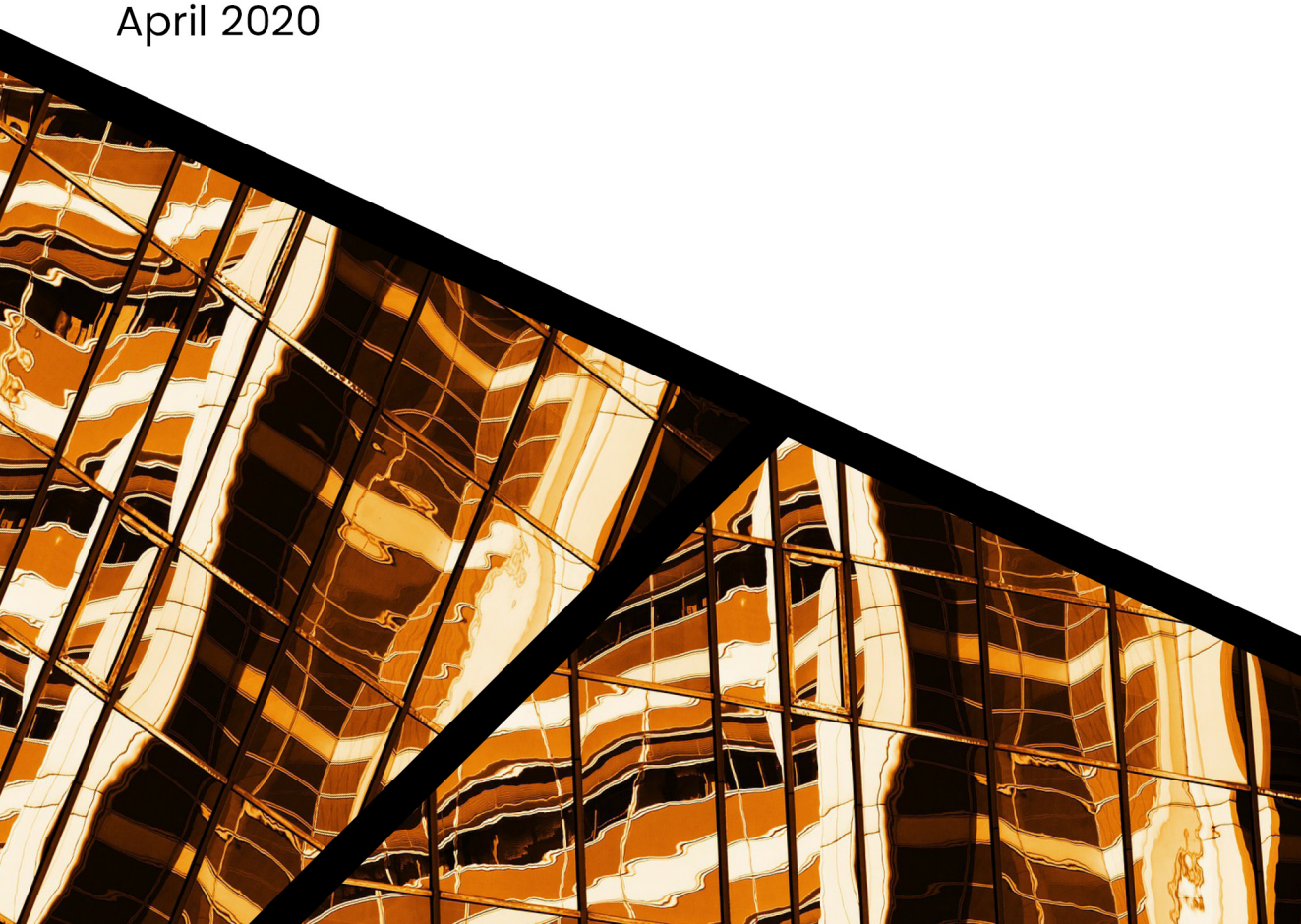
Australian Government
Australian Law Reform Commission

FINAL REPORT

CORPORATE CRIMINAL RESPONSIBILITY

ALRC Report 136
April 2020



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April 2020

This Final Report reflects the law as at 1 April 2020.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

The Hon Christian Porter MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 April 2020

Dear Attorney-General

Review of the Corporate Criminal Responsibility

On 10 April 2019, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into corporate criminal responsibility. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference, *Corporate Criminal Responsibility* (ALRC Report 136, 2020).

Yours sincerely,

The Hon Justice SC Derrington

President

Contents

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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Acknowledgements

The President would like to acknowledge the contribution of the Law Design Office at the Department of Treasury, led by Mr Simon Writer, for their time, expertise, and advice throughout this Inquiry, particularly in grappling with the complexity of legislation administered by that Department.

Recommendations

3. Corporate Criminal Responsibility – the Data

Recommendation 1 The Australian Government, together with state and territory governments, should develop national principles and policies for the collection, maintenance, and dissemination of criminal justice data.

5. Principled Criminalisation

Recommendation 2 Corporate conduct should be regulated primarily by civil regulatory provisions. A criminal offence should be created in respect of a corporation only when:

a) denunciation and condemnation of the conduct constituting the offence is warranted;

b) imposition of the stigma that should attach to criminal offending would be appropriate;

c) the deterrent characteristics of a civil penalty would be insufficient;

d) it is justified by the level of potential harm that may occur as a consequence of the conduct; or

e) it is otherwise in the public interest to prosecute the corporation *itself* for the conduct.

Recommendation 3 Infringement notices should not be available as an enforcement response for criminal offences as applicable to corporations.

Recommendation 4 The Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* should be amended to reflect Recommendations 2, 3, 5, and 8. All departments of state should be required to provide a detailed justification in the Explanatory Memorandum accompanying the relevant bill for any proposed offences that would apply to corporations and that do not comply with the Guide.

6. Corporate Attribution

Recommendation 5 Commonwealth statutory provisions that displace Part 2.5 of the schedule to the *Criminal Code Act 1995* (Cth) should be repealed, unless an alternative attribution method is necessary in the particular instance.

Recommendation 6 Section 12.2 of the schedule to the *Criminal Code Act 1995* (Cth) should be amended such that a physical element of an offence is taken to be committed by a body corporate if committed by:

a) an officer, employee, or agent of the body corporate, acting within actual or apparent authority; or

b) any person acting at the direction, or with the agreement or consent (express or implied), of an officer, employee, or agent of the body corporate, acting within actual or apparent authority.

Recommendation 7

Option 1

Section 12.3 of the schedule to the *Criminal Code Act 1995* (Cth) should be amended to:

a) replace 'commission of the offence' with 'relevant physical element';

b) replace 'high managerial agent' with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority' (with consequential amendments to s 12.3(4));

c) replace 'due diligence' with 'reasonable precautions' (with consequential amendments to s 12.5);

d) pluralise the terms 'attitude', 'policy', and 'rule' in the definition of 'corporate culture' and replace 'takes' with 'take'; and

e) repeal s 12.3(2)(d).

Option 2

Section 12.3 of the schedule to the *Criminal Code Act 1995* (Cth) should be replaced with a provision to the effect that if it is necessary to establish a state of mind, other than negligence, of a body corporate in relation to a physical element of an offence, it is sufficient to show that:

a) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind; or

b) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, directed, agreed to or consented to the relevant conduct, and had the relevant state of mind.

It is a defence, if the body corporate proves that it took reasonable precautions to prevent the commission of the offence.

7. Offences Specific to Corporations

Recommendation 8 Where appropriate, the Australian Government should introduce offences that criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation.

8. Sentencing Corporations

Recommendation 9 The Australian Government should implement Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

Recommendation 10 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, and financial circumstances of the corporation;

b) whether the corporation had a corporate culture conducive to compliance at the time of the offence;

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 unlawful conduct was voluntarily self-reported by the corporation;

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

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

h) the effect of the sentence on third parties; and

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 action; and

   iii. measures to implement or improve a compliance program.

This list should be non-exhaustive and should supplement, rather than replace, the general sentencing factors, principles, and purposes when implemented in accordance with Recommendation 9.

Recommendation 11 To maintain principled coherence and consistency in the assessment of penalties for corporations, a statutory provision should be enacted

requiring the court to consider the following factors when making a civil penalty order in respect of 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) the deterrent effect that any order under consideration may have on the corporation or other corporations;

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

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

e) the personal circumstances of any victim of the contravention;

f) the type, size, and financial circumstances of the corporation;

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

h) whether the corporation had a corporate culture conducive to compliance at the time of the offence;

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 voluntary 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) the effect of the penalty on third parties; and

o) 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 action; and

   iii. measures to implement or improve a compliance program.

Recommendation 12 The *Crimes Act 1914* (Cth) should be amended to provide that when sentencing a corporation that has committed a Commonwealth offence the court has the power to make one or more of the following:

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 requiring the corporation to facilitate redress of any loss suffered, or any expense incurred, by reason of the offence; and

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

A corresponding provision should be enacted in appropriate legislation to empower the court to make equivalent orders in respect of a corporation that has contravened a Commonwealth civil penalty provision.

Recommendation 13 The *Crimes Act 1914* (Cth) should be amended to provide that the court may make an order dissolving a corporation if:

a) the corporation has been convicted on indictment of a Commonwealth offence; and

b) the court is satisfied that dissolution represents the only appropriate sentencing option in all the circumstances.

Recommendation 14 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 of time 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.

Recommendation 15 The Australian Government, together with state and territory governments, should develop a national debarment regime.

Recommendation 16 The *Crimes Act 1914* (Cth) should be amended to empower the court to order a pre-sentence report for a corporation convicted under Commonwealth law.

Recommendation 17 Sections 16AAA and 16AB of the *Crimes Act 1914* (Cth) should be amended to empower the court, when sentencing a corporation for a Commonwealth offence, to consider any victim impact statement made by a representative on behalf of:

a) a group of victims; or

b) a corporation that has suffered economic loss as a result of the offence.

9. Individual Liability Mechanisms

Recommendation 18 The Australian Government should undertake a wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years of the entry into force of the proposed Financial Accountability Regime or equivalent. In undertaking such a review, consideration should be given to the effectiveness of:

a) accessorial liability of individuals for corporate crimes and civil contraventions;

b) directors' and officers' duties;

c) specific duties imposed on directors and senior management of corporations to take reasonable measures or exercise due diligence to comply with or secure corporations' compliance with statutory obligations;

d) sector-specific accountability-mapping regimes such as the Banking Executive Accountability Regime and the proposed Financial Accountability Regime; and

e) extended management liability provisions, including deemed liability and failure to prevent provisions.

10. Transnational Business

Recommendation 19 The Australian Government should consider applying the failure to prevent offence in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 to other Commonwealth offences that might arise in the context of transnational business.

11. Further Reforms

Recommendation 20 The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 should be amended to:

a) vest the power to approve a deferred prosecution agreement in a Judge of the Federal Court of Australia (if needs be as a *persona designata*);

b) permit the parties to present oral submissions to the approving officer; and

c) require the publication of the reasons for any approval in open court.

Outcomes

Implementation of the recommendations in this Report will improve Australia's corporate criminal responsibility regime. These recommendations will:

- result in simpler, clearer laws that reduce the regulatory compliance burden on corporations;
- better protect individuals from serious corporate misconduct by ensuring the criminal law, regulators, and law enforcement are focused on the most egregious criminal conduct;
- make corporations less likely to view civil penalties as merely a 'cost of doing business', by criminalising corporate systems of conduct or patterns of behaviour that lead to breaches of civil penalty provisions;
- standardise the legal tests for attribution of criminal responsibility to corporations, to provide greater certainty, consistency, and clarity;
- increase the range of penalty and sentencing options available in respect of corporate offenders to punish and rehabilitate criminal corporations more effectively;
- provide for judicial oversight of Australia's proposed Deferred Prosecution Agreements scheme;
- make Australian corporations criminally responsible if they fail to prevent an associate from committing certain crimes overseas on their behalf;
- ensure mechanisms to hold directors and senior managers liable for corporate misconduct are monitored closely following recent judicial and legislative developments; and
- establish a national approach to the collection and dissemination of data relating to corporate crime, to facilitate the development of evidence-based criminal justice policy.

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
APRA	Australian Prudential Regulation Authority
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
CLACCC Bill	Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth)
COAG	Council of Australian Governments
Corporations Act	*Corporations Act 2001* (Cth)
Criminal Code	*Criminal Code Act 1995* (Cth) schedule
Discussion Paper	Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper 87, November 2019)
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
TGA	Therapeutic Goods Authority
Treasury	Department of the Treasury (Cth)

UK	United Kingdom
US	United States of America

Figures and Tables

Figures

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1. Introduction

Contents

The Inquiry

1.1 On 10 April 2019, the Attorney-General of Australia, the Hon Christian Porter MP, asked the ALRC to undertake, in the space of a year, a comprehensive review of the Commonwealth corporate criminal responsibility regime, emphasising the need for effective law to hold corporations to account for criminal misconduct. This Inquiry comes at a time of renewed focus on protecting Australian consumers from egregious misconduct by corporations and improved regulation to effectively address corporate wrongdoing. It also follows the release of the Final Report of the ASIC Enforcement Review Taskforce in December 2017, and, more recently, that of 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 revelations of misconduct in various sectors of the financial services industry. Importantly, Commissioner Hayne referred 24 cases of misconduct by financial services companies to financial regulators for the commencement of civil or criminal proceedings.[2] The findings of that Commission

1 Australian Government, *ASIC Enforcement Review Taskforce Report* (2017); Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019).

2 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and

suggest that corporations may be subject to greater legal and regulatory scrutiny in the future than has been the case in the past — with a particular focus on litigating outcomes, rather than negotiating settlements,[3] in order to more strongly deter and punish misconduct.

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 liability regime. Specifically, the ALRC was asked to review the regime for establishing the criminal responsibility of a corporation in Part 2.5 of the *Criminal Code*. In addition, 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) liable 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 matters 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;
- 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;
- 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 the ASIC Enforcement Review Taskforce.

Financial Services Industry (n 1).

3 Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, 30 August 2019) <www.asic.gov.au/about-asic/news-centre/speeches>.

1.6 This Inquiry was conducted contemporaneously with Commonwealth legislative reform initiatives concerning DPAs and foreign bribery offences,[4] and illegal phoenix activity.[5]

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* 25 years ago, there have been various reviews addressing aspects of corporate behaviour and regulation (including corporate criminality and misconduct) over the past three decades, both in Australia and internationally. These inquiries provide important historical context for how the application of the criminal law to corporations has evolved in Australia.

1.8 Relevant inquiries include the:

- Senate Legal and Constitutional Affairs Legislation Committee Report on the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (March 2020);[6]
- Financial Services Royal Commission Final Report (2019);[7]
- ASIC Enforcement Review Taskforce Report (2017);[8]
- COAG Directors' Liability Reform Project (2008), culminating in the COAG Principles for the Imposition of Personal Liability for Corporate Fault (2009) and Guidelines (2012); [9]
- Corporations and Markets Advisory Committee Report on Personal Liability for Corporate Fault (2006);[10]
- Taskforce on Reducing Regulatory Burdens on Business Report (2006);[11]
- ALRC Final Report 95 — Principled Regulation: Federal, Civil and Administrative Penalties in Australia (2002);[12]

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4 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth).
5 *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth).
6 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (March 2020).
7 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 1).
8 Australian Government, *ASIC Enforcement Review Taskforce Report* (n 1).
9 Council of Australian Governments, *Personal Liability for Corporate Fault—Guidelines for Applying the COAG Principles* (2012) ('*Guidelines for Applying the COAG Principles*').
10 Corporations and Markets Advisory Committee (Cth), *Personal Liability for Corporate Fault: Report* (2006) ('*CAMAC Personal Liability Report*').
11 Australian Government, Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006).
12 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002).

- Corporate Law Economic Reform Program — Proposals for Reform (1997);[13]
- Gibbs Committee Reports (1990, 1991)[14] and the Criminal Law Officers Committee Final Report (1993);[15] and
- Senate Standing Committee on Legal and Constitutional Affairs — Company Directors' Duties (1989).[16]

1.9 In addition to these inquiries, the ALRC has considered developments in corporate criminal law 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, tax evasion. The ALRC has also had regard, in particular, to the evolution of corporate vicarious liability for criminal offences in the US.

Economic contribution of corporations

1.10 Few would doubt the integral role of the corporation in our contemporary society. 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'.[17] 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'.[18] Limited liability, in particular, is of critical importance to the taking of risk which is essential for innovation, competitive markets, and to the ultimate success of Australia's economy.

1.11 According to ASIC, as of February 2020, there were 2,749,279 companies registered in Australia[19] and 900,964 businesses run by corporations.[20] With respect to the largest corporate groups in Australia, the ATO has noted that: 'Large corporate

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

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

15 Model Criminal Code Officers Committee and Criminal Law Officers Committee, *Model Criminal Code. Chapter 2, General Principles of Criminal Responsibility: Final Report* (1993) ('*MCCOC Chapter 2*').

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

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

18 Ibid.

19 Australian Securities and Investments Commission, '2020 Company Registration Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/>.

20 Australian Bureau of Statistics, *Counts of Australian Businesses, Including Entries and Exits, June 2015 to June 2019* (Catalogue No 8165.0, 20 February 2020).

groups make a significant contribution to the Australian economy and play a critical role in the tax system.'[21] According to the ATO:

> There are approximately 1,620 large corporate groups with over 5,700 income tax reporting entities in Australia. This represents around 29,000 active companies. These groups include Australian public, Australian private and majority foreign-owned businesses.[22]

1.12 In 2019, the top 1,000 companies in Australia earned $2.34 trillion in revenue — equivalent to 28% of all trade in Australia.[23] Professor Hanrahan has neatly summarised the broader contribution of corporations:

> The impact of corporations — both in traditional and new businesses and as contracted providers of social and human services for the state — on the lives of individuals and the sustainability and prosperity of the communities and environments in which they operate is profound. Their impact has been magnified this century by the expectation that corporations will step up to solve long-term social and economic problems that seem increasingly beyond the scope, capacity or ambition of governments.[24]

1.13 The economic contribution of corporations to the continued living standards and prosperity of Australians is significant. This must be taken into account in reforms to laws that impact corporations, particularly regulatory laws. That is not to say that because of the economic benefit of corporations they should be subject to less stringent regulation. Rather, the social and economic role of corporations means that the regulations that apply to corporations must be successfully calibrated in order to ensure their appropriateness and effectiveness in securing corporate compliance with legitimately determined regulatory standards for the health of the Australian economy as a whole. At the same time, corporate misconduct lessens trust in corporate institutions and impairs the conduct of economic activity in accordance with accepted standards of commercial morality. Effective corporate regulation is in the interests of all participants in the economy. The critical challenge is in ensuring the balance struck by corporate regulation is the right one.

Scope of this Inquiry

1.14 The corporate criminal responsibility regime comprises part of Australia's broader system of corporate regulation, which seeks to promote compliance and ensure that corporate entities adhere to the norms of conduct prescribed by Parliament.

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21 Australian Taxation Office, 'Demographics of Large Corporate Groups' (12 December 2019) <www.ato.gov.au/General/Tax-and-Corporate-Australia/In-detail/Demographics-of-large-corporate-groups/?default>.

22 Ibid.

23 Jason Aravanis, 'IBISWorld Reveals Australia's Top 1000 Companies for 2019' (30 March 2020) <www.ibisworld.com/industry-insider/press-releases/ibisworld-reveals-australia-s-top-1000-companies-for-2019>.

24 Professor P Hanrahan, *Submission 38*.

1.15 There are multiple tools available to regulators in regulating corporate conduct. One of these tools is the actual design of legislation — establishment of norms of conduct and the proscription of unlawful conduct, whether through civil or criminal law. Enforcement of such standards is another distinct, although related, tool. At present, standards can be enforced administratively, civilly, or criminally, depending on the particular contravention in question and the policy and strategy of the relevant regulator. Furthermore, much of corporate regulation is left to private actors through the law of contract and tort, principles of equity, and particular statutory causes of action.

1.16 A separate but related issue is enforcement against individuals involved in corporate misconduct.[25] The law clearly applies to individuals who personally commit or participate in crimes in the corporate context. As the ALRC has previously noted, individual liability for corporate misconduct ensures that persons who engage in 'prohibited conduct will … face the legal ramifications of their acts and will not be able to abuse or hide behind the corporate structure'.[26] A more difficult issue is the extent to which directors and senior managers should be held liable for corporate misconduct as a consequence of their role in the corporation and absent personal involvement in the crime. This distinct issue is discussed in Chapter 9.

1.17 Returning to corporations, under Australian law, criminal offences generally apply to corporations. This is because under Commonwealth criminal law, offences typically apply to corporations in the same way as they apply to individuals. The *Criminal Code* makes this explicit in s 12.1, which provides that:

> 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.
>
> A body corporate may be found guilty of any offence, including one punishable by imprisonment.[27]

1.18 This approach is consistent with s 2C(1) of the *Acts Interpretation Act 1901* (Cth), which provides that under any Commonwealth Act, unless the contrary intention appears

25 See [1.53]–[1.55].

26 Australian Law Reform Commission (n 12) [8.6].

27 The *Criminal Code* does not, however, apply to all Commonwealth criminal offences. Entire statutes, or particular offences, may expressly exclude its application. See, eg, *Corporations Act 2001* (Cth) s 769A ('Despite section 1308A, Part 2.5 of the Criminal Code does not apply to any offences based on the provisions of this Chapter').

> expressions used to denote persons generally (such as 'person', 'party', 'someone', 'anyone', 'no-one', 'one', 'another' and 'whoever') include a body politic or corporate as well as an individual.[28]

1.19 Notwithstanding these rules, the application of the criminal law to a corporation *itself* may be problematic given the fundamental requirement of the criminal law that, for the most part, the corporation must not only commit the physical elements of an offence but also have the requisite state of mind. Indeed, given the complexity of modern corporations, even proof of the commission of a physical element of an offence by a corporation may be complex.

1.20 The general application of the criminal law, particularly under Commonwealth law, may, however, be more theoretical than the principles of statutory interpretation would suggest. Prosecutions of corporations in Australia, relative to those of individuals, are extremely rare. For example, between 30 June 2009 and 30 June 2019, the CDPP commenced only 13 cases against corporations for offences under the *Criminal Code*. When the whole gamut of offences across the Commonwealth statute book is considered, CDPP prosecutions against corporations during that ten-year period numbered 580. This compares with 28,361 cases against individuals.[29] The disparity between individual and corporate prosecutions cannot be explained solely by differences in criminogenic capability. There is no evidence that corporations are less likely to be engaged in criminal activity than people — a corporation is itself made up of people. The corporate or organisational context is nevertheless relevant. As Professors Gobert and Punch explain

> organisations can exert powerful 'pressure cooker' forces on individuals within the organisation, turning them into group actors responsive to institutional demands. … In this environment individuals who may be highly moral in their private life may submit to group pressures and concur with amoral or even immoral decisions that they would never have taken with respect to their own affairs. Individual responsibility may give way to an invidious form of 'group think' … wherein members of a homogenous and cohesive group will defer to views with which they disagree in order not to alienate a valued colleague, undermine what would otherwise be a unanimous decision, or give the appearance of being 'difficult'.[30]

1.21 Understanding the effect of 'organizational properties and dynamics' is 'crucial' to addressing corporate crime as, among other reasons, 'corporate behavior is shaped by its organizational traits'.[31]

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28 See also *Crimes Act 1914* (Cth) s 4B(1) ('A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons').

29 13 prosecutions against corporations were commenced under the *Criminal Code*; 567 prosecutions against corporations were commenced under Commonwealth statutes other than the *Criminal Code.*

30 James Gobert and Maurice Punch, *Rethinking Corporate Crime* (LexisNexis Butterworths, 2003) 17–18 (citations omitted).

31 Wim Huisman, 'Criminogenic Organizational Properties and Dynamics' in Shanna R Van Slyke, Michael L

1.22 While a positivist equality exists notionally as between corporations and individuals under the criminal law, the lack of corporate prosecutions may suggest that decisions are made at the level of both policy and enforcement that produce key differences in approach. This is not to suggest that the solution lies in a simple, unsophisticated response of initiating more criminal prosecutions against corporations — far from it. Instead, understanding why the number of prosecutions is so low has led the ALRC to consider fundamental questions that underpin the regulation of corporations, and the proper principled role of the criminal law in such regulation.

Interrogating the criminal law applicable to corporations

1.23 The Terms of Reference for this Inquiry ask the ALRC to examine Part 2.5 of the *Criminal Code*, which prescribes the methods by which a corporation may be responsible for a criminal offence. In this respect, the Terms of Reference start with a narrow focus on the technical rules of attribution — *how* the physical and fault elements of a criminal offence may be attributed from humans to a corporation for the purpose of establishing the criminal responsibility of the corporate entity.

1.24 Before addressing that question, the ALRC has considered the questions of *why* the criminal law should apply to corporations (as opposed to the individuals who make up the corporation) and *when* the criminal law should apply to corporations. This is appropriate, given that the attribution of criminal responsibility is, ultimately, a constructive process.

1.25 In order to answer those questions, the ALRC examines first the current state of the criminal law as it applies to corporations (Chapter 3). The ALRC's review of the substantive law has identified significant complexity and incoherence in the statutory landscape relating to criminal responsibility and civil liability for corporate misconduct. As identified by Commissioner Hayne in the context of the Financial Services Royal Commission, this severely undermines the efficacy of ongoing efforts to regulate corporate wrongdoing, and also imposes a significant regulatory burden on corporations seeking to comply with their legal obligations.

1.26 The ALRC has found that:

- there are over 3,100 offences potentially applicable to corporations in the 25 statutes reviewed by the ALRC, which represents a significant regulatory burden while also obscuring the reasons why certain prohibitions are necessary, let alone criminal;

Benson and Francis T Cullen (eds), *The Oxford Handbook of White Collar Crime* (Oxford University Press, 2016) 435, 436.

- there is a lack of principled rationale for distinguishing between conduct that is subject to a civil penalty and conduct that constitutes a criminal offence;
- whether and when corporate conduct attracts civil or criminal penalties, or both, varies both within and between statutes; and
- there are numerous, and different, methods for attributing criminal responsibility to corporations.

1.27 This examination reveals that, in Australia, there are relatively few prosecutions of corporations despite the proliferation of criminal offences that may be relevant to them. The literature is clear that the mere enactment of criminal offences is not sufficient to stamp out undesired conduct. In fact, unnecessary complexity and over particularisation may enable misconduct to go unchecked. Furthermore, the likelihood of enforcement is a critical influence on whether or not a criminal offence will act as a deterrent. At the same time, for corporations, particularly in a number of regulated sectors, this unnecessary complexity imposes significant compliance costs and hinders legitimate corporate behaviour.

1.28 Chapter 4 and 5 seek to address the questions of *why* and *when* the criminal law *should* apply to corporations. In Chapter 4, the ALRC provides a theoretical justification for applying the criminal law to a corporation. Given that the law recognises the corporation as a juristic entity, the question is whether corporate criminal responsibility can be justified having regard to the nature of a corporation. Ultimately, there are two key reasons for the ALRC's conclusion that the capacity for a corporation to be criminally responsible is justified. These draw upon both moral blameworthiness and political justifications for corporate criminal responsibility. While a corporation has 'no soul to be damned and no body to be kicked',[32] a corporation nevertheless may

> 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.[33]

1.29 The ability to identify, through corporate actions and processes, fault that is properly criminal is critical. Being such a foundational element of the criminal law, it is fault that should distinguish criminal conduct from prohibited conduct that is subject only to civil regulation.[34] Thus, the identification of corporate fault is

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32 As was said 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.

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

34 See Chapter 4 for a full discussion. There may be circumstances where strict and absolute liability are appropriate and in those cases the criminal law applies without a finding of fault.

necessary to properly apply the criminal law to corporations and for such application to be justified as a matter of principle.[35]

1.30 The lack of a corporate 'body' is also relevant when considering the punishment that may be applied to a corporation. The absence of an ability to imprison a corporation, and the consequential reliance on fines as the primary penalty, means that criminal sanctions may appear indistinguishable from civil penalties. In Chapter 5, the ALRC recommends that, consistent with what has emerged as current practice, civil regulation be recognised as the default mechanism for regulating corporate conduct.

1.31 The criminal law should be applied sparingly so that it retains its core capacity to convey moral opprobrium. The stigma that can attach to the label 'criminal corporation' can be a powerful regulatory tool if the criminal law attaches to serious wrongdoing. Labelling regulatory breaches as 'criminal' where they involve no inherent criminality dilutes the expressive power of the criminal law that makes it such a powerful regulatory tool. Implementing the recommendations in Chapter 5 would involve a significant legislative review process, to decriminalise many offences, reduce complexity and specificity, and better articulate the criminality involved in the offences that remain. The ALRC suggests that this should be implemented in a staged manner over several years.

1.32 Having framed when the criminal law should apply to corporations, and why, the ALRC considers *how* the criminal law should apply to corporations. In Chapter 6, the ALRC examines principles of corporate attribution — the technical legal tests that enable offences that are drafted principally with natural persons in mind to apply to corporations. In Chapter 7, the ALRC considers specific offences drafted so as to apply solely to corporations, both as they presently exist and how they could be framed in the future.

Focus of the Inquiry

Criminal Code

1.33 The starting point for this Inquiry is the Commonwealth *Criminal Code*, which is a schedule to the *Criminal Code Act 1995* (Cth).[36] The *Criminal Code* commenced on 1 January 1997[37] and was the product of a national initiative to standardise the

35 Importantly, fault can be determined in different ways. The notion of fault should not be equated simply with fault elements under the *Criminal Code.*

36 Section 3(2) of the *Criminal Code Act 1995* (Cth) 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.

foundations of criminal law in Australia and to ensure consistency in the application of the principles governing criminal responsibility between states and territories.[38]

1.34 The *Criminal Code* arose from the work of a committee tasked with reviewing all Commonwealth criminal law, chaired by the Rt Hon Sir Harry Gibbs PC AC GCMG KBE QC, ('Gibbs Committee'). The Gibbs Committee was established by the Commonwealth Attorney-General in 1987. It released a report in 1990, which recommended that general principles of criminal responsibility should be articulated. In that same year, the Standing Committee of Attorneys-General established the Model Criminal Code Officers' Committee ('MCCOC') to consider the development of a uniform criminal code.[39] The MCCOC released a report in 1992,[40] which consisted of draft legislation articulating general principles.[41]

1.35 That a Commonwealth Criminal Code was not developed until nearly 100 years after Federation reflects, in part, the fact that under the *Australian Constitution*, the Australian Government does not have a general power to legislate concerning criminal law. Commonwealth offences are created only incidentally to the exercise of a head of power under the *Australian Constitution*. For example, offences with respect to interference with lighthouses are constitutionally valid because such offences are incidental to the Commonwealth's legislative power with respect to lighthouses, not because of a general legislative power for criminal law.

1.36 Consequently, prior to the *Criminal Code*, most Commonwealth offences were found in other, specific Commonwealth statutes.[42] The *Judiciary Act 1903* (Cth) applied such that the courts would apply the principles of criminal responsibility according to the state in which the court hearing the matter was situated.[43] As a result, there was, and still is, variation in the application of Commonwealth criminal law depending on the state in which the criminal proceedings occur.[44] Thus:

> A person might live in Tweed Heads, New South Wales and make a 10-minute trip to Coolangatta, Queensland. In many cases that person would be surprised to know that in relation to the commission of the same federal offence markedly different rules apply. These differences are significant — in some cases they could be the difference between conviction or acquittal.[45]

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38 Parliamentary Library (Cth), *Criminal Code Bill 1994 Bills Digest* (Digest No 139 of 1994) 5.
39 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 15).
40 Ibid.
41 Ibid.
42 For example, the ambit of Commonwealth criminal law was greatly expanded by the insertion of s 233B to the *Customs Act 1901* (Cth), which dealt with drug offences. The *Crimes Act 1914* (Cth) contained many of the procedural rules.
43 *Judiciary Act 1903* (Cth) s 79.
44 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1995, 1331–1332 (Duncan Kerr, Minister for Justice).
45 Ibid.

1.37 The MCCOC envisaged that the *Criminal Code* would be implemented in states and territories, since:

> In principle, the basic rules of criminal responsibility should not vary from one State or Territory to another. In practice, the growth of Commonwealth criminal legislation and the increased incidence of prosecutions involving both Commonwealth and State offences in the same case highlight the need to rationalise this fundamental area.[46]

1.38 While the enactment of the *Criminal Code* was itself an ambitious and significant reform, its broader objectives have not been realised. The states and territories chose not to adopt the Code.[47] Importantly for this Inquiry, much of the simplification expected across the Commonwealth statute book as a consequence of the enactment of the *Criminal Code* never eventuated. Most regulatory offences are not included in the *Criminal Code* and, as such, the *Criminal Code* is not the single source of the criminal law as was originally intended. The ALRC's research shows that the vast majority of criminal prosecutions of corporations occur in respect of offences not contained within the Code.

Attributing liability to a corporation under the Criminal Code

1.39 Turning to attribution specifically, Part 2.5 of the *Criminal Code* sets out a statutory regime for attributing criminal responsibility to bodies corporate for offences against Commonwealth legislation. It displaces the common law rules of attribution that had developed over centuries. Part 2.5 is found in Chapter 2 of the *Criminal Code*, which contains general principles of criminal responsibility.[48] Those principles apply to all offences against the *Criminal Code*, and since December 2001, to all other Commonwealth offences.[49]

1.40 Chapter 2 of this Report examines Part 2.5 in detail. By way of introduction, s 12.2 of the *Criminal Code* uses traditional agency principles to establish the responsibility of a corporation for the physical elements of an offence.[50] In order to determine whether a corporation possessed the requisite state of mind so as to be responsible, ss 12.3 and 12.4 of the *Criminal Code* outline the ways in which the fault elements for an offence committed by a corporation could be proved.[51] A

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46 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 15) 5. The *Criminal Code* has been implemented (to varying degrees) in the Australian Capital Territory and the Northern Territory.

47 At present, New South Wales, Victoria, and South Australia have common law based criminal law systems. Queensland, Western Australia, Tasmania, the Australian Capital Territory, and the Northern Territory have codified the criminal law. The *Criminal Code* (Cth) is seen to be a compromise between the two systems of criminal law.

48 The following chapters of the *Criminal Code* largely consist of offence provisions.

49 *Criminal Code* s 2.2.

50 Chapter 2, particularly [2.37]–[2.38].

51 With the exception of strict liability offences: see s 12.5. See Chapter 6 for a discussion of corporate attribution under s 12.4 for offences where the fault element is negligence.

novel inclusion in this scheme was that a state of mind of intention, knowledge, or recklessness could be proved by reference to the culture of the corporation. Professor 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.[52]

1.41 As was explained by Commissioner Hayne, corporate culture is 'what people do when no-one is watching'.[53] It is hard to prove in a criminal trial. Notwithstanding, deficiencies in the cultures of many institutions were revealed in the course of the Financial Services Royal Commission. Corporate culture has also long been considered relevant in the assessment of the quantum of civil penalties to be imposed for contravention of a civil penalty provision.

Attribution under statutes other than the Criminal Code

1.42 While the approach in Part 2.5 of the *Criminal Code* to the attribution of criminal responsibility to corporations was novel, it has not been widely adopted across Commonwealth legislation. Financial services, which are principally regulated by Chapter 7 of the *Corporations Act,* were a principal focus of the Financial Services Royal Commission.[54] The application of Part 2.5 is, however, expressly excluded from application to that chapter of the *Corporations Act*.[55]

1.43 As set out in Chapter 3, the ALRC's primary research suggests that, for most statutes reviewed by the ALRC, attribution of responsibility is based on a method that first appeared in the Commonwealth statute book in s 84 of the *Trade Practices Act 1974* (Cth) (the 'TPA Model').[56] Under that method of attribution, corporations are responsible for both criminal offences and contravention of civil penalty provisions based on the state of mind and conduct of a director, employee, or agent.[57] While attribution based upon the TPA Model predominates in the Commonwealth statute book, it does not consist of a single, uniform statutory approach. Attribution varies slightly from statute to statute and there is inconsistency as to whether a due diligence defence applies across each statutory variant of the TPA Model. Furthermore, the

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

53 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 1) 334.

54 Ibid 119–218.

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

56 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).

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

TPA Model-based methods operate in conjunction with the common law principles of attribution.

Reforms to attribution

1.44 In arriving at recommendations to reform methods of attribution in line with the requirements of the Terms of Reference to 'review options to strengthen and simplify' those principles, the ALRC has been mindful of ensuring equality as far as possible between individuals and corporations. The principles of attribution should not make the prosecution of a corporation any more onerous than that of an individual and the decision to prosecute should be determined on the evidence available to establish the primary offence, not on the requirements of the particular method of attribution. Relatedly, methods of attribution should be agnostic in their application to corporations of differing sizes and apply irrespective of the activities that the corporation pursues.

1.45 The ALRC has also sought to ensure that how corporations are structured and managed in practice is reflected in the recommended methods of attribution. In addition, corporate fault, discussed in terms of the theory of the criminal law's application to corporations in Chapter 4, informs the framing of recommended reforms to attribution.

Specific offences

1.46 While the method of attribution may be particularly important where proof of a particular state of mind is required to establish corporate criminal responsibility for an offence, strict and absolute liability are common for many 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 in the determination of guilt but may be relevant in sentencing. Furthermore, an increasing number of offences applying specifically to corporations are framed in alternative ways, as discussed in Chapter 7 of this Report. As the data in Chapter 3 highlights, specific corporate offences are much more likely to be prosecuted than ordinary criminal offences against a corporation.

1.47 Associate Professor Crofts submitted:

> If corporate criminal liability is to be rethought, then there needs to be engagement with the types of harms most likely to be caused by large organisations, and the reasons why these harms come about. Whilst there are occasions where large organisations may actively choose to breach the law, it is more likely that breaches of the law are due to systemic failings on the part of the organisation. These systemic failings are culpable.[58]

58 Associate Professor Penny Crofts, *Submission 61*.

1.48 Professor Bant also submitted that a rethinking of how the criminal law ought be applied to corporations was necessary and suggested that

> one direction for future reform might be to take seriously the original position taken by the courts, which was that as artificial entities, corporations lacked 'minds', and instead focus on the objective quality of the conduct of corporations.[59]

1.49 Specific offences directed solely to corporations have the advantage of addressing the specific and distinct aspects of corporate wrongdoing and can be framed having regard to how corporations act in practice. In Chapter 7, the ALRC looks at three types of offences.

1.50 First, the ALRC recommends the creation of a 'system of conduct' type of offence to criminalise systematic contraventions of civil regulatory provisions. A major advantage of the 'system of conduct or pattern of behaviour' concepts are that they focus on the systematic nature of the misconduct and enable that characterisation to be established objectively. Secondly, it considers failure to prevent offences, whereby a corporation is found to be criminally responsible for failing to prevent an associate of the corporation from committing a crime when acting on its behalf. These offences were initially developed in the context of foreign bribery in the UK. Thirdly, the ALRC examines duty-based offences which have been used successfully to criminalise corporate behaviour, particularly in relation to workplace health and safety, for a number of years. A duty-based offence is committed by a corporation that has objectively failed to meet the standard required by the duty.[60] As a result, it is often unnecessary to decide 'whether the conduct, or state of mind, of a servant or agent of a company is to "count as" the conduct, or state of mind, of the company'.[61]

Sentencing corporations

1.51 The utility, and appropriateness, of applying the criminal law to corporations is determined, in part, by the court's ability to impose sanctions that achieve the purposes of sentencing. Sentencing is a critical aspect of Australia's corporate criminal responsibility regime, and warrants consideration as part of this Inquiry. Chapter 8 makes recommendations to improve the processes and outcomes of sentencing corporations. The fundamental purposes and principles of sentencing may be translated appropriately to corporate offenders, provided that sentencing processes and penalties are adapted to the characteristics of both corporate offenders and corporate misconduct.

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59 Professor Elise Bant, *Submission 21*.

60 See, eg, *Bulga Underground Operations Pty Ltd v Nash* (2016) 93 NSWLR 338, [2016] NSWCCA 37 [108]–[110]; *Mouawad and Another v The Hills Shire Council* (2013) 199 LGERA 28, [2013] NSWLEC 165 [88].

61 *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2006) 161 A Crim R 250, [2006] VSC 171 [28].

1.52 The recommendations in Chapter 8 are intended to address the limitations of the existing law in this regard by providing for penalties and processes that are responsive to the nature of corporations and corporate wrongdoing. In particular, the ALRC recommends:

- providing statutory guidance on the factors relevant to sentencing corporations;
- empowering the court to make a range of non-monetary penalty orders when sentencing corporations;
- developing a national debarment regime; and
- strengthening the court's information base for sentencing corporations by introducing pre-sentence reports for corporations and expanding the scope of victim impact statements to better accommodate corporate offences.

Individual liability for corporate misconduct

1.53 Chapter 9 considers the criminal and civil liability of individuals and, in particular, directors and senior managers, in relation to corporate misconduct.[62] Individuals who have failed in their responsibilities of oversight and management of a corporation that has committed a crime should be held accountable. Chapter 9 responds to a specific aspect of the Inquiry's Terms of Reference which required consideration of 'mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct'. The chapter consists of four parts. The first sets out the importance of holding directors and senior managers responsible in relation to corporate misconduct, and the limitations of the criminal law in this regard. It then considers the current legal framework for holding directors and senior managers criminally responsible or liable to a civil penalty, and assesses that framework's effectiveness.

1.54 It then examines the perception, raised in consultations, that directors and senior managers in very large, complex corporations are less likely to be held liable in relation to corporate misconduct than those in other types of corporation. Analysis of data collected by the ALRC suggests there is an accountability gap, particularly in relation to boards and senior managers of the largest corporations. The ALRC identifies how the diffusion of responsibility in such corporations can make internal and external accountability particularly difficult, and highlights proposed law reform through the Government's proposed Financial Accountability Regime ('FAR'), which is aimed at addressing some of these issues in the financial services sector.

1.55 Finally, Chapter 9 examines the proposed FAR. The ALRC supports the implementation of the FAR and suggests that a wide-ranging review of its

62 In this Report the phrase 'directors and senior managers' is used to refer to individuals who may be appropriate subjects for imposition of liability related to their management function. See Chapter 9 for more detail.

effectiveness be commissioned within five years of its entry into force as part of a thorough examination of individual liability of directors and senior managers for corporate misconduct.

Transnational business

1.56 Chapter 10 considers the role of the Commonwealth criminal law in regulating the activities of transnational business. The regulation of transnational business poses special challenges for regulators and law enforcement, while jursidictions with weak regulatory systems pose challenges for ethical business conduct. Despite the extraterritorial application of many serious offences under the *Criminal Code*, prosecutions of corporations for these offences are extremely rare.[63]

1.57 In the first part of this chapter, the ALRC recommends that the Australian Government consider a failure to prevent model for specific extraterritorial offences. In the second part of the chapter, the ALRC suggests a possible roadmap for the Government towards a holistic review of the regulation of transnational crime and corporate human rights impacts that go beyond the domain of the criminal law.

Future reforms

1.58 In the last chapter of the report, Chapter 11, the ALRC examines four distinct issues relevant to corporate accountability for misconduct in respect of which there is scope for further reform to strengthen Australia's corporate accountability regime.

1.59 The first issue is the proposed introduction of a DPA scheme for corporations in Australia. DPAs are one way in which some overseas jurisdictions have sought to overcome the difficulties associated with addressing corporate crime. The CLACCC Bill, introduced by the Government in December 2019, would introduce a DPA scheme in Australia. The ALRC recommends amendments to the CLACCC Bill to ensure appropriate judicial oversight of such agreements. The ALRC considers that such oversight would enhance the integrity of DPAs and uphold public trust in the probity of negotiated agreements that avoid criminal trials.

1.60 Secondly, the ALRC suggests the Government consider a civil form of DPA. Such a scheme could address some of the limitations of enforceable undertakings as an enforcement mechanism, as identified by the Financial Services Royal Commission.

1.61 Thirdly, the ALRC discusses whistleblower protections. Whistleblowers play an integral role in the identification and investigation of corporate crime. In this section of the chapter, reforms that could be considered as part of the five-year review of recent whistleblower reforms are suggested.

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63 See discussion at [10.109].

1.62 Finally, the ALRC discusses measures to address illegal phoenix activity, which involves deliberate restructuring of a corporation to defeat creditors while continuing business operations through other trading entities. Recent reforms to address illegal phoenix activity are subject to a five-year statutory review. Refinements and additions to those recent reforms, which could be considered as part of that review are suggested.

Investigating corporate crime

1.63 In the course of this Inquiry, concerns have been expressed about the process of investigation of corporate misconduct 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.

1.64 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 are concerned. This has several consequences. First, and inevitably, documentary evidence is more likely to disappear and the memories of witnesses fade, making successful prosecutions 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.

1.65 Where charges against individuals are involved, the threat of a criminal trial hanging over the head of individuals for many years may be an intolerable burden. Even if an acquittal is secured, the reputational damage may be irreparable. There is also the additional feature that the extent to which corporate crime seems to escape detection and/or successful prosecution serves only to encourage its growth. The consequences of this were made apparent by the Financial Services Royal Commission.[64]

1.66 In addition, the ALRC heard in consultations that there are significant difficulties in facilitating effective joint operations by regulators. In the absence of specific powers to conduct joint investigations, regulators rely on specific information-sharing mechanisms and delegations of powers that have strict limits and can be administratively complex to implement. The nature of Australia's approach to regulation means that these are not isolated instances. There are areas of significant overlap between the roles and functions of APRA, ASIC, the ATO, and the ACCC in

64 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 1) 424–448.

many cases. Reforms to ensure the efficient and effective regulation of corporations warrant further consideration.

1.67 As set out in Allens' submission,[65] and reiterated in multiple consultations, it is important that any reforms to the substantive law are not simply framed in response to a lack of enforcement or perceived difficulties or challenges to enforcement. In framing the recommendations, the ALRC has sought to be rigorous in its problem analysis — only those deficiencies that relate to the substantive law, and not evidential or investigative problems, warrant law reform.

1.68 Allens submitted that the key issues that should be considered in any review of corporate criminal enforcement include:

> - the appropriateness of jury trials for complex corporate matters;
> - the structure of having distinct investigative and prosecutorial agencies in the context of complex corporate criminal matters and the alternative approach in relevant foreign jurisdictions … ;
> - the principles for appropriate interactions between investigating and prosecutorial agencies and corporations in circumstances where the nature and status of criminal investigations can have serious consequences for corporations, including potentially triggering disclosure obligations to markets, counterparties and regulators and other obligations. … ;
> - the circumstances and means by which corporate criminal liability can be resolved without a conviction given that not all criminal matters in respect of all companies are best resolved through a prosecution. … ; and
> - the desirability of introducing formal incentives for companies to self-report potential misconduct and cooperate with investigations. … .[66]

1.69 While outside the scope of this Inquiry, 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 through the mechanism of joined-up investigators and prosecutors, as reflected in the model of the Serious Fraud Offices in the UK and New Zealand.

Committal hearings

1.70 In the course of consultations, questions were raised as to whether there is ongoing value in committal hearings, particularly in the context of the prosecution of corporations for Commonwealth offences.

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65 Allens, *Submission 31*.
66 Ibid.

1.71 Committal hearings are preliminary hearings traditionally held before a person can be tried on indictment.[67] Conducting a committal hearing is an administrative or ministerial, rather than a judicial function.[68] 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.[69] Committal hearings have been abolished in Western Australia,[70] and, to a large extent, also in Tasmania.[71]

1.72 The Victorian Law Reform Commission recently completed a review of Victoria's committal procedure,[72] which still requires indictable offences to pass through a committal process in the Magistrates' Court, except in certain limited circumstances. At the time of writing, that review had not been tabled in Parliament and is thus not publicly available.

1.73 The CDPP expressed a preference for strong case management in lieu of formal committals:

> The CDPP recognises that many of the historical reasons which justified the retention of committal proceedings are no longer relevant. … The CDPP is keen for any pre-trial or committal process to be an efficient one in dealing with cases in a timely manner. The close management of cases by the courts plays an integral part in such a system, ensuring the progress of cases through the various stages of the criminal trial process are closely monitored by the courts, resulting in cases remaining 'on track' and proceeding without delay. It will also ensure critical issues are identified early and managed appropriately as the case makes its way to possible trial.[73]

1.74 ASIC expressed similar view in its submission:

> ASIC supports reform of committal procedures in Australia and agrees that the benefits of a committal hearing can be achieved through pre-trial hearings and disclosure, as stated by the ALRC. A reformed committal procedure will have significant benefits in reducing the large costs and lengthy delays currently

67 LexisNexis, *Halsbury's Laws of Australia* (at 29 June 2018) 130 Criminal Law, '6 Criminal Proceedings Before Justices and Magistrates' [130-13420].

68 *Grassby v R* (1989) CLR 1, 11, [1989] HCA 45 [10].

69 See *Criminal Law (Procedure) Amendment Act 2002* (WA); *Justices Act 1959* (Tas) s 60; *Criminal Procedure Act 1986* (NSW) ch 3, pt 2, div 4; New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas – Models for Discussion* (Consultation Paper No 15, 2013) 5 [1.13]; *Criminal Procedure Act 1921* (SA) pt 5, div 3; The Hon Martin Moynihan AO QC, *Review of the Civil and Criminal Justice System in Queensland* (2008); Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019).

70 *Criminal Law (Procedure) Amendment Act 2002* (WA).

71 *Justices Act 1959* (Tas) s 60, although there is limited option to run a preliminary proceeding in some circumstances.

72 Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019).

73 Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

faced by parties to criminal proceedings, including those with a corporate defendant.[74]

1.75 The ACCC made a submission in similar terms.[75]

1.76 The ALRC considers harmonisation of the law relating to pre-trial processes for Commonwealth corporate offences 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 applicable criminal justice processes. The benefits of a committal for an accused corporation can be achieved through pre-trial hearings,[76] pre-trial disclosure,[77] and *Basha* inquiries[78] — 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 2009* (Cth).

Process of reform

1.77 The ALRC was asked to consult widely with enforcement authorities charged with policing and prosecuting corporate criminal conduct, courts, and other stakeholders with expertise and experience in corporate law. The ALRC invited people to participate in the Inquiry in a number of ways. This included an invitation to make a submission in response to the Terms of Reference. The ALRC received 14 submissions in response to this invitation, from across a small, albeit varied, spectrum of stakeholders.

1.78 The ALRC published a Discussion Paper on 15 November 2019. The Discussion Paper set out 23 proposals for reform to the Commonwealth's corporate criminal law regime, and asked 12 questions on particular areas of reform. The Discussion Paper addressed a number of aspects of corporate criminal liability, including:

- the principled division between criminal offences and civil penalty provisions;
- the method for attributing criminal liability to corporations;
- individual liability for corporate offences;
- deferred prosecution agreements;
- penalties and the sentencing process;
- illegal phoenix activity (deliberate liquidation with the intent to avoid creditors and continue operations through a new entity); and

74 Australian Securities and Investments Commission (ASIC), *Submission 54* (citations omitted).
75 Australian Competition and Consumer Commission (ACCC), *Submission 25*.
76 *Federal Court of Australia Act 1976* (Cth) ss 23CA, 23CB.
77 Ibid ss 23CD, 23CE.
78 Ibid s 23CQ; *R v Basha* (1989) 39 A Crim R 337.

- the implications of the transnational nature of business and extraterritorial offences.

1.79 The Proposals and Questions are included at Appendix C. In response to the Discussion Paper, the ALRC received 49 submissions. Submissions were received from business groups, corporations, law firms, human rights organisations, and consumer representative NGOs. A list of those submissions is included at Appendix E and those that are not confidential are available on the ALRC website. The ALRC also conducted consultations with more than 100 individuals and organisations around the country and internationally.

1.80 Following the release of the Discussion Paper, but prior to the closing date for submissions, the ALRC hosted a seminar in Sydney in December 2019, in conjunction with Allens, entitled 'Interrogating the English Approach to Prosecuting Economic Crime'. The keynote speakers were the Rt Hon the Lord Garnier QC, who as UK Solicitor-General was the architect of the *Bribery Act 2010* (UK), and Mukul Chawla QC, a prominent English white-collar crime lawyer.

1.81 In February and March 2020, the ALRC held four public seminars in Perth, Melbourne, Sydney, and Brisbane. The Perth and Melbourne seminars were hosted in conjunction with the University of Western Australia and Monash University, respectively. The ALRC welcomed over 290 attendees to these seminars. Each seminar featured an expert panel that delved into the most contentious issues raised in the Discussion Paper, drawing discussion from the submissions received and consultations with regulatory bodies and stakeholders. The key aspects of the Discussion Paper considered at each seminar were the regulatory model, attribution, and individual liability. Attendees from the judiciary, bar, law firms, regulators, law enforcement, industry, government, and civil society had the opportunity to ask questions of the panel.

1.82 In preparing this Report and in reaching its recommendations, the ALRC has been assisted greatly by numerous individuals who have shared their experiences relating to corporations, corporate law, the criminal justice system, and the criminal law. The ALRC has benefited greatly from hearing from both regulators and the regulated. The ALRC has also derived considerable assistance from the Advisory Committee that was established at the outset of this Inquiry, to whom the ALRC expresses sincere gratitude.

2. The Commonwealth Criminal Code

Contents

Introduction

2.1 As discussed in the introductory chapter, the starting point for this Inquiry is the Commonwealth *Criminal Code*, which is a schedule to the *Criminal Code Act 1995* (Cth).[1] The *Criminal Code* commenced on 1 January 1997,[2] and was the product 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 across states and territories.[3]

2.2 This chapter provides a brief, descriptive overview of those aspects of the *Criminal Code* that are most relevant to this Inquiry so as to provide sufficient context for the recommendations made in relation to Part 2.5 of the Code.

The development of a Code

2.3 The enactment of the *Criminal Code* followed a lengthy process of review of the criminal law of the Commonwealth and of the principles of criminal responsibility. The initial work was undertaken by a Committee chaired by the Rt Hon Sir Harry

1 Section 3(2) of the *Criminal Code Act 1995* (Cth) specifically provides that the Schedule may be cited as the '*Criminal Code*'.

2 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.

3 Jennifer Norberry, Department of the Parliamentary Library (Cth), *Criminal Code Bill 1994 Bills Digest* (Digest No 139 of 1994, 31 August 1994) 5.

Gibbs PC AC GCMG KBE QC, which was established in 1987 and which was tasked with reviewing all Commonwealth criminal law ('Gibbs Committee').

2.4 Prior to the enactment of the *Criminal Code Act 1995* (Cth), the *Crimes Act 1914* (Cth) applied the common law principles of criminal responsibility to offences against that Act.[4] In the case of offences created by other Commonwealth statutes, the principles governing criminal responsibility were those of the state or territory in which the offence was prosecuted.[5] As the High Court observed in *R v LK*

> the general principles of criminal responsibility under the common law differ from the principles that were stated in Sir Samuel Griffith's draft code, upon which the criminal codes of a number of Australian jurisdictions are based.[6]

2.5 As a result, criminal responsibility for many Commonwealth offences was susceptible to varying application depending on the jurisdiction in which the offence was prosecuted.

2.6 The Gibbs Committee addressed this difficulty in its Interim Report, which was published in July 1990.[7] It recommended the codification of all the relevant principles of criminal responsibility in order to achieve uniformity in the prosecution of Commonwealth offences throughout Australia. The Committee expressed the hope that codification of the principles would make the law 'more clear and certain'.[8]

2.7 Following the publication of the Interim Report, and in that same year, the Standing Committee of Attorneys-General established the Model Criminal Code Officers Committee ('MCCOC') to consider the development of a uniform criminal code.[9] The MCCOC released a report in 1992,[10] which included a draft of a chapter for a criminal code stating the general principles of criminal responsibility.[11]

2.8 The MCCOC envisaged that the *Criminal Code* would be implemented in states and territories, since:

> In principle, the basic rules of criminal responsibility should not vary from one State or Territory to another. In practice, the growth of Commonwealth criminal legislation and the increased incidence of prosecutions involving both

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4 *Crimes Act 1914* (Cth) s 4.
5 *Judiciary Act 1903* (Cth) s 80.
6 *R v LK* (2010) 241 CLR 177, [2010] HCA 17 [99]. See *Criminal Code Act 1899* (Qld); *Criminal Code Act Compilation Act 1913* (WA); *Criminal Code Act 1924* (Tas); *Criminal Code Act 1983* (NT).
7 The Rt Hon Sir H Gibbs PC AC GCMG KBE QC, the Hon Justice RS Watson and ACC Menzies AM OBE, *Review of Commonwealth Criminal Law: Interim Report, Principles of Criminal Responsibility and Other Matters* (1990).
8 Ibid [3.12].
9 Model Criminal Code Officers Committee and Criminal Law Officers Committee, *Model Criminal Code. Chapter 2, General Principles of Criminal Responsibility: Final Report* (1993).
10 Stephen Odgers, *Principles of Federal Criminal Law* (Lawbook Co, 4th ed, 2019) 2.
11 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9).

> Commonwealth and State offences in the same case highlight the need to rationalise this fundamental area.[12]

2.9 As the then Minister for Justice, the Hon Duncan Kerr MP, expressed in the Second Reading Speech of the Criminal Code Bill 1995 (Cth):

> It is the government's hope that this bill will not only be the beginning of a new era for Commonwealth criminal law but for the criminal law of Australia generally—the beginning of one of the most ambitious legal simplification programs ever attempted in this country.[13]

2.10 While the enactment of the *Criminal Code* was itself an ambitious and significant reform, its broader objectives have not been realised. The states and territories chose not to adopt the Code.[14] As a result, some states continue to have a statutory code for criminal law, while others draw from statute and common law. Inconsistency between state and territory criminal law and Commonwealth law continues. More importantly for this Inquiry, much of the simplification expected across the Commonwealth statute book as a consequence of the enactment of the *Criminal Code* never eventuated. Most regulatory offences are not included in the *Criminal Code* and, as such, the *Criminal Code* is not the single source of the criminal law as was originally intended. The ALRC's research shows that the vast majority of criminal prosecutions of corporations occur in respect of offences not contained within the Code.

2.11 While the offences sit outside the *Criminal Code*, its interpretative principles still apply, as was envisaged by the MCCOC:

> The Code … will also apply the general principles of criminal responsibility to offences both in the Code and in other statutes.[15]

2.12 Significant difficulties in interpretation and application endure in relation to offences located outside the *Criminal Code*, relating to both methods of corporate attribution and the application of the *Criminal Code* principles of criminal responsibility more generally. As an example, in a case concerning two offences under the *Crimes Act 1914* (Cth), Chief Justice Spigelman, sitting in the NSW Court of Criminal Appeal, referred to the specific challenges of interpretation 'where a comprehensive Code is being grafted onto pre-existing legislation'. In his view:

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12 Ibid 7. The *Criminal Code* has been implemented (to varying degrees) in the Australian Capital Territory and the Northern Territory.

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1995, 1335 (Duncan Kerr, Minister for Justice).

14 At present, New South Wales, Victoria, and South Australia have common law-based criminal law systems. Queensland, Western Australia, Tasmania, the Australian Capital Territory, and the Northern Territory have codified the criminal law. The *Criminal Code* is seen to be a compromise between the two systems of criminal law.

15 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 3.

> Fundamental aspects of the law have been altered by the *Criminal Code* in substantial and indeed critical matters, by the replacement of a body of nuanced case law, which never purported to be comprehensive, with the comparative rigidity of a set of interconnecting verbal formulae which do purport to be comprehensive and which involve the application of a series of cascading provisions, including definitional provisions, expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage.[16]

Chapter 1 of the Code

2.13 The *Criminal Code Act 1995* (Cth) enacted the *Criminal Code*. Codes are a particular species of legislation.[17] A code displaces the common law and is generally interpreted without reference to the pre-existing law.[18] There are certain exceptions, such as where the provisions are ambiguous.[19] The MCCOC observed that this

> does not mean that all preceding law will be irrelevant to the interpretation of the Code. For example, English courts have drawn on the pre-existing law of larceny to assist interpretation of the *English Theft Act 1968*. This will also be possible under this Code.[20]

2.14 This is reflected in Chapter 1 of the *Criminal Code*, which consists of one provision, the effect of which is to displace the common law:

> The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.[21]

Chapter 2 of the Code

2.15 Chapter 2 of the *Criminal Code* is titled 'General principles of criminal responsibility'. The stated purpose of the chapter is the exhaustive codification of 'the general principles of criminal responsibility under laws of the Commonwealth'.[22] The remaining chapters contain offences. Chapter 2 applies to all offences under the *Criminal Code* and became applicable to all other Commonwealth offences on 15 December 2001.[23] In anticipation of that date, amendment bills were passed which

16 *R v JS* (2007) 230 FLR 276, [2007] NSWCCA 272 [145].
17 Odgers (n 10) [0.0.200].
18 *R v Barlow* (1997) 188 CLR 1, 31–2, [1997] HCA 19, citing *Robinson v Canadian Pacific Railway Co* [1892] AC 481, 487. The unique nature of interpreting the *Criminal Code* was also raised in submissions: Australian Securities and Investments Commission (ASIC), *Submission 54*, referring to Spigelman CJ, in *R v JS* (2007) 230 FLR 276, [2007] NSWCCA 272 [141]–[146].
19 *R v Barlow* (1997) 188 CLR 1, 31–2, [1997] HCA 19.
20 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 3.
21 *Criminal Code* (n 1) s 1.1.
22 Ibid s 2.1.
23 Ibid s 2.2.

dealt solely or primarily with either including or excluding Part 2.5 of the *Criminal Code*, for multiple Acts.[24]

2.16 The structure of Chapter 2 is:

- Part 2.1 Purpose and application
- Part 2.2 The elements of an offence
- Part 2.3 Circumstances in which there is no criminal responsibility
- Part 2.4 Extensions of criminal responsibility
- Part 2.5 Corporate criminal responsibility
- Part 2.6 Proof of criminal responsibility
- Part 2.7 Geographical jurisdiction

2.17 For the purposes of this Inquiry, Parts 2.2 and 2.5 are particularly relevant.

Part 2.2 of the *Criminal Code* — Offence structure

2.18 Part 2.2 of the *Criminal Code* deals with the elements of offences. The drafters deliberately adopted 'the usual analytical division of criminal offences into the actus reus and mens rea or physical elements or fault elements'.[25] It therefore establishes that an 'offence consists of physical elements and fault elements'.[26] For each physical element there must be a corresponding fault element.[27] The *Criminal Code* emphasises this rigid distinction, and lists three kinds of physical elements and four fault elements. Although the criminal law has generally conceptualised offences as being made of physical and mental elements, this deconstructed and highly specified approach is particular to the Code.

2.19 The physical elements are:

- conduct,
- a result of conduct, or
- a circumstance in which conduct, or a result of conduct, occurs.[28]

2.20 The physical element of 'conduct' is a defined term: 'conduct means an act, an omission to perform an act or a state of affairs'.[29] Further, to 'engage in conduct

24 See, eg, Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001 (Cth).
25 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 9.
26 *Criminal Code* (n 1) s 3.1.
27 Unless the physical element (or the entire offence) is one of strict or absolute liability.
28 *Criminal Code* (n 1) s 4.1.
29 Ibid s 4.1(2).

means to (a) do an act; or (b) omit to perform an act'.[30] The MCCOC considered that a combination of an act, omission, or state of affairs could constitute 'conduct'.[31]

2.21 'A result of conduct' is not defined. It is akin to causation, and arises where

> the physical element of the offence does not involve (just) the conduct of the offender but extends to something caused by that conduct.[32]

2.22 The test is thus left to either the definition within a particular offence, or to common law principles of causation.[33]

2.23 The third type of physical element is 'a circumstance in which conduct, or a result of conduct, occurs'. For example

> s 135.4(3) [of the *Criminal Code*] makes a person guilty of an offence if the person conspires with another person with the intention of dishonestly obtaining a gain from a third person, and the third person is a Commonwealth entity. The last element of the offence, that the third person is a Commonwealth entity, is a circumstance in which the conduct of the offender (conspiring with another person in the prescribed way) occurs.[34]

2.24 This distinction becomes particularly important when considering the applicable corresponding fault elements. For example, an 'act' may be threatening a person, in the 'circumstance' that the person is a Commonwealth official. This 'act' may require the fault element of 'intention', but the 'circumstance' may not require a fault element at all (that is, it may be designated as attracting strict or absolute liability).[35]

2.25 An individual is found guilty of committing an offence if the physical elements are proven, as well as, 'in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element'.[36] There is no scope for a standalone fault element; each fault element must correspond with a physical element.[37]

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30 Ibid.

31 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 9. See further Odgers (n 10) [4.1.120]–[4.1.300].

32 Odgers (n 10) [4.1.330].

33 Ibid. See also Attorney-General's Department (Cth) et al, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 29. The AGD Guide for Practitioners is an internal guidance document which may provide some assistance in interpretation, particularly where there is little or no case analysis of the *Criminal Code*.

34 Odgers (n 10) [4.1.350].

35 See Attorney-General's Department (Cth) et al (n 33) 27, 29.

36 *Criminal Code* (n 1) s 3.2.

37 'Part 2.2 makes no provision for the specification of a fault element that is not "for a physical element of [the] offence"': *R v LK* (2010) 241 CLR 177, [2010] HCA 17 [132].

2.26 For each physical element, the *Criminal Code* provides a default fault element which applies if no other fault element is specified.[38]

2.27 The fault elements, 'in descending order of culpability',[39] are:

- Intention — Intention is defined as:

  (1) A person has intention with respect to conduct if he or she means to engage in that conduct.

  (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

  (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.[40]

- Knowledge — Knowledge is defined in relation to circumstances and results, but not conduct:

  A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.[41]

- Recklessness — Recklessness with respect to a circumstance or result arises if the person is 'aware of a substantial risk' that the circumstance or result exists or will exist,[42] and, 'having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.[43] The question of whether taking a risk is unjustifiable is a question of fact.[44] Proof of intention or knowledge will also satisfy the fault element of recklessness.[45]
- Negligence — The test for 'negligence' is whether a person's conduct involves:

  (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

  (b) such a high risk that the physical element exists or will exist;

  that the conduct merits criminal punishment for the offence.[46]

2.28 An offence provision may specify a fault element other than one of these four.[47] However, significant difficulties may arise in cases involving other fault elements,

38 *Criminal Code* (n 1) s 5.6. Intention is the default fault element for the physical element of conduct, and recklessness is the default fault element for the physical elements of circumstance or a result.
39 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 27.
40 *Criminal Code* (n 1) s 5.2.
41 Ibid s 5.3.
42 Ibid ss 5.4(1)(a), 5.4(2)(a).
43 Ibid ss 5.4(1)(b), 5.4(2)(b).
44 Ibid s 5.4(3).
45 Ibid s 5.4(4).
46 Ibid s 5.5.
47 Ibid s 5.1(2).

particularly if the fault element is not pleaded appropriately with respect to the Code structure.[48]

2.29 Fault elements are not required if a law that creates an offence provides that either the offence or a particular physical element is one of strict or absolute liability.[49] A general defence of mistake of fact is contained in s 9.2, which is applicable unless the physical element, or offence as a whole, is one of absolute liability.[50]

2.30 The offences in the later chapters of the *Criminal Code* follow this structure, such that each physical element is in a separate paragraph, or otherwise clearly distinguishable, with either a clear corresponding fault element or an express indication that the physical element is one of strict or absolute liability.

Part 2.5 of the *Criminal Code* — Corporate criminal responsibility

2.31 Part 2.5 of the *Criminal Code* sets out the legal tests for attributing the physical and fault elements of an offence to corporations. Corporate attribution rules enable offences, which are typically drafted with humans in mind, to apply to corporations, and seek to provide equality between humans and corporations as subjects of the criminal law. Part 2.5 sits in Chapter 2 of the Code as it prescribes general principles of criminal law for corporations. When it was enacted, it was praised for its innovative nature and conceptual sophistication.[51]

2.32 The MCCOC developed Part 2.5 of the *Criminal Code* in response to the existing common law, other statutory provisions, and statutory codes concerning corporate criminal responsibility. The MCCOC found that the pre-existing law, including the various methods of attribution discussed in Chapter 4 and the statutory 'TPA Model' discussed later in this chapter, was inadequate.[52] As a result, Part 2.5 draws together several strands of thinking in a way that is both reactionary and visionary.

2.33 Part 2.5 is structured as follows:

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48 See the discussion below at [6.62] regarding 'dishonesty' in *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 464.

49 *Criminal Code* (n 1) ss 6.1, 6.2.

50 Ibid s 6.1(1).

51 See, eg, Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002). Clough and Mulhern suggest that Part 2.5 was 'arguably the most sophisticated model of corporate criminal liability in the world': 138. See also 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). Dixon suggests that the corporate culture provisions put Part 2.5 'far beyond any other jurisdiction': 2.

52 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 107.

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

General principles

2.34 Section 12.1 provides 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.

2.35 The intention of the MCCOC was to 'develop rules which fairly adapt the general principles of criminal responsibility to the complexities of the corporate form'.[53] The MCCOC observed that corporations

> can be liable directly (eg for an omission where a statute imposes liability on the company) or indirectly through the acts of its servants and agents according to the attribution rules set out.[54]

2.36 Section 12.1 is important as it not only codifies the existing legal principle that the criminal law can apply to corporations as it does to individuals, but also provides courts with flexibility if the 'modifications' or methods of attribution in Part 2.5 are insufficient.[55]

Physical elements

2.37 Section 12.2 sets out how the physical elements of an offence may be attributed from individuals to a corporation. It provides that:

> If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

53 Ibid 105.
54 Ibid 109.
55 Ibid.

2.38 The provision recognises that in 'the large majority of offences, it is impossible for a corporation to engage in conduct, unless it does so via the medium of a human agent'.[56] Section 12.2 uses traditional principles of agency to establish the liability of a corporation for the physical elements of an offence,[57] as can be seen from the provision's use of phrases such as actual or apparent authority.[58]

Aggregation

2.39 An element of aggregation is built into s 12.2, since an offence may have multiple physical elements, and those may have been performed by different individuals. However, s 12.2 does not appear to allow for aggregation to establish a sole physical element.[59] Aggregation is particularly relevant in the corporate context as, by its very nature, a corporation's decisions, omissions, acts, and behaviours are generally the accumulation of states of mind and conduct of multiple people. Similarly, the various elements of a criminal offence may reside in multiple people. Aggregation allows the conduct and states of mind of different individuals to be attributed to the corporation.

Fault elements

2.40 The *Criminal Code* provides two tests for attributing fault to a corporation. The first, under s 12.3, applies to the fault elements of intention, knowledge, and recklessness. The second, under s 12.4, applies to the fault element of negligence.

Intention, knowledge, and recklessness

2.41 Section 12.3(1) provides the method by which the fault elements of intention, knowledge, and recklessness can be attributed to a corporation:

> 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.

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56 Attorney-General's Department (Cth) et al (n 33) 303 (citations omitted).

57 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) 285. See also 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, 1186 referring to *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Address Co Pty Ltd* (1975) 133 CLR 72, [1975] HCA 49; *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451, [2004] HCA 35; *Corporations Act 2001* (Cth) ss 128, 129(3). In addition, Ivory and John contend that the term 'officer' in s 12.2 of the *Criminal Code* should receive a construction consistent with the *Corporations Act 2001* (Cth), 'not least because the provisions were enacted in the same year': 1187.

58 Odgers (n 10) 261.

59 See Clough and Mulhern (n 51) 139.

2.42 The key concept in s 12.3(1) is that a corporation is culpable where it has authorised or permitted the offence.

2.43 The terms 'authorised' and 'permitted' are not defined in the *Criminal Code*, requiring recourse to the common law.

2.44 Under s 12.3, authorisation or permission may be express, tacit, or implied. On one view, the phrase 'expressly, tacitly or impliedly' qualifies the concept of permission (as well as authorisation). This may distinguish the term 'permitted', such that permission 'does not seem to extend more generally to include simple failure to prevent the occurrence of the offence'.[60] Express authorisation or permission is straightforward.[61] For example, a board of directors publishing instructions to employees that directed them to commit the offence.[62] Tacit or implied authorisation or permission may be more complicated.[63] The concept of tacit authorisation is not found elsewhere in the law, and is unique to s 12.3(1).[64]

Methods of proof

2.45 The most innovative aspects of Part 2.5 are located in s 12.3(2), which provides:

> The means by which such an authorisation or permission may be established include:
>
> (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.

2.46 The four methods of proof under s 12.3(2) address different aspects of how the corporation is governed. The board of directors is the highest form of control of the corporation. High managerial agents speak to the running of the corporation. The

60 Attorney-General's Department (Cth) et al (n 33) 313. See also Odgers (n 10) [12.3.200]. It is, on the whole, unclear how permission would operate under s 12.3(1), not least because of the lack of judicial consideration.
61 Odgers (n 10) [12.3.100].
62 Ibid.
63 Ibid.
64 Ibid [12.3.200].

culture of the corporation (or the absence of an aspect of culture) is relevant to the day to day operations of the corporation itself (though likely to be influenced by the board of directors and management).[65]

Board of directors

2.47 The board of directors is defined as

> the body (by whatever name called) exercising the executive authority of the body corporate.[66]

2.48 If the board of directors carries out the relevant conduct (intentionally, knowingly, or recklessly), or authorises or permits the commission of the offence (expressly, tacitly, or impliedly), this may establish that the *corporation* authorised or permitted the commission of the offence.[67] If the fault element is intention or knowledge, it is not sufficient to show that the board acted only recklessly.[68]

High managerial agent

2.49 The term '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.[69]

2.50 This term is unique to the *Criminal Code* and is not drawn from the *Corporations Act* or general corporate law. As such, the interpretation of high managerial agent may be independent of pre-existing notions of seniority and responsibility in corporate law. If a high managerial agent engages (intentionally, knowingly, or recklessly) in the relevant conduct, or authorises or permits the commission of the offence (expressly, tacitly, or impliedly), this may establish that the corporation authorised or permitted the commission of the offence.[70]

2.51 The MCCOC explained that s 12.2(2)(b) would be most useful in isolated instances of offending:

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65 See *Australian Securities and Investments Commission v King* [2020] HCA 4 [94]: 'In large public companies, the board of directors sits at the apex of the managerial pyramid. Ordinarily, the board is involved in setting strategy, approving business plans, making key management decisions (such as major expenditure decisions) and monitoring the performance of management and the returns of the business. Below the board "there will be 'management' consisting of executive employees of the company (senior, middle and junior, perhaps in various divisions of business units), and then the general personnel employed by the company"' (citations omitted).

66 *Criminal Code* (n 1) s 12.3(6).

67 Ibid s 12.3(2)(a).

68 Ibid s 12.3(5).

69 Ibid s 12.3(6).

70 Ibid s 12.3(2)(b).

> It is envisaged that this provision will be used in one-off situations where it cannot be said that there is any ongoing authorisation of the conduct.[71]

Defence of due diligence

2.52 Where the prosecution relies on s 12.2(2)(b), there is a statutory defence of due diligence:

> Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.[72]

2.53 Since the corporation is required to 'prove' the matter, the legal burden is on the defence.[73]

2.54 'Due diligence' is not defined in the Code, although it is possible that assistance may be drawn from the mistake of fact defence under Part 2.5.[74] No explanation was given as to why the defence was made available in respect of a high managerial agent only.

Corporate culture

2.55 The term 'corporate culture' is defined 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.[75]

2.56 If it can be proved, beyond reasonable doubt, that a culture existed within the corporation that directed, encouraged, tolerated, or led to non-compliance with the relevant provision,[76] or that the corporation failed to create and maintain a culture that required compliance with the relevant provision,[77] this may be sufficient to establish that the corporation authorised or permitted the commission of the offence.

2.57 Section 12.3(4) provides a non-exhaustive list of factors to consider in applying paras (2)(c) or (d), which relate to the involvement of a high managerial agent in the alleged corporate culture:

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71 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 111. This was reiterated in the Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 43.

72 *Criminal Code* (n 1) s 12.3(3).

73 Ibid s 13.4.

74 Odgers (n 10) [12.3.310].

75 *Criminal Code* (n 1) s 12.3(6). See the discussion in Chapter 6 of commentary suggesting that the definition creates difficulty because the relevant elements are phrased in the singular: [6.107]–[6.108]. This may limit the complex and diffuse notion of corporate culture to a sole attitude, policy, rule, course of conduct, or practice.

76 *Criminal Code* (n 1) s 12.3(2)(c).

77 Ibid s 12.3(2)(d).

(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.

Relationship between methods of proof and authorisation and permission

2.58 Clough and Mulhern contend that s 12.3(2) erases the distinction between intention, knowledge, and recklessness, considering that

> the fault element for corporate offences is essentially authorisation or permission of the commission of the offence, this being taken to be equivalent to intention, knowledge or recklessness. …
>
> There is no link between proof of the authorisation or permission and the fault element that must then be attributed to the company. The section simply presents a number of circumstances that are sufficient to prove authorisation or permission, and this in turn leads to attribution of the subjective fault element to the corporation. There is therefore no need for the prosecution to prove the specific fault element, nor to prove that authorisation or permission occurred in circumstances commensurate with the requisite fault elements. So long as the prosecution can prove, in whatever way, that the company authorised or permitted the offence, attribution of the fault must occur. [78]

2.59 Absent judicial consideration, the ALRC considers that the gradients of fault are retained.[79] The key aspect of s 12.3 is in s 12.3(1): that intention, knowledge or recklessness may be proved through authorisation or permission. The utility of s 12.3(2) is that it suggests, in a non-exhaustive list, the ways in which permission or authorisation may be established in a manner sensitive to the corporate context. The essential question is whether that authorisation or permission then amounts to the relevant fault element of intention, knowledge, or recklessness.

2.60 By way of example, the MCCOC considered how the different fault elements of intention and recklessness may be proved through tacit authorisation:

> For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (eg recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.[80]

78 Clough and Mulhern (n 51) 140, 145.

79 This view was also supported in consultations.

80 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 9) 113. This was reiterated in the Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 44.

2.61 Each fault element within an offence may be proved by a different mechanism of proof. For instance, consider an offence with two fault elements of intention and recklessness relating to two distinct physical elements of the offence. Intention may be proved, for example, through the approval of the board of directors in respect of one, and recklessness by reference to the state of mind of a high managerial agent in respect of the other.

Negligence

2.62 Section 12.4 provides the test for establishing the fault element of negligence on the part of the corporation itself.

2.63 The test for negligence for a corporation is the same as the test under s 5.5 of the *Criminal Code* for individuals.[81]

2.64 Section 5.5 of the *Criminal Code* states:

> A person is negligent with respect to a physical element of an offence if his or her conduct involves:
>
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist;
>
> that the conduct merits criminal punishment for the offence.

2.65 Section 12.4(2) provides the principles of attribution:

> If:
>
> (a) negligence is a fault element in relation to a physical element of an offence; and
>
> (b) no individual employee, agent or officer of the body corporate has that fault element;
>
> that fault element may exist on the part of the 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).

2.66 Section 12.4(2) reflects organisational blameworthiness, since negligence is established in respect of the corporation itself.[82] As Tahnee Woolf states:

> By specifying that negligence may be proved on the part of the company 'as a whole', the Code implicitly acknowledges that corporations have a 'collective

81 *Criminal Code* (n 1) s 12.4(1).
82 Attorney-General's Department (Cth) et al (n 33) 327.

> 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.[83]

2.67 In addition, s 12.4(2) expressly provides for an element of aggregation. The rationale is that 'a series of minor failures by officers of the company might add up to a gross breach by the company of its duty of care'.[84]

2.68 Section 12.4(3) states that 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.

Mistake of fact (strict liability)

2.69 Section 12.5(1) provides a defence of mistake of fact for offences of strict liability, or particular physical elements of strict liability if:

> (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
>
> (b) the body corporate proves that it exercised due diligence to prevent the conduct.

2.70 The defence requires the satisfaction by the defendant of an evidentiary burden for s 12.5(1)(a), and a legal burden for s 12.5(1)(b).[85]

2.71 Section 9.2 provides the general principles for mistake of fact (strict liability):

> (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
>
> (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
>
> (b) had those facts existed, the conduct would not have constituted an offence.
>
> (2) A person may be regarded as having considered whether or not facts existed if:
>
> (a) he or she had considered, on a previous occasion, whether those

83 Tahnee Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 270.

84 JC Smith and Brian Hogan, *Criminal Law* (Butterworths, 7th ed, 1992) 184.

85 Attorney-General's Department (Cth) et al (n 33) 333.

facts existed in the circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.

2.72 The interaction between s 12.5 and s 9.2 is not explicit. It is unclear whether both sections need to be satisfied, especially as s 12.5 clearly imposes an additional requirement for corporations to prove the exercise of due diligence to prevent the conduct, which does not exist under s 9.2.[86]

Intervening conduct or event

2.73 Section 12.6 provides:

> A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

2.74 Section 10.1 outlines the general principles for intervening conduct or event:

> A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:
>
> (a) the physical element is brought about by another person over whom the person has no control or by a nonhuman act or event over which the person has no control; and
>
> (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

2.75 Section 10.1 is not a defence; the prosecution must prove (beyond reasonable doubt) that the corporation could have reasonably been expected to guard against the intervening conduct or event.

2.76 Under the scheme of corporate criminal responsibility in Part 2.5 of the *Criminal Code*, s 12.6 ensures that for offences of strict or absolute liability (or particular physical elements of strict or absolute liability), the corporation is not able to avoid accountability for employees, agents, or officers, including those who act in a rogue or renegade fashion. The general principles under s 10.1 simply do not apply:

> It makes no difference that the conduct may have been disobedient to instructions, unpredictable and unavoidable by the exercise of due diligence. In offences which require proof of fault, allegations of liability for the unpredictable and uncontrollable conduct of mavericks will be defeated, in most cases, by prosecution failure to

86 Odgers is of the view that there is no policy justification for requiring a corporation to satisfy the requirements of s 9.2 as well as those under s 12.5: Odgers (n 10) [12.5.120].

> prove corporate fault. However, when liability is strict or absolute, corporate criminal responsibility can be incurred for the unpredictable criminal activities of corporate agents.[87]

2.77 Section 12.6 is internally consistent with s 10.1(a), since it is difficult to conceive of a situation where the corporation has no control over its own employees, agents, or officers.[88] This is, importantly, a different inquiry than whether the corporation did, in fact, have control over the relevant employees, agents, or officers.

The exclusion of Part 2.5 from Commonwealth statutes and the alternative attribution model

2.78 While the approach in Part 2.5 of the *Criminal Code* to the attribution of criminal responsibility to corporations was novel, it has not been widely adopted across Commonwealth legislation. Part 2.5 is expressly excluded from a broad range of legislation including, for example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Excise Act 1901* (Cth), *Fair Work Act 2009* (Cth), *Fisheries Management Act 1991* (Cth), *National Consumer Credit Protection Act 2009* (Cth), *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth), *Superannuation Industry (Supervision) Act 1993* (Cth), *Taxation Administration Act 1953* (Cth), and *Telecommunications Act 1997* (Cth).[89]

2.79 Some insight into the circumstances in which it was envisaged that Part 2.5 of the *Criminal Code* might be excluded from application can be gleaned from the Second Reading Speech of the Criminal Code Bill 1995:

> I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate.
>
> At the federal level this will need to occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done. For example, the government is not planning to water down the requirements of section 65 of the *Ozone Protection Act 1989* (Cth) in regard to the matters covered by that act. Part 2.5 concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.[90]

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87 Attorney-General's Department (Cth) et al (n 33) 335.

88 Odgers (n 10) 288.

89 For further analysis of the statutory exclusions of Part 2.5, see [3.57]–[3.65].

90 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1995, 1335 (Duncan Kerr, Minister for Justice). Section 65 of the (as it is now called) *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) is a variation of the TPA Model, which includes, crucially, a defence of taking reasonable precautions and due diligence. This was reiterated in the Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 45.

2.80 The marginalisation of Part 2.5 began almost immediately. For example, in 2001, Part 2.5 was expressly excluded from amendments to the *Fisheries Management Act 1991* (Cth), on the basis that, as 'the Bill is intended to operate in the same way after the *Criminal Code* applies to it, the specific corporate criminal responsibility provisions in the Act are retained by excluding the operation of Part 2.5 of the *Criminal Code*'.[91] Subsequently, the Bills Digest made the pertinent observation that:

> Parliament is entitled to ask 'What is the policy rationale for excluding the corporate criminal responsibility provisions of the Code?' Why rely on provisions that pre-date the Code? It may be the case that it would be easier for regulatory agencies … to achieve a prosecution under the provisions of Part 2.5 of the Code regarding corporate criminal liability, than under older provisions, because the new legislation (Part 2.5 of the Code Act) introduces new concepts of 'corporate culture' and due diligence. Members could ask whether this decision amounts to a decision not to take the opportunity to improve legislation, particularly a decision not to take advantage of the improvements contained in the *Criminal Code*.[92]

2.81 Subsequent Parliaments do not appear to have interrogated the issue when passing bills that expressly excluded Part 2.5 of the *Criminal Code*.

2.82 Where Part 2.5 is excluded, as set out in Chapter 3, the ALRC's primary research suggests that attribution of responsibility is based on a method that first appeared in the Commonwealth statute book in s 84 of the *Trade Practices Act 1974* (Cth) (the 'TPA Model').[93] Under that method of attribution, corporations are responsible for both criminal offences and contraventions of civil penalty provisions based on the state of mind and conduct of a director, employee, or agent. While attribution based upon the TPA Model predominates in the Commonwealth statute book, it does not consist of a single, uniform statutory approach. Attribution varies slightly from statute to statute and there is inconsistency as to whether a due diligence defence applies across each statutory variant of the TPA Model. Furthermore, the TPA Model-based methods operate alongside the common law principles of attribution.[94]

2.83 The courts have held that the legislative intention of s 84 of the *Trade Practices Act 1974* (Cth) was to 'make it "easier" to attribute corporate responsibility for the conduct of agents than the position at common law'.[95]

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91 Explanatory Memorandum, Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001 (Cth) 75.

92 James Prest, Department of the Parliamentary Library (Cth), *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001 Bills Digest* (Digest No 20 of 2001–2) 34.

93 The *Trade Practices Act 1974* (Cth) was replaced by the *Competition and Consumer Act 2010* (Cth). The relevant provision is now s 84 of the *Competition and Consumer Act 2010* (Cth).

94 In the context of s 84 of the *Trade Practices Act 1974* (Cth), see *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, [1985] FCA 619.

95 *Murphy Toenies v Family Holdings Pty Ltd as trustee for the Conway Family Trust* [2019] WASC 423 [95]. See also *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, [2000] FCA 1558 [1241]:

It extends to proceedings, both civil and criminal, and is designed to eliminate the necessity to apply the various and at times divergent tests of the common law relating to a corporation's responsibility for the acts of its servants or agents. It extends those common law principles in order to facilitate proof of a corporation's responsibility.[96]

'It has been accepted that subs 84(2) is an enlarging provision, that is, one that is intended to make proof of corporate responsibility for conduct easier than it is at common law by providing additional means of proving that matter'.

96 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38, [1985] FCA 619.

3. Corporate Criminal Responsibility — the Data

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 This chapter summarises the data that has proved foundational to the ALRC's review of corporate criminal responsibility in this Inquiry. It provides the evidence base for the recommendations set out in this Report. The underlying data collated by

the ALRC, and more detailed original and derivative data than that contained in this chapter, is contained in this Report's *Data Appendices*.[1]

3.3 Complete, timely, and accessible data is pivotal to effective law reform. In the case of the criminal justice system, the need for evidence as to what is effective — and what is not — is acute given the powers of the state that may be applied to an individual in this context and the importance of community safety more broadly.

3.4 In response to difficulties identified and encountered by the ALRC in collecting data relevant to the incidence and prosecution of corporate crime, the chapter also makes a recommendation relating to the improvement of criminal justice data collection and dissemination.

About the data

3.5 This chapter uses three key datasets. The first relates to the substantive Commonwealth criminal law applicable to corporations. The latter two pertain to the enforcement of that law against corporations.

Review of Commonwealth criminal law as it applies to corporations

3.6 The first dataset consists of primary data compiled by the ALRC relating to Commonwealth criminal law as it applies to corporations. The ALRC undertook a review of a cross-section of relevant Commonwealth legislation — consisting of 25 statutes that are particularly relevant to the regulation of corporate conduct[2] — in order to:

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

3.7 The ALRC's review of this legislation is contained in Appendix A of the *Data Appendices*.

Prosecutorial data from Commonwealth agencies

3.8 The second key dataset is constituted by quantitative data relating to the investigation and/or prosecution of corporate crime by Commonwealth agencies. This data consists of six sub-datasets:

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1 Australian Law Reform Commission, *Corporate Criminal Responsibility: Data Appendices* (2020) ('*Data Appendices*').

2 See ibid Appendix A, Table 1. These statutes were those identified by the ALRC in preliminary research and stakeholder consultations as key legislative sources of corporate criminal responsibility in Australia. These 25 statutes are certainly not the only sources of such liability — they represent only a small cross-section of those within the Commonwealth statute book providing for corporate criminal responsibility.

- data provided by the CDPP relating to the incidence of corporate prosecutions commenced in the ten-year period ending on 30 June 2019 ('CDPP Data');[3]
- data provided by ASIC relating to prosecutions conducted by ASIC or referred to the CDPP by ASIC in the five-year period ending on 30 June 2019 ('ASIC Data');[4]
- data analysis conducted by the ALRC of civil penalty and criminal proceedings against corporations or individuals associated with corporations brought under legislation ASIC enforces and publicly reported on by ASIC through media releases during the period of 1 January 2015 to 20 March 2020; ('ALRC Review of ASIC Enforcement Data');[5]
- data analysis conducted by the ALRC of civil penalty and criminal proceedings brought under ACCC-administered legislation against corporations or individuals associated with corporations and publicly reported on by the ACCC in the period of 1 January 2015 to 20 March 2020 ('ALRC Review of ACCC Enforcement Data');[6] and
- data analysis conducted by the ALRC of prosecutions brought under work health and safety ('WHS') legislation in New South Wales ('NSW'), Victoria, and Queensland in the five-year period ending on 30 June 2019.[7]

Criminal court statistics

3.9 The third dataset consists of data provided to the ALRC by statistics agencies and courts regarding corporate criminal prosecutions in federal and state courts of criminal jurisdiction. This data contains four sub-datasets:[8]

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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 ongoing cases. It is not included in the *Data Appendices* in its original form as it was received by the ALRC incrementally by correspondence.

4 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019. See also *Data Appendices* (n 1) Appendix B, Table 1. As the ASIC Data is predominantly general enforcement data provided to the ALRC in correspondence, it is not provided in full in the *Data Appendices*.

5 See *Data Appendices* (n 1) Appendix B, Table 2. This data was collected by reviewing publicly available information relating to civil and criminal court enforcement actions commenced by ASIC or by a prosecuting agency on ASIC's referral. It does not include data relating to enforcement action for summary regulatory offences conducted internally by ASIC's Small Business Compliance and Deterrence Team, which is not ordinarily the subject of ASIC Enforcement Unit media releases (but is included in the ASIC Data sub-dataset). The ALRC's Review of ASIC Enforcement Data is also discussed in Chapter 9.

6 See ibid Appendix B, Table 3. This analysis was conducted in the same way as the ALRC Review of ASIC Enforcement Data and in this chapter, is supplemented by information provided to the ALRC by the ACCC in correspondence, not included in the *Data Appendices*: Advice Correspondence from Australian Competition and Consumer Commission to Australian Law Reform Commission, 25 October 2019. The ALRC's Review of ACCC Data is also discussed in Chapter 9.

7 Ibid Appendix B, Table 4. The review was limited to these jurisdictions due to difficulties with obtaining the relevant data for other jurisdictions. The data from these jurisdictions is publicly available and was collected predominantly from the relevant enforcement agencies' annual reports.

8 The ALRC requested further data from all state and federal higher and local courts of criminal jurisdiction,

- statistics provided by the Australian Bureau of Statistics ('ABS') relating to offences, case outcomes, and sentences of 'organisation'[9] defendants finalised in the criminal jurisdictions of higher, local, and children's courts across Australian states and territories for the ten-year period ending on 30 June 2019 ('ABS Data');[10]
- data provided by the Federal Court of Australia ('FCA') relating to prosecutions of companies and individuals in the FCA for the ten-year reference period ending on 30 June 2019 ('FCA Data');[11]
- statistics provided by the NSW Bureau of Crime Statistics and Research ('BOCSAR') relating to: (1) types of charges, case outcomes, and sentences of corporate defendants[12] finalised in the criminal jurisdictions of NSW higher, local and children's Courts; and (2) prosecutions brought under the 25 statutes and specific provisions reviewed by the ALRC for the ten-year reference period ending on 30 June 2019 ('BOCSAR Data');[13] and
- data provided by the South Australian Courts Administration Authority relating to criminal and civil lodgements in South Australian higher and local Courts for organisation and individual defendants for the four-year reference period ending on 30 June 2019 (the 'South Australian Data').[14]

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specific to the prosecution of corporations. Courts not included in this data were unable to provide the requested data, either because the data was not available, or because resource constraints or unforeseen circumstances rendered provision of the data within the ALRC's timeframe unfeasible.

9 The ABS is unable to disaggregate defendants that are companies from other types of organisation defendants. This data accordingly includes all non-individual defendants. Examples of other non-physical persons included in the term 'organisation' are government agencies, non-governmental organisations, and clubs.

10 Australian Bureau of Statistics, *Criminal Courts, Australia—Organisations Data: Customised Report for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>. The derivative data contained in this chapter is at times supplemented by the broader, publicly available, ABS criminal courts statistics: Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020).

11 This data was provided to the ALRC by correspondence and is not included in the *Data Appendices*: Advice Correspondence from the Federal Court of Australia to the Australian Law Reform Commission, 10 February–18 March 2020.

12 The term 'corporate defendant' is used in this chapter to refer to defendants that are companies, unless otherwise specified. BOCSAR, unlike most court administration authorities and relevant statistical agencies, is able to disaggregate criminal court data according to whether defendants are companies. The ALRC found in the course of this Inquiry that NSW, through BOCSAR, collects the most comprehensive data on criminal courts and justice of all the states and territories in Australia.

13 See NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>. The ALRC requested data from BOCSAR pertaining to the 25 statutes reviewed by the ALRC and NSW equivalents, as well as a list of specific provisions that the ALRC had reviewed in relation to particular aspects of the Inquiry. For example, the ALRC requested data from BOCSAR relating to specific slavery, slavery-like, human trafficking, and violation of foreign sanction offences under the *Criminal Code* to inform the ALRC's research into transnational business (see Chapter 10).

14 Advice Correspondence from the South Australian Courts Administration Authority to Australian Law Reform Commission, 26 March 2020. The counting rules applied in tabulating this data are consistent with those used in the Australian Productivity Commission's *Report on Government Services*. Criminal lodgements are counted as defendants. Civil lodgements are counted as cases, and include intervention

3.10 In addition to the datasets listed above, the ALRC's reform recommendations are informed by qualitative data obtained in the course of submissions from, and confidential consultations with, stakeholders in the area. In the course of this Inquiry, the ALRC undertook consultations with more than 100 individuals and organisations, and received 49 submissions from stakeholders in response to the Discussion Paper. Lists of each are presented in Appendices A and B of the Report. Consultation is a key part of the ALRC process; it informs the ALRC on the topic area and the need for reform. Where possible, the ALRC has sought to cross-check information provided through consultations with the datasets identified above.

3.11 The data relied on has come from multiple sources and there may be gaps and omissions. Accordingly, the data must be interpreted carefully. 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. There is also a thorough consideration of the limitations of particular datasets later in the chapter and in the *Data Appendices*, especially the Explanatory Notes.

Commonwealth criminal law as it applies to corporations

Summary

3.12 The ALRC's review of 25 key Commonwealth statutes providing for corporate criminal responsibility has led to the following conclusions:

- there is an over-proliferation of offences in the Commonwealth criminal law that creates a significant regulatory burden and dilutes the rationale for corporate criminal responsibility;
- the Commonwealth criminal law applicable to corporations suffers from excessive complexity and specificity;
- various approaches are taken to the framing of strict and absolute liability offences applicable to corporations;
- inconsistent approaches are taken to the availability of infringement notices for criminal offences;
- there is a lack of principled rationale for distinguishing between conduct subject to a civil penalty and conduct constituting a criminal offence;
- whether and when corporate conduct attracts civil or criminal penalties, or both, varies both within and between statutes; and

order applications. Where the proceeding was brought against individuals and organisations, the case was counted as 'proceedings brought against organisations'.

- there are numerous, and different, methods for attributing criminal liability to corporations.

Proliferation of criminal offences

3.13 Across the 25 Commonwealth statutes reviewed, the ALRC identified 3,117 criminal offences as potentially applicable to corporations.[15]

3.14 Generally, all Commonwealth offences are applicable to corporations. The *Criminal Code* makes this explicit in s 12.1, which provides that:

> 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.
>
> A body corporate may be found guilty of any offence, including one punishable by imprisonment.[16]

3.15 This approach is consistent with s 2C(1) of the *Acts Interpretation Act 1901* (Cth).[17]

3.16 Exceptions to the general rule are Commonwealth offences that are, by nature, incapable of commission by a corporation — offences considered to be 'inherently human' by their very nature. An example of such an offence is that of bigamy.[18] The category of offences incapable of commission by a corporation by their very nature has, however, been described as now 'narrow'.[19]

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15 See *Data Appendices* (n 1) Appendix A, Table 4. The offences contained in the *Quarantine Act 1908* (Cth) are not included in this figure. This is because the Act is no longer in force; it was replaced by the *Biosecurity Act 2015* (Cth). This figure accordingly only includes offences contained in 24 of the 25 statutes that make up the ALRC's dataset. The figure does not include offences contained in regulations associated with the principal legislation. Although it is recognised that the *Australian Consumer Law* is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth), it is counted separately to that Act for the purposes of this chapter's analysis.

16 The *Criminal Code* does not, however, apply to all Commonwealth criminal offences. Entire statutes, or particular offences, may expressly exclude its application. See, eg, *Corporations Act 2001* (Cth) s 769A ('Despite section 1308A, Part 2.5 of the *Criminal Code* does not apply to any offences based on the provisions of this chapter').

17 See also *Crimes Act 1914* (Cth) s 4B(1) ('A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons').

18 See, eg, *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, [2008] NSWCA 204 [21], [141]; *R v ICR Haulage Ltd* [1944] KB 551, 554; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 514 [1993] HCA 74 [11] (Brennan J). Offences now recognised as capable of commission by corporations have on occasion historically been viewed otherwise: see further *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, [2008] NSWCA 204 [19].

