human rights

12.32 Governments that are parties to international human rights agreements have duties to ensure the human rights of individuals.[22] Under the major international instruments, obligations to protect human rights are not enforceable against corporations, as they are not parties to the agreements.[23] However, States Parties are required to implement domestic laws to ensure that rights are protected, including by regulating the conduct of private actors such as corporations.[24]

12.33 As stated by the UN Committee on Economic, Cultural and Social Rights:

> The past thirty years have witnessed a significant increase of activities of transnational corporations, growing investment and trade flows between countries, and the emergence of global supply chains… These developments give particular significance to the question of the extraterritorial human rights obligations of States. …States Parties are required to take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they are incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory).[25]

12.34 The Commonwealth criminal law is one of the mechanisms by which the Australian Government has fulfilled these obligations, as outlined in the previous section. While the Government has ratified and implemented many of these frameworks, however, there are some notable exceptions, such as the international legal framework for protection of migrants' human rights, including labour rights, which Australia has not ratified.[26]

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21 Ibid s 15.1.

22 United Nations Office of the High Commissioner for Human Rights, *International Human Rights Law*, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>.

23 See generally M Baderin and M Ssenyonjo (eds), *International Human Rights Law: Six Decades After the UDHR and Beyond* (Routledge, 2016).

24 United Nations Office of the High Commissioner for Human Rights, *International Human Rights Law*, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>; Baderin and Ssenyonjo (n 23); *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie* (No A/HRC/8/5, Human Rights Council, 7 April 2008) ('*Protect, Respect and Remedy Framework*').

25 United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, E/C.12/GC/24, 10 August 2017 [25]–[26].

26 The international legal framework consists of three universal instruments: *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, A/Res/45/158; *The International Labour Organization Migrant Workers (Supplementary Provisions) Convention 1975 concerning Migrations in Abusive Conditions and the Promotion of Equal Opportunity and Treatment of Migrant Workers*; and *The International Labour Organization Migration for Employment Convention (Revised) 1949*.

12.35 In addition to the responsibilities of corporations established in domestic law, a number of international initiatives have sought to provide further soft-law guidance on the standards of conduct expected of corporations in relation to the protection of human rights.[27] The key international standards are described below.[28]

UN Guiding Principles on Business and Human Rights

12.36 The United Nations Guiding Principles on Business and Human Rights ('UNGPs')[29] were the first attempt to clarify, by international (non-binding) agreement, the respective obligations of states and corporations under international human rights law.[30] The Principles consist of three pillars:

- **Protect**: States have a duty to protect against human rights abuses by third parties, including businesses;
- **Respect**: Corporations have a responsibility to respect human rights; and
- **Remedy**: Victims have a right to access effective remedies, both judicial and non-judicial.

12.37 The principle that corporations have a responsibility to 'respect' human rights (which is a lesser standard than the state responsibility to 'protect') requires corporations to 'avoid infringing on the human rights of others' and 'address adverse human rights impacts with which they are involved'.[31]

12.38 The Operational Principles within the UNGPs additionally call on States to:

a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

b) Ensure that other laws and policies governing the creating and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

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27 Considerable effort has been directed toward the development of a binding international treaty on business and human rights. To date, this project remains largely aspirational, however. For a good overview, see L McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66(1) *International and Comparative Law Quarterly* 143.

28 Other initiatives include the International Labour Organization's *Tripartite Declaration of Principles Concerning Multinational Enterprises* (2000), the Financial Action Task Force (FAFT) *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2012), and the Caux Round Table's *Principles for Business* (1994).

29 Also known as the 'Ruggie Principles' after John Ruggie, the UN Special Representative who proposed the framework to the UN Human Rights Council, where it was unanimously approved in 2008.

30 United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011); R Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Brill, 2012); Steven Bittle and Laureen Snider, 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' (2013) 21(2) *Critical Criminology* 177.

31 United Nations Human Rights Council (n 30) 13.

> c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
>
> d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.[32]

12.39 The UNGPs are not legally binding on corporations, but UN member states are required to implement the Principles by virtue of the Human Rights Council's endorsement of the Principles in resolution 17/4 of 16 June 2011.[33]

OECD Guidelines

12.40 The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental body with 36 member states. It was founded in 1961 to promote economic development and world trade.

12.41 In 2011, the OECD published *Guidelines for Multinational Enterprises* (the 'OECD Guidelines'), which consist of a set of recommendations 'addressed by governments to multinational enterprises operating in or from adhering countries.' The recommendations set out non-binding principles and standards of conduct that are 'consistent with applicable laws and internationally recognised standards.'[34]

12.42 The Guidelines encourage corporations to, for example:

> 1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
>
> 2. Respect the internationally recognised human rights of those affected by their activities.
>
> …
>
> 10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [of their activities]…
>
> …
>
> 12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship…[35]

12.43 To promote and implement the Guidelines, member states have established National Contact Points (NCPs) within their national governments.

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32 Ibid 4.
33 *Protect, Respect and Remedy Framework* (n 24); United Nations Human Rights Council (n 30).
34 OECD, *OECD Guidelines for Multinational Enterprises* (2011).
35 Ibid 19–20.

12.44 In 2018, the OECD also published *Due Diligence Guidance for Responsible Business Conduct* (the 'OECD Due Diligence Guidance'), which provides practical support and guidance to corporations in relation to implementing the OECD Guidelines.[36]

UN Global Compact

12.45 The United Nations Global Compact is a non-binding initiative of the UN that promotes ten principles of corporate sustainability in relation to human rights. The Principles set out obligations of businesses in relation to human rights, labour, the environment, and corruption.[37]

12.46 According to the Global Compact:

> Businesses have minimum responsibilities to meet to respect human rights. They must act with due diligence to avoid infringing the rights of others. This means they must address any negative human rights impacts related to their business. They must also abide by international standards and avoid causing or contributing to adverse human rights impacts through their activities and relationships.[38]

12.47 More than 9,500 companies and 3,000 non-business participants have joined the Compact, which involves taking steps to operate in alignment with the Principles and reporting annually on those efforts.

