

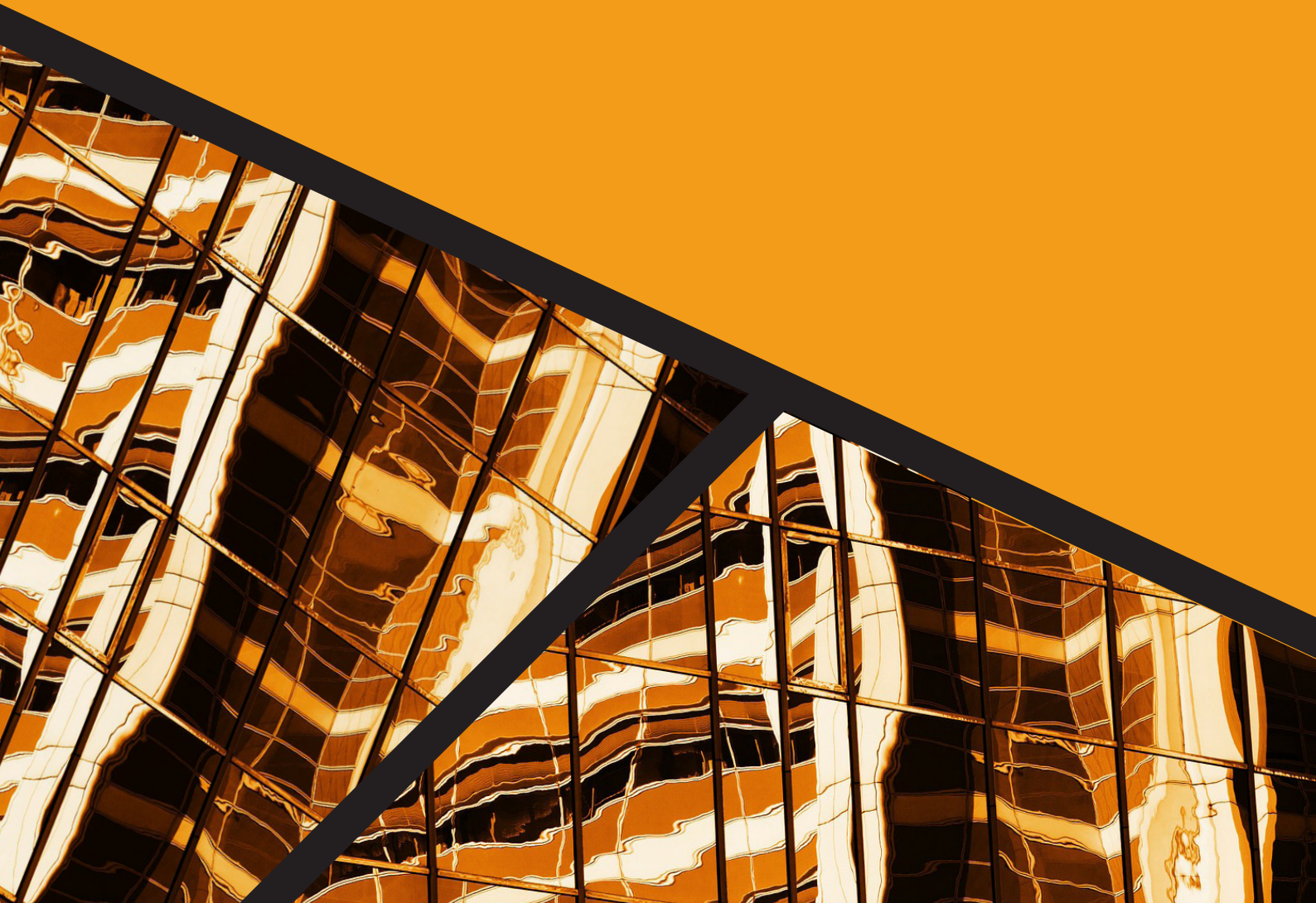


Australian Government

Australian Law Reform Commission

CORPORATE CRIMINAL RESPONSIBILITY

Individual Liability for Corporate Misconduct
An Update - March 2020



Individual Liability for Corporate Misconduct: An Update (March 2020)

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Executive Summary

1. On 15 November 2019, the ALRC released a Discussion Paper as part of its Corporate Criminal Responsibility Inquiry. In Chapter 7 of the Discussion Paper, the ALRC proposed reforms to individual liability for corporate misconduct. That chapter responded to the Inquiry's Terms of Reference which asked the ALRC to consider 'the availability of other mechanisms for attributing corporate criminal responsibility ... including mechanisms which could be used to hold individuals (eg senior office holders) liable for corporate misconduct'.¹

¹ Given the dual-track nature of many criminal offences and civil penalty provisions applying to corporations under Commonwealth law, and the interdependent nature of many of the recommendations made in the Discussion Paper, the ALRC has considered both criminal and civil liability of individuals, in relation to

2. Proposal 9 in the Discussion Paper was that the *Corporations Act 2001* (Cth) (*'Corporations Act'*) be amended to provide that when a corporation commits an offence, any officer in a position to influence the conduct of the corporation in relation to that offence is subject to a civil penalty, unless that officer took reasonable measures to prevent the conduct of the corporation. Proposal 10 proposed an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of the civil penalty provision created in accordance with Proposal 9 (see Appendix One for the text of the Proposals).
3. On 22 January 2020 the Department of Treasury (Cth) published a Proposals Paper for the introduction of a new wide-ranging Financial Accountability Regime (FAR), designed to enhance responsibility and accountability of directors and senior executives in the financial industry, which has the potential to significantly alter the legal framework for individual liability in this sector.²
4. Since releasing the Discussion Paper, the ALRC has undertaken further analysis which confirms its view that there is an 'accountability gap' in relation to holding senior managers of the largest corporations³ liable for corporate misconduct. However, in light of developments in relation to the proposed FAR since publication of the ALRC's Discussion Paper, and feedback received from stakeholders on Discussion Paper Proposals 9 and 10, the ALRC is no longer intending to recommend the scheme it had previously put forward to address these issues.
5. Instead, the ALRC considers that the FAR provides a promising framework for enhanced individual liability, which if proven effective, could be extended to certain other sectors in the Australian economy. In addition, individual liability may be strengthened through legislative amendment to the definition of 'officer' under the *Corporations Act 2001* (Cth), though whether an amendment to the definition is required will turn in part on a case currently before the High Court.
6. Given Government proposals for significant legislative reform with respect to individual liability in the financial services sector and judicial determination of the scope of officer liability awaiting judgment, the ALRC does not consider it appropriate to recommend any specific law reform at the present moment. However, as the ALRC has concluded that there is a gap in accountability, it will recommend that a wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct be commissioned by December 2025.

criminal offences and civil contraventions committed by corporations. The ALRC has not considered other mechanisms to hold individuals accountable (as opposed to legally liable) such as administrative banning orders, withholding or clawback of remuneration and shareholder action.

² Department of the Treasury (Cth), *Implementing Royal Commission Recommendations 3.9, 4.12, 6.6, 6.7 and 6.8 Financial Accountability Regime: Proposal Paper* (2020).