19 *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, [2008] NSWCA 204 [21]. Accordingly, although the ALRC did not include offences clearly incapable of commission by a corporation in the summary statistics pertaining to Commonwealth criminal law applicable to corporations, such offences were infrequent. Examples of such offences are: *Criminal Code Act 1995* (Cth)

3.17 That offences are generally applicable to corporations in the same way as they are to individuals is a policy choice on the part of the legislature. That corporations are treated, to the extent possible, as persons is not uncontroversial as a matter of theory.[20]

3.18 The criminal offences in the legislation reviewed by the ALRC vary significantly in the seriousness of the conduct subject to regulation. In the *Corporations Act*, for example, there are a number of offences that criminalise serious misconduct such as market manipulation,[21] but also a substantial number of offences criminalising more trivial misconduct.

Example

Failure to place an Australian Company Number on certain company documents is currently a criminal offence under the *Corporations Act*,[22] as is a failure to notify ASIC of a change in company office hours.[23]

3.19 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.[24] Roughly, a maximum penalty unit threshold of 300 penalty units for a corporation is said to be commensurate with the severity of a maximum penalty providing for 12 months imprisonment.[25] The median maximum penalty for offences reviewed by the ALRC is 1,000 penalty units.[26] Of the 3,117 offences reviewed 2,356 attract

sch s 105.41(1) ('*Criminal Code*') (disclosure by person being detained of fact of a preventative detention order); *Environmental Protection Biodiversity Conservation Act 1999* (Cth) s 401 (impersonation of an authorised officer or ranger); *Fisheries Management Act 1991* (Cth) s 89(4) (failure to return a personal identification card). Where there was doubt, offences were included in the count of offences applicable to corporations.

20 See further Chapter 4, particularly [4.20]–[4.32].

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

22 Ibid s 153.

23 Ibid s 145(3).

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

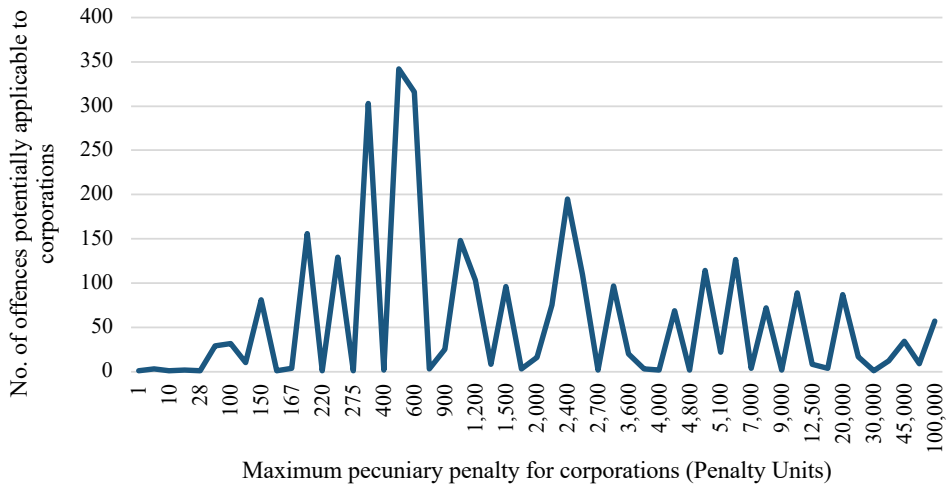
25 Up to and including 300 penalty units has been chosen as a useful threshold for considering the relative seriousness of offences by reference to the pecuniary penalty conversion rules in the *Crimes Act 1914* (Cth). Unless the contrary intention appears, Commonwealth offences 'punishable by imprisonment for a period exceeding 12 months' are indictable offences: *Crimes Act 1914* (Cth) s 4G. A term of 12 months imprisonment can, generally, be converted to a pecuniary penalty of 60 penalty units for an individual and 300 penalty units for a body corporate: *Crimes Act 1914* (Cth) s 4B(2)–(3). Although not all offences with a maximum penalty of more than 300 penalty units for a corporation are indictable offences, all such offences should be of comparable seriousness.

26 *Data Appendices* (n 1) Appendix A, Tables 7–31. This median captures only offences for which a maximum penalty applicable to corporations expressed in penalty units is easily identifiable. Examples of offences not included are those for which the maximum penalty applicable depends on another underlying offence (see, eg, *Criminal Code* (n 19) ss 71.12, 474.14(1)–(2), 477.1(1)). Where maximum penalties are dependent on a formula, the minimum maximum pecuniary penalty is included for the purposes of this calculation: see, eg, most Chapter 4 offences in the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

maximum penalties of more than 300 penalty units for a corporate offender.[27] On the other hand, approximately one quarter (761)[28] have maximum penalties that do not meet this threshold. The proliferation of these offences suggests that the Commonwealth criminal law as it stands does not reflect the requirement that conduct only be criminalised where there is 'substantial wrongdoing'.[29]

3.20 Looking at those offences that attract a maximum penalty of up to 300 penalty units for a corporate offender, there is significant variation in the maximum pecuniary penalty applicable. Some offences attract maximum penalties as low as one penalty unit.[30] Figure 3-1 is illustrative of the variation in maximum penalty units attached to offences identified by the ALRC as potentially applicable to corporations.

***Figure 3-1: Variation in maximum penalties applicable to offences reviewed by the ALRC*[31]**



27 See *Data Appendices* (n 1) Appendix A, Table 4.

28 See ibid. These figures do not add up as neatly as they may seem because of some complexity in determining the penalty applicable to corporations for certain offences. Further, although penalty benchmarks provide insight into the comparative seriousness of offences, they are an imprecise method of distinguishing between improperly criminal, 'quasi' criminal, and 'real' criminal offences. Penalty benchmarks should accordingly only be used as a starting point for identifying offences that warrant review. See further, on the distinction between quasi criminal and real criminal offences, New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Report 102, 2003) 4–6.

29 Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 240; Attorney-General's Department (Cth) (n 24) 12.

30 See, eg, *Income Tax Assessment Act 1936* (Cth) s 252(3).

31 *Data Appendices* (n 1) Appendix A, Tables 7–31. This graph includes only offences for which a maximum penalty applicable to corporations expressed in penalty units is easily identifiable.

Complexity and specificity of criminal offences

3.21 In the *Final Report* of the Financial Services Royal Commission, 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.[32]

3.22 Many of the statutes reviewed by the ALRC suffer from this tendency. The problem is exemplified by the *Corporations Act*.

Example

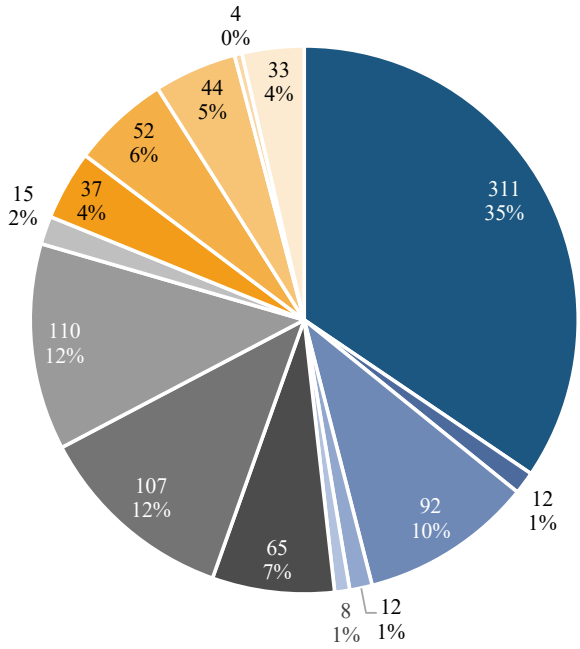
The first criminal offence located in the *Corporations Act* relates to intentionally or recklessly contravening 'a condition to which an exemption under section 111AS or 111AT is subject'.[33]

3.23 Grouping offences in the *Corporations Act* by the type of misconduct regulated by the offence is illustrative of the magnitude and scale of complexity and specificity present in the legislation. Figure 3-2 shows that approximately one third of the offences contained within the *Corporations Act* relate to a breach of duty or conduct obligation.

32 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) [1.5.3].

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

Figure 3-2: Types of offences identified in the Corporations Act[34]



- Breach of duty / conduct obligation
- Client money obligations
- Defective disclosure / false, misleading or deceptive conduct
- Dishonest conduct
- Financial market distortion / misconduct
- Non-compliance with ASIC / court requirement
- Other compliance requirement
- Providing ASIC with information
- Providing auditors / liquidators / administrators with information
- Providing information / disclosure to consumers
- Providing members / directors / company with information
- Record keeping
- Responsible lending
- Unlicensed conduct

34 See further *Data Appendices* Appendix A, Table 14. The categories used to describe the type of misconduct are indicative only.

3.24 Figure 3-2 also shows that 92 offences within the *Corporations Act* relate to defective disclosure or false, misleading, or deceptive conduct.[35] Such offences are also common in other statutes reviewed by the ALRC. The myriad provisions regulating misleading conduct have been described as 'legislative porridge',[36] and 'a labyrinth that defies navigation, let alone rational analysis'.[37]

3.25 The level of minutiae reflected in Commonwealth criminal offences explains, at least in part, the over-proliferation of offences in 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 seem to strike such a balance.

Approaches to strict and absolute liability offences

3.26 Commonwealth criminal offences consist of physical elements and fault elements, unless the law creating the offence provides that there is no fault element for one or more physical elements.[38] No fault element is required where a law creating an offence provides that the offence, or particular physical elements of an offence, is one of 'strict liability' or 'absolute liability'.[39] Strict or absolute liability may, therefore, attach to either an entire offence, or only particular elements of an offence. The data in this section predominantly relates to those offences that are strict or absolutely liability *offences* — that is, no fault element attaches to any element of the offence. The number of offences where one or more elements attracts strict or absolute liability is significantly higher.

3.27 As the requirement that fault be proved is 'one of the most fundamental protections of criminal law',[40] the AGD Guide to Framing Offences provides that 'strict and absolute liability should only be used in limited circumstances, and where

35 See further ibid. This figure is indicative only.

36 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, [2012] FCA 1028 [948].

37 Elise Bant and Jeannie Paterson, 'Developing a Rational Law of Misleading and Deceptive Conduct' in M Douglas, J Eldridge and C Carr (eds), *Economic Torts in Context* (Hart Publishing, forthcoming, 2020). Although these statements were made in contexts particularly concerned with civil prohibitions of misleading conduct, they are apt for repetition in the criminal sphere.

38 *Criminal Code* (n 19) s 3.1. It is also possible that a law may impliedly provide for strict liability, although as Odgers notes, '[i]n practice, the courts are unlikely to so conclude in the absence of express words': Stephen Odgers, *Principles of Federal Criminal Law* (Lawbook Co, 4th ed, 2019) 85.

39 *Criminal Code* (n 19) ss 6.1, 6.2. The difference between strict and absolute liability is in the availability of defences. Where strict liability applies, all defences are available including the mistake of fact defence under s 9.2. Where absolute liability applies, all defences except the mistake of fact defence under s 9.2 are available.

40 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 283; Attorney-General's Department (Cth) (n 24) 22.

there is adequate justification for doing so'.[41] This is consistent with views suggesting that moral blameworthiness inheres in the fault elements of an offence.[42]

3.28 The AGD Guide to Framing Offences provides that the application of strict or absolute liability to all of the physical elements of an offence will, in general, only be considered appropriate where all of the following apply:

- the offence is not punishable by imprisonment and is punishable by a fine of up to:
    - 60 penalty units for an individual (300 for a body corporate) where the offence is a strict liability offence; or
    - 10 penalty units for an individual (50 for a body corporate) where the offence is an absolute liability offence;[43]
- strict or absolute 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'.[44]

3.29 The Scrutiny of Bills Committee considered strict and absolute liability and criteria for its application in 2002 and has developed various principles that the Committee suggests should be taken into account in drafting strict liability offences.[45] The AGD Guide to Framing Offences notes these principles and advises that instructing 'agencies should familiarise themselves with the principles in Report 6/2002 and the Government response to that report'.[46]

3.30 In its review of Commonwealth criminal law, the ALRC identified numerous strict liability offences applicable to corporations. As the ALRC has previously

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41 Attorney-General's Department (Cth) (n 24) 22.

42 Cf Ken Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions* (Oxford University Press, 4th ed, 2015) 4.

43 Footnote 22 in the AGD Guide to Framing Offences clarifies that '[a] higher maximum fine may be used where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment'.

44 Attorney-General's Department (Cth) (n 24) 23. The AGD's *Commonwealth Criminal Code: A Guide for Practitioners* additionally provides that 'strict or absolute liability may be imposed for circumstances or results of that act of which the offender was completely and perhaps excusably ignorant': Attorney-General's Department et al, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 117 ('*AGD Guide for Practitioners*').

45 Senate Standing Committee for the Scrutiny of Bills (n 40) 283–9. In the Government's response to this report, the Government accepted only one recommendation fully (that the *Criminal Code* provisions relating to strict and absolute liability did not require amendment). The Government did not, however, accept the need to require agencies to comply with the principles identified by the Committee, stating that 'decisions should continue to be made by reference to the specific provisions of each piece of legislation': Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2002—Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2004) 3.

46 Attorney-General's Department (Cth) (n 24) 24.

observed, 'strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation'.[47]

3.31 One third (1,039) of the offences identified in the 25 statutes reviewed by the ALRC are strict liability offences.[48] More than 40% of the offences contained in the *Corporations Act* are strict liability offences.[49] Of the 93 offences provided for in the *ASIC Act*, 55 are strict liability offences (approximately 59%).[50] Only three statutes reviewed by the ALRC do not contain strict liability offences.[51]

3.32 The ALRC identified 599 offences (more than half of the 1,039 strict liability offences reviewed) that exceed the penalty unit benchmarks identified in the AGD Guide to Framing Offences as ordinarily acceptable for strict liability offences.[52]

3.33 In eight of the 25 statutes reviewed by the ALRC, more than a quarter of the total criminal offences identified in the reviewed legislation are strict liability offences attracting maximum penalties of more than 300 penalty units for a corporation. These are the:

- *Australian Consumer Law* (72%);
- *ASIC Act 2001* (Cth) (37.7%);
- *Excise Act 1901* (Cth) (29.3%);
- *Fisheries Management Act 1991* (Cth) (27%);
- *National Consumer Credit Protection Act 2009* (Cth) (45%);
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) (38.3%);
- *Therapeutic Goods Act 1989* (Cth) (28.2%); and
- *Work Health and Safety Act 2011* (Cth) (66%).[53]

3.34 Notably, some of the statutes in which strict liability offences that exceed 300 penalty units for a corporation are most prolific contain offences relating to public health and safety or the environment. As the AGD Guide to Framing Offences specifies, a 'higher fine may be used where the commission of the offence will pose

47 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, 2016) [10.36].

48 *Data Appendices* (n 1) Appendix A, Table 4. Offences for which strict liability applies to only identified elements are not included in this number.

49 The ALRC identified 393 of the 902 offences in the *Corporations Act* as strict liability offences: see ibid Appendix A, Tables 4 and 14.

50 Ibid Appendix A, Tables 4 and 10.

51 *Criminal Code* (n 19); *Fair Work Act 2009* (Cth); *Privacy Act 1988* (Cth). See further *Data Appendices* (n 1) Appendix A, Table 4.

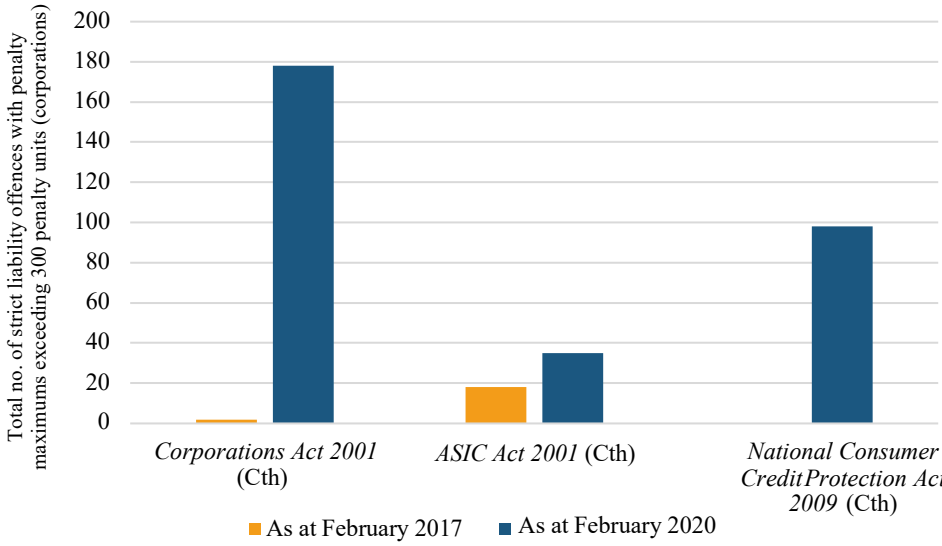
52 *Data Appendices* (n 1) Appendix A, Table 4.

53 For the number of strict liability offences with maximum penalties greater than 300 penalty units for the corporation for each reviewed statute, see ibid.

a serious and immediate threat to public health, safety or the environment'.[54] As seen in Appendix A, Table 4 of the *Data Appendices*, however, such offences are present across the legislation reviewed by the ALRC. Strict liability offences that exceed the recommended maximum penalty are present, to varying degrees, in 17 of the 25 statutes that were reviewed.[55]

3.35 The number of strict liability offences that exceed the recommended penalty benchmark has increased in some of the reviewed legislation in recent years, as illustrated in Figure 3-3.[56]

Figure 3-3: Increase in strict liability offences exceeding penalty maximums of 300 penalty units (for a corporation)[57]



54 Attorney-General's Department (Cth) (n 24) 23 fn 22.

55 See *Data Appendices* (n 1) Appendix A, Table 4.

56 The increase in such offences across the legislation in Figure 3-3 is largely due to the increase in penalties applicable to corporations introduced as part of the ASIC Enforcement Review. See Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.64]–[1.65], [1.67] (considering the appropriateness of increased penalties that do not comply with the AGD Guide to Framing Commonwealth Offences).

57 See *Data Appendices* (n 1) Appendix A, Tables 10, 14, and 24.

3.36 The 25 statutes reviewed more broadly comply with the specification in the AGD Guide to Framing Offences that absolute liability offences should not, generally, be punishable by more than 50 penalty units for a corporation. Indeed, of the statutes reviewed by the ALRC, offences exceeding this penalty were only present in the *Corporations Act* and the *Tax Administration Act 1953* (Cth), and then only to a minimal degree.[58]

3.37 Absolute liability attaches to very few Commonwealth offences, and also to very few identified elements of Commonwealth offences, applicable to corporations. The ALRC identified only six absolute liability *offences* potentially applicable to corporations across the legislation reviewed.[59] None of these absolute liability offences comply with the specification in the AGD Guide to Framing Offences that absolute liability offences should not generally be punishable by more than 50 penalty units for a corporation.[60]

3.38 Notably, there are various offences including identified *elements* of absolute liability in the *Criminal Code*.[61] However, such offences are generally not present in the other legislation reviewed by the ALRC. Indeed, not including the *Criminal Code*, only four statutes include offences with identified elements of absolute liability.[62] This may indicate a difference in approach to the framing of offences under the *Criminal Code* and those sitting outside of it.

Use of infringement notices

3.39 Infringement notices are administrative penalties, sometimes referred to as 'penalties payable instead of prosecution',[63] 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.[64]

3.40 Of the 25 statutes reviewed, 15 provide for infringement notice schemes.[65] Within these statutes, the provisions for which infringement notices are available

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58 See ibid Appendix A, Table 4.

59 *Corporations Act 2001* (Cth) ss 606(1),(2) and (4); *Taxation Administration Act 1953* (Cth) ss 8C(1), 8L(1), 8L(1A). See *Data Appendices* (n 1) Appendix A, Tables 14 and 29.

60 *Data Appendices* (n 1) Appendix A, Table 4.

61 The ALRC identified 160 of the 593 criminal offences in the *Criminal Code* potentially applicable to corporations as including identified elements of absolute liability: see ibid Appendix A, Table 16.

62 *Corporations Act 2001* (Cth) (4 of 902 offences); *Environmental Protection Biodiversity Conservation Act 1999* (Cth) (1 of 146 offences); *Excise Act 1901* (Cth) (1 of 75 offences); *Taxation Administration Act 1953* (Cth) (19 of 52 offences). See *Data Appendices* (n 1) Appendix A, Tables 14, 17, 18, and 28.

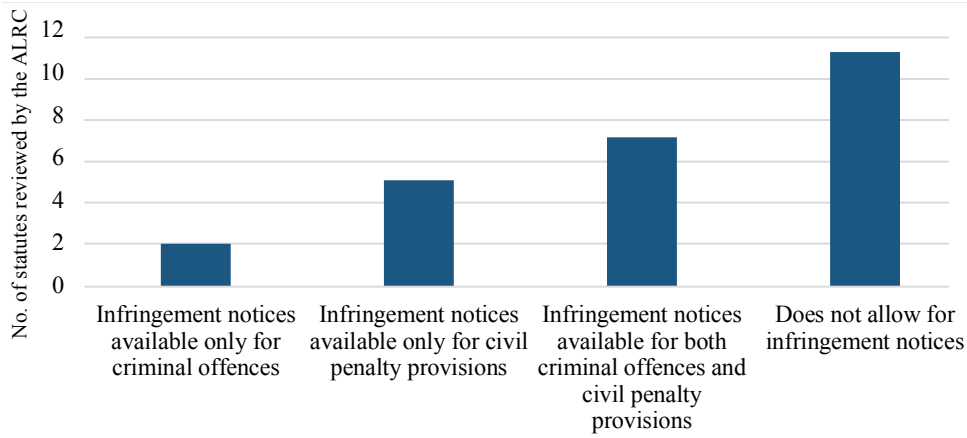
63 See, eg, *Telecommunications Act 1997* (Cth) s 453A.

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

65 See *Data Appendices* (n 1) Appendix A, Table 5.

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 3-4).

Figure 3-4: Availability of infringement notices across reviewed Commonwealth statutes[66]



3.41 Across the legislation containing infringement notice schemes reviewed by the ALRC, 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,[67] whereas others make infringement notices available for entire classes of offences.[68]

Example

Provisions under the *Corporations Act* that may lead to an infringement notice if contravened include strict and absolute liability offences, 'other prescribed offences',[69] and 'prescribed civil penalty provisions'[70] (in addition to infringement notices available for breach of the continuous disclosure provisions[71]).[72]

66 Ibid. Although 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 3-4. 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 of the Act and pt 4-1, div 4 of the *Fair Work Regulations 2009* (Cth) relating to civil penalty provision infringement notices).

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

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

69 Generally, failures to notify ASIC of certain matters: *Corporations Regulations 2001* (Cth) reg 9.4AB.01.

70 Covering a wide range of obligations, including obligations to provide documents to consumers and prohibitions on conflicted remuneration: *Corporations Regulations 2001* (Cth) reg 9.4AB.02.

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

72 This is discussed further in Chapter 5. See particularly [5.112]–[5.113].

3.42 A number of the statutes reviewed allow for changes to the availability of infringement notices by regulation.[73]

3.43 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 provisions relating to unconscionable conduct in the *ASIC Act* can attract an infringement notice.[74] The appropriateness of utilising infringement notices to regulate unconscionable conduct has been questioned, principally because establishing unconscionable conduct involves an evaluative judgment.[75]

Use of civil penalty provisions

3.44 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;[76]
- continuing to charge fees after an arrangement is terminated;[77] or
- a licensee accepting conflicted remuneration.[78]

However, failure to give a client a statement which sets out the terms of a loan is a criminal offence.[79] The principled distinction, if any, warranting civil liability for the former and criminal liability for the latter is unclear.

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73 *Corporations Act 2001* (Cth) s 1317DAN; *Environmental Protection Biodiversity Conservation Act 1999* (Cth) s 497; *Fair Work Act 2009* (Cth) s 799; *Superannuation Industry (Supervision) Act 1993* (Cth) s 223A(3); *Work Health and Safety Act 2011* (Cth) s 243(4).

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

75 *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* (2018) 362 ALR 66, [2018] FCAFC 155 [155]–[157]. There has also been criticism of the availability of infringement notices for breach of continuous disclosure provisions in the *Corporations Act*: see 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.

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

77 Ibid s 962P.

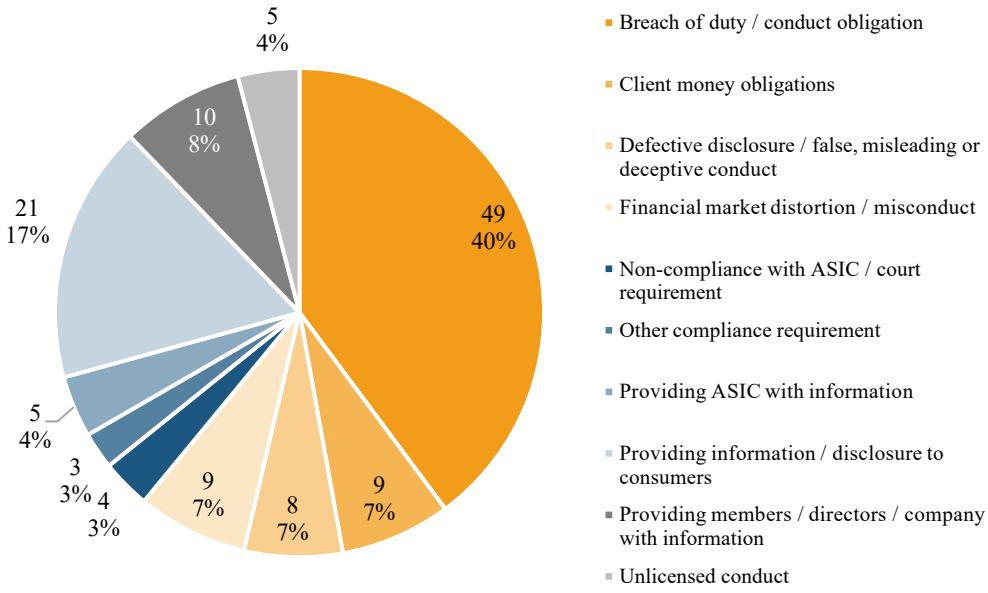
78 Ibid s 963E(2).

79 Ibid s 982C(1).

Types of conduct regulated by civil penalty provisions

3.45 Examining civil penalty provisions within the *Corporations Act* by type reveals little distinction between the categories of misconduct that attract criminal liability (see Figure 3-2 above) and those that attract civil liability (see Figure 3-5 below).

***Figure 3-5: Types of civil penalty provision in the Corporations Act*[80]**

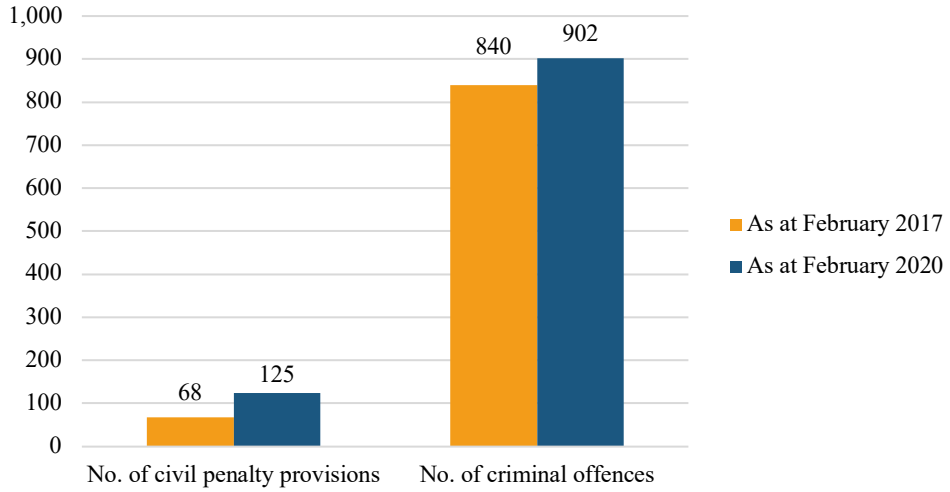


Frequency of civil penalty provisions

3.46 There is a significant difference in the number of civil penalty provisions and offences within the *Corporations Act*. Although the number of civil penalty provisions in the *Corporations Act* has increased in recent years, criminal offence provisions remain the predominant form of legislative prohibition in this statute (see Figure 3-6).

80 See *Data Appendices* (n 1) Appendix A, Table 15. The categories of misconduct are indicative only.

Figure 3-6: Frequency of civil penalty provisions and offences within the Corporations Act[81]



Use of civil penalty provisions as compared to criminal offences

3.47 There is a spectrum of approaches to legislating civil or criminal prohibitions. Contraventions of some statutes are, by general rule, criminal offences,[82] but for others, civil penalties.[83] While there may be legitimate policy reasons for a stronger penalisation regime under the *Work Health and Safety Act 2011* (Cth) — for example, 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.

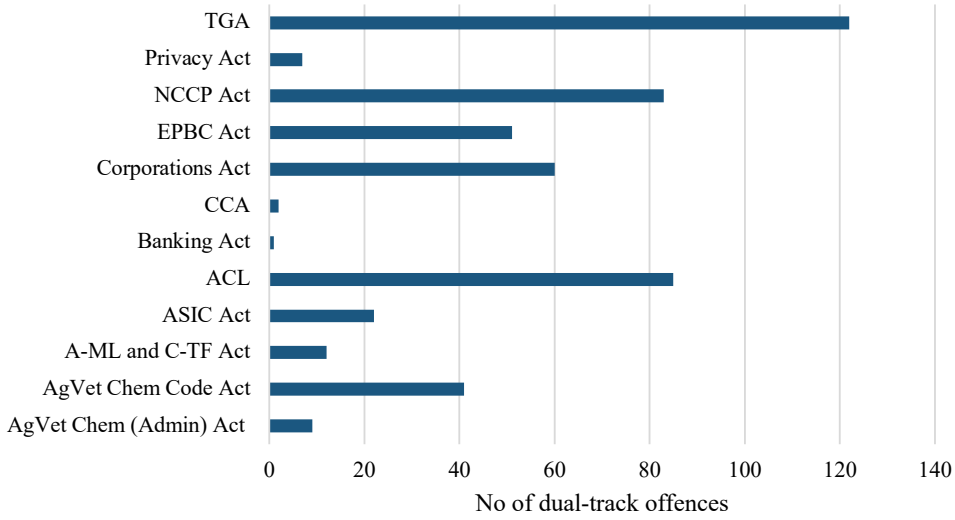
Dual-track regulation

3.48 The ALRC's review has highlighted an increasing preference for legislating both civil penalty provisions *and* criminal offences for prohibited conduct. In multiple statutes, dual-track regulation is provided for identical physical conduct. Dual-track regulation can be problematic because it results in civil and criminal provisions that are nearly identical, with the only difference in effect being the applicable standard of proof. As outlined in Chapter 5 of this Report, as a matter of principle, the defensibility of criminal responsibility for corporations rests on such liability being reserved for distinct — only the most egregious — misconduct, rather than that to which civil penalties attach.[84] Dual-track regulation can risk blurring that distinction.

81 See ibid Appendix A, Tables 14 and 15.
82 See, eg, *Work Health and Safety Act 2011* (Cth).
83 See, eg, *Privacy Act 1988* (Cth).
84 See [5.65]–[5.94].

3.49 Of the 25 statutes reviewed by the ALRC, 12 were identified as containing dual-track regulation.[85] Figure 3-7 portrays the number of offences in each statute for which the ALRC identified a civil penalty provision with physical conduct elements equivalent to those of the principal offence.

Figure 3-7: Number of offences with dual-track regulation in statutes reviewed by the ALRC[86]



3.50 In some of the reviewed statutes, there is dual-track regulation for the majority of offences.[87] In other legislation, dual-track regulation is infrequent,[88] or not present at all.[89]

85 *Data Appendices* (n 1) Appendix A, Table 4.

86 Ibid. Offences are included as 'dual-track' offences for the purposes of the graph if there is a civil penalty provision in the statute with physical elements that are effectively the same, if not also identical in form, to those of the offence. There are additional civil provisions in some statutes that relate to the misconduct regulated by the offence; these are not counted in the graph.

87 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) (50% of the relevant offences); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (approximately 76% of the relevant offences); *Australian Consumer Law* (approximately 99% of the relevant offences). 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. See further *Data Appendices* (n 1) Appendix A, Table 4.

88 *Competition and Consumer Act 2010* (Cth) (approximately 4% of relevant offences, not including those in the *Australian Consumer Law* located in Schedule 2); *Corporations Act 2001* (Cth) (approximately 7% of relevant offences).

89 *Banking Act 1959* (Cth); *Criminal Code* (n 19); *Excise Act 1901* (Cth); *Export Control Act 1982* (Cth); *Fair Work Act 2009* (Cth); *Fisheries Management Act 1991* (Cth); *Income Tax Assessment Act 1936* (Cth); *Income Tax Assessment Act 1997* (Cth); *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); *Taxation Administration Act 1953* (Cth); *Telecommunications Act 1997* (Cth); *Work Health and Safety Act 2011* (Cth).

3.51 The *increasing* preference for dual-track regulation is evidenced by the recent changes to the *Corporations Act* following the ASIC Enforcement Review between October 2016 and December 2017. That review introduced 37 civil penalty provisions,[90] 23 of which were also criminal offences.[91] 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 in accordance with the *Criminal Code*.[92]

3.52 Eight of the 25 statutes reviewed by the ALRC contain strict liability offences that also have equivalent civil penalty provisions.[93] As strict liability negates the requirement to prove fault for these offences, and the equivalent civil penalty provisions have identical physical elements, the regulated conduct is substantially the same. Under some statutes, the maximum penalty applicable to the civil penalty provisions is significantly greater than for the principal criminal offence.[94] In such circumstances, it cannot be said that the criminal offence necessarily applies to more serious conduct, nor that it attracts more serious penalties, than the civil penalty equivalent.

Availability of non-monetary penalties

3.53 Some form of non-monetary penalty is available under eight of the 25 statutes reviewed by the ALRC.[95]

3.54 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.[96]

3.55 The most popular form of non-monetary penalty regime amongst these statutes is a combination of provisions that make available adverse publicity orders,

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90 See Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) 43–5.

91 See *Data Appendices* (n 1) Appendix A, Tables 14 and 15.

92 The *Criminal Code* ascribes particular fault elements to types of conduct where the provision is itself silent: *Criminal Code* (n 19) s 5.6.

93 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth); *Agricultural and Veterinary Chemicals Code Act 1994* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth); *Australian Consumer Law* (n 26); *Corporations Act 2001* (Cth); *Environmental Protection Biodiversity Conservation Act 1999* (Cth); *National Consumer Credit Protection Act 2009* (Cth); *Therapeutic Goods Act 1989* (Cth). See further *Data Appendices* (n 1) Appendix A, Table 4.

94 See, eg, *National Consumer Credit Protection Act 2009* (Cth).

95 See *Data Appendices* (n 1) Appendix A, Table 5. 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.

96 Ibid.

disqualification orders, and a range of 'non-punitive orders' (including community service orders, probation orders, disclosure orders, and advertisement orders).[97] Examples are included in the *ASIC Act*, the *Australian Consumer Law*, and the *Competition and Consumer Act 2010* (Cth).

3.56 None of the legislation reviewed allows for a court to order that a corporation be deregistered as a penalty for an offence.[98]

Legislative methods for attributing liability to corporations

3.57 Part 2.5 of the *Criminal Code* provides the default method for attributing criminal liability to body corporates under the Commonwealth criminal law.[99] Notwithstanding this, the majority of legislation reviewed by the ALRC expressly excludes the operation of Part 2.5.[100] Instead, these statutes generally contain alternative legislative attribution methods, as shown in Figure 3-8. One statute contains an alternative attribution method without excluding Part 2.5,[101] making it theoretically possible to attribute liability under either regime.[102]

97 For a discussion of non-monetary penalties, see [8.64]–[8.125].

98 *Data Appendices* (n 1) Appendix A, Table 5.

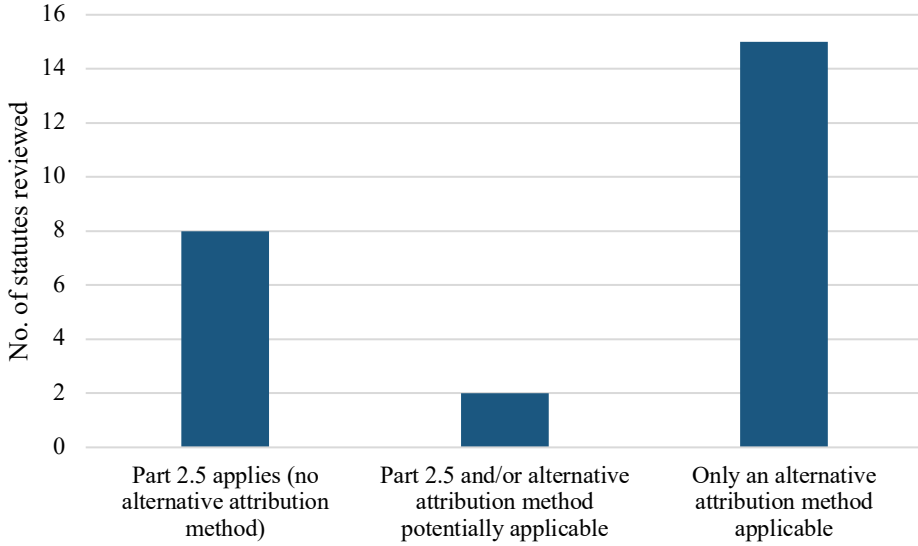
99 Chapter 6 provides a detailed description of attribution under Commonwealth criminal law.

100 See *Data Appendices* (n 1) Appendix A, Table 2.

101 *Therapeutic Goods Act 1989* (Cth).

102 There was, for a period, a provision in the *Therapeutic Goods Act 1989* (Cth) expressly excluding Part 2.5. In 2001, amending legislation inserted s 5A into the statute, reading 'Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against this Act': see *Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) sch 1, s 150. In 2006, s 5A was repealed and a provision that does not address the application of the *Criminal Code* in general, or Part 2.5 in particular, was substituted: *Therapeutic Goods Amendment Act (No 1) 2006* (Cth) sch 1, s 6. As the Act does not, by clear and unambiguous statutory language, exclude Part 2.5, it applies to offences arising under the Act: *Criminal Code* (n 19) s. 2.2.

Figure 3-8: Approaches to attribution across reviewed Commonwealth legislation [103]



3.58 The ALRC's consultations with stakeholders have confirmed that one effect of the existence 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.

3.59 An example is the law relating to the provision of extended warranties, which may be subject to provisions of the *ASIC Act*, *Corporations Act*, or *Australian Consumer Law*, depending on the circumstances. Although each of these statutes contain similar attribution methods, the provisions are not identical, and circumstances could conceivably arise whereby the attribution method might result in corporate liability under one Act but not another.[104]

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103 See *Data Appendices* (n 1) Appendix A, Table 2. Figure 3-8 counts different statutes, not attribution methods. For example, the *Corporations Act* is counted once as a statute to which 'Part 2.5 and/or alternative attribution method potentially applicable' because the ALRC identified three different attribution methods (Part 2.5 and two methods resembling the TPA Model) that may apply to an offence under the Act, depending on the offence. Although it is recognised that the *Australian Consumer Law* is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), it is counted separately to that Act (consistently with the approach to analysis of the reviewed legislation throughout this chapter).

104 The potential complexity that may arise is well illustrated in the case law. See, eg, *Australian Securities and Investments Commission v Managed Investments Ltd (No 9)* (2016) 308 FLR 216, [2016] QSC 109 [589]–[590], [595]–[613] (observing at [590] that 'if their behaviour is not able to be treated as part of the directing mind and will of the company, it may yet be attributed to the company by primary rules of attribution found in the company's constitution or the principles of company law as well as by general rules, the rules of agency and vicarious liability, or, if appropriate, by special rules of attribution in particular

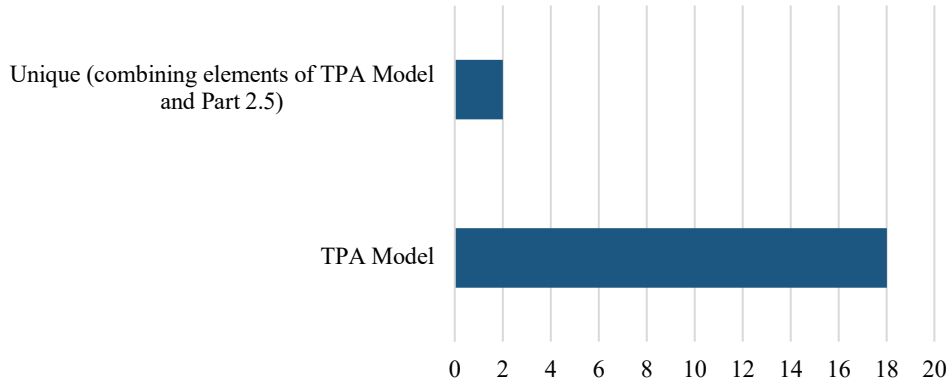
Alternative attribution methods

3.60 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 of the *Criminal Code* by nearly two decades.[105]

3.61 The defining features of the TPA Model are outlined and analysed in Chapter 6.

3.62 Figure 3-9 illustrates the proportion of alternative legislative attribution methods across the reviewed legislation that reflect the TPA Model.[106]

Figure 3-9: Type of attribution method adopted in alternative legislative attribution methods [107]



3.63 Appendix A, Table 2 of the *Data Appendices* provides a summary of the ALRC's analysis of each alternative method by reference to the defining features of the TPA Model to reveal areas of consistency and inconsistency, although the precise drafting of each attribution method might differ. For example, only two of the alternative attribution methods reviewed that employ the TPA Model do not contain the words 'on behalf of'.[108]

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cases used to determine those acts, knowledge or state of mind were, for a particular purpose, intended to be attributed to the company'); *Cleary v Australian Co-operative Foods* (1999) 32 ACSR 582, [1999] NSWSC 973 [44]–[49] (illustrating the multiple statutory regimes, with differing methods of attribution, that may apply to a misleading and deceptive conduct claim).

105 The evolution of Part 2.5 of the *Criminal Code* and its scope are discussed in Chapters 1, 2, and 6.

106 The figure refers to *methods* of attribution available under the reviewed legislation. For some statutes, there is more than one method of attribution available: see, eg, *Corporations Act 2001* (Cth).

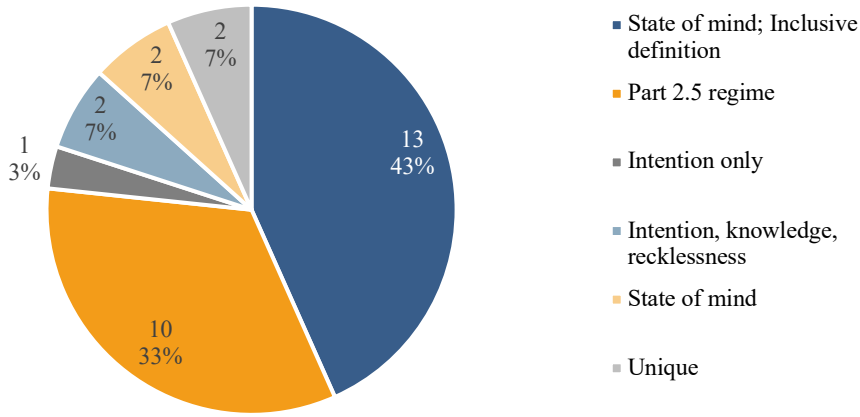
107 See *Data Appendices* (n 1) Appendix A, Table 2. The TPA Model itself, contained in s 84 of the *Trade Practices Act 1974* (Cth), is not counted in this graph or in subsequent figures relating to alternative legislative attribution methods.

108 *Fisheries Management Act 1991* (Cth); *National Consumer Credit Protection Act 2009* (Cth) sch 1. The differences are analysed in more detail in Chapter 6.

Attributable fault elements

3.64 Each attribution provision that resembles the TPA Model applies to establish the 'state of mind' of a corporation. In addition, many of these provisions also contain a definition of 'state of mind' explicitly stating that the term is inclusive of fault elements such as intention, knowledge, or recklessness (see Figure 3-10). Indeed, of the reviewed statutes containing attribution provisions reflecting the TPA Model, 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.[109] The attribution method provided for under the *Taxation Administration Act 1953* (Cth) is an outlier in that it uses the TPA Model, but applies only to establish a fault element of 'intention'.[110] Further, the attribution method contained in s 1042G of the *Corporations Act* applicable to establishing insider trading under s 1043A of that Act provides for four offence-specific states of mind, attributed from officers.[111]

***Figure 3-10: Fault elements covered by statutory attribution methods*[112]**



3.65 The actors covered under the fault limb of the various statutory methods of attribution vary (see Figure 3-11).

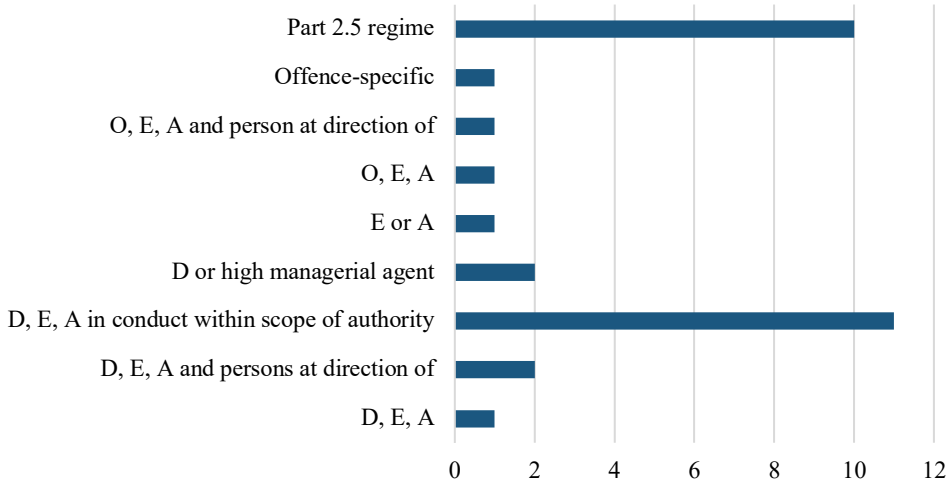
109 Cf *Corporations Act 2001* (Cth) s 1042G; *National Consumer Credit Protection Act 2009* (Cth) sch 1, s 199. See *Data Appendices* (n 1) Appendix A, Table 2.

110 *Data Appendices* (n 1) Appendix A, Table 3 shows that the earliest versions of the TPA Model only applied to the fault element of intention.

111 Section 1042G operates in addition to s 769B, and provides four offence-specific rules for attributing possession of information, knowledge, recklessness, and when a corporation can be said to ought have reasonably known of any matter or thing.

112 See *Data Appendices* (n 1) Appendix A, Table 2. The *Therapeutic Goods Act 1989* (Cth) is counted twice in this graph and subsequent figures relating to all available attribution methods under the reviewed legislation, consistent with the availability of two attribution methods under this statute.

Figure 3-11: Actors covered under the fault limb of statutory attribution methods[113]



Defences to corporate liability

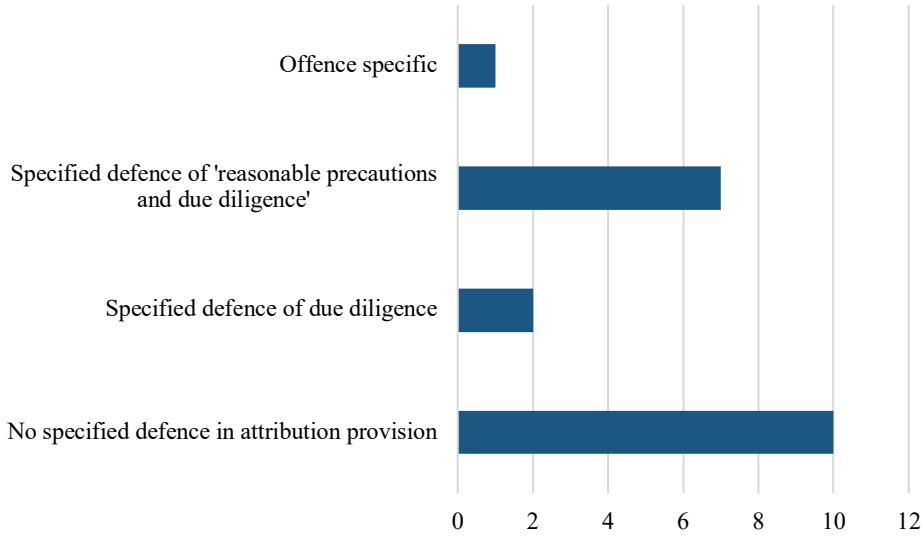
3.66 Of the alternative attribution methods contained in the legislation, half specify a defence.[114] Where a defence is specified, the most prevalent defence is that of 'reasonable precautions and due diligence' (see Figure 3-12).[115]

113 Ibid. 'D, E, A' refers to a director, employee, or agent. 'O, E, A' refers to an officer, employee, or agent. Where either reference is followed by 'in conduct within scope of authority', the reference is to that actor acting within the scope of his or her actual or apparent authority. 'D or high managerial agent' refers to a director, or an employee or agent with duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the body corporate. These references are indicative only. The relevant sections should be consulted directly for further analysis.

114 Ibid.

115 Ibid.

Figure 3-12: Specified defences in alternative statutory attribution methods[116]



Provisions holding individuals responsible for certain misconduct

3.67 As part of this Inquiry, the ALRC also reviewed provisions relevant to individual liability contained in the relevant legislation.[117] The focus of this review was to identify provisions where individuals could be made liable for a crime or contravention by a corporation through specific accessorial liability or extended management liability provisions.[118]

3.68 Across the 25 statutes reviewed, the ALRC identified 77 separate provisions that could extend individual liability — civil or criminal — for corporate fault in certain circumstances.[119] There are four main types of derivative liability provided in these provisions:

- general accessorial liability provisions, which extend liability to any individual for complicity in any offence or contravention;
- board and/or management-specific accessorial liability provisions, which extend liability to directors and/or senior managers for complicity in corporate offences or contraventions;
- 'deemed' liability, where a director and/or senior manager is taken to have committed an offence or contravention committed by a corporation as a result of their position in the corporation; and

116 Ibid.
117 See, for a summary, ibid Appendix A, Table 6.
118 The review is discussed further in Chapter 9.
119 See further *Data Appendices* (n 1) Appendix A, Table 6.

- 'failure to prevent' liability, where the individual commits a separate offence when that individual fails to prevent relevant conduct engaged in by the corporation.[120]

Criminal prosecutions of corporate actors

Summary

3.69 Based on the data available, the ALRC's key findings are that prosecutions against corporations under Commonwealth criminal laws are:

- extremely rare, relative to prosecutions of individuals;
- generally against small corporations, and only very rarely against large corporations;
- most often in relation to regulatory offences;
- typically long in duration;
- often withdrawn or not pursued; but
- generally successful, when pursued to completion.

Frequency

3.70 Prosecutions of corporations in Australia, relative to those of individuals, are extremely rare. That corporate prosecutions occur less than individual prosecutions is, to an extent, understandable. According to ASIC, as of February 2020, there were 2,749,279 companies registered in Australia.[121] Comparatively, the ABS reported Australia's population as being 25,464,116 people as at 30 September 2019.[122] Considering the sheer difference in the number of corporate actors as compared to individuals, the incidence of corporate crime in Australia, and of related enforcement action, is unlikely to be commensurate to that of individuals.

3.71 Corporations do, however, commit crime. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry clearly established that significant corporate misconduct has occurred in Australia in recent years.[123] Further, academic commentators have suggested that the incentive to commit crime increases, rather than decreases, in corporate organisational contexts.[124] It

120 Individual liability for corporate conduct is discussed further in Chapter 9.

121 Australian Securities and Investments Commission, '2020 Company Registration Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/>.

122 Australian Bureau of Statistics, *Australian Demographic Statistics, September 2019* (Catalogue No 3101.0, 19 March 2020).

123 See, especially, 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).

124 This literature is discussed further in Chapter 4.

is apparent, therefore, that, notwithstanding a lack of specific national statistics evidencing high corporate crime rates or corporate victimisation in Australia,[125] and the particular difficulties associated with prosecuting corporate and white collar crime as compared to other types of crime,[126] significant amounts of corporate misconduct do in fact occur.[127] That the law be enforced against corporate entities for such misconduct, as it should be for individuals, is both essential to a society underpinned by the rule of law and a strong community expectation.[128] It is also consistent with the legislative choice to subject corporations to the criminal law in the same way, to the extent possible, as individuals.

3.72 The data collected by the ALRC shows, however, that criminal enforcement action is taken against corporations significantly less often than against individuals, and also infrequently in specific regulatory contexts that are particularly concerned with corporate actors. Generally, approximately only 1% of finalised appearances in criminal courts involve corporate defendants.[129] Even in more specific regulatory contexts in which comparatively high volumes of corporate prosecutions may be expected, regulatory action against corporations is infrequent. For example, approximately only 5% of criminal proceedings brought under ASIC-enforced legislation that are publicly reported on involve corporate defendants.[130] Similarly low numbers of individual prosecutions in some regulatory contexts — as seen, for example, under ACCC-administered legislation[131] — suggest that particular challenges attach to enforcement of the criminal law in corporate contexts.

3.73 In the 2018–19 financial year, less than 1% of finalised defendants in Australian criminal courts were organisations.[132] Although this was a slight decrease from previous years (see Figure 3-13), the data shows that prosecutions of organisation defendants are consistently low.

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125 See further [3.111]–[3.126].

126 See, eg, Mihailis E Diamantis and William S Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15(1) *Annual Review of Law and Social Science* 453. Although enforcement challenges were not a particular focus of this Inquiry, they were raised frequently with the ALRC in consultations.

127 Dr Walburg has stated of the incidence of corporate crime generally that '[a]ll in all, it is fair to assume that officially recorded corporate crime represents only the tip of a large iceberg': Christian Walburg, 'The Measurement of Corporate Crime: An Exercise in Futility?' in Judith van Erp, Wim Huisman and Gudrun Vande Walle (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge, 2015) 27.

128 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 32) 3, 12.

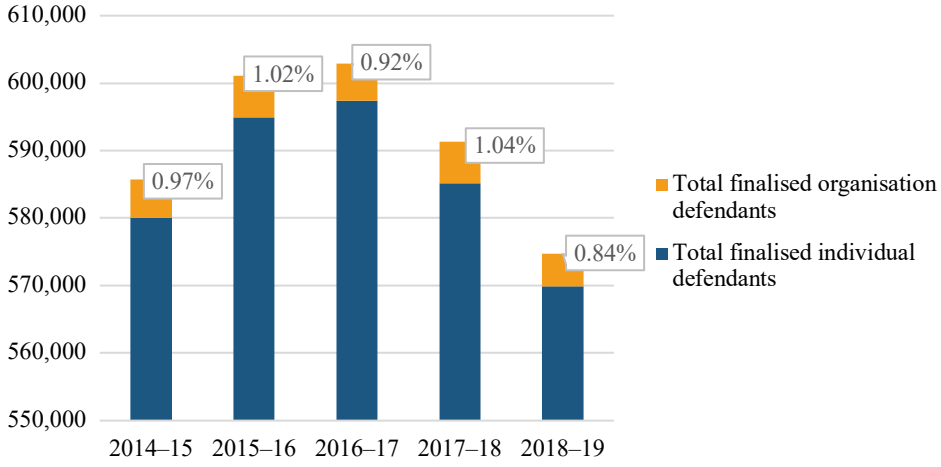
129 See [3.73]–[3.75] below.

130 See [3.80] below. However, this is not the case for all regulatory contexts that involve high numbers of corporate actors, as evidenced by the volume of corporate prosecutions under WHS laws: see [3.82]–[3.83].

131 See also Table 3-4 below.

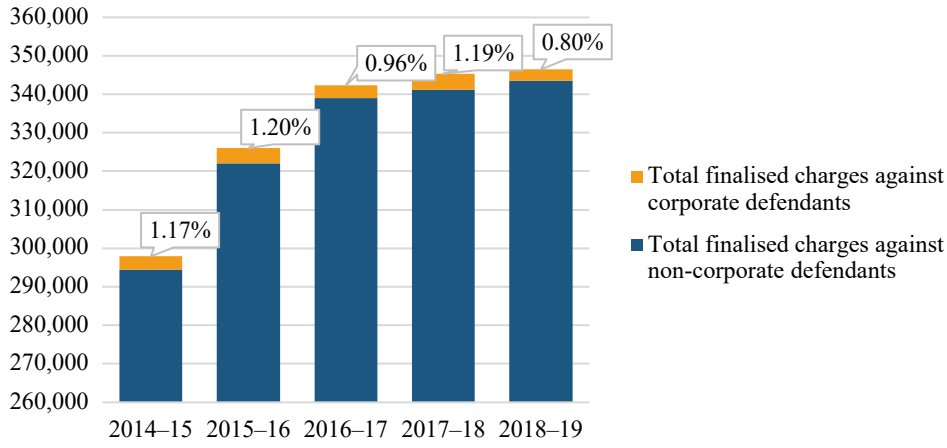
132 Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) Table 1.

Figure 3-13: Total finalised defendants in Australian criminal courts [133]



3.74 This trend is also present in the BOCSAR Data relating to finalised charges against only companies (as compared to other organisational defendants) in NSW criminal courts (Figure 3-14).

Figure 3-14: Total finalised charges (proven court appearances) by defendant in NSW criminal courts [134]

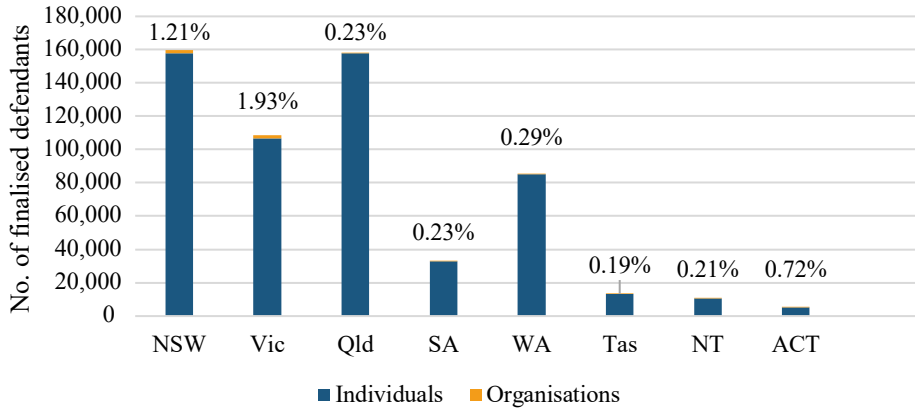


133 Ibid. The principal counting unit for the ABS Data is the *finalised defendant*. This is 'a person or organisation for whom all charges within a case have been formally completed so that they cease to be an active item of work for the court during the reference period': Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) Explanatory Notes; see also Australian Bureau of Statistics, *Criminal Courts, Australia — Organisations Data: Customised Report for the Australian Law Reform Commission* (2020) Explanatory Notes < www.alrc.gov.au>.

134 See NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>. The principal counting unit for the BOCSAR data is the *finalised charge*. This is a charge 'which has been fully determined

3.75 Prosecutions of organisations are, by percentage, even less frequent in other jurisdictions, with the exception of Victoria (see Figure 3-15).

Figure 3-15: Number of finalised defendants in Australian criminal courts in 2018–19[135]



3.76 The number of criminal prosecutions of corporations commenced in the Federal Court of Australia between July 2009 and June 2019 is very small; only four prosecutions against corporations occurred in the reference period.[136] This can be explained by the Federal Court's almost exclusively civil jurisdiction.[137] Most criminal matters are dealt with by state and territory courts.[138]

3.77 The prosecutorial data shared with the ALRC by certain agencies and regulators also indicated a relatively low incidence of prosecutions against corporations. Between 30 June 2009 and 30 June 2019, the CDPP commenced a total

by the court and for which no further court proceedings are required': New South Wales Bureau of Crime Statistics and Research, *Criminal Court Statistics Jul 2014-Jun 2019*, Explanatory Notes. A person charged with more than one offence appears more than once.

135 Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) Table 2.

136 *Deckers Outdoor Corporation Pty Ltd v Farley (No 6)* [2010] FCA 391; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876; *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575, [2019] FCA 1170. The fourth matter is ongoing. As discussed further below, three of the four matters involved the offence of giving effect to a cartel provision. The one matter arising from the Court's non-cartel jurisdiction in the reference period involved two companies charged with contempt of court.

137 See *Federal Court of Australia Act 1976* (Cth) ss 19, 32; *Judiciary Act 1903* (Cth) s 39B(1A)(c) (expanding the Court's jurisdiction to matters 'arising under any laws made by the Parliament, *other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter*' [emphasis added]). The effect is that the Federal Court has jurisdiction over criminal matters only where a federal statute specifically confers jurisdiction on the Federal Court over such matters. Examples of such jurisdiction include the Court's jurisdiction in relation to cartel offences under the *Competition and Consumer Act 2010* (Cth), certain offences under the *Copyright Act 1968* (Cth), offences under the consumer protection division of Part 2 of the *ASIC Act 2001* (Cth), and the *Fair Work Act 2009* (Cth).

138 This is for the reasons identified in Chapter 1, [1.35]–[1.38].

of 580 prosecutions against corporations, as compared to 28,361 against individuals — 2% of prosecutions commenced by the CDPP in the reference period were against corporations.[139]

3.78 Between 30 June 2015 and 30 June 2019, ASIC internally conducted 'between 350 and 450 prosecutions annually'.[140] These matters are those prosecuted internally by ASIC's Small Business Compliance and Deterrence Team against small business entities and individuals.[141] ASIC informed the ALRC that the 'vast majority' — 90% to 95% — of these summary prosecutions concern 'breaches by company officers'.[142] Approximately 5% to 10% are against corporations (equating to approximately 17 to 45 corporate internal prosecutions against small businesses annually).[143]

3.79 In addition to ASIC's internal prosecutions, for the duration of the reference period, ASIC referred between 35 to 50 briefs of evidence to the CDPP annually. 194 matters — against both corporate and individual defendants — prosecuted by the CDPP on referral from ASIC were finalised in this period.[144]

3.80 The ALRC Review of ASIC Enforcement Data, which is limited to proceedings reported on by ASIC in media releases,[145] revealed that only a small number of publicly reported criminal cases brought under legislation enforced by ASIC in the reference period were against corporations. Of the 151 publicly reported criminal proceedings identified in the ALRC Review of ASIC Enforcement Data, only eight (5.3%) involved a corporate defendant.[146]

3.81 The ALRC Review of ACCC Enforcement Data identified similarly low numbers of publicly-reported criminal cases involving a corporate defendant. It also identified criminal cases under ACCC-administered legislation against individuals as infrequent. Between 1 January 2015 and 20 March 2020, of the 133 publicly reported proceedings brought under ACCC-administered legislation, only 10 were criminal proceedings, six of which involved a corporate defendant.[147]

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139 13 prosecutions against corporations were commenced under the *Criminal Code*; 567 prosecutions against corporations were commenced under Commonwealth statutes other than the *Criminal Code*: Advice Correspondence from Office of the Commonwealth Director of Public Prosecutions to Australian Law Reform Commission, 7 August–29 October 2019.

140 These prosecutions occur pursuant to the Memorandum of Understanding between the CDPP and ASIC, which provides that summary regulatory offences that ASIC may prosecute itself are agreed upon between the agencies at a national level as the need arises. The arrangement 'reduces the burden of these high-volume regulatory prosecutions on the resources of the CDPP': Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019.

141 Ibid.

142 Ibid.

143 Ibid.

144 Ibid.

145 The dataset also excludes matters conducted by ASIC's Small Business Compliance and Deterrence Team. Hence the dataset is predominantly constituted of the matters referred to the CDPP by ASIC referred to in [3.79].

146 Where cases involved both a corporate and an individual defendant they are counted in both figures. See further *Data Appendices* (n 1) Appendix B, Table 2.

147 Ibid Appendix B, Table 3.

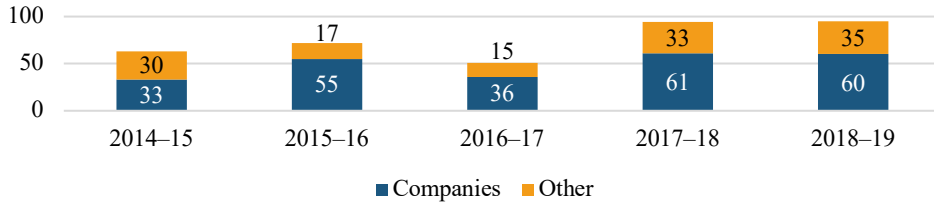
3.82 The ALRC was informed in consultations that prosecutions of corporations are relatively frequent under WHS legislation. This is confirmed by the WHS Data, which indicates that, relative to enforcement action under legislation regulated by ASIC or the ACCC, corporate prosecutions are frequent under WHS legislation. For example, 137 of the 151 finalised prosecutions in Victoria in 2018–19 were against corporate defendants.[148] Table 3-1 shows the comparative frequency of WHS prosecutions across NSW, Victoria, and Queensland. The high volume of WHS prosecutions is consistent with the design of WHS laws, which are structured to prosecute failures to address WHS risks, rather than the actual consequences of breaches.[149]

Table 3-1: WHS prosecutions in NSW, Victoria, and Queensland, 2018–19[150]

No.	NSW	Vic	Qld[151]
Prosecutions commenced	134	156	29
Prosecutions finalised	60	151	16[152]

3.83 The frequency of WHS prosecutions against corporations relative to individuals is also reflected in the BOCSAR Data relating to finalised charges in NSW criminal courts under the *Work Health and Safety Act 2011* (NSW) (see Figure 3-16).

Figure 3-16: Finalised charges under the Work Health and Safety Act 2011 (NSW) in NSW criminal courts[153]



148 Ibid Appendix B, Table 4.

149 The structure of WHS laws is addressed further in Chapter 7 at [7.182]–[7.192].

150 See further *Data Appendices* (n 1) Appendix B, Table 4. The data includes prosecutions of both individuals and corporations. The data in this table is derived from the relevant annual reports of enforcement agencies in each jurisdiction: see NSW Department of Finance, Services and Innovation, *Annual Report 2018/2019* (2019) 75–6; WorkSafe Victoria, *Annual Report 2018-19* (2019) 23, 124–135; Office of the Work Health and Safety Prosecutor (Qld), *Annual Report 2018-19* (2019) 14–15.

151 See Office of the Work Health and Safety Prosecutor (Qld) (n 150) 14–15. The lower numbers for Queensland may be partly explained by Queensland's creation of the Office of the Work Health and Safety Prosecutor in 2019. However, the low numbers of WHS prosecutions were also criticised in the recent *Best Practice Review of Workplace Health and Safety Queensland*: see Tim Lyons, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) 71–4.

152 This figure is not explicit in the relevant underlying data. It has been derived by reference to the stated number of successful prosecutions and success rate: Office of the Work Health and Safety Prosecutor (Qld) (n 150) 13–15.

153 See further NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>.

Type of corporate defendant

3.84 The available data indicates that corporate prosecutions are mainly brought against small corporations. For example, the summary prosecutions conducted internally by ASIC against small business entities each year (approximately 17 to 45[154]) outnumbers the total criminal prosecutions against corporations identified in the ALRC's Review of ASIC Enforcement Data (see Table 3-2).

Table 3-2: ASIC/ACCC prosecutions of corporations by size of corporation over 5-year period [155]

Type of corporation prosecuted	ASIC	ACCC
Small	5	2
Largest	3	4

3.85 ASIC informed the ALRC that the small business entities prosecuted by ASIC's Small Business Compliance and Deterrence Team are 'generally of unlisted public companies'.[156]

Type of offences charged

3.86 As outlined earlier in this chapter,[157] Commonwealth offences generally apply in the same way to corporations as to individuals,[158] with the exception of offences that are incapable, by nature, of corporate commission, which are few.[159] Notwithstanding this position as a matter of law, the data collected by the ALRC indicates that when corporations are prosecuted, it is generally for a narrow category of offences. Notably, a high volume of corporate prosecutions relate to regulatory offences.

3.87 According to the ABS Data, the most frequently prosecuted Australian and New Zealand Standard Offence Classification ('ANZSOC') sub-division categories of offences for organisation defendants in Australian criminal courts are:

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154 This number is derived from ASIC's estimation that over the last five financial years, between 350 and 450 prosecutions were conducted annually by ASIC's Small Business Compliance and Deterrence Team, and between 5% and 10% of these prosecutions are of entities who fail to lodge an annual report with ASIC: Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019. This number could also include small business entities that are not corporations.

155 The comparisons made in this table are indicative only. See further *Data Appendices* (n 1) Appendix B, Tables 2 and 3. Further information about the methodology used to categorise corporate defendants in this table is provided in the Explanatory Notes to the *Data Appendices*.

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

157 See [3.14]–[3.17].

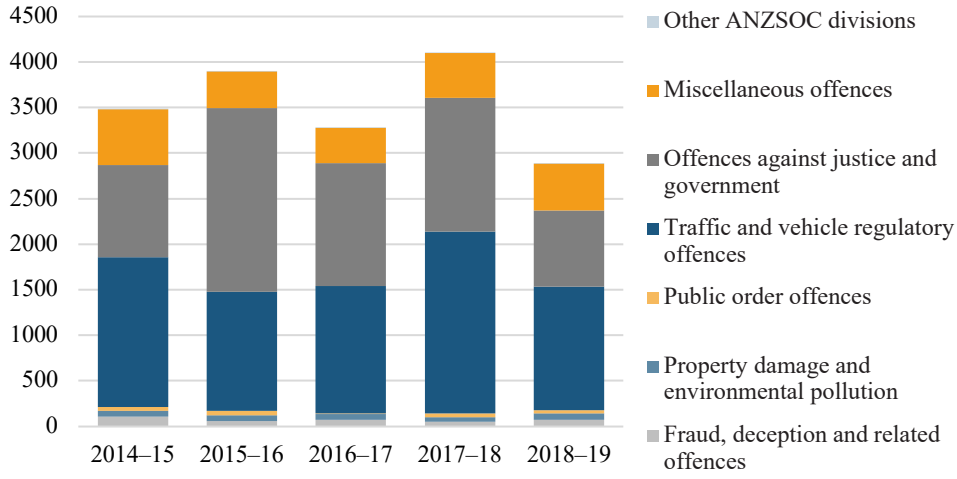
158 *Criminal Code* (n 19) s 12.1.

159 See *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, [2008] NSWCA 204 [21].

- deceptive business/government practices;
- environmental pollution;
- regulated public order offences;
- vehicle registration and roadworthiness offences;
- regulatory driving offences;
- offences against government operations;
- offences against justice procedures;
- public health and safety offences;
- commercial/industry/financial regulation offences; and
- other miscellaneous offences.[160]

3.88 Of the charges finalised in NSW criminal courts in 2018–19 involving a corporate defendant, nearly 50% related to a traffic or vehicle regulatory offence (see Figure 3-17).

***Figure 3-17: Total finalised charges (proven court appearances) against companies in NSW criminal courts by principal offence*[161]**

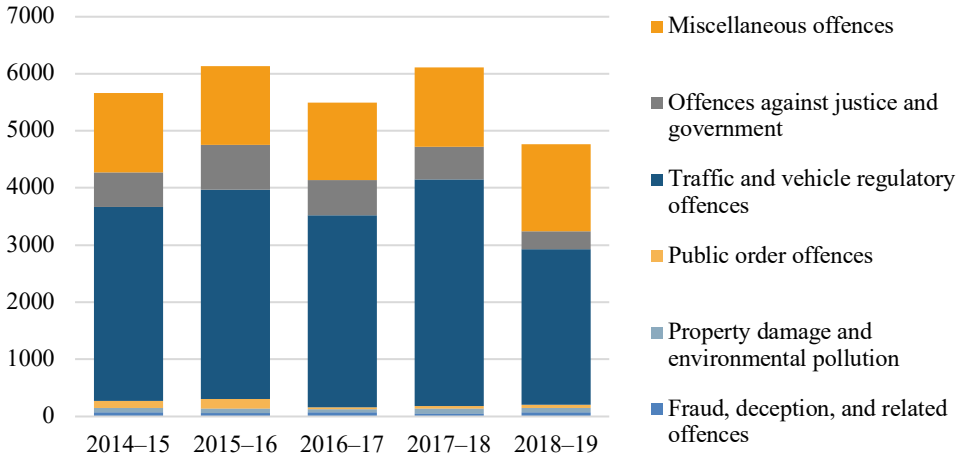


160 See Australian Bureau of Statistics, *Criminal Courts, Australia — Organisations Data: Customised Report for the Australian Law Reform Commission* (2020) Table 2 <www.alrc.gov.au>.

161 See NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>. The categories of offences represented in these figures are those of the Australian and New Zealand Standard Offence Classification ('ANZSOC'): see Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (Catalogue No 1234.0, 3rd ed, 2011). Most financial services industry offences are categorised as 'miscellaneous offences', an ANZSOC division which includes a sub-division of 'commercial/industry/financial regulation' offences. The finalised charges represented in each graph include charges brought under Commonwealth and relevant state legislation.

3.89 The ABS data reflects a similarly high volume of regulatory offence prosecutions (see Figure 3-18).

Figure 3-18: Total finalised organisation defendants in Australian criminal courts by principal offence[162]



3.90 Corporate criminal matters in the Federal Court were, unsurprisingly, an exception to the trends relating to regulatory charges. Two of the three relevant completed matters finalised in the Federal Court during the reference period involved the offence of giving effect to a cartel provision, contrary to s 44ZZRG(1) of the *Competition and Consumer Act 2010* (Cth).[163] Similarly, the corporate defendant in the matter ongoing before the Court is alleged to have committed two offences against s 44ZZRG(1) of the *Competition and Consumer Act 2010* (Cth) and one offence of attempting to induce the contravention of a cartel offence provision, namely s 44ZZRF(1) involving 'making a contract etc. containing a cartel provision'. The fourth criminal matter involving a corporation in the Federal Court finalised during the reference period involved charges against two companies for contempt of the Court.[164]

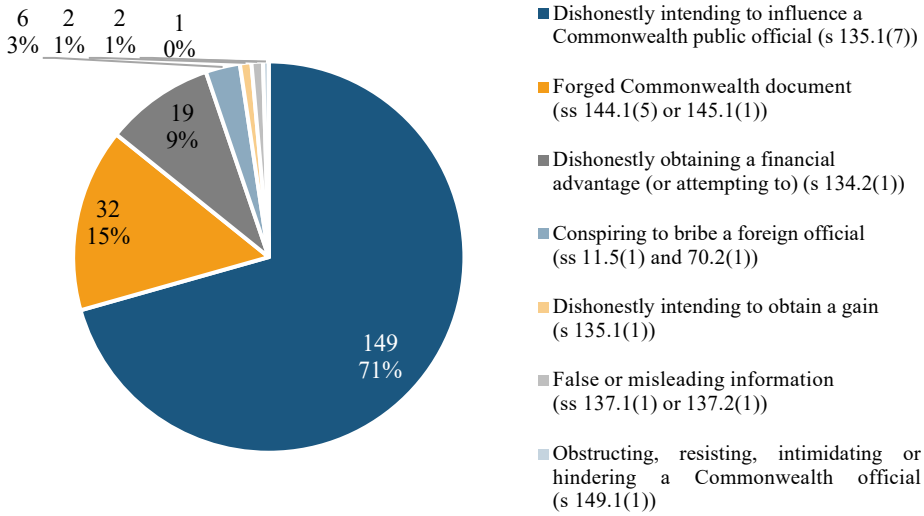
162 See Australian Bureau of Statistics, *Criminal Courts, Australia — Organisations Data: Customised Report for the Australian Law Reform Commission* (2020) Table 2 <www.alrc.gov.au>. 'Miscellaneous offences' includes 'public health and safety offences', 'commercial/industry/financial regulation', and 'other' offences.

163 Now contained in *Competition and Consumer Act 2010* (Cth) s 45AG(1).

164 Although this matter was commenced in 2008, it was concluded in 2010 and therefore was included in this dataset. See *Deckers Outdoor Corporation Pty Ltd v Farley (No 6)* [2010] FCA 391.

3.91 Most charges brought against corporations by the CDPP were not for offences under the *Criminal Code*. In the context of this Inquiry, this is particularly relevant to understanding the applicable method for attributing criminal responsibility to a corporation. The CDPP commenced 13 cases against corporations for offences under the *Criminal Code* between 30 June 2009 and 30 June 2019, involving a total of 214 charges involving nine different offences. The main categories of offences are presented in Figure 3-19. In addition, three cases involved charges under other legislation as well as charges under the *Criminal Code* (see Table 3-3).

Figure 3-19: No. of charges per offence category brought under the Criminal Code by the CDPP against corporations from 30 June 2009 to 30 June 2019[165]



165 The categories of offence are indicative only. The percentages are rounded to the nearest whole number.

3.92 Of the prosecutions commenced by the CDPP against corporations under legislation other than the *Criminal Code*, charges related to a diversity of offences. The CDPP communicated to the ALRC that many of these offences were regulatory in nature. Examples of more significant offences for which corporations were prosecuted by the CDPP are presented in Table 3-3 below.

Table 3-3: CDPP prosecutions commenced under Commonwealth legislation other than the Criminal Code between 30 June 2009 and 30 June 2019[166]

Legislation	Time period	No. of CDPP prosecutions commenced against corporations	No. of CDPP prosecutions commenced against individuals
Agricultural and Veterinary Chemicals legislation[167]	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
Fisheries Management Act 1991 (Cth)	14/04/10 to 05/05/15	16	446
Occupational health and safety enactments[168]	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)[169]	20/09/11 to 24/06/16	25	72
Therapeutic Goods Act 1989 (Cth)[170]	27/01/09 to 22/08/17	10	8

3.93 Of the statutes contained in Table 3-3, 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

166 Prosecutions are included more than once when they involved charges under more than one statute.

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

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

169 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).

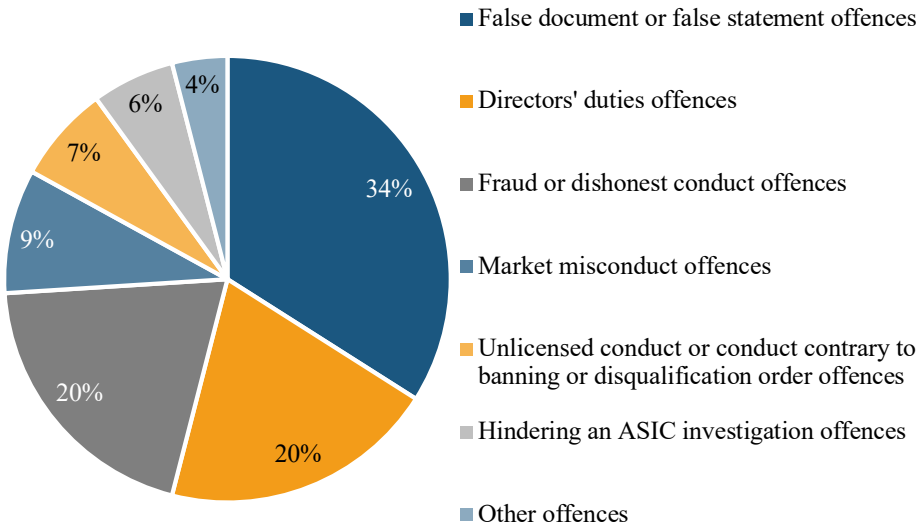
170 In addition to the data received from the CDPP, the ALRC received data relating to prosecutions under the *Therapeutic Goods Act 1989* (Cth) from the TGA which confirmed the data received from the CDPP.

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.

3.94 ASIC informed the ALRC that, of the matters summarily prosecuted internally by ASIC's Small Business Compliance and Deterrence Team over the last five financial years, the most common offence prosecuted against corporations was that of failing to lodge an annual report with ASIC under s 319 of the *Corporations Act*.[171] In the 2018–19 financial year, 17 entities were prosecuted for this offence.[172]

3.95 Of those matters referred to the CDPP by ASIC during the reference period, a range of offences were prosecuted under both ASIC-administered legislation and other legislation (see Figure 3-20).

Figure 3-20: Types of offences for which referrals were made to the CDPP by ASIC[173]



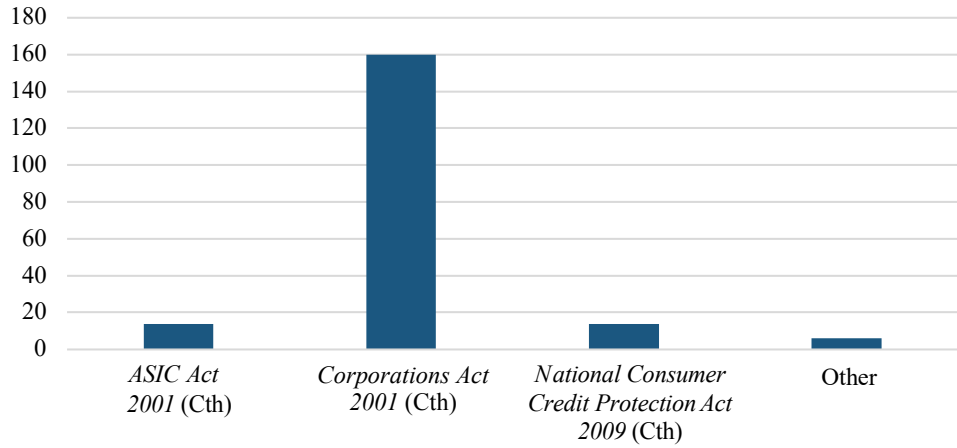
171 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019.

172 733 entities were issued with warning letters by ASIC, and 409 entities were issued with s 1274(11) notices: ibid.

173 Percentages and categorisations of offences are as provided: ibid. The percentages include referrals for offences against both individuals and corporations; the percentages for corporations alone may not mirror those presented in this figure.

3.96 The CDPP finalised 194 matters referred from ASIC in the five-year reference period.[174] A significant portion of these were for offences under the *Corporations Act*, as depicted in Figure 3-21.

***Figure 3-21: Finalised prosecutions over the last 5 years referred to the CDPP by ASIC*[175]**



3.97 Of the criminal cases brought since 1 January 2015 against corporations under ACCC-administered legislation, the majority related to cartel matters.[176] The ACCC confirmed to the ALRC that it has, to date, referred a total of 10 cartel matters to the CDPP.[177] The first was referred in 2015. These referrals have resulted in seven prosecutions by the CDPP against a number of corporate and individual defendants (see Table 3-4).

174 *Data Appendices* (n 1) Appendix B, Table 1.

175 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019; see also *Data Appendices* (n 1) Appendix B, Table 1. These figures include prosecutions finalised within the last 5 financial years. Matters currently in litigation or briefs of evidence still being assessed by the CDPP are not included. Prosecutions are included more than once if 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.

176 *Data Appendices* (n 1) Appendix B, Table 3.

177 Advice Correspondence from Australian Competition and Consumer Commission to Australian Law Reform Commission, 25 October 2019. This data is consistent with that contained in the ALRC Review of ACCC Data: *Data Appendices* (n 1) Appendix B, Table 3.

***Table 3-4: ACCC cartel-related referrals resulting in prosecutions by the CDPP in the last 10 years*[178]**

Filing date	Proceedings	Status	Corporate defendants	Individual defendants
Jul 2016	Nippon Yusen Kabushiki Kaisha[179]	Conviction recorded Penalty: $25 m	1	-
Nov 2016	Kawasaki Kisen Kaisha Ltd[180]	Conviction recorded Penalty: $34.5 m	1	-
Feb 2018	NA	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	-

3.98 The ACCC has not referred any consumer protection matters to the CDPP with a recommendation for criminal prosecution in the past 10 years.[181] The ACCC noted to the ALRC 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';[182] and

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

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

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

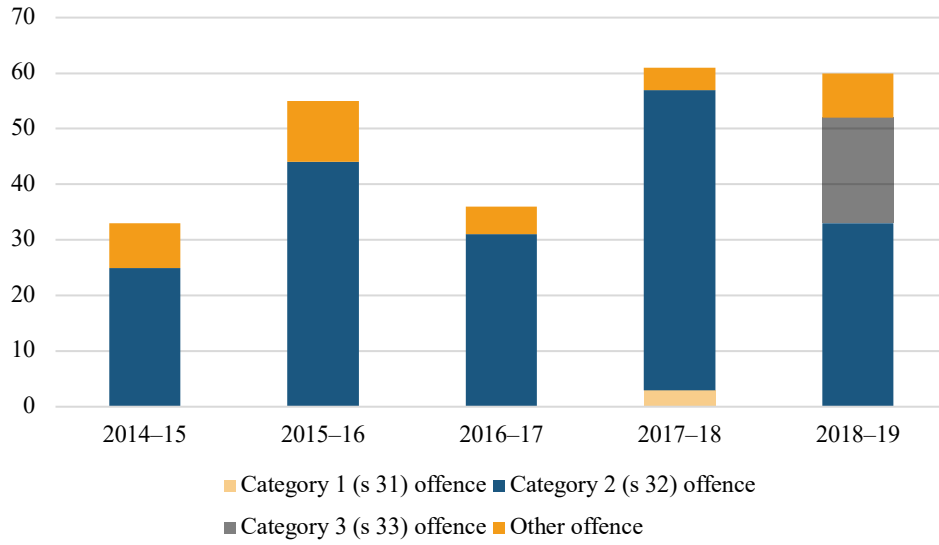
181 The ALRC's Review of ACCC Data confirmed that the other prosecutions of corporations relating to ACCC-administered legislation involved offences against justice procedures: see *Data Appendices* (n 1) Appendix B, Table 3.

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

- 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'.[183]

3.99 A high proportion of the WHS prosecutions reviewed by the ALRC were of duty-based offences.[184] For example, the majority of finalised WHS charges against corporate defendants in NSW criminal courts have been brought under s 32 of the *Work Health and Safety Act 2011* (NSW) (Figure 3-22). Section 32 provides for the 'category 2 offence' of failing to company with a health and safety duty.[185]

Figure 3-22: Finalised charges against companies in NSW criminal courts by provision [186]



183 Ibid.

184 Duty-based offences are discussed further in Chapter 7.

185 A 'category 2 offence' is committed under s 32 if '(a) the person has a health and safety duty; (b) the person fails to comply with that duty; and (c) the failure exposes an individual to a risk of death or serious injury or illness': *Work Health and Safety Act 2011* (NSW) s 32. A 'category 1 offence' is committed under s 31 if a duty-holder without reasonable excuse 'engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury' and 'the person is reckless as to the risk': ibid s 31. A 'category 3' offence is committed if a duty-holder 'fails to comply' with the relevant health and safety duty: ibid s 33. The NSW data is also consistent with data relating to WHS prosecutions in Victoria.

186 See NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>.

Civil versus criminal enforcement action

3.100 The ALRC's Reviews of ASIC and ACCC Enforcement Data indicated that civil penalty proceedings are pursued against corporations more often than criminal proceedings.

3.101 The ALRC Review of ASIC Enforcement Data identified 64 civil penalty proceedings against corporate defendants publicly reported on between 1 January 2015 and 20 March 2020, as compared to eight criminal cases.[187] Under ACCC-administered legislation, the ALRC identified 122 civil penalty proceedings that were publicly reported on in the reference period, as compared to six criminal cases.[188] This data is presented in Table 3-5.

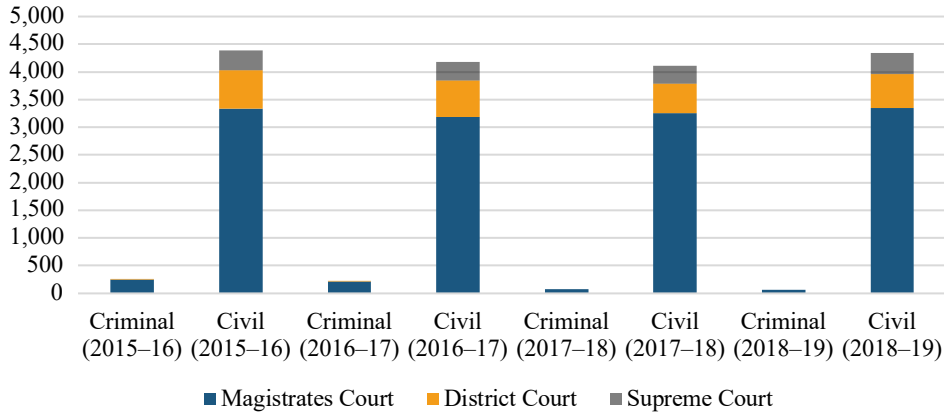
Table 3-5: Civil versus criminal proceedings against corporations as identified in the ALRC Reviews of ASIC and ACCC Enforcement Data

Dataset	No. of publicly reported civil penalty proceedings	Percentage of total (civil)	No. of publicly reported criminal proceedings	Percentage of total (criminal)
ASIC Enforcement Data	64	89%	8	11%
ACCC Enforcement Data	122	95%	6	5%

3.102 The lodgement data received by the ALRC from the South Australian Courts Administration Authority is consistent with these conclusions (see Figure 3-23).[189] Across the four-year reference period, there were 601 criminal lodgements against organisations (all except four in the Magistrates Court) as compared to 17,024 civil lodgements against organisations.[190]

187 Ibid Appendix B, Table 2.
188 Ibid Appendix B, Table 3.
189 The ALRC was unable to obtain equivalent court statistics from other jurisdictions.
190 Advice Correspondence from the South Australian Courts Administration Authority to Australian Law Reform Commission, 26 March 2020.

Figure 3-23: No. of lodgements in South Australian courts against organisations [191]



Duration

3.103 The ALRC was informed in consultations with stakeholders that it often takes a considerable amount of time for legal proceedings against corporations, and individuals associated with corporations, to be commenced, and that, once commenced, proceedings are often long and complex.[192] The recent case of *Australian Securities and Investments Commission v King* is a telling example of this.[193] ASIC first commenced proceedings against senior executives of MFS Group, including Mr King, in 2009. The case was only recently finalised in the High Court in March 2020. Other well-known examples of particularly protracted litigation involving corporations or individuals within corporations abound.[194]

3.104 Finalised criminal proceedings against corporations for the reference period identified by the ALRC in its Reviews of ASIC and ACCC Enforcement Data are

191 Ibid. Data for civil jurisdictions are proceedings brought against organisations. Where the proceeding is brought against individuals and organisations, the case is counted as 'proceedings brought against organisations'. The counting rules are consistent with those used in the Productivity Commission's, *Report on Government Services*. Criminal lodgements are counted as defendants. Civil lodgements are counted as cases, and include intervention order applications.

192 See Vicky Comino, *Australia's 'Company Law Watchdog': ASIC and Corporate Regulation* (Lawbook Co, 2015) 188–9 (noting difficulties and delays occasioned in prosecuting corporate crime by the involvement of multiple enforcement and prosecutorial agencies). ASIC also noted to the ALRC that while inter-agency cooperation allows agencies to share information and delegate specific powers, the arrangements can be administratively burdensome and impractical in certain circumstances: Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 3 April 2020.

193 *Australian Securities and Investments Commission v King* [2020] HCA 4.

194 The litigation in *Australian Securities and Investments Commission v Rich* is a particularly prolific example of such a factually and procedurally complex case: (2009) 236 FLR 1; [2009] NSWSC 1229. Following an appeal to the High Court, the trial for this case resumed before Austin J in the NSW Supreme Court in September 2004 and did not conclude until August 2007. There were 67 interlocutory judgments at first instance, 104 affidavits were read, 37 witnesses gave oral evidence, and the final written submissions were 4384 pages long: at [23].

too few to support generalised conclusions in assessing the views of stakeholders in consultations. Indeed, the ALRC identified only five finalised criminal proceedings against corporations across both sub-datasets that have been publicly reported on by ASIC or the ACCC (Table 3-6). Of the three proceedings for which a total duration could be discerned from the publicly available data, two greatly exceeded the national median duration for criminal court proceedings, which in 2018–19 was seven weeks.[195] Though the ALRC's data sample on this point is too small to support any conclusive findings, the duration of the proceedings is consistent with what the ALRC was told in consultations.[196]

Table 3-6: Duration of reviewed ACCC and ASIC finalised corporate prosecutions [197]

Corporate defendant	Alleged offence	Court	Dates of offending	Commenced	Finalised	Total duration (wks)
Kawasaki Kisen Kaisha Ltd	Cartel conduct	FCA	1997–2012	Nov 2016	Aug 2019	137
MJC Project Group Pty Ltd	Failure to produce books	Southport Magistrates Court	Feb 2017	NA	Feb 2018	NA
Murray Goulburn Co-operative Co. Ltd	Breach of disclosure obligations	FCA	Mar–Apr 2016	Nov 2017	Dec 2017	4
Motorcycle Expense Australia Pty Ltd	Failure to produce books	Magistrates Court of Victoria	Jan 2017	NA	Sep 2017	NA
Nippon Yusen Kabushiki Kaisha	Cartel conduct	FCA	2009–12	Jul 2016	Aug 2017	55

Outcomes

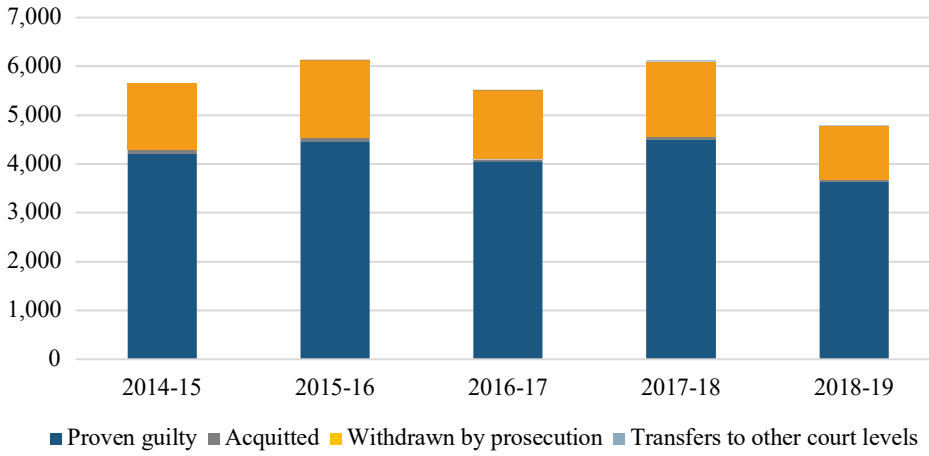
3.105 The data illustrates that a sizeable number of criminal charges against organisations do not reach an adjudicated outcome (see Figure 3-24).

195 Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) Table 1. As identified later in this chapter, some challenges arise in drawing direct comparisons between criminal court statistics pertaining to corporate defendants and individual defendants. Here, the comparison is also drawn between different samples spanning different reference periods.

196 More comprehensive analysis of the duration of proceedings against corporations and individuals associated with corporations would require a greater sample size than that available. Further quantitative evidence was not pursued on this point due to the scope of the Inquiry.

197 See further *Data Appendices* (n 1) Appendix B, Tables 2 and 3. See also Table 3-3 above.

Figure 3-24: Finalisation method for defendants finalised (organisations) in criminal courts [198]



3.106 Charges against organisations are frequently withdrawn by the prosecution, especially compared to withdrawal rates of charges brought against individuals. The data shows that, on average, organisations faced with criminal charges in Australian courts are approximately three times more likely to have criminal charges finalised in court by *withdrawal* than an individual (see Table 3-7).

Table 3-7: Percentage of finalised defendants in Australian courts for which the method of finalisation was withdrawal of charges by the prosecution [199]

Type of defendant	Percentage of defendants finalised by withdrawal of charges by the prosecution				
	2014–15	2015–16	2016–17	2017–18	2018–19
Individuals (Australia-wide)	7.99%	7.8%	8.19%	8.49%	7.77%
Organisations (Australia-wide)	24.01%	25.98%	25.58%	25%	22.77%

3.107 The frequency of prosecution withdrawals for corporate defendants differs, however, across jurisdictions. For example, the BOCSAR Data (Table 3-8), supported by the ABS Data (Table 3-7), shows that withdrawals against companies occur less in NSW courts than the national average, although still more than for 'other' defendants.

198 See Australian Bureau of Statistics, *Criminal Courts, Australia — Organisations Data: Customised Report for the Australian Law Reform Commission* (2020) Table 2 <www.alrc.gov.au>. The number of transfers to other courts for the 2014–15 financial year is omitted as the ABS has not otherwise published this data.

199 See ibid Table 2; Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) Table 1.

Table 3-8: Percentage of finalised defendants in NSW courts for which the method of finalisation was withdrawal of charges by the prosecution [200]

Type of defendant	Percentage of defendants finalised by withdrawal of charges by the prosecution in NSW courts				
	2014	2015	2016	2017	2018
Companies	11.39%	12.06%	12.06%	11.01%	11.17%
Other	7.93%	7.19%	7.05%	6.88%	6.58%

Table 3-9: Percentage of finalised defendants/charges in state and territory courts for which the method of finalisation was withdrawal of charges by the prosecution [201]

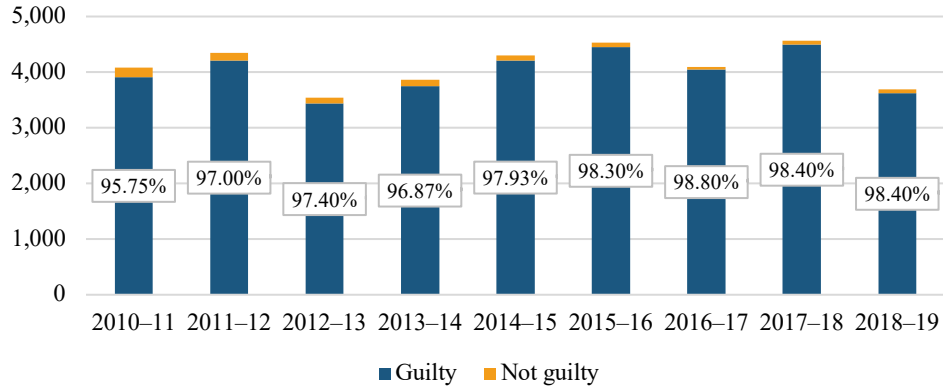
Jurisdiction	Percentage of organisation defendants finalised by withdrawal of charges by the prosecution				
	2014–15	2015–16	2016–17	2017–18	2018–19
NSW	15.35%	15.15%	12.3%	11.74%	11.59%
Victoria	31.14%	32.01%	32.01%	34.15%	32.89%
Queensland	37.5%	32.88%	32.84%	25.87%	20.8%
South Australia	24.43%	24.87%	36.97%	35.48%	48.68%
Western Australia	16.53%	16.91%	18.79%	18.32%	15.64%
Tasmania	NA	NA	NA	NA	NA
Northern Territory	40%	45%	46.88%	52.63%	NA
Australian Capital Territory	NA	17.39%	NA	56.14%	66.67%

200 NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>. The primary data informing this table is organised by calendar year. Technically, other methods of finalisation may be included in those counted as 'withdrawals' for the purpose of this table. This is because the BOCSAR outcome data is counted according to whether the charge resulted in a finding of 'guilty', 'not guilty', or 'other*'. 'Other*' includes dismissed by lower courts due to mental illness, withdrawn by prosecution, and otherwise disposed of (eg transferred to Drug Court, deceased)'. In the case of corporations, the 'other' category therefore largely equates to 'withdrawn by prosecution', although some charges finalised by court transfer may be counted. The ABS Data indicates this is very rare in NSW.