Domestic implementation of the international business and human rights regime

12.48 The Australian Government supports the UNGPs, described above.[39] The former Foreign Minister, the Hon Julie Bishop, established a Multi-Stakeholder Group to advise the Australian Government on implementing the UNGPs, which recommended the development of a National Action Plan, among other things. Additionally, it has implemented the OECD Guidelines and the FAFT *International Standards on Combating Money Laundering and the Financing of Terrorism*.[40]

12.49 The *Illegal Logging Prohibition Act 2012* (Cth) ('*Illegal Logging Act*') is a specific example of domestic due diligence compliance obligations in relation to offshore business activity (though not directly related to human rights). The Act requires

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36 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 3.

37 These principles are in turn derived from the *Universal Declaration of Human Rights*, the International Labour Organization's *Declaration on Fundamental Principles and Rights at Work*, the *Rio Declaration on Environment and Development*, and the *United Nations Convention against Corruption*.

38 UN Global Compact, *The Ten Principles of the United Nations Global Compact* <https://www.unglobalcompact.org/what-is-gc/our-work/social/human-rights>.

39 Australian Government Department of Foreign Affairs and Trade, *Business and Human Rights*, <https://dfat.gov.au/international-relations/themes/human-rights/>.

40 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FAFT Recommendations* (2012) <www.faft-gafi.org>.

importers and processors of timber to undertake verification and certification procedures in order to ensure that any imported timber was logged legally in the country of origin.[41]

12.50 The *Illegal Logging Act* creates an offence of intentionally, knowingly, or recklessly importing or processing illegally logged timber, and imposes significant penalties, including up to five years imprisonment. As Nolan described it, this 'hybrid legislation deliberately targets the firm at the top end of the supply chain (and utilises civil and criminal liability) as a means of deterring illegal activities downstream.'[42]

12.51 In 2017, the law firm Allens prepared a 'Stocktake on Business and Human Rights in Australia' at the request of the Department of Foreign Affairs and Trade (DFAT), to inform the government on implementation of international business and human rights principles, including on the possible development of a National Action Plan for implementing the UNGPs.[43]

12.52 Also in 2017, the Department of Treasury (Cth) commissioned an independent review of the Australian National Contact Point (ANCP), which oversees domestic implementation of the OECD Guidelines. That review delivered a scathing report on the ANCP's activities, finding that the body was 'significantly lacking' when measured against every one of the 18 criteria examined. Core recommendations of that report included that the ANCP should be more independent, more transparent, and better funded.[44]

12.53 In 2018, Treasury implemented a set of reforms that aimed to address the independent review of the ANCP. Changes included the establishment of a new independent examiner to investigate complaints, and the creation of a new advisory board.[45]

12.54 In relation to modern slavery, in 2018 the Australian Government, alongside the Governments of Canada, New Zealand, the UK, and US, committed to a set of 'Principles to guide Government action to combat human trafficking in global supply chains'. Principle 2 commits those governments to 'set clear expectations for private sector entities on their responsibility to conduct appropriate due diligence in their supply chains to identify, prevent, and mitigate human trafficking.'[46]

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41 *Illegal Logging Prohibition Act 2012* (Cth).

42 Justine Nolan, 'Business and Human Rights: The Challenge of Putting Principles into Practice and Regulating Global Supply Chains' (2017) 42(1) *Alternative Law Journal* 42, 46.

43 Allens Linklaters, *Stocktake on Business and Human Rights in Australia* (2017).

44 Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017).

45 Human Rights Law Centre, 'Australia Appoints First-Ever Independent Examiner to Investigate Corporate Human Rights Abuses Overseas' (online at 31 July 2019) <https://www.hrlc.org.au/news/2019/7/31/australia-appoints-first-ever-independent-examiner-to-investigate-corporate-human-rights-abuses-overseas>.

46 Senator the Hon Marise Payne, Minister for Foreign Affairs, Minister for Women, 'Joint statement from the Governments of Australia, Canada, New Zealand, United Kingdom and the United States: Principles to guide Government action to combat human trafficking in global supply chains', 24 September 2018, <https://foreignminister.gov.au/releases/>.

12.55 In 2017, the G20 leaders' declaration in Hamburg included a commitment to fostering human rights due diligence in corporate operations and supply chains, building on the UNGPs.[47]

The Modern Slavery Act 2018 (Cth)

12.56 In addition to the domestic criminal law, Australia has also introduced some 'soft-law' regulations aimed at encouraging corporations to take voluntary measures to reduce the risk of engaging in offshore crimes.[48]

12.57 The *Modern Slavery Act 2018* (Cth) ('*Modern Slavery Act*'), which came into effect on 1 January 2019, is an example of this soft-law (or 'market-based') approach.[49] The Act created a reporting regime that requires large businesses in Australia to make annual public reports on their actions to address modern slavery risks in their operations and supply chains. The Explanatory Memorandum for the Bill stated that the Bill's 'primary objective' was 'to assist the business community in Australia to take proactive and effective actions to address modern slavery.'[50]

12.58 While the *Modern Slavery Act* has been successful in drawing attention to the problem of slavery in the supply chains of Australian businesses, the Act does not impose any new obligations on corporations to actually conduct due diligence to prevent slavery. There are no consequences for failing to report.[51]

12.59 As a result, the Act encourages, but does nothing to ensure, transparency and accountability of Australian corporations in relation to slavery in their supply chains. Nolan and Frishling have argued that corporations will need to implement comprehensive human rights due diligence programs in order to meaningfully comply with the Act.[52]

Corporate Code of Conduct Bill 2000 (Cth)

12.60 In 2000, the Australian Democrats introduced a Bill that would require corporations with more than one hundred overseas employees to meet certain regulatory standards in their overseas operations. The Bill would have imposed additional compliance and reporting obligations, including a range of criminal and non-criminal sanctions.[53] The Bill was rejected at committee stage and has not been reintroduced.