³ Very large and largest corporations are defined in Appendix Two.

Overarching principles

7. Further consultation by the ALRC has confirmed broad agreement that individuals should be held legally responsible for their own wrongdoing in relation to corporate misconduct.⁴ This is seen as important to the rule of law, to meeting community expectations, and to improving corporate culture. It may also be particularly important from a practical point of view when corporations are insolvent or (as in the case of many corporate trustees) do not hold assets in their own right. Key corporate regulators have also recently reaffirmed that, in enforcement action, proceeding against *both* the company and responsible individuals is the primary objective.⁵

8. A number of submissions also specifically supported the idea that – beyond boards and C-suite executives – individuals who have the capacity to influence the conduct of a corporation and who direct and control aspects of a corporation’s business on a daily basis should have legal responsibilities in relation to that conduct.⁶

9. However, there is also relatively broad agreement that responsibility for corporate crimes and contraventions should only be *attributed* to individuals outside the ordinary principles of accessorial liability in relatively narrow circumstances, where there are strong public policy reasons to do so. Such attribution may occur, for example, where particular corporate officers or classes of individuals are *deemed* legally responsible where a company commits a crime. This is discussed further below under the sub-heading ‘Extended management liability’.

The legal landscape

Mechanisms to hold individuals liable

10. The Discussion Paper set out a number of mechanisms under existing law through which individuals (including senior corporate office holders) may be held criminally and/or civilly responsible in relation to corporate crimes and civil contraventions. These include:

- **Direct liability** for violation of common law or statutory civil and criminal provisions.⁷ This liability may be concurrent with a corporation’s separate liability for the same offence (where all the elements of the offence are made

⁴ Australian Law Reform Commission, *Inquiry into Corporate Criminal Responsibility: Discussion Paper* (DP 87 2019) [7.1]-[7.3].

⁵ See, 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, 30 August 2019); Australian Competition and Consumer Commission, *Submission 25* (concerning cartel conduct).

⁶ See, eg, Allens, *Submission 31*; Human Rights Law Centre, *Submission 39*; Australian Securities and Investments Commission, *Submission 54*; BHP, *Submission 58*; Law Society of New South Wales Young Lawyers, *Submission 59*. See further Australian Law Reform Commission (n 4) [7.83].

⁷ See further Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) [8.15]-[8.18] (‘*Principled Regulation*’).

out in relation to the individual), or may arise from statutory provisions imposing specific duties on those in particular roles.⁸

The types of duties that statutes impose on particular individuals include traditional directors' and officers' liability, such as the duties of care and diligence, and to act in good faith and for a proper purpose.⁹ They also include more specific 'failure to take reasonable steps' or 'due diligence' provisions, such as s 344 of the *Corporations Act*, which imposes liability on a director for failure to take all reasonable steps to comply with financial record keeping obligations.¹⁰ Provisions requiring 'officers' or 'executives' to exercise due diligence to ensure entities comply with their obligations are also found in federal legislation and across most states and territories in relation to, for example, workplace health and safety, and the operation of heavy vehicles.¹¹

- **Accessorial liability**, such as when a person is intentionally 'involved in',¹² 'authorised or permitted',¹³ was 'knowingly concerned in or party to',¹⁴ or intentionally 'aids, abets, counsels or procures'¹⁵ the commission of an offence or contravention by a corporation, making them indirectly liable.¹⁶
- **Extended management liability**, when provisions extend liability to directors or other corporate officers as a consequence of the corporation having committed an offence or contravention, beyond the normal 'direct' or

⁸ When statutory provisions impose specific duties on particular individuals, it is not necessary to prove that the corporation committed a crime or contravention. In the same context, when a corporation has committed an offence or contravention, the law does not presume a breach of the individual's duty although the corporation's wrongdoing may be evidence that an individual has committed such a breach (on this point concerning statutory directors' and officers' duties see further *ASIC v Cassimatis (No 8)* [2016] FCA 1023). This is in contrast to provisions such section 493 of the *Environmental Protection Act 1994* (Qld), which deems executive officers liable for an offence of failing to ensure compliance when a corporation commits an offence, subject to a defence of reasonable steps to ensure compliance, or that the executive officer was not in a position to influence the conduct. While direct liability therefore does not involve attribution from the corporation to an individual, it is a way of holding individuals liable in relation to corporate crimes and contraventions.

⁹ Such as those imposed by *Corporations Act* ss 180-184. In some cases breaches of directors' and officers' duties are pleaded to hold individuals liable in respect of their role in allowing corporate contraventions or offences to occur (known as 'stepping stone liability'): see further Australian Law Reform Commission (n 4) [7.25]; Abe Herzberg and Helen Anderson, 'Stepping Stones - From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 *Federal Law Review* 181.

¹⁰ *Corporations Act* s 344(1) (civil penalty), 344(2) (offence where involves dishonesty).

¹¹ See, eg, *Work Health and Safety Act 2011* (Cth) s 27; *Work Health and Safety Act 2011* (Qld) s 27. Such provisions are part of the Model Work Health and Safety Act developed by Work Safe Australia: Work Safe Australia, *Guide to the Model Work Health and Safety Act* (2016). On heavy vehicles see, eg, *Heavy Vehicle National Law (Queensland)*, s 26D, enacted by the *Heavy Vehicle National Law Act 2012* (Qld); *Heavy Vehicle National Law (NSW)*, s 26D, enacted by the *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW).

¹² See, eg, *Corporations Act* ss 79, 1317E(4).

¹³ Eg *Home Building Act 1989* (NSW) s 137. See further Council of Australian Governments, *Personal Liability for Corporate Fault—Guidelines for Applying the COAG Principles* (2012) 2.2.

¹⁴ *Shipping Registration Act 1981* (Cth) s 74.

¹⁵ *Criminal Code Act 1995* (Cth) s 11.2(1).

¹⁶ See further *Principled Regulation* (n 7) [8.19]-[8.27]. Accessorial liability may apply as the result of a specific statutory provision, by application of common law, or (in jurisdictions where criminal law is codified) through operation of a general complicity provision in the Criminal Code.

‘accessorial’ liability.¹⁷ Extended management liability provisions may deem a class of individuals liable for the same contravention or offence as the corporation,¹⁸ or impose liability on a class of individuals for a separate contravention or offence (often essentially a ‘failure to prevent’ provision).¹⁹ In some cases, such provisions may designate particular officeholders as having organisational or operational responsibility for specific conduct dealt with in the legislation, and hold them liable if those provisions are breached.²⁰

11. Statutes often impose two or three different forms of liability in relation to different contraventions or offences.²¹ Some more prescriptive schemes in areas of specific risk such as mine safety extend liability to boards and management both by imposing specific due diligence obligations on ‘officers’ generally, and by requiring the entity to formally identify executives and other personnel responsible for particular areas of operation and imposing specific due diligence duties on them. Responsible individuals may be held criminally liable for a failure to fulfil their duties.²²

12. In February 2018, the Federal Government introduced a statutory scheme applicable to the banking sector, the Banking Executive Accountability Regime (‘BEAR’).²³ This requires corporations to identify directors and senior executives²⁴ responsible for particular parts or aspects of the bank’s business (‘accountable persons’). It requires those persons to act with honesty and integrity, and with due skill, care and diligence, and to deal with the regulator in an open and cooperative way.²⁵ The BEAR also specifically requires them to take reasonable steps in conducting their responsibilities to prevent matters arising that would adversely affect the bank’s prudential standing or prudential reputation.²⁶ When those obligations are breached, the BEAR requires banks to impose a proportionate reduction in remuneration and allows the regulator (APRA) to disqualify the person from being in the position of an ‘accountable person’ in the future.