201 Australian Bureau of Statistics, *Criminal Courts, Australia — Organisations Data: Customised Report for the Australian Law Reform Commission* (2020) Tables 3–10 <www.alrc.gov.au>. Where a percentage is unavailable, it is marked 'NA'.

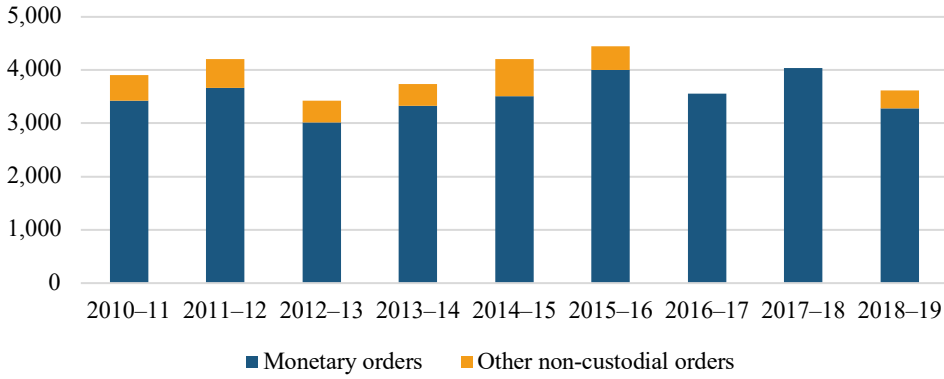
3.108 Notwithstanding high numbers of withdrawals of criminal charges against corporations in Australian criminal courts, the data shows that when prosecutions do reach an adjudicated outcome, the result is usually a conviction (see Figure 3-25).

Figure 3-25: Finalised organisation defendants that reached an adjudicated outcome[202]



3.109 The data also confirms that non-monetary orders are very uncommon for organisation defendants that reach the sentencing phase in Australian criminal courts (Figure 3-26).

Figure 3-26: Principal sentences for finalised organisation defendants proven guilty[203]



3.110 Particularly high conviction rates are seen in the WHS Data. Table 3-10, for example, shows the percentages of WHS prosecutions finalised in NSW, Victoria, and Queensland that resulted in convictions.

202 Ibid Table 2.
203 Ibid.

Table 3-10: Percentage of finalised WHS cases resulting in convictions [204]

Jurisdiction	2014–15	2015–16	2016–17	2017–18	2018–19
NSW	96%	NA	97%	97%	98%
Victoria	93%	94%	90%	91%	89%
Queensland	78%	88%	85%	NA	90%

Difficulties in accessing quantitative data relating to corporate criminal responsibility

3.111 While the data presented in this chapter provides important insights into the state of corporate criminal responsibility in Australia, it is not without its limitations. It is limited in its scope, comes from multiple sources, spans different reference periods, and at times requires comparison of multiple and distinct variables. That the data must be read with careful reference to the Explanatory Notes contained in the *Data Appendices* is illustrative in this regard. Notwithstanding these limitations, the data available does enable analysis and conclusions to be drawn, with care. The data provides the foundations of the evidence base for this Report.

3.112 Nevertheless, the ALRC considers that the available data in relation to the criminal justice system generally, and corporate crime in particular, could be improved significantly. The ALRC's research in this Inquiry revealed that:

- there is a dearth of data relating to corporate crime in Australia, which effectively obscures the extent and nature of such crime, and renders evidence-based regulation of corporate conduct difficult;
- the data that is available is piecemeal and incomplete; and
- the fragmentary state of the existing data renders its collation and analysis unduly challenging.

3.113 This section of the chapter outlines common problems undermining the collection of and engagement with data relating to corporate crime and corporate criminal responsibility in Australia, and proffers a recommendation for the improvement of criminal justice data collection and dissemination.

204 *Data Appendices* (n 1) Appendix B, Table 4.

Importance of quantitative criminal justice data

Recommendation 1 The Australian Government, together with state and territory governments, should develop national principles and policies for the collection, maintenance, and dissemination of criminal justice data.

3.114 The value of reliable, complete, and accessible data in developing rational and effective law and policy cannot be understated. Data relating to criminal justice is particularly important. Insufficient criminal justice data can precipitate low visibility of crime, which in turn can lead to the assumption that certain types of crime do not occur or are not in need of greater regulation. Given the powers of the state that may be applied through the criminal justice system and the importance of community safety more broadly, the public interest in understanding which regulatory approaches are effective, and which are not, is acute.[205]

3.115 In the context of corporate crime specifically, it has been suggested that reliable data is necessary to generate the political and public interest needed to support robust approaches to regulation, investigation, and prosecution of such crime, and that visibility is of itself an important deterrent of corporate and white collar crime.[206]

Lack of accessible and complete data

3.116 In 1987, Professors Peter Grabosky and John Braithwaite observed, in a paper compiled for the Australian Institute of Criminology, that:

> Even a superficial statistical portrayal of corporate crime in Australia is not available. It may well be that corporate crime causes more death, injury and financial loss than does common street crime. Accurate comparisons must await improved statistics, however.[207]

3.117 More than 30 years later, there are still no specific national statistics on corporate crime rates, corporate crime victimisation, or enforcement action against corporations in Australia. More broadly, commentators have observed corporate crime to be a 'blind spot' of the quantitative research agenda.[208] Although there have

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205 See, eg, Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 32) 3, 12.

206 See, eg, David O Friedrichs, *Trusted Criminals: White Collar Crime in Contemporary Society* (Wadsworth, 4th ed, 2010) 48–9; Walburg (n 127) 26 (suggesting that '[i]mproved and regularly collected quantitative data would probably make it somewhat harder for policy-makers and the media to ignore such problems'). See also Angelica Varhammar, *Understanding Effective Enforcement Tools in Work Health and Safety* (NSW Centre for Work Health and Safety, 2018) 21–2 (discussing the role of uniform and accessible information collection in assessing enforcement strategies in the work health and safety context).

207 John Braithwaite and Peter Grabosky, 'Corporate Crime in Australia', *Trends & Issues in Crime and Criminal Justice* (Paper No 5, Australian Institute of Criminology, 1987) 3.

208 See, eg, Antoinette Verhage, 'Corporations as a Blind Spot in Research: Explanations for a Criminological

been various important and detailed studies of specific industries, corporate crime types, and case studies in corporate criminal responsibility, there remains a distinct lack of quantitative data.

3.118 The ABS publishes the most comprehensive national crime statistics in Australia. Most relevant to the incidence of crime and criminal enforcement action are the ABS's criminal court series, crime victimisation series, and recorded crime (offenders) series.[209] However, in relation to corporate crime and corporate criminal responsibility, these statistics suffer from the following deficiencies:

- **The criminal court statistics do not record whether the defendant is a corporation**. Rather, the data is aggregated according to whether a defendant is an 'individual' or 'organisation'. Defendants categorised as organisations include any defendant that is not a natural person.[210] In addition to corporate defendants, the category may also include various unincorporated organisations. In the published data series, offence-specific statistics for organisation defendants is also generally not disaggregated from those relating to other defendant types. The result is that the statistics do not allow identification of statistics specific to corporate defendants, or trends relating to their commission of particular types of crime.
- **Corporate crime is, in effect, largely excluded from the scope of the 'Recorded Crime' (Offenders) and 'Crime Victimisation' data series.** The former collection excludes from its scope 'organisations', 'offences that come under the authority of agencies other than state and territory police, such as Environmental Protection Authorities, etc.', and 'proceedings initiated by the Australian Federal Police'.[211] As this is the principal source of national administrative data on the perpetration of crime in Australia, and the excluded regulatory agencies are key regulators of corporate offenders, corporate crime is effectively excluded from these statistics. The 'crime victimisation' collection does not include a corporate crime data cube.
- **The ANZSOC used to categorise data is primarily configured for analysis of crime perpetrated by individual defendants, not corporations.** ABS

Tunnel Vision' in Marc Cools et al (eds), *Contemporary Issues in the Empirical Study of Crime* (Maklu, 2009); Walburg (n 127) 25.

209 Australian Bureau of Statistics, 'Crime and Justice' (9 March 2020) <www.abs.gov.au/Crime-and-Justice>.

210 Advice Correspondence from Australian Bureau of Statistics to Australian Law Reform Commission, 11 March 2020. Organisations are identified in the same code as a defendant's sex, with the five options of: (1) male, (2) female, (3) other (ie person of another sex), (4) organisation, and (5) not stated. The effect in practice is that an 'organisation' means a defendant who is not a natural person. The ALRC understands that in most cases, organisations are companies. However, this category may also include other non-physical entities, including community organisations. In most cases, the category of 'not stated' is extended to cases where the sex of a person is unknown, rather than where it is unknown whether the defendant was a person or organisation.

211 Australian Bureau of Statistics, *Recorded Crime—Offenders, 2018-19* (Catalogue No 4519.0, 6 February 2020) Explanatory Notes.

data on recorded crime and criminal court charges is collated and categorised according to the ANZSOC, a hierarchical offence classification scheme developed by the ABS.[212] Within the structure of ANZSOC, divisions are the broadest categories of offences. Sub-divisions and group levels provide further detailed dissections of the broad categories. Although the scheme endeavours to provide a 'systematic ordering of criminal offences', most offences relevant to corporations fall within the 'miscellaneous' division and, within that division, the sub-division of 'commercial/industry/financial regulation'. The aggregation of these offences has the effect of obscuring information on crimes specific to corporations in criminal court statistics.

3.119 In addition to the ABS, some court administration authorities and state justice departments publish annual crime statistics and/or criminal court statistics that are more specific to corporate defendants. For example, the Queensland Government Statistician's Office publishes annual criminal court statistics that disaggregate finalised court appearances for corporate defendants.[213] Most courts do not, however, publish statistics specific to companies and/or do not collect information specific to corporate defendants.

3.120 Most investigatory and prosecution agencies publish statistics in their annual reports that are relevant to the incidence of enforcement action against corporations. These statistics are generally organised according to the subject area of offending, not the type of offender. Regulatory agencies that take enforcement action against corporations also generally do not collate data on the size or characteristics of the corporation proceeded against, or whether an individual corporate officer was pursued.

3.121 A consequence of these problems relating to the existing statistical framework relevant to corporate crime is that researchers are required to 'deconstruct a range of different statistical sources' that may not be comparable or complete.[214]

Difficulties in obtaining further data

3.122 For those who attempt to measure corporate crime — and the extent to which corporations are held responsible for corporate crime — there are further difficulties in collating relevant data. Myriad reasons explain, at least in part, the elusiveness of useful data in this area.

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212 Australian Bureau of Statistics, 'Australian and New Zealand Standard Offence Classification (ANZSOC)' (n 161). The main users of ANZSOC are the ABS, 'Australian police, criminal courts and corrective services agencies and more recently, Statistics New Zealand and New Zealand police and justice agencies': at 3.

213 Queensland Government's Statistician's Office, *Justice Report, Queensland 2017–18* (2019) 45.

214 Hazel Croall, 'Victims of Corporate Crime' in *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5481.

3.123 The first is the complexity involved in measuring different types of crime and in particular, corporate crime. Different types of crime require different and sophisticated statistical practices. Where statistical practices are not sensitive to the particular nuances of different types of crime, the result can be misleading or incomplete impressions of reality. The ALRC has previously commented on the serious consequences that may arise from deficient statistics,[215] suggesting that the need for better crime and criminal justice measurement practices and processes may transcend the area of corporate crime.

3.124 Corporate crime measurement has been noted as particularly challenging because it 'involves both individuals and organizational entities and encompasses independencies between criminal actors'.[216] Prosaic of the difficulties that arise in measuring corporate crime and enforcement action are the difficulties in disaggregating corporate offences — and particular categories of corporate offences — from, for example, occupational or conventional property offences,[217] the plethora of actors involved in enforcing corporate regulation,[218] and the availability of both criminal and non-criminal sanctions against individuals and/or corporations in responding to corporate misconduct.[219]

3.125 Further challenges in collecting and analysing data relevant to corporate crime and corporate criminal responsibility are more practical in nature. As many criminal courts collect data according to the ANZSOC, statistics obtained directly from courts often reflect the same deficiencies apparent in the ABS Data.[220] In multiple jurisdictions, it is not centrally documented whether criminal action has been taken against a corporation, as compared to another type of defendant. Where data specific to corporate prosecutions is recorded, it is often not publicly available.[221] Yet where data is recorded by courts but not publicly shared or collected by centralised agencies, it is often practically difficult to obtain by request. Although many courts

215 See, eg, Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017) 120–3.

216 Sally S Simpson, Anthony R Harris and Brian A Mattson, 'Measuring Corporate Crime' in Michael B Blankenship (ed), *Understanding Corporate Criminality* (Garland Publishers, 1993) 115.

217 See Steve Tombs, 'Corporate Violence and Crime' in Harriet Pierpoint and Trevor Bennett (eds), *Handbook on Crime* (Willan Publishing, 2010) 884, 888; John Braithwaite, 'White Collar Crime' (1985) 11 *Annual Review of Sociology* 1, 5.

218 See Braithwaite and Grabosky (n 207) 3.

219 See Walburg (n 127) 28; Simpson, Harris and Mattson (n 216) 116.

220 For example, the ALRC found that many court management systems mirror the categorisation of defendants adopted by the ABS such that data is recorded according to whether a defendant is an 'individual' or an 'organisation'.

221 As data collected by courts and shared with bodies such as the ABS and the Productivity Commission is generally intended to identify trends in court productivity and the type of cases before courts, and corporate defendants are not a specific focus node of analysis, where it is possible to disaggregate data specific to corporations that data is not generally publicly available. This means that where it exists, court data specific to corporate defendants must be obtained by data request.

have established data request processes, the ALRC found that the processes can be difficult to identify and may be limited in availability.[222]

3.126 The lack of accessible data relating to corporate crime and corporate criminal responsibility, coupled with the difficulties in collating such data, evidences a need for further — and dedicated — consideration of different criminal justice measurement strategies and coordination.

222 For example, the ALRC found that some courts limit the class of persons able to make data requests. Although this is understandable noting the limited resources of courts, it results in a lack of accessibility to data for the general public.

4. Foundations of Corporate Criminal Responsibility

Contents

Introduction

4.1 As a general principle, all Commonwealth criminal offences are applicable to corporations.[1] Despite this legislative approach, what has been clear throughout the duration of this Inquiry — whether through research, consultations, seminars or submissions — is that the application of the criminal law to a corporation *itself* remains controversial.

4.2 This chapter considers the aspects of the corporate environment that may uniquely create potential for misconduct by a corporation. This leads to the theoretical question of whether a corporation can properly be the subject of criminal responsibility. The ALRC concludes that it is a question of what *capacity* the law chooses to confer upon a corporation as a juristic entity. It then examines the history of methods of attribution, which can be viewed as different mechanisms the law has developed to give effect to the law's decision to give a corporation the capacity to

1 See *Criminal Code Act 1995* (Cth) sch s 12.1 ('*Criminal Code*'); *Acts Interpretation Act 1901* (Cth) s 2C(1). Exceptions to the general rule are Commonwealth offences that are by nature incapable of commission by a corporation. See [3.14]–[3.17].

be criminally responsible. Finally, the chapter considers a related question, which is how criminal process rights should apply to corporate defendants, if corporations are properly subjects of the criminal law.

4.3 This chapter responds to the Terms of Reference as relevant to what 'reforms are necessary or desirable to improve Australia's corporate criminal liability regime', 'the policy rationale for Part 2.5' of the *Criminal Code* and to 'options … to strengthen and simplify the Commonwealth corporate criminal responsibility regime'. While this may seem to be a 'purely academic' question given the use of corporate criminal liability across much of the common law world,[2] if the law's ascription of criminal responsibility to a corporation cannot be justified at a level of principle, this has implications for how the ALRC should respond to the Terms of Reference. In the result, the existence of corporate criminal responsibility is justifiable as a matter of principle. The question whether responsibility should attach to the corporation as opposed to the relevant individual offenders in a particular case is a matter of policy for regulators and prosecutors.

The potential for misconduct in a corporate context

4.4 Criminological, psychological, and management research for a number of decades has recognised the potential for misconduct in a corporate context. It has been argued that policies towards corporate crime needs to appreciate that 'corporate crime [that is, crime committed by corporations] is *organisational crime*, and its explanation calls for an *organisational* level of analysis'.[3] This research demonstrates the unique criminogenic capacity of the corporate context in cases where internal processes, systems, dynamics, and culture are deficient. It is for these reasons that a number of contemporary models of corporate fault have sought to incorporate concepts of a corporate culture.[4] Models of corporate fault based upon corporate culture

> aim to locate corporate responsibility in what corporations as organizations (rather than the individual employees within them) contribute to misconduct. … Where an organization's ethos or personality encourages agents to commit criminal acts, there is culpability or blameworthiness under a theory of corporate ethos or corporate character. Evidence of ethos or character comes from the firm's hierarchy, corporate goals and policies, efforts to ensure compliance with ethics codes and legal regulations, and the identification and possible indemnification

2 Or, indeed, across the Western world: see Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91 *Notre Dame Law Review* 2049, 2059–60.

3 Robert C Kramer, 'Corporate Crime: An Organizational Perspective' in Peter Wickham and Timothy Dailey (eds), *White-Collar and Economic Crime: Multidisciplinary and Cross-National Perspectives* (Lexington Books, 1982) 435, 79–80, quoted in Wim Huisman, 'Criminogenic Organizational Properties and Dynamics' in Shanna R Van Slyke, Michael L Benson and Francis T Cullen (eds), The Oxford Handbook of White Collar Crime (Oxford University Press, 2016) 435, 435–6 (emphasis in original).

4 Including in Part 2.5 of the *Criminal Code.* See [2.45]–[2.57].

> of guilty employees. Questions relating to the role of the board of directors and to how the corporation has reacted to past violations, if any, are relevant. Such variables can shed light on how deeply a defective corporate ethos or character runs and could inform how authorities should respond.[5]

4.5 Furthermore, the uniquely criminogenic nature of a deficient corporate environment provides a reason for why it may be seen as relevant to provide for corporate criminal responsibility at law. Where misconduct can properly be seen to be the product of aspects of the corporate environment — either through a deficient culture, defective precautions and due diligence procedures, or systemic failures of conduct — then it may be seen as appropriate to hold the corporate entity criminally responsible.[6] Of course, while this provides a case for the existence of corporate criminal responsibility, its invocation in a particular case (as opposed to action against individuals or no action at all) is properly a matter for regulators, prosecutors and, ultimately, the judge or jury.

4.6 The traditional approach of criminologists had been to focus upon individual offenders,[7] which is flawed as

> the problem of corporate crime transcends the micro level of the individual … although corporate crimes are ultimately committed by individual members of an organisation, they have more structural roots, as the enabling and justifying organisational context in which they take place plays a defining role. Accounts of corporate fraud, misrepresentation, or deception that foreground individual offender's motivations and characteristics, often fail to acknowledge that organisational decisions are more than the aggregation of individual choices and actions, and that organisations are more than simply the environment in which individual action takes place.[8]

4.7 Instead, it is important to appreciate that:

> Corporate organizations form the institutional context for corporate offenses, as organizations provide the motives, opportunities, and means for corporate crime. Thus, an organizational perspective is an important part of the explanatory theories of corporate crime. … [I]t is widely accepted that some organizations are more crime-prone than others; organizations have 'criminogenic' features related to specific characteristics of the organizational strategy, structure, and culture.[9]

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5 Mihailis E Diamantis and William S Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15(1) *Annual Review of Law and Social Science* 453, 456 (citations omitted). See also Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 91.

6 At the same time, it might also be appropriate to hold directors and/or senior managers responsible for their role in creating an organisational environment that allowed the misconduct to occur: see [9.7]–[9.17].

7 James Gobert and Maurice Punch, *Rethinking Corporate Crime* (LexisNexis Butterworths, 2003) 14.

8 Judith van Erp, 'The Organization of Corporate Crime: Introduction to Special Issue of Administrative Sciences' (2018) 8(3) *Administrative Sciences* 36, 36 (citations omitted).

9 Ibid 38 (citations omitted).

4.8 Although there is clearly 'no all-embracing causal explanation' for corporate crime, there are organisational features that may result in certain corporate environments being criminogenic.[10] Organisational forces may cause individuals to engage in conduct or make decisions in response to 'institutional demands' that they otherwise would not participate in. Such forces may also result in 'group think'.[11]

4.9 Understanding the effect of 'organisational properties and dynamics' is 'crucial' to addressing corporate crime as, among other reasons, 'corporate behaviour is shaped by its organisational traits'.[12] Various features of particular corporations may increase the potential for corporate crime. Both Professor van Erp[13] and Professor Huisman[14] identify corporate 'strategy, structure, and culture' as significant factors. As Commissioner Hayne observed, corporate culture 'can drive or discourage misconduct'.[15] Commissioner Hayne described

> the [corporate] culture of an entity … as 'the shared values and norms that shape behaviours and mindsets' within the entity. It is 'what people do when no-one is watching'.[16]

4.10 Shared group norms are an important aspect of any corporate culture, for the reasons described by Associate Professor Tomlinson and Amanda Pozzuto:

> Norms (or shared standards of conduct) duct) are often tacit and informal, and because they are essentially guidelines for social approval they are a powerful influence on individual behaviour. In fact, researchers have demonstrated that informal social norms are a more powerful influence on individual behaviour than either their own independent attitudes or formal managerial sanctions. This is not surprising, since most adults determine what is right versus wrong in the workplace on the basis of internalized, shared moral norms of their work group. Most people desire to behave according to the expectations that respected others have for them.[17]

Given the power of such norms, it is not surprising then that, where the corporate norms are deviant, the corporation has the capacity to be criminogenic.

4.11 In the reports of the Financial Services Royal Commission, Commissioner Hayne identified that the relevance of defective cultures was not merely theoretical

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10 Gobert and Punch (n 7) 17–8.
11 Ibid 17–8 (citations omitted).
12 Wim Huisman, 'Criminogenic Organizational Properties and Dynamics' in Shanna R Van Slyke, Michael L Benson and Francis T Cullen (eds), *The Oxford Handbook of White Collar Crime* (Oxford University Press, 2016) 435, 436.
13 van Erp (n 8) 38–9.
14 Huisman (n 12) 442–454.
15 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 375 (citations omitted).
16 Ibid (citations omitted).
17 Edward Tomlinson and Amanda Pozzuto, 'Criminal Decision Making in Organizational Contexts' in Shanna R Van Slyke, Michael L Benson and Francis T Cullen (eds), *The Oxford Handbook of White Collar Crime* (Oxford University Press, 2016) 367, 371.

— defective corporate cultures had translated into actual corporate misconduct within the financial services context examined by the Commission.[18] Commissioner Hayne emphasised that attainment of a good corporate culture was more than mere legal compliance:

> Good culture and proper governance cannot be implemented by passing a law. Culture and governance are *affected* by rules, systems and practices but in the end they *depend* upon people applying the right standards and doing their jobs properly.[19]

4.12 Organisational culture, in Commissioner Hayne's view, had a direct link to the misconduct identified by the Financial Services Royal Commission, though its role also interacted with that of governance arrangements and remuneration systems:

> Failings of organisational culture, governance arrangements and remuneration systems lie at the heart of much of the misconduct examined in this Commission. Improvements in the culture of financial services entities, their governance arrangements and their remuneration systems should reduce the risk of misconduct in future. Culture, governance and remuneration march together. Improvements in one area will reinforce improvements in others; inaction in one area will undermine progress in others. Making improvements in each area is the responsibility of financial services entities. But regulators also have an important role to play in the supervision of culture, governance and remuneration. In the past, that supervision has focused on financial soundness and stability. But, as events here and overseas show, that is too narrow. Supervision must extend beyond financial risks to non-financial risks, and that requires attention to culture, governance and remuneration.[20]

4.13 Commissioner Hayne made a specific recommendation to address culture and governance. He emphasised that this recommendation required 'much more than an exercise in "box-ticking"' and ought to be seen 'as both reflecting and building upon all other recommendations' made in the Final Report.[21] The recommendation, entitled 'Changing culture and governance', recommends that entities in the financial services industry:

> as often as reasonably possible, take proper steps to:
>
> • assess the entity's culture and its governance;

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18 Commissioner Hayne also acknowledged the role of directors and senior managers in contributing to the creation of deficient corporate culture and misconduct, emphasising the role of both the corporate entity and its directors and senior managers in stating that 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': Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 15) 4.

19 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 1* (2018) 320–1 (emphasis in original).

20 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 15) 412.

21 Ibid 392–3.

- identify any problems with that culture and governance;
- deal with those problems; and
- determine whether the changes it has made have been effective.[22]

4.14 Returning to more theoretical analyses, researchers have also identified that organisational structures may provide employees with performance incentives that motivate misconduct. In addition, defective organisational

> 'structures' and 'information' and 'decision-making' procedures may result in irrationalities, group think, flawed risk perceptions, or secrecy with regard to misconduct.[23]

4.15 The level of complexity in a corporation may also be criminogenic. Dr Zyglidopoulous and Professor Fleming have observed that:

> Organisational complexity facilitates criminal activity within organisations for a number of reasons. First, it increases the ethical distance that any individual within the organisation might encounter. The more complex an organisation is, the less access the individuals working within it will have to the information necessary to be able to appreciate fully the ethical consequences of their actions and the more likely they will be to participate in criminal activities, because they cannot perceive the consequences of what they are engaged in. Elliot and Schroth referred to this phenomenon as the 'fog of complexity'. Second, the more complex an organisation, the more credible some neutralisations sound. For example, in a complex structure where responsibilities and information are broken down, saying 'it was not my fault' or 'I was just doing my job' become understandable and acceptable characterisations of one's actions.[24]

4.16 Despite these findings about the potential criminogenic properties of defective corporate environments, and the endorsement of such ideas by bodies such as the Financial Services Royal Commission, criminal prosecutions of corporations in Australia are relatively rare.[25] The misconduct uncovered in recent years by investigations such as the Financial Services Royal Commission indicates, however, that the low level of corporate prosecution in Australia is not due to a lack of misconduct in a corporate context in Australia. Rather, the relatively low rate of corporate prosecutions likely reflects two factors: the preference among regulators for pursuing civil penalty proceedings rather than criminal prosecutions against corporations; and, the use of negotiated outcomes in corporate regulation.[26] Where

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22 Ibid 392, rec 5.6. The recommendation was accompanied by a further recommendation recommending APRA supervise culture and governance as part of its prudential supervision of APRA-regulated institutions: Ibid 393, rec 5.7.

23 van Erp (n 8) 38.

24 Stelios C Zyglidopoulos and Peter Fleming, 'Organizational Self-Restraint' in Shanna R Van Slyke, Michael L Benson and Francis T Cullen (eds), *The Oxford Handbook of White Collar Crime* (Oxford University Press, 2016) 463, 469.

25 See [3.70]–[3.99]. And, it seems, in other jurisdictions such as the US: Diamantis and Laufer (n 5) 454–55.

26 These partly inform the recommendations made by the ALRC in Chapter 5.

criminal prosecutions are commenced for corporate misconduct, these are more often brought against individuals rather than corporate entities.

4.17 If one chooses to preference the prosecution of individuals when having recourse to criminal sanctions for corporate misconduct — and this is a legitimate policy choice — then the law has mechanisms through which it can do so. This includes prosecuting the primary individual offender and also prosecuting, through principles for the extension of criminal responsibility, those who:

- aid, abet, counsel, or procure the primary offence;
- jointly commit the offence;
- commission an offence by proxy;
- incite an offence; or
- are co-conspirators.[27]

4.18 There are limitations, however, to an approach to corporate regulation that does not incorporate corporate criminal responsibility. First, many corporations are complex and diffuse entities. It may be difficult to identify the individuals who should be responsible. Additionally, extensions of responsibility may not be appropriate to identify the individuals who should be held responsible, given the norms, hierarchies and power imbalances that operate within a corporate structure. Relatedly, there is some misconduct that can legitimately be seen as corporate, rather than the work of any one individual, or indeed of any mere group of individuals. Models of organisational liability seek to respond to this, by capturing *corporate* fault.[28] Offences framed so that they are specifically directed to corporations, such as the system of conduct, failure to prevent, and duty-based types of offences discussed in Chapter 7, also seek to capture misconduct that is uniquely corporate. While civil penalty proceedings are an appropriate and effective means of maintaining corporate compliance for most aspects of of corporate regulation, civil penalties are compliance-focused and do not have the unique expressive force that the criminal law possesses.[29]

4.19 It is appropriate for the law to incorporate appropriate and effective criminal and civil mechanisms to secure the accountability of both corporate entities and relevant individuals for corporate misconduct. There are advantages and disadvantages to both lenses of analysis. However, the consequence of a lack of prosecutions of

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27 *Criminal Code* (n 1) ss 11.2, 11.2A, 11.3, 11.4, 11.5. See further Chapter 9, which also discusses other ways in which criminal responsibility may be extended to individual directors and senior managers, including through the use of specific statutory accessorial provisions, deemed liability provisions, and failure to prevent provisions.

28 At the same time, the recognition of corporate criminal responsibility as a means of capturing corporate fault may also serve to re-frame individual accountability of directors and senior managers in more appropriate and effective ways: see [9.10].

29 See [5.67]–[5.94].

corporate entities for corporate misconduct is that the legal system is not addressing the structural roots of corporate crime, nor the entities that facilitate it. The choice between both in a particular case is, of course, a policy choice for regulators and prosecutors. The recommendations in this Report are directed to ensuring that both are optimally effective.

Capacity of a corporation to be criminally responsible

4.20 The normative foundations of corporate criminal responsibility have received considerable scholarly attention in recent decades.[30] The very existence of corporate criminal responsibility attracts strident proponents,[31] and strident critics.[32] Much of the criticism has questioned whether:

- it is appropriate, for the purposes of the criminal law, for a corporation to be treated as an entity when, in reality, it is a creation of the law composed of natural persons;
- even if it is accepted that a corporation is an entity, a corporation, because of its juristic nature, is capable of being morally blameworthy in the sense required to be the subject of the criminal law; and
- given a corporation is a juristic entity, there is any purpose to holding a corporation criminally responsible when it can instead be the subject of civil sanctions.[33]

4.21 Dr Friedman summarises the first two arguments 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

30 For a summary of some of the views, see Diamantis and Laufer (n 5) 455–6.

31 See, eg, W Robert Thomas, 'Making Sense of Corporate Criminals: A Tentative Taxonomy' (2019) 17 *Georgetown Journal of Law and Public Policy* 775; Diamantis (n 2); Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); Philip Pettit, 'Responsibility Incorporated' (2007) 117 *Ethics* 171; Bucy (n 5); Sylvia Rich, 'Corporate Criminals and Punishment Theory' (2016) 29 *Canadian Journal of Law & Jurisprudence* 97; Peter French, *Collective and Corporate Responsibility* (Columbia University Press, 1984).

32 See, eg, VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109(7) *Harvard Law Review* 1477; Daniel R Fischel and Alan O Sykes, 'Corporate Crime' (1996) 25 *Journal of Legal Studies* 319; Albert W Alschuler, 'Two Ways to Think about the Punishment of Corporations' (2009) 46(4) *American Criminal Law Review* 1359; 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. See also the discussion in Diamantis and Laufer (n 5) 455–56.

33 As to which see [5.67]–[5.94].

> 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.[34]

4.22 Professor Alschuler adopts a similar position. He argues that corporate criminal responsibility exists only to ensure that the corporation takes action internally against errant individuals.[35] It is not possible to punish a 'fictional entity'.[36] Corporate criminal responsibility ineffectively directs community condemnation towards 'a blameless thing' rather than the responsible individuals.[37] An argument such as this suggests that the common law erred when it reversed its earlier refusal to recognise corporate criminal responsibility.[38]

4.23 Dr Thomas has identified three groups of theories of corporate criminal responsibility. First, there are economic theories. These are directed solely to deterrence and do not see any distinctive normative role for corporate criminal responsibility.[39] Secondly, there are 'moral agency' theories.[40] These have been increasingly popular in recent decades and posit that the criminal law has a distinctive normative role. The various models within these theories posit different approaches to corporate action and decision making, all of which purport to show that a corporation has the capacity to be morally blameworthy. The corporation's moral blameworthiness is distinct from the moral opprobrium that rightly attaches to those individuals who make up the corporation. This is a precondition to a corporation being morally responsible.[41] Finally, there are what Thomas terms 'political theories'.[42] These theories are diverse but, broadly, do not require corporations to be moral agents in the philosophical sense. They instead argue that the institution of criminal law should apply to corporations as it does to individuals.[43] Corporate criminal responsibility may be

> appropriate because the law has already recognised corporations as eligible for legal personhood … and because it would be unfair to individuals in society not

34 Nick Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' (2019) 83(2) *Modern Law Review* 255, 263.
35 Alschuler (n 32) 1367, 1376–8.
36 Ibid 1367.
37 Ibid 1372–3.
38 Until the nineteenth and twentieth centuries, the common law did not recognise corporations as having the capacity to be criminally responsible: *The Abbot of St Benet's v Mayor of Norwich* (1481) YB 21 Edw IV 7, 12, 27, 67; *Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960 973; *Anon* (1706) 88 ER 1518; William Blackstone, *Commentaries on the Law of England* (Clarendon Press, vol 1, 1765) 464–5. Courts in Australia, England, and the United States eventually came to hold, even for offences requiring proof of a mental element, that a corporation could be criminally responsible: *R v Australasian Films Ltd* (1921) 29 CLR 195, [1921] HCA 11; *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836; *New York Central and Hudson River Railroad Company v United States* 212 US 481 (1909).
39 Thomas (n 31) 781–2.
40 Ibid 783–6.
41 Ibid.
42 Ibid 786–9.
43 Ibid 786–92.

> to extend that status to the criminal law when corporations are capable of both causing and avoiding the kinds of harms that criminal law condemns.[44]

4.24 The ALRC considers that there is nothing inherent in the nature of a corporation as a juristic entity that precludes it from being criminally responsible. Nominalist objections do not reflect how the common law has conceived of the corporation as a juristic entity. Rather, it is a question of whether the law should choose to confer such a *capacity* upon a corporation as an entity. It is this capacity which must be justified, together with the model of *corporate* fault that is adopted to give effect to this responsibility. It is a question of whether a model of corporate fault that appropriately makes the corporation the subject of the criminal law can be adopted — either because it appropriately captures the corporation's moral blameworthiness or because it is justified given the corporation's place in the legal system.[45] Ultimately, the ALRC considers that aspects of both of these justifications are relevant.

The corporation as a juristic entity

4.25 As noted above, the common law did not originally recognise the capacity of a corporation to be criminally responsible. The classic historical statement of the principle that a corporation *itself* could not be criminally responsible is that of Sir Edward Coke in the *Case of Sutton's Hospital*:

> [T]he corporation itself is only *in abstracto*, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law … They cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls, neither can they appear in person, but by attorney … A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear …[46]

4.26 A similar view of a corporation as a juristic entity was adopted by Marshall CJ in *Trustees of Dartmouth College v Woodward*:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.[47]

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44 Ibid 792.
45 These reflect the moral and political theories explained by Thomas: see ibid.
46 *Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960, 973.
47 *Trustees of Dartmouth College v Woodward* 17 US 518 (1819) 636.

4.27 Focus upon a corporation as an artificial, juristic entity has been put forward as a reason for why the criminal responsibility of a corporation cannot be justified as a matter of principle. This reflects debates between nominalist and realist views of a corporation, which are explained by Professor Colvin as follows:

> Competition between nominalist and realist theories of corporate personality has a long history. 'Nominalist' theories of corporate personality view corporations as nothing more than collectivities of individuals. Speaking of corporate conduct or corporate fault is seen as a shorthand way of referring to the conduct and culpability of the individual members of the collectivity. The 'corporation' is simply a name for the collectivity and the idea that the corporation itself can act and be blameworthy is a fiction. 'Realist' theories, on the other hand, assert that corporations have an existence that is, to some extent, independent of the existences of their members. Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault. These contrasting conceptions of corporate personality can lead to dramatically different conceptions of the criminal responsibility of corporations. On the nominalist approach, corporate responsibility is derivative. It must always be located through the responsibility of an individual actor. An individual first commits the offense; the responsibility of that individual is then imputed to the corporation. Conversely, if there is no individual responsibility, there can be no corporate responsibility. On the realist approach, however, the responsibility of the corporation is primary. It is not dependent on the responsibility of any individual. Responsibility is analysed within a realist framework by examining directly questions about what the corporation did or did not do, as an organization; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm from being caused.[48]

4.28 The development of corporate criminal responsibility could be seen as an unprincipled departure from those foundational statements about the nature of a corporation expressed in the *Case of Sutton's Hospital*. Samuel Walpole has argued, however, that Coke's recognition that a corporation was a creation of law was not itself an endorsement of the nominalist view.[49] In fact, the law intended to treat the corporation as an entity. It was, however, an entity created by the law[50]

> although a corporation had a distinct juristic existence from its members for certain purposes, it was in reality treated as a creation, or abstraction of law, and so could not be the subject of the criminal law. Coke's statement does not have to be read as a rejection of the entity view of a corporation. Instead, Coke's statement is a rejection that the juristic entities created by law and called corporations could engage in certain acts. It was a limitation of the *capacity* conferred on these

48 Eric Colvin, 'Corporate Personality and Corporate Crime' (1995) 6(1) *Criminal Law Forum* 1, 1–2.

49 See Samuel Walpole, 'Criminal Responsibility as a Distinctive Form of Corporate Regulation' (2020) 35 *Australian Journal of Corporate Law* (forthcoming).

50 Or, as Edelman J has described it, a legal 'construct': Justice James Edelman, *The Future of the Australian Business Corporation: A Legal Perspective* (Speech, Supreme Court of New South Wales Commercial & Corporate Law Conference, 29 October 2019).

> entities, because their existence arose as a consequence of the law. *Capacity* here refers to the *ability* of a corporation to be held criminally responsible. As a result of this lack of capacity, traditional principles of criminal law, such as intention or motive, could not therefore be applied to such entities. Of course, it could be said this was only because the law had not yet conceived of a model for attributing such concepts to a corporation.[51]

4.29 Contemporary debates about nominalism and realism are often bound up with debates about whether a corporation can properly be morally blameworthy or, in more theoretically agnostic terms, properly be the subject of the criminal law. The real issue is whether the law is capable of constructing an appropriate model of corporate fault, rather than focusing solely upon divides between nominalism and realism.[52]

4.30 Professors Fisse and Braithwaite have argued that the debates create an unhelpful dichotomy between methodological individualism and methodological holism.[53] The more useful approach is found in the sociology of corporate action:

> Social theory and legal theory are thus forced to stake out positions between individualism and holism. The task is to explore how wholes are created out of purposive individual action, and how individual action is constituted and constrained by the structural realities of wholes. This exploration extends to how responsibility for action in the context of collectivities is socially constructed by those involved as well as by outsiders. Moral responsibility can be meaningfully allocated when conventions for allocating responsibility are shared by insiders and understood by outsiders. Metaphysics about the distinctive, unitary, irreducible agency of individuals tend to obstruct analysis, as do metaphysics about the special features of corporateness. As elaborated in the following section, the moral responsibility of corporations for their actions relates essentially to social process and not to elusive attributes of personhood; as Surber has indicated, the issue is 'more a matter of what we consider moral responsibility to be, rather than what sort of metaphysical entities corporations may turn out to be'.[54]

4.31 As has been explained:

> This rejection of an absolutist divide between nominalism and realism by Fisse and Braithwaite, as opposed to the adoption of one or the other for all purposes, may well be consistent with what English law was trying to achieve over the course of the twentieth century. At least, it may be consistent with English law's methodology in dealing with the question of corporate criminal responsibility. How else could the common law continue to treat the corporation as an abstraction, that was a fiction, but then use identification theory which, despite fixing upon a particular person, was used as a means of identifying the directing mind and will

51 Walpole (n 49) (citations omitted).
52 For a detailed discussion, see Ibid.
53 Fisse and Braithwaite (n 31) 24.
54 Ibid.

> of *the corporation itself*?[55] Leigh's work is again of assistance. As he explains, under the early common law, corporations were considered to be an abstraction,[56] but they were an abstraction the law sought to treat 'as nearly as possible as though they were natural persons'.[57] This was because there was no coherent theory of corporate personality in English law,[58] and 'courts were largely content to meet new situations in a pragmatic fashion'.[59] The recognition of the separate entity doctrine in *Salomon v Salomon & Co Ltd*[60] could be seen as a later endorsement of the law's pragmatic decision to treat a corporation, a juristic person, as much like a natural person as was possible. Corporations might be created by law, but they have a real existence in society: they employ persons, they enter contracts, they make purchases, and so on.[61]

4.32 Principles of corporate attribution, as they developed, sought to bridge the gap between nominalist and realist views. The corporation could properly be seen as an entity, even though it is created by law. Although the corporation is an entity, this does not deny that it is constituted by, or acts through, individuals. Nor should that recognition be seen as denying that a corporation can also have a real and discernible impact in society, or that it cannot act as a whole that is greater than the sum of its parts. In any event, the denial of corporate criminal responsibility by Coke was because the law denied the corporate *entity* the capacity to be criminally responsible, arguably because it lacked any sophisticated model of attribution or corporate fault:

> The English approach of the early twentieth century also has a lesson for the contemporary debates about corporate criminal responsibility that may be more useful in that regard. The lesson is that it is not artificial to recognise that a corporation is formed as a series of relationships of individuals, but also recognise that it is a juristic *entity*, constructed by law, that may act in reality *as a corporate entity* but also through the actions of individuals. That is exactly what a corporation is. It is an ontological tight rope that has been walked since the Roman period. It is why attribution methods developed that identified the 'directing mind and will' or organisational fault of the corporation. Indeed, susceptibility to the criminal law may well be considered an incident of the conferral of legal personality. As Leigh argued, English law always treated corporations as close to natural persons as possible. Edelman has suggested that a corporation is a legal *construct*, which may have both acts and purposes attributed to it. The historical denial of corporate criminal responsibility has more to do with limitations the law placed upon the capacity of such a legally-constructed entity, rather than the idea that it was no entity at all.[62]

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55 As in *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705.
56 LH Leigh, *The Criminal Liability of Corporations in English Law* (Weidenfeld and Nicholson, 1969) 6–7.
57 Ibid 6.
58 Ibid 5–8.
59 Ibid 8.
60 *Salomon v A Salomon & Co Ltd* [1897] AC 22.
61 Walpole (n 49).
62 Ibid (citations omitted).

Corporate fault, moral blameworthiness, and capacity for criminal responsibility

4.33 Given that the law recognises the corporation as an entity, the question that arises is whether the application of criminal law to corporations can be justified having regard to the nature of a corporation. Ultimately, there are two key reasons why the ALRC considers that the existence of a capacity for a corporation to be criminally responsible is justified. These reasons draw upon both the moral blameworthiness and political justifications outlined by Thomas.[63]

4.34 The first is that it is possible to develop models of *corporate* fault or blameworthiness, having regard to corporate sociology and behaviour, which would justify the capacity of a corporation to be responsible for a crime that can properly be said to have been committed by the corporation. This is not blameworthiness in the same way as it is might be found to exist in the mental state of a natural person. However, given a corporation is not a natural person, analogues and variations will be required.

4.35 Corporations have an 'identifiable persona', arising from their culture and capacity to make moral judgments, and express opinions and positions as a corporate entity.[64] Such a view is consistent with research on human cognition, which suggests that 'the human mind represents such groups as unified entities, rather than as collections of individuals', and attributes responsibility accordingly.[65] The practical relevance of this view is evident in the agitation for the Financial Services Royal Commission, where consumers expressed feelings of being wronged by the particular institution, not just its individual agents.

4.36 Fisse and Braithwaite have observed 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.[66]

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63 See [4.23] above.

64 Lawrence Friedman, 'In Defence of Corporate Criminal Liability' (2000) 23 *Harvard Journal of Law and Public Policy* 833, 847.

65 Diamantis (n 2) 2077–8.

66 Fisse and Braithwaite (n 31) 35–6.

4.37 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 …[67]

4.38 Associate Professor Diamantis and Professor Laufer have summarised some of the more conceptually sophisticated models of corporate fault as follows:

> More than a century after the criminal law was first applied to corporations, there is increasing interest in proactive, reactive, culture-based, character-based, and corporate policy models of a firm's culpability. Such approaches, called genuine fault or genuine culpability standards, aim to locate corporate responsibility in what corporations as organizations (rather than the individual employees within them) contribute to misconduct. Proactive corporate fault assumes that a corporation is to blame where a firm failed to put in place practices and procedures capable of preventing the commission of a crime. A complementary model of corporate blame, reactive corporate fault, comes with a failure to respond reasonably to the discovery of wrongdoing. Failure to undertake reasonable corrective or remedial measures in reaction to an offense is, under this model, evidence of corporate fault. Where an organization's ethos or personality encourages agents to commit criminal acts, there is culpability or blameworthiness under a theory of corporate ethos or corporate character. Evidence of ethos or character comes from the firm's hierarchy, corporate goals and policies, efforts to ensure compliance with ethics codes and legal regulations, and the identification and possible indemnification of guilty employees. Questions relating to the role of the board of directors and to how the corporation has reacted to past violations, if any, are relevant. Such variables can shed light on how deeply a defective corporate ethos or character runs and could inform how authorities should respond.
>
> Some commentators have posited that corporate actions and intentions may be constructed from decisions and choices that are communicated through corporate policy. It is argued, for example, that the components of the corporation's internal decision structure, consisting of the corporation's flowchart and procedures, define corporate intentionality. Finally, with constructive corporate culpability, firms are said to have a culpable 'mental state' attributed on the basis of their behavior (actions or inactions) and apparent intentions. Constructive corporate culpability asks questions that require objectively reasonable attributions: Did the corporation act 'purposely'? Did the corporation act 'knowingly'? These and related questions allow for a reasonable construction of culpability and liability.[68]

4.39 The ability to identify, through corporate actions and processes, fault that is properly *corporate* also reflects the reality of corporate action. A corporation is

67 Rich (n 31) 109.
68 Diamantis and Laufer (n 5) 456 (citations omitted).

greater than the sum of its parts. The statement of Day J in *New York Central and Hudson River Railroad Company v United States* is apposite in this context:

> 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.[69]

4.40 There is also a second justification for corporate criminal responsibility that does place greater emphasis on the juristic nature of the corporation. Thomas has argued that:

> 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.[70]

4.41 This passage should not be viewed as expressing some naïve reliance upon the separate entity principle or legal fiction. Rather, it is a recognition that a corporation owes its existence to the law. As a creation of the law, all of the rights, capacities, and liabilities of the corporation are conferred by the law. The conferral of legal personhood does not automatically mean the corporation has all rights, privileges, and capacities possessed by a natural person. These must be conferred by law. The law reflects many decisions about corporate capacity. The *Corporations Act* notably confers on a corporation all 'the legal capacity and powers of individual', together with additional capacities.[71] Corporations may enter contracts,[72] hold property, act as trustees, employ individuals, and commit torts. For at least the past hundred years, corporations have also been able to be held criminally responsible.

4.42 The ALRC agrees with Thomas that the decision that corporations may be criminally responsible can be justified by 'fairness norms' — that as corporations acquired expanded legal rights and capacities, and were allowed to participate in the legal system as individuals, it was only appropriate to confer the capacity for them to be criminally responsible. Thomas argues that this explains the recognition of corporate criminal responsibility in the US. This argument has even greater force today in view of development of more sophisticated corporate action and better models of corporate fault.[73]

4.43 The capacity of a corporation to be criminally responsible is, therefore consistent with how the corporation has been conceptualised as a juristic entity by

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

70 W Robert Thomas, 'How and Why Corporations Became (and Remain) Persons under the Criminal Law' (2018) 45 *Florida State University Law Review* 479, 504.

71 *Corporations Act 2001* (Cth) s 124.

72 Ibid ss 125–30.

73 Thomas (n 70) 531–7.

the law. The law, through recourse to sociology and behavioural science, has been able to identify fault that can properly be described as 'corporate' fault, such that proper criminal responsibility is justified. And, it may be argued, the capacity to be criminally responsible is no different from the other rights, privileges, and capacities that the law confers upon a corporation, as a juristic entity that is created — and defined — by law.

4.44 The real area for extensive debate, in the ALRC's view, is the appropriate method of corporate attribution, which is one of the key focal points of this Inquiry.[74] As has been argued:

> Appropriately capturing corporate fault is what the law of attribution of criminal responsibility has always sought to do, since the common law recognised that it was not inconsistent with the corporation's legal construction for it to have capacity to be criminally responsible. As a legal construct, it has always been imbued with certain characteristics by law. And, it may be argued, it is imbued with such characteristics in order to reflect the reality of corporate action. The critical existential threat to corporate criminal responsibility is thus whether the model for attributing corporate criminal responsibility to the legal entity pays sufficient regard to the unique characteristics of corporate existence so as to justly and appropriately capture corporate fault. It is not about whether the law should take a strictly nominalist or realist approach, but about the scope of the capacity to be guilty of a crime that the law imposes on corporations.[75]

4.45 The method of attribution adopted is properly a question of policy — each method conceptualises a corporation, and corporate fault, in different ways. Some will be better than others, both in terms of the corporate fault the method captures (in theory and in practice) and in the broader policy goals achieved. The next section of this chapter considers how methods of attribution have developed through history and how these seek to conceptualise corporate fault.

Historical development of methods of corporate attribution

4.46 As explained above, corporations can be criminally responsible because of the *capacity* that has been conferred on them by law. Initially, the conferral of this capacity was denied, despite the recognition of the corporation as an entity by law. The law later developed methods of attribution in order to bridge the gap between the criminal law, designed as it was for individuals with 'physical and moral existence',[76] and corporations, as legal entities, that otherwise lacked the capacity to commit

74 See [4.46]–[4.91] and Chapter 6.

75 Walpole (n 49).

76 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) 1.

criminal offences.[77] As a consequence, the questions of whether a corporation has the capacity to be criminally responsible, and how the law conceptualises the corporate form, are intimately linked with methods of attribution.

4.47 Different methods of attribution have developed over the past century. Some are more sophisticated than others in how they seek to establish the responsibility of the corporation. Some more traditional methods of attribution conceptualise corporate fault in a narrow way with reference to particular individual actors. As Wilkinson explains, under those traditional approaches

> the actions and intentions constituting the *actus reus* and *mens rea* of the crime must, it is said, be those of a natural person, as a company cannot as a *company per se* itself commit the constitutive elements of the crime.[78]

4.48 Nonetheless, those traditional methods of attribution modelled corporate fault in different ways. One approach, vicarious liability, made a corporation responsible for the acts and mental states of its agent. Corporate criminal responsibility is established derivatively under such a model. Identification theory, on the other hand, ascribed the conduct and states of mind of *particular* individuals to the corporation itself. Their conduct and states of minds were considered by the law to be those of the corporation.

4.49 Since then, more holistic approaches that focus on 'organisational blameworthiness' have been developed. Organisational blameworthiness interrogates the issue of corporate fault in relation to the corporation itself; corporate criminal responsibility does not need to be mediated through particular individual actors. Although organisational blameworthiness often contains innovative elements, it is not a panacea.

Vicarious liability

4.50 The principles of vicarious liability originated in the law of torts.[79] However, as Fisse explains, '[c]orporate criminal responsibility has been, and still remains, closely linked to vicarious liability in tort'.[80]

4.51 Vicarious liability operates as a method of attribution by holding the corporation, as the principal, responsible for the acts of its agents (such as, but not limited to, employees). Once it is established that the agent is primarily liable for a

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77 *Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960 973, 973.

78 Meaghan Wilkinson, 'Corporate Criminal Liability: The Move towards Recognising Genuine Corporate Fault' (2003) 9 *Canterbury Law Review* 142, 145 (emphasis in original).

79 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) [7.34].

80 Brent Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 6 *Adelaide Law Review* 361, 366.

criminal offence, then the corporation becomes vicariously liable for that offence, so long as the agent acted within the course and scope of employment. Vicarious liability is, therefore, a form of indirect, or derivative liability.[81]

4.52 In the US, the Supreme Court adopted an approach of vicarious liability in *New York Central and Hudson River Railroad Company v United States*:

> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act.[82]

4.53 Similarly, in the UK, the earliest conceptions of corporate attribution arose in relation to vicarious liability under the law of torts, with such principles then imported into corporate criminal law:

> In due course, however, the courts came to accept that it was possible to impute criminal intent to a corporation. After all, a corporation could be made liable for the so-called intentional torts by imputing to it the intention of its agents. So it did not take a great shift to impute to a corporation the criminal intent of its agents. This step was taken in the early part of the 20th century in *Mousell Brothers Ltd v London and North-Western Railway* [1917] 2 KB 836, 845, a case of a strict liability offence where it was said that 'there is nothing to distinguish a limited company from any other principal'.[83]

4.54 In *Mousell Brothers Ltd v London and North-Western Railway*, Atkin J explained that vicarious liability could be used to establish corporate responsibility for a statutory offence, including one requiring proof a state of mind. Whether such an offence relied on vicarious liability to establish corporate fault depended on the scope of the statute:

> 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.[84]

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81 Cf direct liability: Chapter 6, particularly [6.26]–[6.29]

82 *New York Central and Hudson River Railroad Company v United States* 212 US 481 (1909), 495. For an explanation of how it came to be adopted, see Thomas (n 70). See also Dixon (n 76) 4. As applied federally in the United States, the conduct of any agent or officer acting within the scope of his or her authority with the intent to benefit the corporation can be attributed to the corporation.

83 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559 [9].

84 *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836, 845–6.

4.55 The High Court of Australia, in *R v Australasian Films Ltd*, adopted the reasoning of the English expansion of vicarious liability in *Mousell Bros v London and North-Western Railway Co*, 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 … 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.'[85]

4.56 In *New York Central and Hudson River Railroad Company v United States,* the Supreme Court justified the application of vicarious liability to establish corporate criminal responsibility in the following terms:

> While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.[86]

4.57 Despite the capacity of vicarious liability to effectively control the power and influence of corporations, vicarious liability has been criticised as failing to reflect culpability on the part of the corporation itself:

> There is no pretence that the act or omission is actually that of the company itself; the company is simply made liable for the fault of another …. It distorts the concept of fault, since the fault of an individual is readily transferred to the company without proof of the company's misfeasance or malfeasance.[87]

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85 *R v Australasian Films Ltd* (1921) 29 CLR 195, 217, [1921] HCA 11.

86 *New York Central and Hudson River Railroad Company v United States* 212 US 481 (1909), 495–6. For a fuller theoretical justification, see Thomas (n 70) 531–7.

87 Wilkinson (n 78) 150. The continued use of vicarious liability also remains controversial in the US: see, eg, Diamantis (n 2); Diamantis and Laufer (n 5) 456–7. For further comparative analysis of how vicarious liability has been treated in other jurisdictions, see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [5.15]–[5.20].

Identification theory

4.58 The UK courts did not continue to employ vicarious liability as an attribution method. Instead, judges developed the method of attribution known as identification theory.[88]

4.59 Identification theory operates as a method of attribution by providing that the conduct and state of mind of the individuals who are the 'directing mind and will' constitute the very conduct and state of mind of the corporation itself. This is a form of direct liability.[89]

4.60 According to identification theory, the corporation has a 'directing mind and will' of its own; but that 'directing mind and will' must be located derivatively, through the conduct and state of mind of individuals. While that may seem somewhat paradoxical:

> It is not artificial to recognise that a corporation is formed as a series of relationships of individuals, but also recognise that it is a juristic *entity*, constructed by law, that may act in reality as a *corporate entity* but also through the actions of individuals.[90]

4.61 The first expression of identification theory was in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, where Viscount Haldane LC explained

> a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[91]

4.62 Affirming Viscount Haldane LC's approach, in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*, Denning LJ observed that:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[92]

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88 Ross Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 *Company and Securities Law Journal* 13, 170.

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

90 Walpole (n 49).

91 *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705, 713.

92 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 172.

4.63 In the seminal decision of *Tesco Supermarkets Ltd v Nattrass*, Lord Reid relied on the reasoning of Denning LJ to reaffirm the 'directing mind and will' approach:

> There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who 'represent the directing mind and will of the company, and control what it does.'[93]

4.64 In Australia, in *Hamilton v Whitehead*,[94] the High Court approved the approach taken by *Tesco*. Subsequently, the principles established in *Tesco* have been 'consistently applied in Australia'[95] across civil and criminal proceedings.[96]

4.65 As identification theory considers the culpability in terms of the corporation itself, it is distinguished from vicarious liability:

> There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.[97]

4.66 Identification theory has been criticised on the basis that it is unduly restrictive. There is a very limited class of individuals who will qualify as the 'directing mind and will' of the corporation:

> Whilst it may be possible under the doctrine to find a small company liable for the fault of its senior managers, larger companies are able to escape liability by decentralizing responsibility within their organization so that those in senior positions cannot be blamed when something goes wrong.[98]

4.67 As a result, identification theory may not properly capture the culpability of the corporation itself. Field and Jorg argue that

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93 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 171.

94 *Hamilton v Whitehead* (1988) 166 CLR 121, [1988] HCA 65. See Dixon (n 76) 4.

95 *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377 [234].

96 See, eg, *R v Haley* [2012] TASSC 86 [29] (citations omitted): 'The knowledge of a company is held by those individuals who are in reality the directing mind and will of the corporation … Here, individuals such as Ms Haley as the Acting Editor are properly regarded as the directing mind and will of the company with regard to matters of publication and editorial responsibility.'

97 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170. The alternative view, as expressed by Colvin, is that identification theory is a species of vicarious liability, see Colvin (n 48) 13–14: 'There has been some disagreement about the nature of identification liability and its relationship to vicarious liability. The simplest and most sensible explanation is that identification liability is a modified form of vicarious liability, under which the liability of a restricted range of personnel is imputed to a corporation. Instead of all employees and agents having the capacity to make the corporation liable, only some category of persons with directorial or managerial responsibilities has this capacity.'

98 Tahnee Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 258.

> the limits of criminal liability constructed by the identification doctrine do not reflect properly the limits of the moral responsibility of the corporation itself. This cannot be limited to responsibility for the acts of high-ranking officials such as company directors. Priorities in hierarchical organizations like corporations are set predominantly from above. It is these priorities that determine the social context within which a corporation's shop-floor workers and the like make decisions about working practices.[99]

4.68 The limits of identification theory are particularly apparent in large corporations, where there is a diffusion of responsibility and therefore, a lack of individuals who constitute the 'directing mind and will':

> The approach adopted in *Tesco* has been roundly criticised as reflecting an outmoded, hierarchical company structure where power is exercised by a very few people at the top. It is ill-suited to modern, de-centralised corporate structures where considerable power is often vested in middle-ranking managerial officers.[100]

4.69 Similarly, as Fisse explains, identification theory has, and will continue to, become increasingly ill-suited as a method of attribution:

> In a corporate world of diffuse organisational responsibilities many employees have an input in management and the people at the top of an organisational hierarchy are often remote from the day-to-day sources of operational power. This invites the conclusion that there is little future in trying to define the personal identity of a company.[101]

4.70 In the UK, the doctrine of identification theory was reshaped and expanded by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission ('Meridian')*.[102] Lord Hoffmann stated that where there is a statutory offence, an inquiry into the appropriate method of attribution must consider the purpose of the relevant legislation, such that

> the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer

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99 Stewart Field and Nico Jorg, 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' [1991] *Criminal Law Review* 156, 159.

100 Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 90. See also Dixon (n 76) 5: 'The limited number of individuals that are identified with the corporation substantially constrains the applicability of the criminal law. The theory can only function for corporations with a rigid hierarchical corporate structure, where high-level managers are involved in the decision making process'.

101 Brent Fisse (ed), *Howard's Criminal Law* (Law Book Co, 1990) 601.

102 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507.

> to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[103]

4.71 The current approach to attribution in the UK follows the principles articulated by Lord Hoffmann in *Meridian*. Crucially, these principles supplement, but do not necessarily set aside, the doctrine of identification theory:

> Lord Hoffmann (and, similarly, the members of the Court of Appeal Criminal Division in *British Steel* and in *Gateway Food Market*) did not think that the common law principles as to the need for identification have changed. Indeed, Lord Hoffmann's speech in *Meridian*, in fashioning an additional special rule of attribution geared to the purpose of the statute, proceeded on the basis that the primary "directing mind and will" rule still applies although it is not determinative in all cases. In other words, he was not departing from the identification theory but re-affirming its existence.[104]

4.72 In Australia, Lord Hoffmann's approach in *Meridian* has been adopted in civil[105] and criminal proceedings,[106] providing 'a framework for analysis [that] dispels the notion that, for all offences, the person with whom a corporation is identified must be its directing mind and will'.[107] The courts have therefore considered that

> [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.[108]

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103 Ibid.

104 *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796, 815–6. 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). Under this Act, 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.

105 See, eg, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 [449].

106 See, eg, *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2006) 161 A Crim R 250, [2006] VSC 171.

107 *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352 [355]. See also *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751 [1660]: '[T]he conventional approach has been to identify the individual who was the 'directing mind and will' of the corporation in relation to the relevant act or conduct and to attribute that person's state of mind to the corporation. But after the injection of flexibility into that concept by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506 to 511, metaphors and metaphysics have had diminished utility … there are no longer the rigid categories for identifying the "directing mind and will".'

108 *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2006) 161 A Crim R 250, [2006] VSC 171 [8], referring to *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507. The decision was successfully appealed, on the ground that attribution was unnecessary under the relevant statute. The application of identification theory, in general, was not contested. For further comparative analysis of how identification theory has been treated in other jurisdictions, see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [5.27]–[5.30].

Organisational blameworthiness

4.73 As a relatively recent method of attribution, the development of organisational blameworthiness was not constrained by the earlier view that corporations do not have the capacity to be criminally responsible.

4.74 Indeed, organisational blameworthiness considers that the corporation is capable of being criminally responsible in its own right.[109] The corporation has a 'distinct and identifiable personality independent of specific individuals'.[110] The actions of individuals are relevant but considered in light of the corporation itself. It is the corporation, for instance, which possesses the whole of the knowledge that is divided between many individuals.[111] Organisational blameworthiness is a form of direct liability, and is a holistic model of corporate fault.

4.75 Accordingly, Fisse's theory of organisational blameworthiness considers how the corporation operates, as a collection of systems and relationships:

> First, vicarious liability is imposed in relation to the external elements of an offence but not in relation to the mental element. Secondly, liability in relation to the mental element is not based on the *Tesco* principle but on the concept of organisational blameworthiness, as reflected by a corporate policy of non-compliance or a failure to take reasonable precautions and to exercise due diligence. Thirdly, liability is extended to cases of reactive corporate fault, in the sense of a corporate policy of unresponsive adjustment to having committed the external elements of an offence, or a failure to take reasonable precautions or to exercise due diligence in light of having committed the external elements of an offence.[112]

4.76 Organisational blameworthiness is particularly relevant as it reflects and responds to the idea of corporate culture, and reflects the research on the sociological and behaviour aspects of corporate misconduct discussed above.[113] The concept of corporate culture became a feature of trade practices law in the early 1990s.[114] Over the subsequent decades it has experienced a 'coming of age':

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109 Woolf (n 98) 258.

110 Dixon (n 76) 3.

111 Colvin (n 48) 24.

112 Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277, 279–280 (citations omitted). Key elements of organisational blameworthiness are incorporated in Part 2.5 of the *Criminal Code* (as discussed in Chapters 2 and 6). Notable features include that: intention, knowledge and recklessness can be proved through reference to corporate culture; negligence exists on the part of the corporation if the corporation's conduct is negligent when viewed as a whole; and mistake of fact (due diligence) incorporates a requirement of due diligence.

113 See [4.4]–[4.19].

114 See 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) 5–6, referring to *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076.

> The meaning of 'culture', what it requires of companies and how the culture can give rise to the authorisation or permission of offences is coming of age, as evidenced by Chapter 6 of the Final Report of the Financial Services Royal Commission, APRA's Prudential Inquiry into the CBA, ASIC's Corporate Governance Taskforce and APRA's revised approach to supervision.[115]

4.77 Indeed, Commissioner Hayne, in the Final Report of the Financial Services Royal Commission emphasised that

> every financial services entity, named in the Commission's reports or not, must look to its culture. Given the conduct and events described in the Commission's reports, some entities must change their culture and their governance. That will require continuing effort 'integrated into daytoday business operations'. It will require leadership from within the entities and continued attention by boards, senior executives and others within the entities as well as consideration and attention by APRA as prudential regulator.[116]

4.78 In many ways, organisational blameworthiness is a radical conception of corporate fault. As a result, it may be difficult to determine how to address organisational blameworthiness in a theoretically coherent but practically achievable fashion.[117]

4.79 In particular, the idea of corporate culture can be considered to be 'conceptually imprecise' and commentators have noted that there is 'little commonality' in its definitions.[118] As Clough and Mulhern state:

> The understandable concern in the corporate community as to what constitutes a criminal corporate culture is probably matched by the concerns of prosecutors who realise the practical difficulties of basing a corporate prosecution on such a nebulous concept.[119]

Other concepts relating to methods of attribution

Aggregation

4.80 Aggregation, in essence, is the idea that that the conduct and state of mind underlying a criminal offence can be drawn from multiple individuals.[120]

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115 Allens, *Submission 31*.
116 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 15) 391. See also [4.11]–[4.13] above.
117 See Chapter 6.
118 John HC Colvin and James Argent, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34 *Company and Securities Law Journal* 30, 36.
119 Clough and Mulhern (n 100) 144.
120 Colvin (n 48) 18.

4.81 There is a general resistance at common law to aggregation. Traditionally, the courts have considered that to prove an offence, it is necessary to show the relevant elements can be established through one person.[121]

> 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.[122]

4.82 Nonetheless, aggregation is an attractive concept because it addresses how corporations often divide responsibility between individuals. Gobert provides a cogent illustration of the utility of aggregation:

> Consider the following hypothetical case. Scientists in the laboratory division of a major manufacturer know that deadly toxins are produced in the manufacture of the company's product but not that one of the company's plants discharges the toxins into a stream; those involved in the manufacture of the product are aware of the discharge but not that the stream is a source of drinking water for neighbourhood children; the branch manager of the plant, who grew up in the community, knows well the practice of the children, having engaged in it himself, but is not aware that the water may prove fatal to a child with a weak resistance system. It is only by aggregating these various bits of knowledge and attributing the resulting composite to the company that the company might be guilty of manslaughter when a child dies from drinking the contaminated water.[123]

4.83 On the whole, however, aggregation raises conceptual difficulties.[124]

4.84 When aggregation is used in conjunction with derivative models of attribution, it 'carries an air of artificiality'.[125] Aggregation approaches the corporation in an essentially holistic manner — the whole is greater than the sum of the parts. Therefore, aggregation represents 'a step towards a scheme of corporate liability that is organizational rather than derivative from individual liability'.[126] In other words, aggregation is a 'clumsy attempt to reflect organisational blameworthiness within a model that is inherently unsuited for the purpose'.[127]

4.85 These notions are illustrated effectively through the idea that multiple states of mind might be combined to form a separate state of mind. When it comes to derivative models of attribution, the proposition that multiple states of mind may be combined in this way is contrary to the notion that the corporation's state of mind

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121 See Clough and Mulhern (n 100) 106.
122 *R v HM Coroner of East Kent; ex parte Spooner* (1987) 88 Cr. App. R. 10, 16–7.
123 James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 405.
124 Clough and Mulhern (n 100) 107.
125 Colvin (n 48) 23.
126 Ibid 19.
127 Clough and Mulhern (n 100) 108.

must be located in a particular individual. To put it another way, 'two innocent minds cannot be added together to produce a guilty state of mind'.[128]

4.86 As Edelman J stated in *Commonwealth Bank of Australia v Kojic*

> an aggregation principle could undermine the fundamental question to be asked in both cases: 'is the conduct unconscionable'? It is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably. Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so (in instances of deceit) and that a corporation has acted contumeliously where no individual has done so (in cases of exemplary damages).[129]

4.87 On the other hand, when aggregation is used under the umbrella of organisational blameworthiness, its primary advantage — the capacity to reflect the nature of corporations as collections of systems and relationships — is weakened. If a corporation's state of mind should be representative of corporate blameworthiness, then considering the state of mind of the various individuals who make up that organisation is already an important part of assessing fault.[130]

Extensions of criminal responsibility

4.88 Aggregation should be contrasted with extensions of liability.[131] Under these well-established principles, which are codified at Commonwealth criminal law, 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.

4.89 Persons whose conduct may be attributed to a corporation under statutory methods often also include persons acting at the direction, or with the consent or agreement (expressed or implied), of a director, employee, or agent. There are also provisions that deem conduct undertaken by an employee or agent of a person to be the conduct of that person.[132] 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.[133]

4.90 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.

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128 JC Smith and Brian Hogan, *Criminal Law* (Butterworths, 7th ed, 1992) 184.

129 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [2016] FCAFC 186 [112].

130 Colvin (n 48) 23.

131 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 had 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.

132 See, eg, *Competition and Consumer Act 2010* (Cth) s 84.

133 This is explicitly stated in the *Corporations Act 2001* (Cth) s 769B(3).

4.91 Another well-established method of extending liability (which does not amount to aggregation) is the innocent agent doctrine. The innocent agent doctrine extends primary — not derivative — liability to a person who intentionally causes the physical elements of an offence to be committed by another person, who may be innocent of the offence.[134] It is therefore already well-accepted that persons who influence the conduct of another may be liable or responsible for that conduct.

Application of procedural and evidential rules to corporations

4.92 A corollary of the question of *whether* the criminal law should apply to corporations and *how* criminal responsibility should be attributed to a corporation, is the question of *how* criminal process rights should be applied to corporate defendants. Do the full gambit of procedural and evidential rules that apply to individuals in criminal proceedings extend to corporate persons? If corporations are subject to the criminal law and are 'persons' for the purposes of its application, are they also entitled to the rights and privileges afforded to those natural persons that encounter the criminal justice system? If civil penalty proceedings are indeed a 'hybrid' of criminal and civil law,[135] can corporate defendants in such proceedings avail themselves of the evidential and procedural protections applicable in criminal proceedings?

4.93 The answers to these questions are important to understanding, and assessing, the appropriateness of different approaches to corporate regulation. This section of the chapter draws together key debates pertaining to these questions and provides an overview of the state of the relevant law. Such an analysis is important to framing the recommendations made in this Report. The scope of the rights and privileges applicable to corporations in legal proceedings goes to the appropriateness of the criminal law as a method of regulating corporate misconduct in Australia, and also to the acceptable form of more specific mechanisms for holding corporations responsible for misconduct.

4.94 This section of the chapter responds to the Terms of Reference as relating to 'whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime'. The ALRC does not, however, consider that reforms to the procedural and evidential rules applicable to corporations are necessary.

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134 See *White v Ridley* (1978) 140 CLR 342, [1978] HCA 38. See also commission by proxy in s 11.3 of the *Criminal Code* (n 1).

135 See Vicky Comino, *Australia's 'Company Law Watchdog': ASIC and Corporate Regulation* (Lawbook Co, 2015) 238; Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26 *Company and Securities Law Journal* 249, 249.

4.95 Though corporations are, and should be, entitled to certain important procedural rights and guarantees in legal proceedings, the suite of procedural rights and guarantees applicable to corporations are not inherently the same, in either availability or content, as those afforded to natural persons. Rather, consistently with the law's approach to criminal responsibility of a corporation, the law determines which rights are applied and the content of such rights where they are held by corporations. Furthermore, the way certain procedural rights apply (or do not apply) in relation to corporations, as a matter of existing law evidences that the underlying rationale underpinning commonly accepted procedural and evidential rights, guarantees, and immunities may not justify their application to corporations. The requirements of a fair trial will not necessarily be the same for a corporation as an individual. This is important context for understanding how corporate criminal responsibility is applied in Australia.

4.96 In *Do Young Lee v The Queen*, the majority of the High Court observed that Australia's 'system of justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused'.[136] However, as Brennan J observed in *Environment Protection Authority v Caltex* ('*EPA v Caltex*'), the 'balance between law enforcement and the interests of a corporation must be struck differently'.[137] Unlike individuals, corporations do not possess human rights, nor the personal autonomy and dignity that underpins those rights. Rather, as a matter of Australian law, a corporation possesses only those properties legislatively conferred upon it. A corporation benefits only from those rights expressly or incidentally necessary to give effect to its existence as a legal person, and to maintain the integrity of a justice system based on the rule of law. A significant requirement of such a system is, of course, the need to ensure a fair trial. This is important when shaping methods of corporate regulation, as it goes to the appropriate boundaries of such regulatory models.

Fairness and the rules of procedure and evidence

4.97 Procedural and evidential rules are those rules that 'regulate the way in which substantive rights and obligations are claimed, proved and enforced, without impacting on the definition of those substantive rights'.[138] The complexity in shaping rules of evidence and procedure is partly attributable to the myriad purposes these rules serve in court litigation.[139]

136 *Do Young Lee v The Queen* (2014) 253 CLR 455, [2014] HCA 20 [32].
137 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 514, [1993] HCA 74.
138 Jill Hunter, Camille Cameron and Terese Henning, *Civil Procedure: Litigation I* (Lexis Nexis Butterworths, 7th ed, 2005) 1. Such rules are commonly described as 'adjectival' rules.
139 See, eg, ibid 6.

4.98 Ensuring the fairness of court proceedings has been recognised as perhaps the most fundamental function of rules of procedure and evidence. In *Dietrich v R*, the right to a fair trial was described as the 'ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law'.[140] The requirement of fairness 'transcends the content of more particularised legal rules and principles'.[141] This principle is equally applicable to civil proceedings and the rules of procedure and evidence that underpin them.[142] As the requirement of fairness is integral to the defining features of a justice system based on the rule of law,[143] it seems that all defendants, including corporations, are entitled to it.[144]

4.99 The courts have refrained from articulating any exhaustive list of the attributes of a fair trial, preferring instead to determine on a case-by-case basis whether an accused has been 'deprived of a fair trial and led to a miscarriage of justice'.[145] Examples of rights, freedoms, or immunities that have been accordingly recognised and protected by the common law include those to the presumption of innocence, access to legal counsel when accused of a serious crime, deprivation of liberty only in accordance with law, the privilege against self-incrimination, legal professional privilege, prospective rather than retrospective operation of the law, and to open justice.[146]

4.100 Widely accepted general attributes of a fair trial are now articulated in international treaties, conventions, human rights statutes, and bills of rights. As found in Article 14 of the *International Covenant on Civil and Political Rights* ('ICCPR'), these include the following:

- **independent court**: the court must be 'competent, independent and impartial';

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140 *Dietrich v R* (1992) 177 CLR 292, 326, [1992] HCA 57, see also 299–300, 362–363; see also *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 29, [1989] HCA 46.

141 *Dietrich v R* (1992) 177 CLR 292, 326, [1992] HCA 57.

142 See, eg, The Hon Chief Justice James Spigelman AC, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 30. For the purposes of the civil justice system, fundamental concerns with fairness are reflected in the 'overriding purpose' of civil procedure rules (justice on the merits, speed, and efficiency): see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, [2009] HCA 27 [98]; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management* (2013) 250 CLR 303, [2013] HCA 46 [56]–[57].

143 See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, 2016) [8.21].

144 See *Forrest v ASIC* (2012) 247 CLR 486, [2012] HCA 39 [25] (noting that the corporate defendant had no case to answer because ASIC failed to clearly identify its case and this violated the 'fundamental requirements for the fair trial of allegations of contraventions of law'); cf *R v Alstom Network UK Ltd* [2019] 2 Cr App R 34 [52] ('a corporate defendant is as much entitled [under common law and the European Convention on Human Rights] to a fair trial as is an individual defendant').

145 *Dietrich v R* (1992) 177 CLR 292, 299–300, [1992] HCA 57.

146 See further George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 41–3; Jennifer Corrin, 'Australia: Country Report on Human Rights' (2009) 40 *Victoria University of Wellington Law Review* 37, 42.

- **public trial**: the trial should be held in public and judgment given in public;
- **presumption of innocence**: the defendant should be presumed innocent until proved guilty — the prosecution therefore bears the onus of proof and must prove guilt beyond reasonable doubt;
- **defendant told of charge**: the defendant should be informed of the nature and cause of the charge against him—promptly, in detail, and in language which they understand;
- **time and facilities to prepare**: the defendant must have adequate time and facilities to prepare a defence and to communicate with counsel of their own choosing;
- **trial without undue delay**: the defendant must be tried without undue delay;
- **right to a lawyer**: the defendant must be 'tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it';
- **right to examine witnesses**: the defendant must have the opportunity to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him';
- **right to an interpreter**: the defendant is entitled to the 'free assistance of an interpreter if he cannot understand or speak the language used in court';
- **right not to testify against oneself**: the defendant has a right 'not to be compelled to testify against himself or to confess guilt';
- **no double jeopardy**: no one shall be 'liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.[147]

4.101 Notwithstanding enunciation of certain elements of the right to a fair trial by the courts and in certain international documents, it remains the case under Australian common law that it is 'not feasible to attempt to list exhaustively the attributes of a fair trial'.[148] In *Jago v The District Court of New South Wales*, Deane J said that the notion of fairness 'defies analytical definition'.[149]

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147 This list and the quotes are drawn from the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14. It is reproduced as contained in Australian Law Reform Commission (n 143) [8.20].

148 James Spigelman, *The Common Law Bill of Rights* (First Lecture in the 2008 McPherson Lectures, University of Queensland, Brisbane, 10 March 2008, 2008) 25.

149 *Jago v The District Court of New South Wales* (1989) 168 CLR 23, [1989] HCA 46 [5].

4.102 To the extent that certain fair trial privileges are protected under the ICCPR, to which Australia is a party, corporations are not beneficiaries of those due process rights — only natural persons are protected.[150] Other human rights treaties have been held to guarantee due process protections for corporations as well as natural persons,[151] but Australia is not a party to these treaties. In any case, international instruments cannot be used to 'override clear and valid provisions of Australian national law',[152] though the courts will generally favour statutory interpretations that accord with Australia's international obligations.[153] It remains the case, therefore, that in Australia the general attributes of a fair trial under common law that are generally accepted in relation to individual defendants are not necessarily also required to afford fairness to corporate defendants.

4.103 Further, although other countries have extended all rights-catalogues to non-individuals,[154] this has not been the approach taken in Australia.[155] Rather, although as a matter of statutory interpretation Australian law is generally to be applied to corporations as individuals to the extent possible, the courts have been careful to distinguish the common law rights associated with the legal personhood afforded to corporations from those that are concerned with protecting peculiarly human attributes.[156]

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150 See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499, [1993] HCA 74 (Mason CJ and Toohey J noting that the language used in the ICCPR 'makes it clear that the purpose of its provisions is to protect individual human beings'); Human Rights Committee, *Views: Communication No 361/1989*, 36th sess, UN Doc CCPR/C/36/D/361/1989 (14 July 1989) [3.2] ('*A Publication and a Printing Company v Trinidad and Tobago*'); *Draft International Covenants on Human Rights: Report of the Third Committee,* UN GAOR Annexes, 3rd Comm, 17th sess, UN Doc A/5655 (1963) [17]. See also Marius Emberland, 'The Corporate Veil in the Jurisprudence of the Human Rights Committee' (2004) 4(2) *Human Rights Law Review* 257, 261–2.

151 See, eg, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 34 (the Court 'may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation'). See further Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press, 2006).

152 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, [2004] HCA 20 [171].

153 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287, [1995] HCA 20.

154 In the United States, corporations have been recognised as rights-holders of those rights guaranteed under the Constitution: *Citizens United v Federal Election Commission*, 558 US 310 (2010). See further Kent Greenfield, *Corporations Are People Too* (Yale University Press, 2018); Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (Liveright Publishing, 2018).

155 The minimum guarantees applicable to criminal proceedings under the statutory bills of rights in Queensland and Victoria apply only to individual persons: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3(1) (definition of 'person'); *Human Rights Act 2019* (Qld) s 11(2) ('Only individuals have human rights').

156 See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [2002] HCA 49 [86] (Kirby J noting that as Daniels was a corporation, 'it may not be entitled to all of the rights described as fundamental human rights'). More generally, see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [1993] HCA 74; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [2001] HCA 63 [126]-[128], [190]-[191]; cf *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 395, [1985] HCA 6; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346, [1983]

4.104 The rationale for denying certain rights to corporations lies in the source and nature of corporate personhood. In *ABC v Lenah Game Meats*, Gummow and Hayne JJ remarked that:

> Lenah [a corporation] can invoke no fundamental value of personal autonomy in the sense in which that expression was used by Sedley LJ. Lenah is endowed with legal personality only as a consequence of the statute law providing for its incorporation. It is 'a statutory person, a persona ficta created by law' which renders it a legal entity 'as distinct from the personalities of the natural persons who constitute it'.[157]

4.105 The result is that under Australian law, the mere ascription of legal personhood to corporations does not confer all rights that inhere in the personhood of a natural person.

4.106 Notwithstanding this, there has often been an assumption that rules relating to due process apply to corporations as they do to individuals.[158] In *EPA v Caltex*, the High Court clarified that this should not be the case. The High Court made clear that examination of the rationale for certain procedural and evidential privileges and immunities may not support their extension to corporations.[159]

4.107 The extent to which fundamental rights and privileges apply to corporations depends on the particular right in question, and, where the rationale for that right is one that is peculiarly human in concern, the common law is unlikely to extend its protection to corporations.

4.108 The following section identifies important common law due process rights recognised by the common law, the rationale of which may warrant different applications to corporations (as juristic entities) and natural persons.

Burden of proof

4.109 Fundamental to the criminal process is the general principle that the prosecution bears the onus of establishing the case against the defendant;[160] the legal and evidential burden of proving an offence usually both rest with the prosecution.[161]

HCA 9; *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150, [1982] HCA 66.

157 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [2001] HCA 63 [126], citing *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 385, [1947] HCA 20.

158 See, eg, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493–5, [1993] HCA 74 (recounting historical assumptions that the privilege against self-incrimination was available to corporations).

159 Ibid 507–8, 499–500, 551. The need to challenge assumptions around the application of due process requirements to corporate actors has been astutely observed in the work health and safety context: see, eg, Richard Johnstone, *Occupational Health and Safety, Courts and Crime* (Federation Press, 2003) 277.

160 See, eg, *Forrest v ASIC* (2012) 247 CLR 486; [2012] HCA 39 [25]: 'It is for the party making those allegations... to identify the case which it seeks to make and to do that clearly and distinctly'.

161 'The distinction between the 'legal burden' and the 'evidential burden' has been explained by [the High] Court as the difference between 'the burden… of *establishing a case*, whether by preponderance of

This is fundamental to the presumption of innocence, which has been described as the 'golden thread' of the criminal law.[162] The underlying rationale for the presumption of innocence is that to place the burden of proof on a defendant is generally 'repugnant to ordinary notions of fairness'.[163] It is 'an important incident of the liberty of the subject'.[164] Professor Ashworth has expanded on the rationale for the presumption of innocence as follows:

> the presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.[165]

4.110 However, the principle that the accused does not bear a legal burden of proof has not been treated as unqualified. In *Kuczborski v Queensland*, the majority of the High Court confirmed that it

> has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof of matters on which questions of substantive rights and liabilities depend.[166]

4.111 The Court in that case also quoted Dixon J in *Orient Steam Navigation Co Ltd v Gleeson*, where His Honour stated that

> the Parliament may place the burden of proof upon either party to proceedings in a Court of law. The onus of proof is a mere matter of procedure. If the Parliament may place the burden of proof upon the defendant, it may do so upon any contingency which it chooses to select.[167]

4.112 In *Williamson v Ah On*, Isaacs J stated that:

> The broad primary principle guiding a Court in the administration of justice is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognized, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object. The usual path leading to justice, if rigidly adhered to in all cases, would

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evidence, or beyond a reasonable doubt' and 'the burden of proof in the sense of *introducing evidence*': *Braysich v The Queen* (2011) 243 CLR 434, [2011] HCA 14 [33]. Where the prosecution bears the legal burden, the standard of proof is beyond reasonable doubt, unless another standard of proof is specified: *Criminal Code* (n 1) s 13.2.

162 *Woolmington v DPP* [1935] AC 462, 481.

163 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264 [9].

164 *Momcilovic v The Queen* (2011) 245 CLR 1, [2011] HCA 34 [44].

165 Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) *International Journal of Evidence and Proof* 241, 251.

166 *Kuczborski v Queensland* (2014) 254 CLR 51, [2014] HCA 46 [240].

167 *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254, 263, [1931] HCA 2.

> sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law.[168]

4.113 As a matter of government policy, the AGD Guide to Framing Commonwealth Offences states that '[p]lacing a legal burden of proof on a defendant should be kept to a minimum'.[169] This principle is also reflected in the *Criminal Code*, which provides that where the law imposes a burden of proof on the defendant, it is an evidential burden,[170] unless the law expresses otherwise.[171]

4.114 Although rare, reversing the burden of proof is a matter for the legislature.[172] Whether the reversal of the burden is applied to defining elements of an offence (its physical and mental elements) or an exception, exemption, excuse, qualification or justification to it (often referred to as defences) may be relevant in assessing the appropriateness of reversing the burden of proof. Generally, the prosecution bears a burden of proof in relation to the defining elements of the offence, as well as negativing any defence raised on the facts.[173] The accused will, however, generally bear the evidential burden in relation to defences. This is reflected in s 13.3(3) of the *Criminal Code* which is in the following terms:

> A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

4.115 Part 2.3 of the *Criminal Code* contains generally available defences. Section 13.3(2) of the *Criminal Code* provides that the defendant bears the evidential burden in relation to those defences. As noted above, the general presumption that the burden rests on the prosecution can be reversed by statute. Under the *Criminal Code*, the requirements in s 13.4 must be expressly addressed in order for such a reversal to occur.[174] This accords with the requirements of the principle of legality

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168 *Williamson v Ah On* (1926) 39 CLR 95, 113 , [1926] HCA 46.

169 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 51.

170 *Criminal Code* (n 1) s 13.3.

171 Ibid s 13.4.

172 An example is the defence of insanity: *R v Porter* (1933) 55 CLR 182, 183–4, [1933] HCA 1: 'It is not for the Crown to prove that any man is of sound mind; it is for the defence to establish inferentially that he was not of sufficient soundness of mind, at the time that he did the actions charged, to be criminally responsible'. Certain Commonwealth statutes contain express reversals of the burden of proof: see, eg, *Criminal Code* (n 1) ss 72.16 and 72.35(2) (imposing a legal burden on the defendant for defences to certain offences relating to explosives and lethal devices), 102.3(2) and 102.6(3) (imposing a legal burden on the defendant for defences relating to certain offences of involvement in a terrorist organisation). Where the defendant bears the legal burden of proof, the standard of proof is the balance of probabilities: s 13.5.

173 See *Criminal Code* (n 1) ss 13.1, 13.2.

174 Where the legal burden of proof is imposed on the defendant, the defendant is only required to discharge it on the balance of probabilities: ibid s 13.5.

> which at common law would require that a statutory provision affecting the presumption of innocence be construed, so far as the language of the provision allows, to minimise or avoid the displacement of the presumption.[175]

4.116 Some of the principles and criteria that may be applied to determine whether a criminal law that reverses the legal burden of proof is justified, together with an example of different reverse burden provisions in Commonwealth law, were discussed in the *Traditional Rights and Freedoms* Report.[176]

4.117 Commonly invoked justifications for reversing the burden of proof are that the facts are 'peculiarly within the knowledge of' the accused, or that disproving the facts would involve the Crown in the difficult task of proving a negative.[177] Other considerations include where the element is not an essential element of the offence, and the seriousness of the offence.[178]

4.118 In the context of corporate misconduct, difficulties of proof are accentuated. The requisite knowledge and evidence relevant to proving an offence is often located in the corporate structure such that it may be particularly difficult for the prosecution to obtain.[179]

Privilege against self-incrimination

4.119 Under the common law, the general rule is that a 'person may refuse to answer any question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal"'.[180] The privilege serves to protect 'against the pains of conviction to which a real person is subject',[181] and reduce the power imbalance between the prosecution and a defendant.[182] The rationale has been explained as follows:

> It is thought that without such protections witnesses might be loath to come forward to give evidence and, although reliance on the privilege will sometimes obstruct the course of justice in the case in which it is claimed, and may militate against the detection of crimes, this is probably sufficient justification from exposure to the peril of criminal proceedings.[183]

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175 *Momcilovic v The Queen* (2011) 245 CLR 1, [2011] HCA 34 [44].
176 See Australian Law Reform (n 143) [9.36]–[9.122].
177 See, eg, *R v Turner* (1816) 5 M&S 206: 'if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party ... who asserts the affirmative is to prove it and not he who avers the negative'.
178 See generally Australian Law Reform Commission (n 143) [9.36]–[9.63].
179 See ibid [9.61]–[9.62].
180 *Sorby v Commonwealth* (1983) 152 CLR 281, 288, [1983] HCA 10.
181 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 516, [1993] HCA 74.
182 See Australian Law Reform Commission (n 143) [11.30].
183 JD Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017) 933 [25140].

4.120 Further, the privilege is said to be generally necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution

> self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.[184]

4.121 In Australia, the privilege against self-incrimination is not available to corporations.[185] In *EPA v Caltex*, the High Court conducted a thorough review of the historical and modern rationales for the availability of the privilege and concluded that those rationales 'do not support the extension of the privilege to artificial legal entities such as corporations'.[186] The

> privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. In respect of natural persons, a fair state-individual balance requires such protection; however, in respect of corporations, the privilege is not required to maintain an appropriate state-individual balance. Nor is the privilege so fundamental that the denial of its availability to corporations in relation to the production of documents would undermine the foundations of our accusatorial system of criminal justice.[187]

4.122 Their Honours noted that

> a corporation is usually in a stronger position vis-à-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural person. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively. Accordingly, in maintaining a 'fair' or 'correct' balance between state and corporation, the operation of the privilege should be confined to natural persons.[188]

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184 *Cornwell v R* (2007) 231 CLR 260, [2007] HCA 12 [176].

185 *Evidence Act 1995* (Cth) s 187; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [1993] HCA 74.

186 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500, [1993] HCA 74.

187 Ibid 508. The Court's views built upon those previously expressed by Murphy J: see, eg, *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150, [1982] HCA 66; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346, [1983] HCA 9; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 395, [1985] HCA 6.

188 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500–1, [1993] HCA 74.

4.123 Brennan J in that case also observed that if

> the privilege against self-incrimination were held to qualify a statutory power compulsorily to obtain access to a corporation's documents, a legislative intention to control corporate conduct by creating a liability to criminal sanctions would often be frustrated.[189]

4.124 It is also now clear that the privilege against self-exposure to a penalty is also unavailable to corporations in Australia.[190] As was noted by Mason CJ and Toohey J in *EPA v Caltex*, 'the reasons for denying the privilege against self-incrimination to corporations apply with equal force to the privilege against exposure to a penalty'.[191]

Legal professional privilege

4.125 Legal professional privilege is the protection given to communications between lawyers and their clients in connection with legal advice or litigation.[192] In Australia, legal professional privilege attaches to those communications made or prepared for the dominant purpose of obtaining or providing legal advice, or for conducting or aiding in the conduct of litigation in reasonable prospect.[193]

4.126 The privilege has been described as a 'practical guarantee of fundamental rights',[194] 'a bulwark against tyranny and oppression',[195] a basic doctrine of the law,[196] and an important human right.[197] It has been recognised as a substantive rule of law, not merely a rule of evidence.[198] In *Esso Australia Resources v FCT*, Gleeson CJ, Gaudron and Gummow JJ observed that the privilege exists 'to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'.[199] The privilege has also been identified as serving the purpose of 'ensuring that those who allege criminality or other illegal conduct should prove it'.[200]

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189 Ibid 515.

190 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [2002] HCA 49 [31]; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, [1994] FCA 543.

191 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 504, [1993] HCA 74.

192 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [1999] HCA 67, [35].

193 Ibid.

194 *Goldberg v Ng* (1995) 185 CLR 83, 121, [1985] HCA 39.

195 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490, [1986] HCA 80.

196 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [2002] HCA 49 [85]; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 505, 551–552, [1997] HCA 3; *Goldberg v Ng* (1995) 185 CLR 83, 121, [1985] HCA 39.

197 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [2002] HCA 49 [86].

198 *Glencore International AG v Commissioner of Taxation* (2019) 93 ALJR 967, [2019] HCA 26 [21].

199 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [1999] HCA 67 [35].

200 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [2002] HCA 49 [31].

4.127 Australian courts have held that corporations are entitled to legal professional privilege. In *Daniels Corporation v Australian Competition and Consumer Commission*, Kirby J noted that

> in the expositions of the rationale for legal professional privilege, it has not so far been suggested (nor was it argued in this case) that such privilege is somehow inapplicable to a corporation or is of a kind that would not attract the presumption of parliamentary respect for its continuance in such a case.[201]

4.128 The explanation of Advocate-General Sir Gordon Slynn before the European Court of Justice of the reasons for legal professional privilege 'in terms applicable to both natural and legal persons'[202] is useful for understanding why the privilege applies to both corporations and natural persons:

> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.[203]

4.129 This articulation of the privilege is indicative of its fundamental value to a society based on the rule of law; it attaches to communications relating to legal advice because preservation of the confidentiality of such communications 'is inherent in and essential to the efficient and proper administration of justice'.[204] Although some of the aspects of human nature that are said to justify the privilege for individuals may not hold true for corporations,[205] its importance to the fairness of the justice system itself renders it important for all defendants.

Civil penalty proceedings

Procedural and evidential rules applicable in civil penalty proceedings

4.130 There are some differences in the procedural and evidential rules that apply to a civil penalty proceeding, as opposed to a criminal prosecution.

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201 Ibid [86]. The majority did not expressly address this question, though their Honours' analysis is consistent with Kirby J's: Ibid [31].

202 Ibid [87].

203 *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 913, [1982] 2 ECR 1575.

204 GT Pagone, 'Legal Professional Privilege in the European Communities: The *AM & S* Case and Australian Lawa' (1984) 33 *International and Comparative Law Quarterly* 663, 670.

205 See further Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford University Press, 2014) 255.

4.131 For example, the privilege against self-incrimination does not apply to civil penalty proceedings, but the privilege against exposure to a penalty does.[206] Like the privilege against self-incrimination, however, penalty privilege cannot be claimed by a corporation.[207]

4.132 Critically, the applicable standard of proof in a criminal prosecution is not the same as in a civil penalty proceeding. In the latter, regardless of the nature of the defendant, the balance of probabilities standard applies.[208] The nature of the civil standard was explained by Dixon J in *Briginshaw v Briginshaw* — it requires the tribunal of fact to 'feel an actual persuasion' of the fact's occurrence or existence, which 'cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in reality'.[209]

4.133 Dixon J went on to indicate that:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[210]

4.134 This does not mean, however, that there is any shifting in the standard of proof to a quasi-criminal standard in a civil case that involves allegations of criminal conduct, fraud or, relevantly, alleged contraventions of civil penalty provisions. As Mason CJ, Brennan, Deane and Gaudron JJ explained in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*:

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or strict proof is necessary 'where so serious a matter as fraud is to be found'. *Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting*

206 However, despite their similar operation, these are distinct privileges. Penalty privilege 'is not a substantive rule of law' and is 'merely a procedural rule that applies in curial proceedings to require the plaintiff to prove his case without any assistance from the defendant': *Australian Securities and Investments Commission v Mining Projects Group Limited* (2007) 164 FCR 32, [2007] FCA 1620 [7], citing *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 142, 1739, [2004] HCA 42 and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559, [2002] HCA 49.

207 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, [1994] FCA 543.

208 See, eg, *Corporations Act 2001* (Cth) s 1332.

209 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2, [1938] HCA 34.

210 Ibid.

> *a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*[211]

4.135 This is because, as the Hon Justice S Gageler AC has recently identified,

> proof of a fact within our system is proof of a fact to the subjective satisfaction of the tribunal of fact, whether the tribunal of fact happens to be a judge or a jury. When we speak in a civil case of proof 'on the balance of probabilities' or 'on the preponderance of the evidence', just as when we speak in a criminal case of proof 'beyond reasonable doubt' … [w]e are talking about belief, and we are acknowledging that belief can be held with different degrees of intensity.[212]

4.136 The ultimate question is whether the allegation is 'ultimately believed or not believed with the requisite degree of intensity'.[213]

4.137 Another pragmatic difference is the fact that both parties are generally liable for costs in civil penalty proceedings.[214] In addition, while a regulator has a duty to act fairly, the duty of fairness owed by the regulator to a defendant in civil penalty proceedings does not require the regulator to call all material witnesses,[215] in contrast to the position in a criminal prosecution.[216] Significant procedural obligations are placed upon regulators, however. The defendant is entitled to a fair hearing, and the regulator must plead its case with sufficient precision in order to enable this to occur:

> This is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law. It is for the party making those allegations (in this case ASIC) to identify the case which it seeks to make and to do that clearly and distinctly.[217]

Fundamental rights and civil penalty proceedings

4.138 Professor Hanrahan expressed concern about any expanded use of civil penalties. Civil penalties proceedings involve a 'trade off' between regulatory goals and a defendant's fundamental rights which results in

> the use of the powers and resources of the state to prosecute [corporations] without those corporations having the benefit of the full rights, privileges and protections

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211 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 170–1, [1992] HCA 66 (emphasis addded and citations omitted).

212 The Hon Justice S Gageler AC, 'Truth and justice, and sheep' (2018) 46 *Australian Bar Review* 205, 207–8.

213 Ibid 208.

214 Pamela Hanrahan, 'Deterring White-Collar Crime: Insights from Australia's Insider Trading Penalties Regime' (2017) 11 *Law and Financial Markets Review* 61, 64–65.

215 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, [2012] HCA 17 [152]–[155], [303].

216 *Whitehorn v The Queen* (1983) 152 CLR 657, [1983] HCA 43; *R v Apostilides* (1984) 154 CLR 563, [1984] HCA 38, cited in ibid [140].

217 *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, [2012] HCA 39 [25].