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47 *G20 Leaders' Declaration: Shaping an Interconnected World* (G20 Summit, Hamburg, Germany, July 8 2017) <http://www.g20.utoronto.ca/2017/2017-G20-leaders-declaration.html>.

48 There have also been some state-based initiatives in this field. Nolan, for example, describes the supply chain regulation introduced in the early 2000s: Nolan (n 42) 45.

49 New South Wales has also introduced a state-based modern slavery reporting regime: *Modern Slavery Act 2018* (NSW). Unlike the Commonwealth Act, the NSW regime imposes penalties for failing to report or providing misleading information, and also establishes an Anti-Slavery Commissioner to raise awareness.

50 Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [2].

51 Human Rights Law Centre, *Submission to the Parliamentary Inquiry of the Joint Standing Committee on Foreign Affairs, Defence and Trade on Establishing a Modern Slavery Act in Australia* (2017).

52 Nolan and Frishling (n 4).

53 Ivory and John (n 9) 106–7; Paul Redmond, 'Sanctioning Corporate Responsibility for Human Rights' (2002) 27(1) *Alternative Law Journal* 23, 27.

Brennan Committee

12.61 The National Human Rights Consultation Committee (NHRCC), chaired by Father Frank Brennan, was established in 2008 to consider which human rights (if any) should be protected and promoted in Australia. The NHRCC noted that there was 'support for requiring business to report on their observance of human rights and for establishing industry-specific complaints mechanisms.'[54] Ultimately, however, the NHRCC recommended that any human rights responsibilities enshrined in Australian law should apply only to 'federal public authorities' and not to private corporations.[55]

Challenges of enforcement in the context of transnational business

12.62 Reports alleging the involvement of Australian companies in offshore crimes including corruption, violence, pollution, and slavery percolate regularly through academia and the media.[56]

12.63 Some of these scandals have resulted in investigations by the AFP or foreign counterparts, and some have resulted in foreign convictions against company officers. In the cases examined by the ALRC, however, none of the Australian corporations have ever been convicted under the Commonwealth criminal law, despite the availability of offence provisions that operate extraterritorially.[57]

12.64 The following examples provide some context regarding the breadth of offences involved, the challenges involved in investigating and prosecuting offshore offences, and the apparent failure of the Commonwealth criminal law to date in preventing or prosecuting these crimes.

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54 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Commonwealth of Australia, 2009) 147.

55 Ibid 147–8, rec 20; Kirsty Magarey and Roy Jordan, 'Parliament and the Protection of Human Rights', *Parliament of Australia* (2010) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection>.

56 See, eg, Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code' (2007) 5(4) *Journal of International Criminal Justice* 809; Ivory and John (n 9); Nolan (n 42); Linda Courtenay Botterill, 'Circumventing Sanctions against Iraq in the Oil-for-Food Programme' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Edward Elgar Publishing, 2011) 122; Joanna Kyriakakis, 'Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law' (2005) 31(1) *Monash University Law Review* 95; Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40(3) *UNSW Law Journal* 1175; Matthew Benns, *Dirty Money: The True Cost of Australia's Mineral Boom* (William Heinemann Australia, 2011); Human Rights Law Centre, (n 6); Jake Sturmer, 'Mamdouh Elomar, Ibrahim Elomar and John Jousif Plead Guilty to Bribing Foreign Minister', *ABC News* (10 July 2017) <https://www.abc.net.au/news/2017-07-10/is-fighter-mohamed-elomar-guilty-bribing-iraq-minister/8693518>; Georgia Wilkins and Charlie Lewis, 'The New Frontier', *Crikey INQ* (online at 9 July 2019) <https://www.crikey.com.au/2019/07/09/out-of-africa-the-new-frontier/>.

57 See generally Human Rights Law Centre (n 6).

Modern slavery in supply chains

12.65 The United Nations estimates that there are more than 40 million victims of modern slavery worldwide, and that more than half of these victims are exploited in the Asia-Pacific region.[58] Given the extensive network of supply chains of Australian-registered businesses in the region, and the seriousness of such crimes, this issue should be a high priority for Australian businesses, consumers, and regulators.

12.66 As the Explanatory Memorandum to the Modern Slavery Bill 2018 (Cth) noted:

> There is a high risk Australian businesses are exposed to modern slavery risks and that Australian goods and services are tainted by modern slavery. This risk may be heightened for large companies and other entities with extensive, complex and/or global supply chains.[59]

12.67 Despite the prevalence and seriousness of these crimes, domestic prosecution rates for slavery, slavery-like offences, and human trafficking are extremely low: between 2004 and 2017, more than 750 slavery and human trafficking cases were referred to the AFP, but only 20 were successfully prosecuted.[60]

12.68 Despite the clear obligation on Australian corporations to refrain from slavery and trafficking both at home and abroad, detection and enforcement of these crimes when they occur in foreign jurisdictions is extremely challenging. The ALRC did not identify any cases in which Australian corporations have been held criminally responsible for their involvement in modern slavery in foreign jurisdictions, despite the significant likelihood of Australian corporations with overseas supply chains being implicated in modern slavery, and the extraterritorial application of the relevant offences under the *Criminal Code*.[61]

Breach of foreign sanctions – AWB and the Oil for Food scandal

12.69 The most infamous alleged violation of foreign sanctions laws by an Australian company was the 'Oil for Food' scandal involving the Australian Wheat Board (AWB). The scandal involved a complex wheat export arrangement apparently designed to circumvent UN sanctions by facilitating the payment of hard currency to the Iraqi Government of Saddam Hussein.[62] In response to a UN independent inquiry and a Royal Commission by the Australian Government, in 2007 ASIC and the AFP began

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58 International Labour Office, *Global estimates of modern slavery: Forced labour and forced marriage* (ILO, Walk Free Foundation and International Organization for Migration, Geneva, 2017).