¹⁷ See the definition of ‘Director’s Liability Provisions’ in Council of Australian Governments (n 13) 2 (concerning criminal liability). For an overview of different ways in which this liability is imposed see further Corporations and Markets Advisory Committee (Cth), *Personal Liability for Corporate Fault: Report* (2006) ch 2.

¹⁸ See, eg, *Taxation Administration Act 1953* (Cth) s 8Y.

¹⁹ See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 494-5.

²⁰ See, eg, *Corporations Act* s 188.

²¹ Eg *ibid* ss 180 (direct), 1317E(4) (accessorial), 188 (deemed).

²² See, eg, *Coal Mining Safety and Health Act 1999* (Qld) ss 34 (Discharge of obligations), 42 (Obligations of site senior executive for coal mine), 47A (Obligations of officers of corporation). Similar provisions exist in the *Mining and Quarrying Safety and Health Act 1999* (Qld).

²³ Introduced as Part IIAA of the *Banking Act 1959* (Cth) by the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth).

²⁴ It covers all directors on the board, individuals with actual or effective senior executive responsibility for management or control of a significant or substantial part or aspect of the operations of the bank or its corporate group and individuals with senior executive responsibility for one of the particular responsibilities specified in the legislation.

²⁵ *Banking Act 1959* (Cth) s 37CA(1)(a)-(b).

²⁶ *Ibid* s 37CA(1)(c).

Principled basis for imposition of different forms of liability

13. The application of **direct** and **accessorial** liability is based on long-established general principles of law and no particular concerns have been raised in consultations or submissions with imposing such forms liability in the corporate context. A number of consultees have, however, noted the particular difficulties of proving accessorial liability of individuals in a corporate context, because it requires a two-step attribution process. First, acts and (where relevant) intention of an individual must be attributed to the corporation to find it has committed the crime or contravention. Second, it is necessary to show that the (often but not always same) individual participated in that crime or contravention with the requisite knowledge and intention. This can be particularly difficult in the context of jury trials.

14. **Extended management liability** is more controversial and, as set out in the Discussion Paper and emphasised in a number of submissions to this Inquiry, the framing and application of such provisions has been the subject of significant discussion and political agreement in Australia over the past 15 years.²⁷ In 2009, this resulted in (at least in respect of imposition of criminal liability) agreement by the Council of Australian Governments on Principles for the Imposition of Personal Liability for Criminal Fault (the ‘COAG Principles’).²⁸ Subsequently, significant reform has been carried out at the state and federal levels in order to reflect these principles, and legislative drafters are required to apply the principles to new legislation.²⁹

15. The COAG Principles reflect the view (supported in a number of submissions to this Inquiry) that deemed liability provisions imposing criminal liability are only appropriate in limited circumstances, where there is a compelling public policy reason (such as a serious risk of public harm).³⁰ Although the principles apply to imposition of criminal liability, feedback received in some submissions and consultations has strongly argued that many of the same considerations apply to the imposition of civil liability on individuals.³¹

16. The ALRC acknowledges the political agreement reached in the COAG Principles in relation to criminal liability of individuals for corporate misconduct, and agrees that many of the drivers behind the principles apply also to liability of individuals to civil penalty.³²

²⁷ *Principled Regulation* (n 7) [8.42]–[8.92]; Corporations and Markets Advisory Committee (Cth) (n 17); Council of Australian Governments (n 13); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Personal Liability for Corporate Fault Reform Bill 2012* (October 2012).

²⁸ The COAG Principles are set out and explained in supplementary guidelines adopted in 2012: Council of Australian Governments (n 13) pt 3.

²⁹ *Personal Liability for Corporate Fault Reform Act 2012* (Cth). Drafting guidance for Commonwealth laws requires that in relation to criminal offences drafters ‘must apply the Council of Australian Government (COAG) Principles and Guidelines for assessment of directors’ liability’: Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 2.4.2.

³⁰ Council of Australian Governments (n 13) Principle 4.

³¹ See, eg, Australian Institute of Company Directors, *Submission 37*.

³² *Principled Regulation* (n 7) [8.67].

17. Nevertheless, the ALRC reaffirms that there is a role for each of direct, accessorial and extended management liability. Extended management liability provisions are ‘efficient mechanisms for attributing liability to individuals for offences and contraventions of corporations’,³³ and stakeholders have stressed the strong deterrent value of such provisions. There are circumstances in which ‘the public interest in achieving compliance by a company may be seen as requiring officers to assume a more positive role within their sphere of influence and to risk personal liability where they have acted with reckless or negligent disregard of the company’s relevant conduct’.³⁴ Other comparable jurisdictions including Canada, Hong Kong, New Zealand, the United Kingdom and the United States also extend individual liability to management in some circumstances,³⁵ and in some cases in much more onerous ways.³⁶ As the ALRC has previously concluded, ‘the mechanisms by which liability is attributed to an individual will ultimately depend on the nature of the regulated community, the legislative scheme and its policy objectives’.³⁷

Problem Analysis

Effectiveness of different mechanisms: preliminary data

18. In order to better understand the way different mechanisms for holding individuals liable are used, the ALRC is currently conducting a review of publicly-reported civil and criminal court enforcement actions taken against corporations and individuals associated with them by regulators the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (the ACCC) over the past five years. The ALRC’s review relies on data made publicly available by each regulator.³⁸ Thus the conclusions from this review must be read with caution as reporting by regulators through media releases may not be complete and may be subject to policy considerations not relevant to this review. This review is in addition to ongoing analysis of the use of certain extended management liability provisions more generally.

19. For the purposes of the analysis of ASIC and ACCC data, the ALRC has categorised the corporations (or, where applicable, corporate groups) as ‘small’, ‘large’, ‘very large’ and ‘largest’ (see Appendix Two for the method of categorisation).

³³ Ibid.

³⁴ Corporations and Markets Advisory Committee (Cth) (n 17) 37. In relation to criminal responsibility, the Committee thought such responsibility would only be appropriate in ‘exceptional’ circumstances (at 36).

³⁵ Confidential submission concerning comparative criminal and civil frameworks for imposing liability on directors.

³⁶ Such as through the operation of the Responsible Corporate Officer doctrine in the United States, which applies predominantly in certain regulatory areas concerning public welfare (including food and drug administration, environmental harm and competition law) and allows for criminal prosecution and imprisonment of an individual who was not personally involved in or aware of corporate misconduct. See generally Kimberly Kessler Ferzan, ‘Probing the Depths of the Responsible Corporate Officer’s Duty’ (2018) 12(3) *Criminal Law and Philosophy* 455. In relation to the United Kingdom, see the Senior Managers & Certification Regime, discussed further below.