> provided by the criminal law. Very significant penalties —– sometimes larger than the fines that can be imposed for similar conduct that is criminal — can result.[218]

4.139 These 'trade-offs' in procedural rights may be particularly problematic given the penalties that may be imposed as a result of a civil penalty proceeding.

4.140 Much of Hanrahan's concerns appear to stem from reservations about 'dual-track' regulation that permits criminal and civil proceedings for substantially the same conduct at the discretion of the regulator, with the regulators decision to follow the civil track resulting in substantial penalties with less procedural protections.[219]

4.141 In its *Traditional Rights and Freedoms Report*, the ALRC raised concerns about 'dual-track' regulation and the use of civil penalty provisions for conduct that should properly be considered criminal. It noted that:

> A person may be denied their criminal process rights where a regulatory provision is framed as a civil penalty, when it should — given the nature and severity of the penalty — instead have been framed as a criminal offence.[220]

4.142 Addressing a lack of principled delineation between criminal and civil regulation is the central focus of Chapter 5 of this Report. In the context of this Inquiry, which is directed primarily to the criminal responsibility of a corporation *itself*, the ALRC makes three observations. First, if the recommendations made in Chapter 5 are implemented, much of the concern about the difference between criminal and civil proceedings (and the applicability of criminal versus civil procedural protections) will be obviated, at least in the context of corporate defendants. In that chapter, the model of regulation recommended aims to make 'dual-track' regulation consistent with a principled distinction between criminal and civil regulation.[221] Secondly, though there are important procedural differences between criminal and civil penalty proceedings, the differences in procedure may be more attenuated than they first appear particularly where the defendant is a corporation.[222] Thirdly, as has been explained above,[223] the fact that the corporation is a juristic entity, with all rights, capacities and liabilities conferred by law, may mean that, provided fair trial rights are maintained, there is a stronger case for the applicable procedural protections to be a legitimate matter of policy choice.

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218 Professor P Hanrahan, *Submission 38* (citations omitted).

219 Hanrahan (n 214) 64–5. See also Professor P Hanrahan, *Submission 38*. For a discussion of dual-track regulation and the ALRC's views on it, see [5.24]–[5.26] and [5.53]–[5.55].

220 Australian Law Reform Commission (n 143) [8.171].

221 See [5.50]–[5.55].

222 In the corporate context, the key difference may actually be the susceptibility of both parties to costs. However, this can be a potential risk for both a defendant and the regulator.

223 See [4.20]–[4.45].

5. Principled Criminalisation

Contents

Introduction

5.1 This chapter includes recommendations to promote a *principled* approach to the use of the criminal law against corporations that contravene the law. A key value of applying the criminal law to a corporation is the stigma that can attach to the label 'criminal corporation'. For that stigma to be effective, the criminal law must be used sparingly and appropriately. Labelling regulatory breaches as 'criminal' where there is no inherent criminality dilutes the expressive power of the criminal law that makes it such a powerful regulatory tool. In terms of current enforcement practice, civil regulation is the predominant mechanism for achieving corporate compliance in Australia. There is a preference amongst regulators for civil enforcement, notwithstanding the proliferation of criminal offences in terms of

statutory enactment.[1] In fact, the preference for civil regulation exists although such a process is not discernible from a plain reading of the legislation.

5.2 Recognising civil regulation is currently the default mechanism for regulating corporate conduct, the ALRC recommends that the criminal law be used in a principled way in order to ensure that the criminal law retains its distinctive force.

5.3 Consistently with this central recommendation, the ALRC also recommends that infringement notices cease to be available as an enforcement response for criminal offences applicable to corporations. Finally, the ALRC recommends administrative measures to promote consistency and coherence in the use of the criminal law in corporate regulation into the future.

5.4 These recommendations respond to the Terms of Reference as 'necessary [and] desirable to improve Australia's corporate criminal liability regime'. They serve to 'strengthen and simplify the Commonwealth corporate criminal responsibility regime' by promoting the principle that criminal responsibility should only attach to contraventions of the law that can properly be considered to be criminal.

Methods of corporate regulation in Australia

5.5 The Australian system of corporate regulation is complex, prescriptive, and overly particularised.[2] Indeed, to describe it as a 'system' conceals the fact that it was not constructed in an integrated fashion by reference to principle, but has instead built up by accretion over a number of decades. Incremental modification over time has led to a system that does not adopt a principled approach to the regulation of corporations, although its lack of coherence may be justified on compliance grounds.

5.6 The criminal law is only one of several methods for regulating corporate behaviour in Australia; there are alternatives to criminalisation where legislators seek to establish a prohibition or norm of conduct for corporations. Civil penalty provisions have become a common alternative. There are three types of penalties that can be imposed on corporations for contravention of the law: criminal penalties, civil penalties, and administrative penalties.[3] Criminal penalties are imposed only for criminal offences and, in the case of the conviction of a corporation, principally consist of fines.[4]

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1 The continued recognition of civil penalties as an appropriate means of achieving compliance is also illustrated by the numerous new civil penalty provisions created as a result of the ASIC Enforcement Review: *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

2 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [4.7]–[4.14].

3 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) [2.40]–[2.70].

4 Ibid [2.40]. For a summary of the present availability of non-monetary penalties see [3.53]–[3.56] of this

5.7 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. A civil penalty order is functionally distinct from a criminal fine. Such penalties exist to deter contravention and promote compliance with regulatory standards.[5]

5.8 Civil penalties have existed in Australian law, although in a limited range of provisions, since Federation.[6] They were introduced into the *Trade Practices Act 1974* (Cth) upon its enactment. In 1993, civil penalty provisions were introduced into the then *Corporations Law* as a penalty for contravention of directors' duties.[7] Previously, contraventions of the *Corporations Law* were solely criminal offences. Civil penalty provisions were introduced to reduce 'the role of the criminal law such that criminal sanctions applied only to the most serious contraventions'.[8] Civil penalty provisions have subsequently become widespread across the *Corporations Act* and a range of Commonwealth regulatory statutes. Most recently, a number of new civil penalty provisions have been introduced in various statutes regulating corporations following implementation of recommendations of the 2017 ASIC Enforcement Review.[9]

5.9 Administrative penalties can be imposed by a regulator without bringing court proceedings.[10] Currently, administrative penalties can be imposed for both criminal offences and civil contraventions. The most common form of administrative penalty is an infringement notice.[11] Other administrative penalties include monetary penalties and charges imposed under taxation law, alterations or revocation of licences,[12] banning orders made by regulators, bespoke regulatory schemes,[13] and enforceable undertakings, among others.[14]

Report and Australian Law Reform Commission, *Corporate Criminal Responsibility: Data Appendices* (2020) Appendix A, Table 5 ('*Data Appendices*').

5 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [2015] HCA 46 [55].

6 Australian Law Reform Commission (n 3) [2.53].

7 Vicky Comino, *Australia's 'Company Law Watchdog': ASIC and Corporate Regulation* (Lawbook Co, 2015) 15.

8 Ibid 15–16.

9 The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) designated a number of existing regulatory provisions in the *Corporations Act*, *National Consumer Credit Protection Act 2009* (Cth), *National Consumer Credit Protection Act 2009* (Cth) sch 1 ('*National Credit Code*'), and *Insurance Contracts Act 1984* (Cth) as civil penalty provisions.

10 Australian Law Reform Commission (n 3) [2.64].

11 Though there is some debate as to whether they are 'true' administrative penalties, being 'administrative methods for dealing with certain breaches of the law': Ibid [2.129]–[2.134]. See also ch 12 of that report.

12 See, eg, the Australian Financial Services Licence regime in *Corporations Act 2001* (Cth) ch 7 pt 7.6.

13 For example, the ASIC Markets Disciplinary Panel makes determinations as to alleged breaches of the ASIC Market Integrity Rules and has the power to issue infringement notices as an alternative to ASIC bringing civil penalty proceedings: see Australian Securities and Investments Commission, *Markets Disciplinary Panel* (Regulatory Guide 216, 2019).

14 See Australian Law Reform Commission (n 3) [2.124]–[2.168].

Responsive regulation and the focus on enforcement response

5.10 There has not been a uniform approach to legislative design in terms of decisions to criminalise particular conduct or to create civil penalty provisions. However, enforcement practices have been said to be underpinned by a particular theoretical perspective known as 'responsive regulation', which is drawn from strategic regulation theory.[15] As the New South Wales Court of Appeal observed,

> this approach … is often expressed in terms of the visual metaphor of a 'pyramid' of enforcement sanctions, namely, that sanctions escalate as contraventions become more serious.[16]

5.11 It was observed that civil penalties were designed to occupy an 'intermediate position' between other penalties and criminal sanctions.[17] Criminal sanctions sit at the uppermost level of the pyramid.[18] The key premise is that more serious contraventions should be met with a more serious response. Put another way, responsive regulation can be considered to be based on the principle that 'regulators use coercive sanctions only when less interventionist measures have failed to produce compliance'.[19] Professor Braithwaite describes the operation of an enforcement pyramid based on responsive regulation as follows:

> Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance civil monetary penalties are imposed; if this fails, criminal prosecution ensues; if this fails the plant is shut down or a licence to operate is suspended; if this fails, the licence to do business is revoked. The form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid.[20]

15 Comino (n 7) 114–6; *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, [2010] NSWCA 331 [692].

16 *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, [2010] NSWCA 331 [692].

17 Ibid [693]–[694].

18 Comino (n 7) 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].

19 Australian Law Reform Commission (n 3) [3.32].

20 Ibid [3.33].

5.12 The ALRC has previously described this approach as suggesting

> the ideal approach of the regulator is described as 'the benign big gun'; that is, the regulator should have access to severe punishments but should rarely use them in practice. … Ayres and Braithwaite's model requires the regulator to behave as though the organisations being regulated wish to cooperate and ensure that it is economically rational for them to cooperate. Where breaches occur, the initial response should be to persuade and educate them as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation.[21]

5.13 There has been criticism that some regulators are unwilling to use the higher-level regulatory responses.[22] In the 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.[23]

5.14 Regulators continue to express support for the responsive regulation model, with the focus being upon 'the appropriate regulatory response' in the particular circumstances.[24] Criticism has led some regulators to adopt a revised enforcement strategy that is more likely to result in a litigious response to contravening conduct.[25] Responsive regulation requires regulatory tools that allow 'sufficient flexibility to take appropriate regulatory responses to misconduct and enable [regulators] to escalate [their] response commensurate with the seriousness of non-compliance'.[26] This approach promotes a model that allows regulators to select between administrative, civil, and criminal penalties for a particular contravention of the law.[27] ASIC has

21 Ibid [3.34].

22 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 433; Comino (n 7) 273.

23 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 22) 433.

24 Australian Securities and Investments Commission (ASIC), *Submission 54*. Although the ACCC submission did not expressly refer to responsive regulation, it did emphasise the need for a 'flexible regulatory toolkit': Australian Competition and Consumer Commission (ACCC), *Submission 25*.

25 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) <www.asic.gov.au/about-asic/news-centre/speeches>.

26 Australian Securities and Investments Commission, Submission to ASIC Enforcement Review, 'Strengthening Penalties for Corporate and Financial Sector Misconduct: Positions Paper 7' (November 2017) [21]–[23].

27 Australian Securities and Investments Commission (ASIC), *Submission 54*; Australian Competition and

suggested that responsive regulation does not establish 'a hierarchy of regulatory tools or sanctions' but a 'hierarchy of regulatory tools or impacts'; accordingly, the 'responsive regulation pyramid is not and should not be understood to be a hierarchy of legal responses'.[28]

5.15 While the focus on enforcement may make sense from a regulatory perspective, it has consequences for the design of legislation and the ability to achieve a distinction between criminal offences and civil penalty provisions. Furthermore, although enforcement may be focused on achieving particular regulatory impacts, in designing regulatory legislation it is necessary to create a hierarchy of regulatory provisions. The fact that there is such a hierarchy is why civil penalties are spoken of as an intermediate sanction. Enforcement practice necessarily looks at matters on a case-by-case basis. Legislative design, on the other hand, must necessarily be hierarchical if the legislature is to have any influence on regulated outcomes.

5.16 The ALRC agrees that regulators require flexibility in order to effectively regulate, and that a proportionate approach to enforcement is desirable. The issue identified in this Inquiry is that the responsive regulation approach, with its focus on enforcement outcomes, must still pay appropriate regard to the unique normative role of the criminal law. Focus on flexibility in enforcement has led to complexity and incoherence in the legislative design of regulatory provisions, which makes it difficult, particularly in the context of offending by a corporation *itself*, to distinguish criminal offences from civil penalty provisions in a principled way, particularly given that both result in a pecuniary penalty and cover a range of different misconduct.

Legislative design, dual-track regulation, and the use of criminalisation

5.17 The embrace of an enforcement-focused approach to regulation has had significant consequences for the legislative design of corporate regulations. There is no real conception within the Commonwealth statute book as to the essence of a criminal offence, which is a particular problem in a corporate context. The ALRC's review of relevant statutes reveals a proliferation of offences that apply to corporations.[29] Although concerns have been raised in recent years about overcriminalisation, particularly in regulatory contexts, the volume of offences *per se* is not necessarily a problem.[30] Instead, the issues are that:

Consumer Commission (ACCC), *Submission 25*.

28 Australian Securities and Investments Commission (ASIC), *Submission 54*.

29 See [3.13]–[3.20].

30 See, eg, 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.

- the great majority of offence provisions address low-level contraventions that could not properly be said to involve any true criminality;[31]
- there is no principled distinction between criminal and civil prohibitions, although criminalisation is meant to be reserved for the most serious misconduct;[32]
- there is a great degree of complexity and duplication in the current offence provisions;[33] and
- there is an over-reliance on specific rather than general prohibitions.[34]

5.18 The proliferation of low-level criminal offences, combined with some instances of dual-track regulation, produces some incoherent results. In the *Corporations Act*, this results in there being more criminal offences than civil penalty provisions, with peculiar results. For example, a failure to notify ASIC of a change in registered office hours is solely a criminal offence,[35] as is the failure to include an Australian Company Number ('ACN') on certain company documents.[36] On the other hand, market manipulation is a civil penalty provision, and can amount to a criminal offence if the appropriate fault elements can be proven beyond reasonable doubt.[37]

5.19 The ALRC's analysis reveals what appears to be a greater level of complexity than is necessary.[38] This analysis is consistent with Commissioner Hayne's observation that the current regulatory regime is overcomplicated.[39] According to

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31 Example offences include: *Corporations Act 2001* (Cth) ss 145(3) (failure to notify a change in registered office hours to ASIC), 153 (failure to include an ACN on certain company documents). See also the discussion at [3.14]–[3.20].

32 Examples include criminal offences accompanied by a mirroring civil penalty provision: see, eg, *Therapeutic Goods Act 1989* (Cth) ss 14, 14A (importing or exporting goods that do not comply with standards); *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69E (requirement to provide annual returns relating to imports, manufacture or export of active constituents for proposed or existing chemical products or chemical products); *Environmental Protection Biodiversity Conservation Act 1999* (Cth) ss 142, 142B (compliance with conditions on approval). In some of the statutes reviewed by the ALRC, criminalisation is often only employed alongside an equivalent civil penalty provision: see, eg, *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth); *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*'); *National Consumer Credit Protection Act 2009* (Cth); *Therapeutic Goods Act 1989* (Cth). See also the discussion at [3.48]–[3.52]. In the *Corporations Act*, there are also more criminal offences than civil penalty provisions: see [3.46].

33 See the discussion at [3.21]–[3.25]. As that discussion indicates, the *Corporations Act* potentially provides the best example. Approximately one third of the offences within it relate to a breach of duty or conduct obligation. Furthermore, there are 92 separate offences relating to defective disclosure or false, misleading, or deceptive conduct. The first criminal offence contained in the *Corporations Act* also exemplifies this the complexity of the regime. It relates to intentionally or recklessly contravening 'a condition to which an exemption under section 11AS or 11AT is subject': *Corporations Act* s 111AU.

34 For example, the variety of false or misleading representation provisions: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DB, 12DC; *Australian Consumer Law* pt 3-1 div 1.

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

36 Ibid s 153.

37 Ibid ss 1041A, 1308A.

38 See [3.21]–[3.25].

39 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 1* (2018) 290–1.

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.[40] Similarly, Chief Justice Allsop has observed how '[d]econstruction and particularism plague our statutes' and 'also plague how we think about regulation and behaviour'.[41] In its submission to this Inquiry, NSW Young Lawyers suggested that the complexity of the corporate regulatory regime warranted a specific requirement for framers of legislation to 'consider whether the conduct is already proscribed by an existing offence, and if yes, whether that conduct attracts civil or criminal liability'.[42]

5.20 Any departure from an enforcement-focused approach may be criticised as favouring theory over pragmatism and as prioritising conceptual purity over compliance objectives. However, the Financial Services Royal Commission made clear that the current incoherence in the law can have significant consequences for effective compliance and regulation in practice. Overparticularisation and complexity means that it is not possible to attain a holistic appreciation of the relevant regulatory environment. It also obscures the actual wrongdoing involved in contraventions of the law when misconduct does occur. As Commissioner Hayne identified, the 'underlying principles' underpinning corporate regulation, even in the complex environment of financial services regulation, can be expressed as simple 'norms of conduct' or 'fundamental precepts' that are 'well-established, widely accepted, and easily understood'.[43] Despite this, and the regulatory sophistication of the legal regime, their reflection in the relevant law was 'piecemeal'.

5.21 Furthermore, the lack of principled distinction between misconduct that is proscribed by criminal and civil provisions respectively means that the Parliament is not providing overall normative guidance as to what it considers to be the most significant prohibitions and norms of conduct. Instead, decisions as to the types of misconduct that are criminalised appear to be made in an ad hoc way, with much delegated to regulator discretion by way of 'dual-track' regulation. At the same time, the complexity of the law undermines enforcement and compliance. Enforcement decisions are driven by resources, with simpler matters prioritised over the more difficult and complex. Accordingly, regulators may be better able to address serious misconduct if the law were to provide clear normative guidance.

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40 Ibid.

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

42 NSW Young Lawyers, *Submission 59*.

43 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 22) 8–9. The six norms identified were: obey the law, do not mislead or deceive, act fairly, provide services that are fit for service, deliver services with reasonable care and skill, and, when acting for another, act in the best interests of that other.

5.22 Commissioner Hayne observed:

> These [norms of conduct] are very simple. Their simplicity points firmly towards a need to simplify the existing law rather than add some new layer of regulation. But the more complicated the law, the easier it is to lose sight of them. The more complicated the law, the easier it is for compliance to be seen as asking 'Can I do this?' and answering that question by ticking boxes instead of asking 'Should I do this? What is the right thing to do?' And there is every reason to think that the conduct examined in this report has occurred when the only question asked is: 'Can I?'.
>
> The existing law has rightly been described, in at least some respects, as labyrinthine and overly detailed. In the blizzard of provisions, it is too easy to lose sight of those simple ideas that must inform the conduct of financial services entities.
>
> It follows that the regulatory framework does not always assist the regulator to impose discipline on entities. Regulatory complexity increases pressure on the regulator's resources and may allow entities to develop cultures and practices that are unfavourable to compliance.[44]

5.23 There is a danger that the overcomplexity of a regulatory regime may obscure the actual misconduct identified and not reflect, in an easy to understand way, the departures from standards of good corporate conduct that the misconduct represented.

Dual-track regulation

5.24 Dual-track regulation involves the same conduct being prohibited by an identical or near-identical civil and criminal prohibition.[45] Eleven out of the 25 statutes reviewed by the ALRC provide for some degree of dual-track regulation.[46] It exists in several forms in different statutes and is not enacted across these statutes in any uniform way.[47] For example, in the *Corporations Act*, the criminal offence that accompanies certain civil penalty provisions requires proof of fault elements derived from the *Criminal Code* beyond reasonable doubt.[48] In other statutes, the civil penalty provision is accompanied by a strict liability offence which is near-identical to the civil prohibition, such that the primary difference between the two is the standard of proof applicable.[49] This latter approach is also taken in the consumer protection

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44 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 39) 290–1.

45 Its existence was also noted by the ALRC in its *Principled Regulation* report: Australian Law Reform Commission (n 3) [11.27]–[11.31].

46 See [3.49].

47 See the discussion at [3.48]–[3.49].

48 See, eg, the provisions in the *Corporations Act 2001* (Cth) dealing with market manipulation and insider trading: *Corporations Act 2001* (Cth) pt 7.10, div 2–3.

49 See, eg, *Therapeutic Goods Act 1989* (Cth) ss 14, 14A; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69E; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 142, 142B. Of the 3,117 offences identified by the ALRC, 191 are strict liability offences for which there is a correlating civil penalty provision identical to the physical elements of the offence: see *Data Appendices* (n 4) Appendix A, Table 4.

provisions relating to unfair practices in the *Australian Consumer Law*.[50] Often, the maximum penalty applicable to the equivalent civil penalty provision is significantly greater than that attaching to the criminal offence.[51] Despite the inclusion of these near-identical criminal offences, the ACCC has advised that:

> Given the 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, the ACCC has not referred any consumer protection matters to the CDPP with a recommendation for criminal prosecution over the past 10 years.[52]

5.25 Dual-track regulation is attractive to regulators. In accordance with responsive regulation theory, it enables selection by the regulator of the pathway considered most appropriate for achieving compliance by a particular corporation or industry. The continued recognition of dual-track regulation as desirable can be seen in the new civil penalty provisions created as a consequence of the ASIC Enforcement Review, many of which involve dual-track regulation.[53]

5.26 Following the ASIC Enforcement Review, there has also been an increase in the enactment of 'ordinary criminal offences' that 'sit alongside strict and absolute liability offences' but which require proof of a fault element.[54] These provide for a higher maximum penalty than the accompanying strict or absolute liability offence.[55] Such an approach to framing offences can also be seen in other statutes,[56] while further statutes contain a 'tri track' for substantially the same conduct, involving a choice between:

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50 See *Australian Consumer Law* pts 3–1, 4–1.

51 Compare, for example, the maximum penalty applicable to a corporation that imports therapeutic goods for use in humans contrary to s 19B(1) and s 19D(1) of the *Therapeutic Goods Act 1989* (Cth). Under the criminal offence, the maximum penalty the corporation is liable for is 20,000 penalty units. Under the civil penalty equivalent, the corporation is liable for a maximum pecuniary penalty of 50,000 penalty units.

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

53 See *Corporations Act 2001* (Cth) ss 601ED(5), 670A, 728, 792B, 853F, 904C, 905A, 911A, 911B, 920C, 922M, 952E, 952H, 993D, 1020A, 1021E, 1021G, 1309; *National Consumer Credit Protection Act 2009* (Cth) sch 1, ss 24, 154, 155, 156, 174, 179U, 179V; *Insurance Contracts Act 1984* (Cth) s 33.

54 See Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.71]–[1.81]. The relevant ordinary offences are contained in *Corporations Act 2001* (Cth) ss 286, 307A, 606, 671B, 989CA.

55 Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.80].

56 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 142A, 142B, 196–196E, 211–211E, 229–229C, 254–254E. This approach is also common throughout the *Therapeutic Goods Act 1989* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth).

a. civil penalty provisions;

b. strict or absolute liability offences; and

c. ordinary criminal offences.[57]

Effective corporate regulation

5.27 The ALRC recommends a principled approach to determining which legislative prohibitions or norms of conduct should be criminalised, rather than simply adopting the premise that concerns about effective enforcement require criminal sanctions to be available for the great majority of contraventions.

5.28 This approach is derived from three key observations. First, the overproliferation, incoherence, and lack of principle in criminal offence provisions that apply to corporations is inconsistent with the unique normative character of the criminal law. Secondly, although the statute book contains more criminal offences than civil penalty provisions, the predominant framework for enforcement of corporate regulations in Australia — as it has developed in recent decades — is through civil penalties, whether negotiated, administrative, or court-enforced. Thirdly, given that a corporation is a juristic entity that cannot be imprisoned, it is necessary to identify a principled distinction between criminal and civil regulation of a corporation, owing to the similarities between the penalties imposed for each type of contravention when the defendant is a corporation.

5.29 With respect to enforcement of civil penalty provisions, enforcement options should be either an infringement notice, a civil penalty proceeding, or, in particular contexts, licence withdrawal or other administrative enforcement outcomes. For criminal offences, the only available enforcement option should be the criminal process. Recommendation 3 would remove the option of issuing an infringement notice for a criminal offence.

57 See, eg, *National Consumer Credit Protection Act 2009* (Cth) ss 49, 50, 133BE, 133BO.

Principled criminalisation

Recommendation 2 Corporate conduct should be regulated primarily by civil regulatory provisions. A criminal offence should be created in respect of a corporation only when:

a) denunciation and condemnation of the conduct constituting the offence is warranted;

b) imposition of the stigma that should attach to criminal offending would be appropriate;

c) the deterrent characteristics of a civil penalty would be insufficient;

d) it is justified by the level of potential harm that may occur as a consequence of the conduct; or

e) it is otherwise in the public interest to prosecute the corporation *itself* for the conduct.

5.30 Recommendation 2 seeks to promote a principled approach to the drafting of criminal provisions that apply to corporations. It seeks to ensure that the criminal law is well defined and remains distinctive, justified, and optimally effective. The principles may also overlap and are not mutually exclusive.

Civil regulation as the primary mechanism of corporate regulation

5.31 Civil regulation be the primary mechanism of corporate regulation in Australia. The ALRC also recommends principles to guide the creation of criminal offences applicable to corporations that harness the expressive power of the criminal law. The principles are disjunctive; not all of the listed principles need to be satisfied in order for a provision to be criminalised.[58]

5.32 In part, Recommendation 2 simply solidifies what has become common enforcement practice. An emphasis on civil regulation makes sense, as corporate regulation is primarily about deterring particular misconduct and encouraging compliance. The capacity of large corporations to do great harm, even unintentionally (through systems failures, for example), can be seen as justifying strict, deterrent-focused consequences for which civil penalties are generally appropriate to secure compliance.[59] If deterrence (or compliance) is the sole aim then civil penalties

58 This is a change from Proposal 2 of the Discussion Paper. It was made to resolve ambiguity and also to address the concern raised in multiple consultations that, otherwise, the principles may be too restrictive and, in fact, be underinclusive.

59 Although, in certain circumstances and in certain contexts criminalisation of a system of conduct or pattern of behaviour may be appropriate: see Recommendation 8 and [7.6]–[7.62] below.

should be adequate, although as Associate Professor Diamantis notes, 'corporate criminal law … has a vital, socially useful role to play that civil or strict liability alone cannot'.[60]

5.33 The particular characteristics of corporations, and the compliance-focused aims of much of corporate regulation, make regulation by way of civil penalties particularly appropriate for corporations. The AGD has previously recognised that civil penalty provisions are particularly appropriate in respect of 'corporate wrongdoing':

> Civil penalties have traditionally been directed against corporate wrongdoing where imprisonment is not available (because the wrongdoing is by a corporate entity). In this case, the financial disincentive that civil penalties provide is most likely to be useful and effective.[61]

Principles guiding criminalisation

5.34 Recommendation 2 sets out five principles designed to provide evaluative guidance to legislators who are framing offences as to what should be taken into account in deciding whether particular misconduct by a corporation should be a criminal offence, rather than a civil penalty provision.

5.35 The concept of providing such guidance to legislative drafters is not new. The AGD has for some years published guidance on framing criminal offences.[62] Previous versions of the AGD Guide to Framing Offences provided guidance for distinguishing criminal offences from civil penalty provisions in a principled way, with the 2007 edition stating that the

> starting point in assessing whether conduct should be subject to a criminal offence or civil liability provision is whether the wrongdoing is of a type that warrants a criminal sanction. Where the wrongdoing warrants a criminal sanction, criminal offences should apply.[63]

5.36 It further stated that a civil penalty provision was 'most likely to be appropriate and effective where … criminal punishment [is] not merited'.[64] The AGD stated that '[c]ontraventions of the law involving serious moral culpability should only be

60 Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91 *Notre Dame Law Review* 2049, 2060.

61 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007) 64.

62 The Attorney-General's Department (Cth) has published several editions of guidance for framing criminal and regulatory provisions: Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004); Attorney-General's Department (Cth) (n 61); Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011). Recommendation 4 is directed to making this guidance more effective.

63 Attorney-General's Department (Cth) (n 61) 63.

64 Ibid.

pursued by criminal prosecution'.[65] The most recent version of the Guide does not include any detailed guidance on the use of civil penalty provisions, although the reason for this is not known.

5.37 Recommendation 2 can be seen as a means of restoring, and further developing, principled guidance to legislators in relation to the use of criminal and civil regulation in relation to conduct by corporations.

5.38 At their core, the principles set out in Recommendation 2 seek to harness the unique expressive power of the criminal law as its distinguishing feature, and to use these as guidance for legislators and framers of legislators. Save for some linguistic amendments and one addition, these principles reflect those proposed in the Discussion Paper.[66] Each of the principles that make up Recommendation 2 is discussed in detailed below.

a) Denunciation and condemnation

5.39 Principle 2(a) is central for determining whether a particular provision applicable to a corporation should be criminalised. Conduct may be criminalised if 'denunciation and condemnation of the conduct constituting the offence is warranted'. Ensuring that decisions as to criminalisation seek to capture conduct worthy of denunciation and condemnation recognises the expressive role of the criminal law, [67] the social significance of criminalisation, and the capacity of criminalisation to convey social meaning.[68]

5.40 Some of the considerations that might be relevant to determining whether the conduct captured by the proposed offence is deserving of denunciation or condemnation include the following matters identified from existing offences:

- fraud or dishonesty;[69]
- serious financial misconduct that would result in significant economic harm;[70]

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65 Ibid.

66 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) 93.

67 Mihailis E Diamantis and William S Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15(1) *Annual Review of Law and Social Science* 453, 463; Gregory M Gilchrist, 'The Expressive Cost of Corporate Immunity' (2012) 64 *Hastings Law Journal* 1, 56; Diamantis (n 60) 2062–3.

68 See Dan M Kahan, 'Social Meaning and the Economic Analysis of Crime' (1998) 27(S2) *The Journal of Legal Studies* 609. The European Commission has made a similar recognition of the role of the denunciation and condemnation as a distinctive feature of the criminal law, noting that criminal sanctions 'are generally considered to send a strong message of disapproval that could increase the dissuasiveness of sanctions, provided that they are appropriately applied by the criminal justice system' and that not 'all types of violations occurring in the financial services area may be considered sufficiently serious so as to warrant criminal sanctions': European Commission*, Reinforcing sanctioning regimes in the financial services sector,* COM/2010/0716 (2010) 14.

69 See, eg, *Criminal Code Act 1995* (Cth) sch pt 7.3 ('*Criminal Code*')

70 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;*

- serious harm to individuals or the environment;[71]
- physical injury to an individual;[72]
- conduct repugnant to commonly accepted standards of decency;[73] or
- conduct representing a marked departure from accepted standards of commercial behaviour.[74]

b) Stigma

5.41 Principle 2(b) provides that criminalisation of particular corporate conduct may be justified where 'the imposition of the stigma that should attach to criminal offending would be appropriate'.[75] Stigma can be viewed as a consequence of the expressive function of the criminal law where criminal offences reflect conduct worthy of denunciation and condemnation. Express consideration of the role of stigma is important, because 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'.[76] A similar criterion has been proposed by the Law Commission of England and Wales.[77] The 'stigmatising effect' of the criminal law has also been recognised by the European Commission as a reason for why 'criminal law must always remain a measure of last resort'.[78]

Stromer v R (2012) 82 NSWLR 510, [2012] NSWCCA 277 [34].

71 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) 40. Potential harm is identified also as a specific principle in Principle 2(d).

72 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, including 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'.

73 See, eg, *Criminal Code* (n 69) 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 service. The section is intended to reduce '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) [11].

74 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].

75 It is related to Principle 2(a).

76 Comino (n 7) 276.

77 Law Commission of England and Wales, *Criminal Liability in Regulatory Contexts* (Consultation Paper No 195, 2010) [1.28].

78 European Commission, *Towards an EU Criminal Policy; Ensuring the effective implementation of EU policies through criminal law,* COM/2011/0573 (2011) 6–7.

c) Deterrence greater than that of a civil penalty

5.42 Principle 2(c) states that criminalisation would be justified where 'the deterrent characteristics of a civil penalty would be insufficient'. This principle recognises, as discussed above, that the function of a civil penalty provision, and corporate regulation generally, is to secure compliance. Criminal law also has a clear deterrent role.[79] However, when its additional expressive role is properly used, the criminal law can be seen to have additional deterrent force due to its expressive consequences and resultant ability to cause reputational as well as financial consequences for the convicted entity.[80] Criminal charges against a corporation will also have a significant deterrent effect on natural persons closely connected with the overall ownership and control of a corporation. The inclusion of this principle is useful, for example, in that it suggests that criminalisation of corporate conduct may be justified where a regulatory provision requires a greater 'hit' in terms of deterrence than a civil penalty provision may itself achieve.[81]

d) Level of potential harm

5.43 Principle 2(d) provides that criminalisation of conduct by a corporation could be justified 'by the level of potential harm that may occur as a consequence of the conduct'. This principle was not included in the Discussion Paper.

5.44 The principle has been included primarily to acknowledge, as emphasised in submissions and consultations, that there is a case in certain contexts for criminal offences applicable to corporations that need not require proof of fault. Although many of these offences not requiring proof of fault would instead be designated as civil penalty provisions if Recommendation 2 is implemented, some may not. The level of potential harm arising from the conduct will generally be the justification for retaining or creating such offences.

5.45 Justification of strict or absolute liability offences on the basis of potential harm is supported by theoretical considerations. This principle draws upon the third of Professor Fletcher's 'patterns of liability' that justify criminalisation — 'harmful consequences' — where 'liability is based on the objective attribution of a harmful event that is conceptually independent of human action or state of mind'.[82] Strict or absolute liability may be appropriate in contexts

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79 See, eg, *He Kaw Teh v The Queen* (1985) 157 CLR 523, 567, [1985] HCA 43 (Brennan J).

80 Diamantis and Laufer (n 67) 462; Samuel W Buell, 'The Blaming Function of Entity Criminal Liability' 81 *Indiana Law Journal* 473, 491–526; cf T Game SC and Justice D Hammerschlag, *Submission 17*.

81 The ALRC notes concerns that have been raised about the capacity of civil penalties to achieve deterrence and suggests this is one of many areas of corporate regulation that would benefit from additional empirical research: Monash Transnational Criminal Law Group, *Submission 35*; Natalie Schell-Busey et al, 'What Works?: A Systematic Review of Corporate Crime Deterrence' (2016) 15(2) *Criminology & Public Policy* 387.

82 Douglas Husak, 'Crimes Outside the Core' (2004) 39 *Tulsa Law Review* 755, 757. See also *He Kaw Teh v The Queen* 1985) 157 CLR 523, 566–7, [1985] HCA 43.

> where misconduct can create grave risks to others and where it may be difficult to prove the actor's knowledge of the relevant facts. The idea behind dispensing with proof of intention or negligence is to increase the pressure to conform with safety rules on the part of those who act in these areas.[83]

5.46 As Brennan J indicated, however, the purpose of the strict or absolute liability offence is not to deter harmful conduct, but to require the person to take measures to prevent the conduct occurring:

> However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. A statute is not so construed unless effective precautions can be taken to avoid the possibility of the occurrence of the external elements of the offence.[84]

5.47 Accordingly, criminalisation is justified where it is appropriate given the level of potential harm, in order to increase pressure for compliance. This principle is embodied in many existing strict or absolute liability offences, particularly those in relation to workplace health and safety and certain environmental offences.[85] As the ALRC has observed in a previous inquiry:

> In Australia (and also in the United Kingdom and Canada) the removal of the common law requirement for a mental element in 'public welfare' legislation has been justified on the basis of protecting the community by enforcing a high standard of care. Without strict liability, this standard of care has the potential to be undermined by the difficulty for the prosecution in proving a guilty mind in these types of cases.[86]

e) Otherwise in the public interest to pursue a corporation itself

5.48 Principle 2(e) provides that criminalisation of conduct by a corporation may be justified where 'it is otherwise in the public interest to prosecute the corporation *itself* for the offence'. This principle is not intended to suggest that there is only a public interest in pursuing corporations solely for criminal contraventions of the law.[87] Instead, this is directed to circumstances in which a criminal offence applicable to a corporation may be justified, but may not be encompassed clearly by the other principles, such as:

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83 Thomas Weigend, 'Subjective Elements of Criminal Liability' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 490, 491.

84 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 566–7, [1985] HCA 43. See also [7.178]–[7.196] (duty-based offences on workplace health and safety).

85 See, eg, *Workplace Health and Safety Act 2011* (Cth) ss 32, 33; *Protection of the Sea (Prevention of Pollution from Ships Act 1983* (Cth), ss 9, 10.

86 Australian Law Reform Commission (n 3) [4.33].

87 Cf T Game SC and Justice D Hammerschlag, *Submission 17*.

- regulatory provisions under which it may be particularly appropriate, given the nature of the conduct, for the corporation *itself* to be pursued criminally;[88] or
- where an aspect of the particular sector or conduct to be regulated justifies greater use of the criminal law.

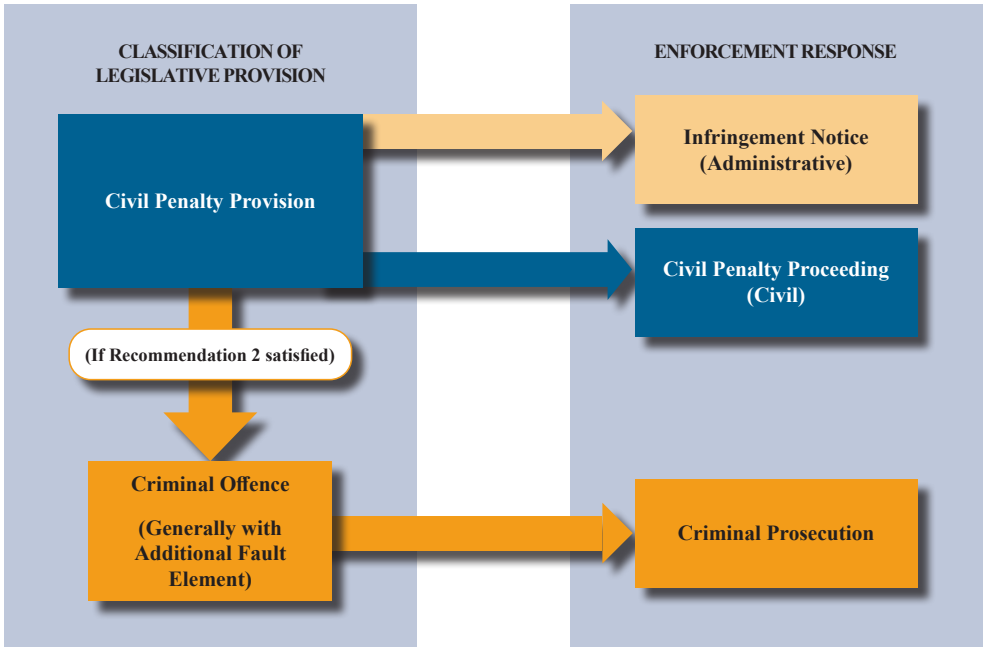
5.49 This principle may also limit criminalisation by reminding framers of legislation to consider how existing provisions are classified and whether the proposed offence is already addressed by other existing criminal or civil regulatory provisions applicable to corporations or, in certain contexts, individuals. If this is the case, creation of the offence may not be in the public interest.

Enforcement options under the recommended model

5.50 The model of corporate regulation contemplated by Recommendations 2 has implications for both the classification of legislative provisions and enforcement responses. Recommendation 2 is that the default mechanism of corporate regulation be civil regulation. It provides a set of evaluative criteria to assist framers of legislation in deciding when particular conduct by a corporation should be criminalised. Recommendation 3 follows from Recommendation 2. It recommends that infringement notices no longer be available for criminal offences. The implications for corporate regulation overall, if Recommendation 2 was implemented, are illustrated in Figure 5-1 below.

88 For example, where the offence is one that is directed to a particular corporate aspect of the behaviour, such as the offences discussed in Chapter 7. The offences discussed in that chapter would generally fit within the other principles in Recommendation 2.

Figure 5-1: Enforcement options under the recommended model



5.51 If Recommendation 2 were implemented, the majority of existing low-level criminal offences (assessed against the principles in Recommendation 2) would be transformed into civil penalty provisions. A criminal offence would only be created if the criteria set out in Recommendation 2 were satisfied. Recommendation 2 is also supported by Recommendation 8, discussed in Chapter 7, which recommends the creation of offences that criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation.

Accommodating dual-track regulation

5.52 The model depicted in Figure 5-1 above does not seek to eliminate 'dual-track' regulation. It is not designed to restrict regulatory flexibility, but to ensure a principled approach to criminalisation. This does place some consequential restrictions on regulatory flexibility but it may simply be formalising current practice in a more principled fashion. Where a dual-track exists, the criminal offence should generally be distinguished from the relevant civil penalty provision by a requirement to prove an additional fault element.[89] If a regulator perceives a need for a full graduation in

89 The concept of proof of a particular state of mind making a contravention more serious than a bare contravention is acknowledged even in the civil penalty realm, although it is normally something relevant to the imposition of a penalty: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, [2016] FCAFC 181 [131]. The use of a fault element as the distinguishing feature between a civil penalty provision and a criminal offence is already present in a

response (ranging from an infringement notice through to a criminal prosecution), this is a justification for dual-track regulation designed in this way.

5.53 This raises the question of strict or absolute liability criminal offences. The ALRC considers that these should generally be restricted to scenarios in which there is a risk of particular harm from the conduct that justifies criminalisation. Otherwise, they should generally be civil penalty provisions. Many of the existing strict or absolute liability offences would not meet the criteria for remaining as a criminal offence,[90] although others would.[91] Instances may remain where a dual-track between a civil penalty provision and a strict or absolute liability criminal offence may be justified (based on the potential harm flowing from the misconduct), despite the general approach of ensuring any dual-track sufficiently distinguishes the criminal offence through an additional fault element. However, such instances are likely to be relatively uncommon. In all circumstances, drafters and regulators should have to justify the particular regulatory approach, with civil penalty provisions as the default.

5.54 Figure 5-2 below shows the approach that the framers of legislation should take, in accordance with Recommendation 2, to determine whether dual-track regulation is appropriate in a particular instance.

number of the statutory regimes reviewed by the ALRC: see, eg, *Corporations Act 2001* (Cth) pt 7.10, div 2–3; *Competition and Consumer Act 2010* (Cth) ss 45AF, 45AG, 45AJ, 45AK.

90 For example, the earlier mentioned offences relating to notifying changes in registered office hours to ASIC or placing an ACN on certain company documents: *Corporations Act 2001* (Cth) ss 145(3), 153.

91 For example, the offences relating to failing to comply with a health and safety duty in the *Workplace Health and Safety Act 2011* (Cth) ss 32, 33, noting the provisions of s 12F, or the offences relating to discharge of oil, oily mixtures, or oil residues into the sea in the *Protection of the Sea (Prevention of Pollution from Ships Act 1983* (Cth), ss 9, 10.

Figure 5-2: Framing of dual-track regulation under the recommended model

5.55 The recommended model may be criticised by some on the ground that it restricts regulatory flexibility, contrary to responsive regulation theory. It could be argued that the better way to understand Commissioner Hayne's comments is to think about them as being focused upon enforcement policy, rather than as suggesting a need to depart from responsive regulation theory.[92] However, this model, and the principled distinction to which it seeks to give effect, could also be seen as a means of properly integrating responsive regulation into legislative design and balancing the normative features of the criminal law with insights from regulatory theory. When there is a need for greater flexibility, it can be achieved through dual-track regulation in accordance with the recommended model.

92 See Michael Legg and Stephen Speirs, '"Why Not Litigate?" – The Royal Commission, ASIC and the Future of the Enforcement Pyramid' (2019) 47 *Australian Business Law Review* 245, 258–9.

Staged implementation and particular regulatory contexts

5.56 Given the consequences of Recommendation 2, it would need to be implemented in a staged manner with a realistic timeline. First, the model proposed could be applied to new legislation and legislative amendments. The ALRC acknowledges that this may not be possible with all amending legislation, particular where amendments are made to legislation with a complex existing penalty framework. In such a context, a longer implementation period may be required. Secondly, the model could be implemented through periodic systematic reviews of relevant legislation. For example, a potential review of Chapter 7 of the *Corporations Act* following the Financial Services Royal Commission may be a possible opportunity to implement the model or undertake a staged review of existing regulation.

5.57 In addition, as ASIC submitted, it is important to appreciate that a uniform regulatory approach may not be appropriate for all regulatory contexts.[93] The model contemplated by Recommendation 2 should have sufficient flexibility to be tailored to particular specialised regulatory contexts. For example, some regulatory environments may have a greater need for dual-track regulation or strict or absolute liability criminal offences. The crux of the model is that there should be a principled approach to criminalisation of conduct by corporations, consistent with the principles in Recommendation 2, with framers of legislation required to justify a particular instance of dual-track regulation.

5.58 The characteristics of a particular regulatory context may also mean that there is a less pressing need for corporate liability, whether criminal or civil, and instead a need for greater reliance upon individual liability, removal of licences, or banning orders against relevant individuals — for example, the regulation of superannuation entities and their trustees.[94] Superannuation trustees are regulated by a 'complex legal environment' comprised of the general law of trusts with an 'overlaying … raft of relevant legislation'.[95] Obligations of superannuation trustees include general requirements of the law of trusts, the governing rules of the fund, and covenants implied by law into those governing rules.[96] There are also various statutory duties that regulate superannuation trustees, including the licensing requirements and conduct obligations relating to financial services businesses under the *Corporations*

93 Australian Securities and Investments Commission (ASIC), *Submission 54*.

94 The ALRC acknowledges the complexity of this context and the many different types of superannuation entity: see Pamela Hanrahan, *Legal Framework Governing Aspects of the Australian Superannuation System* (Financial Services Royal Commission Background Paper 25, 2018) 1–6. What follows is necessarily a general illustration of how this context may require some nuance in regulatory approach.

95 Ibid 7–8. The relevant legislation includes: *Superannuation Industry (Supervision) Act 1993* (Cth); *Superannuation Guarantee (Administration) Act 1992* (Cth); *Superannuation Industry (Supervision) Regulations 1994* (Cth); *Retirement Savings Account Act 1997* (Cth); *Income Tax Assessment Act 1997* (Cth); *Corporations Act 2001* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth).

96 *Superannuation Industry (Supervision) Act 1993* (Cth) s 52.

Act,[97] and the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (Cth).[98]

5.59 Superannuation trustees are generally corporations. Where a superannuation trustee contravenes the law, a question arises as to the appropriate way in which the law should hold the trustee accountable. Many corporate trustees are shell companies with no assets and thus a criminal fine, or the imposition of a civil penalty, against an errant corporate trustee may be purely pyrrhic.[99] Accordingly, in the superannuation context, there may be a need for greater reliance upon licence revocation and disqualification of the corporate trustee, or on proceedings against directors or responsible officers of the corporate trustee,[100] in order to ensure sufficient accountability rather than seeking pecuniary penalties against the corporate trustee. This example highlights that the recommended model of corporate regulation discussed above may require some adaptation in particular contexts. Any such modification should, however, be the subject of proper justification.

Complexities in recalibrating corporate regulation

5.60 The Discussion Paper proposed a suite of reforms to promote a *principled basis* for the *criminalisation* of Commonwealth statutory prohibitions as they apply to corporations. Those proposals were designed to ensure that regulation is consistent with the characteristics of corporations as juristic persons (and hence, legal constructs) and address the over-proliferation of criminal offences relevant to corporations that involve little underlying criminality.

5.61 It was suggested that the legislative provisions that regulate unlawful conduct by corporations be recalibrated into three categories: criminal offences, civil penalty

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97 Noel Davis and Michael Chaaya, LexisNexis (at December 2019) 'The Law of Superannuation in Australia' [43,010]–[43,160].

98 Ibid [17,017].

99 Superannuation trustees have a right of indemnity as against the fund for expenses incurred in the administration of the fund: Ibid [15,010]. Any provision of the governing rules of the fund that seeks to restrict or limit this right of indemnity is void: *Superannuation Industry (Supervision) Act 1993* (Cth) s 56(1). However, s 56(2) of the Act provides that the governing rules may not permit a trustee to be indemnified 'against, *either* liability for breach of trust if the trustee failed to act honestly or intentionally or recklessly failed to exercise the required degree of care or diligence, *or* liability for a money penalty under a civil penalty order or other liabilities and payments': JD Heydon and MJ Leeming, *Jacobs' Law of Trusts* (Lexis Nexis Butterworths, 8th ed, 2016) [29-10]. Similar provision is made in s 57 of the Act in relation to directors of corporate trustees of superannuation entities. This makes sense, as otherwise the penalties applied against a corporate trustee would be taken from the fund. Without any right of indemnity, however, there is a risk that a corporate trustee may not have sufficient assets encumbered by trust obligations with which to meet the penalty.

100 The directors' duties in *Corporations Act 2001* (Cth) ss 180–184 apply to directors of a corporate trustee, like directors of any corporation. Disqualification proceedings may also be brought against responsible officers for contravention of provisions of the *Superannuation Industry (Supervision) Act 1993* (Cth) by the corporate trustee: see pt 15 div 3. For a recent example of an unsuccessful disqualification proceeding, see *Australian Prudential Regulatory Authority v Kelaher* (2019) 138 ACSR 459, [2019] FCA 1521.

proceeding (CPP) provisions, and civil penalty notice (CPN) provisions.[101] As with the recommended model, the proposed primary form of corporate regulation was civil, both in terms of legislative enactment and enforcement. It was proposed that a CPP provision and a criminal offence should not both apply to the same conduct, unless the criminal offence captures a greater level of wrongdoing (such as by fault element) thus restricting, but not eliminating, dual-track regulation. The proposed distinction between CPP provisions and CPN provisions was whether proof of the contravention required judicial proceedings or whether contravention would be evident prima facie.[102] The proposals would have eliminated administrative notice-based enforcement for all but CPN provisions.

5.62 The tenor of submissions and consultations on the model was mixed. Members of the business community, law firms, other practitioners, and some parts of civil society strongly supported a more defined and principled distinction between criminal and civil regulation (including the proposed changes to civil regulation).[103] BHP was particularly supportive, arguing that there needed to be a more coherent approach and that the present system imposes a significant regulatory burden. There was also some academic support for the proposals.[104] Conversely, some submissions criticised the model as 'impractical' and introducing 'unwieldy complexity',[105] while others argued that corporations should not be treated differently from natural persons at all.[106] The Law Council of Australia generally supported a principled distinction between criminal and civil regulation, but questioned how it might be achieved.[107]

5.63 Perhaps the strongest criticisms of the model came from some of the regulators, who were concerned about reduced regulatory flexibility hindering their ability to regulate effectively.[108] It was suggested that the proposed model might lead to no enforcement action at all in many cases, and would be to the detriment of Australian corporate regulation.[109] Such a concern was shared by Associate Professor Overland, who emphasised the need for dual-track regulation for serious

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101 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) 90–3.

102 See ibid 97–9.

103 Australian Small Business and Family Enterprise Ombudsman, *Submission 28*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Financial Markets Association, *Submission 48*; Australian Banking Association, *Submission 57*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

104 Monash Transnational Criminal Law Group, *Submission 35*.

105 T Game SC and Justice D Hammerschlag, *Submission 17*.

106 Professor J Gans, *Submission 18*.

107 Law Council of Australia, *Submission 27*.

108 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Australian Securities and Investments Commission (ASIC), *Submission 54*.

109 Australian Securities and Investments Commission (ASIC), *Submission 54*. ASIC instead suggested there may be a case for a targeted review of particular instances of dual-track regulation where greater clarity is required as to the fault element to be proven in civil versus criminal proceedings.

and complex misconduct such as insider trading.[110] Regulators were also critical of the proposed restrictions upon the availability of infringement notices, and of the posited divide between CPP and CPN provisions.[111] Regulators highlighted that some types of contravention, such as prohibitions on misleading conduct, could sensibly be included in both categories.[112] Conversely, Professor Hanrahan argued that a benefit of the proposed model would be that it would reduce the incidence of dual-track regulation and infringement notices.[113]

5.64 Ultimately, the model contemplated by Recommendation 2 responds to concerns about these earlier proposals. It seeks to balance regulatory flexibility with a principled approach to the use of the criminal law against corporations. Given the focus of this part of the Inquiry has at all times been about ensuring a principled approach to corporate criminal responsibility, it was determined that this could be achieved without recommending a division of civil penalty provisions into CPP and CPN provisions. Instead, the ALRC makes recommendations about civil and administrative penalties only to the extent that they promote a properly delineated and distinctive application of the criminal law.

A distinctive role for the criminal responsibility of a corporation

5.65 The unique expressive power of the criminal law provides a compelling rationale for its application to corporations. As is explained later in this chapter, the attainment of a principled distinction in the framing of criminal and civil regulation is particularly critical in a corporate context because there is otherwise no distinction between the penalties imposed for misconduct. A corporation 'has no soul to be damned, and no body to be kicked'.[114] It is therefore harder to see an immediate distinction between criminal and civil regulation unless there is some normative scope to each mechanism of regulation based upon the conduct that particular statutory provisions capture.

5.66 The question then arises as to how criminal responsibility of a corporation can be distinguished from liability to a civil penalty, and how this should guide legislative design. An answer lies in appreciating the normative foundations of the criminal law, and its particular expressive role. Recommendation 2 seeks to embed those normative principles into the legislative design of corporate regulatory provisions.

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110 Associate Professor J Overland, *Submission 42*.

111 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Australian Securities and Investments Commission (ASIC), *Submission 54*. The Law Council also expressed concern about the workability of the division between CPP and CPN provisions proposed in the Discussion Paper: Law Council of Australia, *Submission 27*.

112 Australian Competition and Consumer Commission (ACCC), *Submission 25*.

113 Professor P Hanrahan, *Submission 38*.

114 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, citing Baron Thurlow LC.

5.67 Is there a principled distinction between criminal responsibility and liability for a civil penalty? Some critics of corporate criminal responsibility argue that corporate criminal responsibility's sole purpose is to deter future corporate wrongdoing. A civil penalty provision has the same purpose.[115] While it may be difficult to distinguish a civil penalty from a criminal fine imposed on a corporation solely from a deterrence perspective alone, this analysis fails to appreciate that criminal law has additional aims of retribution and moral condemnation.[116] Criminal law is not directed to deterrence alone.[117] The High Court of Australia has endorsed such a purposive distinction between criminal and civil penalties. 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.[118]

5.68 Furthermore, even writers like Dr Mann who, in contrast to the High Court, consider civil penalties to be punitive in nature, like criminal penalties,[119] 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.[120]

5.69 In the ALRC's view, the 'distinctive normative role' for criminal regulation can be found in the pluralist purposes of the criminal law and the expressive effects that flow from those.

Aims of the criminal law

5.70 There are debates within criminal law theory as to the proper scope of the criminal law. Within the corporate regulatory context, the creation of a criminal offence is generally justified on the basis of achieving deterrence and promoting

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115 VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109(7) *Harvard Law Review* 1477; Daniel R Fischel and Alan O Sykes, 'Corporate Crime' (1996) 25 *Journal of Legal Studies* 319, 322; Gilchrist (n 67) 31.

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

117 Ibid 841; Gilchrist (n 67) 31.

118 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [2015] HCA 46 [55]. See also *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68, [2018] FCAFC 53 [71].

119 See Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *Yale Law Journal* 1795.

120 Ibid 1863.

compliance.[121] This reflects an instrumental conception of the criminal law.[122] A corollary of this view is that there 'is no fundamental difference between crimes and other branches of law that impose sanctions. The difference is one of degree'.[123] Conversely, other theorists regard criminal law as 'representing a statement of moral or other values'.[124] Simester and von Hirsch consider that:

> 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*.[125]

5.71 Criminalisation 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.[126] Like criminal law itself, the punishment that follows conviction of a crime is also recognised to have pluralist aims.[127]

5.72 These debates are also reflected in similar academic dialogues about what should properly be considered to be a crime, and what should be criminalised. Historically, there was a strong moral element to criminalisation.[128] A 'core case' of crime was generally described as conduct involving 'serious moral wrongdoing'.[129] More procedural definitions of crime arose over the course of the twentieth century in part due to their ability to explain regulatory offences.[130] These lacked any normative content. Professor Glanville Williams defined a crime as

> 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.[131]

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121 Cf *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [2015] HCA 46 [55].

122 See Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 14; AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 4.

123 Simester and von Hirsch (n 122) 4.

124 Wells (n 122) 15.

125 Simester and von Hirsch (n 122) 4.

126 Ibid 6–7.

127 See, eg, *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Justice Act 2003* (UK) s 142; Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing, 2015) 214–5.

128 Horder (n 30) 102–103.

129 Ibid 103.

130 Ibid 105.

131 Glanville Williams, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107, 123.

5.73 There has been a resurgence in the popularity of normative approaches to the boundaries of criminal law in recent years.[132] Professor Ashworth has argued that criminalisation should be confined to instances of 'substantial wrongdoing'.[133] Professor Bagaric has suggested crimes should reflect 'breaches of important moral principles'.[134] 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.[135] Criminal conduct is wrongdoing that is deserving of censure,[136] or as noted above, for which condemnation by the community is justified.[137]

5.74 Recent procedural definitions of crime also adopt some normative content. Dr Lamond, for example, has defined crimes as 'public wrongs … that the community is responsible for punishing but not necessarily wrongs against the public itself'.[138] This definition could also be applied to civil penalty provisions or other administrative penalties.[139] 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'.[140]

5.75 Even amongst normative theorists there are, again, differing views as to what makes conduct sufficiently wrongful so as to be criminal. It may require an assessment of both harm and culpability. Liberal approaches generally focus upon the harm caused.[141] Other liberal theorists consider that deviation from social duties may be sufficient.[142] Moralists, on the other hand, consider that there are certain moral duties that exist independent of harm or social norms.[143] 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. These differing views evince the difficulty in capturing the essence of what is a crime.

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132 Ashworth (n 30) 240.
133 Ibid.
134 Mirko Bagaric, 'The "Civil-Isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.
135 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.
136 Simester and von Hirsch (n 122) 11.
137 Grant Lamond, 'What Is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609, 629.
138 Ibid 614.
139 See Ashworth (n 30) 230–2.
140 Lamond (n 137) 629.
141 Melissaris (n 135) 10–11.
142 Ibid.
143 Ibid 11.

5.76 For these reasons, other theorists, such as Fletcher, have adopted a more 'pluralistic' conception of a crime.[144] As Professor 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.[145]

5.77 In Husak's view, some offences may be 'hybrids' that 'exhibit features of more than one pattern simultaneously'.[146] There may also be other patterns that justify criminalisation, in that some other aspect of the conduct justifies the pluralist response of the criminal law — marked by denunciation, condemnation and drawing upon the expressive power of the criminal law. 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, in that it requires both harm and culpability.[147]

The expressive power of the criminal law in a corporate context

5.78 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 in a corporate context.[148] The justification must be more than mere deterrence by imposition of a pecuniary penalty.

5.79 Criminal haw has a distinctive normative role because it has, along with other purposes, additional purposes of retribution and denunciation and, through this, has a particular expressive role. The statement by the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate* set out above evinces the law's recognition of this. This is not to downplay the deterrent effect of criminalisation. Clearly, making conduct an offence acts as a deterrent. The point, however, is that criminalisation does more than that. As Diamantis has argued:

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144 George P Fletcher, *Rethinking Criminal Law* (Little, Brown & Co, 1978); see also Husak (n 82) 757.
145 Husak (n 82) 757 (emphasis in original).
146 Ibid 760.
147 Ashworth (n 30) 240.
148 W Robert Thomas, 'How and Why Corporations Became (and Remain) Persons under the Criminal Law' (2018) 45 *Florida State University Law Review* 479, 530.

> The ends served by criminal law extend beyond deterrence. Other commonly accepted aims include rehabilitation, incapacitation, and desert. As the Model Penal Code's list of purposes attests, deterrence is just part of the story, even for corporations. Were it otherwise, one would expect the scope of traditional corporate criminal law to recede over time, replaced by the efficient strict civil liability standards that deterrence-focused, law and economics theorists often favor. In fact, precisely the opposite is occurring as the breadth of corporate criminal law expands both here and abroad.[149]

5.80 Relatedly, the expressive effect of the criminalisation, and the stigma that attaches to criminal conviction, amplify the deterrent effect of the criminal law beyond that provided by a civil penalty.

5.81 If a corporation has the capacity to be criminally responsible[150] then the retributive and condemnatory aims of the criminal law, and its expressive power, continue to have relevance to a corporation as a subject of the criminal law.[151] 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.[152]

5.82 Professor Alschuler has argued that the criminal conviction of a corporation is mere symbolism, given the corporation's fictional existence.[153] He argues it is not possible to condemn or seek retribution against an entity that is not a natural person.[154] As Professor Friedman explains, however, the concept of retribution applicable to corporate criminal responsibility is 'expressive retribution'.[155] Expressive retribution is a consequentialist form of retribution[156] that

> 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.[157]

5.83 According to Friedman:

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149 Diamantis (n 60) 2060.
150 See [4.20]–[4.45].
151 Friedman (n 116) 834; Sylvia Rich, 'Corporate Criminals and Punishment Theory' (2016) 29 *Canadian Journal of Law & Jurisprudence* 97, 99.
152 Rich (n 151) 100.
153 See Albert W Alschuler, 'Two Ways to Think about the Punishment of Corporations' (2009) 46(4) *American Criminal Law Review* 1359.
154 Ibid 1367–9, 1372–6.
155 Friedman (n 116) 842–53. He questions whether Kantian notions of retribution could properly be applied to a corporation: Ibid 845.
156 Friedman (n 116) 843.
157 Ibid 842.

> 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 properly should be valued.[158]

5.84 This makes expressive retribution appropriate as:

> 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.[159]

5.85 Dr Thomas makes the following suggestions about the expressive role of the criminal law contributing to its distinctiveness in the corporate context:

> According to expressive theories of law, one vital function of the law, and equally its enforcement, is to convey and reaffirm the right sort of moral or social judgments underpinning a particular law-that is, expressive theories 'assert that state action is required to express.'
>
> Expressive theories have considerable traction with respect to criminal law scholarship. As Henry Hart famously put the point: 'What distinguishes a criminal from a civil sanction … is the judgment of community condemnation which accompanies and justifies its imposition'.[160]

5.86 In the Discussion Paper, the ALRC posited that the expressive power of the criminal law — its power to embrace concepts such as retribution and convey societal denunciation and condemnation — was its signature feature in the corporate context. This is what distinguishes it from deterrent-focused civil penalties.[161] This approach was supported by Associate Professor Crofts:[162]

> I support the idea that criminal law has an expressive function and communicates right from wrong. The law routinely classifies conduct, defines action, interprets events and evaluates worth; it then sanctions these judgments with the force and authority of law. … This expressive aspect of the law has value. Moreover, it

158 Ibid 843.

159 Ibid 854.

160 W Robert Thomas, 'The Ability and Responsibility of Corporate Law to Improve Criminal Fines' (2017) 78 *Ohio State Law Journal* 601, 615, quoting Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503, 1520; see also HM Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 40.

161 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [2.38]–[2.44].

162 Indeed, in another context 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': 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.

> has 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 (or lack thereof) is itself significant.
>
> The law asserts models of right and wrong, good and bad, and this assertion is enforced with the imposition of sanctions. Theorists have recognised and argued that the form of the law will affect, reflect and reinforce perceptions of the morality of a particular practice or behaviour.[163]

5.87 Professor Gilchrist suggests that a consideration of the absence of corporate criminal responsibility reveals 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.[164]
>
> …
>
> 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.[165]

5.88 Furthermore, the expressive power of the criminal law may be particularly relevant to corporate defendants in another way, based upon the cognitive science research referred to by Diamantis and Professor Laufer:

> Retributivists working on corporate criminal law prefer expressive forms of retributivism, according to which the purpose of punishment is to allow society to express its moral condemnation of corporate misdeeds. This approach is bolstered by recent discoveries in cognitive science explaining why people feel condemnatory impulses toward the misdeeds of groups like corporations. Researchers presented subjects with scenarios describing either a group or an individual engaging in some behavior and asked what mental state was animating the behavior. They found that

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163 Associate Professor P Crofts, *Submission 61*, quoting Penny Crofts, *Wickedness and Crime: Laws of Homicide and Malice* (Routledge, 2013); Crofts (n 162); Hart (n 160); David Garland, *Punishment and Modern Society* (Clarendon Press, 1990); Dan Kahan, 'The Anatomy of Disgust in Criminal Law' (1998) 96(6) *Michigan Law Review* 1621.

164 Gilchrist (n 67) 55–6. See also Diamantis (n 60) 2062–3.

165 Gilchrist (n 67) 56 (citations omitted).

> people are as likely to attribute intentions, including bad intentions, to groups as they are to individuals.[166]

5.89 Thus, 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. It relies upon 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 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 Dr Rich has observed, '[a] strict focus on deterrence provides no way of keeping the criminal/civil distinction, and creates a tendency toward overcriminalisation'.[167] Consequently, the issues raised in the earlier part of this chapter regarding the proliferation of criminal offences are particularly pertinent to the rationale for corporate criminal responsibility.

5.90 The general approach that has been adopted in Recommendation 2 to drawing a principled distinction between criminal and civil regulation of corporations was supported by a range of submissions, in addition to that of Crofts.[168] The 'principled approach … [and] its focus on denunciation of corporate wrongdoing' was endorsed by the Monash Transnational Criminal Law Group.[169] The Australian Institute of Company Directors stated that it

> agrees that the distinctive role of corporate criminal responsibility lies in its ability to achieve objectives of retribution and condemnation, and that this should be reserved for the most reprehensive conduct.[170]

5.91 The Business Council of Australia supported that approach,[171] while BHP stated that:

> We also strongly support the overarching objective to reserve criminalisation only for offences where societal denunciation and condemnation is required and there is a public interest in pursuing the corporation itself. The current state of the law, whereby a range of minor regulatory contraventions are criminal offences and civil

166 Diamantis and Laufer (n 67) 463.
167 Rich (n 151) 102.
168 Australian Small Business and Family Enterprise Ombudsman, *Submission 28*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Condon Associates, *Submission 41*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Logie-Smith Lanyon, *Submission 44*; Australian Banking Association, *Submission 57*; NSW Young Lawyers, *Submission 59*; BHP, *Submission 58*; Business Council of Australia, *Submission 63*; Herbert Smith Freehills, *Submission 62*.
169 Monash Transnational Criminal Law Group, *Submission 35*.
170 Australian Institute of Company Directors (AICD), *Submission 37*.
171 Business Council of Australia, *Submission 63*.

> penalties and criminal prosecution are increasingly available for substantially the same conduct, clouds the logic of corporate criminal responsibility.[172]

5.92 Other submissions, while supportive of reserving criminalisation for the most egregious misconduct, suggested that the principled distinction needed to go further; intentionality on the part of the corporation should be required for a provision to be criminalised.[173] On the other hand, ASIC submitted that criminalisation of low-level regulatory-style offences remained necessary in order to secure compliance:

> Criminalisation of these less serious contraventions reflects a legislative intention to harness the expressive force of criminalisation to secure widespread compliance and deter misconduct in relation to particular obligations or prohibitions. Where regulatory interventions lower down the enforcement pyramid have failed in relation to a compliance failure, ASIC has recourse to criminal action. The targeted use of criminal action is effective in reinforcing the power of the rule and further promoting widespread compliance.[174]

5.93 ASIC futher considered that a principled distinction between criminal and civil regulation (having regard to the expressive power of the criminal law) could also be said to be 'embodied in the process of proving to a court such liability should be imposed'.[175]

5.94 Professor Gans criticised the principled distinction put forward by the ALRC based on his view that it confused 'criminalisation' and 'penalisation'.[176] The ALRC agrees that the question of the capacity of a corporation to be criminally responsible[177] (and the attribution rules for establishing this responsibility) is a distinct question from the question of whether a particular contravention should be criminalised or designated as a civil penalty provision. However, it is because a corporation is not a natural person that there is a particular need, at the level of the framing of offences and civil penalty provisions, to consider the normative foundations of the criminal law and how criminal regulation can be framed so that it is distinct from civil regulation. The principles in Recommendation 2 reflect general distinguishing features of the criminal law. It is because of the juristic nature of the corporate entity that these must be given particular emphasis in criminal offences applicable to corporations.

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172 BHP, *Submission 58*.
173 Australian Financial Markets Association, *Submission 48*. See also NSW Young Lawyers, *Submission 59*.
174 Australian Securities and Investments Commission (ASIC), *Submission 54*.
175 Ibid.
176 Professor J Gans, *Submission 18*.
177 As to which see [4.20]–[4.45].

Harnessing the expressive power of the criminal law to provide guidance to legislators

5.95 Settling upon the principles was difficult because of the diversity of views as to what makes something 'criminal'. The principles in Recommendation 2 reflect that, in the corporate context, it is most useful to focus on what should distinguish criminal regulation from civil regulation. Recommendation 2 has the benefit of not being overly essentialist as to what makes something sufficiently wrongful so as to warrant criminalisation. Recommendation 2 reflects that the reasons for criminalisation, like the aims of the criminal law, are pluralistic.[178] It therefore avoids the some of the concerns expressed in submissions about any attempt to use a sole criterion of 'seriousness' to categorise regulatory provisions. Instead, Recommendation 2 focuses on a number of distinct characteristics of the criminal law.

5.96 The five evaluative principles put forward in Recommendation 2 are designed as guidance for use by framers of legislation. They are not to be treated as akin to statutory criteria, nor as guidance for prosecutorial discretion. The decision to criminalise conduct is a difficult policy choice. These principles are necessarily broad and open-textured. They are designed to guide decision making by drafters and not direct a particular outcome. As a result, they are open to interpretation. There will always be an element of value judgment in the question of policy of whether conduct should be criminalised.

5.97 Some submissions criticised the approach taken in providing evaluative guidelines for the creation of criminal offences applicable to corporations. Mr Game SC and the Hon Justice D Hammerschlag considered that 'the character of conduct does not depend only on the framing of the terms of a contravention, but also on the nature and circumstances of the conduct'.[179] They further consider the distinction between the criminal and civil regulation was 'a question of the level' of denunciation and condemnation deserved in respect of a particular contravention, with all contraventions deserving such opprobrium.[180]

5.98 The ALRC agrees that the egregiousness of a particular set of contraventions will depend on the circumstances of the particular case. Indeed this proposition is foundational to the process of sentencing. However, the fact remains that legislators are required to make judgments as to whether particular prohibitions or norms of conduct should be criminalised, or instead be designated as civil penalty provisions. These judgments are made by policymakers on a daily basis. They necessarily involve a consideration of the proposed offence in the abstract. It is better that such decisions are made with the assistance of evaluative principles as guidance,

178 Husak (n 82) 757.
179 T Game SC and Justice D Hammerschlag, *Submission 17*.
180 Ibid.

rather than occurring in an ad-hoc and inconsistent way. Furthermore, the volume of corporate prosecutions when compared with prosecutions of individuals shows that the legal system does not treat the application of the criminal law to corporations in the same way, or as a given.[181]

5.99 Providing guidance for the framers of criminal offences about criminalisation is not a new idea, as has been highlighted earlier in this chapter. The most recent version of the AGD Guide to Framing Offences provides:

> 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.[182]

5.100 The AGD Guide to Framing Offences also states:

> 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.[183]

5.101 All of these remain relevant. What Recommendation 2 adds is particular guidance for proposed offences directed at corporate conduct.

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181 See [3.69]–[3.110].

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

183 Ibid 13.

5.102 Most submissions were broadly supportive of the proposed principles to guide decisions as to criminalisation of conduct by corporations.[184] Some did not consider the principles to have utility.[185] Others did not support the principles on the basis that they were not unique to corporations.[186] Indeed, the principles are not unique to the corporate context — they reflect foundational principles of the criminal law — but their significance is amplified when potential defendants are corporations, as it is otherwise difficult to distinguish between criminal and civil regulation of a corporation.

5.103 Further submissions queried whether the principles were intended to be legislative guidance or were better viewed as guiding principles for the exercise of prosecutorial discretion.[187] The Monash Transnational Criminal Law Group provided some constructive suggestions as to how the principles could be reframed to clarify whether they are directed to legislators or prosecutors,[188] and the form of Recommendation 2 builds upon these suggestions.

5.104 Broad evaluative guidelines are preferable to any attempt to define, by subject matter for example, an 'economic crime'.[189] Instead, the recommended principles 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 the 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.

5.105 Rather than considering that the principles in Recommendation 2 provided too much of a restriction upon government, Professor Hanrahan submitted that it was because decisions as to criminalisation and legislative design have 'been left to the framers in the past that we have the current incoherence in the regulatory stock'.[190] The ALRC shares concerns about incoherence, and about a lack of adherence to principle in framing corporate regulation, while noting that it is the domain of legislators to determine the content of legislation. Recommendation 2,

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184 Australian Small Business and Family Enterprise Ombudsman, *Submission 28*; Allens, *Submission 31*. Australian Institute of Company Directors (AICD), *Submission 37*; Condon Associates, *Submission 41*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Logie-Smith Lanyon, *Submission 44*; Australian Financial Markets Association, *Submission 48*; BHP, *Submission 58*; NSW Young Lawyers, *Submission 59*; Associate Professor P Crofts, *Submission 61*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

185 T Game SC and Justice D Hammerschlag, *Submission 17*.

186 Professor J Gans, *Submission 18*.

187 Ibid. See also Monash Transnational Criminal Law Group, *Submission 35*.

188 Monash Transnational Criminal Law Group, *Submission 35*.

189 Cf HM Government and UK Finance, *Economic Crime Plan 2019-22* (2019) 10.

190 Professor P Hanrahan, *Submission 38*.

in combination with the process in Recommendation 4 below, should promote a principled distinction between criminal and civil regulation of corporations.

5.106 Some submissions suggested that additional restraining principles should be included in Recommendation 2. The Australian Financial Markets Association submitted that there should be a requirement to consider, in framing an offence, whether there is 'a sufficient level of (non-constructive) intentionality on the part of the corporation' and a consideration of whether the proposed offence 'is proposed to assist with the maintenance of the regulatory system … or is wrong in itself'.[191] The ALRC considers that these principles would be too restrictive. Subject to Principle 2(d) where the harm is so great so as to justify strict or absolute liability, a fault element should be required for a criminal offence and that regulatory requirements would not be criminal offences.[192]

5.107 NSW Young Lawyers characterised the principles proposed in the Discussion Paper as 'useful tools to ensure that criminal liability is appropriately limited on a principled basis'.[193] They submitted that a further principle should be included:

> When considering [the principles] above, legislators should give particular regard to: the nature of the conduct; the state of mind of the relevant actors (i.e. objective or subjective, considered in light of the nature of the conduct); and the extent and nature of the likely impact of the conduct. This guidance is not intended to limit the matters that can be considered when assessing whether [the principles] are met.[194]

5.108 Such matters should be taken into account in framing offences. Recommendation 2 includes the principle that the framer consider the level of potential harm arising from the offence. State of mind is not a principle to be considered on its own. Consideration of the nature of the conduct could be considered to be subsumed into consideration of the principles in Recommendation 2.

5.109 The Australian Banking Association suggested that it was not clear what the principle in Principle 2(b) added to that in Principle 2(a).[195] While there is similarity between these two principles, the labelling of an errant corporation's conduct as criminal, should be a specific principle to be considered in determining whether to criminalise particular conduct.

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191 Australian Financial Markets Association, *Submission 48* .

192 See *Proudman v Dayman* (1941) 67 CLR 536; cf *He Kaw Teh v The Queen* 1985) 157 CLR 523, 567, 594–5. Reference was made to this by ASIC: Australian Securities and Investments Commission (ASIC), *Submission 54*. Principle 2(d) takes this into account.

193 NSW Young Lawyers, *Submission 59*.

194 Ibid.

195 Australian Banking Association, *Submission 57*.

Infringement notices and corporate criminal responsibility

Recommendation 3 Infringement notices should not be available as an enforcement response for criminal offences as applicable to corporations.

5.110 Recommendation 3 flows from Recommendation 2. If only conduct by corporations that satisfies Recommendation 2 is criminalised, infringement notices would no longer be an appropriate response for the criminal offences that remain. As Recommendation 3 is dependent on Recommendation 2, its implementation would also have to occur in a staged manner in tandem with that of Recommendation 2.

Current availability of infringement notices in corporate regulation

5.111 In its Report on *Principled Regulation*, the ALRC summarised the operation of infringement notices as follows:

> An infringement notice (sometimes called a penalty notice) is a notice authorised by statute setting out particulars of an alleged offence. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice to expiate the offence or electing to have the matter dealt with by a court. The notice also specifies the time and method for payment and the consequences if the person to whom the notice is issued fails to respond to the notice either by making payment or electing to contest the alleged offence.[196]

5.112 Traditionally, infringement notices were only available for criminal offences, not civil contraventions, and were traditionally issued for minor criminal offences.[197] As Commissioner Hayne recently observed, '[o]ver time, the types of provisions for which an infringement notice can be issued have expanded'.[198] They may now be issued for a wide and expanding range of criminal and civil contraventions of varying levels of seriousness. In the context of financial services, the ASIC Enforcement Review Taskforce observed that ASIC has acquired additional powers to issue infringement notices in respect of:[199]

- breaches of continuous disclosure provisions of the *Corporations Act*;[200]
- unconscionable conduct and consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (Cth);[201]

196 Australian Law Reform Commission (n 3) [12.4]. Chapter 12 of that Report addresses infringement notices.
197 Ibid [12.5].
198 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 22) 437.
199 Australian Government, *ASIC Enforcement Review Taskforce Report* (2017) 80–1.
200 *Corporations Act 2001* (Cth) pt 9.4AA.
201 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GXA.

- strict liability offences and certain civil penalty provisions under the *National Consumer Credit Protection Act 2009* (Cth);[202] and
- breaches of the Market Integrity Rules, Derivative Transaction Rules, and Derivative Trade Repository Rules under the *Corporations Act*.[203]

5.113 The ASIC Enforcement Review Taskforce noted that the 'types of contraventions for which infringement notices may be issued under these Acts do not always sit easily within the principles earlier enunciated by the ALRC' for the use of infringement notices.[204] It also noted that 'ASIC has made relatively frequent use of the infringement notice powers in relation to alleged contraventions of significant (ie non-minor) provisions'.[205] Nonetheless, the Taskforce recommended the creation of further infringement notice provisions, and subsequent legislative amendments passed to give effect to the Taskforce's recommendations made infringement notices available for all strict and absolute liability offences in the *Corporations Act* as well as certain civil penalty provisions in the *Corporations Act* and *Insurance Contracts Act 1984* (Cth).[206]

5.114 The ACCC has powers to issue infringement notices for certain contraventions of the *Australian Consumer Law*,[207] including for:

- unconscionable conduct;[208]
- unfair practices;[209]
- certain unsolicited consumer agreement, lay-by, and gift card provisions;[210] and
- certain product safety and product information provisions.[211]

5.115 Infringement notice powers are also widely available under other regulatory statutes.

Differing views on infringement notices

5.116 Infringement notices can undoubtedly be a useful tool for securing compliance in an efficient way, because they:

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202 *National Consumer Credit Protection Act 2009* (Cth) s 331; *National Consumer Credit Protection Regulations 2010* (Cth) rr 38, 39.
203 *Corporations Act 2001* (Cth) s 798H; *Corporations Regulations 2001* (Cth) r 7.2A.04.
204 Australian Government (n 199) 81.
205 Ibid.
206 See *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) s 288K.
207 *Competition and Consumer Act 2010* (Cth) s 134A.
208 *Australian Consumer Law* pt 2-2.
209 Ibid pt 3-1 other than ss 32(1), 35(1), 36(1), (2), (3), 40, 43.
210 Ibid pt 3-2 div 2 other than s 85; div 3 other than ss 96(2), 99B(1), 99C, 99D(1), 99E, 99F(2).
211 Ibid ss 100(1) or (3), 101(3) or (4), 102(2), 103(2), 106(1), (2), (3) or (5), 107(1) or (2), 118(1), (2), (3) or (5), 119(1) or (2), 125(4), 127(1), (2) or (6), 131(1), 132(1), 136(1), (2) or (3), 137(1) or (2).

- 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
- are a diversionary tool that prevent the criminal justice system being overwhelmed by low-level prosecutions.[212]

5.117 Infringement notices 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.[213]

5.118 In addition, their use can contribute to the responsive regulatory approach favoured by regulators.

5.119 Despite the growth in the number of criminal offences and civil penalty provisions in respect of which an infringement notice may be issued, the position of the AGD remains that they should be restricted to minor contraventions:

> An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. The offences should be such that an enforcement officer can easily make an assessment of guilt or innocence.
>
> An infringement notice scheme should generally only apply to strict or absolute liability offences.
>
> …
>
> Serious offences should be prosecuted in court and should not be capable of being excused by an administrative assessment.[214]

5.120 Infringement notices have been criticised as trivialising crime and diminishing the imposition of stigma that should attend criminal responsibility.[215] As such, it has been argued that contraventions that attract any form of infringement notice ought to be decriminalised.[216] The ALRC's concerns about the inappropriate use of infringement notices are long-standing. The Senate Standing Committee on the Scrutiny of Bills summarised the disadvantages of an infringement notice scheme for strict liability offences as follows:

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212 Australian Law Reform Commission (n 3) [12.6]–[12.7].

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

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

215 Mirko 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.

216 Ibid.

- a lack of court scrutiny;
- the risk that innocent people will pay the infringement notice penalty to avoid the expense of contesting proceedings; and
- the possibility of 'net widening' with the automatic issue of an infringement notice where there would otherwise be a caution or a warning.[217]

5.121 The grant of infringement notice powers for complex contraventions has been the subject of particular criticism as the availability of such powers has expanded.[218] In relation to infringement notices for breach of continuous disclosure provisions, the ALRC in its *Principled Regulation* Report stated, among other concerns, that it was

> 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.[219]

5.122 Although Professor Rees supports the use of infringement notices in appropriate circumstances, she has observed that

> in recent years we have seen [infringement notices] develop from small penalty alternatives to being significant penalties in their own right lacking the checks and balances that come when a regulator has to make a case before the courts … [There] is an argument for a review of the use of infringement notices in federal regulation to ensure they remain as they are meant to be and are not more serious punishments clothed in a benign name.[220]

5.123 The Law Council of Australia has criticised the use of infringement notices in relation to corporate crime as 'lazy regulation',[221] and has particularly criticised their expanded use in relation to civil penalty provisions due to the complexity of such provisions.[222] The Law Council renewed its criticisms in its submission to the

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217 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 273–4. These had been identified by the ALRC in Australian Law Reform Commission, *Customs and Excise* (Report No 60, 1992).

218 See 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 213) 278.

219 Australian Law Reform Commission (n 3) [12.35].

220 Rees (n 213) 291.

221 Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 6 December 2016, 15 (Greg Golding, Law Council of Australia Business Law Section Foreign Corrupt Practices Working Group).

222 See Law Council of Australia, Submission on ASIC Enforcement Review *Positions Paper 7 – Strengthening Penalties for Corporate and Financial Sector Misconduct* (2017) [47]–[50].

Inquiry.[223] Critiques like these were analysed by the ASIC Enforcement Review Taskforce, but ultimately were not adopted.[224]

5.124 In the Final Report of the Financial Services Royal Commission, Commissioner Hayne heavily criticised the expanded infringement notice regime in the *Corporations Act* and its use in relation to financial services. He stated that:

> *Further attention should be given to those criticisms* [raised by the ALRC and Law Council]. It cannot be doubted that infringement notices serve as a practical regulatory tool for dealing with non-compliance with some provisions. But I *doubt that expanding the infringement notices regime can be shown to have served the public well.*
>
> Infringement notices give the regulator a course of action (reportable as 'enforcement action') that is unlikely to have any real deterrent (or punitive) effect.
>
> …
>
> 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 pure administrative 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.[225]

5.125 Ultimately, Commissioner Hayne recommended that these matters be addressed by changes to ASIC's enforcement policy

> to reflect that:
>
> - infringement notices should principally be used in respect of administrative failings by entities;
> - the use of infringement notices for provisions that require an evaluative judgment will rarely, if ever, be appropriate; and
> - beyond purely administrative failings, infringement notices will rarely be the appropriate enforcement tool where the infringing party is a large corporation.[226]

5.126 The ALRC agrees with Commissioner Hayne's recommendations. Although these were directed primarily at enforcement policy,[227] the criticisms made are

223 Law Council of Australia, *Submission 27*.
224 Australian Government (n 199) 81–3.
225 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 22) 438–9 (emphasis added).
226 Ibid 439.
227 Ibid 446, Rec 6.2.

equally applicable to questions of legislative design in relation to the availability of infringement notices.

Principled use of infringement notices

5.127 As noted above, the ALRC does not recommend any wide-reaching changes to the civil regulation system as was proposed in the Discussion Paper. Under the model contemplated by Recommendation 2, many of the low-level criminal offences that presently may be enforced through infringement notices would continue to have infringement notice powers attached because these would be civil penalty provisions. In relation to the conduct by corporations that would remain criminal if Recommendation 2 is implemented, it is appropriate that such conduct be proven in court in order to achieve the full expressive power of the criminal law.

5.128 The ALRC notes the criticisms that have been made of the availability of infringement notices for many complex civil penalty provisions and reiterates the concerns it has expressed both in this Inquiry and in its report on *Principled Regulation* about such enforcement powers. It also notes regulators' strong views as to the continued desirability of infringement notice powers for such provisions. For example, ASIC submitted that 'the existing availability of infringement notices for civil or criminal contraventions should remain'.[228] It cautioned against any removal of infringement notices for the continuous disclosure regime, and cited empirical research that indicated the availability of infringement notices for such misconduct improved compliance and was also supported by industry.[229] Similarly, the ACCC 'strongly opposes' any removal of infringement notice powers for civil penalty provisions.[230] It noted that while the Discussion Paper suggested that

> prohibitions involving misleading elements are examples of complex and significant civil penalty provisions which should not be eligible for an infringement notice … since the ACCC's infringement notice powers were introduced in 2010, the majority of matters that the ACCC has resolved by … infringement notices have been matters involving some form of alleged false or misleading representations.[231]

5.129 In the final analysis, the ALRC does consider that misleading conduct is a form of civil prohibition that could adequately be dealt with by infringement notices in appropriate circumstances. Other civil penalty provisions, such as unconscionable conduct, do not seem to be appropriate provisions for inclusion of infringement notice powers, due to the evaluative judgment required. The ALRC makes no recommendations on the use of infringement notices in civil regulation.

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228 Australian Securities and Investments Commission (ASIC), *Submission 54*.
229 Ibid.
230 Australian Competition and Consumer Commission (ACCC), *Submission 25*.
231 Ibid.

Enhanced processes to facilitate principled recourse to corporate criminal responsibility

Recommendation 4 The *Attorney-General's Department (Cth) Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* should be amended to reflect Recommendations 2, 3, 5, and 8. All departments of state should be required to provide a detailed justification in the Explanatory Memorandum accompanying the relevant bill for any proposed offences that would apply to corporations and that do not comply with the Guide.

5.130 Legislative review, consultations, and submissions have highlighted a common theme: incoherence and inconsistency in Commonwealth corporate regulation have added to the complexity of the regulatory environment and may well have reduced its effectiveness. Commonwealth regulation, in its current form, also imposes a significant regulatory burden upon corporations seeking to comply with their obligations. At the same time, it fails to deploy the criminal law to conduct that should properly be considered to be criminal. A similar level of incoherence, without any principled basis, can be seen in the variety of methods for attribution of conduct and states of minds to corporations.[232] As set out in Chapter 2, it was expected that introduction of the *Criminal Code* would lead to simplification of the criminal law; if anything, the content of the criminal law is more complicated now than it was then.[233]

5.131 A number of the recommendations made in this Report seek to address these concerns. Recommendation 2 recommends steps to restore a principled distinction between criminal and civil regulation of corporations. Recommendation 5 recommends a single method for the attribution of conduct and mental states to corporations. Recommendation 8 recommends a novel model of offence to address systematic misconduct. The success or otherwise of these recommendations depends upon their consistent adoption by the framers of legislation and the legislature itself, with deviation from them only occurring where there is a principled justification based on the particular regulatory context or conduct or entity to be regulated.

5.132 Recommendation 4 has two parts. The first is that the AGD Guide to Framing Offences be amended to incorporate the principles set out in the relevant recommendations. The second is to require framers of legislation to further justify any deviations from the Guide to reduce incoherence in Commonwealth corporate

232 See [3.57] and Chapter 6.
233 See [3.57]–[3.68].

regulation, with that process to include oversight by the Senate Standing Committee on the Scrutiny of Bills.

Utilising the Parliamentary process to promote compliance

5.133 Recommendation 4 contemplates that departments of state framing regulatory legislation applicable to corporations would be required to provide a detailed justification in the Explanatory Memoranda for any proposed offence applicable to corporations that does not comply with the AGD Guide to Framing Offences, as amended.

5.134 This already occurs to some extent when proposed offences deviate from the existing guidance in the AGD Guide to Framing Offences. This usually occurs in the context of proposed strict or absolute liability offences. The level of justification varies depending on the bill. For example, the Explanatory Memorandum to the Environment Legislation Amendment Bill 2013 (Cth) provides the following justification:

> The amendment of this strict liability offence is proposed having considered the Senate Standing Committee on the Scrutiny of Bills *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (the Strict Liability Report), as well as the Criminal Guide. Having regard to these documents, *the amendment to the strict liability offence by tripling the penalty units is justified to deter the illegal killing or injuring of turtles and dugong and thereby provide additional protection for these species*.[234]

5.135 Similarly, Therapeutic Goods Amendment (2017 Measures No 1) Bill 2017 (Cth) provides:

> The 100 penalty unit maximums for the new strict liability offences are considered appropriate. Although they are higher than the usual maximum for strict liability offences, this is justified because of the potential risk to public health arising from the misuse of therapeutic goods. The conduct involved in each of these offences is sufficiently serious that, if the defendant were convicted of an equivalent fault-based offence, a much higher penalty could be imposed, including a significant term of imprisonment.[235]

5.136 The Explanatory Memorandum for the recent Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) provides:

> The Guide suggests an appropriate penalty for a strict liability offence is 60 penalty units for an individual and 300 penalty units for a body corporate. For absolute liability offences, the Guide suggests an appropriate penalty to be 10 penalty units for an individual and 50 penalty units for a body corporate. *While the amendments depart from the Guide, the increased penalty now reflects the seriousness of*

234 Explanatory Memorandum, Environment Legislation Amendment Bill 2013 (Cth) [2.18] (emphasis added).
235 Explanatory Memorandum, Therapeutic Goods Amendment (2017 Measures No 1) Bill 2017 (Cth) 71.

> *the offence, and is appropriate as it makes the amounts more proportionate to the other penalty increases and acts a sufficient deterrent. The increases in the financial penalties also offset the removal of imprisonment as a possible sanction for committing strict or absolute liability offences*.[236]

5.137 These memoranda show that drafters do seek to provide some justification where offences deviate from guidance in the AGD Guide to Framing Offences. Furthermore, consultations have indicated that the Senate Standing Committee on the Scrutiny of Bills already reviews bills containing proposed offences that deviate from the AGD Guide to Framing Offences and, at times, seeks further justification from departments. The difficulty at present is that the AGD Guide to Framing Offences does not include any guidance reflecting Recommendations 2, 3, 5 and 8 of this Report and so these matters (such as the principled distinction between criminal and civil regulation in a corporate context) are not considered in that process. If Recommendation 4 were implemented, there would be a requirement to address these matters in the relevant Explanatory Memorandum.

5.138 In addition, while the Commonwealth Office of Parliamentary Counsel ('OPC') provides drafting services for agencies seeking to enact new legislation, and publishes a range of drafting manuals to provide assistance to agencies instructing OPC on the drafting of a bill or statutory instrument.[237] OPC will typically highlight to the instructing department matters of interest to the Scrutiny of Bills Committee. Ultimately, it is a matter for the department of state instructing OPC to draft the explanatory memorandum and ensure the appropriateness of the legislation.

5.139 If Recommendation 4 were implemented, the relevant Explanatory Memorandum for bills proposing the creation of criminal offences applicable to corporations would be required to address whether the proposed offences:

- are consistent with the principles in Recommendation 2 and, if not, what is the justification for the deviation from these principles;
- would operate within any form of dual-track regulation and, if so, why this dual-track regulation is justified;
- include a system of conduct offence and, if so, whether it is consistent with the principles in Recommendation 8;
- are, generally, consistent with the AGD Guide to Framing Offences; and

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236 Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.65].

237 The various drafting manuals, along with other resources, can be found on the Office of Parliamentary Counsel's website: Office of Parliamentary Counsel, 'Drafting Manuals' <www.opc.gov.au/drafting-resources/drafting-manuals>. These resources include particular drafting directions issued by the OPC: Office of Parliamentary Counsel, 'Drafting Directions' <www.opc.gov.au/drafting-resources/drafting-directions>.

- have a method of attribution that deviates from the single attribution method adopted by government and, if so, why the deviation is justified.

5.140 The Senate Standing Committee on the Scrutiny of Bills may then analyse these justifications as part of its role.[238] As justifications will be included in Explanatory Memoranda, they will also be available for scrutiny by the public and interested stakeholders. The recommended process will promote a more consistent approach to Commonwealth corporate regulation

5.141 The ALRC proposed amendments to the AGD Guide to Framing Offences to reflect the proposals made in the Discussion Paper and proposed that the AGD 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 Enforcements Powers*, as amended.[239]

5.142 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. [240]

5.143 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. The ALRC suggested that a principled approach to corporate regulation can only be maintained if there was 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.

5.144 The ALRC remains of the view that an enhanced process for securing compliance with the AGD Guide to Framing Offences — and, thus, coherence in the use of criminal law — is critical to the attainment and maintenance of a principled distinction between criminal and civil regulation of corporations. Submissions generally supported a stronger administrative mechanism to require compliance with

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238 See *Senate Standing Order 24 (Cth)*.

239 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) 103, Proposal 6.

240 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 8.

the AGD Guide to Framing Offences, including submissions from some regulators.[241] It was suggested in consultations that an administrative mechanism operated by the AGD was unlikely to be effective, given the role of other departments of state in the framing of regulatory legislation applicable to corporations. Some government stakeholders suggested that a requirement of 'substantial justification' may be too onerous where regulatory flexibility was required. These insights from consultations perhaps explain the comment by Hanrahan in her submission that

> experience (including with the use of Regulatory Impact Statements) suggests that [the proposal for improved administrative mechanisms] is unlikely to result in greater legislative discipline in the absence of some form of independent discipline or oversight or formal program of regulatory stewardship.[242]

5.145 It is for these reasons that the ALRC instead recommends a process focused on use of Explanatory Memoranda and overseen by Parliamentary processes.

A need for further guidance in framing offences

5.146 The purpose of the AGD Guide to Framing Offences is to

> assist officers in Australian Government departments to frame criminal offences, infringement notices, and enforcement provisions that are intended to become part of Commonwealth law.
>
> The Guide provides a general overview of the types of things that need to be considered when developing or amending offences and enforcement powers, including relevant principles and precedents.[243]

5.147 The most recent version of the AGD Guide to Framing Offences does not, however, offer any guidance on two critical aspects of Commonwealth law: the differentiation of criminal offences from civil penalty provisions, and the methods of attribution to be used where an offence is applicable to a corporation. With respect to the former, previous versions of the AGD Guide to Framing Offences did offer guidance as to when a civil penalty provision should be enacted rather than a criminal offence.[244]

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241 Law Council of Australia, *Submission 27*; Australian Institute of Company Directors (AICD), *Submission 37*; Condon Associates, *Submission 41*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Financial Markets Association, *Submission 48*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Australian Banking Association, *Submission 57*; BHP, *Submission 58*; Business Council of Australia, *Submission 63*.

242 Professor P Hanrahan, *Submission 38*.

243 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 5.

244 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007) 82; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) 56.

5.148 The absence of these matters in the AGD Guide to Framing Offences has likely contributed to the complexity and incoherence in Commonwealth corporate regulation.

6. Corporate Attribution

Contents

Introduction

6.1 The legal mechanism of attribution was developed to enable the criminal law to be applied to corporations.[1] Professor Fisse has observed that the 'attribution of criminal liability to corporations is an intractable subject: indeed, it is one of the blackest holes in criminal law.'[2]

6.2 It is through attribution that the law determines the conduct and state of mind to be ascribed to the corporation itself. Chapter 4 describes the traditional methods of attribution that developed from the earliest conceptualisations of corporate criminal responsibility.

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1 See Chapter 4, particularly [4.46].

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

6.3 Those traditional approaches include the vicarious liability method of attribution, adopted in jurisdictions such as the US and South Africa, and the identification doctrine, which remains the dominant, although not exclusive, approach to attribution in the UK,[3] Canada,[4] and New Zealand.[5] The nuance added to the identification doctrine by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* ('*Meridian'*),[6] whereby the focus shifted to a purposive approach to the relevant statutory offence rather than simply on the 'directing mind and will' of the corporation, still reflects the common law position in Australia,[7] in the rare case where it has not been wholly, or partly, replaced.

6.4 In addition to common law approaches, there are multiple statutory methods of attributing criminal and civil liability to a corporation.[8] These different mechanisms of attribution reflect competing and overlapping views of corporate personality and include the more recent development of 'organisational blameworthiness'; a concept that underpins Part 2.5 of the *Criminal Code*.

6.5 Increasingly, offences are being framed so as to speak directly to corporations. If an offence is framed in this way it becomes largely unnecessary to grapple with the difficult issues of attribution considered in this chapter. Particular examples include the duty-based offences, often found in the context of work health and safety, and the more recent development of 'failure to prevent' offences, particularly in the context of transnational crime.[9] Chapter 3 shows that, at the state and territory level in particular, criminal enforcement against a corporation commonly occurs in relation to duty based offences rather than through offences for which attribution is critical.

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3 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).

4 The common law approach in Canada has been modified by an amendment to its Criminal Code in 2003. The changes move the inquiry from the organisation's 'directing mind' and extend it to the organisation's 'senior officers'. Courts have interpreted the meaning of 'senior officers' broadly, to include independent agents, and have interpreted the legislative intent as extending the scope of liability from the boardroom to the plant floor: see, *R v Pétroles Global inc* (2013) QCCS 4262, 42. See also *R v Metron* [2013] OJ No 3909 (QL), 2013 ONCA 541 in which 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 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) ch 5.

6 [1995] 3 All ER 918.