59 Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [5].

60 Australian Government, *Submission 89 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into Establishing a Modern Slavery Act in Australia* (2017) 7–8. See also the final report of that inquiry: Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia: Hidden in Plain Sight* (Commonwealth Parliament of Australia, 2017) [7.4]–[7.9].

61 See [12.22]–[12.23] above.

62 For an insightful analysis of the scandal and the legal implications that flowed from it, see Botterill (n 56); see also Ivory and John (n 9) 100–2.

investigating accusations that AWB had violated UN sanctions. In 2009, however the AFP proceedings were discontinued.[63]

12.70 No proceedings were ever brought against AWB, and no criminal proceedings were brought against any of the senior officers. Civil fines and disqualification orders were eventually imposed on the former AWB chairman, Trevor Flugge, CEO Andrew Lindberg, and CFO Paul Ingleby, for contravention of their directors' duties.[64] The civil proceedings continued until 2018, when ASIC lost an appeal in the Victorian Court of Appeal against another senior officer, Mr Geary.[65]

12.71 The case clearly demonstrates the difficulty faced by regulators in investigating offshore crimes. The AWB saga was drawn out over more than a decade, and ultimately resulted in no criminal proceedings under the relevant sanctions laws or the *Criminal Code*.

Human rights violations – G4S and the treatment of detainees in offshore immigration detention

12.72 G4S, a private Australian security firm, was accused of being responsible for the death at least one detainee at the Australian Government's offshore immigration detention centre on Manus Island, and injuring 77 others.[66] A class action was brought in Australia against G4S, the Australian Government, and other contractors in relation to alleged negligence and false imprisonment at the facility.[67] The action was settled before trial in 2017 for $70 million, without an admission of liability.[68]

12.73 The Australian-based security firm Broadspectrum Ltd (formerly Transfield Services Ltd) has also been the subject of allegations of human rights abuses in the course of services provided at Australian offshore immigration detention centres.[69] No criminal charges have been brought.

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63 Legal and Constitutional Affairs Reference Committee, 'Work Undertaken by the Australian Federal Police's Oil for Food Taskforce' (Commonwealth of Australia, 2015); Richard Baker and Nick McKenzie, 'Senate Inquiry to Investigate Explosive Federal Police Bribery Claims over Wheat Board Oil-For-Food Scandal', *The Sydney Morning Herald*, 26 June 2014, <https://www.smh.com.au/politics/federal/senate-inquiry-to-investigate-explosive-federal-police-bribery-claims-over-wheat-board-oilforfood-scandal-20140626-zsn4d.html>.

64 *ASIC v Flugge*; *ASIC v Geary* (2016) 342 ALR 1, [2016] VSC 779; *ASIC v Lindberg* (2012) 91 ACSR 640, [2012] VSC 332; *ASIC v Ingelby* (2013) VR 554, [2013] VSCA 49.

65 *ASIC v Geary* (2018) 126 ACSR 310, [2018] VSCA 103.

66 Human Rights Law Centre (n 6).

67 Kamasaee, 'Fourth Amended Statement of Claim' (15 May 2017) Submission in *Kamasaee v Commonwealth of Australia & Ors S CI 2014 6770*, Supreme Court of Victoria, 'Manus Island Detention Centre Class Action', <https://www.supremecourt.vic.gov.au/court-decisions/case-list/manus-island-detention-centre-class-action>.

68 *Kamasaee v Commonwealth of Australia & Ors S CI 2014 6770* (VSC, 2018); ABC News, 'Manus Island Detainees' $70m Compensation Settlement Approved', ABC Online (6 September 2017) <https://www.abc.net.au/news/2017-09-06/manus-island-detainees-settlement-with-commonwealth/8876934>.

69 No Business in Abuse, *Association with Abuse: The Financial Sectors' Association with Gross Human Rights Abuses of People Seeking Asylum in Australia* (2016); Ivory and John (n 9) 106; Melissa Davey, 'Transfield given $1.5bn over Three Years to Manage Nauru and Manus Centres', *The Guardian*

Crimes against humanity – Anvil Mining and the Kilwa massacre

12.74 In 2004, the Congolese military is alleged to have violently supressed a small community protest in the town of Kilwa in the Democratic Republic of Congo (DRC), where Anvil Mining Ltd, an Australian-Canadian corporation, was operating. As the Human Rights Law Centre reported, '[o]ver 70 residents were killed and many others were detained, raped or tortured.'[70] Following a *Four Corners* investigation in 2005,[71] Anvil admitted to providing logistical support to the military and contributing to the payment of soldiers.[72]

12.75 In 2006, Congolese military prosecutors recommended that three Anvil employees be prosecuted in relation to their involvement in the attack, but all were ultimately acquitted.[73] The AFP also launched an investigation into the company's role in the incident,[74] but it was controversially discontinued following the decision of the Congolese military court.[75]

12.76 Victims of the massacre brought a civil legal action against Anvil in Western Australia in 2005. The proceedings stalled 'when the victims' Congolese lawyers began receiving death threats and the Congolese authorities prevented the claimants' lawyers from entering the country to meet with their clients.'[76]

12.77 In 2017, following a complaint by the victims, the African Commission on Human and People's Rights found the DRC Government responsible for the massacre. The Commission ordered the DRC Government to re-open the criminal investigation and to 'take all due measures to prosecute and punish agents of the state and Anvil Mining Company staff.'[77] No further investigations or proceedings have been initiated in the DRC or Australia.