³⁷ *Principled Regulation* (n 7) [8.39].

³⁸ Using information published by Federal Court databases, media releases available on each regulator’s website, ASIC’s biannual *Enforcement Updates*, available at: <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/> and the ACCC’s quarterly activity report, *ACCCcount*, available at: www.accc.gov.au/publications/acccount.

Preliminary analysis (concerning the period 2017 to date) points to the some initial conclusions.

- Proceedings (civil and criminal) are successfully brought against individuals in relation to facts giving rise to corporate civil or criminal responsibility using direct and accessorial liability.
- ASIC has successfully brought civil proceedings against directors and senior management of both private and public companies in relation to corporate contraventions and offences for breaches of their duties under s 180(1) of the *Corporations Act* (including for stepping stone liability).
- Outside of the context of large corporate collapse and cartel conduct, proceedings are only relatively rarely instituted against directors and executives (senior or otherwise) of the largest corporations for their role in relation to corporate crimes and contraventions.³⁹ This is the case even though a significant number of criminal and civil proceedings are brought against such corporations.

In cases brought by ASIC, those involving allegations against senior management related to company misconduct made up only 9% of the total reported cases in the 'largest' category, contrasted with 75% in the 'very large' category, 67% in the 'large' category and 54% in the 'small' category.⁴⁰ On the other hand, the proportion of reported cases involving allegations against the corporation only (without associated allegations against individual managers, employees or agents in the same proceedings) was 48% for the 'largest' companies, 20% for 'very large' companies, 14% for 'large' companies and 11% for 'small' companies.

In cases brought by the ACCC, 48% of cases reported against 'small' companies involved allegations against senior management. However, litigation against senior managers was almost unheard of for larger companies, except for recent cartel prosecutions. For the 'large' category no cases concerned senior management, for the 'very large' category, only one case concerned senior management (9% of total cases), and for the 'largest' category, all six cases concerning senior managers (13% of the total) involved allegations of cartel conduct.

20. The review of this data, and further consultation, suggests that in themselves, the forms of liability available can be effectively used to hold individuals (such as senior

³⁹ In the period 1 January 2017 to date, only three cases were reported on by ASIC concerning senior management of companies in the 'largest' category (excluding cases concerning private misconduct such as insider trading). The companies concerned were G8 Education Limited, Leighton Holdings Limited and Rio Tinto Limited. High profile cases concerning corporate collapse prior to the period reviewed include cases concerning HIH Insurance, One.Tel and Quintex.

⁴⁰ This does not necessarily mean that regulators are not investigating directors and executives of such companies. Consultation suggested that a significant number of such investigations are carried out but are generally 'low yield' investigations in terms of enforcement outcomes due to difficulties of proof.

corporate office holders) responsible in relation to corporate misconduct in certain types of corporations.⁴¹

21. However, both the data and consultation feedback suggest that legal liability for company misconduct is less likely to be sheeted home to senior management of the largest corporations than other categories of corporation. This appears to support observations in the academic literature about a ‘responsibility gap’ or ‘accountability gap’ in relation to such corporations.⁴² While there have been perceptions that some federal regulators have been reluctant to take enforcement action against high profile violators,⁴³ ALRC consultations have suggested that the lack of litigation results in part from the legal and evidential difficulties related to the nature of such corporations. This is supported to some extent by the lack of success regulators have had in some high profile proceedings against senior management of such corporations in the period prior to that covered by this data review,⁴⁴ although there have also been high profile successes.⁴⁵

Individual responsibility for misconduct by the largest corporations

22. Corporate scandals in recent years have shown that significant misconduct can and does take place in very large corporations. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) and reviews leading up to it provided a wealth of information on wrongdoing in the banking, insurance and superannuation sectors, including among many of the largest corporations in Australia.⁴⁶ Misconduct is not limited to this sector – information has also come to light about alleged serious misconduct in other industries with very large corporate players including the aged care, automotive, telecommunications, energy and

⁴¹ This point was also made in a number of submissions on the Discussion Paper: see, eg, Law Council of Australia, *Submission 27*; Australian Institute of Company Directors, *Submission 37*, P Hanrahan, *Submission 38*.

⁴² See eg Samuel W Buell, ‘The Responsibility Gap in Corporate Crime’ 12(3) *Criminal Law and Philosophy* 471; Gregory Gilchrist, ‘Individual Accountability for Corporate Crime’ (2018) 34(2) *Georgia State University Law Review* 336 (referring to an ‘accountability gap’). See also House of Lords and House of Commons Parliamentary Commission on Banking Standards, United Kingdom Parliament, *Changing Banking for Good: Report of the Parliamentary Commission on Banking Standards, Volume 1: Summary, and Conclusions and Recommendations* (2013) 9.

⁴³ In relation to ASIC’s risk appetite in relation to litigation generally and commitment to changes following the Royal Commission see Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 1* (2018) 285–9; Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 425–6. See further Vicky Comino, ‘The Challenge of Corporate Law Enforcement in Australia’ (2009) 23 *Australian Journal of Corporate Law* 233, 234.

⁴⁴ Including, eg *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 (concerning the collapse of telecommunications company One.Tel); *Forrest v ASIC* (2012) 247 CLR 486; [2012] HCA 39 (concerning mining company Fortescue Metals Group Ltd).

⁴⁵ Including proceedings brought against senior executives of James Hardie Industries: *Shafron v ASIC* (2012) 247 CLR 465, [2012] HCA 17; in relation to the collapse of HIH Insurance *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd*; *Australian Securities and Investments Commission (ASIC) v Adler* (2002) 168 FLR 253; [2002] NSWSC 171; and in the context of a takeover bid for GIO Insurance *Vines v ASIC* (2007) 233 FLR 1; [2007] NSWCA 75.

⁴⁶ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) (n 43).

resources and retail sectors.⁴⁷ In each of these sectors, the risk of public harm is significant.

23. As the Hon KM Hayne AC emphasised in light of the evidence presented to the Royal Commission, there

can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities: their boards and senior management.⁴⁸

24. The question is whether this moral responsibility correlates with legal responsibility. In a number of case studies from the Royal Commission, and cases litigated since, senior management appear to have been deeply implicated in wrongdoing, and in some cases had actual knowledge of it.⁴⁹ In such cases, the law should be sufficient to hold them legally liable. In many other examples serious failings in management were found to have incentivised the misconduct or to have allowed it to take place.⁵⁰ However, though there are reports some senior executives may face criminal charges,⁵¹ only low-level employees or agents of the largest corporations have been subjected to litigation to date.⁵²

25. Some argue that the accountability gap in relation to the largest corporations is due to the very nature of the large industrial corporation, which entails levels of delegation and risk taking that do not easily fit within existing concepts of (especially criminal) law.⁵³ In such corporations responsibility is diffused as a matter of fact, not in

⁴⁷ See, eg, Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect* (2019); ACCC, 'Bupa Aged Care in Court for Alleged Misrepresentations about Services' (Media Release, 16 April 2019); Russell Hotten, 'Volkswagen: The Scandal Explained', *BBC News* (10 December 2015); *ACCC v Volkswagen Aktiengesellschaft* [2019] FCA 2166; Adele Ferguson, 'Revealed: How 7 Eleven Is Ripping off Its Workers', *Sydney Morning Herald* (online, 2015) <www.smh.com.au/interactive/2015/7-eleven-revealed/>; Senate Standing Committees on Economics, Parliament of Australia, 'Inquiry into Unlawful Underpayment of Employees' Remuneration' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages>; *ACCC v Optus Mobile Pty Limited* [2019] FCA 106. See further Rod Sims, Companies Behaving Badly? (Speech, 2018 Giblin Lecture, University of Tasmania, Hobart, 13 July 2018).