7 *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147, [2018] FCA 751 [1660]. The conventional approach was to identify the individual who was the 'directing mind and will' of the corporation in relation to the relevant act or conduct and to attribute that person's state of mind to the corporation. After the injection of flexibility into that concept by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission,* [1995] 3 All ER 918, 506-511, 'metaphors and metaphysics have had diminished utility … there are no longer the rigid categories for identifying the 'directing mind and will''. See also *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2006) 161 A Crim R 250, [2006] VSC 171 [8].

8 See Chapter 3, particularly [3.57].

9 Failure to prevent offences are discussed in Chapter 7 and transnational crime is discussed in Chapter 10.

Offences specific to corporations, including a recommendation for a new 'system of conduct' offence, are discussed in detail in Chapter 7.

6.6 This chapter is concerned with examining the statutory mechanisms for attribution for the vast majority of offences that require human acts and states of mind to be ascribed to a corporation in order to hold the corporation criminally responsible for the offence. Those mechanisms are:

a) Part 2.5 of the *Criminal Code*; and

b) the 'TPA Model' — a collection of features common among statutory methods of attribution that originated in s 84 of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)).

6.7 The ALRC considers that these existing attribution methods are deficient in two significant respects. First, they do not reflect notions of organisational blameworthiness or culpability in a consistent manner. When particular conduct is subject to multiple legislative regimes, there is a risk that those regimes might provide for different methods of attribution, and therefore potentially different responsibility for the same conduct.[10] Professor Bant observed that:

> The remarkable complexity and incoherence in our statutory landscape on the issue of criminal and civil corporate liability for serious misconduct … severely undermines the efficacy of ongoing efforts to regulate corporate wrongdoing. This complexity encompasses and undermines the swathe of statutory attribution rules that seek to ameliorate or depart from the common law rules of attribution.[11]

6.8 Secondly, they do not necessarily reflect the ways in which corporations are structured in practice, and therefore the attribution methods can operate in a discriminatory manner depending on the size and complexity of the particular corporation.

6.9 In this chapter, the ALRC explains the rationale for a single method of corporate attribution in relation to general offences that are drafted neutrally such that they apply to humans and corporations, and recommends that there be a single legislative method of attribution.

6.10 The chapter then sets out options for reforming Part 2.5 of the *Criminal Code* and the TPA Model so as to strengthen and simplify the Commonwealth corporate criminal responsibility regime. The ALRC does not consider that there should be radical reform of either Part 2.5 of the *Criminal Code*, or the TPA Model. There is almost no evidence on which substantive reform to Part 2.5 could be recommended,

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10 See, eg, *Australian Securities and Investments Commission v Managed Investments Ltd (No 9)* (2016) 308 FLR 216, [2016] QSC 109; *Cleary v Australian Co-operative Foods Ltd (No 2)* (1999) 32 ACSR 701, [1999] NSWSC 991.

11 Professor E Bant, *Submission 21*.

given the paucity of its application in the nearly two decades since its enactment.[12] Just as importantly, there is a well-developed and well-understood body of jurisprudence in respect of the TPA Model that should not be displaced.

6.11 Nevertheless, the ALRC makes recommendations for incremental change. The first of these recommendations proposes a change to the method of attribution in respect of the physical elements of an offence (the conduct elements). The second recommendation provides two options for a revised method of attributing the fault element of an offence to a corporation. This chapter explains the underlying policy choice that would need to be made by Government to accept either of the two options.

6.12 The recommendations in this chapter are informed by the following principles:

- criminal offences directed at corporations should capture a corporation's moral blameworthiness;[13]
- criminal offences directed neutrally at persons, whether human or juristic, should be investigated and prosecuted neutrally;[14]
- the application of the criminal law should be agnostic as to the size of a corporation, its corporate structure, and its management structure;[15]
- the application of the criminal law should be agnostic as to the purposes for which a corporation is established;
- the attribution model should reflect the reality of modern corporate decision-making;[16] and
- there should be simplicity and certainty for corporations (including their owners and controllers), regulators, and prosecutors.

Single legislative attribution method for corporations

Recommendation 5 Commonwealth statutory provisions that displace Part 2.5 of the schedule to the *Criminal Code Act 1995* (Cth) should be repealed unless an alternative attribution method is necessary in the particular instance.

6.13 Recommendation 5 is that the various (often TPA Model) attribution methods in Commonwealth criminal legislation be repealed so that Part 2.5 (as amended

12 Part 2.5 of the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*') applies to all Commonwealth offences committed on and after 15 December 2001.

13 See generally Mihailis E Diamantis and William S Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15(1) *Annual Review of Law and Social Science* 453.

14 Ibid 456.

15 See *Australian Securities and Investments Commission v King* [2020] HCA 4 [92]–[93].

16 CMV Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59(4) *Modern Law Review* 561.

by Recommendations 6 and 7) becomes the default method of attribution. In very particular circumstances, it may be the case that a unique method of attribution is required, but in each case the rationale should be properly articulated.[17]

6.14 Currently, it is possible for multiple different attribution methods to be applicable to the same incident of misconduct.[18] For example, Nyman Gibson Miralis observed that the exclusion of Part 2.5 from Chapter 7 of the *Corporations Act*, for example, has led to

> a manifest discrepancy between principles of criminal responsibility applying with respect to the relevant offences under the *Corporations Act 2001* (Cth) and those that are founded on the basis of corporate culture failures set out under ss 12.3(2)(c) and s12.3(2)(d) of the Code.[19]

6.15 Having multiple different methods of attribution leads to possible confusion as to the circumstances in which a corporation may be criminally responsible,[20] and complicates the litigation process.[21] As Professor Overland has argued:

> The various different mechanisms that exist, of which a number are untested, cause significant uncertainty in this context. The availability and overlap between the different mechanisms of attribution makes it difficult to definitively state which mechanism will operate or the matter in which it should apply. Corporations, and those who work within them, deserve to be afforded greater certainty as to when the organisation is likely to be the subject of corporate criminal liability. Similarly, regulators, who are often the subject of criticism for the lack of enforcement action or a lack of success in actions brought, are hampered in their roles without sufficient clarity as to when organisations they may pursue are likely to be found to have engaged in criminal conduct.[22]

6.16 Investigations and prosecutions of criminal offences committed by corporations are made more complicated given the need to work through legal tests of attribution when proving a corporation committed a criminal offence. In many contexts, this added complexity may be a factor when deciding whether to charge a corporation

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17 See Recommendation 4 and [5.130]–[5.149] which set out a justification procedure for proposed criminal offences that do not comply with recommendations in this Chapter.

18 For example, a fraud offence which might be prosecuted under a generic fraud offence as well as under a dishonesty offence in the *Corporations Act 2001* (Cth).

19 Nyman Gibson Miralis, *Submission 34*.

20 Juliette Overland, 'The Concept of Attribution in Corporate Law: Making Corporations Liable for Criminal Conduct' in David Chalkin and Gordon Hook (ed), *Corporate and Trust Structures: Legal and Illegal Dimensions* (Australian Scholarly Publishing, 2018) 35, 45.

21 The case of *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, [2007] FCA 963 was discussed by Overland (n 20), who suggested that: 'One can infer from the judgment… that the Court was not presented with arguments concerning alternative means of attributing the [physical elements]' and that 'if regulators have difficulty in determining when and how attribution provisions are to be applied, this not only indicates the similar difficulties that corporations face, but also highlights the problems that exist in the effective enforcement of criminal and civil breaches by corporations': 46.

22 Overland (n 20) 48.

for particular misconduct. Ideally the rules of attribution should be facilitative — the rules of attribution should enable the application of criminal offences to corporations. Decisions whether to charge a corporation should be based on the extent to which the available evidence proves the offence — and should not be hindered by a system 'comprising of a number of different methods [which] is apt to lead to confusion and inconsistency'.[23] If the rules of attribution are hindering prosecution, those rules are necessarily undermining equality between individuals and corporations as subjects of the criminal law. This runs contrary to the precept of the criminal law that the attachment of criminal responsibility should be coherent and consistent.

6.17 The *Criminal Code* was designed to introduce a consistent approach to attribution, at least in relation to 'ordinary offences' and would be 'the basis of liability if no other basis is provided'.[24] One of the guiding concepts applied by the *Criminal Code*, as expressed in the Second Reading speech, was that 'those accused of federal offences will be dealt with under the same principles—no longer will people charged in different states and territories be treated differently from one another'.[25]

6.18 That consistency has not been achieved and, 18 years after the *Criminal Code* was passed, the proliferation of TPA Models has persisted, and has permeated the Commonwealth statute book. While different models proliferated, they did so without any explicit rationale in terms of the nature of the specific offence provisions or the broader legislative scheme to which they apply.[26]

6.19 The Discussion Paper proposed that there should be a single method of attribution. This was broadly accepted in submissions.[27] Bryan Cave Leighton Paisner LLP suggested that the proposal had 'the inestimable advantages of being understandable, straightforward and just'[28] when compared with the current smorgasbord of attribution methods.

6.20 The current complexity created by multiple attribution methods represents a significant compliance burden, extends the length and scope of investigations, increases difficulties for prosecutorial agencies in determining whether a prosecution

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23 Commonwealth Director of Public Prosecutions, *Submission 56*.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1995, 1333–7 (Duncan Kerr) 1335. See also Chapter 1.

25 Ibid 1331.

26 See Chapter 2 from [2.78].

27 Professor E Bant, *Submission 21*; Australian Competition and Consumer Commission, *Submission 25*; Allens, *Submission 31*; Nyman Gibson Miralis, *Submission 34*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Associate Professor J Overland, *Submission 42*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

28 Bryan Cave Leighton Paisner LLP, *Submission 46.*

is viable, and complicates matters for a jury (and judge) if a matter is ultimately prosecuted. A single statutory method will improve simplicity and certainty for corporations (and their directors and officers), as well as regulators and prosecutors, as the potential scope of liability will be clearer. A body of interpretation will more readily be developed by courts to aid in nuanced and consistent application of the single attribution method.

Exceptions to singularity

6.21 All sections in the Commonwealth statute book which exclude Part 2.5 should be repealed (unless there is a specific need for a particular attribution method for an offence provision to be effective). Submissions pointed to particular areas of law where unique attribution methods should remain.[29] There will be circumstances in which the general method of attribution is not appropriate. Indeed, in many of the examples cited to the ALRC, it is likely that a neutrally drafted offence is not appropriate in any event and the drafters might consider one of the alternative approaches discussed in Chapter 7.

6.22 In order to implement Recommendation 5, legislative drafters and regulators will need to consider whether:

a) the existing attribution provisions offer a truly different approach to attribution;

b) that difference is necessary and justifiable in considering the desirability of certainty and consistency in criminal law; and

c) the offence would be better framed as one directed to the corporation itself, such as a duty-based offence or a 'failure to prevent' offence.[30]

29 For example, continuous disclosure obligations and insider trading prohibitions: see Australian Competition and Consumer Commission (ACCC), *Submission 25*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Associate Professor J Overland, *Submission 42*. In relation to insider trading, the current law (s 1042G of the *Corporations Act*) applies additional methods of attribution (which relate to imputing states of mind) to the general TPA Model of attribution in s 769B of the *Corporations Act*. This is not incompatible with Recommendations 6, 7, and 8. That is, additional methods of attribution that are particular to areas of law could be retained, in addition to Part 2.5. Regarding the overall utility of s 1042G, see Juliette Overland, *Corporate Liability for Insider Trading* (2019) Routledge: London.

30 See Chapter 7.

Attributing physical elements

Recommendation 6 Section 12.2 of the schedule to the *Criminal Code Act 1995* (Cth) should be amended such that a physical element of an offence is taken to be committed by a body corporate if committed by:

a) an officer, employee, or agent of the body corporate, acting within actual or apparent authority; or

b) any person acting at the direction, or with the agreement or consent (express or implied), of an officer, employee, or agent of the body corporate, acting within actual or apparent authority.

6.23 Recommendation 6 sets out a legal test for attributing to a corporation the conduct of particular individuals (officers, employees, and agents), when the corporation has endowed those individuals with actual or apparent authority. In addition, under b), when the physical element of an offence is committed by a third party, the corporation will still be liable if that third party is acting at the direction of, or with the agreement or consent of, an individual with apparent authority.

6.24 Recommendation 6 is a relatively a minor amendment to s 12.2 of the *Criminal Code*. The named categories of individuals are well understood in criminal and corporate law; so too the need for a nexus between relevant individual's authority and the liability of the corporation. To prove the physical elements of the offence, a prosecutor would need to prove the physical acts (or the result or circumstances as needs be), by the individual, and prove authority (either direct or through an intermediary acting as directed).

A second limb

6.25 Item b) under Recommendation 6 seeks to clarify the conduct that may be attributed to a corporation to ensure that s 12.2 is not read down to exclude the conduct of an agent acting at the direction of an employee with apparent authority. This is consistent with the second limb of the most frequently used version of the TPA Model.[31] On one view, under the current law, 'agent' is broad enough to encompass persons acting at the direction of an 'employee', or 'officer'. Thus, on a plain reading of s 12.2, the second limb of Recommendation 6 may be unnecessary.[32] However, it is possible without further clarification that 'agent' could be read down and not extended to situations in which, for example, an agent is acting at the direction of

31 Australian Law Reform Commission, *Corporate Criminal Responsibility: Data Appendices* (2020) Appendix A, Table 2 ('*Data Appendices*').

32 This view was put to the ALRC in consultations.

an employee with apparent authority. The recommended amendment is intended to avoid a narrow interpretation of s 12.2 of the *Criminal Code*.[33]

Direct liability

6.26 Recommendation 6 also replaces the phrase 'must also be attributed to the body corporate' with the phrase 'is taken to be committed by the body corporate'.[34] This recommended language is consistent with that in the various statutes that have been considered by appellate courts. Courts have held that such language 'deems the conduct engaged in by the prescribed persons on behalf of the body corporate to be conduct also engaged in by the body corporate.'[35] It is, therefore, the imposition of *direct* liability on the corporation.

6.27 The recommended choice of language is also consistent with extensions of criminal responsibility in Part 2.4 of the *Criminal Code*.[36]

6.28 The TPA Model deems the conduct of directors, employees, or agents (acting within the scope of actual or apparent authority) — and in most statutory iterations of the TPA Model, any other person acting at the direction, or with the consent or agreement of a director, employee, or agent (acting within the scope of actual or apparent authority) — to be the conduct of the corporation.[37] As a result liability is direct, not vicarious.

6.29 If it is accepted that both s 12.2 as currently drafted and the TPA Model impose direct liability, the recommended amendment of s 12.2 might be considered purely semantic. The ALRC considers, nevertheless, that it is important to put the matter

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33 When the second limb was introduced into the *Trade Practices Act 1974* (Cth) (in 1986), no explanation was articulated in the Explanatory Memorandum: see *Data Appendices* (n 31) Appendix A, Table 3; Explanatory Memorandum, Trade Practices Revision Act 1986 (No 17) (Cth) [185].

34 Allens suggested retaining the current drafting of Part 2.5 — 'attributed' — rather than 'deemed': Allens, *Submission 31*.

35 *Australian Workers' Union v Leighton Contractors Pty Ltd* (2013) 295 ALR 449, [2013] FCAFC 4 [86], quoting *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, [2000] FCA 1188. See also *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719, 737–8, [1983] FCA 99, 41–2, in which Toohey J considered that, although grounded in common law formulations of tortious liability based on agency and vicarious liability, s 84 of the *Trade Practices Act 1974* (Cth) does not make a corporation vicariously liable. Instead, consistent with the theory expressed in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 his Honour 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, [1985] FCA 619.

36 For example, *Criminal Code* (n 12) s 11.3 'Commission by Proxy' provides that:
'A person who:
(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it; *is taken to have committed that offence* and is punishable accordingly.' (emphasis added)

37 See also *Data Appendices* (n 31) Appendix A, Table 2.

beyond doubt consistent with the ALRC's exposition of the theoretical underpinnings of corporate criminal responsibility. Vicarious liability is predicated on the need for a natural person to have engaged in the conduct before the corporation is answerable for it. Direct liability attributes to the corporation the conduct of the individuals referred to in the statute, who have been endowed by the corporation with actual or apparent authority. Direct liability improves the expressive power of the criminal law and so better reflects the culpability of the corporation as it involves the law characterising the acts of the relevant corporate actors as those of the corporation.[38]

Associate

6.30 A different approach was proposed in the Discussion Paper from that which is now recommended. Proposal 8 suggested a functional definition of the relevant actors whose physical actions and mental state could be attributed to a corporation: 'associates'.[39]

6.31 The intention behind Proposal 8 was that a person could be an 'associate' of a corporation if they were acting '*for or on behalf of*' the corporation. Although this definition might *include* officers, employees, and agents, it would do so only in cases where those persons were acting for or on behalf of the corporation (and not independently or as a rogue). In addition, the term 'associate' was not intended to be limited to those categories of persons — that is, it might include subsidiaries or contractors, if and when they were acting *for or on behalf of* the corporation.

6.32 Submissions generally considered that the definition of 'associate' in Proposal 8 was 'too broad' to be applied in a more general method of attribution,[40] although several submissions thought the definition was appropriate.[41] While some submissions acknowledged that using the term 'associate' was not dissimilar in effect to the two limbs of the TPA Model,[42] most submissions appeared to focus on the ordinary (rather than legal) meaning of 'associate' expressing concerns that 'criminality by association' would follow from such a term.[43]

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38 See Chapter 5, particularly [5.78]–[5.94].

39 This concept was borrowed from the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth).

40 T Game SC and Justice D Hammerschlag, *Submission 17*; Professor J Gans, *Submission 18*; Justice T Payne, *Submission 19*; Law Council of Australia, *Submission 27*; Australian Financial Markets Association, *Submission 48*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

41 Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*; Bryan Cave Leighton Paisner LLP, *Submission 46*; NSW Young Lawyers, *Submission 59*.

42 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Australian Securities and Investments Commission (ASIC), *Submission 54*.

43 For example, Dr L Price, *Submission 33*.

6.33 Many submissions preferred the inclusion of the phrase 'within actual or apparent authority' and said it would provide a closer nexus between the corporation and the individual than the phrase 'for or on behalf of'.[44] Little case law was provided to support this, and instead the preference appeared to flow from familiarity and corporate law practice.[45]

6.34 After the publication of the Discussion Paper, the CLACCC Bill was reintroduced.[46] If and when the Bill is passed in its current form, the term 'associate' (albeit with a slightly different definition) will be used in the narrow context of foreign bribery offences. This is discussed in more detail in Chapter 7 and Chapter 10.

6.35 Following consultations and consideration of submissions, the ALRC considers that the test in Recommendation 6 achieves the same flexible, functional approach taken by Proposal 8, but does so using language with which stakeholders are familiar. Recommendation 6 assists to prevent formal job titles, complex corporate structures or deliberate outsourcing of criminal conduct being used as a barrier to attributing conduct to a corporation. At the same time, Recommendation 6 ensures that authority, both actual and apparent, is an explicit element in determining when the physical element of a criminal offence, done by an individual, should be attributed to a corporation.

Attributing fault — A single model

6.36 The requirement that some degree of 'fault' be proved is 'one of the most fundamental protections of criminal law'.[47] The attribution of fault elements to a corporation should reflect notions of corporate blameworthiness (as discussed in Chapter 4).[48] The concept of organisational blameworthiness contemplates that a corporation is capable of being criminally responsible in its own right.[49] It is the corporation, for instance, which possesses the whole of the knowledge that may be

44 Professor J Gans, *Submission 18*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*. In addition, Australian Financial Markets Association, *Submission 48,* suggested that 'acting at the direction or with the consent or agreement' was preferable to 'for or on behalf of'.

45 The meaning of these two phrases is discussed in greater length at [6.137]–[6.147] below.

46 See [7.93]–[7.177] for a detailed discussion of the CLACCC Bill.

47 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 283. Noting that there are, of course, offences of strict and absolute liability.

48 See also Chapter 5. The ALRC recommends that where there is a criminal offence applicable to a corporation there should be a fault element. Only in particular contexts of potential harm is strict criminal liability justified.

49 Tahnee Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 258.

divided between many individuals.[50] Organisational blameworthiness is thus a form of direct liability, and is a holistic model of corporate fault.

Recommendation 7

Option 1

Section 12.3 of the schedule to the *Criminal Code Act 1995* (Cth) should be amended to:

a) replace 'commission of the offence' with 'relevant physical element';

b) replace 'high managerial agent' with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority' (with consequential amendments to s 12.3(4));

c) replace 'due diligence' with 'reasonable precautions' (with consequential amendments to s 12.5);

d) pluralise the terms 'attitude', 'policy', and 'rule' in the definition of corporate culture and replace 'takes' with 'take'; and

e) repeal subsection 12(2)(d).

Option 2

Section 12.3 of the schedule to the *Criminal Code Act 1995* (Cth) should be replaced with a provision to the effect that, if it is necessary to establish a state of mind, other than negligence, of a body corporate in relation to a physical element of an offence, it is sufficient to show that:

a) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind; or

b) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, directed, agreed to, or consented to the relevant conduct, and had the relevant state of mind.

It is a defence if the body corporate proves that it took reasonable precautions to prevent the commission of the offence.

50 Eric Colvin, 'Corporate Personality and Corporate Crime' (1995) 6(1) *Criminal Law Forum* 1, 24.

6.37 Recommendation 7 sets out a legal test for attributing the fault element of an offence to a corporation. It includes two options, either of which would reside in Part 2.5 of the *Criminal Code*:

(a) the current method in ss 12.3 and 12.4 of the *Criminal Code*, with some amendments, including replacing the term 'high managerial agent' with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority' ('Option 1') or

(b) a modified TPA Model approach, including a defence of reasonable precautions ('Option 2').

6.38 The data discussed in Chapter 3 supports what the ALRC has heard in consultations: the majority of prosecutions against companies (corporations or otherwise) are against small companies.[51] Part of the reason for the disparity in prosecutions, is difficulty in proving fault in large corporations. Traditional methods of attribution that look to the directing mind of the organisation in determining corporate fault are more easily proved against smaller corporations. The hand of the master is necessarily more obvious in a small company, whereas larger companies are more complex. Larger corporations often have a greater degree of devolved authority and are structured around divisions and business units (and in multinational companies there may be additional layers of management around regions and countries).[52] Thus, there is no one person who can be said to be directing the operations of the corporation. Organisational hierarchies mean that decisions and their implementation are necessarily separated, not always documented, and often opaque.[53]

6.39 In the context of discussing the definition of 'officer', Nettle and Gordon JJ made the following observations:

> The quality of a person's capacity or actions, and the effects of that capacity or those actions on the management of a corporation, are not necessarily uniform across corporations or corporate groups, or even uniform within a single corporation or group. The size of a corporation, the corporate structure, the management structure, and the identity and nature of the persons involved are likely to affect who is an officer of a corporation at any point in time. …
>
> In smaller companies, it is possible for all members to participate in the management of the company such that it practically operates much like an incorporated partnership. This is not true of larger companies:

51 See Chapter 3.

52 Professor Elise Bant, *Submission 21*; Serious Fraud Office, Evidence to Select Committee on the Bribery Act 2010, House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 2019) [105].

53 This view was reiterated in Bryan Cave Leighton Paisner LLP, *Submission 46*.

> The traditional focus of corporate law in relation to responsibility for corporate actions has been on the role of directors. In smaller companies especially, this may still reflect the way they are in fact run.
>
> However, the reality in most medium to large enterprises is that operational decision-making devolves to managers and other individuals below board level who conduct the ongoing business of the company subject to higher level supervision by the board of directors. [54]

6.40 This section of the chapter explains recommended incremental changes within the current legislative structure to the method of attributing fault to a corporation in order to better address these characteristics of corporate action.

6.41 There are two broad approaches to attributing fault in Commonwealth criminal law:

- Part 2.5 currently approaches fault in two ways: a rule in s 12.3 for attributing intention, knowledge and recklessness, and another rule in s 12.4 for attributing negligence. Each of these rules utilises an organisational fault approach, and in some instances allows a defendant corporation to disprove fault (on the balance of probabilities) by reason of its having exercised 'due diligence'. Aggregation is available in a number of ways.
- The TPA Model generally attributes to the corporation any 'state of mind' of employees, agents, or officers. This approach has created complex questions around aggregation.

6.42 By their very nature, a corporation's decisions, omissions, acts, and behaviours are generally the accumulation of states of mind and conduct of multiple people. Thus, wrongdoing may occur across, for example, a department (with each person doing or thinking in a particular way to cause misconduct), or more vertically (for example, encouraged by a supervisor, misconduct undertaken by a floor-person, for the purpose of meeting a lofty target set by above). Similarly, the various elements of a criminal offence may reside in multiple people. Although the criminal law as it applies to individuals avoids aggregation (an individual should generally only be responsible for their own criminality), this principle does not appropriately reflect the utterly different nature of corporate entities, being necessarily the combination of many. Aggregation allows the conduct and states of mind of different individuals to be attributed to the corporation. Arguably, this better reflects the inherent nature of a corporate structure. It also prevents a corporation from deliberately structuring its business in such a way as to avoid criminal responsibility by ensuring that conduct and intention are diffuse. Aggregation is discussed further below.

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54 *Australian Securities and Investments Commission v King* [2020] HCA 4 [92]–[93], quoting Corporations and Markets Advisory Committee, *Corporate Duties Below Board Level: Report* (2006) at [1.2].

Corporate blameworthiness

6.43 Recommendation 7 seeks to embed corporate blameworthiness as a critical precondition to the attribution of fault to a corporation for the purposes of criminal responsibility. Recommendation 7 incorporates this principle by acknowledging that:

- proving that a relevant individual had a relevant state of mind should not be sufficient to attribute fault to a corporation, unless it is also proved that the corporation itself is in some way blameworthy; and
- irrespective of whether there is one particular individual who can be said to have had the relevant state of mind, the relevant state of mind should also be able to be aggregated from the corporation as a whole.

6.44 For criminal responsibility to be attributed to a corporation, the corporation itself must be culpable. Consistent with this approach, a corporation should be able to establish that, although criminal conduct has been proved by the prosecution, the corporation is not culpable.

6.45 Under Option 1, corporate blameworthiness is captured inherently in the first and third ways of proving 'authorisation or permission' — the board *is* the corporation (identification theory) and the culture of the corporation evidences its blameworthiness, or lack thereof. Corporate blameworthiness is also captured in the second way of proving 'authorisation or permission' (via officers, employees, and agents): a lack of culpability can be established by way of the defence of having taken reasonable precautions. That is, a corporation can establish that it had in place policies, procedures and systems such that it should not be held responsible for the criminal actions of its employees, agents or officers — in effect, upon proof of an appropriate culture.

6.46 Under Option 2, the notion of corporate blameworthiness is recognised by ascribing a defence of reasonable precautions. A corporation can prove that it is not culpable for the criminal actions of its officers, employees, or agents. To this, rather more limited, extent the concept of corporate culture is also captured in Option 2.

Rationale for providing two options

6.47 There is a policy decision to be made by government in respect of the choice between Options 1 and 2. It is a choice as to how government wants corporations to be held to account and to what standard. The choice should not, however, be considered in isolation. The options presented form a discrete part of the suite of recommendations in this Report and should be considered in the context of:

- the underlying rationale for the application of the criminal law to a corporation (Chapter 4);

- the principled model of corporate regulation, which would result in many fewer criminal offences directed at corporations but those that remain directed to denunciation of particularly egregious corporate conduct (Chapter 5); and
- the alternative legislative options for directly addressing criminal conduct by corporations (Chapter 7).

6.48 **Option 1** involves modifications to a provision considered by many to be an innovative, and forward-thinking method of attributing criminal responsibility to a corporation that clearly focuses on the moral blameworthiness of the corporation itself. Australia was considered to be at the forefront of legal thinking in this regard when Part 2.5 was first implemented. A key advantage of Part 2.5 is that it provides for more ways of attributing responsibility to a corporation, and different attribution methods may be used for each relevant fault element, as is appropriate to the particular facts of an individual case.

6.49 Submissions overwhelmingly argued in support of including 'corporate culture' as a method of attributing fault.[55] Given there are few examples of 'corporate culture' having been used (at all or successfully), the arguments in support of it as a method of attribution are largely theoretical. However, the ALRC heard in consultations of situations in which attribution by reference to corporate culture would greatly assist in prosecuting particular fact scenarios.

6.50 While complexity exists, Part 2.5 is not unworkable, at least if amended as recommended.[56] Those amendments involve replacing the phrase 'commission of the offence' in s 12.3 with 'relevant physical element', and the replacement of the term 'high managerial agent' in s 12.3(2)(b) with 'officer, employee, or agent', a change that would largely mirror the TPA Model but with the important proviso of including a defence of 'reasonable precautions' to properly reflect notions of corporate blameworthiness.

6.51 It is also recommended that corporate culture be retained as a method of attribution, subject to the repeal of s 12.3(2)(d) and a minor amendment to the definition of 'corporate culture' in s 12.3(6). If Option 1 is chosen by Government, there is a risk that it will take years to resolve the best approach to investigating, and then prosecuting, corporations using this provision, and even longer for jurisprudential issues to be resolved by courts. There is a further risk of creating uncertainty for corporations, and their legal advisors, as to the manner in which

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55 Professor E Bant, *Submission 21*; Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Dr L Price, *Submission 33;* Australian Securities and Investments Commission (ASIC), *Submission 54*; Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

56 This view was supported in some consultations and submissions, particularly submissions that argued in favour of retaining the corporate culture provisions: see, eg, Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

this provision will operate in practice, which will create further compliance (and therefore cost) burdens on corporate Australia.

6.52 Option 1 has two primary advantages:

- unlike the TPA Model, the prosecution does not need to rely on proving that one individual had the requisite state of mind: if the particular facts of the case, or the collection of evidence, do not procure a whistleblower or witness who is prepared to give evidence against their (potentially continuing) employer, there are other ways to prove corporate fault; and
- the fact that evidence of poor corporate culture may result in criminal responsibility for a corporation may have a deterrent effect and encourage corporations to proactively improve their culture of compliance.

6.53 **Option 2** is a modification to the more widely utilised TPA model, a model that is more familiar to the majority of corporations, regulators, investigators, and prosecutors. Perhaps for that reason, it has been described to the ALRC as being 'more prosecutorially friendly'. A key advantage of the TPA Model is its current breadth of use across Commonwealth legislation and the profession's familiarity with its application. The recommendation would make the availability of the defence of reasonable precautions to corporate defendants consistent across those offences to which the *Criminal Code* applies.

6.54 Reducing complexity in corporate criminal law is essential to strengthening and simplifying the Commonwealth corporate criminal responsibility regime. Given this Inquiry has been commissioned following the findings of the Financial Services Royal Commission, a view might be taken that there is less risk of criminal misconduct going unpunished if a more familiar model of attribution is chosen. The importance of mitigating that risk will become more readily apparent if Recommendation 2 of this Report is accepted, whereby there will be many fewer offences directed at a corporation itself, but where those offences will be directed at particularly egregious conduct that is considered inappropriate for mere civil regulation.

Option 1 — Modification of Part 2.5

6.55 The amendments to Part 2.5 contained in Option 1 of Recommendation 7 seek to address concerns (albeit largely theoretical) expressed by academics, practitioners and judges (both in cases and extra-judicially) about the current drafting of Part 2.5.[57]

57 See, eg, the voir dire comments of Blow CJ in *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 464. See also Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002).

Option 1 retains the basic structure of s 12.3 of the *Criminal Code*,[58] but with some key amendments, which are discussed below.[59]

Commission of the offence

6.56 The phrase 'commission of the offence', which appears throughout s 12.3, arguably has the unintended effect of requiring proof of all of the physical and fault elements of the offence by an individual, in order to prove one particular fault element on the part of the corporation.[60] This argument represents a strict reading and application of s 3.2 of the *Criminal Code*, which states that 'to be found guilty of committing an offence' the physical and related fault elements must be proved. The effect of such an interpretation would require a prosecutor to prove that the entire offence was committed by an individual, before being able to attribute to a corporation either of the prescribed fault elements.

6.57 Alternatively, s 12.3(1) could be read such that the prosecution must prove that the corporation authorised or permitted the physical elements. The fault element 'can be located in the culture of the corporation even though it is not present in any individual'.[61] Indeed, s 12.3(1) 'does not expressly require the offence to have been committed by an individual'.[62] This reading of the provision is 'far simpler', whereas the former interpretation would constitute 'a backward step to make criminal liability contingent upon individual liability'.[63]

6.58 In its submission, ASIC noted the significant differences amongst commentators as to the proper reading of this section and suggested that any attribution method

> should explicitly state that proof of corporate liability is not dependent upon the conviction or finding of guilt of an individual offender…[64]

6.59 More fundamentally, the recommendation effects a decoupling of individual fault from the fault of the corporate entity, consistent with the notion of corporate blameworthiness being required before ascribing criminal responsibility to a corporation.

6.60 Option 1 replaces 'commission of the offence' with 'the physical element', which includes conduct (including an omission or a state of affairs), a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs.[65]

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58 The operation of s 12.3 of the *Criminal Code* is explained in detail in Chapter 2. See particularly [2.41]–[2.61].
59 See Appendix H for an illustration of how these amendments could be implemented.
60 Clough and Mulhern (n 57) 144.
61 Colvin (n 50) 35.
62 Stephen Odgers, *Principles of Federal Criminal Law* (Lawbook Co, 4th ed, 2019) 269.
63 Clough and Mulhern (n 57) 144.
64 Australian Securities and Investments Commission (ASIC), *Submission 54*.
65 *Criminal Code* (n 12) s 4.1.

Alternative states of mind

6.61 Many offences within the *Criminal Code* (and in other Commonwealth legislation) require proof of fault elements other than intention, knowledge, or recklessness (or negligence); for example, some offences require the absence of a requisite belief, an opinion or dishonesty.[66] The *Criminal Code* does not prevent the creation and use of alternative states of mind.[67]

6.62 However, the prescriptive approach of enumerating particular states of mind can create some uncertainty and complexity in attribution when a fault element is not pleaded within the structure of s 12.3. In *R v Potter & Mures Fishing*,[68] Blow CJ considered an offence for which the fault element was dishonesty. However, the Crown particularised the charge on the basis of s 12.3(1). His Honour held that, given s 12.3 only applied to intention, knowledge, or recklessness (and not dishonesty), the defendant company had no case to answer.[69]

6.63 Although it will be rare for a corporation to be prosecuted for a dishonesty offence, as these are more directed to human conduct,[70] this case provides an example of the complexity of the Code.

6.64 'Dishonesty' is currently defined in various sections of the *Criminal Code* (eg s 130.3) and reflects a test known as the '*Ghosh test*',[71] adapted for the conceptual framework of the *Criminal Code*. It consists of a physical element that is a circumstance (the conduct is 'dishonest according to the standards of reasonable people'), and a fault element of knowledge (the conduct is 'known to be dishonest according to the standards of ordinary people'). Therefore under the *Criminal Code*, dishonesty is not a state of mind itself; rather, 'dishonesty' is a character given to the fault element (knowledge) in a particular circumstance.[72]

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66 See, eg, *Criminal Code* (n 12) s 138.1: unwarranted demand with menaces — liability depends on proof of the offender's absence of belief that there were reasonable grounds for either making the demand or reinforcing it with menaces.

67 *Criminal Code* (n 12) s 5.1(2).

68 *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 464.

69 Ibid 464–465.

70 For example, in NSW from July 2009–June 2019, there were 46 charges finalised under s 1041G of the *Corporations Act* (Dishonest conduct in relation to financial product/service). None of those charges concerned corporations. NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>.

71 See Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report: Volume 1* (2019) 155–157 for a discussion of the *Ghosh* test as previously reflected in the *Corporations Act 2001* (Cth) s 1041G(2). The test derives from *R v Ghosh* [1982] QB 1053.

72 Odgers (n 62) [5.1.170]. See also the discussion regarding how to treat dishonesty in the Attorney-General's Department et al, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 323 ('*AGD Guide for Practitioners*').

6.65 However, the CLACCC Bill if passed, will insert a new definition of 'dishonest' into the Dictionary of the *Criminal Code*:

> Under the new definition, dishonest means 'dishonest according to the standards of ordinary people'. …
>
> This new definition will replace provisions in the Code that apply the two-limb test for dishonesty (the *Ghosh/Feely* test) with the objective test for dishonesty endorsed by the High Court in *Peters v The Queen* (1998) 192 CLR 493. …
>
> In *Peters*, the High Court adopted a new test to determine dishonesty. The new test requires the defendant's knowledge, belief or intent to have been dishonest according to the standards of ordinary, decent people. Under the test adopted in *Peters*, there is no requirement to also prove that the defendant was aware that their knowledge, belief or intent was dishonest in this sense.[73]

6.66 This objective test is consistent with the approach to offences under the *Corporations Act* following the passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth),[74] the position at common law in Australia,[75] and the law in the UK.[76] Removing the subjective fault element, it would reduce the complexities facing prosecutions, 'ensuring that Australia's law enforcement agencies can effectively prosecute dishonest corporate conduct'.[77] It would also harmonise the *Criminal Code* with the law in other statutes both at a Commonwealth and state level, and particularly with the *Corporations Act* where the change has already been made.[78] The ALRC supports the amendment proposed in the CLACCC Bill.

Methods of proof

6.67 The most innovative aspects of Part 2.5 are located in s 12.3(2), which provides:

> The means by which such an authorisation or permission may be established include:
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> (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly,

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73 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [25], [204].

74 Ibid [1.171]–[1.178].

75 *Peters v The Queen* (1998) 192 CLR 493; the objective test is also reflected in some state criminal codes: see, eg, *R v Dillon; Ex parte Attorney-General* [2016] 1 Qd R 56, [2015] QCA 155, interpreting *Criminal Code Act 1899* (Qld) sch 1, s 408C.

76 *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391.

77 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (March 2020) [2.69]. The proposed amendment was criticised in some submissions to the Senate Legal and Constitution Affairs Legislation Committee. The ALRC did not receive any submissions on the proposal.

78 See *Corporations Act 2001* (Cth) ss 9 (definition of 'dishonest'), 1660.

> 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.

6.68 Option 1 would continue to allow the prosecutor to select the most appropriate method of proving fault, by reference to:

- the board;
- an individual (officers, employees, or agents of the body corporate acting within authority, subject to a defence of taking reasonable precautions); or
- a corporate culture which, inter alia, encourages non-compliance.

6.69 It is recommended that s 12.3(2)(d) be repealed. For the reasons discussed below, the ALRC considers that it is inappropriate to require proof beyond reasonable doubt of the non-existence of a particular culture in order to attribute liability to a corporation.

6.70 The methods of proof under s 12.3(2) address different aspects of how the corporation is governed. The board of directors is the highest level of control of a corporation. High managerial agents are involved in the running of the corporation. The culture of the corporation, or the absence of a particular culture, is relevant to the day to day operations of the corporation itself (although inevitably influenced by the board of directors and management).[79]

6.71 There is an element of aggregation inherent in s 12.3: it is not necessary for the physical elements and the fault elements to be satisfied by reference to the same individual or individuals.

> It is evident that the Code deviates here from traditional common law principles, whereby the knowledge and intention of the agent is imputed to the body corporate. There is a required coupling of the physical and mental elements to substantiate

79 See *Australian Securities and Investments Commission v King* [2020] HCA 4 [94]: 'In large public companies, the board of directors sits at the apex of the managerial pyramid. Ordinarily, the board is involved in setting strategy, approving business plans, making key management decisions (such as major expenditure decisions) and monitoring the performance of management and the returns of the business. Below the board "there will be 'management' consisting of executive employees of the company (senior, middle and junior, perhaps in various divisions of business units), and then the general personnel employed by the company"' (citations omitted).

> imputation to a body corporate under the common law, whereas under the Code there is no requirement that such a coupling exists.[80]

6.72 Although there may be an argument that s 12.3(2) erases the distinction between intention, knowledge, and recklessness,[81] the ALRC considers that the provision retains relevant gradients of fault. That is, the prosecution must prove that the authorisation or permission amounted to intention, knowledge or recklessness.[82]

6.73 The operative part of s 12.3 is in s 12.3(1), which provides that intention, knowledge or recklessness may be proved through authorisation or permission. Section 12.3(2) provides a non-exhaustive list of the ways in which permission or authorisation may be established in a manner sensitive to the corporate context. Regardless of the way authorisation or permission may be proved, the essential question is whether that authorisation or permission then amounts to the relevant fault element of intention, knowledge or recklessness.

6.74 By way of example, the Model Criminal Code Officers Committee (MCCOC) considered how the different fault elements of intention and recklessness may be proved through tacit authorisation, applying the corporate culture provisions as the method of proof:

> For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (eg recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.[83]

6.75 Each fault element within an offence may be proved by a different mechanism of proof. For instance, consider an offence with two fault elements of intention and recklessness. Intention may be proved through the approval of the board of directors, and recklessness by reference to the state of mind of a high managerial agent.

Board of directors

6.76 Option 1 makes no change to this method of attribution.

6.77 Under existing law, if a board of directors carries out the relevant conduct (intentionally, knowingly, or recklessly), or authorises or permits the commission of the offence (expressly, tacitly, or impliedly), this may establish that the *corporation*

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80 *Commonwealth Director of Public Prosecutions v Brady* (2016) 346 FLR 1, [2016] VSC 334 [1098].

81 Clough and Mulhern (n 57) 145. See also Chapter 2.

82 This view was also supported in consultations.

83 Model Criminal Code Officers Committee and Criminal Law Officers Committee, *Model Criminal Code. Chapter 2, General Principles of Criminal Responsibility: Final Report* (1993) 113 ('*MCCOC Chapter 2*'). This was reiterated in the Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 44.

authorised or permitted the commission of the offence.[84] If the fault element is intention or knowledge, it is not sufficient to show that the board acted only recklessly.[85]

6.78 Section 12.3(2)(a) reflects an aspect of the common law doctrine of identification.[86] Identification theory regards some individuals as so important to the corporation that they constitute the 'directing mind and will of the corporation, the very ego and centre of the personality of the corporation'.[87] Therefore, the corporation itself is identified with the decisions and actions of those individuals who 'may implicate the corporation in criminal activity if they personally engage in criminal conduct, or if they authorise or give permission to another to do so'.[88]

High managerial agent

6.79 Option 1 recommends replacing the term 'high managerial agent' with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority'. This aspect of Option 1 is consistent with the common position in the majority of statutory attribution provisions that currently apply to offences directed at corporations,[89] namely that the fault of officers, employees, or agents can be attributed to a corporation. Such an amendment to s 12.3(2)(b) would continue to be counterbalanced by the availability of a reasonable precautions defence.[90] The retention of the defence recognises the explicit decoupling of individual fault from corporate fault and so focuses attention on corporate blameworthiness.

6.80 The term 'high managerial agent' is presently 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.[91]

6.81 The current position of attributing to a corporation the fault of a 'high managerial agent' focuses attention on whether an individual either committed the conduct element, with the relevant state of mind, or directed its commission. If a high managerial agent engages (intentionally, knowingly, or recklessly) in the relevant conduct, or authorises or permits the commission of the offence (expressly, tacitly, or impliedly), this may establish that the corporation authorised or permitted

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84 *Criminal Code* (n 12) s 12.3(2)(a).
85 Ibid s 12.3(5).
86 Attorney-General's Department et al (n 72) 313–15.
87 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713. *See also HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 17.
88 Attorney-General's Department et al (n 72) 313–15.
89 See *Data Appendices* (n 31) Appendix A, Table 2. See also Chapter 3.
90 Currently, s 12.3(3) provides that s 12.3(2)(b) does not apply if a body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission. The defence in Recommendation 8 is 'reasonable precautions'. The rationale for this choice is explained below.
91 *Criminal Code* (n 12) s 12.3(6).

the commission of the offence.[92] If the fault element is intention or knowledge, it is not sufficient to show that the high managerial agent acted only recklessly.[93] A defence of due diligence is available in respect of attribution of fault pursuant to s 12.3(2)(b).[94] For reasons explained in greater detail below, the language of 'reasonable precautions' should replace the phrase 'due diligence'.[95]

Definitional issues

6.82 The term 'high managerial agent' is unique to the *Criminal Code* and is not drawn from the *Corporations Act* or general corporate law. As such the interpretation of high managerial agent may be independent of notions of seniority and responsibility pre-existing in corporate law.

6.83 It requires a prosecutor to prove, beyond reasonable doubt, that the relevant employee, agent, or officer has *duties of such responsibility that their conduct may fairly be assumed to represent the body corporate's policy*.[96] Although the current definition suggests that a level of seniority is required for an individual to meet the definition, presumably duties could be undertaken at a lower level of responsibility within the scope of what might 'fairly be assumed to represent the body corporate's policy'.

6.84 Indeed, in one of the very few cases that has ever considered the term, Douglas J considered in relation to a director of the relevant company, two other persons who were the CEO and CFO of the 'Group' of which the relevant company was a member, and *an employee* of the relevant company (the fund manager), that their 'significant roles in the company … seem to me to qualify them as its "high managerial agents"', although did not elaborate any further.[97]

6.85 There has been no significant analysis of the term in any case to date. Unsurprisingly, a sole director of a company has been accepted to be a high managerial agent.[98] Senior executives, some of whom held the position of a director, were also accepted, albeit without argument, to be high managerial agents, in circumstances where the board of directors itself was not involved in the offending.[99]

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92 Ibid s 12.3(2)(b).
93 Ibid s 12.3(5).
94 Ibid s 12.3(3).
95 See [6.168]–[6.175] below.
96 *Criminal Code* (n 12) s 12.3(6).
97 *Australian Securities and Investments Commission v Managed Investments [No 9]* (2016) 308 FLR 216, [2016] QSC 109 [613]. Subsequent appeals did not need to consider the meaning of 'high managerial agent' in the *Criminal Code*: *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105, [2018] QCA 352; *Australian Securities and Investments Commission v King* [2020] HCA 4 (emphasis added).
98 *Australian Competition and Consumer Commission v Davies* [2015] FCA 107 [32], [41].
99 *Commonwealth Director of Public Prosecutions v Note Printing Australia Ltd* [2012] VSC 302 [72].

6.86 There are many difficulties with the definition of high managerial agent which remain to be resolved by judicial consideration. As Dr Ivory and Anna John observe, it is possible that the scope of s 12.3(2)(b)

> varies both in accordance with the particular offence provisions and the 'real' distribution of powers in a company – or within a corporate group; 'High managerial agent' may cover both appointed and de facto officers of a company and lower-level decision-makers with duties relevant to the contravention.[100]

6.87 The phrase 'may fairly be assumed' is also ambiguous. In particular, it is unclear whether the assumption lies with the corporation, the tribunal of fact, or a relevant third party. The concept bears resemblance to apparent authority, being similar to a representation to a third party, but lacks the clarity of that doctrine.

6.88 Further, it is difficult to envision what might constitute 'the body corporate's policy'. 'Policy' is not defined; the courts may therefore apply the common meaning of the word. However, corporations often have multiple policies; some set by the board of directors, rather than management; some tangibly expressed in written form, and others amorphous. The prosecution would need to establish what the corporation's policy is, and whether it was fair to assume that the individual represented it, before trying to establish that the individual either engaged in the conduct or authorised or permitted the commission of the offence. It is also unclear whether there should be a connection between the policy, and the relevant provision which has allegedly been breached. Similarly, it is unclear whether the individual must represent the *entire* policy of the corporation, or just the part of the policy relevant to the conduct. This element of s 12.3(2) was identified in consultations as particularly difficult for prosecutors satisfy.

6.89 Professors Beaton-Wells and Fisse regard the high managerial agent concept as 'ill-defined' and posit that it 'begs the questions of what is required before responsibility should be attributed to a corporation'.[101] The ALRC agrees.

Expansion to officers, employees, and agents

6.90 The ALRC recommends the replacement of the term 'high managerial agent' with 'officers, employees, and agents, acting within the scope of actual or apparent authority', as is the case throughout most of the Commonwealth statute book. The inclusion of this range of persons better reflects the reality of modern corporate decision making, which is often not readily reduced to an easily identifiable 'senior' individual but is the result of a much broader array of inputs. It is also more agnostic

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100 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, 1192.

101 Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 231.

as to corporate size and structures. Although the burden of proving that such a person was indeed acting within apparent or actual authority is not necessarily straightforward, the language, concepts and jurisprudence on actual and apparent authority are more familiar.[102]

6.91 Further, it is arguable that the amendment does not represent any significant expansion to the existing subsection — the term 'high managerial agent' already encompasses an employee, agent or officer, so the question is whether the addition of the phrase 'acting within actual or apparent authority' involves any significant expansion to the phrase 'with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy'. In *Australian Securities and Investments Commission v Managed Investments [No 9]*,[103] it is arguable that the conduct of the employed fund manager could be construed equally as having occurred within actual or apparent authority, and as part of duties with such responsibility as to fairly assume that it represented the body corporate's policy — the latter as held by Douglas J.[104]

6.92 The recommended amendment also accords with the view advocated by the Gibbs Committee in its Interim Report, but which did not find its way into the specific drafting of the *Criminal Code*, albeit without comment or explanation. The Committee said:

> The view can be put that some provision should be made for corporations being criminally responsible for the acts of servants below managerial level where the corporation enables them to act in their name without adequate supervision and where facilities provided by the corporation may, in some cases, enable the commission of the offence.
>
> … the Review Committee has concluded that, as a second basis of liability, conduct engaged in by any director, servant or agent of a corporation acting within the scope of his or her office, employment or engagement and the state of mind of that person should be attributed to the corporation if the corporation failed to take measures that in the circumstances were appropriate to prevent, or reduce, the likelihood of, the commission of the offence.[105]

Consequential amendments

6.93 Section 12.3(4) provides for two factors that are relevant when proving 'authorisation or permission' by reference to corporate culture. Both relate to the actual or perceived authorisation by of a high managerial agent of the commission of

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102 See, eg, *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, [1985] FCA 619.

103 *Australian Securities and Investments Commission v Managed Investments [No 9]* [2016] QSC 109.

104 Ibid [613].

105 The Rt Hon Sir H Gibbs PC AC GCMG KBE QC, the Hon Justice RS Watson and ACC Menzies AM OBE, *Review of Commonwealth Criminal Law: Interim Report, Principles of Criminal Responsibility and Other Matters* (1990) [26.15]–[26.16] ('*Gibbs Committee Interim Report*').

the offence. Thus the factors give weight to instances where a person who represents the corporation's 'policy' might authorise, or be reasonably expected to authorise, the commission of the offence.

6.94 The ALRC considers that it would be appropriate to replace 'high managerial agent' with 'officer' (as defined in s 9 of the *Corporations Act*) in section 12.3(4) of the *Criminal Code*.[106] The functional definition of officer captures a level of managerial oversight which reflects the intention of these two subsections. The factors are non-exhaustive and non-prescriptive; thus it remains open to the prosecution to lead evidence in relation to other relevant factors.

Corporate culture

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

> ***corporate culture*** means 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.

6.96 As ss 12.3(2)(c) and 12.3(2)(d) are methods of proof directed towards the fault of the corporation itself as an entity, these provisions capture organisational blameworthiness:

> 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.[107]

6.97 If it can be proved, beyond reasonable doubt, that a culture existed within the corporation that directed, encouraged, tolerated, or led to non-compliance with the relevant provision,[108] or that the corporation failed to create and maintain a culture that required compliance with the relevant provision,[109] this may be sufficient to establish that the corporation authorised or permitted the commission of the offence.

6.98 This aspect of the *Criminal Code* has been described as 'the most radical scheme' set out 'in the Australian Model Criminal Code'.[110]

6.99 The MCCOC considered that the predominant utility of the corporate culture provisions was in 'the more elusive situation of implicit authorisation where the corporate culture encourages non-compliance or fails to encourage compliance'.[111]

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106 As interpreted by the High Court. See *Australian Securities and Investments Commission v King* [2020] HCA 4.

107 Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' [2003] (1) *Journal of Business Law* 1, 18. See further Chapter 4.

108 *Criminal Code* (n 12) s 12.3(2)(c).

109 Ibid s 12.3(2)(d).

110 Colvin (n 50) 34.

111 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 83) 113.

Significantly, the MCCOC regarded the concept of corporate culture as analogous to the 'key concept in personal responsibility — intent'.[112] In other words, the corporation itself is able to 'manifest its intention via a complex organisational process'.[113] The MCCOC quoted Professors Field and Jorg's observation 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.[114]

6.100 The MCCOC considered that the concept of corporate culture establishes a 'much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test', it being 'both fair and practical to hold companies liable for the policies and practices adopted as their method of operation'.[115]

6.101 Section 12.3(4) provides a non-exhaustive list of factors to consider in applying s 12.3(2)(c) or (d) which relate to the involvement of a high managerial agent in the alleged corporate culture:

> (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.

6.102 Commentary, both departmental and academic, takes the view that s 12.3(4)(a) is relevant when there are 'overt' policies of non-compliance, such that 'a high managerial agent has authorised past breaches of the law, leading to an expectation that future breaches will be condoned'.[116]

6.103 Section 12.3(4)(b) is pertinent to the concept of corporate culture, as it inspects the 'real manner in which the corporation operates'.[117]

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112 Ibid 109.

113 Woolf (n 49) 263.

114 Stewart Field and Nico Jorg, 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' [1991] *Criminal Law Review* 156, 159. This was reiterated in the Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 44.

115 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 83) 109. This was reiterated in the Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 44.

116 Attorney-General's Department et al (n 72) 319. See also Odgers (n 62) 275: 'It may be doubted whether this provision really adds much to s 12.3(2). If "a high managerial agent of the body corporate" had in the past authorised an offence of the same or similar character to that charged, it would usually be inferred that the high managerial agent had thereby "tacitly or impliedly authorised or permitted the commission of the offence" charged for the purposes of s 12.3(2)(b).'

117 Woolf (n 49) 263.

> Whilst it would be reasonable for an employee of a company which merely paid lip service to compliance to draw the inference that his illegal conduct would be permitted by senior officers, it certainly would be less reasonable for an employee to hold such a belief where the company had in place a genuine, efficient compliance system.[118]

6.104 In addition, as Stephen Odgers SC explains:

> s 12.3(4)(b) does serve the substantive purpose of making it clear that an admission by the employee, agent or officer of the body corporate who committed the offence will be admissible against the defendant body corporate without any need to rely on some hearsay exception — that is, any admission by the employee, agent or officer, even if not treated as an admission by the body corporate, will be direct non-hearsay evidence of the state of mind of the employee, agent or officer.[119]

Interpretative difficulties

6.105 One significant concern with the corporate culture provisions is that they are largely untested. It may be that the provisions suffer 'from evidential burdens too high to meet with any practical certainty'.[120] In consultations, a key concern was their complexity and the number of steps between corporate culture and proof of a fault element. Juries faced with considerable complexity may be inclined to acquit.

6.106 Compellingly, the NSW Young Lawyers argued for the removal of s 12.3(2)(d) on the basis that 'it is inappropriate to attribute liability on the basis of a culture that does not exist'.[121] The ALRC agrees that there is a conceptual difficulty in having to prove, beyond reasonable doubt, the failure to create and maintain a theoretical culture which, had it existed, would have required compliance with the relevant provision.

6.107 An additional apparent limitation of the definition is captured in the remarks of the former Chief Justice, the Hon Robert French AC, who observed:

> The Criminal Code definition of 'corporate culture' is an extraordinarily wide and vague one. It picks up individual policies, or rules or practices. It does not accord with the emphasis on predominating attitudes and behaviour or distinctive ethos…[122]

6.108 The ALRC is aware of one case in which the corporate culture provisions have been considered. In *R v Potter & Mures Shipping*,[123] it was alleged that the

118 Ibid.
119 Odgers (n 62) 276–77.
120 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) 16.
121 NSW Young Lawyers, *Submission 59*.
122 Justice Robert French, 'The Culture of Compliance - a Judicial Perspective' (2003) 16 *Federal Judicial Scholarship*.
123 *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September

corporation failed to create and maintain a corporate culture that required compliance with s 135.1(7) of the *Criminal Code*.[124] Chief Justice Blow expressed similar concerns:

> First of all, it's curious that corporate culture is defined, not in terms of the entire corporate culture of a company, but it is defined in terms of aspects of what one might ordinarily think of as the corporate 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'.[125]

6.109 Although the corporate culture provisions have not been utilised, the potential benefits, and limitations, of the corporate culture provisions under Part 2.5 of the *Criminal Code* have been recognised, both in academia and amongst sections of the legal profession. Had the provisions not 'for reasons unknown … suffered statutory marginalization',[126] particularly by being excluded from the *Corporations Act* and the *Competition and Consumer Act 2010* (Cth), any perceived limitations may have been resolved.

6.110 Associate Professor Crofts suggests that the importance of corporate culture provisions was demonstrated by the Royal Commission into Institutional Child Sexual Abuse,[127] although she observes that despite 'establishing blameworthiness, corporate culture provisions have failed in practical terms of enforceability.'[128] Crofts refers to 'uncertainty and vagueness, difficulties of proof, [and] whether corporate culture has changed since the offending behaviour occurred' as examples of the problems associated with the corporate culture provisions.[129]

6.111 These various deficiencies defy the optimism expressed shortly after the enactment of the provisions. Professor Clough and Professor Mulhern, writing in 2002, provided practical guidance about what evidence would help establish corporate culture. They considered 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

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2015). Blow CJ directed the jury to acquit.

124 Section 135.1(7) of the *Criminal Code* is as follows: 'A person commits an offence if: (a) the person does anything with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and (b) the public official is a Commonwealth public official; and (c) the duties are duties as a Commonwealth public official.'

125 *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015).

126 Associate Professor P Crofts, *Submission 61*.

127 Penny Crofts, 'Criminalising Institutional Failures to Prevent, Identify or React to Child Sexual Abuse' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 104, 112–3.

128 Associate Professor P Crofts, *Submission 61*.

129 Ibid.

the company's attitudes and expectations.[130] This academic guidance has not been tested by a judge and jury.

Retaining the corporate culture provisions

6.112 Several submissions strongly encouraged the retention of the corporate culture provisions in any proposed reforms. Professor Bant considered that

> the 'corporate culture' attribution provisions contained in s 12.3(2) of Part 2.5 of the Criminal Code contain potentially important and innovative approaches to address embedded corporate practices that are inherently apt (and in that sense calculated or designed) to foster misconduct. … [A]s a general matter, using corporate culture-focussed provisions to identify corporate 'states of mind' aligns much more closely with the realities of modern complex corporations than the TPA and 'identification' attribution models. …
>
> [I]t is arguable that these attribution rules actually encourage corporate structures that disperse knowledge and responsibility. By contrast, the corporate culture provisions have the potential to prevent corporations from sheltering behind the veil of ignorance created by their own business models and design and promote responsible institutional designs.[131]

6.113 Allens noted that the meaning of 'culture'

> is coming of age, as evidenced by Chapter 6 of the Final Report of the Financial Services Royal Commission, APRA's Prudential Inquiry into the CBA, ASIC's Corporate Governance Taskforce and APRA's revised approach to supervision.[132]

6.114 Allens commented on a level of corporate maturity over recent years such that the criticism of corporate culture being 'uncertain' no longer has force and that 'there is normative power in having an express pathway to criminal liability if a corporate culture requiring compliance is not created and maintained.'[133]

6.115 Similarly, the CDPP observed that

> there is little available judicial authority on Part 2.5. Accordingly, it is fair to say that the provision is largely 'untested'. This has also been the experience of the CDPP, although it should be observed that there are current cases being prosecuted by the CDPP where the concept is relied on.
>
> …
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> The CDPP is also of the view that the concept of 'corporate culture' contained in Part 2.5 of the Criminal Code should be retained in some form under a new model of corporate criminal responsibility. The concept is a novel one and was viewed

130 Clough and Mulhern (n 57) 142; see also Dixon (n 120) 15.
131 Professor E Bant, *Submission 21*.
132 Allens, *Submission 31*.
133 Ibid.

> as such at the time of its introduction. In circumstances where the provision has remained largely untested there does not appear to be a sound basis to abandon it.
>
> On the contrary, it is the CDPP view that the underlying rationale for the concept of corporate culture … is worth retaining. Of particular significance is the fact that corporate culture … 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 and is a mechanism for capturing the fault element of the corporation itself as an entity. While certain modifications to the current form of the provision may be required … it is the CDPP view that the overall tenor of the concept of corporate culture is one worth preserving in an endeavour to hold corporations responsible for their criminal conduct.[134]

6.116 ASIC has previously recommended applying Part 2.5 of the *Criminal Code* to Chapter 7 of the *Corporations Act*.[135] ASIC considered that this would remedy ASIC's otherwise limited powers to address corporate culture. ASIC's position was that 'when an employee breaches the law ASIC administers and culture is responsible, not just the employee — not just the fruit but also the tree — but also the officers and the company should be responsible'.[136] However, subsequently ASIC's then Chairman stated, 'I want to be very clear that we are not trying to regulate culture'.[137] In its submission to this Inquiry, ASIC expressed the view that the corporate culture provisions that currently exist in s 12.2(2)(c) and (d) of the *Criminal Code*, or an amended version of those provisions, should be retained so that specific reference is made in the legislation to the ability to prove fault through proof of a poor corporate culture.[138]

6.117 Courts are also increasingly familiar with the concept of corporate culture, albeit largely in the context of sentencing.[139] The ALRC is aware of three cases between July 2009 and June 2019 in which a corporation was sentenced for a criminal offence in the Federal Court.[140] In two of those cases, Wigney J found that the cartel conduct was well known in the particular part of each corporation, and

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134 Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

135 See John HC Colvin and James Argent, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34 *Company and Securities Law Journal* 30, 31. Part 2.5 is expressly excluded from applying to ch 7 of the *Corporations Act*, which deals with financial services regulation: *Corporations Act 2001* (Cth) s 769A.

136 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 3 June 2015, 8 (Greg Medcraft).

137 Greg Medcraft, 'Directors' Duties and Culture' (Speech, Law Council of Australia, Business Law Section Corporations Workshop, Gold Coast, 19 June 2016) 2.

138 Australian Securities and Investments Commission (ASIC), *Submission 54*.

139 There are, of course, differences between proceedings at trial and proceedings at sentence. The ALRC recommends codification of consideration of corporate culture as a sentencing factor: see Chapter 8 and Recommendation 10(b).

140 *Deckers Outdoor Corporation Pty Ltd v Farley (No 8)* [2010] FCA 657; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876; *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575, [2019] FCA 1170. Note that in the latter two cases, the corporations pleaded guilty.

indeed, appeared to be part of the corporate culture.[141] This was on the basis of active knowledge and engagement in the cartel conduct on the part of senior management, in tandem with covert behaviour which involved conscious steps taken to conceal the cartel conduct.[142]

6.118 When corporations are subject to civil penalties, corporate culture is often a pertinent consideration in the imposition of a penalty. The question is 'whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention'.[143] Indeed, effective programs and training are regarded as perhaps the 'clearest indicator of a corporate culture of compliance'.[144]

6.119 Significantly, courts have drawn a distinction between a façade of compliance and the reality of corporate culture.[145] Compliance programs are not effective unless there is a 'degree of awareness and sensitivity' to the application of the relevant regulatory obligations on a day to day basis.[146] In *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)*, Lee J emphasised that:

> A 'culture of compliance' is an amorphous concept. But whatever it actually means, it must transcend simply putting in place expensive "systems"; or it must be more than persons, whose titles include terms such as "governance" and "compliance", declaiming platitudes. One might question the point of such structures and roles in a company, if the corporate will to do the right thing is absent.[147]

6.120 In addition, courts have differentiated between isolated instances of misconduct (even if there are multiple instances) and a permeating culture of non-compliance with the law. Courts have found a corporate culture of non-compliance when there have been 'deliberate, extensive and protracted' contraventions,[148]

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141 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [241]; *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575, [2019] FCA 1170 [300].

142 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [240]–[241]; *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575, [2019] FCA 1170 [299]–[301].

143 *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153, [1990] FCA 762 [45]. As discussed in Chapter 8, the courts have drawn on the case law relating to imposing civil penalties on corporations when sentencing corporate offenders. See [8.30]–[8.31].

144 French (n 122). See also *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544 [72]–[73].

145 See, eg, *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2017] FCA 1251 [118].

146 *Australian Securities and Investments Commission, in the matter of Chemeq Limited v Chemeq Limited* [2006] FCA 936 [86].

147 *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69 [2].

148 *Australian Competition and Consumer Commission v Domain Name Corp Pty Ltd* [2018] FCA 1269 [51].

and where there has been what is 'properly described as egregious, systemic and widespread … deliberate conduct'.[149]

Defining corporate culture

6.121 The ALRC recommends that, in order to avoid arid debates about whether a single 'attitude, policy, rule, course of conduct or practice' suffices to establish the existence of a particular corporate culture, the definition of 'corporate culture' in s 12.3(6) should be amended to read:

> ***corporate culture*** means attitudes, policies, rules, a course of conduct or practices existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

6.122 The ALRC's recommendation also includes correcting the grammatical error in the original definition.[150] The CDPP suggested this amendment to the definition.[151]

Option 2 — A TPA Model approach

6.123 Option 2 is the TPA Model but with a defence. Except for the question of where the onus of proof should lie in relation to that defence, it is one of the bases of liability recommended by the Gibbs Committee.[152] The language was not adopted by the MCCOC, although without explanation. Instead, the concept of 'high managerial agent' was preferred.

6.124 This modified TPA Model invokes a relatively simple, longstanding test that looks to attribute to a corporation the actions and states of mind of a broad group of individuals, while retaining a defence of reasonable precautions.[153] A defence of reasonable precautions supports the notion that criminal liability should only attach to a corporation where the corporation can be said to be blameworthy. As discussed in Chapter 3, there is currently inconsistency as to the content and availability of a defence applicable to statutory attribution methods which use the TPA Model.[154] Option 2 seeks to improve the TPA Model, by standardising the defence that is available to corporate defendants. There may be offence-specific situations in which a defence is not appropriate, however, this should be reflected in the offence provision (rather than in the attribution method), and appropriately justified (in accordance with Recommendation 4).

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149 *Commissioner for Fair Trading v Digital Marketing and Solutions Pty Ltd* [2019] NSWSC 370 [68].

150 See *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 466: 'Parliament got the grammar wrong there, it should have said "take" rather than "takes"'.

151 Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

152 See *Gibbs Committee Interim Report* (n 105) [26.16].

153 The TPA Model does not always incorporate a defence. Sometimes there is a defence of 'due diligence' and/or 'reasonable measures', and often the defence is attached to the conduct limb of attribution.

154 See also *Data Appendices* (n 31) Appendix A, Table 2.

6.125 Option 2 has the benefit of simplicity in that, for any person whose conduct is deemed to be that of a corporation, that person's state of mind, rather than one of the four states of mind articulated in the *Criminal Code,* is also deemed to be the state of mind of the corporation. The ALRC does not consider that the broad reference to fault used in the TPA Model ('states of mind') contradicts the structure of fault elements within the *Criminal Code* given that the Code does not prevent the creation and use of alternative states of mind.[155] The term 'states of mind' avoids unnecessary complications, particularly given that most offence provisions do not reside in the *Criminal Code,* and therefore do not follow the rigid distinctions of intention, knowledge, recklessness, and negligence.[156]

6.126 Option 2 has the significant limitation that fault must ultimately reside in one individual. As discussed below [6.150], the TPA Model, and thus Option 2, allows aggregation between conduct and fault. A prosecutor must, however, still prove that a single officer, employee, or agent of the corporation had the requisite state of mind at the relevant point in time. Thus, instances of 'corporate omission', corporate fault, or failing to create a culture of compliance would not be attributable under Option 2.

Breadth of the TPA Model

6.127 The ALRC heard in some consultations that, within the realm of attribution of criminal responsibility, the TPA Model is too broad and, in reality, is simply the imposition of vicarious liability. The courts have been clear that this is not so; it is the imposition of direct liability in circumstances where Parliament has made a policy choice that the conduct and states of mind of certain prescribed persons should be attributed the corporation.[157] The method is familiar to many stakeholders; it is common across both Commonwealth and state legislation.[158]

6.128 Nevertheless, the TPA Model was in force in 1990 when the draft code was conceived, and was subject only to the defences then contained in s 85 of the T*rade Practices Act 1974* (Cth). It was rejected by the Gibbs Committee as an option for corporate criminal liability for any Commonwealth law, as 'too draconian a course'.[159] The Committee noted, however, that the Attorney-General's Department, the Federal Bureau of Consumer Affairs, and the Trade Practices Commission argued strongly for the retention of ss 84 and 85 in the *Trade Practices Act 1974* (Cth) itself and, in the

155 *Criminal Code* (n 12) s 5.1(2).

156 Both ASIC and the CDPP considered that 'state of mind' is preferable to specific fault elements: Australian Securities and Investments Commission (ASIC), *Submission 54*; Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*. Importantly, where legislation is silent as to the fault element the interpretative principles of the *Criminal Code* apply — see Chapter 2 of this Report.

157 *Australian Workers' Union v Leighton Contractors Pty Ltd* (2013) 295 ALR 449, [2013] FCAFC 4 [86]. See also *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719, 737–8, [1983] FCA 99, 41–2.

158 See *Data Appendices* (n 31) Appendix A, Table 2, in relation to Commonwealth legislation.

159 See *Gibbs Committee Interim Report* (n 105) [26.9].

case of the Attorney-General's Department, for retention of like provisions in other statutes. Over the ensuing two decades, methods of attribution corresponding to the TPA Model have been introduced into 15 of the 25 statutes that were reviewed by the ALRC.[160] Even if it were considered to be too draconian by the Gibbs Committee in 1990, that view seems not to have prevailed.

6.129 As then enacted, s 85 provided a defence if the defendant corporation established:

- that the contravention was due to reasonable mistake;
- that the contravention was due to reasonable reliance on information supplied by another person (who was not a director, servant, or agent of the body corporate); or
- that the contravention was due to the act or default of a person (who was not a director, servant, or agent of the body corporate), accident or a cause beyond the defendant's control, and the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

Section 85 did not provide a 'reasonable precautions' defence in respect of the conduct of a director, servant, or agent of the corporation.

Construction of the TPA Model

6.130 The key feature of the TPA Model is that the conduct and state of mind of particular individuals may be attributed to a corporation. As a result, the prosecution must prove, beyond reasonable doubt, that a relevant individual had the requisite state of mind in order for a corporation to be liable.

6.131 Under the TPA Model, the *conduct* of an individual is deemed to be the conduct of the corporation when:

- the individual was a director, employee, or agent;
- that individual engaged in the conduct;
- the conduct was undertaken on behalf of the corporation; and
- the conduct was within the scope of actual or apparent authority.

In addition, in most iterations of the TPA Model, the conduct of an individual is deemed to be the conduct of the corporation when any other person acts at the direction of, or with the consent or agreement of, a director, employee, or agent, within their actual or apparent authority. This is referred to as the 'second limb' of the TPA Model. It extends liability to encompass the conduct of 'any other person'.[161]

160 See Chapter 3 [3.57]; *Data Appendices* (n 31) Appendix A, Table 2.

161 The extension to the scope of the section occurred in 1996 but without explanation: *Explanatory Memorandum, Trade Practices Revision Act 1986 (No. 17) (Cth)* [185].

6.132 The *state of mind* of an individual is deemed to be the state of mind of the corporation when:

- the individual was a director, employee or agent;
- that individual engaged in the conduct; and
- the conduct was within the scope of actual or apparent authority.

6.133 The key variations between the different TPA Models are whether: the relevant actors include 'officers', or just 'directors'; the fault element is defined, limited to certain states of mind, or broad; a defence of due diligence or reasonable precautions, or both, is included; and whether Part 2.5 is expressly excluded.[162]

6.134 Unlike the *Criminal Code*, the TPA Model does not displace but, rather, incorporates and extends the common law principles of attribution.[163]

6.135 There is little explanation as to the genesis of s 84 of the *Trade Practices Act 1974* (Cth). The Explanatory Memorandum does not provide the rationale behind the provision.[164] Appendix A, Table 3 of the *Data Appendices* sets out in detail the legislative history of s 84 as it has been modified and enacted in different statutes. The courts have held that the legislative intention of s 84 of the *Trade Practices Act 1974* (Cth) was to 'make it "easier" to attribute corporate responsibility for the conduct of agents than the position at common law':[165]

> It extends to proceedings, both civil and criminal, and is designed to eliminate the necessity to apply the various and at times divergent tests of the common law relating to a corporation's responsibility for the acts of its servants or agents. It extends those common law principles in order to facilitate proof of a corporation's responsibility.[166]

6.136 There is, therefore, a general perception that the TPA Model is more amenable to successful prosecutions than other attribution methods. It is important to observe, however, that the ALRC's attention has not been directed to any case in which it was asserted that the TPA Model has been applied in a manner that has produced an inappropriate or unjust outcome.

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162 See *Data Appendices* (n 31) Appendix A, Table 2.

163 See, in the context of s 84 of the *Trade Practices Act 1974* (Cth): *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38, [1985] FCA 619, 23.

164 See Brent Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 *Adelaide Law Review* 285, 289. See also *Data Appendices* (n 31) Appendix A, Table 3.

165 *Murphy Toenies v Family Holdings Pty Ltd* [2019] WASC 423 [95]. See also *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558 [1241].

166 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38, [1985] FCA 619.

'Actual or apparent authority'

6.137 Under the TPA Model, conduct and state of mind are attributed from individuals, acting within the scope of their actual or apparent authority, to the corporation. As such, the TPA Model incorporates the common law doctrine of actual and apparent authority.[167]

6.138 Actual authority derives from the relationship between the principal and the agent.[168] Apparent authority is created by the relationship between the principal and the third party:

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract.[169]

6.139 Across the various iterations of the TPA Model, the requirement of actual or apparent authority has been important and relevant to the determination of corporate fault. The requirement to demonstrate actual or apparent authority has prevented the conduct or state of mind of a renegade or rogue from being attributed to the corporation.[170] At the same time, the requirement to demonstrate actual or apparent authority has not operated as a shield to prevent attribution where the corporation failed to prevent the individual from representing themselves as having actual authority.[171]

6.140 Under the TPA Model, actual or apparent authority is necessary but not sufficient. The courts have considered, in the context of s 84 of the *Trade Practices Act 1974* (Cth), that:

> Its operation is not limited to cases in which a person has a corporation's actual authority (whether express or implied) to engage in the conduct in question. So limited, it would be no more than a restatement of the general law.[172]

'On behalf of'

6.141 The TPA Model deems conduct engaged in 'on behalf of' the corporation by individuals to be the conduct of the corporation itself. The phrase 'on behalf of'

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167 Ibid [37].
168 *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502].
169 Ibid [503].
170 See, eg, *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2001) 119 FCR 1, [2001] FCA 1861 [819].
See also *Australian Workers' Union v Leighton Contractors Pty Ltd* (2013) 295 ALR 449, [2013] FCAFC 4 [92].
171 See *Trade Practices Commission v Sun Alliance Australia Ltd* [1993] FCA 863 [28].
172 *Adelaide Petroleum NL v Poseidon Ltd* (1990) 98 ALR 431 [521], [1990] FCA 576.

is instrumental in expanding the application of the concepts of actual or apparent authority beyond the relationship of agency:

> The words "on behalf of" also encompass acts done by a corporation's servants in the course of their employment; but those words are not confined to the notion of the master/servant relationship…the phrase "on behalf of" casts a much wider net than conduct by servants in the course of their employment, although it includes it.[173]

6.142 Throughout the different variations of the TPA Model, the courts have considered that the phrase 'on behalf of' does not have a 'strict legal meaning':

> The wide range of relationships to which the phrase is applicable are those that are 'in some way concerned with the standing of one person as auxiliary to or representative of another person or thing'.[174]

6.143 The phrase, however, does suggest 'some involvement by the person concerned with the activities of the corporation'.[175] As a result, an act is done 'on behalf of the corporation' where:

> Either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so 'as representative of' or 'for' the corporation, or that the actor engaged in the conduct in the course of the corporation's business, affairs or activities.[176]

6.144 These two situations are not exhaustive of the circumstances that can satisfy the phrase 'on behalf of'.[177] It may be that whether conduct was engaged in 'on behalf of' the corporation depends on the particular features of each case.[178]

6.145 It is neither necessary nor sufficient that the individual who engaged in the relevant conduct intended that their conduct be for the benefit of the corporation, or that the conduct was, in fact, for the benefit of the corporation.[179]

6.146 Despite the potential breadth of the words 'on behalf of' it is extremely unlikely that the legislative intention was that it would apply to

> a wholly unauthorized, but misleading or deceptive statement, made by a bystander with the implied consent of a servant of a corporation conducting retail stores who was employed only as a truck driver.[180]

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173 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37, [1985] FCA 619.
174 *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 [55], citing *The Queen v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374, 386.
175 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37, [1985] FCA 619.
176 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) FCR 270, [2000] FCA 1558 [1244].
177 *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 [55].
178 *NSW Mutual Real Estate Fund Ltd v Brookhouse* [1979] ATPR ¶40-104 [18,052], [1979] FCA 16, 15.
179 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38, [1985] FCA 619. See also *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) FCR 270.
180 *NSW Mutual Real Estate Fund Ltd v Brookhouse (1979)* ATPR 40-104 [18,052].

6.147 Ultimately, the courts have considered, in relation to s 84 of the *Trade Practices Act 1974* (Cth), that the words 'on behalf of' call for careful consideration of context:

> It may be that the words 'on behalf of' in s 84(2) do not lend themselves to any general statement concerning the cases to which they apply and that whether any conduct was engaged in 'on behalf of' a body corporate must depend upon the circumstances of the particular case.[181]

'Any other person'

6.148 Many iterations of the TPA Model include the 'second limb' and attribute the conduct of 'any other person' acting at the direction of, or with the consent or agreement (express or implied) of a director, employee, or agent (acting within the scope of their actual or apparent authority), to the corporation.

6.149 The courts have considered the meaning of 'direction', in the context of s 84 of the *Trade Practices Act 1974* (Cth):

> The dictionary definition of it is: "guidance; instruction: to offer some direction, (plural) instructions ... order; command ... management; control" (Macquarie Dictionary, The Macquarie Dictionary Online, accessed 2012), or "the action or function of directing ... of putting or keeping in the right way or course; guidance, conduct ... of instructing how to proceed or act aright; authoritative guidance, instruction ... of keeping in right order; management, administration" (Oxford Dictionary, Oxford English Dictionary Online, accessed 2012). Thus it should be taken to mean to give: "authoritative guidance, instruction ... of keeping in right order; management, administration".[182]

6.150 When there is a subsidiary and a parent company, the courts have emphasised that:

> While it is true to say that s 84(2) is not to be read down, there is no warrant in s 84(2)(b) to disregard the fundamental principle that companies are entities with rights and liabilities separate from their shareholders and holding companies are entities separate from their subsidiaries … The requirement of a direction by a representative with the actual or apparent authority of a holding company is not satisfied by showing no more than a general economic interest in the success of the subsidiary.[183]

Aggregation

6.151 Aggregation, as a concept, is particularly relevant in the corporate context. Corporations are efficient aggregators of people and resources — corporate output

181 Ibid.

182 *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 291 ALR 191, [2012] FCA 211 [225]. The decision was successfully appealed in *Consolo Ltd v Bennett* (2012) 207 FCR 127, [2012] FCAFC 120, however, the ordinary meaning of 'direction' was not contested.

183 *Consolo Ltd v Bennett* (2012) 207 FCR 127, [2012] FCAFC 120 [83]–[84].

is necessarily greater than the sum of its parts. As a result, corporations typically act through multiple people.[184] Professor Colvin has explained that:

> It is sometimes argued that, for the purpose of calculating corporate criminal liability, the conduct, states of mind, and culpability of individual representatives of the corporation should be 'aggregated'. Aggregation could involve matching the conduct of one individual with the state of mind or culpability of another individual. Alternatively, where an offence requires a particular level of knowledge or negligence, this could be found in an aggregation of the knowledge or negligence of several individuals. Aggregation is a step toward a scheme of corporate liability that is organisational, rather that derivative from individual liability.[185]

6.152 A degree of aggregation of the first kind is permissible under the TPA Model. Any conduct engaged in on behalf of the corporation is taken to have been engaged in by the corporation itself. When the relevant offence contains multiple elements of conduct, the TPA Model may allow for these various components to have been engaged in by various individuals.

6.153 There is a further mode of aggregation embedded in the TPA Model, when the 'second limb' is present (that is, when conduct of any person acting at the direction, consent or agreement of an employee, agent, or officer may also be attributed to the corporation). It is possible for conduct to be attributed from one individual and the state of mind to be attributed from the individual who directed, consented, or agreed to the conduct. This nexus between the individual who engaged in the conduct and the person with the state of mind is essential:

> There must be some connection between the two if this form of aggregation is to be plausible. Otherwise, there will be no basis for holding anyone culpable with respect to the conduct.[186]

6.154 The common law principles regarding attribution are also relevant, given many statutory methods of attribution expand upon rather than exclude the common law.[187]

6.155 Clough and Mulhern explain that there are some circumstances in which aggregation is possible at common law.[188] For example, when 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.[189]

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184 See Chapter 4 for more detail on aggregation. See in particular [4.80]–[4.91].
185 Colvin (n 50) 18–19.
186 Ibid 22.
187 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [2016] FCAFC 186 [109].
188 Clough and Mulhern (n 57) 9.
189 IM Ramsay, RP Austin and HAJ Ford, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) [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.

6.156 This is different from the aggregation of states of mind to create another, different state of mind. The Full Court of the Federal Court of Australia in *Commonwealth Bank of Australia v Kojic* ('*Kojic*')[190] held (in a civil context) that the *knowledge* of two officers 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.[191]

6.157 Chief Justice Allsop (who agreed with Edelman J in relation to aggregation) noted that the 'question of aggregation will generally arise in a particular statutory context or in the context of a particular substantive rule.' His Honour said, in the context of s 84 of the *Trade Practices Act 1974* (Cth) (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.[192]

6.158 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.[193]

6.159 Aggregation is possible under either Option 1 or Option 2 of Recommendation 7, to the same extent as aggregation is possible for individuals under existing extensions of criminal responsibility;[194] that is, if A did not engage in the conduct but directed, consented, or agreed to B engaging in the conduct, and A had the requisite state of mind, then the conduct of B and the state of mind of A can be aggregated.

6.160 Option 1 potentially facilitates broader aggregation than Option 2. The corporate culture provisions allow reference to a variety of evidence to prove fault (via 'authorisation or permission'). As the MCCOC envisaged the operation of the corporate culture provisions, the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions, and the knowledge of individuals within the corporation. The fault element is

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190 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [2016] FCAFC 186.

191 Ibid [66]–[67] (Allsop CJ), [112] (Edelman J).

192 Ibid [64].

193 *Competition and Consumer Act 2010* (Cth) s 84.

194 In particular, under s 11.3 of the *Criminal Code,* commission by proxy, which deems the person to have 'committed that offence', rather than to have committed the conduct, or have the 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 to the corporation. One solution is to remove the language 'engaged in that conduct' from s 12.3.

attributed from what has 'emerged from the decision making process recognised as authoritative within the corporation'.[195] The other two provisions (under which fault is established by reference to (a) the board, or (b) an officer, employee, or agent), facilitate attribution of fault in a similar way as extensions of criminal responsibility — if the board/individual 'authorised or permitted' the conduct, this may amount to authorisation or permission by the corporation.

Reasonable precautions defence

6.161 In respect of attribution through an officer, employee, or agent under either Option 1 or Option 2, the defendant corporation has a defence of 'reasonable precautions' and bears the legal burden of proving the defence, on the balance of probabilities.

6.162 As discussed in relation to Option 1 above, when the prosecution relies on s 12.3(2)(b), currently attribution through a 'high managerial agent', there is a statutory defence of due diligence:

> Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.[196]

6.163 Since the corporation is required to 'prove' the matter, the legal burden is on the defence.[197]

6.164 Due diligence, as a statutory defence, also often appears in legislation that utilises the TPA Model.[198]

6.165 'Due diligence' is not defined in the *Criminal Code*, although it is possible that assistance may be drawn from the mistake of fact defence that is contained in s 12.5 of the Code:[199]

> A failure to exercise due diligence 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

195 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 83) 113.
196 *Criminal Code* (n 12) s 12.3(3).
197 Ibid s 13.4.
198 See discussion below regarding the TPA Model and see *Data Appendices* (n 31) Appendix A, Table 3. Regarding the meaning of 'due diligence' in the context of s 85 of the *Trade Practices Act 1974* (Cth), see *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531, [1978] FCA 18 [9]. See also WD Duncan and Samatha J Traves, *Due Diligence* (LBC Information Services, 1995) and *State Pollution Control Commission v R V Kelly* (1991) 5 ASCR 607 at [608]–[609].
199 Odgers (n 62) 272.

> relevant persons in the body corporate.[200]

6.166 The due diligence defence is particularly notable as, in the words of the MCCOC, it speaks to a 'lack of organisational blameworthiness'.[201] Generally speaking, organisational blameworthiness characterises the corporation as having a 'distinct and identifiable personality independent of specific individuals'[202] and that culpability must rest in that separate, corporate personality. The due diligence defence therefore marks a departure from the common law doctrine of identification theory:[203]

> 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.[204]

6.167 It is a safety valve for the corporation. A due diligence defence enables a corporation to be acquitted, even if a high managerial agent had the requisite state of mind, if the corporation can demonstrate that it would be unreasonable to attribute liability to the corporation in all of the circumstances.

'Reasonable precautions'

6.168 The ALRC has adopted the language of 'reasonable precautions' in preference to that of 'due diligence' to avoid any confusion with the other common usage of the phrase 'due diligence'. The Gibbs Committee spoke of 'reasonable measures'[205] and the phrase used in the defence provided in s 85 of the *Trade Practice Act 1974* (Cth) was, 'took reasonable precautions and exercised due diligence', suggesting there is perhaps some difference in substance between 'due diligence' and 'reasonable measures/precautions'.

6.169 The ALRC heard in consultations that, while a defence of 'due diligence' is common to attribution methods in many areas of the law,[206] the financial and commercial sectors in particular may face some confusion with the phrase 'due diligence'. Due diligence is a common term in commercial transactions and ostensibly involves a forensic examination of a corporation. That type of sustained and expensive due diligence is potentially at odds with a criminal law test which is focused on the reasonableness of the policies and procedures, relevant to the

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200 *Criminal Code* (n 12) s 12.5(2).
201 Model Criminal Code Officers Committee and Criminal Law Officers Committee (n 83) 107.
202 Dixon (n 120) 3.
203 Attorney-General's Department et al (n 72) 297.
204 Woolf (n 49) 261.
205 *Gibbs Committee Interim Report* (n 105) Part V.
206 See *Data Appendices* (n 31) Appendix A, Table 2.

circumstances in issue, that have been put in place by a corporation to prevent criminal activities.

6.170 Whether a corporation has taken 'reasonable precautions' is an objective test and is therefore context specific. Accordingly, it is likely that courts would expect a corporation to take greater measures with respect to those persons with whom the corporation has more contact, or over whom the corporation can exercise greater control.[207] The Gibbs Committee suggested that what

> preventative measures were appropriate in the circumstances would depend on the nature of the offence, whether the offender's position in the corporation and access to facilities provided by the corporation facilitated the offence and the frequency of occurrence of such offences.[208]

6.171 The concept of looking to what is objectively reasonable in the circumstances reflects the underlying approach in duty-based offences (discussed in Chapter 7). Namely, an offence is committed by an objective failure to meet the standard necessitated by the duty.[209] Duty-based offences penalise a failure to meet an identified standard of behaviour, according to an objective test. Under a duty-based offence objectivity is an element of the offence whereas a reasonable precautions defence asks the same questions from a different perspective: notwithstanding the commission of an offence, was the behaviour of the corporation objectively reasonable in the circumstances?

6.172 A short definition of 'reasonable precautions' could be provided in Part 2.5.[210] Some of the phrases currently used in s 12.5(2) could be incorporated into such

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207 Submissions raised concerns that charities may be disadvantaged by the defence, due to their limited resources. However, as the objective and context-specific nature of a defence of either due diligence or reasonable precautions would take into account a charity's fiscal ability and overall circumstances in determining whether it had exercised due diligence or taken reasonable precautions. See, eg, in relation to the defence of 'adequate procedures' in the CLACCC Bill:

> 'What constitutes "adequate procedures" would be determined by the courts on a case by case basis. It is envisaged that this concept would be scalable – its exact requirement would depending on circumstances including the size and nature of the body corporate concerned. … Small and medium-sized enterprises would not necessarily be expected to put in place a compliance program of the same size that would be required of a large multi-national company. Similarly, a corporation with limited exposure to foreign bribery risk would not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile.' (Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [108] and [113].).

208 *Gibbs Committee Interim Report* (n 105) [26.16].

209 See [7.178]–[7.196].

210 See, eg, *Fisheries Management Act 1991* (Cth) s 164(2A), where regard is to be had to:

> (a) any action the body corporate took to inform the director, employee or agent of the legal obligations of the body corporate, director, employee or agent, in relation to the conduct; and
>
> (b) any action the body corporate took to ensure that those obligations were understood and complied with by the director, employee or agent; and
>
> (c) when any such action was taken; and
>
> (d) whether there were any other actions that the body corporate could reasonably have taken that may have prevented the conduct.

a defence.[211] Alternatively, the six principles of 'reasonable measures' could be adapted from the *Bribery Act 2010* (UK).[212]

6.173 Specific guidance documents on what may constitute reasonable precautions in particular regulated areas may also be of assistance for corporations.[213] Concerns were raised in submissions that guidance documents may not be sufficient.[214] These concerns may have more force initially, but as with all new laws, a body of law will develop to provide additional guidance. Evidence of the available guidance at the time of the alleged misconduct (including industry practice and regulator approaches) should be admissible to contextualise the corporation's conduct in any proceedings.

6.174 There exists already a significant body of law that explains the terms 'due diligence', 'reasonable measures' and 'reasonable precautions'. Each case will need to be considered on its facts. Ultimately, it is not unreasonable to suggest as a matter of common sense that corporations take reasonable precautions to ensure that they, and the agents who are their 'arms and legs', do not commit criminal offences. As is evident from Chapter 3, corporations are familiar with the need to comply with a range of regulatory requirements.

6.175 Some concerns were raised in submissions about whether hindsight might be applied by courts in determining the appropriateness of the corporation's actions at the relevant time.[215] However, this is a matter for clear jury directions, in relation to which a defendant corporation can make submissions in court. A direction to a jury not to apply hindsight in relation to what precautions would have been reasonable is likely to be no more complex or fraught than other jury directions required in a corporate crime trial.

Burden of proof — defences

6.176 As discussed in Chapter 4, a foundational element of the criminal law is that an accused is innocent until proven guilty. The burden rests on the prosecution to prove the offence beyond reasonable doubt. Generally, Parliament should justify any reversal of the burden of proof. However, it is not unusual for the burden of proving

211 That is, that a failure to exercise due diligence (being the current language) may be evidenced by the fact that the prohibited conduct was substantially attributable to (a) inadequate corporate management, control or supervision, or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

212 The six principles are: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including training); monitoring; and review.

213 A draft of such guidance has been issued in connection with the CLACCC Bill.

214 See, eg, Allens, *Submission 31*.

215 Ibid.

a defence to rest on the defendant, on the balance of probabilities.[216] Indeed, this is the current position under many attribution methods for defendant corporations.[217]

6.177 Proposal 8 in the Discussion Paper suggested that the defendant corporation should bear the onus of proving (on the balance of probabilities) a due diligence defence.

6.178 Many submissions were of the view that a defendant corporation should not bear this legal burden,[218] although the submissions did not address the numerous instances in which attribution methods currently incorporate a defence for which the legal burden rests on the defendant.

6.179 Furthermore, the presumption in these submissions was that the same protections which are provided to individuals (that is, humans) should be afforded to corporations. As discussed in Chapter 4, the ALRC takes a fundamentally different view: corporations should not be treated identically to natural persons.[219]

6.180 In recommending that the conduct, and where relevant the state of mind, of any director, servant, or agent acting within the scope of his or her office, employment or engagement, should be attributed to the corporation, the Gibbs Committee considered that, in an attribution provision of general application (as opposed to in specialist legislation such as the *Trade Practices Act 1974* (Cth)), the onus of proving that the corporation had failed to take reasonable measures should be placed on the prosecution. The Committee also proposed a third basis of liability:

> Conduct engaged in by any director, servant or agent of a corporation, acting within the scope of his or her office, and, where relevant, the state of mind of that person, would be attributed to the corporation even if the prosecution did not prove that the corporation had failed to take measures appropriate in the circumstances to prevent, or reduce the likelihood, of the commission of the offence, but the fact that the corporation had taken such measures would be a defence, the onus of proof of which would rest on the defendant.[220]

6.181 As observed earlier, it is in fact this third basis of liability that has come to predominate across the Commonwealth statute book. The ALRC is not persuaded that a different approach should now be taken in respect of this particular defence.

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216 See, eg, the defence of insanity (*R v Porter* (1933) 55 CLR 182), and also express statutory reversals of burdens for diminished responsibility and mistake of fact (s 9.2 *Criminal Code).*

217 See *Data Appendices* (n 31) Appendix A, Table 2.

218 For example, Professor J Gans, *Submission 18;* Professor P Hanrahan, *Submission 38*; Australian Banking Association, *Submission 57*; Business Council of Australia, *Submission 63.*

219 An argument which does underpin the concern for treating corporations differently from individuals is that, where an individual is subject to deemed liability or accessorial liability flowing from the conviction of a corporation, the 'rights' of a corporation in the first instance may be of importance to the human individual's follow on proceedings. The continued role of extended management liability provisions and the policy choices to be made around such provisions are discussed in Chapter 9.

220 *Gibbs Committee Interim Report* (n 105) [26.19].

6.182 The ALRC's recommendation places the onus of proving the taking of reasonable precautions on the defendant in all cases, unless a specific offence either contains no defence, or situates the onus with the prosecution. As discussed in Chapter 4, it 'has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof'.[221] However, where it chooses to place the burden of proof on a defendant corporation, Parliament should give clear justification to ensure that the principle of legality is not applied so as to read down what would otherwise be an incursion upon the presumption of innocence. Where the legal burden rests on a defendant, strong justification should be provided.

6.183 Nevertheless, it is by no means abnormal for the legal burden of proving a defence, in particular, to rest on the defendant. In addition, there are two main justifications in this context for placing the onus of proof for the defence on the defendant corporation in the context of attribution.

6.184 The first pertains to the nature of the defendant being a body corporate and, the fact that the defence is directed to the question of whether a particular fault element should be attributed to a corporation, not simply whether a particular offence is established. Before the defence becomes relevant, it is necessary for the prosecution to establish:

- first, that an officer, employee or agent of the body corporate, acting within actual or apparent authority, committed the physical elements of the offence, or that a person acting at the direction or with the agreement or consent of such a person did so;
- secondly, that the relevant fault elements can be attributed to the corporation due to the possession of the relevant state of mind by an officer, employee, or agent of the body corporate, acting within actual or apparent authority.

It is only once these matters are proved by the prosecution that the defence becomes relevant. The utility of the defence then is to negate attribution, and not to impose a reverse onus for elements of the offence which the prosecution should rightly be required to prove.

6.185 The second justification pertains to the nature of the evidence required to prove such a defence, which is also affected by the corporate context. The nature of the evidence falls into a recognised class of facts for which reversing the onus of proof is justifiable: the facts that would need to be proved to determine whether reasonable precautions were undertaken by a corporation are clearly facts which are

221 *Kuczborski v Queensland* (2014) 254 CLR 51, [2014] HCA 46, [240] per Crennan, Kiefel, Gageler and Keane JJ. The majority of the High Court was relying on the decision in *Commonwealth v Melbourne Harbour Trust Commissioners* (1992) 31 CLR 1, 12, 17–18; see also *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264. See Chapter 4, particularly [4.109]–[4.118].

'peculiarly within the knowledge of' the accused, or the disproof of the facts would require the Crown to prove a negative.[222]

6.186 It is neither appropriate nor reasonable to require the prosecution to prove that the defendant corporation did not take reasonable precautions, either as an element of the criminal offence (which would need to be proved beyond reasonable doubt), or to negative the evidential burden being raised.

6.187 To require the prosecution to prove an absence of reasonable procedures would require the prosecutor to either: obtain evidence that is held by the corporate defendant, then to search through potentially voluminous documentary evidence; or, to approach (potentially defence) witnesses, and then to prove (beyond reasonable doubt) a negative, being a lack of reasonable corporate procedures.

6.188 Furthermore, the Crown is already required to prove culpability, being the state of mind which is attributed to the corporation. The reasonable precautions defence allows the defendant corporation to establish that, notwithstanding culpability on the part of one of its agents, as a whole it should not be held to be criminally responsible.[223]

Availability of the defence

6.189 In the Discussion Paper, a key aspect of Proposal 8 was the inclusion of a due diligence defence. Many submissions saw the value in a broadly available due diligence defence,[224] although it was suggested that there may be certain areas in which it is not appropriate or warranted.

6.190 In particular, the ACCC opposed a due diligence defence in the context of the *Competition and Consumer Act 2010* (Cth) on the basis that it would undermine the immunity incentives for cartel conduct.[225] Other submissions were concerned that the defence did not counterbalance the scope of the particular term 'associate'.[226]

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222 See *R v Turner* (1816) 5 M & S 206; 105 ER 1026: 'if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party […] who assets the affirmative is to prove it and not he who avers the negative.'

223 In *Traditional Rights and Freedoms*, the ALRC noted that, while it would not be justifiable to impose a legal burden on a defendant in proving an issue that is essential to culpability, it may be acceptable to do so for issues that are defences, excuses, or exceptions to criminal responsibility. As noted above, the ALRC considers that the matter of adequate procedures is not an element essential to culpability in this context but rather seeks to negate attribution of the criminal offence to the corporation.

224 Professor J Nolan and N Frishling, *Submission 26*; Australian Shareholders' Association, *Submission 30*; Allens, *Submission 31*; Nyman Gibson Miralis, *Submission 34*; NSW Young Lawyers, *Submission 59*; Associate Professor P Crofts, *Submission 61*.

225 See, eg, Australian Competition and Consumer Commission (ACCC), *Submission 25*.

226 See, eg, Law Council of Australia, *Submission 27*; Monash Transnational Criminal Law Group, *Submission 35*.

6.191 Concerns were raised in submissions that a generally applicable defence of due diligence might lead to a 'check-box' compliance approach, rather than substantively positive culture change and otherwise divert corporate resources.[227] However, these concerns do not appear to take into account that corporate culture is not proved by reference only to compliance documents but also by reference to their practical implementation and effect. Such obligations have proved to be very effective in changing corporate behaviour and culture in the area of work health and safety.

6.192 The ALRC agrees that there will be particular offences where a defence of reasonable precautions (due diligence) is inapposite.