(27 October 2015) <https://www.theguardian.com/australia-news/2015/oct/27/transfield-given-15bn-over-three-years-to-manage-nauru-and-manus-centres>.

70 Human Rights Law Centre (n 6) 17.

71 ABC, 'The Kilwa Incident', *Four Corners* (6 June 2005).

72 United Nations Organization Mission in the DRC (MONUC), *Report on the Conclusions of the Special Investigation Concerning Allegations of Summary Execution and Other Human Rights Violations Perpetrated by the Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa (Katanga Province) on 15 October 2004* [36].

73 Human Rights Law Centre (n 6) 18.

74 Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code' (n 56).

75 See Rights and Accountability in Development, *Ten Years On: Still No Justice for Kilwa Victims* (11 February 2015) 2, which described the AFP's handling of the investigation as 'pitifully inadequate'.

76 Human Rights Law Centre (n 6) 18. A subsequent class action was brought in Quebec, where Anvil's Canadian office was based. This action was dismissed for lack of jurisdiction.

77 See Rights and Accountability in Development, 'African Commission: Landmark $2.5 Million Award to DR Congo Massacre Victims' (4 August 2017) <http://www.raid-uk.org/blog/african-commission-landmark-2-5-million-award-dr-congo-massacre-victims>, which includes links to the original French and official English translation of the Commission's decision.

Environmental crimes and corporate manslaughter – BHP and the Samarco dam collapse

12.78 The Anglo-Australian mining company BHP was one of the joint owners of the Samarco dam that collapsed in 2015, killing 19 people and causing one of Brazil's worst environmental disasters. In 2016, 21 executives, including eight directors of BHP, were charged in Brazil with negligent homicide and environmental crimes.[78] Commentators are doubtful that these actions will succeed.[79]

12.79 In the UK, BHP was served with a class action on behalf of 235,000 Brazilian citizens, community groups, municipalities, and Indigenous communities. The class action commenced earlier in 2019 and is ongoing.[80] In the US, the company settled a class action for USD $50 million with no admission of liability.[81]

12.80 In Australia, BHP is currently facing a shareholder class action brought by more than 30,000 shareholders. The case is expected to be one of the biggest shareholder actions brought against an Australian company.[82] No criminal investigations have been commenced in Australia, however.

Comparative law examples of criminal due diligence regimes

12.81 In a recent paper, Nolan examined five laws that aim to mitigate the adverse human rights impacts of global supply chains. Three of the Acts impose mandated disclosure laws (similar to Australia's *Modern Slavery Act*): the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (US, 2010, Pub.L. 111–203); the *California Transparency in Supply Chains Act of 2010* (SB 657); and the *Modern Slavery Act 2015* (UK) (which was the model for Australia's *Modern Slavery Act*). The paper also examines two Acts that impose due diligence-focused laws: the Australian *Illegal Logging Act* and the French 'Duty of Corporate Vigilance' law. Nolan concludes that, in order for these regimes to

> generate substantive (and not just procedural) human rights compliance they must include: detailed requirements on reporting and due diligence; collaboration with external stakeholders; and compliance mechanisms.[83]

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78 Lia Timson, '"Profit before People": Documents Allege BHP Execs Were Warned over Deadly Dam', *The Sydney Morning Herald (online)* (4 March 2019) <https://www.smh.com.au/business/companies/profit-before-people-documents-allege-bhp-execs-were-warned-over-deadly-dam-20190215-p50y6y.html>.

79 Human Rights Law Centre (n 6) 10–11.

80 'BHP Billiton "Woefully Negligent" over Brazil Dam Collapse', *BBC News Online* (7 May 2019) <https://www.bbc.com/news/business-48194377>.

81 Ewen Hosie, 'BHP to Settle US Samarco Class Action for $US50m', *Australian Mining* (9 August 2018) <https://www.australianmining.com.au/news/bhp-to-settle-us-samarco-class-action-for-us50m/>.

82 Sarah Danckert, 'BHP Class Action Heats up as 30,000 Shareholders Sign Up', *The Sydney Morning Herald* (30 October 2018) <https://www.smh.com.au/business/markets/bhp-class-action-heats-up-as-30-000-shareholders-sign-up-20181029-p50cnv.html>.

83 Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure and Due Diligence Laws Capable of Generating Substantive Compliance with Human Rights Norms?' (2018) 15(2) *Revista de Direito Internacional*.

12.82 In 2017, France enacted a 'duty of vigilance' law, which imposes three new obligations on certain corporations to: a) have a human rights 'vigilance' plan; b) implement their plan; and c) report publicly on implementation.[84] The Act goes further than the Australian or UK modern slavery Acts by, for example, requiring corporations to take active steps to prevent human rights violations in their supply chains, rather than just reporting on any steps taken.

12.83 The draft legislation had included civil penalties for failing to implement a plan, but the penalties were struck out by the French Constitutional Council. However, corporations may still be liable to pay compensation to individuals who suffered harm as a result of a corporation's failure to implement a plan.[85]

12.84 The Act has been widely praised as a new global standard showing how domestic laws can effectively be utilised to ensure that corporations comply fully with the criminal law in the course of their offshore operations, and take adequate measures to not only report on but also prevent human right abuses in their supply chains.[86]

12.85 In a similar approach, in 2017 the Dutch Parliament adopted the Child Labour Due Diligence Bill, which would require corporations to identify child labour risks in their supply chains, and develop and implement procedures to address those risks.[87]

Extraterritorial enforcement of the Commonwealth criminal law: Options for reform

12.86 The preceding section highlighted the breadth of offences and human rights abuses in which Australian corporations may be implicated in the course of their offshore business activities. It additionally highlighted the many challenges of investigating and prosecuting such offences, even where law enforcement agencies are aware of the allegations, and where domestic criminal offence provisions have extraterritorial application.