⁴⁸ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) (n 43) 4. This responsibility 'may derive from, among other things, management's role in cultivating corporate culture, in failing to police effectively within the firm, and in accepting lavish compensation for taking the firm's reins': Buell (n 42) 471.

⁴⁹ See, eg, Case Study: Fees for No Service: AMP: Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 2* (2018) 123–151. See also *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69.

⁵⁰ For the Royal Commission Case Studies see Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 2* (2019); Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 2* (2018) (n 49).

⁵¹ See, eg Daniel Ziffer, 'AMP Executives Facing Potential Criminal Charges', *ABC News* (8 February 2019) <www.abc.net.au/news/2019-02-08/amp-executives-will-face-criminal-charges/10793402>.

⁵² See, eg ASIC, '19-216MR Former NAB Branch Manager Pleads Guilty to Fraud' (Media Release, 21 August 2019); ASIC, '19-274MR Former NAB Financial Adviser Sentenced' (Media Release, 4 October 2019); ASIC, '19-297MR ASIC Takes Civil Penalty Action against RI Advice and Former Melbourne Financial Adviser, John Doyle: Royal Commission Case Study' (Media Release, 31 October 2019).

⁵³ See, eg, Buell (n 42).

a deliberate attempt to avoid accountability.⁵⁴ However, as emphasised in the Discussion Paper, large corporations have the potential to do great harm to employees, consumers, the environment, the economy or to the wider public. The responsibilities of the officers who take on senior management positions should reflect this.⁵⁵ There should be systems of internal accountability and in some circumstances allocation of legal liability may be an important way to ensure that ‘those in the most senior positions fully ... fulfil their duties and ... supervise the actions of those below them’.⁵⁶

26. The legal liability of individuals is at the ‘pointy end’ of the regulatory pyramid – it is in addition to, but connected to, addressing the key drivers of misconduct as identified by the Royal Commission: culture, governance and remuneration.⁵⁷ As Commissioner Hayne recognised, corporate culture, in particular, cannot be prescribed or legislated.⁵⁸ However, as set out in ‘The Legal Landscape’, above, boards and senior management can and do have particular legal duties to take care to ensure that laws are not contravened.⁵⁹

27. In the context of the Terms of Reference of this Inquiry, it is therefore important to ensure that the existing legal mechanisms to hold individuals liable in relation to corporate misconduct operate as effectively as possible, and to consider whether there are further areas in which extension or clarification of legal responsibility is justified. In the Discussion Paper the ALRC expressed the view that ‘the legal framework for director liability is generally not in need of reforms within the purview of this Inquiry’.⁶⁰ The ALRC maintains that view. However there may be areas in which difficulties in enforcement that are particularly apparent in relation to the largest corporations can be ameliorated. The problem analysis above also supports the preliminary conclusion in the Discussion Paper that there is a need to clarify the potential liability of senior officers who influence and manage the day-to-day affairs of a corporation, particularly with regard to compliance.⁶¹

28. In light of the proposed FAR since publication of the Discussion Paper, and feedback received from stakeholders on Discussion Paper Proposals 9 and 10, the ALRC

⁵⁴ See Allens, *Submission 31*, Australian Financial Markets Association, *Submission 48*, BHP, *Submission 58*.

⁵⁵ Australian Law Reform Commission (n 4) [7.94]-[7.95].

⁵⁶ House of Lords and House of Commons Parliamentary Commission on Banking Standards, United Kingdom Parliament (n 42) [8], [234]. On the importance of clear internal accountability and the role that legislation (in that case the BEAR) can play in ensuring systems are implemented see ‘Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019)’ (n 43) 407.

⁵⁷ ‘Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019)’ (n 43) ch 5. On the important role of internal disciplinary procedures see further Brent Fisse and John Braithwaite, ‘The Allocation Of Responsibility For Corporate Crime: Individualism, Collectivism And Accountability’ (1988) 11 *Sydney Law Review* 468.

⁵⁸ ‘Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019)’ (n 43) 376.

⁵⁹ Relevant duties include general directors’ and officers’ duties, direct obligations to take ‘reasonable measures’ in relation to compliance with certain corporate obligations, and extended management liability provisions.

⁶⁰ Australian Law Reform Commission (n 4) [7.1], [7.70].

⁶¹ *Ibid* [7.83].

no longer intends to recommend those Proposals. Instead, the ALRC currently considers that further reform or consideration is merited in the following four areas.

Areas for review or reform

1. Extending the BEAR

29. The BEAR, discussed above, is a regime specifically for the banking sector incorporating aspects both from general directors' and officers' duties, and sector-specific due diligence obligations (in respect of accountability for prudential matters), and clarifying who bears those obligations. It was inspired by, although it is much more limited in scope than, the United Kingdom's Senior Managers & Certification Regime (the 'SM&CR').⁶²

30. The SM&CR was introduced in the wake of the global financial crisis to address the issues of diffused responsibility and collective decision-making in banks. According to the United Kingdom Parliamentary Inquiry recommending the reform, it was

designed to address one of the most dismaying weaknesses that we have identified, whereby a combination of collective decision-making, complex decision-making structures and extensive delegation create a situation in which the most senior individuals at the highest level within banks ... cannot be held responsible for even the most widespread and flagrant of failures.⁶³

31. Commissioner Hayne similarly agreed with the proposition that 'the problem of diffused responsibility and no clarity of accountability [was] at the heart of' many of the problems in the financial services sector examined by the Royal Commission.⁶⁴ As a consequence, he recommended expansion of the BEAR in two respects. First, he said responsibilities should be extended to cover 'all steps in the design, delivery and maintenance of all products offered to customers by the [bank] and any necessary remediation of customers in respect of any of those products'.⁶⁵ Secondly, provisions modelled on the BEAR should be extended (i) to all APRA-regulated financial services institutions (such as insurance companies and superannuation funds), to be jointly administered by ASIC and APRA.⁶⁶

⁶² Under that regime regulators can take action (resulting in fine, disqualification, conditions on licensing or statement of misconduct) against an individual for misconduct where (i) conduct rules have been broken (these apply to all employees except for ancillary staff, with additional rules applicable to 'senior managers' and include an obligation on all employees to act with integrity (CR1), to act with due skill, care and diligence (CR2) and to pay due regard to the interests of customers and treat them fairly (CR4)); or (ii) the individual has been 'knowingly concerned' in a contravention; or (iii) a senior manager 'was at that time responsible for the management of any of the authorised person's activities in relation to which [a contravention of a relevant regulation occurred]', and 'the senior manager did not take such steps as a person in the senior manager's position could reasonably be expected to take to avoid the contravention occurring (or continuing)': *Financial Services and Markets Act 2000* (UK) s 66A.