Negligence and mistake of fact (strict liability)

6.193 As is appropriate, there are very few crimes for which negligence is the requisite fault element.[228]

6.194 Recommendations 6 and 7 would not amend either s 12.4 of the *Criminal Code*, which allows for aggregation when proving the fault element of negligence,[229] or s 12.5, which contains the defence of mistake of fact for strict liability offences.

6.195 Some academics have expressed concern that s 12.4 (by implication) allows for the negligence of an individual employee, agent, or officer to be attributed to a corporation.[230] The ALRC does not share those concerns for two reasons: first, this is the current law under the TPA Model, under which any state of mind of an individual is attributable; secondly, a court would need to apply, through s 12.4, the general test for negligence in s 5.5 of the *Criminal Code,* which requires both

> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist;
>
> that the conduct merits criminal punishment for the offence.

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227 Justice T Payne, *Submission 19*; Allens, *Submission 31*; Monash Transnational Criminal Law Group, *Submission 35*.

228 Chapter 7 discusses an alternative species of offence — duty-based offences. These may seem similar to negligence offences, however they differ both theoretically and in terms of proof. Per *Criminal Code* (n 12) s 5.5, proof of negligence requires evidence of 'a great falling short of the standard of care that a reasonable person would exercise in the circumstances'. For duty-based offences, where often a prosecutor must simply establish that a duty was owed (this is often a statutorily imposed duty) and that the duty was breached.

229 Section 12.4 of the *Criminal Code* provides that a 'fault element may exist on the part of the 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).'

230 Clough and Mulhern (n 57) 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 49) 271–2.

6.196 Although the 'great falling short' may be of a single individual, the test contemplates that the conduct of that individual must be such as to merit the criminal punishment of the corporation for the offence, because it is the corporation which faces the criminal punishment (not the individual).

Liability for civil penalties

6.197 As discussed earlier, there is currently significant inconsistency between statutory methods of attribution which apply the TPA Model — these often apply to civil proceedings as well. Where there is no express statutory attribution method, the common law applies (that is, the modified identification theory).[231]

6.198 There also exists, in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), a framework for enforcing civil penalty provisions which includes, in s 97, an attribution method:

> If an element of a civil penalty provision is done by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the element must also be attributed to the body corporate.

6.199 The Discussion Paper considered attribution methods for civil contraventions,[232] and expressed the preliminary (and caveated) view that Proposal 8 should also be used to attribute liability to corporations for contraventions of civil penalty provisions. This was supported by ASIC.[233]

6.200 There is value in consistency, both within the civil sphere, and as between civil and criminal law. However, the ALRC makes no recommendation in this respect for three reasons:

- the Terms of Reference do not extend to considering attribution methods of civil liability;
- the attribution of fault and any defence[234] in the civil context requires greater consideration, namely, whether the method of attributing fault in Recommendation 7 is appropriate to apply generally to civil penalty contexts;[235] and

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231 See Chapter 4.

232 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [6.34]–[6.39].

233 Australian Securities and Investments Commission (ASIC), *Submission 54*.

234 See *Data Appendices* (n 31) Appendix A, Table 2. Many of the methods reviewed in Table 2 apply to attributing civil liability as well as criminal responsibility. Note also that for methods which use the TPA Model, the defence is generally attached to the conduct limb. This deviates from the emphasis in the criminal law (and reflected in Recommendation 7) that blameworthiness is attached to the fault element.

235 This will no doubt be greatly aided by the work of Professor Elise Bant (recipient of an Australian Research Council Future Fellowship Grant, commencing May 2020) which aims to examine and model reforms of

- the nuances and peculiarities of the *Criminal Code* language may not be desirable in the civil sphere, and thus any approach is unlikely to be drafted in precisely the same language.

the laws that inhibit corporate responsibility for serious civil misconduct, including the laws concerning corporate attribution.

7. Offences Specific to Corporations

Contents

Introduction

7.1 This chapter examines legislative options for directly addressing criminal conduct by corporations.

7.2 As noted earlier in this Report, generally offences apply to both humans and corporations, but with human actors being the principal focus of the legislative drafter. Chapter 4 and Chapter 6 explain how attribution methods have developed as a means of applying the criminal law to corporations, even when the offences are framed in such a way as to require human characteristics.

7.3 In order to address corporate misconduct directly, an increasing number of offences are framed so as to apply only to corporations. These offences recognise the capacity of a corporation to act uniquely as a corporate entity, comprised of, but greater than, a mere combination of individuals. As the data in Chapter 3 highlights, specific corporate offences are much more likely to be prosecuted against a corporation than ordinary criminal offences. This reflects legislative intent as much as enforcement strategy.

7.4 In this chapter, three distinct methods of framing criminal offences specifically directed to corporations are outlined. First, the ALRC makes a recommendation for the creation of a 'system of conduct' type of offence to criminalise systematic contraventions of civil regulatory provisions in such a way as could appropriately be considered to be criminal. Such an offence utilises a different approach to legislative

design as compared to traditional prohibitions,[1] one which has been successfully employed in certain existing regulatory contexts.[2] A major advantage of the 'system of conduct or pattern of behaviour' concepts is that they focus on the systematic nature of the misconduct and enable that characterisation to be established objectively.

7.5 The remainder of the chapter considers existing models of criminal offences drafted specifically for corporations including failure to prevent offences, and duty-based offences.

System of conduct offences

Recommendation 8 Where appropriate, the Australian Government should introduce offences that criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation.

7.6 Recommendation 8 provides a means of criminalising systematic misconduct that would otherwise have to be dealt with through civil enforcement. While it recommends a novel type of specific offence, it draws upon the emerging body of jurisprudence on the 'system of conduct or pattern of behaviour' concept used in existing civil regulatory provisions.[3] This new offence would complement the narrowing of criminal offences as recommended in Recommendation 2 and the principled justification for dual-track regulation set out in Chapter 5.

7.7 The offence contemplated by Recommendation 8 is targeted towards systematic corporate misconduct that occurs in such a way that it can be considered appropriate to be the subject of criminal, rather than solely civil, regulation. The recommendation's application is necessarily narrow. The key features are:

- the use of a 'system of conduct or pattern of behaviour' concept;
- the requirement that at least two civil contraventions have resulted; and
- the need to prove the particular fault elements.

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1 See Jeannie Marie Paterson and Elise Bant, 'Unfair, Unjust and Unconscionable Conduct in Consumer Contracting: Designing Effective Law Reform in Australia' (Paper, Melbourne Law School Obligations Group Annual Conference, Melbourne, 5–6 December 2019).

2 See *Competition and Consumer Act 2010* (Cth) sch 2 s 21(4) ('*Australian Consumer Law*'); *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(4)(b).

3 See *Australian Consumer Law* (n 2) s 21(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(4)(b). These provisions confirm the earlier judicial interpretation of the statutory prohibition on unconscionable conduct in *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, [2005] FCAFC 226.

7.8 As outlined in Chapter 5, Recommendation 2 would confirm civil regulation as the default mode of corporate regulation in Australia.[4] As a result, many of the current low-level criminal offences would become civil penalty provisions. Given the primacy of civil regulation that is recommended, there is a particular need to discourage and punish systematic corporate conduct that is contrary to civil regulatory provisions.

7.9 In addition, Recommendation 8 recognises that contraventions of certain civil regulatory provisions in a systematic manner could properly be considered to be criminal. This rationale is strengthened by the requirement that the corporation be reckless as to whether the system or pattern will result in civil contraventions. The development of a criminal offence to capture systems of conduct or patterns of behaviour by corporations that operate in breach of the law is consistent with the nature of corporate action. Legislators have recognised, in a consumer context at least, that there is a need to effectively design regulatory provisions that address contravening business systems and practices.[5] Corporations operate as an aggregation of individuals and so it is through the applications of their systems and their collective behaviours that criminal offending by corporations often occurs.

7.10 There is a particular need to capture conduct that should attract criminal sanction, in the form of:

- business practices done without regard to the requirements of civil regulatory provisions; and
- business practices in contravention of civil penalty provisions adopted in a calculated decision to absorb the penalty and profit from the conduct.

7.11 Added to this is the need to address the risk of civil penalties being seen as a cost of doing business. Generally, this concern has been addressed to date through the imposition of higher penalties.[6] Sometimes, however, monetary penalties will not be sufficient if the counter-veiling incentives are strong enough — only a criminal penalty will be an appropriate response. The enactment of the offence may also assist in obviating the need to frequently increase maximum civil penalties in order to respond to the most serious contraventions. Recommendation 8 seeks to criminalise systematic or persistent contravening behaviour, and as such can be an appropriate response where civil regulation has failed to achieve compliance.

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4 See [5.31]–[5.33].

5 See Paterson and Bant (n 1).

6 Concern about penalties being seen as a cost of doing business is a consideration in setting an appropriate civil penalty: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243, [2018] FCAFC 73 [259]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20, (2012) 287 ALR 249 [68]. It was also a justification for the increase in maximum penalties in relation to a number of civil penalty provisions as a consequence of the ASIC Enforcement Review: Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.32]–[1.33], [1.40]–[1.41], [1.108], [1.144], [1.154], [1.214].

A draft model offence

7.12 Included below is a Draft Model Offence that illustrates how the concepts contained within Recommendation 8 might be enacted. It is an illustrative draft only and should not be treated as the final form of a system of conduct offence. Any implementation of Recommendation 8 would be subject to the normal legislative drafting process. It may also be that the offence as enacted may need to be altered depending on the particular regulatory context.[7] The final form of any system of conduct offence would also need to take into account the attribution model that is ultimately adopted, as this will have implications for the evidence to be led in a prosecution for the Draft Model Offence.

DRAFT MODEL OFFENCE

System of conduct or pattern of behaviour involving a series of contraventions of a prescribed civil penalty provision

(1) A corporation commits an offence if:

(a) the corporation engages in conduct;

Fault element: intention OR recklessness

(b) the conduct constitutes a system of conduct or pattern of behaviour; and

Fault element: absolute liability

(c) the system of conduct or pattern of behaviour would result in two or more contraventions of the same prescribed civil penalty provision or a prescribed civil penalty provision with similar characteristics.

Fault element: recklessness

(2) For the purposes of (1)(a) and (b), the conduct and the system of conduct or pattern of behaviour may involve an omission or omissions.

(3) If a civil penalty proceeding has at any time been commenced in respect of conduct alleged to have resulted from a system of conduct or pattern or behaviour for the purposes of this offence then a corporation cannot be convicted of an offence under this section in respect of any such contravention.

7 The ALRC has also made this observation in relation to Recommendation 2: see [5.57]–[5.59].

7.13 The offence would require the prosecution to prove particular conduct by the corporation.[8] A fault element of intention or recklessness would attach to the conduct (subsection 1(a)). If, on an objective assessment, this conduct constituted a system of conduct or pattern of behaviour then subsection 1(b) would be satisfied. To allow for this objective assessment, the fault element for subsection 1(b) would be absolute liability. A focus on the objective characterisation of the conduct as a system or a pattern is appropriate in a corporate context as it is the application of corporate policies, procedures and norms of behaviour that gives rise to the criminal conduct, rather than individual moral turpitude which underlies traditional notions of fault. Finally, it would be necessary to prove (in order to establish subsection 1(c)) that the system of conduct or pattern of behaviour would result in two or more contraventions of the same prescribed civil penalty provision or a prescribed civil penalty provision with similar characteristics, and that the corporation was reckless as to whether the system of conduct or pattern of behaviour would have such a result.

7.14 The Draft Model Offence captures substantially greater wrongdoing than a number of civil penalty contraventions, and so it is appropriate for the conduct by the corporation to be criminalised. This is demonstrated by the requirement to prove a system of conduct or pattern of behaviour that would result in two or more contraventions of prescribed civil penalty provisions, and the requirement to prove fault elements for subsections 1(a) and (c). It is not an escalation of civil penalty contraventions to a criminal offence based on the volume or circumstances. Rather, it is about qualitatively different conduct. It is also substantially more difficult to prove than mere repetition of civil penalty contraventions.

7.15 The recklessness fault element for subsection (1)(c) does presume, to a certain extent, that a corporation should be aware of the regulatory requirements upon it. This is not a radical proposition in the corporate context. The present regulatory environment requires corporations to comply with myriad different regulatory provisions, ranging from corporations law to taxation requirements. To a certain extent, a requirement to comply with such laws could be seen as a concomitant feature of the many privileges given to corporations by the law.[9]

7.16 A more detailed analysis of the elements of the Draft Model Offence follows.

8 See [7.46]–[7.52] for examples of how the Draft Model Offence might apply to two example scenarios.

9 This may, perhaps, been seen as a reflection of the 'concession theory' of a corporation, which holds that as a corporation owes its existence to the State, the State has the power to regulate the corporation. See Stefan Padfield, 'Rehabilitating Concession Theory' (2014) 66 *Oklahoma Law Review* 327.

Subsection (1)(a) — Conduct

7.17 Subsection (1)(a) of the Draft Model Offence requires the prosecution to prove that the corporation has engaged in 'conduct'. This physical element refers to the actual acts or omissions that comprise the relevant system of conduct or pattern of behaviour. For example, in a 'fees for no service' case, this would be the actual charging of fees to customers in respect of which there was no legal entitlement to charge such fees.

7.18 In the Draft Model Offence, either 'intention' or 'recklessness' may be an appropriate fault element for this physical element. The ALRC considers that the selection of the applicable fault element is a policy choice for Government. If a narrower scope for the offence is considered more appropriate, 'intention' may well be more appropriate. However, it was suggested in consultation that an element of 'recklessness' may be more appropriate, given that in many cases of systematic business failures the conduct is unintentional or amounts to an omission.

7.19 Indeed, a number of consultations emphasised the relevance of omissions to this offence. For this reason, the Draft Model Offence expressly provides that the conduct captured by the offence may involve omissions as well as acts.[10] In a submission to this Inquiry, Associate Professor Crofts stated that the ALRC needed to 'adequately deal with the most likely types of harms caused by large organisations'.[11] Crofts argued that:

> The recent Royal Commission into Institutional Responses to Child Sexual Abuse and the ongoing Royal Commission into Aged Care highlight that many substantive harms are caused due to systemic failures by large organisations. As highlighted in both Royal Commissions, the criminal justice system has failed to engage with these forms of organisational failure. … [T]he issue highlighted in these Royal Commissions was a failure to prevent, rather than authorisation or permission.
>
> One response in the UK has been to develop a realist approach to corporate liability, that of failure to prevent (or report) offences.
>
> …
>
> If corporate criminal liability is to be rethought, then there needs to be engagement with the types of harms most likely to be caused by large organisations, and the reasons why these harms come about. Whilst there are occasions where large organisations may actively choose to breach the law, it is more likely that breaches

10 Subsection (2) of the Draft Model Offence. Section 4.3 of the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*') provides that an omission to perform an act can only be an act if the law creating the offence makes it so, or impliedly provides that the offence is committed by an omission to perform an act that there is a duty to perform. For an example of the operation of s 4.3, see *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408, [2011] HCA 43. See also Associate Professor P Crofts, *Submission 61* on the need for the law to respond to systematic failures by corporations.

11 Associate Professor P Crofts, *Submission 61*.

> of the law are due to systematic failings on the part of the organisation. These systematic failings are culpable.
>
> …
>
> The negative model of wickedness holds out the possibility of conceiving of corporate failure as culpable and will often be more appropriate to apply to corporations than the positive model of wickedness. It provides an example of a redefinition of responsibility practices that bypasses the criminal law focus upon individuals in attributions of blameworthiness and reinstates a link between (failure to) act and harmful consequences.[12]

7.20 Crofts is thus supportive of a wider role for the failure to prevent model of offences, which is discussed later in this chapter.[13] What Crofts' submission emphasises is the clear role of systemic failures as a dimension of corporate misconduct. The system of conduct type of offence contemplated by Recommendation 8 embraces these concerns. Given such misconduct often involves omission, it is appropriate that the Draft Model Offence covers both acts and omissions.

Subsection (1)(b) — System of conduct or pattern of behaviour

7.21 The 'system of conduct or pattern of behaviour' concepts in subsection 1(b) of the Draft Model Offence are fundamental to Recommendation 8. A benefit of structuring Recommendation 8 around this concept is that it embraces the developing body of jurisprudence about systems of conduct or patterns of behaviour in a regulatory context. It is the characterisation of the conduct as constituting a system of conduct or pattern of behaviour that makes the misconduct different from that based on the mere volume or repetition of civil penalty provision contraventions. The concepts are wide enough to capture systematic misconduct, but not so wide as to stretch the bounds of the criminal law inappropriately. Adopting concepts that have been the subject of judicial interpretation provides clarity as to how the offence might be proved.[14]

7.22 In *Unique International College Pty Ltd v Australian Competition and Consumer Commission*, the Full Court of the Federal Court of Australia described the operation of the concept, and how a 'system' case might be proved, as follows:

> A 'system' connotes an internal method of working, a 'pattern' connotes the external observation of events. These words should not be glossed. How a system or a pattern is to be proved in any given case will depend on the circumstances.

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12 Ibid.

13 See [7.63]–[7.177]. It should be noted, however, that the ALRC does not support the replacement of principles of attribution or the traditional approach to corporate criminal responsibility with any of these specific offences. Such offences should instead be made available where appropriate in the particular regulatory context and in respect of the particular conduct to be criminalised.

14 Albeit with the caveat that the existing use of the concepts of a 'system of conduct or pattern of behaviour' relate solely to the statutory prohibitions on unconscionable conduct.

> It can, however, be said that if one wishes to move from the particular event to some general proposition of a system it may be necessary for some conclusions to be drawn about the representative nature or character of the particular event. … A system of conduct requires, to a degree, an abstraction of a generalisation as to method or structure of working or of approaching something.[15]

7.23 The recent decision of *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)*[16] provides further guidance as to the different ways of proving a 'pattern of behaviour' or a system of conduct'. As to a 'pattern of behaviour', Beach J stated the following:

> The reference to behaviour is looking at the external manifestation of behaviour and whether it can be characterised as a pattern. … [T]he meaning of pattern is most usefully expressed as 'a regular and intelligible form or sequence discernible in certain actions or situations' (Oxford English Dictionary, meaning 11(b)). So there has to be both repetition and external discernibility.
>
> How is a pattern of behaviour to be proved? Clearly, two or more instances of identical or similar behaviour may be sufficient to infer and discern a pattern. … How many instances will support the induction of a pattern depends upon the context. Numerous like instances with no counter-examples would clearly be sufficient to display a pattern. By numerous, I am referring not just to the absolute number of instances but also that number relative to the total pool of external interactions with investors/members of the public. … A pattern may still exist, notwithstanding the exceptions. But the greater the number of exceptions, the even greater the number of conforming instances that may be required if a conclusion of a pattern is to be supportable. …First, there is evidence that the instances are not anomalies but are natural and likely consequences of the respondent's conduct or system(s), that is, representative; of course the purity of random sampling may fortify this. Second, there is no evidence that the respondent's conduct or system(s) was designed not to produce but to avoid such instances. …
>
> Further, it would be an error to treat the concept of 'pattern' as applying to a respondent's conduct as being binary, that is, as being either a pattern or no pattern. Some parts of its conduct may manifest a pattern, other parts not. A 'pattern of behaviour' may be sufficiently found in relation to a part. This may be so where the respondent's conduct is divisible between different regions, between different parts of the respondent's operations, between different personnel where there is decentralised management or between different categories of investors or consumers. But the divisions must be naturally and forensically discernible from how the respondent was structured and operated at the relevant time rather than super-imposed artificially and retrospectively from a regulator's or litigator's perspective.[17]

15 *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 362 ALR 66, [2018] FCAFC 155 [104].
16 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208.
17 Ibid [386]–[388].

7.24 With respect to a 'system of conduct', Beach J said that

> 'system' connotes something designed or intended in its structure; contrastingly, a pattern may be manifested without any design or intentional input. Further, 'system' is usually saying something about the internal structure, for example, internal working, of whatever it is that has produced or reflects the conduct. It cannot just mean numerous instances or a pattern of external behaviour. …
>
> But a system of conduct' could produce a 'pattern of behaviour'. Relatedly, evidence of a 'pattern of behaviour' could enable you to infer a 'system of conduct' in some cases.
>
> Now 'system' also connotes an organised and connected group or set of things that can be thought of as a complex whole. The gist is organisation and connection. … Does 'system of conduct' mean that each element of individual conduct is *directly* connected in a structured and intended way one to the other? Or does 'system of conduct' focus on the system as being the underlying internal structure or method of procedure, organisation or administration of the respondent, which internal structure or method then produces the conduct such that the conduct is *indirectly* connected one to the other through the underlying system?
>
> I am inclined to the view that 'system of conduct' encompasses both concepts. But if the latter concept, one does not necessarily need to invoke concepts such as justifiable sampling or representativeness of individual instances as I have discussed concerning patterns. But if the former concept, then the discussion concerning patterns that may be identified from sampling or representativeness of individual instances may have some application to 'system of conduct' in the sense that one may require sufficient instances of individual conduct before one can conclude that they are directly connected in a structured and intended way one to the other.[18]

7.25 It is clear that, in order to establish a 'system of conduct' or 'pattern of conduct', the way that a case is framed and the evidence that is led is critical. The ALRC notes that '[e]vidential flaws have underpinned a number of cases where the regulator has failed to establish … a "system of conduct or pattern of behaviour"', the impacts of which have been amplified by the statutory unconscionability context in which the concepts are currently deployed.[19] The contrast between these two different approaches can be seen in comparing the case run in *Unique* with that brought in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*.[20] A 'key conceptual difference' between *Unique* and that case was

18 Ibid [389]–[392].
19 Paterson and Bant (n 1).
20 *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982.

> that the vectors of reasoning went in different directions. In the aspect of Unique that was overturned on appeal, specific instances of what had happened to six individual consumers were said to substantially establish the overall system case. While there was some general evidence, such as the targeting of disadvantaged students, the Full Court held that evidence could not of itself prove the case. The applicants' case here, by way of a fundamental contrast, was substantially based upon evidence directly going to AIPE's internal workings, as proven by AIPE's former employees, as well as business records such as enrolment records and data, enrolment forms and other documents, together with complaints and how they were handled. This evidence combined to give a reasonably pervasive sense of what was taking place, and its likely impact could thereby be ascertained on the balance of probabilities. Evidence from individual consumers was then used to demonstrate, by example, how this pattern or system played out at the enrolment coalface. The evidence of the individual consumer witnesses was thus helpful and made for a stronger case for the applicants, but was not indispensable and not used as evidence that of itself was representative of the system or pattern.[21]

7.26 For the purposes of Recommendation 8, the evidence needs to be capable of leading to a conclusion that there is a 'system' or 'pattern' in the sense described in the case law. It is not enough to prove individual civil contraventions, unless they could be said to be representative. It also appears that the strongest case will be where there is evidence of the internal workings of the corporation which demonstrate a system which would result in two or more contraventions of a prescribed civil penalty provision.

Subsection 1(c) — Would result in two or more contraventions of the same prescribed civil penalty provision or a prescribed civil penalty provision with similar characteristics

Would result in two or more contraventions

7.27 The requirement in (1)(c) of the Draft Model Offence, that the system or pattern 'would result in two or more contraventions' of the relevant civil penalty prohibitions, adapts similar such language and concepts from existing criminal offences.[22] Many of these offences are different in ambit from the matters to which the Draft Model Offence would generally apply. However, their existence illustrates

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21 Ibid [163].

22 Provisions dealing with multiple instances of conduct as elements of the offence take various forms. See, eg, *Financial Transactions Reporting Act 1988* (Cth) s 31 (structuring offences); *Criminal Code* (n 10) ss 272.11 (persistent sexual abuse of a child outside of Australia), 273.7 (aggravated offence relating to possessing, controlling, producing, distributing or obtaining child abuse material outside Australia involving conduct on three or more occasions and two or more people), 471.22 (aggravated offence relating to using a postal or similar service for child abuse material), 474.17A(4) (aggravated offence involving private sexual material — using a carriage service to menance, harass or cause offence where three or more civil penalty orders previously made). See also *Drugs Misuse and Trafficking Act 1985* (NSW) s 25A (offence of supplying prohibited drugs on an ongoing basis); *Criminal Code* (Qld) s 229B (maintaining a sexual relationship with a child).

the fact that it is not unprecedented to frame elements of an offence that require the commission of other offences, usually with a requirement for two or more occurrences of the relevant conduct.

7.28 Furthermore, it is also not unprecedented for a criminal offence to rely upon proof of civil penalty contraventions as one of the elements of the offence. It is not only proof of multiple criminal offences that may lead to escalation. Proof of multiple civil penalty contraventions also generally results in an aggravated offence, but requires proof also of an ordinary offence. Section 474.17A(4) of the *Criminal Code* (which is directed to non-consensual sharing of intimate images), provides a 'special aggravated offence' where:

> (4) A person commits an offence against this subsection if:
>
> (a) the person commits an offence (the underlying offence) against subsection 474.17(1); and
>
> (b) the commission of the underlying offence involves the transmission, making available, publication, distribution, advertisement or promotion of material; and
>
> (c) the material is private sexual material; and
>
> (d) *before the commission of the underlying offence, 3 or more civil penalty orders were made against the person* under the *Regulatory Powers (Standard Provisions) Act* 2014 in relation to contraventions of subsection 44B(1) of the *Enhancing Online Safety Act 2015*.[23]

7.29 The Draft Model Offence would not establish an aggravated offence. Instead, it would create a criminal offence. It would, however, be distinguished from its constituent civil penalty provisions by both the requirements to prove a system of conduct or pattern of behaviour and to prove the relevant fault elements. The general concept as a matter of legislative design is, however, comparable to the models outlined in the previous paragraph.

7.30 In contrast to offences such as that in s 474.17A(4), the Draft Model Offence would not require civil penalty proceedings to have previously been brought and the contraventions to have been established. The phrase 'would result' is intended to require the prosecutor, in proceedings relating to the alleged contravention of the Draft Model Offence, to prove that the system of conduct or pattern of behaviour would constitute contraventions of prescribed civil penalty provisions.[24]

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23 *Criminal Code* (n 10) s 474.17A(4) (emphasis added).

24 See [7.38]–[7.41] below for a discussion of how the Draft Model Offence deals with risks of civil or criminal 'double jeopardy'.

7.31 At the same time, the number of proved instances of conduct that 'would' result in contraventions of civil penalty proceedings would be an important culpability factor when considering the particular penalty to be imposed.

Prescribed civil penalty provisions

7.32 The Draft Model Offence should not apply to all civil penalty provisions or in all regulatory contexts. Two mechanisms for limiting the availability of the Draft Model Offence appropriately are suggested.

7.33 First, Recommendation 8 should be implemented only in appropriate regulatory contexts. This could be done either through enacting a central provision in the *Criminal Code* or the *Corporations Act* and then prescribing the statutory regimes to which it would apply, or through enacting a separate offence in specific statutes where the offence is considered to have utility and to be appropriate.

7.34 Secondly, within a particular regulatory context, consideration should be given to which civil penalty provisions should be prescribed for the purposes of the Draft Model Offence. This enables the scope of the offence to be tailored appropriately. It may also be appropriate to prescribe applicable civil penalty provisions by regulation.

Same … or similar characteristics

7.35 It is appropriate for the Draft Model Offence to be capable of applying to contraventions of the 'same prescribed civil penalty provision or a prescribed civil penalty provision with similar characteristics'. This accommodates the complexity and specificity of many civil penalty provisions and the potential scale of non-compliance, while also mandating a link between the different contraventions that are relevant to the offence. For example, it is conceivable that a particular system of conduct could result in contraventions of differing false or misleading representation provisions across the same statute or across different statutes.

7.36 There are also different ways of establishing which prescribed civil penalty provisions are 'similar':

- it could left up to the common law as an element of the offence to be proved;
- similarity could be prescribed in particular offences in which the Draft Model Offence is enacted; or
- alternatively, if the Draft Model Offence were enacted as a central offence in a central statute, different prescribed civil penalty provisions from across Commonwealth statute law could be grouped together as 'similar' based on the type of misconduct involved.[25]

25 This could have the advantage of capturing a system of conduct that involves contraventions of civil penalty

Subsection (1)(c) — Fault Element of Recklessness

7.37 The proposed fault element for subsection (1)(c) is recklessness. It is appropriate for the offence to apply only when a corporation is reckless as to whether the system of conduct or pattern of behaviour established under (1)(b) resulted in contraventions of two or more prescribed civil penalty provisions. The criminal sanction is justified when a corporation engages in a system of conduct or pattern of behaviour, reckless as to whether that system or pattern would result in two or more prescribed civil penalty provision contraventions.

Subsection (3) — Double jeopardy and the availability of the Draft Model Offence

7.38 Subsection (3) provides that

> if a civil penalty proceeding has at any time been commenced in respect of conduct alleged to have resulted from a system of conduct or pattern or behaviour for the purposes of this offence then a corporation cannot be convicted of an offence under this section in respect of any such contravention.

7.39 This avoids the risk of a situation that might be described as civil or criminal 'double jeopardy' in relation to any civil contraventions used for the purposes of prosecution for the Draft Model Offence.[26]

7.40 As stated, Recommendation 8 contemplates an offence for conduct of a corporation amounting to a system of conduct or pattern of behaviour. It is not intended to remove regulators' ability to proceed in respect of individual civil penalty contraventions by way of a civil penalty proceeding, which was a concern raised by one regulator.[27] Rather, the Draft Model Offence would be available as an additional option for regulators where systematic misconduct can be established.

provisions that are similar, although enacted in different legislation.

26 The drafting of subsection (3) has been based on similar, but not identical provisions, in existing offences: see, eg, *Criminal Code* (n 10) ss 272.11(9), 273.7(5), 471.22(5), 474.17A(8), 474.24A(5). As to the concept of civil 'double jeopardy', see, eg, *Fair Work Act 2009* (Cth) s 556; *National Consumer Credit Protection Act 2009* (Cth) s 175.

27 Australian Competition and Consumer Commission (ACCC), *Submission 25*.

7.41 However, the effect of subsection (3) is that if one civil penalty contravention occurs and it is dealt with, then a prosecution for the Draft Model Offence cannot be brought if the contravention recurs, unless there a number of subsequent contraventions that are systematic in character. Thus, the Draft Model Offence is not an easy fit with real-time enforcement, but may be of assistance when a regulator uncovers systematic misconduct. A regulator may also choose not to bring a civil penalty proceeding in respect of a contravention, in order to seek to determine if it should instead prosecute for systematic misconduct. This is no different to the choice that a regulator would presently make under the existing system of conduct provisions about whether to run a system case or a case based on individual episodes of misconduct. Recommendation 8 gives regulators an additional enforcement option where appropriate. It may also be a useful tool for regulators in ensuring regulatory flexibility, by having the option to proceed criminally in appropriate circumstances.

Matters for further consideration

7.42 There are matters that would require further consideration by government if Recommendation 8 were to be implemented. First, Parliament would need to consider whether the Draft Model Offence would be an offence that can be prosecuted summarily[28] and whether it should be within the criminal jurisdiction of the Federal Court of Australia, given that is where the current system of conduct civil penalty cases relating to statutory unconscionability are brought.

7.43 Secondly, if the offence is to be prosecuted on indictment, a jury would be required to reach a unanimous verdict, including as to which two or more civil contraventions were established.[29] Relatedly, consideration would need to be given as to whether some sort of extended unanimity direction would have to be given by the trial judge to the jury as, in respect of the two or more civil contraventions that 'would result' from the system of conduct or pattern of conduct alleged, there may be multiple pathways to determine guilt based on proof of different contraventions said to result from the system of conduct or pattern of behaviour.[30]

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28 This is significant as it would determine whether s 80 of the *Australian Constitution* — which provides that the 'trial on indictment of any offence against any law of the Commonwealth shall be by jury' — is engaged.

29 *Cheatle v The Queen* (1993) 177 CLR 541.

30 See, eg, *R v Walsh* (2002) 131 A Crim R 299, [2002] VSCA 98; *Lane v The Queen* (2018) 357 ALR 1, [2018] HCA 28.

7.44 Thirdly, consideration would need to be given as to whether it would be appropriate for individuals to be potentially held liable as an accessory once a corporation has been found to have committed the Draft Model Offence. This may be an effective means for further deterring systematic corporate misconduct. However, it would require further consideration.

7.45 Finally, although Recommendation 8 is aimed at providing a mechanism for dealing with systematic contraventions of civil penalty provisions with a reckless disregard for those regulatory requirements, the overarching concept behind the Draft Model Offence does not need to be restricted to civil penalty provisions. A criminal offence could also be framed that captures a system of conduct or pattern of behaviour that would result in two or more particular criminal offences. This would obviate concerns about escalation from civil to criminal liability and may also be appropriate as a means of criminalising systematic corporate criminal misconduct that is more serious than multiple individual offences.

Potential operation of a system of conduct offence

7.46 As highlighted earlier in this chapter, offences specific to corporations are designed to address some of the limitations in applying traditional criminal offences to corporations due to the nature of corporate activity. The system of conduct type of offence in Recommendation 8 focuses on systematic misconduct. Although the system or pattern is to be proved objectively, principles of attribution will remain relevant in establishing the other constituent elements of the offence. This means that the attribution method ultimately adopted will need to be considered in the final form of any enactment of the Draft Model Offence, as the attribution method would influence how the offence is to be proved.

7.47 The Draft Model Offence is contemplated as an additional regulatory tool that might be used when it appears important to denounce and condemn the systematic misconduct, or when there is utility in pursuing a criminal sanction because deterrence achieved through a traditional civil penalty proceeding would be inadequate.

7.48 As to how a prosecution under the Draft Model Offence might operate, the ALRC has developed two example scenarios. These contemplate attribution using the TPA Model,[31] for ease of illustration.

31 See [6.130]–[6.150].

Example 1 — Two or more contraventions of the same prescribed civil penalty provision: System of conduct or pattern of behaviour involving contravention of fee arrangement obligations in relation to financial services

7.49 This scenario is based, albeit with modifications, upon the AMP Fees for No Service Case Study from the Financial Services Royal Commission.[32]

Example

A corporation was engaged in the provision of financial advice to retail clients through its Financial Planning business unit, under an Australian financial services licence. The corporation and its representatives provided ongoing financial planning services to each client under an ongoing service agreement, where, for a period of more than 12 months, the corporation charged fees at agreed intervals in exchange for tracking the progress of the client's financial planning strategy. The advice provided was personal advice within the meaning of s 766B(3) of the *Corporations Act*, and the services provided constituted financial services within the meaning of s 766A of the *Corporations Act.* The fees charged were ongoing fees arrangements within the meaning of s 962A of the *Corporations Act*.

Two routine practices developed whereby employees did not switch off the charging of fees in their database when a client's ongoing fee arrangement was terminated. Instead, the employees either transferred the client into a special fee pool, where the client would continue to be charged for 90 days after the termination of the ongoing fee arrangement, or did not change the fee settings of the client at all. The corporation charged fees to clients whose ongoing fee arrangements had been terminated on 5,000 occasions between 2015 and 2019.

32 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 2* (2018) 123–51. The ALRC makes no allegations of wrongdoing against AMP beyond the findings of the Royal Commission and to the extent that this example varies the facts presented in the Royal Commission Report it is done for the purposes of demonstrating the utility of Recommendation 8 in a hypothetical situation.

The routine practices were approved by the Managing Director of Financial Planning (an employee of the corporation), despite emails in 2015 (soon after the charging commenced) from two junior managers of the Financial Planning business, and the corporation's General Counsel, who indicated that they suspected that the conduct was in breach of the corporation's best interests obligations under Part 7.7A of the *Corporations Act*. The relevant employees were directed by the Managing Director of Financial Planning to continue to charge the fees. While the Managing Director did not know the specific provisions of Part 7.7A, he was aware that charging the ongoing fees to clients under terminated fee arrangements was one way in which the Financial Planning business retained its viability, and encouraged senior management of the Financial Planning business to devise ways to retain client fees. He was also aware, following the concerns expressed by the General Counsel, that there was a risk that this amounted to charging fees for no service, which could result in the contravention of multiple civil penalty provisions contained in the *Corporations Act* and which had featured prominently in proceedings at the recent Financial Services Royal Commission.

Following an investigation, the Australian Securities and Investment Commission concluded that it had a case against the corporation, amongst other contraventions, for its contravention of s 962P of the *Corporations Act*, which is a civil penalty provision. Given the systematic nature of the contraventions of s 962P, if Recommendation 8 were implemented, ASIC may decide to refer the matter for prosecution under the new 'system of conduct or pattern of behaviour' offence. For the purposes of this offence, s 962P could be a prescribed civil penalty provision.

7.50 Figure 7-1 below provides a simplified example of how the Draft Model Offence could be applied to this hypothetical scenario, while Table 7-1 provides a more detailed example of how it could be applied and what evidence would need to be led to establish the relevant elements.

Figure 7-1: Application of Draft Model Offence to Example 1

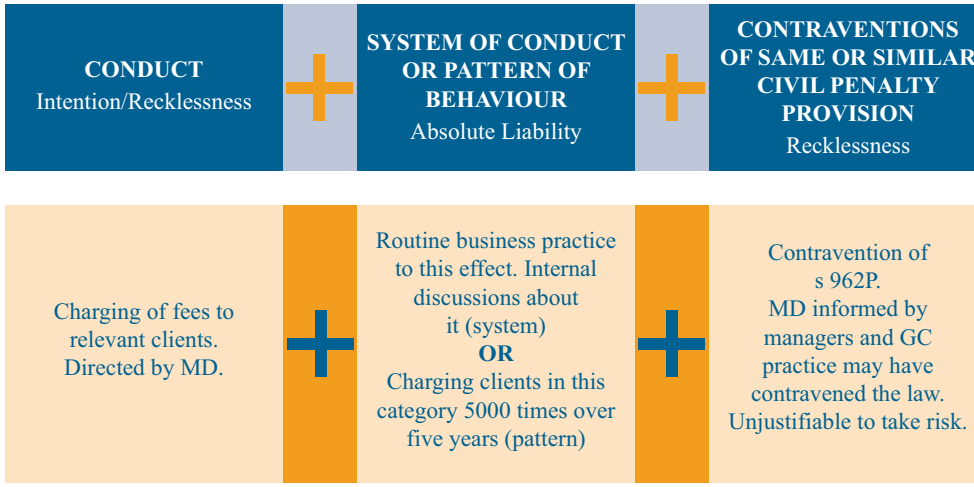

Table 7-1: Detailed Application of Draft Model Offence to Example 1

ELEMENT	Allegation	Indicative Evidence (using the TPA Model)[33]
(a) the corporation engages in conduct *Physical element*	The corporation charged ongoing fees to a number of clients over a four year period after their ongoing fee arrangement had terminated.	The Managing Director of Financial Planning directed the relevant employees to continue to charge ongoing fees to the relevant clients.
Intention *Fault element*	The corporation meant to charge the fees.	The Managing Director of Financial Planning directed the relevant employees to charge ongoing fees to the relevant clients.

33 The TPA Model has been used here solely for ease of illustration.

ELEMENT	Allegation	Indicative Evidence (using the TPA Model)[33]
(b) the conduct constitutes a system of conduct or pattern of behaviour *Physical element*	The corporation's charging of the ongoing fees on 5,000 separate occasions over a period of four years to these clients constituted a system of conduct or pattern of behaviour.	Evidence could be led that there were two routine business practices of the corporation (as approved and directed by the Managing Director of Financial Planning) when ongoing fee arrangements were terminated whereby clients were moved to a special pool or did not have their fee settings changed at all, with the result of these sanctioned business practices being that fees continued to be charged to the relevant clients. The internal discussions amongst managers, the Managing Director and the General Counsel about the legality of this practice show that it was a planned 'system of conduct' for this particular category of clients. Alternatively, it would be possible to establish a 'pattern of behaviour' in the form of clients in the relevant category being charged these ongoing fees on 5,000 separate occasions over a period of five years.
Strict liability *(No fault element)*		
(c) the system of conduct or pattern would result in two or more contraventions of the same prescribed civil penalty provision or a prescribed civil penalty provision with similar characteristics *Physical element*	On 5,000 separate occasions, the corporation contravened s 962P by charging ongoing fees after an arrangement had been terminated.	

ELEMENT	Allegation	Indicative Evidence (using the TPA Model)[33]
Proof of CPP contravention ***Corporations Act* s 962P** Fee recipient	The corporation is a fee recipient by s 962C(1) of the *Corporations Act* because it entered into an ongoing fee arrangement.	The corporation entered into an ongoing fee arrangement as part of its ongoing service agreement with the client for financial advice.
Must not continue to charge an ongoing fee in relation to ongoing fee arrangement	The ongoing fees were charged through the client database.	Employees did not switch off the fees in the client database or moved the client into the special fee pool.
If the fee arrangement is terminated for any reason	The fees were charged under an ongoing fee arrangement by s 962A(1) of the *Corporations Act*. The fee was an 'ongoing fee' as it was payable under the ongoing fee arrangement by s 962B of the *Corporations Act*.	The fees were charged to a retail client under an ongoing fee arrangement with the corporation for more than 12 months.
	The fee arrangement had terminated.	Evidence to show the fee arrangements in respect of each client who was charged had been terminated.
Recklessness *Fault element*	The corporation was aware of a substantial risk of a contravention of prescribed civil penalty provisions and it was unjustifiable to take that risk.	The Managing Director of Financial Planning had been made aware by junior managers and the General Counsel that they suspected the system of conduct or pattern of behaviour contravened the *Corporations Act*. Furthermore, the Managing Director was given advice by the General Counsel that the practice may have amounted to charging fees for no service, which he knew contravened the civil penalty provisions of the *Corporations Act.*

Example 2 — Two or more contraventions of prescribed civil penalty provisions with similar characteristics: System of conduct or pattern of behaviour involving contravening advertisements for peptides

7.51 This scenario draws upon, but modifies and simplifies, the facts surrounding *Secretary, Department of Health v Peptide Clinics Australia Pty Ltd*,[34] in particular, the contravening conduct in relation to ss 42DLB and 42DMA(1) of the *Therapeutic Goods Act 1989* (Cth) ('*TGA*') the subject of declarations 1 and 7 in that judgment.

Example

A corporation was engaged in the direct supply to consumers of peptides through an online store. The entire business model of the corporation revolved around the selling of peptides directly to consumers. Peptides are 'therapeutic goods' within the meaning of s 3(1) of the *TGA*, and are substances included in Schedule 4 of the current Poisons Standards. The corporation advertised the sale of peptides through its website, as well as its Instagram and Facebook pages for approximately nine months. The advertisements also represented that the peptides could be used for inappropriate purposes such as, inter alia, mood regulation, body building, injury repair, heart health, weight loss, libido enhancement, premature ejaculation and hair loss, which was contrary to the 2015 and 2018 Therapeutic Goods Advertising Codes.

The business model of the corporation was developed by its Chief Executive Officer, who directed its focus toward providing peptides directly to consumers through the internet. This meant that direct advertising to consumers was an important part of its marketing strategy. He settled the design of the advertisement and authorised their placement on the different internet channels.

The CEO had a history of involvement in the alternative medicine and health and fitness industry, and was aware that there were a number of restrictions upon the sales and marketing of therapeutic goods. He did not, however, know that these advertisements contravened the *TGA*. Having developed the corporation's business model, he was unwilling, however, to investigate the particular regulatory restrictions to which its operations were subject.

34 *Secretary, Department of Health v Peptide Clinics Australia Pty Ltd* [2019] FCA 1107. The ALRC makes no allegations of wrongdoing against Peptide Clinics Australia Pty Ltd or any person associated with Peptide Clinics Australia Pty Ltd beyond the findings of the Federal Court of Australia. To the extent that this example varies the facts found by the Federal Court it is done for the purposes of demonstrating the utility of Recommendation 8 in a hypothetical situation.

Following an investigation, the Therapeutic Goods Administration concluded that it had a case against the corporation for contravention of ss 42DLB(1) and 42DMA(1) of the *TGA*, which are civil penalty provisions. Given that the business model of the corporation was designed around this contravening conduct, and that the conduct appeared to have been engaged in without regard to the relevant regulatory provisions, if Recommendation 8 were implemented the regulator might determine that the most appropriate means of capturing the entirety of the unlawful conduct would be to use the 'system of conduct or pattern of behaviour' offence. For the purposes of this offence, both s 42DLB(1) and s 42DMA(1) could be designated in the *TGA* as prescribed civil penalty provisions with similar characteristics, because both relate to the advertising of therapeutic goods.

7.52 Figure 7-2 below provides a simplified example of how the Draft Model Offence could be applied to this example scenario, while Table 7-2 provides a more detailed example of how it could be applied and what evidence would need to be led to establish the relevant elements.

Figure 7-2: Application of Draft Model Offence to Example 2

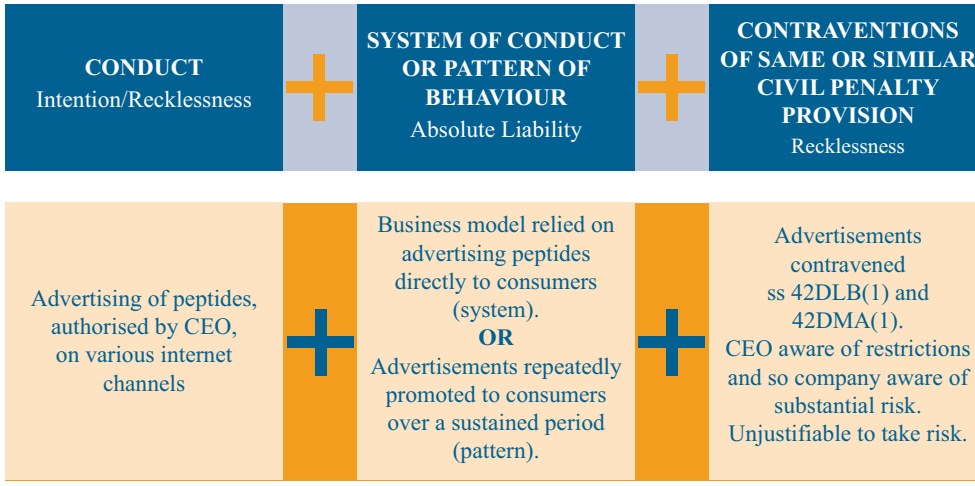

Table 7-2: Detailed Application of Draft Model Office to Example 2

ELEMENT	Allegation	Indicative Evidence (using the TPA Model)[35]
(a) the corporation engages in conduct *Physical element*	The corporation advertised peptides on its webpage, Instagram page and Facebook page (through a series of advertisements) for a period of approximately nine months.	Following the settling of the advertisements by the CEO (an employee of the corporation), the CEO directs his website manager (by email) to place the advertisements on the particular internet channels.
Intention *Fault element*	The corporation meant to advertise the peptides.	The CEO, the employee of the corporation who directed the relevant conduct, intended for the corporation to advertise the peptides.
(b) the conduct constitutes a system of conduct or pattern of behaviour *Physical element*	The corporation's advertising of peptides on these channels constituted a system of conduct or pattern of behaviour.	The CEO chose to conduct a business where the entire model of the business relied on advertising peptides directly to consumers. The CEO was, or ought to have been, aware that there were restrictions upon such a business model. Evidence of this would show a 'system of conduct'. It would also be possible to bring a 'pattern of behaviour' case based on the advertisements themselves and the website and other marketing materials of the corporation as above.
Strict liability *No fault element*	N/A	N/A

35 The TPA Model has been used here solely for ease of illustration.

ELEMENT	Allegation	Indicative Evidence (using the TPA Model)[35]
(c) the system of conduct or pattern would result in two or more contraventions of the same prescribed civil penalty provision or a prescribed civil penalty provision with similar characteristics *Physical element*	For a period of nine months, the corporation advertised peptide products on its webpage, Instagram and Facebook pages and made particular representations about the circumstances in which they could be used that contravened the Therapeutic Goods Code.	
Proof of CPP contravention ***TGA* s 42DLB(1)** Advertises by any means	The peptides were advertised on the corporation's webpage, Instagram page and Facebook page.	The advertisements placed on the internet channels as directed by the CEO.
Therapeutic goods	Peptides are a therapeutic good within s 3(1) of the *TGA*.	The advertisements related to peptides.
Substances or goods contained in substances in Schedule 4 of the Poisons Standard.	Peptides are listed in Schedule 4 of the Poisons Standard.	The advertisements related to peptides.

ELEMENT	Allegation	Indicative Evidence (using the TPA Model)[35]
***TGA* s 42DMA(1)**		
Advertises by any means	The peptides were advertised on the corporation's webpage, Instagram page and Facebook page.	The advertisements placed on the internet channels as directed by the CEO.
Therapeutic goods	Peptides are a therapeutic good within s 3(1) of the *TGA*.	The advertisements related to peptides.
The advertising does not comply with the Therapeutic Goods Code	The representations about uses of the peptides contravened the Code.	The advertisements made inappropriate representations about the use of peptides.
Recklessness *Fault element*	The corporation was aware of a substantial risk of a contravention of prescribed civil penalty provisions and it was unjustifiable to take that risk.	The CEO was aware of restrictions upon the sales and marketing of therapeutic goods owing to his experience in the industry. He could be said to have been aware of a substantial risk of contravention. Given that, and knowing that the corporation was advertising therapeutic goods, it was unjustifiable for him to take the risk that the system of conduct or pattern of behaviour may contravene ss 42DLB(1) and 42DMA(1).

A need for escalation mechanisms?

7.53 The Discussion Paper proposed two 'escalation mechanisms' as part of its proposals for recalibrating corporate regulation. These would have involved the creation of criminal offences for when a corporation has:

(a) been found previously to have contravened a civil penalty proceeding provision or 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.[36]

7.54 These were developed from a recognition that there was 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.[37]

7.55 The ALRC also considered that there was a need to deal with systematic conduct, and this was the key part of the rationale behind the 'flouting or flagrant disregard' part of Proposal 5.

7.56 Proposal 5 was not supported by the great majority of submissions,[38] although it received some support.[39] It received mixed responses in others.[40] BHP noted that it supported 'the overall intention of Proposal 5 (in its original form)' and suggested improvements.[41] Escalation mechanisms are not unknown to the criminal law, although they take several different forms. These may take the form, for example, of:

- a higher maximum penalty where a person has previously been convicted of a relevant offence;[42]
- a power for a court, when a person has failed to comply with a requirement and so committed an offence, to order compliance with the requirement in addition to imposing a penalty, with a further offence committed if the order is not complied with;[43] or
- an aggravated offence with a higher penalty where a person engages in prohibited conduct after having previously been subject to a direction or undertaking in relation to such conduct.[44]

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36 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) Proposal 5.

37 Ibid [4.47].

38 T Game SC and Justice D Hammerschlag, *Submission 17*; Professor J Gans, *Submission 18*; Australian Competition and Consumer Commission (ACCC), *Submission 25*; Law Council of Australia, *Submission 27*; Australian Small Business and Family Enterprise Ombudsman, *Submission 28*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Australian Banking Association, *Submission 57*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

39 Condon Associates, *Submission 41*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*.

40 Logie-Smith Lanyon, *Submission 44*; BHP, *Submission 58*.

41 BHP, *Submission 58*.

42 *Taxation Administration Act 1953* (Cth) ss 8R, 8V.

43 Ibid s 8G, 8H.

44 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 74.

7.57 Although these mechanisms generally do not escalate a purely civil contravention to a criminal offence, there are provisions that provide for an aggravated offence where an offence is committed, and the offender has previously had several civil penalty orders made against him or her for particular civil penalty contraventions.[45]

7.58 Despite this, several submissions were concerned that Proposal 5 was unsound as it challenged 'the very distinction between civil and criminal liability',[46] or was contrary to the principled distinction between criminal and civil regulation that the ALRC was seeking to achieve.[47] Others suggested that objectives were already taken into account at the point a penalty was imposed,[48] and that this was the appropriate point at which to consider whether contraventions were repeated or flagrant.[49] The ALRC understands the concerns expressed about the potential widening of the scope of criminal liability under the proposals but also notes that the law currently does not draw a consistent or principled distinction between civil penalty provisions and criminal offences. In many cases there exists significant regulator discretion as to whether civil or criminal proceedings are brought in respect of particular misconduct.

7.59 Further submissions queried the operability of the Proposal 5.[50] Concerns were raised about the number of contraventions that would be required to enliven it; the temporal link between contraventions; and what would be the situation if a corporation repeatedly contravened a particular general conduct obligation, such as that in s 912(1)(a) of the *Corporations Act* in relation to the repeated conduct limb.[51] As to the flagrant conduct limb, concern was expressed as to how it would operate in practice and whether flagrancy would be treated as a novel fault element.[52]

7.60 Despite these submissions there remains a case for a targeted criminal offence dealing with systems of conduct or patterns of behaviour that show reckless disregard for the requirements of the civil regulatory system. Recommendation 8 represents, in line with the views of stakeholders, a more targeted approach to addressing the problems that Proposal 5 sought to address.

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45 *Criminal Code* (n 10) s 474.17A.

46 T Game SC and Justice D Hammerschlag, *Submission 17*.

47 Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Australian Financial Markets Association, *Submission 48*; Australian Banking Association, *Submission 57*.

48 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Allens, *Submission 31*.

49 Herbert Smith Freehills, *Submission 62*.

50 Professor J Gans, *Submission 18*; Allens, *Submission 31*.

51 Logie-Smith Lanyon, *Submission 44*; Australian Banking Association, *Submission 57*; Herbert Smith Freehills, *Submission 62*.

52 Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

7.61 Recommendation 8 also reflects that the gap in the law is more to do with systematic conduct done in disregard of civil regulation, rather than a broader need to escalate matters. Such conduct, done in a systematic way, could properly be seen to be criminal. Given there is now greater flexibility in the principled approach to criminalisation contemplated under Recommendation 2 than in the equivalent model proposed in the Discussion Paper, it is appropriate to take this more refined approach to escalation. The Draft Model Offence is framed so that it is not a mere escalation of civil contraventions to a criminal offence. The 'system of conduct or pattern of behaviour' concept, which Recommendation 8 embraces, is a form of regulatory provision that is designed to respond to malfeasant business systems.[53]

7.62 In consultations, it was suggested that a preferable way of responding to deficient business systems would be to create duty-based offences[54] that criminalise the failure to provide a suitable system for a particular purpose. Duty-based offences, along with failure to prevent offences are a useful way of securing corporate compliance in certain contexts, however, widespread adoption of such offences for failures to meet a broad range of regulatory requirements is not appropriate.

Failure to prevent offences

7.63 The 'failure to prevent' model is another approach to corporate criminal responsibility. This model is not a method of attribution, but rather involves the creation of a specific, separate offence of failing to prevent certain conduct. Being convicted of a failure to prevent offence implies a different type of culpability than being directly responsible for the primary offence. That is, the corporation is guilty of failing to prevent bribery — rather than guilty of bribery.

7.64 The ALRC considers that it may be appropriate to have mechanisms both for holding corporations responsible for directly engaging in criminal conduct such as foreign bribery, as well as holding corporations responsible for failing to prevent such conduct by their associates.[55]

7.65 This section examines the failure to prevent model generally as a form of corporate criminal regulation, while in Chapter 10 the ALRC recommends that the model be extended to particular transnational offences.

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53 See Paterson and Bant (n 1).

54 See [7.178]–[7.196].

55 The ALRC suggested in the Discussion Paper that, if the changes proposed in relation to corporate attribution under Part 2.5 of the *Criminal Code* were adopted, the failure to prevent model would likely be superfluous: see [6.75]. As a result of changes to the ALRC's recommendations with regard to attribution, failure to prevent offences may still have an appropriate role to play.

Overview of the failure to prevent model

7.66 The failure to prevent model has attracted considerable comment since its introduction in the UK in relation to foreign bribery and the facilitation of tax evasion. Variations on the failure to prevent model also exist in Canada and New Zealand, as set out in the Discussion Paper.[56]

7.67 The failure to prevent model consists of a standalone offence under which a corporation can be convicted of failing to prevent the commission of a stipulated primary offence (sometimes described as the 'notional offence' or 'underlying offence') by one of its 'associates'. A defence of appropriate or reasonable measures (or due diligence) allows a corporation to show that it lacks organisational culpability if it can prove that targeted policies and procedures were put in place to prevent the offence.

7.68 The failure to prevent model aims to encourage corporations to take proactive responsibility for the conduct of their associates, particularly in cases where the corporation is in a position to both benefit from and prevent certain types of misconduct. The approach acknowledges the capacity of large corporations to do significant harm (whether intentionally or otherwise), as a result of their potential size, power, and cross-jurisdictional operation. It also implies that corporations should not only be held responsible when they knowingly engage in criminal conduct, but also when they are reckless or indifferent as to well-known risks associated with their business activities. While the latter might warrant a somewhat lighter sanction as compared to the former, it should nonetheless be expected that corporations will take reasonable steps to identify and prevent serious misconduct by persons acting on their behalf.

7.69 There is a significant social benefit to ensuring successful prosecutions of corporations when they have benefited from serious criminal activity. The failure to prevent model creates a strong positive incentive for corporations to improve their corporate culture and to adopt measures to prevent the commission of serious crimes.[57]

7.70 While the failure to prevent model has become fashionable recently in some jurisdictions, it is in fact one of the oldest forms of corporate liability, having been introduced in the 1600s in relation to omissions causing nuisance in England. Professor Clough and Carmel Mulhern described this as 'an early recognition that a corporation could be liable in its own right rather than be deemed to be liable for the acts of an individual'.[58]

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56 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [6.51]–[6.53].

57 Ibid [6.46].

58 Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002)

7.71 The model has been revived in recent discussions on corporate regulation in light of the perceived advantages offered by the failure to prevent model in regulating large multinational corporations, in particular. The recent resurgence of interest in omissions liability is connected to a revival of an organisational view of liability, in which corporations are capable of moral blameworthiness in their own right, and can therefore be proper subjects of criminal responsibility.

7.72 Clough and Mulhern noted that omissions liability 'provides a simpler model of liability that reflects organisational blame by looking to the conduct of the corporation in aggregate'.[59] They considered that:

> Liability for omissions is particularly appropriate for offences of negligence where the corporation is punished for failing to meet the standards of a reasonable corporation in discharging its legal duties.[60]

7.73 Professor Hill has summarised some of the key policy justifications for this model of corporate regulation, which include

> the opacity of the corporation, which makes it sometimes difficult to identify or gather evidence against the wrongdoer in the enterprise; the potential for scapegoating within the organization; the existence of devices such as indemnification, which may insulate top management from the effects of personal liability; and the existence of some inherently 'organizational' wrongs such as failure to have adequate systems in place to provide a check on human error.[61]

7.74 In adopting an organisational view of corporate culpability, a core objective of the failure to prevent model is to drive cultural change within corporations in order to promote a culture of compliance and prevent misconduct. In this sense, Professor Campbell has argued that the failure to prevent model promulgates a view of the criminal law as 'a preventative device and a mechanism to influence behaviour, rather than something that operates primarily in reactive mode'.[62]

121.

59 Ibid 122.

60 Ibid 124.

61 Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 *Journal of Business Law* 1, 8–9.

62 Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57, 59.

7.75 Indeed, one of the key policy objectives of the UK failure to prevent foreign bribery offence was 'to influence behaviour and encourage bribery prevention as part of corporate good governance'.[63] Dr Montagu-Cairns has argued that the UK should extend the failure to prevent model to money laundering offences, suggesting that it 'offers an innovative means of legislative redress that has proven to be effective' and has 'brought about a shift in British corporate attitudes to business'.[64]

7.76 Campbell has argued that the British experiment with failure to prevent offences demonstrates

> a move in respect of corporate criminal liability to what might be called cooperation *through* criminalisation. Here the criminal law is used as leverage to effect change in corporate behaviour… In contrast to entities being "[k]icked and damned in the hope of inculcating a corporate conscience" [these developments] indicate a more subtle preventative mode.[65]

7.77 Professor Bronitt and Zoe Brereton also examined the normative value of a failure to prevent offence in their submission to the AGD's public consultation on reforming the Commonwealth foreign bribery offence. They argued that the standard of culpability implied by a failure to prevent offence is distinct — and that the offence must accordingly be applied with distinction — compared to the standard of culpability inherent in offences that require proof of a fault element such as intention, recklessness, or negligence:

> The imperative to draw graded distinctions between offences underscores core principles of criminalisation and criminal responsibility: the importance of distinguishing between crimes and penalties based on different levels of 'moral culpability' is often explained by reference to the principle of 'representative' or 'fair labelling'.[66]

7.78 James Chalmers and Fiona Leverick have argued that this principle of 'fair labelling' requires that the law indicate variations in the degree of culpability inherent in a particular case of wrongdoing. They argue that differentiating between distinct offences (such as between a primary offence and an offence of *failing to prevent* the commission of that primary offence) can serve an important normative

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63 Ministry of Justice and Department for Business, Innovation and Skills (UK), *Insight into Awareness and Impact of the Bribery Act 2010 among Small and Medium Sized Enterprises (SMEs)* (UK Government, 2015) 3, foreword by Mike Penning MP, Minister of State for Policing, Crime, Criminal Justice and Victims.

64 Steven Montagu-Cairns, 'Corporate Criminal Liability and the Failure to Prevent Offence: An Argument for the Adoption of an Omissions-Based Offence in AML' in Katie Benson, Colin King and Clive Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Routledge, 2020) 185, 199.

65 Campbell (n 62) 66.

66 Professor Simon Bronitt and Zoe Brereton, Submission to Public Consultation Paper*, Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (10 May 2017) [2.8].

function by distinguishing between different standards of culpability inherent in the relevant conduct, and therefore indicating to both offenders and broader society the appropriate level of blame and condemnation that should be imposed on the offender.[67]

7.79 Bronitt and Brereton warned in their submission to the Senate inquiry on the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 ('CLACCC Bill 2017') that, in light of this normative function of the criminal law, failure to prevent offences must not be allowed to operate *in place of* the primary offence if it would be more appropriate to recognise a higher level of culpability as provided for in criminal offences that include a fault element such as intention.[68]

7.80 Campbell has also warned that the failure to prevent model 'should not replace substantive criminal responsibility, insofar as it seems to both over-criminalise and under-criminalise corporate entities'.[69] However, she is cautiously optimistic regarding the potential of failure to prevent offences to fill an existing gap in the application of the Commonwealth criminal law to corporations:

> Indirect omissions liability has many potential benefits. Instrumentally, it is likely to be more effective than orthodox criminal prosecution for substantive offences. … The expressive component of wider corporate liability is significant also, in its communication to the public and to the business community. Imposing criminal liability for failure to prevent certain crimes conveys a positive and important message about the expectations and responsibilities of corporate entities.[70]

7.81 The ALRC concurs with these views.

Views of stakeholders in this Inquiry

7.82 As the ALRC did not make any specific proposals regarding the failure to prevent model of corporate criminal responsibility in the Discussion Paper, it attracted limited comment in written submissions. However, those submissions that did discuss the approach were generally highly supportive of the failure to prevent model in relation to specific offences. Those views are set out in Chapter 10.

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67 James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, 219, citing A Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 88.

68 Professor Simon Bronitt and Zoe Brereton, Submission 8 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (14 March 2018) [6.2]–[6.5].

69 Campbell (n 62) 65.

70 Ibid 61.

Failure to prevent offences in the UK

7.83 The first failure to prevent offence was introduced in the UK through s 7 of the *Bribery Act 2010* (UK), which created a strict liability offence of failing to prevent foreign bribery.[71] Under that Act, a corporation is guilty of the offence of failing to prevent bribery if a 'person associated' with the corporation bribes another person. The bribe must have been paid with the intention of either obtaining or retaining business for the corporation, or obtaining or retaining an advantage in the conduct of business for the corporation.

7.84 The associate may be a legal or natural person, and may be located anywhere in the world. They need not have a formal or direct relationship with the corporation, but the bribe must have been paid with the intention of benefiting the corporation. The term 'associate' was intended to have broad application, potentially including any person who performs services for or on behalf of the corporation, such as employees, agents, or subsidiaries. The Ministerial Guidance on the Act states that:

> Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by a reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.[72]

7.85 The Guidance goes on to note that, depending on the circumstances, this could include contractors or suppliers.[73]

71 *Bribery Act 2010* (UK) s 7(1).

72 Ministry of Justice (UK), *The Bribery Act 2010: Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)* (2012) [37].

73 Ibid [38].

7.86 In part, the UK offences were intended to address perceived difficulties in attributing liability to corporations under the UK's identification doctrine.[74] In its post-legislative review, the House of Lords Bribery Act Committee concluded that, on the whole, the offence had been 'remarkably successful'.[75] At a seminar hosted by the ALRC and Allens in December 2019, leading UK practitioners explained how the failure to prevent offences had driven a change in compliance culture. This was also reflected in the report of the Bribery Act Committee, which noted that the

> creation of an offence of failure by a commercial organisation to prevent bribery was an unprecedented way of enlisting the support of those most susceptible to being involved in the offence and most able to aid in its prevention.[76]

7.87 Transparency International UK considered that the failure to prevent offence was 'invaluable as a tool to incentivise improvements in corporate behaviour and for prosecutors to hold companies to account within a criminal law framework'.[77] Montagu-Cairns has argued that the 'substantive benefits' of the UK offence are clear, and noted that

> perhaps the most important reason for using [a failure to prevent] offence is the informal positive impact the [*Bribery Act 2010*] is already having on the markets. The overall perceptions of bribery and corruption are that they have fallen since 2014, with 91% of those surveyed stating that their companies' management were clear in their condemnation of the practice.[78]

7.88 Montagu-Cairns considers that the regime has been successful enough to warrant its expansion to money laundering offences as well.[79]

7.89 More recently, the failure to prevent model was adopted in the *Criminal Finances Act 2017* (UK).[80] That Act creates two new offences of failing to prevent the facilitation of tax evasion, one domestic and one foreign.[81] Campbell has described the reforms as 'broad offences' that were 'designed to target tax-planning consultants who enable criminal evasion and crossing of the contested line between avoidance and evasion'.[82]

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74 Montagu-Cairns (n 64) 189.
75 Select Committee on the Bribery Act 2010, House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 2019) [171].
76 Ibid [171].
77 Select Committee on the Bribery Act 2010, House of Lords (n 75) written evidence from Transparency International UK (BRI0003), [171].
78 Montagu-Cairns (n 64) 197.
79 Montagu-Cairns (n 64).
80 *Criminal Finances Act 2017* (UK).
81 Ibid ss 45, 46. For an overview of the new offences, see Jenny Wheater and Elly Proudlock, 'UK Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (2018) 19(2) *Business Law International* 187.
82 Campbell (n 62) 60.

7.90 On 11 May 2016, the then Prime Minister of the UK noted that in addition to existing failure to prevent offences for bribery and tax evasion, the UK Government 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.[83]

7.91 In 2017, the Ministry of Justice called for submissions on the viability of a general failure to prevent offence in relation to economic crime.[84] This proposal was supported by the Serious Fraud Office.[85] Government consultations on the issue were conducted in 2017; however, the work of the Ministry of Justice on this issue has since stalled.[86]

7.92 In 2017 the UK Joint Committee on Human Rights proposed that the failure to prevent model should be extended to corporate human rights violations.[87] This proposal is discussed in more detail in Chapter 10, in relation to Recommendation 19.

The CLACCC Bill

7.93 In Australia, the CLACCC Bill would introduce a corporate offence of failing to prevent foreign bribery (among other reforms), modelled on the UK offences.[88] In announcing the Bill, the Attorney-General of Australia, the Hon Christian Porter MP stated that:

> Companies that view foreign bribery as simply the cost of doing business overseas are creating an uneven playing field which unfairly penalises businesses who do the right thing and play by the rules.[89]

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83 David Cameron, 'The Fight against Corruption Begins with Political Will', *The Guardian* (online at 12 May 2016) <www.theguardian.com>.

84 Ministry of Justice (UK), 'Corporate liability for economic crime: Call for evidence' (13 January 2017) <www.consult.justice.gov.uk>.

85 House of Commons Treasury Committee, UK Government, *Economic Crime - Anti-Money Laundering Supervision and Sanctions Implementation* (Twenty-Seventh Report of Session 2017–19, HC 2010, 5 March 2019) [188], written evidence from the Serious Fraud Office (ECR0068). This sentiment is shared by some academic commentators. See, eg, Campbell (n 62) 66.

86 See HM Government and UK Finance, *Economic Crime Plan 2019-22* (2019).

87 UK Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (House of Lords Paper No 153, House of Commons Paper No 398, Session 2016–17, 5 April 2017) [186], [193].

88 The 2019 Bill is the second iteration of the original Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth). The 2019 Bill was introduced after the 2017 Bill lapsed. The 2017 Bill was part of the Australian Government's First Open Government National Action Plan 2016–18. The 2019 Bill is substantively similar to the earlier Bill, but incorporates some amendments in light of the report by the Senate Legal and Constitutional Affairs Legislation Committee in 2018: see Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (2018).

89 Attorney-General's Department (Cth), 'New Laws to Help Stamp out Foreign Bribery Offences' (Media Release, Attorney-General for Australia and Minister for Industrial Relations, 28 November 2019).

7.94 The Attorney-General went on to note that the Bill

> puts the onus squarely on corporations to get their own houses in order by encouraging them to put effective controls and safeguards in place to prevent bribery from happening in the first place.[90]

7.95 In March 2020 the Senate Legal and Constitutional Affairs Legislation Committee reported on the CLACCC Bill, with a majority recommending that the Bill be passed by the Senate.[91] The majority of the Committee concluded that:

> The proposed amendments relating to foreign bribery will ensure that Australia's law enforcement agencies are able to effectively combat corporate crime. In particular, the proposed new offence of failure to prevent foreign bribery will ensure that companies cannot be wilfully blind to corrupt practices within their businesses.[92]

7.96 The AGD has now published draft guidance on the meaning of the 'adequate procedures' defence, as required under the CLACCC Bill. The draft guidance is discussed further below.

Overview of proposed changes to foreign bribery offences

7.97 Like the 2017 Bill, the CLACCC Bill would amend the primary offence of bribing a foreign public official, as well as introducing an offence of failing to prevent foreign bribery.

7.98 Section 70.2 of the *Criminal Code* — the offence of bribing a foreign public official — gives effect to Australia's obligations under Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention), to which Australia has been a state party since 1999.[93] Section 70.2 currently provides that a person (Person A) commits an offence if:

- Person A provides, offers, or promises a benefit to Person B (or causes the benefit to be given or offered to Person B); and
- the benefit is not legitimately due to Person B; and
- Person A 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.

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90 Ibid.

91 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (March 2020) rec 1.

92 Ibid [2.66].

93 Attorney-General's Department (Cth), *Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (Public Consultation Paper, 2017) 1.

7.99 The offence applies to both individuals and corporations.

7.100 Noting that s 70.2 applies to corporations through the operation of Part 2.5 of the *Criminal Code*, the AGD has stated that 'due to the complex nature of foreign bribery, it can be challenging to establish criminal liability for companies'.[94]

7.101 The CLACCC Bill would amend the offence of bribing a foreign public official by replacing the requirement of a benefit that is 'not legitimately due' with a requirement of intending to 'improperly influence' a foreign public official. The official may or may not be the person to whom the bribe is paid, but it must be paid 'in order to obtain or retain business or a business or personal advantage' (whether for themselves or someone else).[95]

7.102 In addition to proposed changes to the primary offence of foreign bribery, the CLACCC Bill would introduce a new offence of failing to prevent foreign bribery by associates. Under this offence, an Australian corporation would be liable for bribery committed by an 'associate' (which may include employees, agents, and subsidiaries, for example, as set out below) if it did not have adequate procedures in place designed to prevent bribery by its associates.[96] The bribe by the associate may be paid anywhere in the world and does not itself have to be the subject of prosecution.

7.103 There is no fault element that must be proved on the part of the defendant (though fault by the associate must still be proved). In addition, 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 its associates.[97] Guidance would need to be published by the relevant 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').[98]

7.104 The ALRC is broadly supportive of the failure to prevent foreign bribery offence proposed in the CLACCC Bill, with some qualifications as set out in the sections that follow.

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94 Ibid 8.

95 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 6, amending s 70.2 of the *Criminal Code*.

96 The Bill also included provisions for a Deferred Prosecution Agreement (DPA) scheme. DPAs are discussed in Chapter 11.

97 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 8, proposed s 70.5A(5) of the *Criminal Code*.

98 Ibid sch 1 item 8, proposed s 70.5B of the *Criminal Code*.

7.105 Some types of offending, including foreign bribery, by their very nature involve the use of third-party agents or intermediaries. Under the current law, corporations may be protected by the apparent blindness or indifference of senior management to activities occurring within their organisations and a lack of readily available written evidence.[99]

7.106 Additionally, corporations may become involved in serious offending as a result of their failure to identify and respond to the particular risks associated with certain industries or jurisdictions. This may include failing to ensure sufficient oversight, control, and guidance of associates acting on their behalf, especially in overseas jurisdictions.

7.107 The failure to prevent model is therefore well suited to offences of this nature, particularly where the relevant conduct is likely to take place outside Australia.

7.108 The Senate inquiry on the CLACCC Bill 2017 similarly concluded that:

> The introduction of the new corporate offence of failing to prevent foreign bribery will capture circumstances where a company is wilfully blind towards the wrongful conduct of its associates. In this context, the committee considers the reforms proposed in the bill will also encourage companies to be proactive and accountable for the actions of their associates and to adopt effective anti-bribery compliance measures. The committee also believes it is reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent foreign bribery from occurring within their businesses, and to be required to prove the existence of these procedures in instances of non-compliance.[100]

7.109 The Committee acknowledged that the offence would impose an increased burden on Australian corporations, but considered that this was appropriate in order to bring Australian laws into line with foreign jurisdictions and international standards on bribery prevention.[101]

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99 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [7].

100 Senate Legal and Constitutional Affairs Legislation Committee *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (2018) [2.86].

101 Ibid [2.89].

Stakeholder views on the failure to prevent foreign bribery offence

7.110 In this section, the views of stakeholders as to the desirability, or otherwise, of a failure to prevent foreign bribery offence are drawn from three inquiries.[102]

7.111 In submissions to the AGD's public consultation on proposed amendments to the foreign bribery offence in the *Criminal Code*, the failure to prevent offence was supported by 11 out of 16 submissions.[103]

7.112 In submissions to the Senate Legal and Constitutional Affairs Committee Inquiry on the CLACCC Bill, the failure to prevent foreign bribery offence was supported by five out of six submissions.[104]

7.113 The AFP has noted that

> the complex corporate structures of international corporations can make it difficult to establish the liability of corporations, particularly where there has been wilful blindness to the activities of employees or agents.[105]

7.114 The AFP expected that the failure to prevent offence would create incentives for corporations to implement measures to prevent foreign bribery, and therefore welcomed the proposed reforms. Professor Brand agreed, suggesting that the proposed failure to prevent offence 'significantly enhances the likelihood of successful foreign bribery prosecutions in the Australian context'.[106]

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102 The Attorney-General's Department (Cth) public consultation paper on proposed amendments to the foreign bribery offence in the *Criminal Code*, which included a proposed offence of failing to prevent foreign bribery; the subsequent Senate Legal and Constitutional Affairs Committee Inquiry on the CLACCC Bill 2017; and the 2020 Senate Legal and Constitutional Affairs Committee Inquiry on the CLACCC Bill.

103 These were Allens, the International Bar Association, Transparency International Australia, Uniting Church in Australia (Synod of Victoria and Tasmania), BHP Billiton, Professor Simon Bronitt and Zoe Brereton, Chartered Accountants of Australia and New Zealand, Control Risks Group, Orica, Red Flag Group, and Woodside Petroleum.

104 These were the AICD, Uniting Church in Australia (Synod of Victoria and Tasmania), Professor Liz Campbell, the AFP, and the AGD. Note that while the Inquiry received eight submission in total, two of those submissions did not comment on the failure to prevent offence at all. In submissions to the Senate Legal and Constitutional Affairs Committee Inquiry on the CLACCC Bill 2017, the failure to prevent foreign bribery offence was supported by five out of eight submissions. These were Uniting Church in Australia (Synod of Victoria and Tasmania), Associate Professor Vivienne Brand, the Anti-Corruption Committee of the International Bar Association, Morgan Lewis & Bockius LLP, and the AGD. In relation to the failure to prevent offence, submissions to the 2020 Senate inquiry on the CLACCC Bill were largely similar to the submissions made regarding the CLACCC Bill 2017.

105 Australian Federal Police, Submission 8 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (20 January 2020) 2.

106 Associate Professor Vivienne Brand, Submission 4 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (7 February 2018) 1.

7.115 While maintaining some specific reservations, as discussed below in detail, the AICD supported the failure to prevent offence in general, stating that:

> We agree that all companies should be held accountable for bribery of foreign public officials by their associates where they do not take steps, or have adequate procedures in place, to detect, address and prevent such conduct occurring.[107]

7.116 The proposed offence was also supported by a number of corporations and industry bodies, including BHP Billiton, Woodside Petroleum, Orica, Red Flag Group, Chartered Accountants of Australia and New Zealand, and Control Risks Group. Woodside Petroleum suggested that

> incorporating such an offence, and related defence, into the *Criminal Code* would further serve to dissuade Australian companies and individuals from engaging in bribery of foreign public officials, as well as provide a further incentive to develop and implement robust governance processes for the prevention of bribery.[108]

7.117 Orica argued that:

> Adoption of a 'failure to prevent' offence will put the Australian government, like the UK government, in a position of strength with which to argue for enhancements to foreign bribery laws of other jurisdictions, particularly those which have ratified the OECD Anti-Bribery Convention. It will be important for Australia to utilise this opportunity as a means to promote international consistency in enforcement and therefore create a level playing field which enables ethical Australian companies to compete around the world.[109]

7.118 The Uniting Church in Australia strongly supported the proposed offence, noting that:

> There is a wealth of corporate guidance materials that already exist for companies to develop compliance regimes to prevent bribery, so the imposition of an offence for failing to prevent foreign bribery is completely reasonable.[110]

7.119 The Law Council of Australia noted that:

> The need to continually review regulatory and enforcement frameworks as they apply to corporations has also been brought to light following the findings of

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107 Australian Institute of Company Directors, Submission 3 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (10 January 2020) 2.

108 Woodside Petroleum, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (4 May 2017) 2.

109 Orica, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (5 May 2017) 3.

110 Uniting Church in Australia, Synod of Victoria and Tasmania, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (1 May 2017) 4.

> the Royal Commission into the Banking, Superannuation and Financial Services Industry. This process has highlighted the need to ensure there are adequate frameworks in place to promote early detection and strong deterrence of corporate wrongdoing.[111]

7.120 However, the Law Council of Australia considered that the offence was not an appropriate response to perceived difficulties in prosecuting foreign bribery offences, and encouraged the Government to consider alternative regulatory options.[112] The Law Council suggested that any decisions regarding the Bill should be deferred until the ALRC had reported on the present Inquiry into corporate criminal responsibility.[113]

7.121 The failure to prevent offence was not supported by the Australia-Africa Minerals & Energy Group ('AAMEG'), and the Export Council of Australia.[114] The AICD expressed hesitation regarding the failure to prevent offence, and in particular opposed the definition of 'associates'.[115]

Definition of 'associate'

7.122 Under the CLACCC Bill, 'associate' is defined as a person that:

> (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.[116]

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111 Law Council of Australia, Submission 4 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (14 January 2020) [4].

112 Law Council of Australia, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (8 May 2017) [22]–[23].

113 Law Council of Australia (n 111) [30]–[31].

114 Australia-Africa Minerals & Energy Group (AAMEG), Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (1 May 2017) [47]–[48]; Export Council of Australia, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (2017) 2.

115 Australian Institute of Company Directors (AICD), Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (8 May 2017) 3.

116 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 2, amending s 70.1 of the *Criminal Code*.

7.123 The Explanatory Memorandum to the CLACCC Bill explained that the definition was intended to have broad application to a person that provides services for or on behalf of another person, and that:

> Such a person would not necessarily need to be an officer, employee, agent, contractor, subsidiary or controlled entity.[117]

7.124 This definition of 'associate' is broader than that used in the equivalent UK failure to prevent offence, which focuses on the substantive nature of the relationship between the corporation and the associate, rather than any formal status. In order to be an 'associated person' under the *Bribery Act 2010* (UK), a person must perform services for, or on behalf of, the corporation.[118] In order for bribes paid by the 'associated person' to lead to criminal responsibility for the corporation under the UK offence, the 'associated person'[119] must intend to obtain or retain business, or an advantage in the conduct of business, for the corporation concerned.

7.125 Under the CLACCC Bill, the associate must engage in bribery 'for the profit or gain of' the corporation in question.[120] While the scope of potential associates is nominally broader than under the UK offence, in practice it is limited by the requirement that the associate be acting for the benefit of the corporation when they engaged in the bribery itself.

7.126 As the Explanatory Memorandum further noted:

> The 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.[121]

7.127 The definition of 'associate' proposed in relation to the failure to prevent offence was supported by Brand, Morgan Lewis & Bockius LLP, the Uniting Church in Australia, Control Risks Group, Transparency International Australia, and Bronitt and Brereton.[122]

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117 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [58].

118 *Bribery Act 2010* (UK) s 8.

119 Being the term used in the *Bribery Act 2010* (UK).

120 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 8, proposed s 70.5A(1)(c) of the *Criminal Code*.

121 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [2].

122 Brand (n 106); Morgan Lewis & Bockius LLP, Submission 3 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (2018); Uniting Church in Australia, Synod of Victoria and Tasmania, Justice and

7.128 The definition was opposed by Allens and the AICD on the basis that it was unjustifiably broad.[123] They considered that it would pierce the corporate veil in cases where parent companies do not have effective control over their subsidiaries, which would, in the Law Council's view, lead to 'miscarriages of justice'.[124] The Law Council considered further that the definition proposed in the CLACCC Bill was inconsistent with the existing criminal law and the UK failure to prevent foreign bribery law.[125] While supporting the failure to prevent offence generally, the AICD maintained that the Bill should instead adopt the UK's approach of 'substance over form' in this regard.[126]

7.129 Conversely, the International Bar Association's Anti-Corruption Committee considered that the definition was too limited:

> The Committee is concerned to ensure that the legal status of "associate" is in no way limited, and should clearly and unambiguously capture conduct by any natural or incorporated person, including any association (incorporated or unincorporated) or persons operating through a trust or any other structure designed or created to facilitate the relevant conduct in a manner to shield others from potential liability. … [T]he question of whether the payer of the bribe performs services on behalf of a company should be determined by reference to all the relevant circumstances rather than what appears to be an exclusive list.[127]

7.130 While the Bill uses a new defined term, 'associate', rather than using existing terminology, the ALRC considers that the definition of 'associate' used in the CLACCC Bill is not substantially broader than the current scope of relevant actors

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International Mission Unit, Submission 1 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (22 January 2018); Control Risks Group, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (1 May 2017); Transparency International Australia, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (8 May 2017); Bronitt and Brereton (n 66); Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 5 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (13 January 2020).

123 Australian Institute of Company Directors (AICD) (n 115) 3; Allens Linklaters, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (2017) 4.

124 See Law Council of Australia (n 112) 5.

125 Law Council of Australia (n 111) [9], [25]–[27]. The Law Council was specifically concerned that the definition may expose corporations to liability for the acts of 'a range of individuals who may intentionally be acting against the interests of the corporation'.

126 Australian Institute of Company Directors (n 107) 3.

127 International Bar Association Anti-Corruption Committee, Submission 2 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (23 January 2018) [3.3].

under many attribution methods, which generally extends to agents acting within (actual or implied) apparent authority.[128]

7.131 'Apparent authority' has the potential to capture a scope similar to that implied by 'associate'. This form of agency requires that the principal (the corporation) makes a representation (express or implied) to a third party that the agent has authority (for the particular conduct), which is then relied upon by the third party.[129] In these circumstances, the principal (corporation) will be estopped from denying responsibility for the conduct of their agent.[130]

7.132 Implied apparent authority may exist absent consent or in breach of an express prohibition.[131] Relevantly, apparent authority reflects the approach that law should consider the nature of the relationship between principal, agent, and the world at large, rather than simply the formal title and roles of persons acting on behalf of a principal. This is in substance the same approach as that embodied in the definition of associates in the CLACCC Bill, which looks broadly at persons who act on behalf of a corporation.

7.133 In the context of the CLACCC Bill, the ALRC considers that it is appropriate that the offence apply to associates as defined, including subsidiaries in certain circumstances, and agrees with stakeholders that the focus should be on the substance of the relationship, rather than the form. The ALRC's views in this regard are set out in more detail in Chapter 10 at [10.50]–[10.56].

'Adequate procedures' defence

7.134 A key aspect of the proposed failure to prevent foreign bribery offence is that it provides a corporation with a defence that imports notions of corporate blameworthiness. The CLACCC Bill provides that the offence does not apply if the defendant proves that it had in place 'adequate procedures designed to prevent' bribery of foreign public officials by an associate of the defendant.[132]

7.135 The ALRC's views on the appropriate construction of such a defence are set out in Chapter 6, in relation to methods of attribution for corporate criminal responsibility. In particular, the ALRC considers that 'reasonable procedures' would be a clearer standard, and avoid the confusion associated with 'adequate procedures'

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128 Most statutory models of attribution use this terminology: see Chapter 6.

129 *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [503]. See also Chapter 6.

130 *Rama Corp v Proved Tin and General Investment Ltd* [1952] 2 QB 147, in which Slade J stated 'Ostensible or apparent authority... is merely a form of estoppel, indeed, it has been termed agency by estoppel and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) reliance on the representation, and (iii) an alteration of your position resulting from such reliance': 149–50. See also Chapter 6, in which the principles of agency are discussed in relation to the TPA Model of attribution.

131 Robert Bradgate, *Commercial Law* (Oxford University Press, 2005) 144.

132 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 8, proposed s 70.5A(5) of the *Criminal Code*.

and 'due diligence', the former of which may be construed as self-defeating, while the latter carries a variety of meanings in different legal contexts and may create legal uncertainty.

7.136 Under the CLACCC Bill, the Attorney-General is required to publish guidance on the steps that body corporates can take to prevent an associate from bribing foreign public officials.[133] Several submissions to the AGD's public consultation and the Senate inquiries into the two CLACCC Bills noted that ministerial or other non-statutory guidance as to the meaning of adequate procedures would be critical to the success of the proposed offence, by providing the mechanism to generate behavioural change among corporations in preventing foreign bribery.[134]

7.137 The submissions also widely agreed that such guidance should be the subject of extensive public consultation, both to ensure that it is fair and reasonable, and to promote corporate awareness of what would be required to access the defence under the proposed failure to prevent offence. Orica and Brand also noted that any such guidance should be consistent with equivalent guidance in the UK and other relevant jurisdictions.[135]

7.138 The ALRC agrees that the adequate procedures defence is a critical component of a failure to prevent offence, and it must be accompanied by ministerial guidance that has been the subject of public consultation. The ALRC further agrees that the guidance should be consistent with similar guidance from the UK, and broadly consistent with international standards on the prevention of foreign bribery, such as the Anti-Bribery Convention.

7.139 The draft guidance from the AGD sets out steps that a corporation can take to prevent an associate from bribing a foreign public official. According to the AGD:

> Adequate procedures include maintaining effective and proportionate compliance and enforcement strategies, risk assessments and due diligence, whistle-blower reporting mechanisms, staff training and the promotion of a strong integrity culture at all levels, including company boardrooms.[136]

7.140 The draft guidance is principles-based, and expressly aims to avoid providing a 'checklist for compliance'.[137] It is intended for general application to corporations

133 Ibid item 1, sch 8, proposed s 70.5B of the *Criminal Code*.

134 Law Council of Australia (n 112); Orica (n 109); Woodside Petroleum (n 108); Australian Institute of Company Directors (AICD), Submission 5 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (8 February 2018) 1; Brand (n 106) 2; International Bar Association Anti-Corruption Committee (n 127); Law Council of Australia (n 111) [37]–[38].

135 Orica (n 109); Brand (n 106) 3.

136 Attorney-General's Department (Cth), 'New Laws to Help Stamp out Foreign Bribery Offences' (n 89).

137 Attorney-General's Department (Cth), *Consultation Draft: Draft Guidance on the Steps a Body Corporate Can Take to Prevent an Associate from Bribing Foreign Public Officials* (Australian Government, 2019) [8]

of all sizes and sectors. The draft guidance further notes that the concept of 'adequate procedures' is intended to be 'scalable, depending on the relevant circumstances, including the size and nature of the body corporate', and would be 'determined by the courts on a case-by-case basis'.[138] It also notes that the guidance is 'not prescriptive' and refers to other guidance published by the OECD, the United Nations Office on Drugs and Crime, Austrade, the World Bank, and Transparency International.[139]

7.141 The 'overarching guiding principles' of the draft guidance are proportionality and effectiveness:

> Companies of all sizes should put in place effective and proportionate procedures to prevent bribery from occurring in their business. However, considering corporations can operate in a wide variety of circumstances, for example as a consequence of their size, type or industry, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation.[140]

7.142 The draft guidance covers the meaning of proportionality and effectiveness and the key elements of effective bribery prevention policies. It also recommends a set of procedures for implementing a compliance framework that are very similar to the UK Guidance. The procedures include risk assessment; management dedication; due diligence; communication and training; confidential reporting and investigation; and monitoring and review.[141]

Whether 'adequate procedures' ought to be an element of the offence

7.143 Chapter 4 considers the distinction between the defining or essential elements of an offence (the physical and fault elements), and an exception, exemption, excuse, qualification, or justification (often referred to as defences).[142]

7.144 In relation to the CLACCC Bill, the AICD and the Law Council of Australia considered that the existence, or lack, of adequate procedures should be an element of the failure to prevent offence (to be proved by the prosecution beyond reasonable doubt) rather than a defence.[143]

7.145 The existence of adequate procedures designed to prevent foreign bribery by associates is properly categorised as a defence or excuse to criminal responsibility in this context, and should not be an element of the offence.

(Introduction).

138 Ibid [61].

139 Ibid [65].

140 Ibid [69].

141 Ibid [74].

142 See [4.114]–[4.116].

143 Australian Institute of Company Directors (AICD) (n 134) 3; Law Council of Australia, Submission 6 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (9 February 2018) 8; Australian Institute of Company Directors (n 107) 3.

7.146 The defence of adequate procedures is not an essential element of the offence, but is rather intended to provide an excuse where corporations implemented adequate procedures — to the extent that would be proportionate and reasonable for a corporation of that type and size, and given the particular risks associated with the relevant industry and jurisdiction — and yet a rogue associate disregarded these preventative measures and engaged in the bribery anyway.

7.147 The defence acknowledges that, under those circumstances, it would not be appropriate to hold a defendant criminally responsible for the acts of a rogue agent. It is appropriate as a defence, rather than an element of the offence, because to make the absence of adequate procedures an element of the offence would place an unreasonable and unnecessary burden on the prosecution.

Legal burden of proof in relation to the defence

7.148 While the Explanatory Memorandum to the CLACCC Bill and many submissions to the Senate inquiries refer to this defence as a 'reverse onus', this language is apt to mislead.

7.149 Two separate aspects of the failure to prevent offence have been conflated under the term 'reverse onus'. The first is that, while the failure to prevent offence includes a fault element in relation to the underlying bribery offence by the associate, it is not otherwise necessary for the prosecution to prove fault by the defendant corporation (this is addressed in the section below regarding fault elements).

7.150 The second point of contention is that, if the defendant corporation seeks to rely on the defence, it bears a legal burden of proof, rather than an evidentiary burden.[144] That is, the defendant must prove, on the balance of probabilities (pursuant to s 13.5 of the *Criminal Code*), that it implemented adequate procedures to prevent foreign bribery by its associates.[145]

7.151 As discussed in Chapter 4, ordinarily when a defence is provided, the usual standard of proof in relation to the defence is an evidentiary one: the defendant must adduce sufficient evidence to raise a real possibility that the defence may apply.[146] In contrast, if the defendant bears a legal burden in relation to a defence, they must prove that the defence applies on the balance of probabilities.[147] In the context of

144 Statutory presumptions that place an 'evidentiary' burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence: *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 379. See also Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Criminal Law Review* 901, 904. The distinction between legal and evidentiary burdens is discussed further in Chapter 4.

145 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 8, proposed s 70.5A(5) of the *Criminal Code*.

146 *Criminal Code* s 13.3.

147 Ibid s 13.5.

the failure to prevent offence, the real question underpinning debates regarding the 'reverse onus' is whether it is appropriate to require a defendant to meet the legal burden, rather than an evidentiary burden, for the defence.

7.152 Subject to their views that the defence should instead be an element of the offence (see above), the AICD and the Law Council argued that if it were to remain as a defence, it should carry an evidentiary burden of proof, rather than the legal burden as proposed.[148] The AICD noted that:

> Ordinarily, the rule of law requires that a defendant should only bear the onus of establishing a matter where the matter is within the defendant's knowledge and not available to the prosecution.[149]

7.153 As discussed in Chapter 4, it 'has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof'.[150] However, where it chooses to do so, Parliament should give clear justification to ensure that the principle of legality is not applied so as to read down what would otherwise be an incursion upon the presumption of innocence.

7.154 The *Traditional Rights and Freedoms* report outlined a number of Commonwealth offences that include defences imposing a legal burden of proof on the defendant. These include terrorism, child sex offences outside Australia, drug offences, taxation, copyright, plastic explosives, unfair dismissal, migration offences, discrimination, and a number of other specific offences.[151]

7.155 The ALRC suggested in the report that imposing a legal burden of proof with regard to a defence may be justified if: such a measure is proportionate; the matter is not an essential element of the offence; the conduct in question is sufficiently serious; and the prosecution may face particular difficulties of proof because the relevant information is in the possession of the defendant.[152]

7.156 The seriousness and importance of preventing foreign bribery is widely agreed among stakeholders. With regard to proportionality, the Parliamentary Joint Committee on Human Rights has noted that a reverse legal burden is likely to be 'compatible with the presumption of innocence' if it is 'reasonable, necessary and proportionate in pursuit of a legitimate objective'.[153] This requirement is met in the case of an offence of failing to prevent foreign bribery.

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148 Australian Institute of Company Directors (AICD) (n 134) 3; Law Council of Australia (n 143) 8; Australian Institute of Company Directors (n 107) 3.

149 Australian Institute of Company Directors (n 107) 2.

150 *Kuczborski v Queensland* (2014) 254 CLR 51, [2014] HCA 46 [240].

151 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) [11.35]–[11.102].

152 Ibid [11.103]–[11.108].

153 Parliamentary Joint Committee on Human Rights (Cth), *Offence Provisions, Civil Penalties and Human Rights (Guidance Note No 2)* (2014) 2.

7.157 *Traditional Rights and Freedoms* noted that, while it would not be justifiable to impose a legal burden on a defendant in proving an issue that is essential to culpability, it may be acceptable to do so for issues that are defences, excuses, or exceptions to criminal responsibility.[154] As noted above, the ALRC considers that the matter of adequate procedures is not an element essential to culpability in this context.

7.158 Finally, evidence of any measures taken by a corporation to prevent foreign bribery is likely to be particularly within the knowledge of the defendant, and not necessarily available to the prosecution. If the defence only required an evidentiary burden — under which a corporation need only adduce sufficient evidence to raise a real possibility that it undertook adequate measures to prevent foreign bribery — it would be extraordinarily difficult for the prosecution to prove that the corporation in fact *did not* have adequate procedures (or that the particular procedures were not adequate).[155]

7.159 If the prosecution can prove that an associate of a corporation has engaged in foreign bribery intentionally and for the benefit of the corporation, then it is reasonable to require that a corporation seeking to avoid liability must prove, on the balance of probabilities, that it had adequate (reasonable) procedures in place to prevent such conduct. As it is entirely within the corporation's knowledge whether adequate procedures existed, there is no justification for lowering this to an evidentiary burden. Doing so would enable a corporation to evade liability merely by adducing sufficient evidence to suggest that such policies *may* have existed, subject to the prosecution proving beyond reasonable doubt that the corporation's policies were not adequate.

7.160 The Explanatory Memorandum to the CLACCC Bill 2017 noted additionally that:

> The justification for imposing this legal burden on the body corporate is that it would create a strong positive incentive for corporations to adopt measures to prevent foreign bribery.[156]

154 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) [11.110]–[11.111].

155 See *R v Turner* (1816) 5 M & S 206; 105 ER 1026, 1028: 'if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party … who attests the affirmative is to prove it and not he who avers the negative'.

156 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) [95].

7.161 Campbell has also considered that the defence as provided is justified in this context:

> These defences are directed at a legitimate objective, namely the prosecution and prevention of serious criminality; they allow corporate defendants to exonerate themselves through articulation of compliance procedures; it is more appropriate for the entity than the prosecution to prove the details of internal procedures and implementation in practice; and the imposition of the burden is necessary, reasonable and not arbitrary.[157]

7.162 The imposition of the legal burden in relation to the defence of adequate procedures may also be justified and appropriate for other specific offences as provided in Recommendation 19, particularly when the relevant conduct typically takes places overseas and can result in widespread and irreversible harm.

Fault elements

7.163 As set out in Chapter 6, under the *Criminal Code*, each physical element of an offence must have a corresponding fault element unless strict or absolute liability applies.

7.164 Section 70.5A(2) of the CLACCC Bill expressly states that absolute liability applies to each of the three physical elements of the failure to prevent offence, which are:

(a) that the defendant is a relevant body corporate;

(b) that an associate of the defendant commits an offence against s 70.2 (or engages in conduct outside Australia that would constitute such an offence inside Australia); and

(c) that the associate does so for the profit or gain of the defendant.[158]

7.165 There are no fault elements for these physical elements and a defendant cannot raise the defence of reasonable mistake of fact.[159] As such, it is unsurprising that the offence has been categorised as an absolute liability offence.

7.166 However, the ALRC disagrees that the offence, as a whole, is one of absolute liability, as fault must still be proven in relation to the primary offence. In order to commit an offence against s 70.2, the associate must provide a benefit (or otherwise cause, offer, or promise a benefit to be provided) to another person, and the associate

157 Campbell (n 62) 62.

158 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1, item 8, proposed s 70.5A(1)(a)–(c) of the *Criminal Code*.

159 Ibid sch 1 item 8, proposed s 70.5A(2) of the *Criminal Code*.

must do so 'with the intention of improperly influencing a foreign public official… in order to obtain or retain business or a business or personal advantage'.[160]

7.167 While the offence may closely resemble an absolute liability offence, it is subtly distinct in that it requires proof that an associate has committed an offence against s 70.2. Put another way, the prosecution must prove both the physical and fault elements under s 70.2 against the associate, before proceeding to prove the physical elements under s 70.5A against the corporate defendant. In that regard, the failure to prevent offence may be distinguished from other absolute liability offences that are not predicated upon proof of a different, separate offence.

7.168 This is relevant given that some argued in relation to the CLACCC Bill that there should be a fault element in the failure to prevent offence, in addition to the fault element for the underlying offence. Some stakeholders considered that the prosecution should have to prove the fault of the defendant who failed to prevent the bribery, not just the intention of the individual who committed the underlying bribery offence.