12.87 The implications of the ALRC's proposed revision to Part 2.5 of the *Criminal Code* for the operation of extraterritorial offences was examined above.[88] With or without these changes, Australian corporations may be exposed to criminal responsibility through the actions of their officers, employees, or agents, including when the conduct occurs outside Australia.

12.88 The above examples all involved alleged contraventions of criminal offences that apply extraterritorially, including slavery, crimes against humanity, and violation of

84 *Loi relative au devoir de vigilance des société mères et entreprises donneuses d'ordre* (France) Loi n° 2017-339, 27 mars 2017.
85 European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law* (2017).
86 Ibid; Nolan (n 83).
87 European Coalition for Corporate Justice (n 85).
88 See [12.26]–[12.31].

foreign sanctions. Despite this, none of the corporations were criminally prosecuted in Australia.

12.89 In light of the overwhelming challenges to the effective domestic prosecution of offshore crimes — including the significant asymmetries in information between large transnational corporations and law enforcement — this section considers whether a strengthened regulatory regime in relation to extraterritorial crimes could ensure better compliance with Commonwealth criminal laws.

12.90 The ALRC has identified three preliminary options for law reform that could serve to strengthen the obligations of Australian corporations in relation to preventing their involvement with offshore crimes.

12.91 The first option consists of strengthening the existing reporting regime introduced by the *Modern Slavery Act*. A second approach would create a new offence of 'failing to prevent' certain offshore crimes, such as bribery or slavery, similar to that discussed in Chapter 6. The third option would involve the creation of new positive obligations to prepare, implement, and report on internal corporate compliance policies to identify and prevent involvement in offshore crimes. Such an obligation would include a corresponding offence for corporations that fail to fulfil these obligations.

12.92 The ALRC also considered whether additional regulatory guidance is needed in relation to the standard of due diligence expected of corporations in preventing offshore crimes. However, as discussed in Chapter 6, extensive sector-specific guidance already exists to assist corporations in particularly challenging regulatory contexts.[89] As such, the ALRC does not consider that additional guidance would be likely to improve compliance.

Strengthening the reporting regime

12.93 The *Modern Slavery Act*, described above, encourages Australian corporations to report on the steps they have taken to identify modern slavery risks in their supply chains. The Act was based on the UK *Modern Slavery Act*, and both draw on international standards with regard to preventing human rights violations.

12.94 The UNGPs, for example, set out four key elements of due diligence, which require businesses to:

- Identify and assess any actual or potential adverse human rights impacts of their activities;
- Integrate the findings internally and take appropriate action to prevent or mitigate adverse impacts;
- Track and measure the effectiveness of the measures implemented; and
- Publicly report on these prevention and mitigation activities.[90]

89 For example, as provided by the OECD and Transparency International. See [6.24]–[6.33] above.
90 United Nations Human Rights Council (n 30) 17.

12.95 These elements have been incorporated into the Australian *Modern Slavery Act*. However, they are incorporated in such a way that they remain voluntary. The Act does not create a positive obligation for corporations to actually take risk-mitigation steps, only to report honestly on whether or not they do.[91]

12.96 The reporting regime could be improved by imposing penalties on corporations that do not comply, by expanding the range of factors which must be reported on, and by expanding the scope of corporations captured by the regime. Ultimately, however, the 'name and shame' approach to enforcement of the Commonwealth criminal law is both limited in potential efficacy and difficult to justify, given the seriousness of the offences involved.

12.97 While it is beyond the scope of this Discussion Paper to consider the effectiveness of private sector-led corporate social responsibility and human rights programs, the ALRC notes that there is a wealth of literature calling attention to the limits of a market-based approach in this context.[92] Turner has argued that:

> Models of private regulation displace the obligation of monitoring and enforcement from the public to the private sphere. The Costco and Nestlé class actions, for example, followed scrutiny by mainstream media outlets and non-government organisations, with the costs and burden of enforcement borne by the class action plaintiffs. The weakness of a private regulatory model is apparent; regulation is contingent on the existence and effectiveness of private sector actors such as investigative journalists, non-government organisations and private individuals.[93]

12.98 Turner and others have criticised the overreliance on soft-law disclosure models (such as that introduced in the *Modern Slavery Act*), calling into question their effectiveness in preventing and addressing serious crimes.

12.99 A more effective approach may be to instead reform this soft-law mechanism into a hard-law obligation to actually conduct due diligence in relation to extraterritorial offences, similar to the French approach. This option is discussed further below.

A 'failure to prevent' approach to foreign crimes

12.100 In Chapter 6, the ALRC considered the 'Failure to Prevent' model of corporate liability. That section considered some foreign examples of such an offence, namely from the UK, Canada, and New Zealand. It also discussed the Criminal Law Amendment

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91 For a good analysis of the due diligence aspects of the *Modern Slavery Act*, see Nolan and Frishling (n 4).

92 See, eg, Erin O'Brien, 'Human Trafficking and Heroic Consumerism' (2018) 7(4) *International Journal for Crime, Justice and Social Democracy* 51; Nolan and Frishling (n 4); Stephanie Schleimer and John Rice, 'Australian Corporate Social Responsibility Reports Are Little Better than Window Dressing', *The Conversation* (4 October 2016) <https://theconversation.com/australian-corporate-social-responsibility-reports-are-little-better-than-window-dressing-66037>; Nolan (n 42); C Parsons, 'The (In)Effectiveness of Voluntarily Produced Transparency Reports' [2017] *Business and Society* 1; Bittle and Snider (n 30); Clough (n 1) 7.