⁶³ House of Lords and House of Commons Parliamentary Commission on Banking Standards, United Kingdom Parliament (n 42) 237.

⁶⁴ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) (n 43) 407.

⁶⁵ *Ibid* rec 1.17.

⁶⁶ *Ibid* rec 6.8.

32. As highlighted above, the Department of Treasury (Cth) published a Proposals Paper on 22 January 2020 for the introduction of the FAR to implement these recommendations.⁶⁷ The FAR is proposed to apply to all APRA-regulated entities, with the potential for later extension to solely ASIC-regulated entities. Based on experience with the BEAR, the FAR focusses the majority of obligations on the largest of entities, termed ‘enhanced compliance entities’, in an attempt to minimise the compliance burden for the majority of companies. It proposes a broader class of persons as ‘accountable persons’ than the BEAR, and requires them to take reasonable steps within their area of responsibility to ensure entity compliance with licensing obligations (rather than just to prevent matters arising affecting prudential standing or reputation). The FAR also includes specific responsibilities for end-to-end product management, and proposes the imposition of civil penalties on individuals for breach of their obligations as accountable persons.

33. A number of submissions to this Inquiry referred to the BEAR and FAR as a more promising response to the challenges of assigning liability to individuals for corporate misconduct in the financial services sector (and potentially other sectors) than the proposals made in the Discussion Paper.⁶⁸ According to the Australian Banker’s Association

the BEAR and FAR models aspire to appropriately attribute responsibility to individuals where a clear nexus can be shown with the impugned conduct – i.e. where the individual had actual responsibility for the part of the business in which the relevant conduct arose.⁶⁹

34. In the view of the Australian Institute for Company Directors,

[t]he value of a BEAR model (and the proposed FAR model) is that relevant accountable persons will know what is in their specific remit. Further, in the financial services context, there was a specific evidence base of misconduct warranting law reform, namely the matters highlighted at the Financial Services Royal Commission.⁷⁰

35. The ALRC suggests that an extension of the BEAR, along the lines of the proposed FAR, has the potential to help address the issue of diffused responsibility that makes it difficult to ensure individual accountability (and where appropriate legal liability) in the largest corporations in the financial services sector. In introducing such legislation it is important that

- obligations are differentiated according to the size of the corporation or corporate group, focussing compliance efforts where the problems in enforcement are most acute;

⁶⁷ Department of the Treasury (Cth) (n 2).

⁶⁸ See, eg, Australian Institute of Company Directors, *Submission 37*, Australian Securities and Investments Commission, *Submission 54*.

⁶⁹ Australian Banking Association, *Submission 57*.

⁷⁰ Australian Institute of Company Directors, *Submission 37*.

- accountable persons' responsibilities extend to compliance with licensing obligations within their area of responsibility, and capture customer-related issues including end-to-end product management; and
- civil penalties can be imposed on accountable persons who breach their obligations to take reasonable steps to ensure entity compliance within their area of responsibility. This is both justifiable in principle (as they reflect statutory officer duties of due care and diligence), and is in line with community expectations as reported by stakeholders to the Commission.

36. The proposed FAR (as at January 2020) reflects these priorities. Such a scheme should provide a greater degree of certainty for both responsible individuals and regulators as to where accountability lies. In doing so, the FAR should provide flexibility by allowing corporations to define the appropriate level within their own management structure for each responsibility.

37. Although the FAR would operate only within the financial services sector initially, the ALRC suggests government could consider, if the FAR proves successful, introducing similar schemes in other highly-regulated sectors with very large corporate actors and demonstrated accountability deficits.

2. Clarifying the application of statutory officers' duties

38. The extension of the BEAR has the potential to address some of the problems identified in the financial services sector. Although that is a sector in which problems of accountability of senior management have recently been highlighted, they are not confined to this sector.

39. In other sectors, public enforcement of directors' and officers' existing statutory duties through what has been termed 'stepping stone liability', a form of direct liability, has proved an important and effective way to hold management accountable and to effectively shape governance standards.⁷¹ However, the relative scarcity of such proceedings in relation to the largest companies suggests that the law in this area may not operate as effectively in relation to such corporate structures. Submissions and academic commentary suggest that this may be in part because of uncertainty about the extent to which particular individuals fall within the definition of 'officer' in s 9 of the *Corporations Act*, and therefore the extent to which officers' duties apply to senior managers with the closest proximity to corporate misconduct.⁷²

40. The first issue which may warrant clarification in relation to statutory officers' duties is the level within the management hierarchy to which the definition of 'officer' extends. In very large complex corporate groups the most obvious responsibility for

⁷¹ See, eg, Ian Ramsay and Benjamin Saunders, 'An Analysis of the Enforcement of the Statutory Duty of Care by the Australian Securities and Investments Commission' (2019) 36(6) *Company and Securities Law Journal* 497; Jennifer G Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (Law Working Paper No 431/2018, European Corporate Governance Institute, December 2018).

⁷² Australian Securities and Investments Commission, *Submission 54*. See also P Hanrahan, *Submission 38*; Tim Bednall and Pamela Hanrahan, 'Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?' (2013) 31 *Company and Securities Law Journal* 474, 473–4.

wilful blindness in relation to misconduct may rest with managers below the very top tier of management (the C-suite) who nevertheless direct and control significant aspects of the corporation's business on a day-to-day basis.

41. Secondly, there is ongoing uncertainty about the extent to which an executive of a group of companies who is involved in the management of a subsidiary falls within the definition of 'officer' for that subsidiary. This is the central issue in the case of *ASIC v King*, currently reserved before the High Court.⁷³ In that case, the Queensland Court of Appeal held that, to fall within the definition of 'officer', an individual must hold 'a recognised position with rights and duties attached to it' within the corporation.⁷⁴ The Chief Executive Officer of the parent company, although involved in management of the subsidiary, was held not to fall within the definition and therefore not to be subject to statutory officer duties in respect of the subsidiary.

42. The definition of 'officer' in s 9 of the *Corporations Act* includes (among other named functions including receivers and administrators)

- (a) a director or secretary of the corporation; or
- (b) a person
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)...

43. There have been a number of changes to the definition of the class of individuals to whom statutory officer duties apply, and the current definition was inserted by amendments made to the *Corporations Act* in 2000.⁷⁵ Immediately prior to that, the duties of care and diligence, good faith and proper purpose applied to (among others) 'executive officers', defined as 'a person who is concerned in, or takes part in, the management of a corporation'. While the reference to 'takes part in' was included in the new definition of 'officer', the words 'concerned in' were not.⁷⁶

44. Concerns about an unintentional narrowing of the definition of 'officer' by the 2000 amendments were raised in 2003 by the Hon Justice Neville Owen in his report of the HHH Royal Commission. Concerned that there was a gap in accountability below board level, he thought that the statutory officer duties in Chapter 2D of the *Corporations Act* should

⁷³ Case B29/2019, on appeal from *King v ASIC* [2018] QCA 352.