7.169 In particular, the AICD considered that the prosecution should have to prove fault by the defendant given that the failure to prevent offence may attract the same penalty as the primary bribery offence:

> [T]hese features of the offence create an unduly onerous and punitive law. They create a real risk that the proposed failure to prevent offence would become the 'default' or 'go to' offence, used to prosecute all instances of corporate failure to prevent foreign bribery, rendering the primary s 70.2 offence redundant. This is particularly problematic and unjust considering that both offences attract the same penalties, and yet the failure to prevent offence does not require a finding of fault on the part of the corporation.[161]

7.170 The ALRC agrees that it may be appropriate for the failure to prevent offence to attract a lower penalty than the primary offence of foreign bribery, to reflect the different type of culpability and the fact that the prosecution has not proven a fault element on the part of the defendant under a failure to prevent offence.

7.171 In their submission to the Senate inquiry into the CLACCC Bill 2017, Bronitt and Brereton similarly suggested that the failure to prevent offence as drafted was too blunt to capture the full spectrum of potential corporate culpability:

> A corporation may fail to implement adequate procedures to prevent foreign bribery due to inadvertence, carelessness or ineptitude, but equally it may fail to prevent foreign bribery intentionally, knowingly, recklessly or dishonestly. … There is a risk that the FPFB offence undermines a fundamental tenet of criminalisation

160 Ibid sch 1, item 6, proposed s 70.2(1)(a)–(b) of the *Criminal Code* (emphasis added).
161 Australian Institute of Company Directors (AICD) (n 134) 3.

> that requires distinctions to be drawn between types of crime and penalties based on different levels of culpability (known as the 'representative' or 'fair labelling' principle).[162]

7.172 They argued that framing the offence to not require fault on the part of the defendant undermines the normative effect of the criminal law in signalling proportionate condemnation for varying degrees of corporate blameworthiness. Bronitt and Brereton worried that, if introduced, the failure to prevent offence would become the 'go to' offence in place of the primary offence of bribing a foreign public official, even in cases where a higher level of culpability may instead warrant prosecution under the primary offence.

> This is problematic, as a matter of principle and policy, since the proposed offence does not reflect the different levels of fault associated with intention, knowledge, recklessness or inadvertence/negligence, attributed to the corporation, in failing to implement adequate procedures preventing foreign bribery.[163]

7.173 The Explanatory Memorandum to the CLACCC Bill and submissions by the AGD make it clear that the failure to prevent offence is not intended to offer a substitute where the primary offence of bribing a foreign public official could be made out.[164] Rather, it is intended to fill the gap where it is not possible to prove intention to engage in bribery by the corporation itself, yet it is appropriate to hold the corporation accountable for the different offence of failing to prevent bribery by an associate acting for the benefit of the corporation.[165]

7.174 As the AGD argued:

> It is reasonable to expect companies of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business. [The offence is] designed to capture circumstances where a company is wilfully blind towards the wrongful conduct of its associates, and encourage companies to be proactive and accountable and to adopt effective anti-bribery compliance measures. The only way for them to avoid liability is to have adequate procedures in place and to rely on the proposed defence in 70.5A(5) of the Bill.[166]

7.175 The ALRC acknowledges the concerns of Bronitt and Brereton to the extent that a failure to prevent foreign bribery offence should not be applied in place of the primary offence of bribing a foreign public official in cases where the latter

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162 Bronitt and Brereton (n 68) [6.2].

163 Ibid [1.2.1].

164 See Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) [90]–[91]; Attorney-General's Department (Cth), Submission 7 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (2018) 7–8.

165 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) [90]–[91]; Attorney-General's Department (Cth) (n 164) 7–8.

166 Attorney-General's Department (Cth) (n 164) 9.

offence would be more appropriate. Nonetheless, it considers that there may exist circumstances in which the failure to prevent model — with fault on the part of the associate, but not the defendant — is appropriate to capture the distinct nature of corporate blameworthiness as a form of omission.

7.176 The lack of any requirement to prove fault on the part of the defendant is justified for offences of a transnational nature, in which it is difficult for the prosecution to prove corporate fault because a matter is particularly within the knowledge of the defendant. Transnational offences often also involve potential for widespread and irreversible harm to the public, which may justify the imposition of the burden on corporate defendants to either prevent the offence, or alternatively to prove that they had in place reasonable measures designed to prevent such offences.

7.177 Finally, in response to arguments that the offence violates the presumption of innocence, Campbell has pointed out that one should not conflate the rights of individuals with those granted to corporations (the legal status of corporations as 'persons' notwithstanding); corporations do not have the same procedural rights as natural persons, and furthermore are not at risk of being imprisoned. Accordingly, Campbell considered that the legal burden of proof in relation to the defence is justified in light of the power dynamic between corporations and prosecutors and does not violate the presumption of innocence.[167]

Duty-based offences

7.178 Utilising statutory duties to hold corporations accountable for corporate misconduct is not new. Indeed, many scholars have located the very beginnings of corporate criminal responsibility in the first acceptance by courts of liability for corporations for breaches of statutory duties in the mid-1800s.[168] The initial imposition of such liability came with the recognition that there could be 'no great objection in holding a corporation liable where a statute imposed a duty upon a corporation (or other person) to act and no action was taken'.[169] Before grappling with the conceptual problem of attribution, courts were thus able to evade it through corporate liability based on breach of statutory duty.[170]

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167 Campbell (n 62) 62.

168 See, eg, Meaghan Wilkinson, 'Corporate Criminal Liability: The Move towards Recognising Genuine Corporate Fault' (2003) 9 *Canterbury Law Review* 142, 143; Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 88–9; Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43(3) *International and Comparative Law Quarterly* 493, 495–97; cf Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22(3) *Criminology* 3, 4–5.

169 Wilkinson (n 168) 145. Corporate liability for breach of statutory duty was then extended to 'positive' acts by corporations: see further Bernard (n 168) 8–9.

170 Stessens (n 168) 496.

7.179 Depending on the drafting of the statutory duty, the appeal of duty-based offences in the context of corporate criminal responsibility is that they can obviate the need for recourse to rules of attribution.[171] An offence is committed by the objective failure to meet the standard necessitated by the duty;[172] and so it is often unnecessary to decide 'whether the conduct, or state of mind, of a servant or agent of a company is to "count as" the conduct, or state of mind, of the company'.[173] The reasoning behind this is as stated by Sir John Smith in the context of health and safety laws:

> Where a statutory duty to do something is imposed on a particular person (here, an 'employer') and he does not do it, he commits the [physical element] of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case of vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. *There is no need to find someone — in the case of a company, the 'brains' and not merely the 'hands' — for whose acts the person with the duty can be held liable. The duty on the company in this case was 'to ensure' — ie to make certain — that persons are not exposed to risk.* They did not make certain. It does not matter how; they were in breach of their statutory duty and, in the absence of any requirement of [a fault element] that is the end of the matter.[174]

7.180 Where framed effectively, duty-based offences can, accordingly, constitute a model of corporate liability that secures corporate accountability while avoiding issues of attribution. Liability for such offences turns directly upon the corporation's conduct (or misconduct) – there is no need for recourse to an exercise in 'connecting the dots' between the actions and states of mind of multiple individuals as liability depends on the acts or omissions of the corporation itself.[175] Such offences may be considered examples of what Professor Bant referred to in her submission as

> models of corporate liability… which assess the objective quality of corporate misconduct against the proscribed legislative and general law standards, rather

171 This also applies in the context of statutory duties imposed on directors and senior managers in the corporate context, obviating the (often complex) process of proving a corporate offence or contravention and attributing it to the individual through principles of accessorial liability or other forms of derivative liability. See further Chapter 9.

172 See, eg, *Bulga Underground Operations Pty Ltd v Nash* (2016) 93 NSWLR 338, [2016] NSWCCA 37 [108]–[110]; *Mouawad and Another v The Hills Shire Council* (2013) 199 LGERA 28, [2013] NSWLEC 165 [88].

173 *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2007) 172 A Crim R 269, [2007] VSCA 138 [28] ('*ABC v Wallace*').

174 John Smith, 'Health and Safety at Work' [1995] *Criminal Law Review* 654, 655 (emphasis added). This passage was quoted in *ABC v Wallace* (at [15]) and by the UK Court of Appeal in *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796 (at 812).

175 The 'connecting the dots' analogy was employed by Professor Bant in her submission to the ALRC: Professor E Bant, *Submission 21*:'it remains very difficult to "connect the dots" between the states of mind of multiple associates of a company, all working on some shared task but carrying out independent actions or roles'.

> than through the prisms of an artificial culpable or predatory corporate state of mind.[176]

7.181 In the modern criminal law applicable to corporations, there are numerous criminal offences applicable to corporations that are framed as a breach of a statutory duty.[177] Prosecutorial data presented in Chapter 3 suggests that these offences, most prolific in the regulation of conduct relating to health and safety,[178] can be particularly effective in securing corporate accountability.

Duty-based offences in work health and safety legislation

7.182 Work health and safety ('WHS') laws contain many duty-based offences, and these have been demonstrably effective in practice.

7.183 WHS laws in Australia are based on the 'Robens model',[179] the key features of which 'include a unified and integrated system of general duties and self-regulation'.[180] In the Australian context, the model posits

> that duty holders be required to comply with general duties of care set out in a broad-based WHS statute, together with more detailed standards laid down in regulations, with codes of practice forming a 'third tier' of the WHS architecture.[181]

7.184 In all Australian jurisdictions except Victoria and Western Australia, the Robens model is now implemented through harmonised legislation reflecting the model *Work Health and Safety Act 2011* (Cth).[182] WHS statutes following the Robens approach also exist in Victoria and Western Australia,[183] though these states have not implemented the model law.[184]

7.185 The cornerstone of all Australian WHS statutes is the imposition of broad, overarching statutory duties on relevant actors. Under the model law, the duties

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176 Ibid.

177 There are also many criminal offences and civil penalty provisions applicable to directors and senior officers of corporations that are framed as breaches of a statutory duty. This is discussed further in Chapter 9.

178 See *Mouawad and Another v The Hills Shire Council* (2013) 199 LGERA 28, [2013] NSWLEC 165 [70] (referring to such an area as a 'protective regulatory regime').

179 This term is used to describe the approach to work health and safety regulation developed by Lord Robens' 1972 Report of the Committee on Safety and Health at Work (UK): see *Report of the Committee on Safety and Health at Work 1970–72* (HMSO, 1972).

180 Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (2018) 22 fn 7.

181 Ibid 22.

182 See *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

183 *Occupational Health and Safety Act 2004* (Vic); *Occupational Health and Safety Act 1984* (WA).

184 Western Australia is currently transitioning to the model work health and safety laws. The Work Health and Safety Bill 2019 (WA) passed through the Legislative Assembly of the Western Australian Parliament on 20 February 2020. At the time of writing, the *Work Health and Safety Act 2019* (WA) had not yet received the Royal Assent and so had not come into force.

apply to any 'person conducting a business or undertaking'.[185] Though there are myriad tools by which regulators can enforce compliance with the duties, at the apex of the WHS enforcement pyramid are criminal offences for failing to comply with a WHS duty.[186] In the Final Report of the 2018 Review of the Model Work Health and Safety Laws, Marie Boland remarked of this duty-based offence approach that

> the offences are focused on the culpability of the offender and the level of risk and not the actual consequences/outcomes of the breach. This approach was considered by the 2008 National Review to be more effective for deterrence.[187]

7.186 By taking a duty-based approach to regulation, the WHS statutes preference a 'constitutive' approach to regulation,[188] described by Professor Johnstone as

> a form of regulatory law that attempts to use legal norms to constitute structures, procedures and routines which are required to be adapted and internalised by regulated organisations, so that these structures, procedures and routines become part of the normal operating activities of such organisations.[189]

7.187 In the WHS context, a key aim of taking such a regulatory approach is 'to tackle the corporation at the organization and individual level' in order to overcome the difficulties of attribution raised by corporate criminal responsibility.[190] At this broad level, the WHS approach to regulation of both primary and secondary responsibility is responsive to the organisational context in which misconduct occurs.[191]

7.188 More specifically in relation to establishing corporate criminal responsibility, the framing of offences as breaches of statutory duty avoids many of the issues

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185 Such persons are broadly defined and include corporations: *Work Health and Safety Act 2011* (Cth) s 5. For further analysis of the definition see Paul Harpur and Philip James, 'The Shift in Regulatory Focus from Employment to Work Relationships: Critiquing Reforms to Australian and U.K. Occupational Safety and Health Laws' (2014) 36(1) *Comparative Labor Law and Policy Journal* 111, 119–123.

186 See, eg, *Work Health and Safety Act 2011* (Cth) ss 31, 32, 33. The duties and principles applicable to them (including a definition of what is 'reasonably practicable') are contained in ss 13–29.

187 Boland (n 180) 113.

188 See Bridget M Hutter, *Regulation and Risk: Occupational Health and Safety on the Railways* (Oxford University Press, 2001) 16–18.

189 Richard Johnstone, 'Safety, Courts and Crime: Occupational Safety and Health Prosecutions in the Magistrates' Courts' (2003) 1(1) *Policy and Practice in Health and Safety* 105, 108. The approach is coupled with a constraining regulatory approach so that where it fails, there may be recourse to 'intervening more overtly, through external regulation and sanctions'.

190 Hutter (n 188) 18. Professor Johnstone criticises the approach for not going far enough in challenging the very form and structure of the criminal law as it applies to corporations: see Richard Johnstone, *Occupational Health and Safety, Courts and Crime* (Federation Press, 2003) 284–5.

191 See further Hutter (n 188) 18; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 103–13. The original Robens Report is attuned to this as a matter of law, but has been criticised for its associated conclusions regarding the appropriate enforcement policy: cf *Report of the Committee on Safety and Health at Work 1970–72* (HMSO, 1972) [261]; Anthony D Woolf, 'Robens Report - The Wrong Approach?' (1973) 2(1) *Industrial Law Journal* 88, 91.

associated with attributing individual conduct and fault to corporate entities. Johnstone describes the effect as follows:

> The [WHS] general duty provisions do not require the prosecutor to discuss fault by showing that practicable measures were not taken. The strict or absolute provisions coupled with the notion of practicability, however, limit the prosecutor to having to prove fault as negligence without, in traditional criminal law thinking, having to demonstrate full criminal intention or recklessness.[192]

7.189 The result is that rules of attribution are unnecessary to determine corporate liability for the duty-based offences. This was recently made clear by the Victorian Court of Appeal in *DPP v JCS* in the context of s 23(1) of the *Occupational Health and Safety Act 2004* (Vic) ('OHS Act'). The Court stated that

> it is tolerably clear that the rules of attribution do not apply to a charge under s 23(1) of the [OHS Act]… the duty of an employer company under s 23(1) is to ensure, so far as is reasonably practicable, that non-employees are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking. Unless the company has done all that is reasonably practicable to ensure that non-employees are not exposed to the relevant risks, it will be in breach of the section. If it is proved that the company has not done all that is reasonably practicable, it is immaterial to ask where in the company hierarchy the failure occurred.[193]

7.190 Not all duty-based offences avoid the need for recourse to the rules of attribution. For example, WHS offences that include fault elements of recklessness require application of the rules of attribution.[194]

7.191 The data outlined in Chapter 3 supports the conclusion that WHS duty-based offences are often and effectively prosecuted against corporations.[195] This was clearly the legislative intent behind the drafting of such offences.

7.192 In the 2018–19 financial year, 33 charges under s 32 (failure to comply with a work health and safety duty) of the *Work Health and Safety Act 2011* (NSW) were finalised in NSW courts against incorporated defendants, with 26 of those charges resulting in guilty verdicts.[196] In Victoria, 94.7% of cases brought under s 21 of the

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192 Johnstone (n 190) 283.

193 *Director of Public Prosecutions v JCS Fabrications Pty Ltd* [2018] VSCA 50 [39].

194 See, eg, *Orbit Drilling Pty Ltd v The Queen* (2012) 223 A Crim R 10, [2012] VSCA 82 [18]: 'an offence under s 32 involves the mental element of recklessness. This means — again in contradistinction to other offences under the Act — that proving a breach of s 32 by a body corporate calls for rules of attribution'. Of the main duty-based offences in the model WHS laws, only s 31 involves a fault element (recklessness).

195 The same conclusion may also be drawn about the prosecution of duty-based offences against corporate officers: see Chapter 9.

196 By comparison, 23 charges were finalised under s 32 against other defendant types and 11 resulted in guilty verdicts. 19 charges were finalised against companies for s 33 offences (Category 3), resulting in 9 guilty verdicts) as compared to 10 non-company defendants resulting in 8 guilty verdicts. No charges for s 31 (Category 1) offences were finalised against company or other defendants in 2018–19. See NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the*

Occupational Health and Safety Act 2004 (Vic) (failure to provide and maintain a safe working environment) in higher courts between 1 July 2013 and 30 June 2018 were against incorporated defendants.[197] In NSW, an average of 97% of WHS prosecutions are successful,[198] and in Victoria, approximately 90%.[199]

An increasing preference for duty-based offences

7.193 The potential efficacy of duty-based offences in securing corporate accountability may also underlie the increasing preference for such offences in legislation relevant to industries involving high proportions of corporate actors. For example, the Heavy Vehicle National Law ('HVNL')[200] was recently amended to adopt a duty-based approach to liability modelled on the WHS scheme.[201] The reforms were motivated partly by the desire to achieve consistency with the WHS scheme and partly because of the efficacy of WHS laws.[202]

7.194 Similarly, Victoria recently passed environmental law reforms introducing a duty-based approach to environment protection.[203] The new legislation provides for a 'general environmental duty' as follows:

> A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.[204]

Australian Law Reform Commission (2020) <www.alrc.gov.au>.

197 Sentencing Advisory Council of Victoria, 'SACStat Higher Courts: Fail to Provide and Maintain a Safe Working Environment' (May 2019) <www.sentencingcouncil.vic.gov.au>. This data relates to cases against persons sentenced in Victorian higher courts.

198 See NSW Department of Finance, Services and Innovation, *Annual Report 2018/2019* (2019) 75–6; NSW Department of Finance, Services and Innovation, *Annual Report 2017/2018* (2018) 21–2; NSW Department of Finance, Services and Innovation, *Annual Report 2016/2017* (2017) 68–69. See further Australian Law Reform Commission, *Corporate Criminal Responsibility: Data Appendices* (2020) Appendix B, Table 4.

199 See WorkSafe Victoria, *Annual Report 2018–19* (2019) 32–3, 124–35; WorkSafe Victoria, *Annual Report 2017–18* (2018) 17, 106–116; WorkSafe Victoria, *Annual Report 2016–17* (2017) 21, 105–7.

200 The HVNL is an applied law scheme regulating the use of heavy vehicles in Australian states and territories. All Australian states and territories except Western Australia and the Northern Territory are participating jurisdictions for the purposes of the HVNL and have applied the HVNL as a law in each of their jurisdictions: see *Heavy Vehicle National Law (ACT) Act 2013* (ACT); *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW); *Heavy Vehicle National Law Act 2012* (Qld); *Heavy Vehicle National Law (South Australia) Act 2013* (SA); *Heavy Vehicle National Law (Tasmania) Act 2013* (Tas); *Heavy Vehicle National Law Application Act 2013* (Vic). Queensland is the host jurisdiction for the HVNL, with each participating jurisdiction adopting the Queensland legislation through application statutes.

201 See *Heavy Vehicle National Law Act 2012* (Qld) s 26C. The offences for failing to comply with the duty are contained in ss 26F–26H. As to the responsibility of an executive to exercise due diligence to ensure the legal entity complies with the safety duty, see further Chapter 9.

202 Explanatory Note, Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (Qld) 3–4.

203 *Environment Protection Amendment Act 2018* (Vic). The legislation is not yet in force, but is intended to take effect from 1 July 2020: see State Government of Victoria, 'Environment Protection Amendment Act 2018', *Environment Protection and Amendment Act 2018* (17 December 2019) <www.environment.vic.gov.au/sustainability/environment-protection-reform/ep-bill-2018>.

204 *Environment Protection Amendment Act 2018* (Vic) s 25(1).

7.195 Breach of the duty by a person 'in the course of conducting a business or an undertaking' constitutes an indictable offence punishable by a penalty of 10,000 penalty units for a body corporate, or 2,000 penalty units in the case of a natural person.[205] The Explanatory Memorandum to the amending Bill states that the new duty-based regime is 'intended to be similar to that imposed by the duty under section 21 of the OHS Act'.[206]

7.196 Though it is yet to be seen whether these new duty-based offences will prove effective in practice in securing corporate accountability, their enactment bolsters arguments that there is, and should be, a place in the criminal law for offences framed in a way that responds directly to, and assesses the objective quality of, corporate misconduct, measured against prescribed standards.

205 Ibid s 25(2).
206 Explanatory Memorandum, Environment Protection Amendment Bill 2018 (Vic) 29.

8. Sentencing Corporations

Contents

Introduction

8.1 In this chapter, the ALRC makes recommendations to improve the process and outcomes of sentencing corporations for Commonwealth criminal offences.

8.2 The utility and appropriateness of applying the criminal law to corporations is determined in part by the court's ability to impose sanctions that achieve the purposes of sentencing. As discussed in earlier chapters, the labelling of conduct as criminal serves a denunciatory and retributive function in and of itself. However, the realisation of the pluralist aims of the criminal justice system is also premised 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 as part of this Inquiry.

8.3 In this chapter, the ALRC observes that the fundamental purposes and principles of sentencing may be translated appropriately to corporate offenders. However, the application of these purposes and principles to corporate offenders necessarily differs

from their application to individual offenders. Sentencing processes and penalties must be appropriately adapted to corporate offenders, which have 'no soul to damn, no body to kick'.[1]

8.4 The ALRC has found that there are limitations on the ability of courts to pursue relevant purposes when sentencing corporations for Commonwealth criminal offences. These limitations necessarily blunt the force of the criminal law as a regulatory tool for addressing corporate wrongdoing. The recommendations in this chapter are intended to address these limitations by providing for penalties and processes that are responsive to the nature of corporations and corporate wrongdoing.

8.5 In particular, the ALRC makes recommendations to:

- provide statutory guidance on the factors relevant to sentencing corporations;
- empower the court to make a range of non-monetary penalty orders when sentencing corporations;
- develop a national debarment regime; and
- strengthen the court's information base for sentencing corporations by introducing pre-sentence reports for corporations and expanding the scope of victim impact statements to better accommodate corporate offences.

8.6 The ALRC's recommendations aim to maintain consistency, where appropriate, between the processes and penalties for corporations in respect of civil penalty contraventions and criminal offences.

8.7 The ALRC also comments on further areas that may warrant additional consideration, including:

- maximum penalties for corporations;
- consolidation of court powers to make compensation orders;
- the status of penalties in corporate insolvency proceedings; and
- notifying regulators of proceedings against regulated entities.

1 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, citing words attributed to Baron Thurlow LC.

Sentencing corporations: purposes and principles

Purposes of sentencing

8.8 Sentencing purposes describe the goals or objectives that a sentence should aim to achieve. The purposes of sentencing are related to, although distinguishable from, the principles of sentencing, which are the overarching legal rules that should be applied when sentencing an 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.

8.9 There is no legislative statement of the purposes of sentencing in Commonwealth criminal legislation.[3] Accordingly, the ALRC has previously 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]

8.10 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.

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2 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) [5.1] ('*Same Crime, Same Time*').

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) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 3–4; *Sentencing Act 1991* (Vic) s 5(1).

4 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 4–1 (emphasis added).

Just punishment and denunciation

8.11 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; although in accordance with 'just deserts', that punishment should be proportionate to the offending conduct.[5]

8.12 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]

8.13 As discussed in Chapter 5, there is divergence among theorists on whether the purposes of retributive punishment and denunciation are relevant to corporations, given their status as juristic 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 expressly denounce particularly egregious conduct, in circumstances where the corporation itself may be appropriately described as 'blameworthy'.[8] If this premise is accepted, it would seem to follow that denunciation and ensuring just punishment represent legitimate sentencing purposes for corporations. Indeed, this is consistent with current sentencing practice.[9]

8.14 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

8.15 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.

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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].
8 See further [5.78]–[5.94] of this Report.
9 See, eg, *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [289], [300].

8.16 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.[10] 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.[11]

8.17 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'.[12] Behavioural theorists focus on the human actors within corporations, noting, for example, that employees' interests may conflict with those of the corporation. 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.[13]

8.18 Professor Clough reconciles the insights from these two views 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 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.[14]

10 See generally Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, 9th ed, 2014) ch 7.

11 See, eg, Coffee (n 1) 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.

12 Coffee (n 1) 393.

13 Ibid.

14 Jonathan Clough, 'Sentencing the Corporate Offender: The Neglected Dimension of Corporate Criminal Liability' [2003] *Corporate Misconduct eZine* 1, 7.

Rehabilitation

8.19 Rehabilitation of an offender relates to addressing underlying factors that contributed to a person's offending, with the aim of reducing the likelihood of recidivism.[15] While rehabilitation may be most readily associated with behavioural modification and drug treatment programs, the objective of addressing underlying causes of offending to reduce recidivism is adaptable to corporate offenders. For corporations, rehabilitation may involve measures to reform the internal structures and processes, or organisational culture, that facilitated, encouraged, or permitted the offence.

Incapacitation

8.20 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.[16] 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 ('dissolution').

Restoration

8.21 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'.[17] 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.[18]

15 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [4.12].
16 Ibid [4.14].
17 Ibid [4.20].
18 Ibid.

8.22 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.[19]

Principles of sentencing

8.23 The sentencing of corporations for Commonwealth offences is also subject to the common law principles of sentencing, in the same way as sentencing of individual offenders.

8.24 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).[20]

8.25 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.[21]

19 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.

20 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 5–1.

21 See ibid [4.32]–[4.36], [5.24].

Sentencing factors

Recommendation 9 The Australian Government should implement Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

Recommendation 10 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, and financial circumstances of the corporation;

b) whether the corporation had a corporate culture conducive to compliance at the time of the offence;

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 unlawful conduct was voluntarily self-reported by the corporation;

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

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

h) the effect of the sentence on third parties; and

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 action; and

    iii. measures to implement or improve a compliance program.

This list should be non-exhaustive and should supplement, rather than replace, the general sentencing factors, principles, and purposes when implemented in accordance with Recommendation 9.

Recommendation 11 To maintain principled coherence and consistency in the assessment of penalties for corporations, a statutory provision should be enacted requiring the court to consider the following factors when making a civil penalty order in respect of 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) the deterrent effect that any order under consideration may have on the corporation or other corporations;

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

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

e) the personal circumstances of any victim of the contravention;

f) the type, size, and financial circumstances of the corporation;

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

h) whether the corporation had a corporate culture conducive to compliance at the time of the offence;

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 voluntary 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) the effect of the penalty on third parties; and

o) 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 action; and

    iii. measures to implement or improve a compliance program.

8.26 Implementation of Recommendations 9 to 11 would provide harmonised statutory guidance on sentencing and making civil penalty orders for corporations. Complexities in the design of these recommendations 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

8.27 There is currently no specific statutory guidance on the factors that are relevant to sentencing a corporation for a Commonwealth offence.

8.28 Section 16A(2) of the *Crimes Act 1914* (Cth) ('*Crimes Act*') sets out a non-exhaustive list of factors that the court must take into account when sentencing any person for a Commonwealth offence, to the extent that those factors are relevant and known to the court. As discussed below, this section has been subject to criticism. Wholesale reforms were recommended by the ALRC in 2006.[22]

8.29 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',[23] 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 dependants'.[24] 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.[25]

8.30 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*.[26]

8.31 Commonly cited factors include: the size and financial position of the company; whether senior officers were involved in the contravention; the existence of

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22 See, eg, ibid recs 4–1, 5–1, 6–1 and 6–8.
23 *Crimes Act 1914* (Cth) s 16A(2)(a).
24 Ibid s 16A(2)(p).
25 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.28].
26 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [220].

compliance programs or systems within the corporation; and whether the corporation had a culture of compliance.[27]

Introducing statutory guidance on sentencing corporations

8.32 Introducing statutory guidance on the factors relevant to sentencing corporations would address a 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.[28]

8.33 While the recommended list is generally consistent with the case law,[29] 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,[30] or excluding the consideration of additional factors.

8.34 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 action; any advantage realised by the corporation; and the effect of the sentence on third parties.[31]

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27 For a particularly influential statement of relevant factors (referred to as the 'French factors') from a civil penalty case see *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153 [1990] FCA 762, 45 (French 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]. See also discussion at [6.117]–[6.120] of how courts have considered corporate culture in sentencing and civil penalty order determinations.

28 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 30–2; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Report 102, 2003) rec 3. See also Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) [10.38]. An example of a statutory list of factors for sentencing corporations can be found in the Canadian Criminal Code: *Criminal Code* (Canada) RSC 1985, c C-46 s 718.21.

29 The Law Council of Australia suggested that the list of factors should more closely resemble the 'French factors': Law Council of Australia, *Submission 27*, citing *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153 (French J). However, all of the 'French factors' are captured, albeit at a higher level of abstraction, in either the list of factors in Recommendation 10, or the general list of sentencing factors (as currently provided for by s 16A(2) of the *Crimes Act*, or as amended pursuant to Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 6–1).

30 See, eg, the prescriptive approach in United States Sentencing Commission, *Guidelines Manual* (2018) ch 8.

31 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; although there is some precedent for consideration of these types of factors. See, eg, *Australian Competition and Consumer Commission v Woolworths Ltd* (2016) ATPR ¶42-521, 43,068, [2016] FCA 44 [126]; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [253].

8.35 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.[32] 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.[33]

8.36 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 result of the offence. In relation to the case law on civil penalties for consumer law contraventions, Professors 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.[34]

8.37 In respect of offences that provide for calculation of a maximum penalty with reference to benefits obtained,[35] 'any advantage realised by the corporation as a result of the contravention' will be taken into account as part of the process of determining the maximum penalty. However, including advantage as a sentencing factor ensures that profits or advantage obtained as a result of misconduct are considered where relevant and known to the court, regardless of the maximum penalty calculation method.

8.38 Bant noted that there may be a role for soft law guidelines in, for example, 'outlining the more detailed kind of guidance from related fields of law such as the equitable account of profits'.[36] This guidance may assist the court in assessing the extent and relevance of 'any advantage realised by the corporation' in the sentencing process.

8.39 Consideration of 'whether the corporation had a corporate culture conducive to compliance at the time of the offence' as part of the sentencing process may

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32 See Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 500.

33 This issue was not considered, for example, in *Commonwealth Director of Public Prosecutions 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.

34 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.

35 Provisions that allow the court to calculate the maximum penalty for a corporation with reference to benefits obtained or detriment avoided by reason of an offence are discussed below: [8.163].

36 Professor E Bant, *Submission 21*.

overlap with the assessment of whether or not fault can be attributed to the corporation in accordance with s 12.3(2) (c) and (d) of the *Criminal Code*.[37] Even if s 12.3(2)(d) is repealed, in accordance with Recommendation 7 (Option 1), it is arguable that the nature of the culture of the corporation should not be taken into account by the court as an aggravating factor in sentencing where criminal responsibility was attributed to the corporation on the basis of that culture.[38] However, the relevance of a corporation's culture to sentencing extends beyond potential aggravation of penalty. For example, culture will be relevant to the court's assessment of the appropriateness and design of a corrective action order per Recommendation 12. Given that Commonwealth statutory guidance on sentencing does not distinguish between aggravating and mitigating factors,[39] the ALRC does not consider that an explicit statutory statement on this issue is necessary.

8.40 Some of the factors included in Recommendation 10 are arguably captured by the existing (or amended) list of general factors.[40] In particular, factor (e) — voluntary self-reporting — overlaps with *Crimes Act* s 16A(2)(h) — cooperation with law enforcement agencies in the investigation of the offence. However, there is a policy argument for specifically spelling out the relevance of voluntary self-reporting in respect of corporate offenders, given its particular importance in the corporate crime context.[41] Equally, there is a policy argument for specifically providing for 'the extent of any efforts by the corporation to compensate victims and repair harm' (factor (g)), rather than relying on factor s 16A(2)(f) of the *Crimes Act*, particularly given the general factor's focus of 'contrition', which is less cogent for corporate offenders.[42]

8.41 Submissions that commented on Proposal 13 generally expressed support for the incorporation of statutory guidance on the factors relevant to sentencing.[43] Herbert Smith Freehills observed that

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37 If Option 2 of Recommendation 7 is adopted, culture would not be relevant to attribution of corporate criminal responsibility.

38 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2), which provides that the court is not to have additional regard to an aggravating factor in sentencing if it is an element of the offence.

39 The ALRC has previously rejected this approach: Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 6–4.

40 This was noted, for example, by Australian Securities and Investments Commission (ASIC), *Submission 54*.

41 The importance of incentivising self-reporting of corporate crime is a critical part of the justification of DPAs for corporations: see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [9.44], [9.47].

42 Although the courts have been willing to use this terminology in respect of corporations. See, eg, *Australian Competition and Consumer Commission v Woolworths Ltd* (2016) ATPR ¶42–521, 43,069-7–43,069-8, [2016] FCA 44 [161]–[167]; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [253]–[254].

43 Australian Shareholders' Association, *Submission 30*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Condon Associates, *Submission 41*; Australian Financial Markets Association, *Submission 48*; Australian Securities and Investments Commission (ASIC), *Submission 54*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*.

> insertion of sentencing guidelines for corporations in legislation as proposed by the ALRC ... will provide greater certainty and promote transparency and consistency in the sentencing process.[44]

8.42 BHP emphasised the importance of retaining judicial discretion, but nonetheless considered

> that clarification of the principles for sentencing corporations could be implemented on a standalone basis even if the other Proposals did not progress; this is one of the exceptions to our general recommendation that the Proposals be addressed as a package of reforms, not to be adopted individually.[45]

8.43 Some submissions provided feedback on the list of factors proposed in the Discussion Paper.[46] The lists of factors in Recommendations 11 and 12 have been refined based on this feedback.

8.44 Factor (e) of Proposal 13 — whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence — has been removed, on the basis that prompt cessation of unlawful conduct after its discovery should not be treated as a mitigating factor. As ASIC observed, this is 'no more than mere compliance with the law'.[47] If a corporation does persist in unlawful conduct after its discovery, this may be taken into account as part of an assessment of the 'nature and circumstances of the offence'.[48]

8.45 The reference to whether a corporation self-reported misconduct has been qualified by 'voluntarily', in order to clarify that compliance with mandatory reporting requirements should not apply in mitigation of penalty. This too is 'mere compliance with the law'.[49]

8.46 Factor (b) of Recommendation 10 has been amended to direct judicial attention to the broader consideration of 'whether the corporation had a corporate culture conducive to compliance',[50] rather than the mere 'existence of a compliance program designed to prevent and detect criminal conduct' as initially proposed. The reference to 'internal culture' in factor (a) of Proposal 13 has in turn been removed.[51]

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44 Herbert Smith Freehills, *Submission 62*.

45 BHP, *Submission 58*.

46 See, eg, Professor E Bant, *Submission 21*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Institute of Company Directors (AICD), *Submission 37*; Australian Securities and Investments Commission (ASIC), *Submission 54*.

47 Australian Securities and Investments Commission (ASIC), *Submission 54*.

48 *Crimes Act 1914* (Cth) s 16A(2)(a).

49 Australian Securities and Investments Commission (ASIC), *Submission 54*.

50 This wording reflects one of the factors from *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,153, [1990] FCA 762, 45.

51 See also concerns from the Australian Institute of Company Directors that the reference to 'internal culture' was too vague: Australian Institute of Company Directors (AICD), *Submission 37*.

The need for broader reform of sentencing factors

8.47 The list of factors for sentencing corporations should 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*) is inadequate.[52] Professor Fisse recently observed that 'Part IB of the *Crimes Act* has been criticised for complexity, poor drafting, inflexibility, limited scope and impracticality.'[53] As Recommendation 10 would build upon the foundations laid by s 16A(2), the ALRC considers that it is pertinent to reiterate the ALRC's prior calls for reform in the context of this Inquiry.[54]

8.48 Implementation of Recommendations 4–1, 5–1, 6–1, and 6–8 of the *Same Crime, Same Time* report would involve amendment of the legislative guidance on sentencing all federal offenders (individuals and corporations) to provide:

- separate provisions setting out the purposes (Recommendation 4–1) and principles of sentencing (Recommendation 5–1), as set out above;
- 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 6–1); and
- a separate provision on the relevance of procedural matters, such as guilty pleas, that impact on the administration of the criminal justice system (Recommendation 6–8).[55]

8.49 The text of these recommendations is reproduced at Appendix I.

8.50 There was support from submissions for introducing statutory provisions setting out the purposes and principles of sentencing per Recommendations 4–1 and 5–1.[56] Some submissions suggested that implementation of Recommendations 6–1 and 6–8 was unnecessary because s 16A(2) of the *Crimes Act* already addresses the matters covered by these recommendations.[57] Although there is overlap between the

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52 See Australian Law Reform Commission, *Same Crime, Same Time* (n 2) ch 6.

53 Fisse, 'The First Cartel Offence Prosecution in Australia: Implications and Non-Implications' (n 33) 484.

54 See also Beaton-Wells and Fisse (n 32) 529, suggesting that the ALRC's recommendations on reform of Part IB 'should be acted on without further delay'.

55 The ALRC also recommended further statutory guidance on how these factors should be considered: Australian Law Reform Commission, *Same Crime, Same Time* (n 2) recs 11–2 and 11–3.

56 Australian Institute of Company Directors (AICD), *Submission 37*; BHP, *Submission 58*. The Law Council of Australia and Allens supported implementation of these recommendations, but suggested amendments to the lists of purposes/principles: Law Council of Australia, *Submission 27*; Allens, *Submission 31*.

57 See Law Council of Australia, *Submission 27*; Australian Institute of Company Directors (AICD), *Submission 37*. The Law Council endorses, however, the incorporation of 'detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence' into s 16A(2) of

sentencing factors proposed by these recommendations and those currently provided for by s 16A(2), there are key structural differences between s 16A(2) and the provisions contemplated by the ALRC in *Same Crime, Same Time*. These differences were informed by principled considerations,[58] which remain relevant. The ALRC therefore endorses its previous recommendations.

8.51 ASIC opposed the inclusion of 'factors relating to the detriment sanctioned by law to which the offender has been or will be subject to as a result of the commission of the offence' in the list of factors set out in Recommendation 6–1.[59] ASIC suggested that there should instead be greater clarity provided within legislation that creates the detriment or sanction as to how it should be treated by a court in sentencing. Consideration of this matter is beyond the scope of this Inquiry.

8.52 The CDPP emphasised that it would be preferable for implementation of the sentencing proposals to occur through the enactment of a Federal Sentencing Act,[60] as recommended by the ALRC in *Same Crime, Same Time*.[61] The ALRC notes that the substance of Recommendations 4–1, 5–1, 6–1, and 6–8 of the *Same Crime, Same Time* report could be implemented through amendments to Part IB of the *Crimes Act*, as initially proposed in the Discussion Paper.[62] However, the ALRC agrees that its recommendations would be better implemented as part of the enactment of a Federal Sentencing Act.

Making civil penalty orders for corporations

8.53 There is no statutory provision that sets out the factors generally applicable to making civil penalty orders in respect of individuals or corporations.

8.54 The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ('*Regulatory Powers Act*') provides a list of four matters that courts must take into account in determining a pecuniary penalty in civil penalty proceedings.[63] 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. Some statutes separately provide for equivalent, although not identical, lists of general factors relevant to setting pecuniary penalties.[64]

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the *Crimes Act*.

58 See Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [6.26]–[6.33].

59 Australian Securities and Investments Commission (ASIC), *Submission 54*.

60 Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

61 *Same Crime, Same Time* (n 2) rec 2–1.

62 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) Proposal 12.

63 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 82(6).

64 See, eg, *Environmental Protection Biodiversity Conservation Act 1999* (Cth) s 481(3); *Competition and Consumer Act 2010* (Cth) sch 2 s 224(2) ('*Australian Consumer Law*').

8.55 There is no provision for factors specific to corporations. Guidance on the factors relevant to civil penalties for corporations has instead developed at common law, as outlined above.

8.56 Although there is divergence between the purposes of civil penalties and criminal offences,[65] there is overlap between the factors relevant to determining an appropriate penalty for corporations in respect of criminal offences and contraventions of civil penalty provisions. This has manifested in cross-fertilisation of case law on civil penalties and sentencing corporations, as discussed above. In order to maintain consistency, it is desirable to introduce statutory guidance on making civil penalty orders for corporations in tandem with statutory guidance for sentencing corporations. The proposed introduction of statutory guidance on the factors relevant to making civil penalty orders for corporations was generally supported by submissions that commented on Proposal 14.[66]

8.57 Implementation of Recommendation 11 would provide for a generally applicable list of factors relevant to civil penalty orders for corporations. The ALRC leaves open the question of where a provision implementing Recommendation 11 should be enacted. In the Discussion Paper, the ALRC proposed implementation of the list of factors in the *Corporations Act*. Consequential amendments could then be made to other statutes creating civil penalties to refer back to the *Corporations Act* provision. Recommendation 11 could alternatively be enacted in the *Regulatory Powers Act.* However, as noted above, there has been limited uptake of the provisions of this Act. Consequential amendments to other statutes would be required to 'activate' the relevant provision. Consideration could also be given to the enactment of a 'Regulatory Contraventions Statute', as previously recommended by the ALRC.[67]

8.58 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 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'.[68]

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65 See [5.66]–[5.68] of this Report.

66 Australian Shareholders' Association, *Submission 30*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Australian Securities and Investments Commission (ASIC), *Submission 54*; NSW Young Lawyers, *Submission 59*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*.

67 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) rec 6–7.

68 Paterson and Bant (n 34) 160.

8.59 In some statutes, it may be appropriate to provide further factors to meet the objectives of the statute or relevant parts (or subsections) therein.

8.60 The list of factors in Recommendation 11 covers all the factors identified in Recommendation 10 in respect of sentencing corporate offenders, but also provides for the type of general factors that are currently outlined in s 16A(2) of the *Crimes Act* in the criminal context. This is necessary because, as noted above, there is currently no generally applicable statutory guidance on making civil penalty orders. Providing a list that merely mirrors Recommendation 10 would require courts to have regard to the common law principles on general civil penalty factors, and in some cases a statute-specific list of factors, in addition to the statutory list of corporate-specific factors.

8.61 As discussed in Chapter 5, civil penalty provisions are primarily directed to deterrence and promoting compliance,[69] while the criminal law has pluralist aims, including denunciation and retribution.[70] In the absence of an appropriate legislative statement of the general purposes of civil penalty provisions, the ALRC recommends that deterrence should be included in the list of relevant 'factors'. ASIC expressed concerns that including deterrence as one in a long list of factors does not appropriately reflect the status of deterrence as the principal purpose of civil penalties.[71] The ALRC agrees that it would be preferable to provide separately for deterrence as a purpose of civil penalties rather than including it in the general list of factors. However, recommending a general legislative statement of the purpose of civil penalties is beyond the scope of this Inquiry.

8.62 The Law Council of Australia and NSW Young Lawyers expressed concerns about factor (e) — the personal circumstances of any victim of the contravention.[72] It was submitted that this factor is too broad and may not represent a relevant consideration. However, s 16A(2)(d) of the *Crimes Act* currently provides for this factor in the same terms.

8.63 The ALRC notes that Recommendation 11 would have the consequence of causing the setting of civil penalties for corporations to be out of step with that for individuals, 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 this 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

69 Cf Paterson and Bant (n 34). Paterson and Bant suggest that punitive purposes should also be acknowledged as relevant in the civil penalty context. See also Professor E Bant, *Submission 21*.

70 See further [5.66]–[5.68].

71 Australian Securities and Investments Commission (ASIC), *Submission 54*.

72 Law Council of Australia, *Submission 27*; NSW Young Lawyers, *Submission 59*.

setting process for individuals and corporations.[73] The adoption of this previously recommended legislative scheme would be a sensible approach.

Non-monetary penalties

Recommendation 12 The *Crimes Act 1914* (Cth) should be amended to provide that when sentencing a corporation that has committed a Commonwealth offence the court has the power to make one or more of the following:

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 requiring the corporation to facilitate redress of any loss suffered, or any expense incurred, by reason of the offence; and

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

A corresponding provision should be enacted in appropriate legislation to empower the court to make equivalent orders in respect of a corporation that has contravened a Commonwealth civil penalty provision.

Recommendation 13 The *Crimes Act 1914* (Cth) should be amended to provide that the court may make an order dissolving a corporation if:

a) the corporation has been convicted on indictment of a Commonwealth offence; and

b) the court is satisfied that dissolution represents the only appropriate sentencing option in all the circumstances.

73 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) rec 29–1.

Recommendation 14 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 of time 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.

a) the corporation has been convicted on indictment of a Commonwealth offence; and

b) the court is satisfied that dissolution represents the only appropriate sentencing option in all the circumstances.

Expanding the court's sentencing toolkit

8.64 In respect of most Commonwealth criminal offences, the only available sentencing option for a convicted corporation is a fine.[74] This stands in contrast to the array of sentencing options available for individual offenders, which may include imprisonment, community service orders, and probation.[75]

8.65 It has long been observed that fines are an inadequate penalty for corporate offenders.[76] 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 action, 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').[77]

8.66 Empowering courts to impose non-monetary penalties in addition to (or, in appropriate instances, instead of) monetary penalties would strengthen the court's ability to impose a sentence that best promotes the purposes of sentencing in respect

74 See [3.53]–[3.56] of this Report.

75 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) 30 FLR 88; *Sheen v Geo Cornish Pty Ltd* [1978] 2 NSWLR 162; *Lanham v Brambles-Ruys Pty Ltd* (1984) 37 SASR 16.

76 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.

77 See further Australian Law Reform Commission, *Sentencing: Penalties* (Discussion Paper No 30, 1987) [290]; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [10.3].

of the corporation and offending in question, while limiting the adverse spillover effects of the sentence on innocent third parties where possible. The alignment of each of the recommended penalties with relevant sentencing purposes is discussed below.

8.67 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,[78] as well as a range of 'non-punitive orders', including community service orders, probation orders, and orders to disclose information or publish an advertisement.[79]

8.68 However, there is no general power for the court to impose non-monetary penalties, and there are concerns that existing 'non-punitive orders' provisions are not fit for purpose.[80] In particular, the court is unable to make these orders of its own initiative. The orders must first be applied for by the regulator,[81] or prosecutor.[82] Furthermore, the explicit characterisation of the orders as 'non-punitive' limits their application for the pluralist purposes of sentencing.

8.69 In its submission, ASIC noted gaps in the availability of non-monetary penalties in respect of contraventions and offences under ASIC-administered legislation:

> For example, currently there is a broad range of specific non-monetary penalties available in relation to some contraventions of the ASIC Act but the availability of non-monetary penalties under the Corporations Act is more limited.[83]

8.70 Recommendation 12 would equip the court with a general power under the *Crimes Act* to make a range of non-monetary penalty orders when sentencing corporations that have committed a Commonwealth offence. The ALRC recommends a separate, limited power to dissolve corporations convicted on indictment of a Commonwealth offence (Recommendation 13), and a related power to disqualify persons from managing corporations (Recommendation 14).

8.71 The ALRC also recommends the enactment of an equivalent provision that would empower the court to make the same types of non-monetary penalty orders in respect of corporations that are found to have contravened a Commonwealth

78 *Australian Consumer Law* (n 64) s 247; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB; *Competition and Consumer Act 2010* (Cth) s 86D; *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) s 158; *National Consumer Credit Protection Act 2009* (Cth) s 182; *Work Health and Safety Act 2011* (Cth) s 236.

79 *Australian Consumer Law* (n 64) s 246; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA; *Competition and Consumer Act 2010* (Cth) s 86C.

80 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 32) 455–60.

81 *Australian Consumer Law* (n 64) s 246(1); *Competition and Consumer Act 2010* (Cth) s 86C(1); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB(1).

82 *Competition and Consumer Act 2010* (Cth) s 86C(1A).

83 Australian Securities and Investments Commission (ASIC), *Submission 54* (citations omitted).

civil penalty provision. This provision could be located in the *Corporations Act*, *Regulatory Powers Act*, or in a newly enacted Regulatory Contraventions Statute.[84] Consequential amendments to other statutes that create civil penalty provisions should be made to empower the court to make the orders provided for by the general provision.

8.72 A centralised list of non-monetary penalty options for corporations in respect of both criminal offences and civil penalties 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.

8.73 The proposed introduction of a general power to make dissolution and disqualification orders elicited some concerns from corporate stakeholders and legal practitioners,[85] as discussed below. There was, nonetheless, substantial support from submissions for the expansion of non-monetary penalty orders for corporations.[86]

8.74 The Monash Transnational Criminal Law Group noted that they

> welcome and endorse the recommendations by the ALRC in relation to expanding the range of sentencing options available to courts in relation to corporate crime. Pluralising sanction options can provide a court with the discretion it needs to adopt measures that are best directed to the circumstances at hand.[87]

8.75 ASIC considered that the ALRC's proposals 'would enhance consistency of sentencing options, and enable flexible, tailored responses to misconduct that appropriately advance the object of deterrence'.[88]

8.76 The Law Council of Australia expressed support in principle for the introduction of alternative sanctions for corporate criminal conduct provided 'it can be done in a way that will promote fairness, justice and the imposition of an appropriate penalty in all the circumstances of the case'.[89]

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84 See discussion of implementation of Recommendation 11: [8.57].

85 See, eg, Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Banking Association, *Submission 57*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

86 See, eg, Monash Transnational Criminal Law Group, *Submission 35*; Condon Associates, *Submission 41*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*; NSW Young Lawyers, *Submission 59*; Herbert Smith Freehills, *Submission 62*.

87 Monash Transnational Criminal Law Group, *Submission 35*.

88 Australian Securities and Investments Commission (ASIC), *Submission 54*.

89 Law Council of Australia, *Submission 27*.

8.77 The AICD submitted that the introduction of the proposed non-monetary penalty orders should be subject to further consultation.[90] However, Recommendation 12 is not novel. The ALRC and NSW Law Reform Commission have each made similar recommendations in previous reports.[91] The Council of Europe recommended the introduction of a range of similar penalties for corporations in 1998.[92] Further, as outlined below, there is already precedent for the availability of some of these types of orders in the Commonwealth statute book and in overseas jurisdictions.

Guidance on non-monetary penalty orders

8.78 The imposition of non-monetary penalties does not provide the same level of transparency and certainty as monetary penalties, because the costs of complying with these orders may not be ascertainable at the time of sentencing.[93] This may make it more difficult to assess whether the principles of proportionality, consistency, and parity are being met.[94] However, qualitative assessments may still be made with respect to the imposition of like orders for like circumstances.[95]

8.79 Several submissions expressed support for the promulgation of guidance on the circumstances where the recommended non-monetary penalty orders may be appropriate and the types of conditions that could attach to these orders.[96] The ALRC considers that this type of guidance could be appropriately developed by the courts through Practice Notes.[97] Harmonisation of Practice Notes across the courts could be facilitated through the Council of Chief Justices of Australia. The existence of harmonised guidance from the courts on non-monetary penalty orders for corporations would provide regulators, prosecutors, and corporate stakeholders

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90 Australian Institute of Company Directors (AICD), *Submission 37*.

91 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 30-1; Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) recs 27-1, 28-3. See also New South Wales Law Reform Commission (n 28) rec 4; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [10.9], [10.17], [10.22].

92 Council of Europe, *Liability of Enterprises for Offences,* Recommendation No R(88) 18, adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum (1990) art 7. The Monash Transnational Criminal Law Group noted that the kinds of orders recommended by the Council of Europe are reflected in the language adopted in the ALRC's proposal, albeit in more general terms: Monash Transnational Criminal Law Group, *Submission 35*.

93 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.

94 This concern was raised in submissions from BHP and the Business Council of Australia: BHP, *Submission 58*; Business Council of Australia, *Submission 63*.

95 See discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) [27.15]–[27.17].

96 See, eg, Allens, *Submission 31*; Monash Transnational Criminal Law Group, *Submission 35*; Herbert Smith Freehills, *Submission 62*.

97 Practice Notes provide supplementary guidance in relation to court proceedings. As Practice Notes are maintained by the courts they may be more readily adapted to address developments and issues as they arise in practice than legislation and regulations.

with greater certainty, and enhance consistency in the application of these kinds of orders.

Supervision of non-monetary penalty orders

8.80 In the Discussion Paper, the ALRC suggested that where court supervision of non-monetary penalty orders would be inappropriate, supervision could be undertaken by a court-appointed independent monitor whose costs could be reimbursed by the corporation.[98]

8.81 The Law Council of Australia expressed the view that, in order to ensure independence and objectivity, non-monetary penalty orders should be supervised by a government agency rather than a private monitor whose costs are reimbursed by the corporate offender.[99] However, the ALRC considers that court appointment of the monitor, and requirements for the monitor to report back to the court (or a registrar), would ordinarily be sufficient to safeguard independence. Nonetheless, the ALRC does not exclude the possibility that in certain circumstances, and with an appropriate level of supervision by the court or a registrar, it might be appropriate for supervision of a non-monetary penalty order to be undertaken by a regulator.

Consequences of non-compliance with non-monetary penalty orders

8.82 Legislative amendments to implement Recommendation 12 should also address the consequences of non-compliance. The *Crimes Act* currently contains several provisions that enable the court to deal with breaches of sentencing orders made pursuant to specified provisions.[100] It may be appropriate to introduce a new provision that addresses the consequences of non-compliance by a corporation with a non-monetary penalty order made pursuant to the provision implementing Recommendation 12. The court could be empowered to: impose a pecuniary penalty; revoke the order and resentence the corporation; vary the order; or take no action.[101]

8.83 Consideration could also be given to empowering the court to order that a corporation provide a bond or surety, known as a 'recognizance', to encourage compliance with non-monetary penalty orders. The recognizance could be forfeited

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98 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [10.69], [10.74] in relation to community service and corporate probation orders, citing Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [10.10], [10.17].

99 Law Council of Australia, *Submission 27*.

100 Section 20A of the *Crimes Act 1914* (Cth) deals with breaches of orders for conditional discharge without conviction (s 19B(1)); orders for conditional release after conviction (s 20(1)(a)); and recognizance release orders (s 20(1)(b)). Section 20AC deals with breach of state and territory sentencing orders applied to federal offenders pursuant to s 20AB.

101 This is consistent with the court's powers in respect of non-compliance by a federal offender with an order for conditional release after conviction, with the exception of the power to vary the order. See *Crimes Act 1914* (Cth) s 20A(5)(b). The ALRC has previously recommended that the court should have the power to vary its orders in the event of non-compliance by a federal offender: Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 17–2.

in the event of non-compliance.[102] An alternative might be to make provision for partial suspension of a pecuniary penalty, subject to compliance with non-monetary penalty orders.

8.84 Consideration should also be given to making consequential amendments to the *Corporations Act* to provide for enforcement mechanisms in the event of non-compliance by a corporation with a non-monetary penalty order made pursuant to the provision implementing Recommendation 12.

Overview of recommended non-monetary penalty orders

8.85 Each of the following non-monetary penalty orders has been previously canvassed and recommended by the ALRC, with the exception of redress facilitation orders.[103] The purposes and key features of each type of order are briefly revisited below.[104]

Publicity/disclosure orders

8.86 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. Orders could require publication of information through traditional media outlets, as well as new media outlets, such as social media.

8.87 These orders may be designed to have a punitive effect on corporations by inflicting reputational damage,[105] as well potentially furthering general deterrence by alerting other corporations to the consequences of the misconduct in question. Such orders may also facilitate 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).[106]

8.88 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).

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102 See, eg, *Crimes Act 1914* (Cth) s 20A(7).

103 Although see discussion of regulatory redress in Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) ch 8.

104 For further discussion see Australian Law Reform Commission, *Sentencing: Penalties* (n 77) [292]–[307]; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [10.5]–[10.24]; Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) [28.19]–[28.58]; Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.13]–[30.25].

105 However, as the ALRC has previously noted, the impact of publicity orders on corporate reputation is uncertain: Australian Law Reform Commission, *Sentencing: Penalties* (n 77) [306].

106 Although this consequence would be necessarily limited to consumer-facing corporations. See further [10.171].

8.89 The Monash Transnational Criminal Law Group raised doubts about the impact of publicity orders on corporate reputation, but suggested that we might nonetheless 'remain optimistic that such orders could serve other purposes like bolstering public trust through transparency'.[107]

8.90 Currently, the *Australian Consumer Law*, *Competition and Consumer Act 2010* (Cth), and the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') distinguish between information disclosure orders,[108] advertisement orders,[109] and adverse publicity orders.[110] 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.[111] The ALRC recommends 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

8.91 Community service orders require corporations to expend time and effort to undertake activities for the benefit of the community.[112]

8.92 As currently provided for under the *Competition and Consumer Act 2010* (Cth) and *ASIC Act*:

> ***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;
>
> 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

107 Monash Transnational Criminal Law Group, *Submission 35*.

108 *Australian Consumer Law* (n 64) 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).

109 *Australian Consumer Law* (n 64) 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).

110 *Australian Consumer Law* (n 64) s 247; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLB; *Competition and Consumer Act 2010* (Cth) 86D.

111 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].

112 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.19].

> awareness program to address the needs of consumers when purchasing the product.[113]

8.93 Providing the court with a general power to make corporate community service orders would strengthen the court's ability 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.[114]

Probation/corrective orders

8.94 Probation orders could require corporations to take corrective actions in response to the offence or contravention, such as investigating the misconduct, taking internal disciplinary action, and/or implementing organisational reforms.

8.95 The ALRC reiterates its previous view that, when making a corporate probation order, the court should be able to impose whatever conditions are reasonably related to the nature and circumstances of the contravention or the history and characteristics of the organisation, and are necessary to achieve relevant sentencing purposes.[115]

8.96 Examples of probation orders provided for under the *Competition and Consumer Act 2010* (Cth) and *ASIC Act* 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.[116]

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113 *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* (n 64) s 246(2)(a), (aa).

114 Although currently the imposition of community service orders is limited to 'non-punitive' purposes in some statutes: *Australian Consumer Law* (n 64) 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 32) 458–9.

115 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [10.9].

116 *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* (n 64) s 246(2)(b).

8.97 Probation orders are also available as general sentencing options for corporations in the US,[117] as well as Canada.[118]

8.98 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.[119] 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.[120] Punitive injunctions may be inappropriate in respect of civil penalty contraventions,[121] but are consistent with the purposes of retribution and denunciation in the criminal justice system.[122]

Redress facilitation orders

8.99 Corporate misconduct may cause harm or loss on a significant scale. The availability of compensation 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.

8.100 Section 21B(1)(d) of the *Crimes Act* empowers the court to order an offender to make reparation to any person in respect of any loss suffered or expense incurred by reason of a Commonwealth offence. However, the harm caused by corporate misconduct is liable to be spread across a number of individuals, who may not be readily identifiable. Reparation orders pursuant to s 21B are unlikely to be appropriate in these cases.[123] The same limitation applies to statute-specific provisions for compensation orders that are directed to compensating 'a person'.[124]

8.101 The ALRC invited stakeholder views on whether there was a need for reforms to better facilitate the compensation of victims of corporate misconduct (Question

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117 United States Sentencing Commission (n 30) §8D1.1–4.

118 *Criminal Code* (Canada) RSC 1985, c C-46 ss 731, 732.1(3.1).

119 Coffee (n 1) 452. However, as noted above, the use of probation orders is currently restricted under some statutes to non-punitive purposes.

120 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.18]; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [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) 313.

121 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) [28.31].

122 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.25].

123 See also Beaton-Wells and Fisse (n 32) 526.

124 *Privacy Act 1988* (Cth) ss 25, 25A; *Corporations Act 2001* (Cth) ss 1317GA, 1317HA, 1317HB, 1317HC, 1317HE. Although note some provisions facilitate compensation of 'persons' or a 'class of persons': *Competition and Consumer Act 2010* (Cth) s 87(1A)(c); *Australian Consumer Law* (n 64) s 239; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GM(2)(c).

H), noting that one option for reform would be the introduction of a general power to make 'redress facilitation orders'.

8.102 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 …[125]

8.103 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).[126] 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.[127]

8.104 A number of submissions expressed general support for consideration of reforms to better facilitate the compensation of victims of corporate misconduct.[128] There was limited feedback on the type of reforms required. However, the Law Council of Australia and CHOICE acknowledged the potential value of redress facilitation orders in circumstances where the quantum of loss for individual victims is unknown.[129] Another suggestion by the Law Council was to make provision for the court to make orders compelling the corporation to advertise that people may be eligible for compensation. This type of order could be made as part of a redress facilitation order under the model proposed by Professor Fisse.[130]

8.105 Redress facilitation orders would fill a gap in the court's powers to address harm from corporate misconduct in circumstances where a compensation order would be inappropriate because, for example, the victims of the misconduct and/

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125 Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (n 80) 95.

126 See Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (n 80).

127 Ibid 95–6. Note there is overlap between order (b) under this model and disclosure/publicity orders under Recommendation 12.

128 Law Council of Australia, *Submission 27*; CHOICE, *Submission 29*; Allens, *Submission 31*; Condon Associates, *Submission 41*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*.

129 Law Council of Australia, *Submission 27*; CHOICE, *Submission 29*.

130 Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (n 80) 95–6.

or the amount of their loss are not readily identifiable. The availability of redress facilitation orders would strengthen the ability of the court to advance the sentencing purpose of restoration.

8.106 Redress facilitation orders would be appropriately categorised as 'ancillary orders' that may be made in addition to the imposition of penalties. This reflects the status of compensation orders made pursuant to s 21B of the *Crimes Act*.[131]

8.107 Empowering courts to make redress facilitation orders is consistent with broader changes to regulatory approaches internationally that prioritise compensation and redress.[132]

Disqualification orders

8.108 Disqualification orders are designed to restrain the activities of corporations. This 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.[133]

8.109 For example, a court could order the indefinite suspension of a financial services corporation's Australian Financial Services licence pending satisfactory compliance with a corrective action order.[134]

8.110 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.

8.111 Orders disqualifying a corporation from undertaking specified commercial activities may have significant consequences for the employees, consumers, and shareholders of a corporation, as well as for the market. It was submitted that any power to make orders of this kind should be subject to limitations.[135] However, the ALRC is not convinced that limitations on this power are necessary or appropriate. Unlike dissolution orders, the seriousness of disqualification orders will vary from case to case, depending on the particular conditions imposed. Whether or not it is appropriate to make a disqualification order, and on what terms, is a matter

131 See Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [8.1], [8.7]–[8.21].

132 See, eg, Christopher Hodges and Stefaan Voet, *Delivering Collective Redress: New Technologies* (Hart Publishing, 2018). See also Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (n 103) ch 8.

133 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.13]; New South Wales Law Reform Commission (n 28) [8.2].

134 Consequential amendments to statutes (*Corporations Act 2001* (Cth) ch 7 in this example) would be necessary to permit revocation or suspension of licences by the court in exercise of this power.

135 See, eg, Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Herbert Smith Freehills, *Submission 62.*

appropriately left to the discretion of the court. In making this assessment, the court would be required to consider the impact of any such order on third parties.[136]

8.112 The ALRC does not propose that courts should be given the power to disqualify a corporation from government contracts. Instead, the ALRC recommends the development of a national debarment regime (Recommendation 15). This would make disqualification from government contracts a possible administrative consequence of conviction, rather than a court-imposed penalty.

Dissolution as a sentencing option

8.113 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, creditors, and consumers. Nonetheless, there are a range of existing circumstances in which a corporation may be dissolved (or 'wound up') by court order.[137] The ALRC considers it appropriate that dissolution is available as an option for sentencing a corporation.

8.114 In certain circumstances, dissolution of a corporation may represent the only sentencing option that would fulfil the sentencing purposes of general deterrence, denunciation, and incapacitation. This may be the case, for example, where the offending corporation was operated primarily for a criminal purpose or by criminal means.[138]

8.115 As the ALRC has previously noted, the imposition of a dissolution order would, however, 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.[139]

8.116 The ALRC initially proposed that dissolution should be part of the court's general sentencing toolkit for corporations. However, given that dissolution represents the pinnacle of the sentencing order hierarchy for corporations, it is appropriate to explicitly limit the availability of dissolution orders to circumstances where the court is satisfied that it is the only appropriate sentencing option.[140] This

136 See Recommendation 10, factor (h) and Recommendation 11, factor (n).

137 See *Corporations Act 2001* (Cth) s 461.

138 In these circumstances US courts are required to set a fine at an amount sufficient to divest an organisation of all its net assets: United States Sentencing Commission (n 30) §8C1.1. Clough notes that this represents an indirect means of deregistering (or dissolving) a corporation: Clough (n 14) 22–3.

139 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) rec 28–2.

140 The Law Council and Herbert Smith Freehills supported this restriction: Law Council of Australia, *Submission 27*; Herbert Smith Freehills, *Submission 62*.

is consistent with restrictions on the imposition of a sentence of imprisonment for individual offenders.[141]

8.117 Recommendation 13 also limits dissolution to cases where a corporation has been convicted on indictment of a Commonwealth criminal offence. The recommended power would accordingly be exercisable by state and territory District and County Courts, as well as Supreme Courts and the Federal Court of Australia.

8.118 Dissolution purports to permanently remove the capacity of the offender to re-offend — removing 'from the community a corporate entity which has flagrantly violated the rules of society'.[142] 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 (Recommendation 14).[143]

8.119 Several submissions expressed the view that it is unnecessary to introduce additional court powers to dissolve a corporation and disqualify those involved in managing the corporation.[144] However, there is value in introducing the proposed powers. There is an existing court power to wind up a corporation where it is 'just and equitable to do so'.[145] However, this power is only vested in the Federal Court and state and territory Supreme Courts,[146] and is not available as part of the sentencing process.

8.120 The proposed power to disqualify individuals from managing corporations is a corollary of the dissolution power and would provide for disqualification in circumstances that are not addressed by existing court powers.[147] The purpose of this power would be to ensure that a dissolution order is not defeated by those responsible for the dissolved corporation recommencing activities through a new corporate entity.

8.121 Implementation of Recommendations 14 and 15 would nonetheless be appropriately informed by the existing statutory landscape in respect of winding up corporations and disqualifying individuals from managing corporations.

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141 *Crimes Act 1914* (Cth) s 17A(1).

142 Australian Law Reform Commission, *Sentencing: Penalties* (n 77) [292].

143 See also Clough (n 14) 23.

144 See, eg, Australian Institute of Company Directors (AICD), *Submission 37*; Australian Banking Association, *Submission 57*; Business Council of Australia, *Submission 63*.

145 *Corporations Act 2001* (Cth) s 461(1)(k).

146 Ibid s 58AA. The power is also vested in the Family Court of Australia and 'a court to which section 41 of the *Family Law Act 1975* applies because of a Proclamation made under subsection 41(2) of that Act'.

147 See, eg, *Australian Consumer Law* (n 64) s 248; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLD; *Competition and Consumer Act 2010* (Cth) s 86E; *Corporations Act 2001* (Cth) ss 206C, 206D, 206E, 206EAA, 206EAB.

8.122 The Business Council of Australia expressed concerns about how a dissolution order would operate in practice.[148] However, unless there is a principled reason for departure in respect of certain aspects, the winding up of a corporation that has been sentenced to dissolution would occur in accordance with existing provisions governing the winding up of a corporation by court order.[149]

8.123 In consultations for this Inquiry, it was suggested that the proposed power to disqualify individuals involved in managing corporations should be subject to certain restrictions that apply to existing court powers to this effect. Namely, it was suggested that the recommended power should only be exercisable where the court is satisfied that:

- disqualification is justified in the circumstances;[150] and
- the manner in which the corporation was managed was wholly or partly responsible for the corporation being dissolved in accordance with the sentencing order.[151]

8.124 The ALRC considers that incorporation of these conditions should be considered as part of the statutory drafting process of any provisions implementing Recommendation 14.

8.125 In its submission, ASIC recommended consideration of an administrative power for ASIC to disqualify persons from managing corporations in the same circumstances as Recommendation 14. This would be consistent with existing provisions that provide parallel (although not identical) disqualification powers to the court and ASIC in respect of certain circumstances.[152] The ALRC considers that the suitability of an equivalent ASIC power should be considered in conjunction with legislative amendments to implement Recommendation 14.

148 Business Council of Australia, *Submission 63*.
149 See, eg, *Corporations Act 2001* (Cth) pts 5.4B, 5.6.
150 Ibid ss 206C, 206D, 206E, 206EAA, 206EAB.
151 See ibid s 206D.
152 See, eg, ibid ss 206D, 206F, 206EAB, 206GAA.

A national debarment regime

Recommendation 15 The Australian Government, together with state and territory governments, should develop a national debarment regime.

8.126 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. Recommendation 15, which substantively mirrors Proposal 18 of the Discussion Paper, would limit the involvement of criminally convicted corporations in government work through the development of a unified debarment regime.

8.127 A debarment regime would make exclusion from government contracts a potential consequence of a corporation being convicted of a criminal offence. Debarment would be an administrative measure, rather than a court-imposed penalty.

8.128 There is international precedent for the use of debarment regimes to deter corporate crime and protect the public interest. For example, the European Union, World Bank, US, and Canada all have debarment regimes in place.[153]

8.129 It might be argued that development of an Australian 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.[154]

8.130 In reports on the implementation of the OECD Anti-Bribery Convention in Australia, the OECD Working Group on Foreign Bribery has repeatedly expressed concerns about the absence of government-wide guidelines for procuring agencies on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery.[155] The OECD Working Group has

153 See Government of Canada, *Ineligibility and Suspension Policy* (4 April 2016); *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC* [2014] OJ L 94/65; *Federal Acquisition Regulation* (US) 48 CFR § 9400 (2020); World Bank, *Procurement Regulations for Investment Project Financing Borrowers* (2nd rev ed, August 2018).

154 Department of Finance (Cth), *Commonwealth Procurement Rules* (20 April 2019).

155 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (October 2012) [149]; OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia* (December 2017) [135]. The OECD's comments were highlighted by Law Council of Australia, *Submission 27*.

recommended that the Australian Government develop such guidelines on several occasions.[156]

8.131 ASIC noted in its submission that some

> standard form agreements or forms of request for tender in use by Government require disclosure by a proposed supplier of specific information, including that it is not on the Commonwealth's list of entities to which a terrorist asset freezing applies or that it has not had a judicial decision made against it relating to employee entitlements. However, criminal convictions are not generally required in these disclosures.[157]

8.132 The development of a debarment regime would strengthen the force of criminal conviction for corporations. 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. This arguably dilutes the distinction between a criminal conviction and civil penalty for corporations. As discussed in Chapter 5, the criminal law should be reserved for regulation of the most egregious instances of corporate misconduct. The imposition of additional consequences for corporations convicted of a criminal offence is consistent with, and would reinforce, the distinction between civil penalties and criminal offences for corporations.

8.133 The prospect of debarment may represent a significant deterrent for corporations with an interest in government work.[158] 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.

8.134 Debarment of a corporation may have an impact on employees and directors who were not involved in the misconduct, as debarment would attach to the

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156 OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia* (December 2017) 58, rec 4(b); OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (October 2012) 52, rec 16(a); OECD Working Group on Bribery, *Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (2006) [181]. See also Senate Economics References Committee, Parliament of Australia, *Foreign Bribery* (March 2018) rec 20; OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention: Phase 4 Two-Year Follow-Up Report* (December 2019, 2019) 8, 20–1.

157 Australian Securities and Investments Commission (ASIC), *Submission 54*.

158 See, eg, Emmanuelle Auriol and Tina Søreide, 'An Economic Analysis of Debarment' (2017) 50 *International Review of Law and Economics* 36. Auriol and Søreide find that an appropriately designed debarment framework 'can deter both collusion and corruption, thus improving the results of public procurement'.

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 will only be pursued in circumstances where responsibility for the offending was not readily attributable to individual personnel, and the circumstances reflect an element of corporate fault. Inappropriate exclusions under a debarment regime could be further limited by providing for 'self-cleaning', which would allow a corporation to avoid exclusion if it can demonstrate it has taken sufficient steps to remedy relevant deficiencies.[159]

8.135 The majority of submissions that addressed Proposal 18 expressed supported for the development of a debarment regime.[160] The Law Council of Australia acknowledged that debarment 'is a globally recognised penalty that has a sound policy basis', but expressed concerns about 'whether such a scheme can operate in a fair, consistent and impartial manner'.[161]

Design and operation of a debarment regime in Australia

8.136 The debarment regimes that operate in overseas jurisdictions and international institutions vary in respect of a number of key features, including:

- triggers for debarment;
- the level of discretion involved in debarment;
- periods of debarment;
- whether the regime is statutory or policy-based; and
- whether debarment can be lifted in the event that a corporation can demonstrate it has remedied relevant deficiencies ('self-cleaning').[162]

8.137 Several submissions expressed views on the design and operation of a debarment regime.

8.138 Herbert Smith Freehills suggested that:

> Any development of a unified debarment regime should carefully consider which offences should be subject to that regime, including limiting the regime to those offences of particular concern in a procurement process, such as bribery.

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159 See, eg, *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC* [2014] OJ L 94/65, art 57(6).

160 Australian Shareholders' Association, *Submission 30*; Monash Transnational Criminal Law Group, *Submission 35*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Securities and Investments Commission (ASIC), *Submission 54*. Cf K Doherty, *Submission 20*; Condon Associates, *Submission 41*.

161 Law Council of Australia, *Submission 27*.

162 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; Auriol and Søreide (n 158).

> If a debarment regime is developed, it will also be important for there to be accountability and transparency in debarment decisions, guidance in relation to potential periods of debarment and an ability for debarment to be lifted if a corporation can demonstrate it has remedied the relevant deficiencies.[163]

8.139 The Law Council of Australia suggested that debarment should be limited 'to convictions in Australian courts that concern bribery, corruption or dishonesty'. [164]

8.140 The Monash Transnational Criminal Law Group noted that the interrelationship between DPAs and debarment needs to be considered carefully.[165] As discussed in Chapter 11, 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.[166] If a DPA scheme for corporations is introduced in Australia, as currently proposed by the CLACCC Bill, 'one possibility of introducing a debarment scheme is that conviction might be less likely and circumvented by the use of DPAs'.[167] However, on the other hand, the prospect of debarment may represent a significant incentive for corporations to self-report an offence, in order to access the DPA regime. The ALRC agrees that the interaction between a debarment and DPA scheme should be carefully considered to ensure cohesion between the purposes and operation of the schemes, and to provide for appropriate resolution of tensions between the public interest in limiting the involvement of criminally implicated corporations in government work, on the one hand, and the public interest in limiting the 'spillover' of corporate criminal convictions on innocent third parties, on the other.[168]

8.141 During consultations, it was also suggested that consideration should be given to how to limit the possibility of individuals circumventing debarment of their corporation by reincorporating as a new entity (phoenixing).[169]

8.142 The details of a national debarment regime in Australia should be developed through COAG. A unified debarment regime that encompasses state and territory, as well as Commonwealth procuring agencies would promote consistency and provide greater certainty for corporations in respect of the consequences of criminal misconduct.

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163 Herbert Smith Freehills, *Submission 62*.
164 Law Council of Australia, *Submission 27*.
165 Monash Transnational Criminal Law Group, *Submission 35*.
166 See [11.7].
167 Monash Transnational Criminal Law Group, *Submission 35*. See Chapter 11 for discussion of the DPA scheme proposed by the CLACCC Bill.
168 In the UK, the court has been cognisant of this tension when determining whether or not to approve a DPA. See, eg, *Serious Fraud Office v Serco Geografix Ltd* [2019] 7 WLUK 45 [27]–[32].
169 The recent enactment of the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) may assist in limiting this kind of behaviour. See discussion in Chapter 11: [11.74].

Informed sentencing

Pre-sentence reports

Recommendation 16 The *Crimes Act 1914* (Cth) should be amended to empower the court to order a pre-sentence report for a corporation convicted under Commonwealth law.

8.143 Provisions governing the use of pre-sentence reports in state and territory statutes are directed to individual offenders.[170] There is no provision for pre-sentence reports in the *Crimes Act*.

8.144 Recommendation 16 would provide the courts with the power to order a pre-sentence report for a corporation convicted of a Commonwealth offence. This recommendation substantively mirrors Proposal 19 of the Discussion Paper, and is consistent with previous recommendations by the ALRC and the NSW Law Reform Commission.[171]

8.145 The power to require pre-sentence reports in respect of corporate offenders would enable the court to obtain an independent assessment of matters relevant to imposing an appropriate sentence, such as:

- the financial circumstances of the corporation;
- the corporation's compliance culture; 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.

8.146 A pre-sentence report would be of particular utility where the court is considering a non-monetary penalty. An independent expert appointed by the court could report to the court on matters relevant to the appropriateness and design of orders under consideration. The NSW Young Lawyers suggested that Proposal 19 was 'particularly sensible' if the sentencing options for corporations convicted of Commonwealth offences are expanded in accordance with the ALRC's recommendations.[172]

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170 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 40A; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 17B, 17D; *Sentencing Act 2017* (SA) s 17; *Sentencing Act 1991* (Vic) ss 8A, 8B.

171 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 14–2; New South Wales Law Reform Commission (n 28) rec 22. See also Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (n 28) [10.40].

172 NSW Young Lawyers, *Submission 59*. See Recommendation 12 in relation to the expansion of non-monetary penalty orders for corporations.

8.147 ASIC submitted that if there is to be an ability for a court to order a pre-sentence report for corporate offenders, it should be limited to considering 'the effect of any sentence on third parties'.[173] However, the ALRC considers that this would unduly limit the court's discretion, as there may be a range of other matters that could be appropriately addressed in a pre-sentence report for a corporation, as highlighted above.

8.148 Pre-sentence reports for corporations could be prepared by an independent expert appointed by the court.[174] Appropriate persons might include management consultants, organisational psychologists, and lawyers. As observed by the NSW Young Lawyers in its submission, the type of expertise relevant to the preparation of a pre-sentence report for a corporation would vary 'depending on the likely issues to be addressed in the report and the particular sentencing options under consideration'.[175]

8.149 Submissions that addressed Proposal 19 supported pre-sentence reports for corporations,[176] with the exception of ASIC.[177] ASIC's concerns included that the benefits of pre-sentence reports for corporations would not outweigh the costs and delay associated with their preparation.[178]

8.150 The preparation of pre-sentence reports will inevitably increase the time and expense involved in sentencing corporations. However, in some cases the utility of a pre-sentence report may outweigh the expense and time involved. Equipping the court with a discretionary power would allow the court to order pre-sentence reports in appropriate cases. In cases where the court has sufficient information to sentence a corporation based on submissions by the parties, it could be reasonably expected that the court would not request a pre-sentence report.[179]

8.151 The Law Council of Australia and NSW Young Lawyers expressed concerns about the possibility of corporate offenders being required to pay for the costs of preparing pre-sentence reports.[180] However, the ALRC considers that it would be appropriate to provide the court with the discretion to order a corporation to pay the

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173 Australian Securities and Investments Commission (ASIC), *Submission 54*.

174 The NSW Young Lawyers suggested that both parties should have the opportunity to suggest suitable experts to the court: NSW Young Lawyers, *Submission 59*.

175 Ibid.

176 Law Council of Australia, *Submission 27*; Condon Associates, *Submission 41*; NSW Young Lawyers, *Submission 59*.

177 Australian Securities and Investments Commission (ASIC), *Submission 54*.

178 Ibid. Cf NSW Young Lawyers, *Submission 59*.

179 The NSW Young Lawyers submitted that 'guidance should be given to judges that it is not usually appropriate to order a pre-sentence report for a corporation in cases where the only sentencing option under consideration is a fine, and sufficient evidence relevant to the imposition of the fine … can be obtained through other means': NSW Young Lawyers, *Submission 59*. However, the ALRC considers that this may be appropriately left to judicial discretion. It would remain open to the courts to develop a Practice Note addressing matters relevant to the use of pre-sentence reports for corporations.

180 Law Council of Australia, *Submission 27*; NSW Young Lawyers, *Submission 59*.

costs of preparing a pre-sentence report. Report preparation, particularly in respect of large corporate offenders, is likely to be more complex than the preparation of pre-sentence reports for individual offenders, and would be undertaken by independent experts rather than by officers of a government agency. Court appointment of the report-writer would safeguard the report's independence.

8.152 In view of the absence of a general provision in the *Crimes Act* on pre-sentence reports, an amendment to make provision for pre-sentence reports for corporations should address procedural matters in relation to the preparation, use, and challenge of pre-sentence reports. This would be preferable to allowing state and territory provisions to govern these matters,[181] given the absence of uniformity across jurisdictions. The ALRC has previously recommended legislative amendments to provide for minimum standards for the use of pre-sentence reports in the sentencing of federal offenders.[182]

Victim impact statements

Recommendation 17 Sections 16AAA and 16AB of the *Crimes Act 1914* (Cth) should be amended to empower the court, when sentencing a corporation for a Commonwealth offence, to consider any victim impact statement made by a representative on behalf of:

a) a group of victims; or

b) a corporation that has suffered economic loss as a result of the offence.

8.153 Section 16AAA of the *Crimes Act* makes provision for victim impact statements by, or on behalf of, 'an individual who is a victim of an offence'.[183] However, victims of corporate crime may include other corporations, as well as 'victims who may be identified more readily as a group'.[184] 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.

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181 Pursuant to ss 68 and 79 of the *Judiciary Act 1903* (Cth).

182 Australian Law Reform Commission, *Same Crime, Same Time* (n 2) rec 14–2.

183 State and territory statutes similarly do not provide for victim impact statements on behalf of groups: see, eg, *Crimes (Sentencing) Act 2005* (ACT) s 49; *Sentencing Act 1995* (NT) ss 106A, 106B; *Penalties and Sentences Act 1992* (Qld) ss 179I, 179L; *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1991* (Vic) s 8K; *Sentencing Act 1995* (WA) ss 23A, 24. Cf NSW legislation provides that a 'victim impact statement may relate to more than one victim': *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3). South Australia makes provision for the preparation of 'community impact statements' by the Commissioner for Victims' Rights or the prosecutor: *Sentencing Act 2017* (SA) s 15. However, these reports appear to be rarely used.

184 New South Wales Law Reform Commission (n 28) [14.22]. For example, consumers of a particular product, or residents of an area affected by an environmental offence.

8.154 Recommendation 17, which substantively mirrors Proposal 20 of the Discussion Paper, aims to address the limitations of individual victim impact statements in circumstances where the harm resulting from an offence by a corporation is diffuse, and where the offence has negatively impacted other corporations.[185]

8.155 Provision of a victim impact statement on behalf of victims of corporate crime may assist the court in assessing the impact and nature of the offence, the extent of the corporation's efforts to compensate victims, and the suitability of making a compensation or redress facilitation order.[186] Community legal centres, consumer advocacy organisations, and other non-governmental organisations may be well placed to provide the court with information on the impact of a corporate criminal offence on a broad class of individuals.

8.156 Group victim impact statements would also afford a voice to those affected by corporate misconduct. In expressing its support for Proposal 20, CHOICE commented that:

> Not only can victim impact statements function as an effective sentencing tool, they also provide people with an official legal forum in which to outline how corporate misconduct has affected them. This can be beneficial for the affected individual as well. In short, there is no downside to including victim impact statements when sentencing a corporation.[187]

8.157 There was unanimous support for representative victim impact statements from submissions that addressed Proposal 20.[188]

8.158 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. The NSW Young Lawyers suggested, for example, that victim impact statements should be served on the defendant prior to the sentencing hearing to allow any challenge to the authority of the representative making the victim impact statement to be raised within an appropriate time limit.[189]

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185 A legislative amendment to implement Recommendation 17 could appropriately provide for victim impact statements by representatives on behalf of other types of entities, such as trusts and incorporated associations, in addition to corporations. Victorian sentencing legislation, for example, makes provision for victim impact statements on behalf of a person, or body, that has suffered injury, loss or damage as a direct result of the offence: *Sentencing Act 1991* (Vic) ss 3, 8K(3)(c).

186 See Recommendation 12 and *Crimes Act 1914* (Cth) s 21B.

187 CHOICE, *Submission 29*.

188 Law Council of Australia, *Submission 27*; CHOICE, *Submission 29*; Condon Associates, *Submission 41*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Securities and Investments Commission (ASIC), *Submission 54*; NSW Young Lawyers, *Submission 59*.

189 NSW Young Lawyers, *Submission 59*. Section 16AAA(1)(c)(ii) of the *Crimes Act* currently requires a victim impact statement to be given to both parties at a reasonable time before the sentencing hearing.

8.159 CHOICE noted that formal appointment of a representative by victims will not be practicable in all cases and suggested that any provisions allowing for representative victim impact statements should be 'broadly framed, to allow the Court to appoint a representative … that has expertise to speak to the impact on victims'.[190]

8.160 Court practice notes or rules would likely be of benefit in guiding the use of representative victim impact statements.[191]

8.161 In consultations for this Inquiry it was suggested that consideration should be given to extending the availability of representative victim impact statements as contemplated in Recommendation 17 to sentencing proceedings for offenders that are not corporations. For example, a statement on behalf of a group of victims may be of utility in sentencing proceedings for an individual in respect of their role in corporate misconduct that had a diffuse impact.

Areas for further consideration

Maximum penalties

8.162 Corporations convicted of a Commonwealth offence are generally subject to a maximum pecuniary penalty equal to five times the maximum penalty applicable to individuals.[192] However, this general rule may be displaced by the statute that creates the specific offence. A number of statutes specifically provide for the maximum penalty applicable to body corporates, in addition to the maximum penalty for individuals.

8.163 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.[193]

8.164 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

190 CHOICE, *Submission 29*.

191 See also NSW Young Lawyers, *Submission 59*. As noted above in respect of non-monetary penalties, it would be desirable for there to be harmonised Practice Notes on these issues across all the courts involved in sentencing corporations for Commonwealth offences.

192 *Crimes Act 1914* (Cth) s 4B(3).

193 See, eg, *Australian Consumer Law* (n 64) s 151(5); *Australian Securities and Investments Commission Act 2001* (Cth) s 93E(3); *Competition and Consumer Act 2010* (Cth) ss 45AF(3), 45AG(3); *Corporations Act 2001* (Cth) s 1311C(3); *National Consumer Credit Protection Act 2009* (Cth) s 288D(3).

annual turnover or the benefits gained from the offending conduct go some way to addressing this issue by providing a maximum penalty that is tailored to the financial circumstances of the offender and the offending conduct. However, there is some 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.[194]

8.165 In the UK there is no maximum limit for fines for corporate offenders convicted of certain offences. Instead, there are mandatory guidelines, prepared by the Sentencing Council, which detail how a fine should be calculated.[195] The Canadian Criminal Code also provides that the amount of fines for corporations convicted of indictable offences is 'in the discretion of the court', except where otherwise provided by law.[196]

8.166 The ALRC invited submissions on:

- whether there are any Commonwealth offences for which the maximum penalty for corporations requires review (Question F); and
- whether the maximum penalty for certain offences should be removed for corporations (Question G).

8.167 There were limited submissions on Question F. Submissions from ASIC and the Australian Banking Association referred to the recent review of penalties by the ASIC Enforcement Review Taskforce,[197] and consequential amendments to penalty levels in ASIC-administered statutes.[198] These amendments included increases in the maximum penalties for a range of offences, as well as providing for maximum penalties based on turnover or benefit/detriment.[199]

8.168 There was, however, suggestion in consultations that there may be utility in a review of maximum penalties for corporations under taxation legislation. As noted in the Discussion Paper, in relation to prescribed taxation offences, the maximum penalty has not been updated since 1984.[200] This maximum penalty is expressed as

194 See Beaton-Wells and Fisse (n 32) 447–453. See also consideration of relevant provisions in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [2017] FCA 876 [185]–[186]; *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243, [2018] FCAFC 73 [169]–[207].

195 Sentencing Council (UK), *Corporate Offenders: Fraud, Bribery and Money Laundering* (Definitive Guideline, 2014) <www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-offenders-fraud-bribery-and-money-laundering/>; Sentencing Council (UK), *Corporate Manslaughter* (Definitive Guideline, 2016) <www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/>.

196 *Criminal Code 1985* (Canada) s 735(1)(a).

197 Australian Securities and Investments Commission (ASIC), *Submission 54*; Australian Banking Association, *Submission 57*, citing Australian Government, *ASIC Enforcement Review Taskforce Report* (2017) ch 7.

198 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

199 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 93E; *Corporations Act 2001* (Cth) s 1311C; *National Consumer Credit Protection Act 2009* (Cth) s 288D.

200 *Taxation Administration Act 1953* (Cth) s 8ZJ(9)(b); as introduced by the *Taxation Laws Amendment Act*

a fixed dollar amount, rather than with reference to penalty units.[201] The *Taxation Administration Act 1953* (Cth) also provides for a limited application of the general rule that the maximum penalty for natural persons is multiplied by five for corporate offenders.[202]

8.169 Although there was some support in consultations for consideration of removal of maximum penalties for corporations, there was no support for this option in submissions.[203]

8.170 Removal of maximum penalties for corporations, and the provision of sentencing guidelines, for appropriate Commonwealth 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.

8.171 However, maximum penalties offer an important indication of the relative seriousness of different offences, reflecting Parliament's perception of community expectations. The ASIC Enforcement Review Taskforce considered that 'a nominal maximum provides valuable guidance to courts faced with the task of imposing a penalty appropriate to the case before them'.[204]

8.172 The feasibility of introducing appropriate guidelines for Australian courts in accordance with the UK approach warrants further consideration before removal of maximum penalties for corporations is pursued.[205]

8.173 The ALRC does not recommend consideration of removal of maximum penalties for corporations at this time. However, the Australian Government should consider the desirability of expanding the use of provisions that allow for calculation

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1984 (Cth). The 'prescribed amount' for corporations is $25,000.

201 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.

202 *Taxation Administration Act 1953* (Cth) s 8ZF, which excludes taxation offences that are not punishable by imprisonment if committed by a natural person. This section was also inserted by the *Taxation Laws Amendment Act 1984* (Cth) and has not been amended.

203 See Law Council of Australia, *Submission 27*; Australian Financial Markets Association, *Submission 48*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Commonwealth Director of Public Prosecutions (CDPP), *Submission 56*; Australian Banking Association, *Submission 57*.

204 Australian Government, *ASIC Enforcement Review: Strengthening Penalties for Corporate and Financial Sector Misconduct* (Positions Paper 7, 2017) [17].

205 Australia does not have a Commonwealth body equivalent to the Sentencing Council in the UK. Moreover, careful drafting and consideration of the legal basis for the proposed guidelines would be necessary to ensure the guidelines do not infringe on the exercise of judicial discretion in a constitutionally impermissible, or practically undesirable, manner: Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [10.93].

of a maximum penalty for corporations with reference to benefit/detriment or annual turnover, following a review of recent amendments to this effect.[206]

Compensating victims of corporate crime

8.174 The ALRC asked whether reforms are needed to better facilitate the compensation of victims of corporate misconduct (Question H). As noted above, on the basis of feedback to this question the ALRC recommends the introduction of a court power to make 'redress facilitation orders'.[207] These orders are intended to fill a gap in court's powers to facilitate compensation of victims of corporate crime in circumstances where a compensation order would be inappropriate because, for example, the identity of the victims and the quantum of their loss are not readily identifiable.

8.175 However, there is also scope for reform to court powers to make compensation orders.

8.176 There are currently limited statutory provisions for the award of compensation to victims in respect of corporate crime or civil penalty provision contraventions.

8.177 Section 21B(1)(d) of the *Crimes Act* empowers the court to order that a person who has been convicted of a Commonwealth 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.[208]

8.178 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,[209] while others also cover offences.[210]

8.179 Many of these provisions make the availability of compensation orders contingent on the application of the regulator, prosecutor, or the persons seeking

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206 The ALRC has previously expressed reservations about 'turnover fines' on the basis that 'it is undesirable for the quantum of a financial penalty to be linked formulaically to the financial circumstances of the offender': Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [30.24]. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) [26.118]. However, in the context of this Inquiry, the ALRC supports consideration of the use of alternative maximum penalties to overcome the limitations of fixed maximum penalties for corporations.

207 Recommendation 12(d).

208 Reparation is a broad term used to describe any attempt to make amends for wrong or injury. It encompasses compensation, as well as restitution. See Australian Law Reform Commission, *Same Crime, Same Time* (n 2) [8.3].

209 *Corporations Act 2001* (Cth) ss 1317H, 1317HA, 1317HB, 1317HC, 1317HE.

210 *Australian Consumer Law* (n 64) ss 237, 239; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GM(2)(c); *Competition and Consumer Act 2010* (Cth) s 87(1A)(c); *Privacy Act 1988* (Cth) ss 25, 25A.

compensation,[211] although some are available on the court's own initiative.[212] Some provisions allow applications for compensation to be made independently of enforcement proceedings,[213] while others are contingent on conviction or the making of a civil penalty order.[214]

8.180 Some Acts also give priority to 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.[215]

8.181 Compensation may also be secured by regulators as part of negotiated settlements in respect of alleged breaches of the law ('enforceable undertakings').[216] 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.[217]

8.182 Alternative mechanisms for obtaining compensation include industry-based dispute resolution schemes,[218] and class action proceedings.

8.183 In the Discussion Paper, the ALRC noted that 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. Such a power of general application already exists in the criminal context (*Crimes Act* s 21B). However, there is no equivalent power of general application in respect of civil penalty contraventions. In the absence of such a power, there is limited scope for consolidation of statute-specific provisions on compensation orders, which, as noted above, relate either exclusively to civil penalty contraventions, or to both criminal offences and civil penalty contraventions.

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211 *Australian Consumer Law* (n 64) ss 237, 239; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GM(2)(c); *Competition and Consumer Act 2010* (Cth) s 87(1A)(c); *Privacy Act 1988* (Cth) ss 25, 25A.

212 *Corporations Act 2001* (Cth) ss 1317H, 1317HA, 1317HB, 1317HC, 1317HE.

213 *Australian Consumer Law* (n 64) s 242.

214 *Privacy Act 1988* (Cth) ss 25, 25A.

215 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GCA; *Competition and Consumer Act 2010* (Cth) s 79B; *Corporations Act 2001* (Cth) s 1317QF.

216 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA; *Competition and Consumer Act 2010* (Cth) s 87B; *Telecommunications Act 1997* (Cth) s 572B.

217 Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (n 103) [8.17].

218 See ibid [8.11]–[8.14].

8.184 The Australian Government should consider introducing a general court power to make compensation orders in respect of civil penalty contraventions. This would facilitate the consolidation of statute-specific provisions, and address gaps in the availability of compensation orders. ASIC observed in its submission that there

> are currently a number of significant gaps in the coverage afforded by the compensation order provisions under the Corporations Act, as compensation orders are restricted to breaches of specified provisions, breaches of 'corporation/scheme civil penalty provisions', and breaches of 'financial services civil penalty provisions', but not all civil penalty provisions in respect of which loss or damage can result from contravention are captured by these categories.[219]

8.185 The Law Council of Australia also supported reforms to avoid duplication and inconsistencies across federal legislation with respect to court powers to make orders for reparation.[220]

8.186 The retention of statute-specific provisions would be appropriate in some circumstances — namely, where the provisions govern circumstances beyond the scope of the general power.[221]

8.187 Consolidation of existing statutory provisions governing compensation orders would necessitate the introduction of a general court power that covers contraventions by both individuals and corporations. A power of this nature could be located in the *Regulatory Powers Act* or in a Regulatory Contraventions Statute.[222]

Status of penalties in corporate insolvency

8.188 The status of penalties in corporate insolvency was raised by the Association of Independent Insolvency Practitioners in its submission to this Inquiry.[223] In accordance with s 553B of the *Corporations Act,* criminal penalties are generally not provable debts in insolvency and will therefore be extinguished if the insolvency results in the winding up and deregistration of the corporation.[224] There is nonetheless precedent for the imposition of penalties against insolvent corporations for the purposes of denunciation and general deterrence.[225]

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219 Australian Securities and Investments Commission (ASIC), *Submission 54* (citations omitted).

220 Law Council of Australia, *Submission 27*.

221 For example, section 239 of the *Australian Consumer Law* (n 64), which governs compensation of loss or damage suffered by a class of persons who are 'non-party consumers'.

222 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) rec 6–7.

223 Association of Independent Insolvency Practitioners, *Submission 49*.

224 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) [32.29].

225 See, eg, *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) (No 3)* (2017) ATPR ¶42-549, 42,211-25, [2017] FCA 1018 [78]; *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544 [31]–[36]; *Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company*

8.189 The ALRC has previously recommended that both criminal and civil penalties should be provable in corporate insolvency proceedings[226] and suggests that this recommendation should be revisited.[227]

8.190 In addition, consideration should be given to whether penalties should be given standing priority, subject to court discretion, over the claims of owners and shareholders of the corporation, and entities associated with the corporation. The ALRC noted in *Principled Regulation* that:

> Although there is an argument that bona fide creditors should not be disadvantaged by the insolvent company's illegal actions, some creditors of an insolvent company could well be the employees or officers responsible for the offence (particularly with small companies).[228]

8.191 It would generally be appropriate for penalties to rank behind genuine third-party creditors. Potential injustice to innocent third parties could also be mitigated by court discretion. For example, in some circumstances, the court might consider it appropriate to indicate the penalty that would have been imposed without awarding the penalty, in view of the impact on creditors.

8.192 In *Principled Regulation*, the ALRC did not make any recommendations on the priority of penalties in corporate insolvency proceedings, noting that this was an issue that warrants further detailed consideration following a comprehensive review of the law of insolvency, which fell outside the scope of the Inquiry.[229] The ALRC reaffirms this assessment.

Notification of regulators

8.193 The Australian Charities and Not-for-profit Commission ('ACNC') observed in its submission that it may be of benefit to require notification to the ACNC when corporate charities and their directors and/or responsible persons are found to have committed a criminal offence.[230] The ACNC submitted that this 'would allow the

Arrangement) (No 4) [2020] FCA 23 [150].

226 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) rec 32–2(a). At the time the *Principled Regulation* report was written it was assumed that civil penalties were not captured by s 553B(2) of the *Corporations Act 2001* (Cth), but there has been subsequent authority to the contrary: see, eg, *Mathers v Commonwealth* (2004) 134 FCR 135, [2004] FCA 217; *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in Liq) (No 5)* [2019] FCA 1544 [31].

227 Recommendation 32–2 also relates to the status of penalties in personal bankruptcy proceedings. The ALRC's comments in the context of this Inquiry are confined to the aspect of the recommendation that relates to corporate insolvency proceedings.

228 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (n 67) [32.164].