93 Ryan J Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17(1) *Melbourne Journal of International Law* 188, 198.

(Combatting Corporate Crime) Bill 2017 (Cth), which would have enacted a new offence of failing to prevent bribery by an 'associate'. Under this offence, corporations would face strict liability for bribery by 'associates' (including subsidiaries) if they did not have 'adequate procedures' in place designed to prevent bribery of foreign public officials by their 'associates'.[94]

12.101 As Chapter 6 concluded, the Failure to Prevent Model would be superfluous in Australia if Proposal 8 is implemented.[95] Additionally, in relation to transnational crimes, the ALRC considers that the Failure to Prevent Model would still be susceptible to many of the same challenges that undermine extraterritorial enforcement of the existing criminal law, given the need to prove the commission of the underlying offence.

New positive due diligence obligations for corporations

12.102 In Chapter 6, the ALRC examined the meaning of 'due diligence' as a defence to corporate liability. This section considers the meaning of due diligence in a different sense — namely, the concept of *positive* due diligence obligations. Rather than steps that a corporation must take in order to show that it should not be liable for an offence committed, this section considers, among other questions, whether corporations should have positive, stand-alone obligations to exercise due diligence in relation to the prevention of crimes offshore.

12.103 As set out in Chapter 6, the OECD has published extensive sector-specific guidance to assist corporations in particularly challenging regulatory contexts. In addition, the obligations of Australian corporations with respect to offshore crimes should be understood in light of the commitments made by the Australian Government in relation to the international corporate human rights standards, including the UNGPs and the OECD Guidelines.

12.104 As described at [12.82] above, the French 'duty of vigilance' law imposes a positive due diligence obligation on corporations to identify human rights risks in their operations and take measures to address those risks. Corporations can be the subject of civil prosecutions if their failure to do so results in harm.

12.105 Under the *Illegal Logging Act*, described above at [12.49], corporations can be criminally prosecuted for a number of activities, including the importation of things made from illegally logged timber, or the importation of a 'regulated timber product' without complying with the due diligence requirements set out in the *Illegal Logging Prohibition Regulations 2012* (Cth).[96]

12.106 Based on preliminary research and consultation, the ALRC considers that this type of approach — namely, the imposition of positive due diligence obligations in relation to offshore offences — offers a potential option for further consideration.

94 See [6.60]–[6.72] above.
95 See, in particular, [6.73]–[6.75].
96 *Illegal Logging Prohibition Act 2012* (Cth) ss 8, 12.

Such an approach may provide a more effective means of enforcing the existing Commonwealth criminal law as it applies to corporations,[97] as well as fulfilling the commitments made by the Australian Government in ratifying the major international human rights frameworks.[98]

12.107 Commentators have increasingly called for Commonwealth criminal laws to be strengthened in this direction.[99] Clough, for example, has argued that domestic criminal liability 'should form a vital part of an integrated regulatory framework governing the conduct of transnational corporations.'[100]

12.108 Gibney and Emerick have denounced

> the perpetuation of a double standard under which most foreign corporations, as well as their home governments, operate. There is one set of standards – legal and moral – in domestic operations; but a completely different and much lower set of standards when these same entities are operating abroad, particularly in much poorer countries. This dichotomy is wrong, and the governments in the industrialized world have the means of preventing it; by applying extraterritorially many of the domestic and international standards that are adopted and enforced at home.[101]

12.109 Nolan has emphasised the potential of positive due diligence obligations in the criminal law to 'utilise the leverage of lead firms to improve supply chain working conditions'.[102] Nolan has further argued that:

> If a firm at the top end of the supply chain can control the size, design, quantity and quality of a product, and possess potential leverage to influence the working conditions of those producing the goods, it is then both fair and effective to align that power with legal accountability. Chain liability, as used selectively in Australia's homeworker industry and the logging industry, can shift the overarching legal responsibility to the firms at [the] top of the supply chain, making them liable for harms occurring in their supply chain. If companies can demonstrate that they have exercised due diligence in such circumstances, this could be a defence to liability.[103]

12.110 Strengthening the positive due diligence obligations of corporations with regard to their offshore activities may bring business practice into line with community expectations. For example, an Australian corporation may engage a foreign supplier to provide goods or services for a price that would cause any reasonable person to be suspicious as to whether slavery-like practices are being used to provide those goods or services.

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97 See Turner (n 93).
98 See [12.19]–[12.20] above.
99 See, eg, Nolan (n 83).
100 Clough (n 1) 3.
101 M Gibney and RD Emerick, 'The Extraterritorial Application of United States Law and the Protection of Human Rights: Hold Multinational Corporations to Domestic and International Standards' (1996) 10 *Temple International and Comparative Law Journal* 123, 145.
102 Nolan (n 42) 46.
103 Ibid.

12.111 Under the current law, the Australian company need simply not enquire into such circumstances to avoid any liability, and there are no penalties if a company fails to report on the possible existence of slavery in its supply chain. A strengthened due diligence regime could make it clear that such a company must make necessary enquiries to satisfy itself and regulators that slavery or slavery-like practices are not being used to service their contracts.

12.112 The ALRC anticipates that it may be argued that the imposition of positive due diligence obligations on Australian corporations may impose a higher burden on them in ensuring that overseas crimes are not committed by their subsidiaries and associates. On a principled basis, this burden is justified by the gravity and unacceptable prevalence of the crimes in question, and the policy objective of disenabling corporations from materially benefiting from such crimes by simply turning a blind eye to the conduct in their supply chains.