⁷⁴ Ibid [246].

⁷⁵ Corporations and Markets Advisory Committee (Cth), *Corporate Duties Below Board Level* (April 2006) 18, 90–3.

⁷⁶ In *Corporate Affairs Commission (Vic) v Bracht* [1989] VR 821 Ormiston J thought that the words 'concerned in' had a considerably wider ambit of operation than the words 'takes part in' (at 830).

embrace a class of senior personnel engaged in management functions broader in operation and application than that embraced by the current definition of ‘officer of a corporation’.⁷⁷

45. This issue was further examined in significant detail by a report of the Corporations and Markets Advisory Committee (the CAMAC Corporate Duties Report) in 2006. It shared the concern that the definition of ‘officer’ in s 9 of the *Corporations Act*

may not cover, for instance, some divisional managers whose areas of corporate responsibilities, while significant in their own right, may be less than a substantial part of the company’s overall business.⁷⁸

46. It recommended that subsection 180(1) (the duty of care and diligence), and sections 181 and 184(1) (the duties of good faith and proper purpose)

should be extended beyond directors and other officers of a corporation to any other person who takes part, or is concerned, in the management of the corporation.⁷⁹

47. In reaching that conclusion the Committee had taken account of extensive consultation. It emphasised that this approach

better reflects the nature of the modern corporation, in that the larger the corporation the less involved the board is likely to be in its day-to-day management, with a wider group of people undertaking significant managerial functions and responsibilities.⁸⁰

48. It stressed that the recommendation did ‘not involve any departure from the classes of persons subject to the duties now found in ss 180 and 181, as applied through the 1980s and 1990s’.⁸¹ In addition, they did not impose duties unrelated to the officer’s function within the corporation, as the relevant sections focus on the proper functions at whatever level the person operates.⁸² It could be added that the nature and circumstances of the corporation will also be relevant to assessing what can reasonably be expected of an officer in a particular case.⁸³

49. There has been no change in the definition of officer since the CAMAC Corporate Duties Report, and little further clarification on the level of management within a very large corporation to which the statutory duties extend.⁸⁴ The scope and functional nature of the definition is the central issue in the case of *ASIC v King*, and it is likely that the High Court’s judgment will provide further clarity.⁸⁵ Depending on how the High Court

⁷⁷ Commonwealth of Australia, Royal Commission into HIH Insurance, *Final Report: Volume 1* (2003).

⁷⁸ Corporations and Markets Advisory Committee (Cth) (n 75) 36.

⁷⁹ Ibid 35.

⁸⁰ Ibid.

⁸¹ Ibid 36.

⁸² Ibid 39.

⁸³ Bednall and Hanrahan (n 72) 496; Ramsay and Saunders (n 71) 500.

⁸⁴ Though see *Hodgson v Amcor* (2012) 264 FLR 1, [2012] VSC 94 (group general manager of one division of a company, responsible for the largest division of the company with the greatest number of staff, resources and revenue, held to fall within the definition of ‘officer’, even though he reported to the upper tier of management rather than directly to the Board). See also *ASIC v Flugge* (2016) 342 ALR 1; [2016] VSC 779, where the Group General Manager Trading of AWB Limited conceded that he was an ‘officer’ within the meaning of s 9 of the *Corporations Act*.

⁸⁵ Case B29/2019, on appeal from *King v ASIC* (n 73).

interprets the existing provision, there may be a need for statutory reform to ensure that individuals below the C-suite who are responsible for a division or business unit, and executives of parent companies, are adequately captured by the definition of ‘officer’ in the *Corporations Act*.

3. A continued role for extended management liability

50. The ALRC remains of the view that in certain contexts there may be important public policy reasons to impose either direct obligations on senior management to exercise due diligence to ensure corporate compliance with particular provisions, or to impose extended management liability on appropriate individuals for certain corporate offences or contraventions. These have proved effective in certain statutory contexts in enhancing corporate compliance.⁸⁶

51. On the other hand, following feedback in submissions and consultations the ALRC has reconsidered the view that various extended management liability provisions deeming individuals responsible for corporate misconduct should be replaced by a single model.⁸⁷

52. The ALRC is also persuaded that imposing liability on individual managers on a civil penalty basis for a corporation’s criminal offence poses particular practical difficulties in enforcement (concerning the admissibility of evidence and different standards of proof).⁸⁸ The ALRC therefore concludes that extensions of liability to management for corporate criminal offences and contraventions may take different forms and should be considered on a principled case by case basis. When the individual’s liability is predicated on a corporate offence or contravention, the type of liability imposed on the individual (criminal or civil penalty) should generally be the same as the underlying offence or contravention. Imposition of extended management liability to a criminal offence should be carried out in accordance with the COAG Principles, while extension of liability to civil penalty provisions should take account of recommendations 8-1 to 8-4 previously made by the ALRC in respect of such provisions in its *Principled Regulation* report.⁸⁹

4. Addressing evidentiary, procedural and practical challenges

53. Another area for potential reform relates generally to all enforcement action, but challenges are particularly marked in respect of the largest corporations and liability of

⁸⁶ In the workplace health and safety sector, see, eg Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (2018). Boland noted that, although there was considerable unease about the introduction of due diligence obligations on officers when the provisions were introduced, the ‘positive duty that is placed on officers of organisations to exercise due diligence to ensure their organisations meet their duties of care under the model WHS Act was highlighted throughout the Review as one of the key successes of the model WHS laws’ (at 52).

⁸⁷ See further Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia (n 27) [4.24]-[4.27]. That Inquiry heard that the question of a single provision by way of a model law was ‘looked at very substantively’ during design of the Act to implement the COAG Principles but that technical policy advice provided by the Parliamentary Counsel’s Committee made it clear that it was not feasible to develop a model provision that could achieve the degree of uniformity expected by’ stakeholders (at [4.26]).

⁸⁸ See further Australian Securities and Investments Commission, *Submission 54*.

⁸⁹ *Principled Regulation* (n 7).

individuals. Resourcing and regulator's enforcement priorities are important factors mitigating against investigation and/or court action in some cases.⁹⁰ However, feedback from lawyers, regulators and criminal justice agencies in consultations and submissions since the Discussion Paper has suggested that significant evidentiary, procedural and practical challenges also hinder the progress of investigations and the ability to bring cases to trial. These are heightened in relation to complex investigations into the largest corporations, and made even more difficult in cases against individuals because of the (understandable) tendency for such proceedings to be very strongly contested.⁹¹

54. Some challenges may be inherent in the way modes of liability operate (such as difficulties of proving accessorial liability in this context, discussed at paragraph 13 above). There are also obvious significant practical and resourcing challenges in conducting large, complex investigations, where the number of documents involved may run into the millions, and where those documents largely lie in the hands of the party accused of wrongdoing. However, beyond this, there are specific procedural and evidential hurdles such as:

- blanket claims for legal professional privilege over search warrant material, commonly including claims over all data held on electronic devices seized under warrant, resulting in delays of up to many years and significant costs;
- limitations on different agencies' investigation powers and legal impediments to inter-agency cooperation and evidence sharing, leading to parallel investigations;⁹²
- restrictions on the use in criminal proceedings of information obtained under regulators' compulsory powers;⁹³
- the application of the common law privilege against exposure to penalties and due process rights when civil penalty proceedings concern individuals rather than corporations;⁹⁴
- application of different rules of evidence in state courts;

⁹⁰ In relation to ASIC's enforcement priorities see Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) (n 43) 423–446. As a result of the Royal Commission, ASIC announced a new approach to enforcement, with the starting point 'Why Not Litigate?': Hughes (n 5). See further Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Company and Securities Law Journal* 40.

