

CORPORATE CRIMINAL RESPONSIBILITY

SEMINAR SERIES

24, 26, 27 February, 2 March 2020
Perth | Melbourne | Sydney | Brisbane



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Australian Law Reform Commission

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PERTH PANEL:

The Hon Justice SC Derrington, President, Australian Law Reform Commission

Matt Corrigan, General Counsel, Australian Law Reform Commission

Joe Longo, Senior Advisor, Herbert Smith Freehills

Professor Elise Bant, The University of Western Australia

Rebecca Faugno, The University of Western Australia

Paul D Evans, Quinn Emanuel Urquhart & Sullivan



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Matt Corrigan, General Counsel, ALRC

Professor Liz Campbell, Monash University

Professor Jonathan Clough, Monash University

Michael Wyles QC, Barrister

The Hon Justice RJ Bromwich, Part-Time Commissioner, ALRC



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BRISBANE PANEL:

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REGULATORY MODEL

Proposal 1-7



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Regulatory Model (Proposals 1-7)

Summary of Submissions Received

- Strong support overall for a principled distinction between criminal and civil regulation of corporations.
- Regulators and some other submitters expressed concern about lack of flexibility in model between offences, CPP provisions and CPN provisions. Other submitters supported this approach.
- Criteria for determining whether a criminal offence provision were broadly supported.
- Some support for the overall intention behind the escalation mechanisms (Prop 5) but generally these not supported – concern about how these might actually operate in practice.



Regulatory Model (Proposals 1-7)

Current Thinking

Four key nuances to Proposals in Discussion Paper:

- Focus on criminal aspects of the model and not on the civil aspects of the model – No proposals on Civil Penalty Provisions and Civil Penalty Notices
- Propose that there should be no infringement notices for criminal offences. If parliament wants to provide a regulator with flexibility to enforce by way of infringement notice the relevant provision should be civil
- Re-affirm our analysis that dual-track regulation can be consistent with a principled approach
- Reframe the escalation proposal - The ALRC is considering an offence of engaging in a system of conduct or pattern of behaviour while being reckless as to whether the result is breach of civil penalty provisions.



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ATTRIBUTION OF CRIMINAL RESPONSIBILITY TO CORPORATIONS

Proposal 8



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Submissions – Single Method



Generally supported



Certain areas may need their own method



Submissions – associate



- Many submissions thought ‘associate’ was too broad
 - Some disliked the choice of the word ‘associate’ and interpreted it as ‘criminality by association’.
- Others considered it no broader than the current method in the legislation.
- Some submissions supported a due diligence defence; others rejected the concept.
- Concerns were raised regarding the legal burden, but did not address the current state of law.



Submission – retaining corporate culture

- Most submissions agreed that the corporate culture provisions should be retained.



Current thinking



Single model

But there may be need for specific rules of attribution for particular offences.



A policy choice to be made as between:

- 1. A standardised TPA Model**
(which is the predominate model and is simple)
- 2. Pt 2.5 with some amendments**

A hybrid is possible, but as both are from different theoretical bases, a combination is challenging.



Specific offences:

There is utility in specific offences drafted to address corporate wrongdoing – such as license or duty based offences, or in particular areas, failure to prevent offences.



INDIVIDUAL LIABILITY FOR CORPORATE CONDUCT



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Stakeholder Response

- Broad agreement that individuals should be held legally responsible for their own wrongdoing in relation to corporate misconduct.
- **Proposals 9 and 10**
 - Most submissions opposed. Limited support, including from the ACCC and Human Rights Law Centre that the Proposals create appropriate incentives to prevent misconduct.
 - Key concerns:
 - Deeming of liability too broad (including to those without any clear duties, responsibility or capacity to prevent misconduct).
 - Lack of clarity as to scope of obligations presents significant uncertainty for individuals.
 - Meaning of ‘position to influence’ and ‘reasonable measures’ are unclear, concept of ‘influence’ is too broad.
 - Using criminal proceedings against the corporation to trigger civil liability of management raises practical issues about admissibility and standards of proof.
 - Potential overlap and inconsistency with BEAR and proposed FAR.
- **Question A** Agreement any individual liability proposal should apply to ‘officers’ or ‘executive officers’.



Updated Approach

- 1. Extend the BEAR as proposed by FAR** and consider future introduction of similar schemes in other highly-regulated sectors with very large corporate actors and demonstrated accountability deficits.
- 2. Clarifying the application of statutory officers' duties:** Depending on how the High Court interprets 'officer' in *ASIC v King*, statutory reform may be needed to ensure executives of parent companies and individuals below top-tier management, including division heads, are adequately captured.
- 3. Continued role for extended management liability** on a principled basis in certain contexts.
- 4. Addressing evidentiary, procedural and practical challenges** of enforcement action against individuals in very large corporations may merit further examination.



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VIEW THE DISCUSSION PAPER AND SUBMISSIONS:

<https://www.alrc.gov.au/inquiry/corporate-crime/>

CONTACT ALRC

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