12.113 Moreover, it must be emphasised that the due diligence obligations would apply only in relation to conduct that is *already* criminalised under Commonwealth law. We should therefore expect that the measures required by corporations to fulfil such obligations would be no more than the steps already taken by any responsible corporation genuinely seeking to comply with its existing obligations under the criminal law. Accordingly, the creation of new due diligence obligations in relation to preventing offshore crimes will incur no additional burden on corporations who are currently complying with their legal obligations.

12.114 It might also be argued that imposing stricter due diligence requirements on Australian companies may put them at a competitive disadvantage with respect to foreign companies. The implication of this argument is that any amendments would result in no net reduction in the prevalence of these crimes in the supply chains of goods ultimately entering the Australian market, because they will be replaced by goods of foreign corporations that are not subject to the same requirements. The ALRC acknowledges but rejects this argument on a number of grounds.

12.115 First, the ALRC acknowledges that domestic criminal law is a necessarily limited tool in the context of an inherently global problem, which requires genuine international cooperation. Nonetheless, expanding the due diligence obligations of Australian corporations would be consistent with commitments made by the Australian Government in relation to combatting slavery, corruption, and other crimes as noted above. As the European Coalition for Corporate Justice has argued:

> Making human rights due diligence mandatory for businesses could help gradually shift focus towards prioritising risks to people rather than risks to the company… Self-regulation and voluntary measures to foster corporate respect for human rights have proved insufficient thus far. A binding framework is needed to protect people and the planet, and ensure fair competition for companies who act responsibly.[104]

104 European Coalition for Corporate Justice (n 85).

12.116 Such an approach would therefore utilise the tools at our disposal to their fullest extent in preventing these offences, in a way that supports Australian corporations that are committed to responsible business practices, as well as supporting international efforts toward the same goal.

12.117 Second, while acknowledging that a balance must be struck between ensuring the competitiveness of Australian firms internationally, and minimising risk and harm to both Australian and overseas communities, it is argued that a higher standard of due diligence on the part of companies is warranted by the incredibly low rates of enforcement of such serious crimes under the current law.

12.118 Third, the strictness of Australia's crime prevention regime is just one among countless other factors that influence the strategic decisions of transnational businesses, including decisions about where they register and do business. It is not clear that changes of this nature would have any material impact on the number of companies registered in Australia, or on the proportion of Australian-produced goods supplying the domestic market.

12.119 Finally, from a principle-based approach, the argument that if we prevent one actor from committing a crime, that same crime will only be committed by another in their place, is defeatist and unhelpful. Such an approach is inconsistent with the objective of the criminal law, which is to deter the commission of crimes by holding the perpetrators responsible for their actions.[105]

Regulating foreign corporations with business activities in Australia

12.120 The final part of this chapter considers the application of the domestic criminal law to foreign corporations with business activities in Australia.

12.121 The globalisation of trade and commerce has created special challenges in the regulation of business activities by entities that are not registered in the jurisdiction in which the criminal conduct takes place, or where the resulting impact of that conduct occurs. This is especially true in relation to internet-based services, including social media platforms like Facebook and Twitter, and other intermediaries like Google and Amazon.

12.122 This issue was highlighted in the wake of the Christchurch mosque shooting on March 15 2019. Following the attack, sites including Facebook were criticised for failing to remove Australian access to the live-streamed footage until about 70 minutes after the stream began. At the time, while the removal of such violent content was already a matter of internal policy for all of the major sites, there was no clear legal requirement or government direction to do so.

105 See Ch 2.

12.123 The task faced by the platforms should not be underestimated: within two weeks following the attack, Facebook reported that it had identified more than 900 separate versions of the footage on its site. All of these files have to be manually identified and reviewed, as automated video recognition software (that would search for copies of the original video) is not sufficiently advanced for the task.

12.124 In response, the government rushed through legislation creating two new offences that aimed to curtail the sharing of such content, in the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth):

- First, it is an offence if a relevant person fails to remove abhorrent violent material 'expeditiously', punishable by 3 years' imprisonment, or fines of up to 10 percent of the company's annual turnover.[106]
- Second, it is an offence if a relevant person anywhere in the world fails to expeditiously notify the AFP if they become aware that their service is streaming abhorrent violent conduct that is occurring in Australia, punishable by fines of up to $840,000 for a corporation.[107]

12.125 'Abhorrent violent material' and 'abhorrent violent conduct' are both defined in the Act.[108] The latter includes conduct in which a person engages in a terrorist act, or the murder, torture, rape, or kidnap of another person.[109] The offences apply to any person (individual or corporate) that is a provider of internet, content, or hosting services.[110]

12.126 The new offences came into effect just three weeks after the attack, and following little or no consultation with industry or the public. The law has drawn criticism from a wide variety of actors, including intermediaries, lawyers, and civil society.

12.127 The new law highlights key challenges involved in the moderation of offensive content online, as well as the regulation of foreign business entities with regard to their activities or products within Australia. The efficacy of the law in addressing the problem it aims to solve is doubtful, as is the prospect of enforcing the offences against any of the major internet-based companies that it targets, given that they are almost exclusively registered outside Australia.

12.128 The prosecution of foreign entities with no assets in Australia can be a poor proposition for taxpayers, and non-Australian officers of foreign-registered corporations generally cannot be prosecuted domestically without an effective extradition agreement.

12.129 The principles set out in Proposals 1 to 7 should guide the utilisation of domestic criminal law in the regulation of foreign corporate entities, including identifying whether particular entities or types of activities would be better dealt with through non-criminal

106 *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) s 474.34.
107 Ibid s 474.33.
108 Ibid ss 474.31, 474.32.
109 Ibid s 474.32.
110 Ibid ss 474.33(1)(a), 474.34(1)(a).

regulatory approaches. This question remains the subject of further research, but the ALRC suggests that the most appropriate responses to this issue may fall beyond the scope of Australian corporate criminal law.