⁹¹ Although Ramsay and Saunders sound a note of caution in this respect, given ASIC's high success rate in bringing proceedings under s 180(1) of the Corporations Act: Ramsay and Saunders (n 71) 517.

⁹² See further *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53 (one agency's powers may not be exercised for another agency's purposes). Note inter-agency cooperation is usually subject to a Memorandum of Understanding, eg *Memorandum of Understanding Between the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission* (2004).

⁹³ See, eg, *R v Leach* [2018] QCA 131.

⁹⁴ Senate Economics References Committee, Parliament of Australia, '*Lifting the Fear and Suppressing the Greed: Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia*' (2017) [3.9]–[3.10].

- the interplay between civil and criminal proceedings, such as restrictions on the admissibility of evidence gathered under search warrant in criminal investigations for civil proceedings and situations in which civil proceedings are stayed while criminal proceedings are completed.⁹⁵

55. Some of these issues have recently been examined by the Senate Economics References Committee, the Royal Commission and the ASIC Enforcement Taskforce Review, and some recommendations have been implemented or are in the process of being implemented.⁹⁶ Reforms to whistleblower protections and the introduction of Deferred Prosecution Agreements (DPAs) (discussed elsewhere in the Discussion Paper) may go some way to increasing cooperation with regulators and overcoming some of these difficulties. However experiences in the UK suggest that DPAs may not necessarily resolve the difficulties in respect of prosecuting offences and contraventions allegedly committed by individuals. Although the DPA regime was intended to assist regulators to prosecute individuals responsible for corporate misconduct, the seven DPAs concluded to date have not resulted in conviction of any individual.⁹⁷

56. Detailed consideration of these challenges is outside the scope of the Terms of Reference of this Inquiry, however they merit further examination given their impact on the ability of regulators to efficiently use mechanisms to hold individuals and corporations liable in relation to corporate misconduct.

⁹⁵ On some of these issues see *Commonwealth of Australia v Helicopter Resources Pty Ltd* [2019] FCAFC 25.

⁹⁶ See, eg, 'Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019)' (n 43) recs 11-17; *ASIC Enforcement Review Taskforce Report* (2017); Senate Economics References Committee, Parliament of Australia (n 94). Note that the government did not support the Senate Committee's recommendation that 'the government consider reforms to provide greater clarity regarding the evidentiary standards and rules of procedure that apply in civil penalty proceedings involving white-collar offences', but committed to 'keep[ing] the matter under review should new developments emerge': Australian Government, *Australian Government Response to the Senate Economics References Committee Report: 'Lifting the Fear and Suppressing the Greed': Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia* (2018) 2.

⁹⁷ V Comino, *Submission 51*.

Need for continued review of individual liability

57. Given the potential for significant legislative development and judicial clarification in this area in the near future, the ALRC does not intend to recommend any specific law reform at the present moment. However, addressing individual liability for corporate conduct is an area in which there does appear to be a gap in accountability, and the effectiveness of new mechanisms such as the proposed FAR should be kept under review. If the new and existing mechanisms do not operate to ensure senior managers may be held liable where appropriate for corporate misconduct further law reform may be required.

Recommendation The Australian Government should consider undertaking a wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct by December 2025. In undertaking such a review, consideration should be given to the effectiveness of:

- (i) accessory liability of individuals in relation to corporate crimes and contraventions;
- (ii) directors' and officers' duties;
- (iii) specific obligations imposed on directors and senior management of corporations to exercise due diligence to ensure entities comply with statutory obligations;
- (iv) sector-specific accountability-mapping regimes such as the Banking Executive Accountability Regime and proposed Financial Accountability Regime; and
- (v) extended management liability provisions, including deemed liability.

Appendix One: Discussion Paper Proposals

59. **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.

60. **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.

61. **Question A** Should Proposals 9 and 10 apply to ‘officers’, ‘executive officers’, or some other category of persons?

62. **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?

Appendix Two: Categorisation of corporations and corporate groups for data analysis

A corporation or corporate group is considered to fall within a size category where it meets at least two of the specified criteria:

	Gross consolidated revenue	Gross consolidated assets	Employees	Market capitalisation
Small	<50m	<25m	<100	
Large	>50m	>25m	>100	
Very large	>250m	>250m	>100	>100m Or ASX300
Largest	>250m	>250m	>4000	>100m Or ASX300

Appendix Three: Publicly-reported civil and criminal enforcement action by ASIC and the ACCC, January 2017 to January 2020

ASIC Reported Cases⁹⁸

Category of company	Total cases	Against company only	Involving senior management (corporate misconduct)	Involving senior management (individual misconduct)	Involving lower level employees or agents
Small	76	8 (11%)	41 (54%)	20 (26%)	8 (11%)
Large	21	3 (14%)	14 (67%)	4 (19%)	1 (5%)
Very Large	15	3 (20%)	11 (73%)	1 (73%)	0 (0%)
Largest	33	16 (48%)	4 (12%)	2 (6%)	11 (33%)

ACCC Reported Cases⁹⁹

Category of company	Total cases	Against company only	Involving senior management (corporate misconduct)	Involving senior management (individual misconduct)	Involving lower level employees or agents
Small	42	21 (50%)	20 (48%)	1 (2%)	1 (2%)
Large	8	8 (100%)	0 (0%)	0 (0%)	0 (0%)
Very Large	11	10 (91%)	1 (9%)	0 (0%)	0 (0%)
Largest	45	39 (87%)	6 (13%) ¹⁰⁰	0 (0%)	0 (0%)

⁹⁸ Information published by Federal Court databases, ASIC online media releases, and ASIC's biannual *Enforcement Updates*, available at:

<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/>.

⁹⁹ Information published by Federal Court databases, ACCC online media releases, and ACCC's its quarterly activity report, *ACCCount*, available at: www.accc.gov.au/publications/acccount.

¹⁰⁰ Note all six cases concerned cartel conduct.

Total Reported Cases

Category of company	Total cases	Against company only	Involving senior management (corporate misconduct)	Involving senior management (individual misconduct)	Involving lower level employees or agents
Small	118	29 (25%)	61 (52%)	21 (18%)	9 (8%)
Large	29	11 (38%)	14 (48%)	4 (14%)	1 (3%)
Very Large	26	13 (50%)	12 (46%)	1 (4%)	0 (0%)
Largest	78	55 (71%)	10 (13% ¹⁰¹)	2 (3%)	11 (14%)

¹⁰¹ This figure is 5% if cartel cases are excluded.