229 Ibid [32.184].

230 Australian Charities and Not-for-profits Commission, *Submission 52*.

Commissioner to assess the risk of the charity contravening the governance standards and/or external conduct standards'.[231]

8.194 The ALRC considers that it would be desirable to develop an administrative mechanism to ensure that interested regulators, such as the ACNC for corporate charities, are notified of the commencement of civil penalty and/or criminal proceedings against a corporation. This would assist regulators in fulfilling their functions and facilitate coordination of regulatory actions where appropriate. Further consideration should be given to how to appropriately facilitate this.[232]

231 Ibid. See *Australian Charities and Not-for-profits Commission Act 2012* (Cth) pt 3-1; *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) divs 45, 50.

232 For example, by making provision for service of process on relevant regulators.

9. Individual Liability Mechanisms

Contents

Introduction

9.1 In this chapter, the ALRC considers the liability of individuals, and in particular directors and senior managers, in relation to corporate misconduct.[1] When corporations commit a crime, individuals who have failed in their responsibilities of oversight and management should be held accountable. Due to recent judicial and policy developments in this area, the ALRC does not recommend specific changes to the law, but instead recommends a wide-ranging review once proposed new legislation aimed at enhancing accountability in the financial services sector has been enacted and operational for a reasonable period.

1 Throughout this chapter the phrase 'directors and senior managers' is used to refer to individuals who may be appropriate subjects for imposition of liability related to their management function. The term 'senior managers' is used to include at least 'officers' as defined by s 9 of the *Corporations Act*, but should be distinguished from the technical meaning of 'senior managers' set out in the same section (which is essentially the same as the definition of 'officer', but excludes a director and secretary of a corporation). It is also intended, for the avoidance of doubt, to include senior executives below the C-suite who direct and control significant aspects of a corporation's business on a day-to-day basis.

9.2 This chapter relates to the Inquiry's Terms of Reference, which asked the ALRC to consider 'mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct'. Although the focus of the overall Inquiry is criminal law, rather than civil liability, in this chapter the ALRC considers both criminal responsibility and civil penalty liability of individuals,[2] in relation to both criminal offences and civil contraventions committed by corporations. This is because for much of the conduct that is regulated in relation to corporations, regulators may choose between civil penalty and criminal enforcement options. In addition, many of the recommendations made in this report are interdependent, and implementation of Recommendation 2 in particular may have the effect of changing whether particular conduct is dealt with under criminal law or by way of civil penalty proceedings. The ALRC has not included consideration of other mechanisms to hold individuals accountable (as opposed to legally liable) such as administrative banning orders, withholding or clawback of remuneration, and shareholder action.

9.3 The first part of this chapter sets out principles underlying the importance of pursuing individual liability of directors and senior managers, and the limitations of the criminal law in this regard. It suggests that recognition of corporate criminal responsibility as a means of conceptualising and addressing corporate fault may focus attention on the role of directors and senior managers in corporate misconduct, reframing individual liability in more appropriate and effective ways. It also briefly considers the appropriate subjects of liability, concluding that — while the responsibilities of directors and C-suite executives are well-established — liability should generally reflect the appropriate function of the individual, and clearly extend to senior executives below the C-suite who direct and control significant aspects of a corporation's business on a day-to-day basis.

9.4 The chapter then sets out the modes of liability available to hold directors and senior managers criminally responsible or liable to civil penalty under the current law. It considers the operation and effectiveness of these modes of liability in relation to corporate misconduct, and their application within specific regimes providing for accountability of particular individuals within corporations such as the Banking Executive Accountability Regime ('BEAR'). The ALRC examines how accessorial liability, with its focus on criminal notions of fault, has been augmented by other approaches to liability, tailored to the expected role of management in particular regulatory contexts.

2 This is particularly important because civil penalty liability is commonly used to hold directors and senior managers liable in relation to corporate criminal conduct (such as through the use of directors' and officers' duties).

9.5 Next it examines the perception, raised in consultations, that directors and senior managers in very large, complex corporations are less likely to be held liable in relation to corporate misconduct than boards and management of other corporations. It discusses data collected by the ALRC based on reports of proceedings brought under the legislation administered and enforced by ASIC and the ACCC over a five-year period. Analysis of this data provides evidence of an accountability gap, particularly in light of evidence of misconduct in the banking sector and other industries with very large corporate actors. It then examines how the diffusion of responsibility in such corporations can make internal and external accountability particularly difficult, and highlights proposed law reform through the Financial Accountability Regime, aimed to address some of these issues in the financial services sector.

9.6 Finally, the chapter examines the Financial Accountability Regime. In light of this proposed legislation and recent judicial clarification on the scope of officer duties, the ALRC does not consider it appropriate to recommend any specific law reform at the present moment. However, it offers some observations on potential further developments in this area. In addition, as the ALRC has concluded that there is reason to believe there is a gap in accountability in relation to individual liability of directors and senior managers in very large, complex organisations, it recommends that a wide-ranging review of the effectiveness of mechanisms imposing liability on directors and senior managers for corporate misconduct be commissioned within six years from the date of this Report.

Corporate misconduct: role of individual liability

9.7 Chapter 4 set out how attributing criminal responsibility to a corporate entity is important to accurately identify and apportion accountability for wrongdoing that is organisational in nature.[3] However, this should not preclude individuals also being held liable for wrongdoing in a corporate context.[4] As one submission to the Inquiry noted, corporate responsibility

> must operate as an improvement over simply holding individuals responsible; it must not weaken the familiar expressive and practical force associated with holding an individual responsible for something they have done. If corporate liability is seen as a proxy for individual liability, then there is a risk it is perceived as a way for individuals to avoid liability in the corporate context.[5]

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3 See in particular [4.4]–[4.19].

4 Concerning accessorial liability see the decision of the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121, 128, [1988] HCA 65: 'the fundamental purpose of the … legislation — to ensure the protection of the public — would be seriously undermined if the hands and brains of a company were not answerable personally for breaches of the Code which they themselves have perpetrated'. For a discussion of the debate between individualism (supporting reliance on individual criminal liability only) and corporate criminal accountability see Brent Fisse and John Braithwaite, 'The Allocation Of Responsibility For Corporate Crime: Individualism, Collectivism And Accountability' (1988) 11 *Sydney Law Review* 468, 473–5.

5 Dr L Price, *Submission 33,* citing Manuel Velasquez, 'Debunking Corporate Moral Responsibility' (2003)

Pursuing individual liability aims to ensure that '[h]uman agents of prohibited conduct will … face the legal ramifications of their acts and will not be able to abuse or hide behind the corporate structure'.[6]

9.8 In the corporate context, individuals may clearly be held criminally responsible for crimes that they personally commit or participate in with the requisite level of fault.[7] However, to what extent should directors and senior managers be held liable for their role in offences or contraventions by the corporation that they do not take an active part in?

9.9 In relation to criminal responsibility of individual directors and senior managers, significant international literature exists on a 'responsibility gap' or 'accountability gap' involving large, complex corporations.[8] Diffused responsibility within such organisations means that it can be difficult to locate in one individual the necessary knowledge and intention to reach traditional criminal standards of fault in relation to conduct they have not committed personally.[9] Even when senior corporate officers do hold the necessary knowledge and intention to be morally responsible for corporate crimes so as to fall within ordinary principles of criminal law, this may be very difficult to prove.[10] Tied to this, when

> directors and senior officers may be responsible for creating, or failing to monitor the corporation's culture, this will usually fall outside established principles of criminal liability, which requires *mens rea* and has limited applicability to omissions.[11]

9.10 However, recognition of corporate criminal responsibility as a means of conceptualising and addressing corporate fault may focus attention on the role of directors and senior managers in corporate misconduct, reframing individual liability in more appropriate and effective ways. As Professor Hill observes

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13 *Business Ethics Quarterly* 531, 543.

6 Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) [8.6]. See further Fisse and Braithwaite (n 4); Stefan HC Lo, *In Search of Corporate Accountability: Liabilities of Corporate Participants* (Cambridge Scholars, 2015) 2; Simon Chesterman, 'The Corporate Veil, Crime and Punishment; *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch*' (1994) 19 *Melbourne University Law Review* 1064, 1065.

7 See [9.26]–[9.33], [9.60]–[9.82].

8 See, eg, ibid; Gregory Gilchrist, 'Individual Accountability for Corporate Crime' (2018) 34(2) *Georgia State University Law Review* 335 (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 I: Summary, and Conclusions and Recommendations* (2013) 9.

9 See further [9.149]–[9.153].

10 Lim Wen Ts'ai, 'Corporations and the Devil's Dictionary: The Problem of Individual Responsibility for Corporate Crimes' (1990) 12 *Sydney Law Review* 311, 323–5.

11 Jennifer G Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (Law Working Paper No 431/2018, European Corporate Governance Institute, December 2018) 19–20 (citations omitted).

> entity criminal liability can address issues involving relative blameworthiness of individuals within the firm, in situations where the misconduct is committed by low to mid-level employees, but is generated by unrealistic goal directives from senior management.[12]

9.11 Recognition of the role directors and senior managers play in creating and maintaining corporate cultures conducive to wrongdoing highlights the potential blameworthiness of such individuals in relation to ensuing misconduct, potentially justifying a different approach to mechanisms apportioning liability to them.[13] This is especially the case in sectors with a risk of public harm, where liability based on a lesser degree of responsibility such as recklessness or negligence may be justified.[14] The imposition of direct duties, and extended forms of accessorial liability, are ways in which this is commonly done. Depending on the context, these provisions may impose civil penalty liability or (often with an additional or stricter fault element) criminal responsibility.

9.12 Imposition of liability on directors and senior managers also has an instrumental function. It is argued that such liability plays a key role in ensuring corporate compliance.[15] Without individual liability, there may be a culture of breaching the law and paying the penalty, seen as a cost of doing business.[16] As Professors Fisse and Braithwaite explain:

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12 Ibid 12. Similarly, a focus on entity criminal responsibility can 'obviate the associated danger of organizational "scapegoating" to protect senior managers': 12, citing Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 219 (discussing the possible *ex ante* appointment of 'vice-presidents responsible for going to jail').

13 Including the imposition of specific duties of care and extensions of liability beyond ordinary principles of accessorial liability. In considering corporate criminal responsibility, Fisse and Braithwaite note how the role or capacity of an individual may lead to higher standards of responsibility: '[a]ny culture confers certain types of responsibilities on certain kinds of actors. … Just as fathers and doctors can be held to different and higher standards of responsibility by virtue of role or capacity, so it is possible for corporations to be held to different and higher standards of responsibility than individuals because of their role or capacity as organisations': Fisse and Braithwaite (n 4) 485. On the creation of poor compliance cultures within large organisations by senior executives see, eg, House of Representatives Standing Committee on Economics, Parliament of Australia, *Review of the Four Major Banks: First Report* (2016) 14–15.

14 Lim Wen Ts'ai (n 10) 317. Discussing the imposition of criminal liability (and writing before the widespread introduction of civil penalty proceedings to regulate corporate conduct in Australia), Lim Wen Ts'ai suggests that 'such departures from standards of moral responsibility are to be avoided whenever possible'. He proposed a positive duty to supervise to prevent corporate offences and ensure that 'not only direct actors are held liable but also their superiors, who have hitherto escaped liability even when they were morally responsible': 345.

15 Michelle Welsh and Helen Anderson, 'Directors' Personal Liability for Corporate Fault: An Alternative Model' (2005) 26 *Adelaide Law Review* 299, 301; Chesterman (n 6) 1065. See generally G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 1, 1. See also Australian Securities and Investments Commission, *Penalties for Corporate Wrongdoing* (Report 387, 2014) 9.

16 Abe Herzberg and Helen Anderson, 'Stepping Stones—From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 *Federal Law Review* 181, 192.

> The impact of enforcement can easily stop with a corporate pay-out of a fine or monetary penalty ... because that is the cheapest or most self-protective course for a corporate defendant to adopt.[17]

9.13 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'.[18] In their view, the use of civil penalties against corporate officers should be considered when the objective of regulation is to ensure compliance.[19]

9.14 Key corporate regulators have also recently stressed the deterrent aspect of enforcing individual liability of boards and senior management.[20] According to ASIC Commissioner Sean Hughes:

> How is effective deterrence achieved, where the directors and officers of a corporation are insulated from the impact of any fines or behavioural requirements imposed upon the corporation, where it is found to have contravened the law? Implicit in the imposition of any such penalties is the anterior fact that an individual, or group of individuals holding senior positions of importance in the company, caused that company to act in breach of the law. Yet those officers are hardly deterred where the shareholders suffer, because the imposed penalties diminish the profitability of the company and thus the dividend it can pay to shareholders in any given year.
>
> The evidence to the Royal Commission raises the spectre of a 'cost of doing business' attitude towards financial penalties and enforceable undertakings imposed on companies. Such an attitude cannot be tolerated, and ASIC's enforcement approach needs to deter any such unacceptable attitude. When appropriate, proceeding against **both** the corporation and the individual corporate officers responsible for the contravening actions of the company should be our primary objective.[21]

9.15 There are significant practical reasons to support the pursuit of individual liability alongside corporate criminal responsibility. 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.[22] 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,

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17 Fisse and Braithwaite (n 4) 469.

18 Welsh and Anderson (n 15) 301. See also Lo (n 6) 2–3.

19 Welsh and Anderson (n 15) 300.

20 See Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, 30 August 2019) <www.asic.gov.au/about-asic/news-centre/speeches>; Australian Competition and Consumer Commission (ACCC), *Submission 25* (concerning cartel conduct).

21 Hughes (n 20) 4 (emphasis in original).

22 See generally Chapter 8.

or consumers.[23] This 'spillover' effect has been criticised previously by the ALRC and others.[24] Related to this, it is relatively common in enforcement proceedings that corporations are insolvent or (as in the case of many corporate trustees) do not hold assets in their own right, and therefore cannot satisfy any judgment made against them.[25]

9.16 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.[26] In the context of a different inquiry in 2016, the ALRC expressed the view that

> imposing personal liability for corporate fault may encourage greater transparency in management process, and improve accountability and performance standards of corporate officers.[27]

9.17 Submissions to this Inquiry from a range of stakeholders also reflected support for liability of boards and senior management in appropriate circumstances.[28] Individual accountability of those directing and profiting from corporations was described as important to the rule of law, to meeting community expectations, and to improving corporate culture.[29] Some agreed that individual liability had an important role to play in improving corporate compliance or deterring misconduct.[30] However, a number of submissions suggested that liability for corporate crimes and contraventions should only be attributed to individuals outside the ordinary principles of accessorial liability in clearly defined circumstances, with appropriate justification.[31]

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23 A point made by the Australian Shareholders' Association, *Submission 30*.

24 Australian Law Reform Commission (n 6) 311; Chesterman (n 6) 1070; Acquaah-Gaisie (n 15) 146–7.

25 As to corporate trustees in the superannuation context see [5.58]–[5.59]. See further Herzberg and Anderson (n 16) 190.

26 Australian Law Reform Commission (n 6) [8.6].

27 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, 2016) [9.84].

28 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Australian Shareholders' Association, *Submission 30*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*; Australian Securities and Investments Commission (ASIC), *Submission 54*; BHP, *Submission 58*; NSW Young Lawyers, *Submission 59*; Herbert Smith Freehills, *Submission 62*.

29 Professor P Hanrahan, *Submission 38*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*.

30 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Australian Shareholders' Association, *Submission 30*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*.

31 Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*.

The appropriate subjects of managerial responsibility

9.18 As the discussion following will show, directors and 'officers' (or 'executive officers') of a corporation are the usual subjects of provisions extending liability in relation to corporate misconduct to individuals by reference to their role within a corporation. In the Discussion Paper, the ALRC asked for submissions on the appropriate subjects of a general extension of liability to management for a corporation's crime.[32]

9.19 Responses received supported the view put forward in the Discussion Paper that directors were already exposed to significant liability given their oversight role and may not be the most appropriate targets of any reform efforts.[33] Many of the same submissions also supported clarification and strengthening of the liability of senior executives who have a significant management role in relation to the impugned conduct. This included senior executives 'who direct and control aspects of a corporation's business on a daily basis'.[34] Legal issues around whether such individuals already fall within the definition of 'officer' in the *Corporations Act* are discussed below at [9.42]–[9.49].

Role of indemnities and insurance

9.20 When considering regulatory approaches to director and senior manager liability for corporate misconduct, the role of corporate indemnification and availability of directors' and officers' insurance (known as 'D&O insurance') also needs to be considered. This is because if a director or officer can be indemnified or insured against a risk of personal liability, this may impact on the potential deterrent effect as regards the individual. Imposition of additional forms of liability on individual directors and officers may also increase the potential compliance costs for a company.[35]

32 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [7.98]–[7.116].

33 Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; BHP, *Submission 58*; NSW Young Lawyers, *Submission 59*.

34 Australian Securities and Investments Commission (ASIC), *Submission 54*. See also BHP, *Submission 58*; NSW Young Lawyers, *Submission 59*.

35 A point noted in a number of submissions: Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Insurance Council of Australia, *Submission 55*; Australian Banking Association, *Submission 57*; Business Council of Australia, *Submission 63*.

9.21 The *Corporations Act* imposes limits on the types of liability for which corporations may indemnify their officers, including prohibiting indemnities for pecuniary penalty orders or compensation orders flowing from breach of civil penalty provisions.[36] Directors' and officers' insurance can usually be obtained to cover pecuniary penalty orders. However, policies will generally exclude cover for liability arising from conduct 'including fraud, dishonesty, criminal act, deliberate breach of legislation, insider trading and gaining an improper personal advantage'.[37] Exceptions will normally be made to such exclusions when the insured person 'had no direct or personal involvement in, or knowledge of, the matters upon which the operation of the exclusions is based'.[38] This means that risks arising from some strict liability offences applying to directors and officers are insurable.

Corporate misconduct: modes of individual liability

9.22 Under existing law, individual directors, managers and employees may be held criminally responsible or liable to civil penalty in relation to corporate misconduct through a number of different modes of liability under both the common law and statute. Statutes often impose two or three different forms of liability in relation to different offences or contraventions.[39]

9.23 Although these modes of liability have been described and grouped together in different ways,[40] for the purposes of this Report the ALRC adopts the following structure (with each type described in further detail below).

36 *Corporations Act 2001* (Cth) s 199A(2). Section 199A(3) also prohibits indemnification for legal costs arising out of defending proceedings including civil penalty and criminal proceedings.

37 LexisNexis, *Halsbury's Laws of Australia*, vol 15 (at 10 November 2017) 235 Insurance, 'E Special Liability Policies — Liability Insurance' [235–1890].

38 Ibid (citations omitted).

39 See, eg, *Corporations Act 2001* (Cth) ss 180 (direct), 188 (deemed), 1317E(4) (accessorial).

40 In its *Principled Regulation* report, the ALRC previously identified three key forms of individual liability for corporate misconduct: concurrent liability, accessorial liability, and managerial liability: Australian Law Reform Commission (n 6) [8.13]. Karen Wheelwright delineated five categories of individual liability for corporate conduct: lifting the corporate veil by statute; accessorial (participatory) liability; deemed liability; responsible officer liability; and personal (primary) liability: Karen Wheelwright, 'Australia' in Helen Anderson (ed), *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (Wolters Kluwer, 2008) 45, 53–5.

Table 9-1: ALRC classification of modes of liability

Mode of liability	Primary (direct) liability *Does not require separate finding of corporate crime or contravention*	**Extensions of liability** *Require finding of corporate crime or contravention as first step*	
		Accessorial liability *Requires knowledge of the essential facts and intention to participate in the crime or contravention*	**Extended management liability** *Derivative liability of management beyond ordinary principles of accessorial liability*
General	• Liability for active commission of an offence or contravention (liability may or may not be concurrent with the corporation)	• *Criminal Code* complicity (and common law and statutory equivalents as applicable in the states and territories) • Provisions extending civil penalty liability to those 'involved in' contraventions • Other specific criminal and civil statutory provisions based on criminal complicity liability principles	
Role-related	• Statutory directors' and officers' duties (including using the stepping stone approach) • Other duty-based offences and contraventions	• Specific role-related statutory accessorial liability provisions	• Statutory deemed liability provisions (including designated officer liability provisions) • Statutory failure to prevent provisions

Note: *Responsible officer / accountability mapping regimes (eg. the Banking Executive Accountability Regime (see [9.110]) may include one mode, or a combination of modes, of liability*

9.24 Each of the entries in Table 9-1 is a mechanism 'which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct' as

described in the Terms of Reference. The structure in Table 9-1 has been chosen for two reasons. First, it makes the distinction between:

- Extensions of liability: mechanisms that require proof of a corporate crime or contravention before a finding of liability of the individual. With the exception of failure to prevent provisions, these extensions of liability *attribute* corporate liability, including criminal responsibility, to an individual.
- Primary (direct) liability: mechanisms that do not require proof of a corporate crime or contravention. These are other, related, 'mechanisms which could be used to hold individuals … liable for corporate misconduct'.

9.25 Second, it separates out 'extended management liability' as a mode of liability that has been subject to particular scrutiny and has been the subject of political agreement.[41] These distinctions assist to highlight particular aspects of different modes of liability that may impact on the appropriate application and scope of provisions and their effectiveness, as further discussed below.

Primary (direct) liability

9.26 Individuals, including senior corporate officers, may be held liable for personal wrongdoing in a corporate context in equity, under common law, or through statutory criminal and civil provisions. For example, directors may be liable for breach of common law duties, in equity for breach of fiduciary obligations, or for direct commission of criminal offences.[42]

9.27 Criminal responsibility or liability to civil penalty may arise for an offence or contravention an individual commits for purely personal gain (such as theft) that cannot be attributed to the corporation, or for an offence or contravention related to corporate misconduct. In light of the Terms of Reference, this part will consider the latter — when corporate, as opposed to purely private, misconduct is involved.

9.28 Where corporate misconduct is involved, an individual may be held individually liable (i) for a crime or contravention they actively commit personally (in some cases that liability may be concurrent with the corporation's liability for the same offence or contravention, in others it may be otherwise related to corporate wrongdoing), or (ii) for breach of statutory duty, usually imposed on individuals in particular roles.

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41 Culminating in the Council of Australian Governments on Principles for the Imposition of Personal Liability for Criminal Fault ('*COAG Principles*'), see further [9.92]–[9.100].

42 In limited circumstances the corporate veil may also be lifted to hold them liable for corporate torts or breaches of contract. See further Wheelwright (n 40) 50–2; The Hon Chief Justice TF Bathurst AC and Naomi Wootton, 'Directors' and Officers' Duties in the Age of Regulation' in Pamela Hanrahan and the Hon Justice Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in Honour of Professor Robert Baxt AO* (LexisNexis Butterworths, 2019) 4.

Active commission of an offence or contravention

9.29 Some crimes and contraventions are drafted in such a way that they can only be committed by a corporation: for example, continuous disclosure obligations applying to listed corporations.[43] In such cases, when a corporation breaches such a provision, the individuals through whom the corporation acts cannot be held directly liable, but must instead be held liable as accessories (as to which see further below).[44]

9.30 However, other provisions show a clear legislative intention that individuals may be held directly liable for a crime or contravention, and in some cases concurrently with a corporation. One such provision was at issue in the High Court case of *Mallan v Lee*.[45] That case concerned s 230(1) of the *Income Tax Assessment Act 1936* (Cth), which provided that any

> person who, or any company on whose behalf the public officer, or a director, servant or agent of the company, in any return knowingly and wilfully understates the amount of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence.

9.31 The offence was drafted in such a way that only a natural person could commit it, and a corporation could be held vicariously responsible for the actions of its 'public officer, … director, servant or agent'. In that case the Court held that both the individual director and corporation could be held directly liable, but the individual could *not* be held liable as an accessory.[46]

9.32 Section 1041G (Dishonest Conduct) of the *Corporations Act* is an example of an offence for which an individual and a corporation could be held criminally responsible concurrently.[47]

9.33 In other cases, directors and senior managers will be held liable for crimes or contraventions *related to* corporate misconduct. Conspiracy to commit an offence (where a person is prosecuted for agreeing with others to commit an offence, even if the offence is not committed) is one example.[48] Others include crimes relating

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43 Such as *Corporations Act 2001* (Cth) s 674(2).

44 *Hamilton v Whitehead* (1988) 166 CLR 121, [1988] HCA 65. For application to a case concerning contravention of a civil penalty provision see *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56 [245]–[247], concerning contravention of the *Fair Work Act 2009* (Cth) s 50.

45 *Mallan v Lee* (1949) 80 CLR 198, [1949] HCA 48.

46 Ibid.

47 Although it appears that it is rarely, if ever, used against corporations. The BOCSAR Data from New South Wales criminal courts recorded no prosecutions of corporations under this section (and eight finalised charges in relation to other persons) in the ten-year reference period: see NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>. The failure to use this provision against corporations was an issue addressed in the Financial Services Royal Commission: Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 152–7.

48 See, eg, *Criminal Code Act 1995* (Cth) sch s 11.5 ('*Criminal Code*'). Note that a corporation may be

to obstruction of investigations or enforcement activities. Section 1307 of the *Corporations Act*, concerning falsification of books, is one such provision, drafted in such a way as to only apply to individuals:

> An officer, former officer, employee, former employee, member or former member of a company who engages in conduct that results in the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company is guilty of an offence.

Omissions liability: Directors' and officers' duties

9.34 Another way in which the legislature indicates that individuals are to be held directly liable in relation to conduct in a corporate setting is to impose specific duties on directors, senior managers and/or employees. Any breach of those duties will result in direct criminal responsibility or liability to civil penalty (as to duty-based offences and contraventions more generally see [7.178]–[7.196]).

9.35 The duties imposed on directors and senior managers include statutory directors' and officers' duties set out in Part 2D.1 of the *Corporations Act*. These include the duties of care and diligence, to act in good faith and for a proper purpose, and not to misuse a person's position or information.[49] In Australia, unlike some other comparable jurisdictions, these duties are generally enforced publicly, by ASIC, rather than by the company or its shareholders.[50] Breach of these duties gives rise to civil penalty, and (in the case of duties of good faith, use of position and use of information) to criminal responsibility where dishonesty and/or recklessness is involved.[51]

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party to a conspiracy: *R v McDonnell* [1966] 1 QB 233, [1966] 1 All ER 193, 197–200; *Criminal Code* (n 48) s 11.5(3)(b). However at common law it has been held that a sole director cannot conspire with his or her own company: *R v McDonnell* [1966] 1 QB 233, [1966] 1 All ER 193, 199–200. See also, eg, the separate offence of conspiracy to defraud: *Criminal Code* (n 48) s 135.4. The ALRC's review of data from ASIC cases reported over the past five years (see [3.8] and Australian Law Reform Commission, *Corporate Criminal Responsibility: Data Appendices* (2020) Appendix B, Table 2 ('*Data Appendices*')) included one case where a director and senior managers were prosecuted for conspiracy to falsify books and records and to give false or misleading information to an auditor: Australian Securities and Investments Commission, '19–186MR Directed verdict in the case against former chief executive officer and former chief operating officer of Hastie Services' (Media Release, 15 July 2019). Prosecution of directors and senior managers of corporations (and their advisors) of conspiracy to defraud the Commonwealth was common in addressing widespread tax evasion schemes (known as the 'bottom of the harbour' schemes) in Australia in the 1980s: Arie Freiberg, 'Abuse of the Corporate Form: Reflections from the Bottom of the Harbour' (1987) 10 *University of New South Wales Law Journal* 22, 74–5.

49 *Corporations Act 2001* (Cth) ss 180–4.

50 Hill (n 11) 26–7. On how the codification of these duties and imposition of civil penalties has given these duties a public aspect in Australia, see further *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 [456]–[457] (Edelman J).

51 *Corporations Act 2001* (Cth) s 184. Note that dishonesty *or* recklessness is required for s 184(1), whereas dishonesty is required for ss 184(2) and 184(3). Note also that the duties in ss 182 (use of position — civil obligations), 183 (use of information — civil obligations), 184(2) (use of position — criminal offence) and 184(3) (use of position — civil offence) also apply to employees.

9.36 Both 'directors' and 'officers' are defined in the *Corporations Act*. The definition of 'officers' expressly includes, among other named positions, directors, secretaries, receivers and liquidators, as well as 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).[52]

9.37 These duties are traditionally conceived as being 'owed to the company and to the company alone'.[53] However, it has become increasingly common for ASIC to use them to hold directors and senior managers liable for their role in *allowing* corporate offences or contraventions to occur. This has come to be known as the 'stepping stone' approach, a term coined by Herzberg and Anderson and borrowed from Keane CJ's description in *ASIC v Fortescue Metals Group*.[54] As described by Herzberg and Anderson, the

> first stepping stone involves an action against a company for contravention of the [*Corporations Act*]. The establishment of corporate fault then leads to the second stepping stone: a finding that by exposing their company to the risk of criminal prosecution, civil liability or significant reputational damage, directors contravened their statutory duty of care with the attendant civil penalty consequence. … The effect of the 'stepping stone' approach is that directors may face a type of derivative civil liability for corporate fault, but one which nonetheless is based on their own inadequate conduct.[55]

9.38 Although using directors' duties in this way has a clear public aspect, courts have been careful to stress that directors' and officers' duties do not impose a general obligation to ensure that the company complies with the law.[56] A finding of corporate wrongdoing is not sufficient in and of itself to show breach by a director or officer

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52 Ibid s 9 (definition of 'officer'). The scope of this definition and the extent to which it extends duties down the chain of management in large corporations is discussed further at [9.42]–[9.49].

53 LS Sealy, 'Directors' "Wider" Responsibilities: Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 164, 187.

54 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, [2011] FCAFC 19 [10]; Herzberg and Anderson (n 16) 181–2.

55 Herzberg and Anderson (n 16) 182 (citations omitted). See also Alice Zhou, 'A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability' (2019) 47(1) *Federal Law Review* 151, 153; Rosemary Teele 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.

56 *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, [2006] NSWSC 1052 [104]; *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 [460] (Thawley J). As to the public nature of s 180 of the *Corporations Act* see, eg, *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 [27], [196]–[197] (Greenwood J).

of their duties. Similarly, breaches of directors' and officers' duties may be proved without a finding of corporate wrongdoing, but such a finding may be evidence pointing to such a breach.[57] As such — as recently stressed by two justices of the Full Court of the Federal Court in *Cassimatis v ASIC* — these cases do not involve a new form of derivative liability, or (in the words of Greenwood J) 'some sort of dystopian accessorial liability', but rather 'primary direct failures on the part of the appellants to discharge the obligations cast upon them by s 180(1) … '.[58]

9.39 Some commentators have questioned the legitimacy of the approach taken in 'stepping stone' cases, arguing that it is a pragmatic approach of potentially uncertain application accommodating 'elevated community and commercial expectations on officers', while eclipsing and lacking consistency with the existing routes to directors' and officers' liability under the *Corporations Act*.[59] However, no specific concerns were raised with the use of the duties in this way in consultations or submissions to this Inquiry, and those consulted generally saw it as a useful way to hold directors and officers liable for their own failings leading to corporate offences and contraventions, in line with existing duties and well understood principles of law.

9.40 There is evidence that public enforcement of directors' and officers' existing statutory duties has proved an important and effective way to hold management accountable and to shape governance standards.[60] In a study published in 2019, Professor Ian Ramsay and Dr Benjamin Saunders found that ASIC had been successful in 83% of the cases it had brought under s 180(1) in the period 1993–2017.[61] The research showed that the most common category of proven breach in that sample (46.2%) involved

> causing the company to breach the law, or failing to prevent the company from breaching the law or engaging in actions which were inherently likely to constitute a breach of the law.[62]

9.41 Considering the question of 'whether the law strikes the right balance between ensuring directors exercise a proper standard of care while not deterring

57 *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 [528] (Edelman J).

58 *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 [74], [77] (emphasis in original) (Greenwood J); [462]–[465] (Thawley J). See further Rosemary Teele Langford, '*Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 – "Dystopian Accessorial Liability" or The End of "Stepping Stones" as We Know It?' (2020) 37 *Company and Securities Law Journal* (forthcoming).

59 Zhou (n 55) 64. See also Tim Bednall and Pamela Hanrahan, 'Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?' (2013) 31 *Company and Securities Law Journal* 474. See also the minority judgment of Rares J in *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 [221]–[222], [286].

60 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; Hill (n 11).

61 Ramsay and Saunders (n 60) 511.

62 Ibid 515–19.

entrepreneurial decision making', Ramsay and Saunders found 'no case in which a business decision was overturned on its merits – indeed … no case in which ASIC made such an argument'.[63] Their survey of all of the decided cases indicated that the standard of care in s 180(1) of the *Corporations Act* 'is not higher than the standard applicable at general law and essentially reflects a negligence standard'.[64] The standard 'takes into account the nature of the responsibilities held by the officer', and the courts 'have recognised differences in the standard applicable to different offices and positions'. Therefore the

> standard expected of executive directors reflects the reality that, in large companies, the business of the company is typically managed by the executive officers. Additional expectations typically apply to specific roles such as a managing director of a listed public company, general counsel and finance director. Non-executive directors are not typically involved in the business of a company at an operational level, rather their role is to guide and monitor management. Thus, they are not typically held to the same standard as executive directors.[65]

The definition of 'officer'

9.42 Submissions identified uncertainty about the definition of 'officer' in s 9 of the *Corporations Act* as potentially limiting the usefulness of directors' and officers' duties in relation to misconduct in large corporations. This uncertainty relates to the level of management captured by the definition, and therefore the extent to which officers' duties apply to senior managers with the closest proximity to corporate misconduct.[66] In very large, complex, corporate groups, the most obvious responsibility for recklessness in relation to misconduct may rest with managers below the very top tier of management.

9.43 That top tier of management — including the Chief Executive Officer ('CEO'), Chief Financial Officer ('CFO'), Chief Operating Officer ('COO'), Chief Information Officer ('CIO'), and in some corporations, the General Counsel — is often referred to as the 'C-suite'. It reports directly to the board and is generally considered to clearly fall within the definition of 'officer'. However, in very large corporations, senior executives below the C-suite may direct and control significant aspects of the corporation's business on a day-to-day basis. The extent to which officers' duties apply to such individuals remains relatively untested.[67]

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63 Ibid 517–18.

64 Ibid 518.

65 Ibid (citations omitted).

66 Australian Securities and Investments Commission (ASIC), *Submi*ssion 54. See also Professor P Hanrahan, *Submission 38*; Bednall and Hanrahan (n 59) 502–3.

67 Although 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 *Australian Securities and Investments Commission v Flugge* (2016) 342 ALR 1, [2016] VSC 779, where the Group General Manager Trading of

9.44 At the time of publication of the Discussion Paper, and a subsequent update paper published by the ALRC in March 2020 on the issue of individual liability,[68] this was a particularly live issue, as the case of *ASIC v King*, concerning interpretation of the definition of 'officer' was reserved before the High Court.[69] In that case, the Queensland Court of Appeal had 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, and that the CEO of a parent company could not be held to be an 'officer' of a subsidiary in which they held no formal role.[70] This raised uncertainty both as to the application of officer duties to such individuals, and — if a formal rather than functional approach was adopted — raised questions about the level within the management hierarchy to which the definition of 'officer' extends.[71]

9.45 The High Court delivered its judgment on 11 March 2020, and unanimously overturned the decision of the Queensland Court of Appeal.[72] In two separate judgments, the High Court held that King, the CEO of the parent company, was an officer of the subsidiary as he fell within the plain meaning of the words in s 9(b)(ii). Both judgments emphasised that (in contrast to s 9(a) and (c)-(g)) the definition set out in s 9(b) is a functional one, capturing individuals who do *not* hold named offices within a corporation.[73] According to the lead judgment, it is 'what the putative officer does or has the ability to do, in relation to the company, that is material for the purposes of para (b) of the definition'.[74]

9.46 Although the case did not specifically deal with the question of how far down the management chain officer liability extends in a large corporation, the emphasis on the functional nature of the definition suggests a broad approach should be taken rather than a narrow one. In *obiter*, Nettle and Gordon JJ specifically rejected concerns that the current definition of 'officer' was (unintentionally) narrower than the position prior to 2000 (when duties applied to an 'executive officer', defined as 'a person who is concerned in, or takes part in, the management of a corporation').[75] They explained how the question of the significance of the role a person plays, and who is an officer within a management structure, is a matter of fact and degree, noting that the

AWB Limited conceded that he was an 'officer' within the meaning of s 9 of the *Corporations Act*.

68 Australian Law Reform Commission, *Individual Liability for Corporate Misconduct: An Update* (2020).

69 Case B29/2019, on appeal from *King v Australian Securities and Investments Commission* [2018] QCA 352.

70 Ibid [246].

71 Australian Law Reform Commission (n 68) [40]–[49].

72 *Australian Securities and Investments Commission v King* [2020] HCA 4.

73 Ibid [24]–[25] (Kiefel CJ and Gageler and Keane JJ), [87]–[88] (Nettle and Gordon JJ).

74 Ibid [25] (Kiefel CJ and Gageler and Keane JJ).

75 See ibid [85]–[96], [185]–[186] (Nettle and Gordon JJ). See further Australian Law Reform Commission (n 68) [43]–[49].

> quality of a person's capacity or actions, and the effects of that capacity or those actions on the management of a corporation, are not necessarily uniform across corporations or corporate groups, or even uniform within a single corporation or group. The size of a corporation, the corporate structure, the management structure, and the identity and nature of the persons involved are likely to affect who is an officer of a corporation at any point in time. Circumstances may change over time, sometimes dramatically.[76]

9.47 The High Court's judgment in *ASIC v King* supports a view that managers below the very top tier of management in large corporations who nevertheless direct and control significant aspects of the corporation's business on a day-to-day basis would be considered to be officers. Nettle and Gordon JJ quoted with approval the following from a 2006 report by the Corporations and Markets Advisory Committee:

> The traditional focus of corporate law in relation to responsibility for corporate actions has been on the role of directors. In smaller companies especially, this may still reflect the way they are in fact run. However, the reality in most medium to large enterprises is that operational decision-making devolves to managers and other individuals below board level who conduct the ongoing business of the company subject to higher level supervision by the board of directors.[77]

9.48 With this in mind, the extension of duties to officers

> [t]akes 'account of the fact that many companies are managed under the broad direction of the board of directors rather than by the board itself'. It recognises that there is substantial room for people outside the boardroom to have a significant effect on a corporation and that modern structured corporate groups are often 'run day-to-day by key group executives or executive committees of the holding company whose decisions, made on a group rather than an entity basis, are implemented across the various companies within the group'.[78]

9.49 The decision in *ASIC v King* may provide impetus for ASIC to bring proceedings for breach of officer duties against more senior managers who are not in the C-suite. If that happens, greater guidance as to the matters of 'fact and degree' that determine whether an individual has a sufficiently significant role to fall within the definition of 'officer' is likely to be provided by the courts.

Omissions liability: other due diligence and 'reasonable steps' provisions

9.50 The legislature may also indicate an enhanced duty of care in particular areas by imposing on directors, senior managers, and other identified individuals

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76 *Australian Securities and Investments Commission v King* [2020] HCA 4 [92] (Nettle and Gordon JJ).

77 Ibid [93] (Nettle and Gordon JJ), quoting Corporations and Markets Advisory Committee (Cth), *Corporate Duties Below Board Level* (April 2006) [1.2] ('*CAMAC Corporate Duties Below Board Level Report*').

78 *Australian Securities and Investments Commission v King* [2020] HCA 4 [95] (Nettle and Gordon JJ) (citations omitted).

specific, personal, obligations under statute to 'take reasonable steps' or exercise 'due diligence' to secure corporate compliance with certain statutory obligations.

9.51 These include, for example, s 344 of the *Corporations Act*, which imposes civil penalty liability or criminal responsibility on a director for failure to take all reasonable steps to comply with financial record keeping obligations.[79] Directors also have specific obligations under the *Corporations Act* to aid administrators and to prevent insolvent trading,[80] and officers have duties not to 'engage in conduct that results in the company making a creditor-defeating disposition of property'.[81] For each of these, failure to comply with the duties is a crime. Illustrative examples of duties on directors, senior managers and other identified management personnel found in the 25 Commonwealth statutes reviewed by the ALRC as part of this Inquiry are set out in Appendix A, Table 6.3 of the *Data Appendices*.

9.52 Chapter 7 of this Report sets out how duty-based offences have increasingly been used in Commonwealth legislation and across most states and territories to impose liability on corporations in specific areas of regulation including workplace health and safety ('WHS'), and the operation of heavy vehicles.[82] Related provisions requiring directors, officers, 'executive officers', or 'executives' to exercise due diligence to ensure entities comply with their obligations are also found in these schemes.[83] Section 27(1) of the *Work Health and Safety Act 2011* (Cth) (reflected in legislation across most states and territories) provides, for example, that if a person (such as a corporation) conducting a business or undertaking has a duty or obligation under the Act

> an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.[84]

9.53 The section then sets out the types of steps that an officer might be expected to take to satisfy the due diligence duty.[85] Breach of that duty is an offence, graded as to

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79 *Corporations Act 2001* (Cth) s 344(1) (civil penalty), 344(2) (offence where involves dishonesty).

80 Ibid ss 438B and 588G. Note that s 588G imposes direct liability rather than derivative liability because the corporation is not liable for an offence or contravention.

81 Ibid s 588GAB.

82 See further [7.178]–[7.196].

83 See, eg, *Work Health and Safety Act 2011* (Cth) s 27; *Work Health and Safety Act 2011* (Qld) s 27; *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).

84 This section is based on the Model Work Health and Safety Bill, which is also implemented in all states and territories except for Victoria and Western Australia (although Western Australia is transitioning to the model law: see further Chapter 7). For the Model Work Health and Safety Bill see: Work Safe Australia, *Guide to the Model Work Health and Safety Act* (2016).

85 *Work Health and Safety Act 2011* (Cth) s 27(5).

whether it is reckless (Category 1), exposes an individual to risk of death or serious injury or illness (Category 2), or otherwise (Category 3).[86]

9.54 Similar provisions have recently been introduced in relation to the regulation of heavy vehicles across Australia, replacing previous provisions deeming executive officers liable for corporate offences.[87] The reforms were motivated partly by the desire to achieve consistency with the WHS scheme and partly because of the efficacy of WHS laws.[88]

9.55 These duty-based offence and contravention provisions are similar to, but differ from, the extended management liability provisions discussed later in this Part. Unlike such provisions, they do not require a finding that the corporation committed an offence or contravention as the first step in proving the case against the individual. Although a corporate contravention is often used as evidence of a breach of the individual's responsibilities in proceedings enforcing duties, proceedings may also be brought proactively, before a corporate breach occurs. Similar to failure to prevent offences, duty-based offences and contraventions also reflect a different level of culpability to being held liable for the offence or contravention itself through accessorial liability or deemed liability (discussed further at [9.87]).

9.56 Just as for liability of corporations, direct due diligence duties on individuals have proved effective in certain statutory contexts in enhancing corporate compliance. In the WHS sphere, for example, a review of the model laws found that 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.[89]

9.57 According to Marie Boland, author of the review,

> when the model WHS Act was first developed, there was considerable unease around the introduction of officers' duties, but it is clear that the concern about this duty acting as a disincentive for people to take up officer roles has been unfounded.[90]

9.58 In the context of the review, '[o]verwhelming feedback from the public consultation process was that officers' duties were generally supported and

86 Ibid ss 31 (Category 1), 32 (Category 2), 33 (Category 3).

87 National Heavy Vehicle Regulator, *Heavy Vehicle National Law: Major Legislative Changes Commencing 1 October 2018 – A Guide for Judicial Officers and Legal Practitioners* (2018) 6–12. 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).

88 Explanatory Note, Heavy Vehicle National Law and Other Legislation Amendments Bill 2016 (Qld) 2–5.

89 Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (2018) 52.

90 Ibid.

accepted'.[91] Boland noted further that the provisions were reported to be operating effectively to change behaviour:

> Across the diverse range of individuals and groups, it was reported that the introduction of due diligence requirements for officers has placed accountability for management of WHS at the appropriate level within organisations.
>
> I received consistent feedback that discussions about WHS have been brought into the boardroom and that safety issues are being considered alongside other corporations' due diligence requirements.[92]

9.59 Data from New South Wales criminal courts shows that provisions under WHS law imposing due diligence duties on officers are used by prosecutors in that state to hold individual officers accountable, although sparingly, with a focus on more serious offences.[93] Data for the ten-year reference period ending on 30 June 2019 shows that, from the introduction of the *Work Health and Safety Act 2011* (NSW), four charges were finalised for Category 3 offences, with three resulting in findings of guilt. In the same period 48 charges were finalised for Category 2 offences, resulting in 21 findings of guilt.[94] No charges were finalised under Category 1, however, noting that Category 1 offences require proof of recklessness. Although this data is necessarily limited, it suggests that such provisions can be effectively used, and also that proceedings brought under them can be effectively defended. The fact that no charges involved allegations of recklessness may indicate potential difficulties of proof of recklessness in this context, however analysis of a larger data sample is required to give greater weight to that conclusion.

Accessorial liability

9.60 Any individual, including a director or senior manager, may also be liable for corporate misconduct in which that individual is involved through the ordinary principles of accessorial liability, and statutory equivalents for particular crimes and particular civil penalty provisions. At its heart, accessorial liability requires knowing and intentional participation or assistance in a crime or contravention. Imposition of this form of liability on directors and senior managers is uncontroversial, but may raise particular difficulties in a corporate setting.[95]

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91 Ibid 51.

92 Ibid 52.

93 See Chapter 3 and NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics — Companies Data: Customised Reports for the Australian Law Reform Commission* (2020) <www.alrc.gov.au>.

94 Ibid. Note that the data refers to finalised charges, rather than defendants. One defendant may have been charged with multiple counts.

95 In its 2006 review into personal liability for corporate fault, the Corporations and Markets Advisory Committee concluded that 'as a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories': Corporations and Markets Advisory Committee (Cth), *Personal Liability for Corporate Fault: Report* (2006) 33 ('*CAMAC Personal Liability Report*').

Complicity in criminal offences

9.61 Part 2.4 of the *Criminal Code* provides the general rules on extensions of criminal responsibility, including accessorial liability. These apply to all Commonwealth crimes unless otherwise excluded, and states and territories have equivalents in either common law or statute.[96] The most relevant extension of responsibility in this context is contained in s 11.2, which codifies the common law of complicity, such that:

> (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
>
> (2) For the person to be guilty:
>
> (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
>
> (b) the offence must have been committed by the other person.
>
> (3) For the person to be guilty, the person must have intended that:
>
> (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
>
> (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

9.62 Section 11.2(3) is the fault element that must be proved against the accessory. The prosecution must show that, 'knowing all the essential facts which made what was done a crime, [the person] intentionally aided, abetted, counselled or procured the acts of the principal offender'. [97]

9.63 Other extensions of criminal responsibility under Part 2.4 of the *Criminal Code* (and their state and territory equivalents) including joint commission (s 11.2A) (the statutory equivalent of joint criminal enterprise) and commission by proxy (s 11.3) (the statutory equivalent of innocent agency) may also conceivably be used in the corporate context,[98] but are less likely to be applied to extend the liability of the corporation itself, and also have a high bar for proof of fault.[99]

This was the position adopted in the *COAG Principles* (n 41), as discussed at [9.92]–[9.98].

96 *Criminal Code* (n 48) s 2.2(2). See generally LexisNexis, *Halsbury's Laws of Australia*, vol V (at 3 April 2018) 130 Criminal law, '2 Complicity' [130-7200]–[130-7205].

97 *Giorgianni v R* (1985) 156 CLR 473, 488, [1985] HCA 29 [17] (Gibbs CJ).

98 In relation to s 11.3 (commission by proxy) see, eg, *Selim v R* [2006] NSWCCA 378, 8 (director of a company alleged to have ordered an employee to destroy computer files in the context of an investigation by the Therapeutic Goods Authority).

99 Incitement (s 11.4) and conspiracy (s 11.5) are other extension of liability under the *Criminal Code*, but

Individuals 'involved in' civil penalty contraventions

9.64 A number of statutes, including the *Corporations Act* and the *Competition and Consumer Act 2010* (Cth), also extend liability to those 'involved in' contraventions of civil penalty provisions.[100] For example, s 79 of the *Corporations Act* provides that a person is 'involved in' a contravention if the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

Section 1317E(4) of the *Corporations Act* provides that a person who attempts to contravene a civil penalty provision or is involved in a contravention of a civil penalty provision is taken to have contravened the provision.[101]

9.65 Appendix A, Table 6.1 of the *Data Appendices*, shows that this formulation is commonly used to impose accessorial liability in relation to civil penalty provisions in the 25 statutes reviewed by the ALRC as part of this Inquiry ('ALRC Legislation Review'). Legislation imposing accessorial liability on those 'involved in' contraventions (defined in the same way) includes the *Environment Protection and Biodiversity Conservation Act 2001* (Cth),[102] *Superannuation Industry (Supervision) Act 1993* (Cth),[103] *Therapeutic Goods Act 1989* (Cth),[104] and the *Work Health and Safety Act 2011* (Cth).[105]

9.66 These provisions, like s 11.2 of the *Criminal Code*, have their genesis in the criminal law of complicity, and judicial authority is clear that the corresponding elements of the definition 'should be given the same meaning'.[106]

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create separate offences rather than attributing liability for the primary offence. On conspiracy, see above, [9.33].

100 These provisions are based on s 75B of the *Trade Practices Act 1974* (Cth) (now repealed).

101 This blanket provision was introduced into the *Corporations Act* in 2019 by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). A number of other pre-existing provisions in the *Corporations Act* specifically provide that a person involved in a contravention of a particular civil penalty provision contravenes that provision (see, eg, ss 181(2), 182(2) and 183(2)). For similar provisions in the *Competition and Consumer Act 2010* (Cth) see ss 75B, 76.

102 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 484.

103 *Superannuation Industry (Supervision) Act 1993* (Cth) s 194.

104 *Therapeutic Goods Act 1989* (Cth) s 42YC.

105 *Work Health and Safety Act 2011* (Cth) s 256.

106 The Hon Justice Ashley Black, 'Directors' Statutory and General Law Accessory Liability for Corporate Wrongdoing' (2013) 31 *Company and Securities Law Journal* 511, 513, citing *Yorke v Lucas* (1985) 158 CLR 661, 667 (Mason ACJ, Wilson, Deane and Dawson JJ) and 673 (Brennan J), [1985] HCA 65. That case concerned s 75A of the *Trade Practices Act*, but has consistently been applied to interpret s 79 of the *Corporations Act*: *Australian Securities and Investments Commission v Vocation Limited (In Liquidation)* (2019) 140 ACSR 382, [2019] FCA 807 [614]–[619] (Nicholas J). The law is still unsettled as to whether

Other statutory accessorial liability provisions: criminal and civil

9.67 Appendix A, Table 6.1 of the *Data Appendices*, shows that, with a small number of exceptions, the Commonwealth legislation reviewed as part of the ALRC Legislation Review usually extends criminal responsibility to accessories using s 11.2 of the *Criminal Code*, and liability to civil penalty using the formulation set out in s 79 of the *Corporations Act*.

9.68 However, the ALRC Legislation Review identified a small number of provisions that extend *criminal* responsibility to accessories using the same formulation as the definition of 'involved in' set out in s 79 of the *Corporations Act*. These were found in the *Australian Securities and Investments Commission Act 2001* (Cth)[107] and the *Competition and Consumer Act 2010* (Cth) (relating to cartel offences).[108] The *Corporations Act* also extends criminal responsibility on this basis in relation to a number of offences, where it can be shown that the involvement was dishonest (with one exception, in s 601FE(4), where criminal responsibility is extended on this basis without the requirement of dishonesty).[109] The ALRC Legislation Review also identified two provisions in the *Corporations Act* that extend criminal responsibility to persons who were 'recklessly' 'involved in' a specific contravention.[110]

9.69 Other statutes use aspects of the same wording used in s 79 of the *Corporations Act* to specifically impose accessorial liability on individuals in relation to both crimes and contraventions. Some Acts specifically extend accessorial liability (using similar terminology) only to individuals in particular roles within a corporation such as directors, 'executive officers', or 'officers'. For example, the *Shipping Registration Act 1981* (Cth) provides that when

> a corporation commits an offence against this Act, a director, manager, secretary or other officer of the corporation who is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the offence, is taken to also have committed that offence and is punishable accordingly.[111]

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there may be differences in scope between the differently worded provisions. For example, it has been suggested that s 79(c) ('knowingly concerned') of the *Corporations Act* is broader than s 79(a): see further Justice Ashley Black (n 106) 513–14; Bednall and Hanrahan (n 59) 489.

107 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GB(1).

108 *Competition and Consumer Act 2010* (Cth) s 79(1).

109 *Corporations Act 2001* (Cth) ss 209(3), 254L(3), 256D(4), 259F(3), 260D(3), sch 4 s 29(6).

110 Ibid ss 601FD(4), 601JD(4). Each of the relevant provisions states: 'A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1)'. Although it could be argued that 'recklessly' only qualifies the word 'contravene' in each of these provisions, that does not appear to be the intention in light of the previous subsection in each case, which imposes civil penalty liability on those involved in a contravention of subsection (1) of the relevant provision.

111 *Shipping Registration Act 1981* (Cth) s 74(5). It also has a provision extending liability to any person 'in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision' (s 61BL).

Again, the requirements of knowing and intentional participation required for criminal law complicity apply.

9.70 Other provisions use different language again, such as that an individual 'knowingly authorised or permitted' the offence or contravention.[112] This formulation was found in one provision in the ALRC Legislation Review,[113] and is often found in state legislation.[114] It requires knowing and intentional participation by the individual and is therefore considered to be an accessorial liability provision (and not to fall within the scope of the COAG Principles applying to extended management liability discussed further at paras [9.92]–[9.98] below).[115]

General principles: knowledge, intention and participation

9.71 For all of the accessorial liability provisions outlined above, knowing and intentional participation by the alleged accessory must therefore be proved, even when the principal can be convicted on the basis of strict liability.[116] The alleged accessory must have had knowledge of the essential elements of the contravention or offence, and through the accessory's own conduct (by act or omission) have been implicated or involved in it.[117]

9.72 However, determining the essential elements of a contravention or offence, and the precise level of knowledge required, is often a complicated process.[118]

9.73 As to the level of knowledge, such knowledge must be actual, rather than constructive, and actual knowledge is taken to include 'wilful blindness', but not 'recklessness or negligence'.[119] It is therefore not sufficient that a manager 'ought to have known all the facts and would have done so if [the person] had acted with reasonable care and diligence'.[120] Proof of actual knowledge of the essential elements

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112 See, eg, *Heavy Vehicle National Law (Queensland)* s 636(1), applied in Queensland by the *Heavy Vehicle National Law Act 2012* (Qld) and in other states and territories by equivalent legislation.

113 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 201.

114 For multiple examples of such provisions in state legislation (as at 2017) see, eg, MinterEllison, *Protecting Your Position: Victorian Laws Imposing Personal Liability on Directors and Officers* (2017); MinterEllison, *Protecting Your Position: Queensland Laws Imposing Personal Liability on Directors and Officers* (2017).

115 Council of Australian Governments, *Personal Liability for Corporate Fault—Guidelines for Applying the COAG Principles* (2012) 2 ('*Guidelines for Applying the COAG Principles*'). Note that provisions that extend liability to those who 'knowingly authorise or permit' certain activity developed in a context different to those modelled on the criminal law and require an arguably different level of knowledge and participation (analogous to failure to prevent). See further: *Roadshow Films Pty Ltd v iiNet Limited* (2012) 248 CLR 42, [2012] HCA 16 [42]–[54] (French CJ, Crennan and Kiefel JJ), [104]–[116] (Gummow and Hayne JJ); Bruce Cowley, 'Personal Liability for Nominee Directors' [2003] *AMPLA Yearbook* 481, 503–9.

116 For example, *Giorgianni v R* (1985) 156 CLR 473, [1985] HCA 29 concerned alleged accessorial liability in relation to a strict liability offence.

117 *Yorke v Lucas* (1985) 158 CLR 661, 670, [1985] HCA 65 [17] (Mason ACJ, Wilson, Deane and Dawson JJ).

118 Justice Ashley Black (n 106) 514–18; Stephen Ranieri, 'Accessories and the Fair Work Act: Section 550 and an Individual's "Involvement" in a Contravention: Is Reform Needed?' (2018) 31 *Australian Journal of Labour Law* 180, 187.

119 *Giorgianni v R* (1985) 156 CLR 473, 487–8, [1985] HCA 29 [17].

120 Ibid 483, [11] (Gibbs CJ).

need not always be from direct evidence, however, and may commonly be 'a matter of inference from all the circumstances'.[121] Actual knowledge can be inferred, for example, 'from the combination of a defendant's knowledge of suspicious circumstances and the decision by the defendant not to make inquiries to remove those suspicions'. [122]

9.74 It is not necessary to prove 'that the individual was aware of all the details of the contravention, or even the identity of all the participants',[123] or that the facts would amount to an offence or contravention.[124] As long as the individual is aware

> both of the general nature of the contravention and that the part played by him or her, whether by positive act or omission, will assist the offence, then the requirement of being 'knowingly concerned' is satisfied.[125]

9.75 Determining the essential elements constituting the offence or contravention may be straightforward in some cases and complex and contested in others. As the Hon Justice A Black has noted, extracurially, it is likely to be particularly complicated when 'the relevant "fact" or matter is a conclusion that might be drawn from assembling other anterior facts or matters', such as liability for misleading and deceptive statements and continuous disclosure obligations.[126] Difficulties have also arisen in determining the 'essential elements' in employment law contraventions: for example, how essential is an accessory's knowledge of a particular award or minimum standard applying to an affected worker?[127] This has led to significant judicial disagreement and uncertainty in litigation.[128]

Particular difficulties in the corporate context

9.76 Proving accessorial liability is therefore rarely straightforward. In relation to corporations, it can be particularly difficult to prove that a person or entity removed by a fragmented management chain from the physical acts had actual knowledge of

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121 *Australian Securities and Investments Commission v ActivSuper Pty Ltd* (2015) 235 FCR 181, [2015] FCA 342 [400] (White J).

122 Ibid.

123 *CAMAC Personal Liability Report* (n 95) 29.

124 *Gore v Australian Securities and Investments Commission* (2017) 341 ALR 189, [2017] FCAFC 13 [15] (Dowsett and Gleeson JJ).

125 *CAMAC Personal Liability Report* (n 95) 29.

126 Justice Ashley Black (n 106) 515. See, eg, *Australian Securities and Investments Commission v Vocation Limited (In Liquidation)* (2019) 140 ACSR 382, [2019] FCA 807.

127 Ranieri (n 118) 190–203. See further Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *Australian Journal of Labour Law* 78, 87.

128 See generally Justice Ashley Black (n 106) 514–18. In the context of disclosure obligations under the *Corporations Act* see Bednall and Hanrahan (n 59) 490–2; *Gore v Australian Securities and Investments Commission* (2017) 341 ALR 189, [2017] FCAFC 13; *Australian Securities and Investments Commission v Vocation Limited (In Liquidation)* (2019) 140 ACSR 382, [2019] FCA 807.

the essential facts, 'regardless of the extent to which their business practices may have contributed to the relevant breaches'.[129]

9.77 This has been an issue, for example, in situations of alleged 'wage theft' of employees in franchised businesses. In such arrangements it has been argued that franchisors, including large corporations such as 7-Eleven, 'exercise high levels of influence over the performance of work and yet remain insulated from the problems this may create'.[130]

9.78 In an article comparing regulation of workplace rights in franchises across a number of jurisdictions, Dr Tess Hardy explains how in Australia, the principal way in which the regulator has 'sought to coerce reluctant franchisors to engage in voluntary initiatives' has been to threaten action under the accessorial liability provisions of the *Fair Work Act 2009* (Cth).[131] These provisions extend liability to those 'involved in' contraventions.[132] However, she notes that the regulator 'has only brought one successful case against a franchisor under the accessorial liability provisions', and that concerned a case with unique circumstances which did 'not reflect the typical business format franchise arrangement'.[133] She describes how, following a comprehensive inquiry by the Fair Work Ombudsman into alleged wage theft within the Australian franchisor 7-Eleven Stores, the regulator found that 7-Eleven Stores

> was in a position to prevent workplace contraventions among its franchisees given that it 'controlled the settings of the system in which the franchisee employers operated'. The regulator also found that while 7-Eleven Stores ostensibly promoted franchisee compliance with workplace standards, it 'did not adequately detect or address deliberate noncompliance and as a consequence compounded it'. Notwithstanding these damning findings, 7-Eleven Stores evaded any legal consequences for the systematic worker exploitation that took place. In particular, the [Fair Work Ombudsman] concluded that there was insufficient probative evidence to pursue 7-Eleven Stores under the accessorial liability provisions of the *Fair Work Act.*[134]

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129 Andrew Stewart and Tess Hardy, Submission No 8 to Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (2018) 12. The authors cite the Fair Work Ombudman's inquiry into 7-Eleven as an example: see Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016).

130 Tess Hardy, 'Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada, and Australia' (2019) 40(2) *Comparative Labor Law and Policy Journal* 285, 296, citing David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 184 .

131 Ibid 300.

132 *Fair Work Act 2009* (Cth) s 550(2).

133 Hardy (n 130) 300, referring to *Fair Work Ombudsman v Yogurberry World Square* [2016] FCA 1290.

134 Ibid 300–1 (citations omitted).

9.79 The difficulties associated with using accessorial liability in this situation arose, in part, because of the high degree of knowledge required to establish it.[135] Recognition of the inadequacy of accessorial liability provisions to address the franchise business model led to the enactment in 2017 of an amendment to the *Fair Work Act 2009* (Cth) to go beyond accessorial liability and extend liability to franchisor entities through a new 'failure to prevent' civil penalty provision (as to this type of provision see further from [9.85] below).[136] Further reforms have been recommended and accepted in principle by the Australian Government to enact extended accessorial liability provisions for situations in which businesses contract out services to persons.[137]

9.80 Although the franchise example predominantly concerns the accessorial liability of corporate entities, the difficulties of proving actual knowledge through a chain of management and influence — and identifying the necessary elements of an offence or contravention — can apply equally to establishing accessorial liability of an individual through the management chain within a corporation, as a number of decided cases show.[138]

9.81 In consultations, the ALRC was told of an additional, particular, difficulty of proving accessorial liability of individuals in the corporate context. Conduct relied on to establish accessorial liability of the manager will often be the same conduct relied on to establish principal liability of the corporation. That is because a director or manager may 'aid and abet what the company speaking through his mouth or acting through his hand may have done'.[139]

9.82 Such cases require a two-step attribution process. First, acts, and (when relevant) fault, of the individual must be attributed to the corporation to find it has committed the crime or contravention. Second, it is necessary to show that the individual participated in that crime or contravention with the requisite knowledge and intention to be held liable as an accessory to the corporation's offence or contravention. Prosecutors and regulators repeatedly stressed during consultations that this adds an additional layer of complexity that can be particularly difficult in the context of jury trials and summary proceedings.

135 Ibid 301.
136 *Fair Work Act 2009* (Cth) s 558B, introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).
137 Australian Government, *Report of the Migrant Workers Taskforce* (2019) rec 11(a).
138 Ranieri (n 118) 197–8 (discussing *Potter v Fair Work Ombudsman* [2014] FCA 187) and 200–2 (discussing *Fair Work Ombudsman v Devine Marine Group* [2014] FCA 1365).
139 *Hamilton v Whitehead* (1988) 166 CLR 121, [1988] HCA 65, 128.

Extended management liability

9.83 Given the complexities and limitations of accessorial liability, and the particular issues corporate misconduct raises in this respect, legislators have often provided for other ways to hold individuals liable for such misconduct. One way has been to explicitly extend liability to directors and senior managers for proven corporate offences or contraventions in circumstances where complicity liability based on criminal law principles would not apply.

9.84 Various overlapping terms have been used to describe such provisions, but for the purposes of this report the term 'extended management liability' is used. This is intended to be a catch-all term covering forms of derivative liability applicable to directors and senior managers of corporations that extend liability beyond the requirements of criminal law complicity liability (and analogous extensions of liability to civil penalty).[140]

Forms of extended management liability

9.85 Extended management liability provisions include:

- **deemed liability provisions**: deeming a class of individuals liable for the same contravention or offence as the corporation.[141] These include **designated officer provisions**, which designate *particular* officeholders as having organisational or operational responsibility for specific conduct dealt with in the legislation, and hold those officeholders liable if those provisions are breached;[142] and
- standalone **failure to prevent provisions**, which impose liability on a class of individuals for a separate contravention or offence as a result of their failure to prevent a (proven) corporate offence or contravention (as to which see further [7.63]–[7.177]).[143]

9.86 Appendix J to this Report sets out examples of each type of provision, and Appendix A, Table 6.2 of the *Data Appendices*, summarises the extended management liability provisions identified as part of the ALRC Legislation Review. Only six statutes out of the 25 covered by the ALRC Legislation Review were identified as containing extended management liability provisions. Deemed liability provisions were identified in the *Corporations Act*[144] and *Taxation Administration*

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140 In this respect, see in particular the definition of 'Director's Liability Provisions' in the *Guidelines for Applying the COAG Principles* (n 115) 2, concerning criminal liability. For an overview of different ways in which this liability is imposed see further *CAMAC Personal Liability Report* (n 95) ch 2.

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

142 See, eg, *Corporations Act 2001* (Cth) s 188.

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

144 *Corporations Act 2001* (Cth) ss 188, 324BC.

Act 1953 (Cth).[145] Failure to prevent provisions were identified in the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth),[146] *Agricultural and Veterinary Chemicals Code Act 1994* (Cth),[147] *Environment Protection and Biodiversity Conservation Act 1999* (Cth),[148] and *Therapeutic Goods Act 1989* (Cth).[149] Both types of provision are also found in state legislation.[150]

9.87 Although both deemed liability and failure to prevent provisions require proof of a corporate crime or contravention as a first step, there is a key difference between the two. Deemed liability provisions attribute liability to the individual for the crime or contravention itself. As discussed further in Chapter 7, failure to prevent provisions create a new offence or contravention, and reflect a different type of culpability.[151] In this way, they are analogous to duty-based due diligence provisions discussed above.

9.88 The classes of individuals to which such legislation applies typically include 'directors', 'executive officers', 'officers', and/or 'persons concerned in, or who take part in, the management of the corporation'.

9.89 Such provisions usually provide protections related to individual rights by either requiring the prosecution to establish a fault element (such as recklessness or negligence) or providing a statutory defence such as lack of capacity to influence the conduct, lack of knowledge or the exercise of due diligence (as to these protections see further below).[152] The first approach essentially extends accessorial liability by introducing a partly objective fault element, in place of the purely subjective fault element required by the equivalent criminal law complicity and civil penalty complicity provisions.[153] The second approach usually also does this but goes further by requiring the individual to provide sufficient evidence to raise the defence (in the context of extensions of criminal responsibility see further [9.97]).

9.90 Other provisions, such as s 8Y of the *Taxation Administration Act 1953* (Cth) effectively reverse the onus of proof for an offence by imposing liability on an individual for a corporate offence unless the individual can prove that they were not an accessory to it. Section 8Y was the only provision of this type identified in the ALRC Legislation Review.

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145 *Taxation Administration Act 1953* (Cth) s 8Y.
146 *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EJR.
147 *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 145CF.
148 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 494–5.
149 *Therapeutic Goods Act 1989* (Cth) s 54B.
150 For examples of such provisions in Victoria (as at 2017) see, eg, MinterEllison, *Protecting Your Position: Victorian Laws Imposing Personal Liability on Directors and Officers* (n 114).
151 See further [7.63]–[7.81] and Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [6.40]–[6.75].
152 Wheelwright (n 40) 54.
153 See further Ranieri (n 118) 203–7, discussing potential reforms to the *Fair Work Act 2009* (Cth).

Reviews of extended management liability

9.91 Extended management liability provisions, while relatively common in Commonwealth, state, and territory legislation, have proven to be controversial. The framing and application of such provisions was the subject of significant discussion from the late 1980s.[154] Concerns included the sheer number of such provisions and lack of uniformity in approach, the lack of a requirement for personal fault in certain provisions, and reversals of the onus of proof.

The COAG Principles and their implementation

9.92 In 2009 the Council of Australian Governments responded to these concerns by agreeing on Principles for the Imposition of Personal Liability for Criminal Fault (the 'COAG Principles').[155] The COAG Principles reflect the view (supported in a number of submissions to this Inquiry) that extended management liability provisions imposing criminal responsibility are only appropriate in limited circumstances and should provide specific protections to individuals subject to them.[156]

9.93 Referred to as 'Directors' Liability Provisions', they are defined as

> provisions that impose individual criminal liability on directors or other corporate officers as a consequence of the corporation having committed some offence (the Underlying Offence), beyond the normal liability that applies to a person who directly commits, or who is an ordinary accessory to, the Underlying Offence.[157]

9.94 The COAG Principles do not apply to provisions extending liability to individuals for corporate contraventions of civil penalty provisions, nor to provisions under which directors and other officers may be held criminally liable directly.[158]

9.95 The COAG Principles provide that where a corporation contravenes a statutory requirement 'the corporation should be held liable in the first instance', and directors 'should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire act'.[159] Instead, the COAG Principles

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154 For a more comprehensive summary of relevant reviews and inquiries, see Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Personal Liability for Corporate Fault Reform Bill 2012* (October 2012) [2.3]–[2.23]. Such provisions have been subject to extensive review: see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties* (1989) [12.31]; Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors* (Proposals for Reform: Paper No 3, 1997) [6.6]; Australian Law Reform Commission (n 6) [8.6], recs 8–2, 8–4; *CAMAC Personal Liability Report* (n 95) 9.

155 The COAG Principles are set out and explained in supplementary guidelines adopted in 2012: *Guidelines for Applying the COAG Principles* (n 115) pt 3.

156 Ibid Principle 4.

157 *Guidelines for Applying the COAG Principles* (n 115) [4.1].

158 Ibid 2.

159 Ibid Principles 1–2.

provide that a director should only be criminally responsible for the misconduct of a corporation (beyond ordinary principles of complicity liability) when:

> (a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
>
> (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
>
> (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
>
> i the obligation on the corporation, and in turn the director, is clear;
>
> ii the director has the capacity to influence the conduct of the corporation in relation to the offending; and
>
> iii there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.[160]

9.96 When extending liability is appropriate, the COAG Principles recognise that negligence or recklessness may be a sufficient basis on which to do so, and that in some circumstances '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'.[161] In effect, this Principle permits a reverse onus on the defendant in some cases, but the COAG Principles as a whole emphasise that this measure should be used sparingly, if at all. [162]

9.97 Guidelines later agreed on by COAG for applying the COAG Principles set out three types of deemed liability of officers in relation to corporate conduct, reflecting the different approaches outlined in [9.89]–[9.90] above.

- **Type 1** When 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

160 Ibid Principle 4.

161 Ibid Principle 6.

162 Stakeholders to this Inquiry have expressed opposition to reversal of the onus of proof without sufficient justification in relation to individual liability. See, eg, Professor J Gans, *Submission 18*; Justice T Payne, *Submission 19*; Law Council of Australia, *Submission 27*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Insurance Council of Australia, *Submission 55*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

must adduce sufficient 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.[163]

9.98 The COAG 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.

9.99 Subsequently, Commonwealth, state, and territory governments have carried out significant reform in order to reflect the COAG Principles in legislation.[164] Each jurisdiction conducted an audit of legislation and all but Western Australia have implemented significant law reforms to bring their statutes into line with the COAG Principles, with the aim of achieving a nationally consistent and principled approach.[165] Legislative drafters are also required to apply the COAG Principles to new legislation.[166]

9.100 Although some Type 2 and Type 3 provisions remain in Commonwealth, state, and territory legislation following the legislative reform process,[167] these reforms have significantly reduced the exposure directors and senior managers have to such provisions, and the COAG Principles have established a framework by which to assess whether the extension of criminal responsibility to directors and senior managers is appropriate in a particular case.

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163 See *Guidelines for Applying the COAG Principles* (n 115) [2.3].

164 See further Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia (n 154) [2.23]–[2.41].

165 In relation to Commonwealth legislation see the *Personal Liability for Corporate Fault Reform Act 2012* (Cth). Following concerns raised about a lack of consistency across initial audits, states and territories were required to reaudit their laws in August 2011: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia (n 154) [2.33]. Western Australia introduced the Directors' Liability Reform Bill 2015 (WA) in January 2015, but it did not pass the second reading stage. Despite reports of an announcement by the Attorney-General in 2018 that it would be reintroduced to Parliament, the Bill remains with the Legislative Council.

166 *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.

167 Including *Taxation Administration Act 1953* (Cth) s 8Y.

The continued role of extended management liability provisions

9.101 For extensions of liability in respect of civil penalty provisions, recommendations previously made by the ALRC in its *Principled Regulation* report continue to provide an appropriate guide.[168] In summary, the ALRC recommended that provisions extending personal liability to directors and senior managers for the contravening conduct of a corporation should, in the absence of any clear, express, statutory statement to the contrary,

- 'include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur' (Recommendation 8–2); and
- include as 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 (Recommendation 8–4).

9.102 These limits reflect the concerns aired in consultations and in a number of submissions to this Inquiry that many of the same fairness considerations about extensions of criminal responsibility apply equally to the imposition of civil penalty liability on individuals and that there should usually be some element of personal fault involved.[169] On the other hand, the recommendations do not impose the same stringent restriction on application as the COAG Principles (that there be compelling public policy reasons to impose such liability such as the potential for significant public harm), recognising that 'a civil penalty proceeding is precisely calculated to avoid the notion of criminality',[170] and that 'the intention underpinning the civil penalty approach is to act as a greater stimulus for behavioural reform than what might be observed in criminal law contexts'.[171] Given this, as previously recognised in this context by the ALRC, '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'.[172]

9.103 In Australia, extended management liability provisions continue to be used by legislatures to address areas where it is considered the ordinary principles of accessorial liability are not workable or sufficient. They are 'efficient mechanisms for

168 Australian Law Reform Commission (n 6).
169 See, eg, Australian Institute of Company Directors (AICD), *Submission 37*. See also Australian Law Reform Commission (n 6) [8.67].
170 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [2015] HCA 46 [54], cited in Ranieri (n 118) 189.
171 Ibid.
172 Australian Law Reform Commission (n 6) [8.39].

attributing liability to individuals for offences and contraventions of corporations',[173] and stakeholders have stressed the strong deterrent value of such provisions. As CAMAC recognised, 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.[174]

9.104 Other comparable jurisdictions including Canada, Hong Kong, New Zealand, the UK, and the US also extend individual liability to management beyond the ordinary notions of complicity in some circumstances,[175] and in some cases in much more onerous ways.[176]

9.105 When a decision is made to extend liability in this way, choices are made between deemed liability approaches and the failure to prevent model. Deemed liability provisions may have the benefit of simplicity of drafting and application. However, for cases in which accessorial liability cannot be proved, it is arguable that a failure to prevent type of offence or contravention may more accurately reflect the culpability of directors and senior managers in relation to the corporate misconduct.[177] It has also been argued that failure to prevent liability may (similarly to duty-based liability) reflect a more proactive and preventive model of responsibility.[178] Again, the appropriate choice is likely to depend on the regulated community, the particular difficulties of establishing individual liability in that context, and the nature of the offence or contravention involved.[179]

Locating responsibility: Accountability mapping regimes

9.106 The previous section has shown how legislatures have often imposed liability on directors and senior managers in relation to corporate misconduct in ways that go beyond accessorial liability. However, in a large corporation, many individuals may be subject to general or specific duties of care and diligence, but knowledge of potential

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173 Ibid [8.66].

174 *CAMAC Personal Liability Report* (n 95) 36. In relation to criminal responsibility, the Committee thought such responsibility would only be appropriate in 'exceptional' circumstances.

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

176 Such as through the operation of the Responsible Corporate Officer doctrine in the US, 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 UK, see the Senior Managers & Certification Regime, discussed further below.

177 See further Chapter 7.

178 See [7.74]–[7.76].

179 See further Australian Law Reform Commission (n 6) [8.39].

wrongdoing may be diffused through a management structure. Consequently, it may still be difficult to trace responsibility back to a single individual.

9.107 In some areas such as mine safety, where there is the risk of great public harm and significant regulatory oversight, certain legislative schemes — in addition to imposing due diligence duties on officers and others in the chain of responsibility — require the entity to formally identify and notify regulators of specific individuals responsible for particular areas of operation within the site. Those named individuals are then subject to specific due diligence duties. The specific accountability mechanism for nominated 'accountable individuals' in relation to particular areas of operation may exist alongside more general duties and/or deeming provisions for directors and officers, as well as statutory accessorial liability provisions.

9.108 Under schemes applicable in Queensland an individual who wishes to be nominated as a 'site senior executive' for a mine must have particular experience and be assessed as competent for that role by the Board of Examiners at the relevant government department.[180] Site senior executives may be held criminally responsible for a failure to fulfil their duties.[181] As part of their duties, the site senior executive must develop, document and maintain a management structure allowing for development and implementation of the safety and health management plan, and provide it to the regulator.[182] In other jurisdictions, individuals holding specific statutory functions such as mine managers must be notified to the regulator and may hold similar responsibilities.[183]

9.109 The adoption of an approach that identifies the named site senior executive as holding significant responsibilities has been recognised as appropriate in locating responsibilities where decision-making power lies.[184] However, a recent review of the Queensland schemes identified concerns among some stakeholders that the legislation places a disproportionate level of accountability on the site senior executive (all of their responsibilities being prescribed in the legislation).[185] There were also concerns that 'senior individuals within companies who were located

180 *Coal Mining Safety and Health Act 1999* (Qld) s 185(e). Similar provisions exist in the *Mining and Quarrying Safety and Health Act 1999* (Qld).

181 See, eg, *Coal Mining Safety and Health Act 1999* (Qld) ss 34 (discharge of obligations), 42 (obligations of site senior executive for coal mine), 50 (notices by the coal mine operator), 51 (notice of management structure). See ss 40–46 for obligations on others in the chain of responsibility including operators, contractors, designers, constructors and erectors of plant and ground works, manufacturers, importers and suppliers. Liability is also extended to boards and senior management by imposing specific due diligence obligations on 'officers' generally: ibid 47A (obligations of officers of corporation).

182 *Coal Mining Safety and Health Act 1999* (Qld) ss 51, 55.

183 See, eg, *Mines Safety and Inspection Act 1994* (WA) ss 34–35.

184 Neil Gunningham, *Evaluating Mine Safety Legislation in Queensland* (National Research Centre for Occupational Health and Safety Regulation Working Paper 42, 2005) 16.

185 Minerals Industry Safety and Health Centre, University of Queensland, *Expert Legal Assessment: MQSHA, MQSHR, and Guidelines* (2019) [5.1.12]; Minerals Industry Safety and Health Centre, University of Queensland, *Expert Legal Assessment: CMSHA, CMSHR and Recognised Standards* (2019) [5.1.10].

offsite … were increasingly influencing approaches onsite, without having any clear obligations ascribed to them' under the legislation.[186] This suggests that such schemes should be carefully crafted to ensure that responsibilities are appropriately assigned, and that executives senior to nominated accountable individuals also have clear responsibilities not to give directions inconsistent with the nominated accountable individual's obligations.[187]

The Banking Executive Accountability Regime

9.110 In February 2018, the Australian Government introduced an analogous statutory scheme applicable to the banking sector, the BEAR.[188] It applies to 'Authorised Deposit Taking Institutions' (ADIs), which include all banks, credit unions, and building societies licensed by APRA.[189] Taking inspiration from accountable persons regimes in the UK and Hong Kong (see further [9.159]),[190] the BEAR requires corporations to identify directors and senior executives[191] responsible for particular parts or aspects of the ADI'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.[192] 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.[193]

9.111 In a consultation paper released during the drafting of the BEAR, the Treasury stated that the intention of the legislation was

> to enhance the responsibility and accountability of ADIs and their directors and senior executives. The BEAR will provide greater clarity in relation to responsibilities and impose heightened expectations of behaviour in line with community expectations. There will be strong incentives for arrangements to be

186 Minerals Industry Safety and Health Centre, University of Queensland, *Expert Legal Assessment: MQSHA, MQSHR, and Guidelines* (2019) [5.1.12]; Minerals Industry Safety and Health Centre, University of Queensland, *Expert Legal Assessment: CMSHA, CMSHR and Recognised Standards* (2019) [5.1.10].

187 Minerals Industry Safety and Health Centre, University of Queensland, *Expert Legal Assessment: MQSHA, MQSHR, and Guidelines* (2019) [5.1.12].

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

189 *Banking Act 1959* (Cth) ss 5 (definitions of 'authorised deposit-taking institution' and 'banking business'), 9(3).

190 Australian Government, *Banking Executive Accountability Regime: Consultation Paper* (2017) 3, Appendix A.

191 See further *Banking Act 1959* (Cth) s 37BA(3). These senior executives include 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.

192 Ibid s 37CA(1)(a)–(b).

193 Ibid s 37CA(1)(c).

> put in place to improve the culture and behaviour within the ADI sector. However, where endemic poor behaviour continues there will be consequences.[194]

9.112 The BEAR was designed

> to apply a heightened responsibility and accountability framework to the most senior and influential directors and executives within ADIs, rather than replacing or changing the existing prudential framework or directors' duties.[195]

9.113 The BEAR does not impose general duties to avoid breach of licensing conditions or impose criminal responsibility or civil penalty liability on accountable persons for breach of their obligations. When an accountable person's 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 an 'accountable person' in the future.[196] Reforms are currently proposed to significantly expand the scope and application of the BEAR, and to introduce civil penalties for breach of obligations by accountable persons. This is discussed further at [9.162] below.

Preliminary conclusions on modes of individual liability

9.114 The foregoing summary shows that there are multiple mechanisms available to 'hold individuals (eg senior corporate office holders) liable for corporate misconduct'. The primary way of extending liability to individuals for corporate criminal conduct is through accessorial liability, and those principles have also generally been legislated for and applied to civil penalty wrongs. However, as discussed above, accessorial liability provisions require a high standard of fault that is not necessarily appropriate or workable in relation to some corporate wrongdoing and management responsibility in relation to it.

9.115 In this context the principle of the corporate veil and the shareholder-centred model of the corporation are not all-powerful. Policy-makers have recognised areas where more care is required of directors and senior managers and impose a higher standard on certain management positions or people either through specification of particular duties, or through deemed liability and failure to prevent provisions. Although extended management liability provisions have at times been controversial, a significant law reform effort has been undertaken to ensure that such provisions generally meet standards of fairness to the individual and there is now widespread acceptance of principles to guide the drafting of such provisions.

9.116 One notable trend is a move in some areas away from derivative liability through the 'deeming' of individuals as liable, to the imposition of direct duties to

194 Australian Government (n 190) 2.
195 Ibid 3.
196 *Banking Act 1959* (Cth) ss 37E, 37J.

exercise due diligence or to take reasonable measures to prevent corporate offences or contraventions.[197] This means that an individual is not being held liable *for* corporate misconduct, but rather for their own failings in relation to it. In relation to due diligence duties, it also means that a more proactive approach can be taken to regulation, allowing for action to be taken against individuals before offences or contraventions occur. Both in the regulation of directors' and officers' duties, and in the WHS sphere, such duties have reportedly been relatively well accepted by stakeholders, effective in bringing compliance issues to the board table, and able to be effectively used in enforcement.

9.117 Despite previous calls to create a standardised approach to individual liability for corporate misconduct, statutory drafters have reported that this is, in reality, not practical and a multiplicity of provisions remain.[198] In the Discussion Paper, the ALRC again raised concerns that the 'proliferation of different statutory liability provisions for corporate officers in relation to corporate conduct presents challenges for both officers and law enforcement'.[199] However, the proposal of a single model of liability, to replace the 'tangle of overlapping and diverging individual liability provisions', was not met with support.[200] Instead, there was more support for the view, similar to that adopted in a previous report by the ALRC, that each of the modes of liability had its place in their particular legislative and regulatory schemes.[201] Although a number of people consulted during the Inquiry reported the significant difficulties of proving accessorial liability of directors and managers of corporations, no major issues (beyond those addressed by the COAG principles) were reported with existing extended management liability provisions.[202]

9.118 As discussed above at [9.18]–[9.19] there is a concern, however, that liability is not always extended to, or enforceable against, individuals at the right level of management, especially in the largest corporations. Similarly, concerns were raised in consultations that when responsibility and knowledge are diffused through a management chain in a large corporation, breach of a duty of care to prevent violations is particularly difficult to prove. Finally (and outside the scope of reference for this

197 See above [9.50]–[9.59] and Chapter 7.

198 See further Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia (n 154) [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: [4.26].

199 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [7.65].

200 See further [9.166]–[9.173] below.

201 See Australian Law Reform Commission (n 6) [8.39]. See, eg, Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*.

202 See, eg, Law Council of Australia, *Submission 27*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*.

Inquiry), a number of practitioners consulted reported that significant procedural, practical, and evidentiary hurdles made court action against individuals in relation to corporate misconduct particularly difficult, especially in relation to large, well-resourced corporations.[203] The effectiveness of the mechanisms of holding individuals liable for corporate misconduct in very large corporations is considered in the next section, in light of these concerns.

Individual liability in the largest corporations

9.119 The Discussion Paper referred to a perception that arose from consultations in this Inquiry that — despite the different ways liability may be imposed on boards and management for corporate misconduct — senior executives of the largest corporations have 'been too often shielded from responsibility in relation to conduct over which they had significant influence or supervision'.[204] The ALRC noted that in large corporations, it may be 'difficult or impossible to sort out who knew what in a company when misconduct occurs'.[205] As Professor Garrett (writing about prosecutions in the US) observes:

> 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.[206]

9.120 Corporate scandals in Australia in recent years have shown that significant misconduct can and does take place in the largest corporations. The Financial Services 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.[207] 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 resources, and retail sectors.[208] In each of these sectors, the risk of public harm is significant.

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203 Australian Law Reform Commission (n 68) [53]–[55].

204 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [7.31].

205 Ibid [7.33].

206 Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014) 84, 88.

207 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47).

208 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* (2015) <www.smh.com.au>; Senate Standing Committees on Economics, Parliament of Australia, *Inquiry into Unlawful Underpayment of Employees' Remuneration* (19 February 2020); *Australian Competition and Consumer Commission v*

9.121 However, as will be shown below, in the past five years, proceedings have rarely been instituted against directors or managers (senior or otherwise) of the largest corporations for their role in relation to corporate misconduct falling within the remit of two key regulators, ASIC and the ACCC. The rate of court enforcement action against directors and senior managers of such corporations is significantly lower than equivalent action for any other corporate type. For the largest corporations, court action is much more likely to be instituted against the corporation alone.

9.122 As this part explores further, it is unlikely that this disparity can be explained by the fact that all directors and senior managers of such corporations are less morally blameworthy in relation to corporate misconduct than equivalent individuals in other types of corporation (although that blameworthiness may take a different form). For example, Commissioner Hayne emphasised in light of the evidence presented to the Financial Services Royal Commission, that there could

> 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.[209]

9.123 Similarly, it was suggested in consultations that the disparity cannot be fully explained by the regulators' approach to enforcement in relation to such companies. Rather, it has been suggested that practical and legal difficulties make enforcement in relation to the largest corporations particularly difficult.[210]

9.124 Three key questions arise. First, have directors and senior managers of the largest corporations been held liable in relation to corporate misconduct? Second, if they have not been held liable, should they have been? And third, if not, what stands in the way of such liability being imposed?

Enforcement action by ASIC and the ACCC by size of corporation

9.125 The ALRC has undertaken empirical research in order to understand better how different mechanisms for holding individuals liable are used, in particular in relation to directors and senior managers in the largest corporations. This research supports the suggestion that there is an accountability gap in relation to boards and/or senior management of the largest corporations. It indicates that in the sectors regulated by ASIC and the ACCC, boards and senior management of the largest corporations were subject to significantly fewer court enforcement actions than equivalent individuals in any other size corporation, as a percentage of total cases.

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).

209 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) 4. See also House of Representatives Standing Committee on Economics, Parliament of Australia (n 13) [3.11].

210 See, eg, Law Council of Australia, *Submission 27*; Allens, *Submission 31*.

The review also showed how frequently different modes of liability identified earlier in this chapter were proved against directors and senior managers in corporations of different sizes.

9.126 Chapter 3 summarises the data sample reviewed for this purpose,[211] and the data collected is set out in Appendix B, Tables 2 and 3 of the *Data Appendices*. Using publicly available reports, the ALRC collected specific information on criminal and civil penalty proceedings reported on in the period 1 January 2015 to 20 March 2020 by ASIC and the ACCC as having been conducted against corporations and individuals associated with them.[212] The ASIC data does not include proceedings conducted by its Small Business Compliance and Deterrence Team, which conducts between 350 and 400 prosecutions annually, as these concern high-volume 'less serious, strict liability, summary regulatory offences' and are confined to small businesses.[213] Subject to this, each regulator has confirmed to the ALRC that the public data sources relied upon by the ALRC provide a comprehensive picture of court enforcement activities under legislation administered or enforced by them, including criminal matters prosecuted by the CDPP.

9.127 For the purpose of analysing the proceedings, the ALRC categorised the corporations or corporate groups involved into four groups: 'small', 'large', 'very large', and 'largest', according to financial and organisational indicators.[214] When proceedings concerned more than one corporation the proceedings were categorised by reference to the corporation or corporate group in the highest category.

9.128 When proceedings involved an individual, the relationship of that individual to the corporation was recorded, along with the mode or modes of liability alleged and/or proved. Cases with individual defendants were further coded as to whether they concerned boards and senior management and/or lower-level employees or

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211 See the descriptions of 'ALRC Review of ASIC Enforcement Data' and 'ALRC Review of ACCC Enforcement Data' at [3.8].

212 Including: judgments; information published by court databases; ASIC's biannual *Enforcement Updates*, available at: <www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/>; the ACCC's quarterly activity report, *ACCCount*, available at: <www.accc.gov.au/publications/acccount>; and media releases available on each regulator's website. These include proceedings commenced during this period (some of which are ongoing) and proceedings finalised during this period (some of which commenced prior to the period under review). See further *Data Appendices* (n 48) Explanatory Notes.

213 Advice Correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 25 October 2019. The data does not include any proceedings taken by the Small Business Compliance and Deterrence Team, including civil or criminal actions.

214 This terminology was chosen to align with the distinction made between 'small proprietary companies' and 'large proprietary companies' in s 45A of the *Corporations Act*. The financial indicators used were, in the year misconduct occurred, gross consolidated revenue and gross consolidated assets for all corporations and corporate groups, and market capitalisation for listed entities. The organisational indicator used was the number of employees of the corporation or corporate group. For the method of categorisation, see *Data Appendices* (n 48) Explanatory Notes.

agents. The misconduct was divided into either 'corporate' or 'private' to account for misconduct of a personal or rogue nature, such as fraud for private gain.

9.129 For each size group, the ALRC tracked four categories of proceedings as a percentage of total court enforcement action: cases against the corporation only, cases involving allegations against boards and senior management for corporate misconduct, cases involving allegations against boards and senior management for private misconduct, and cases involving allegations against lower level employees or agents.[215]

Findings by corporation size

9.130 The ALRC's empirical data review shows that, outside of the contexts of corporate collapse and cartel conduct, proceedings were rarely instituted against directors or managers (senior or otherwise) of the largest corporations for their role in relation to corporate misconduct. This is the case even though a significant number of proceedings were brought against such corporations.

Table 9-2: ASIC reported proceedings

Size Group	Total proceedings reported	Against corporation only	Involving directors and/or senior managers (corporate misconduct)	Involving directors and/or senior managers (private misconduct)	Involving lower level employees or agents
Small	121	10 (8%)	74 (61%)	33 (27%)	12 (10%)
Large	33	4 (12%)	20 (61%)	8 (24%)	6 (18%)
Very Large	16	2 (13%)	11 (69%)	4 (25%)	3 (19%)
Largest	52	22 (42%)	7 (13%)	6 (12%)	6 (12%)

Note: *one proceeding may involve individuals from more than one category of individual, so the percentages in each row do not necessarily total 100%.*

9.131 In the ASIC sample, only seven cases involved allegations against directors and/or senior managers for corporate misconduct in the largest corporations.[216] This accounts for 13% of the total cases brought against corporations in the 'largest' size group.

9.132 There was a significantly higher proportion of total cases brought against directors and/or senior managers for corporate misconduct in the remaining, smaller

215 Note that some cases involved action against the corporation only, some against both the corporation and individuals, and some against individuals only. For further details on the research methodology and its limitations, see *Data Appendices* (n 48) Explanatory Notes.

216 The corporations concerned were AWB Limited, EDIS Service Logistics Pty Ltd (part of Kleenmaid Group), Leighton Holdings Ltd (part of CIMIC Group), ABC Learning Centres Limited, G8 Education Limited, Rio Tinto Limited, and LM Investment Management Limited.

corporation size categories. Proceedings involving action against directors and/or senior managers for corporate misconduct made up 69% of cases in the 'very large' size group, 61% in the 'large' size group, and 61% in the 'small' size group.

9.133 In contrast, the highest proportion of cases in the 'largest' size group were brought against the corporation only, at 42% of total cases. By comparison, a much smaller proportion of cases were brought against the corporation only in the other size groups. This indicates that for the largest corporations in the ASIC sample, proceedings relating to corporate misconduct were much more likely to be commenced against the corporation than against directors and/or senior managers. For smaller corporations, proceedings relating to corporate misconduct were much more likely to also involve directors and/or senior managers.

Figure 9-1: ASIC — Subject of proceedings

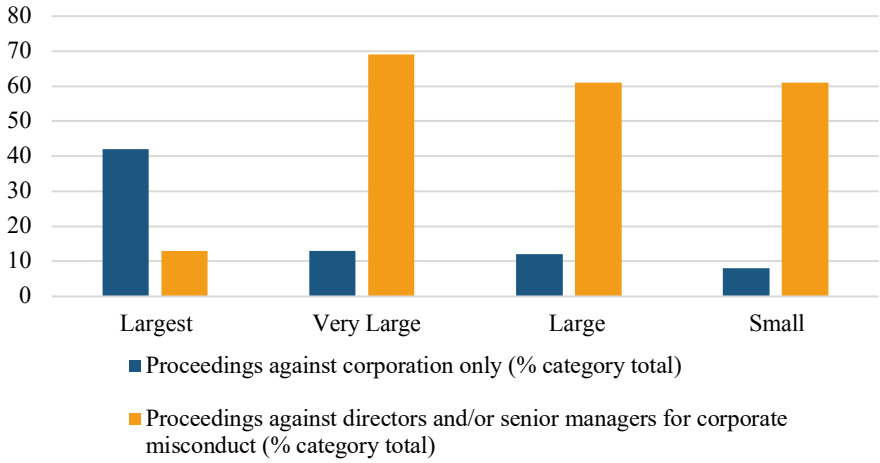


Table 9-3: ACCC reported proceedings

Size Group	Total proceedings reported	Against corporation only	Involving directors and/or senior managers (corporate misconduct)	Involving directors and/or senior managers (private misconduct)	Involving lower level employees or agents
Small	53	23 (43%)	28 (53%)	1 (2%)	1 (2%)
Large	12	11 (92%)	1 (8%)	-	-
Very Large	9	8 (89%)	1 (11%)	-	-
Largest	57	52 (91%)	5 (9%)	-	-

Note: *One proceeding may involve individuals from more than one category of individual, so the percentages in each row do not necessarily total 100%.*

9.134 In the ACCC sample, 53% of cases in the 'small' size group involved allegations against directors and/or senior managers for corporate misconduct. However, proceedings against directors and/or senior managers were almost unheard of for the larger size groups, except for recent cartel prosecutions. For the 'largest' size group, all five proceedings concerning directors and/or senior managers (9% of total cases) involved allegations of cartel conduct.

Figure 9-2: ACCC — Subject of proceedings

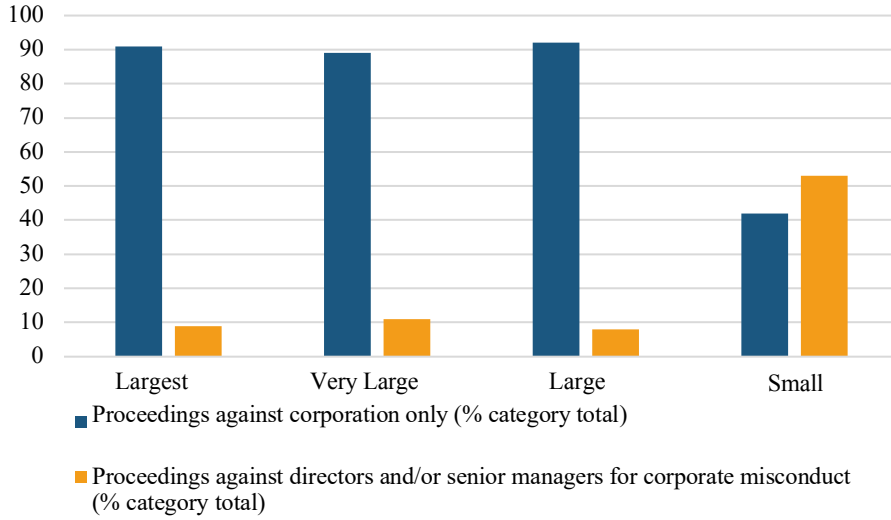
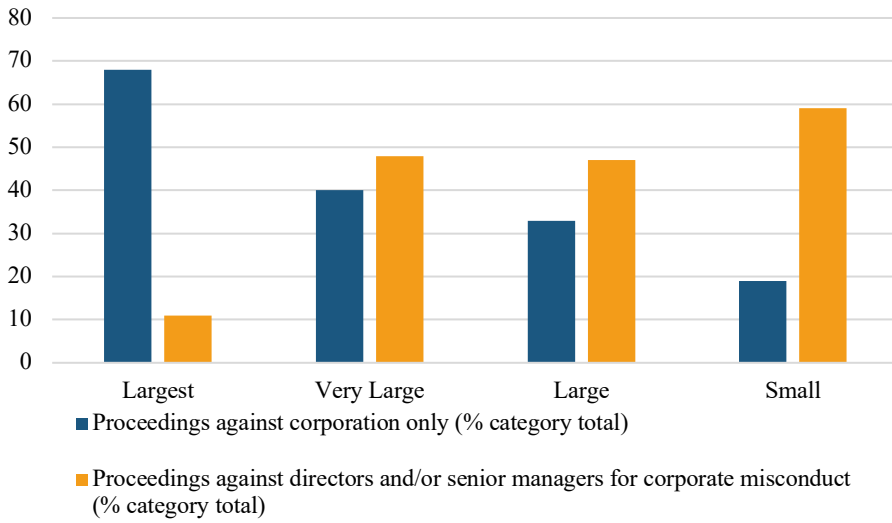


Table 9-4: Total reported proceedings — ASIC and the ACCC

Size Group	Total proceedings reported	Against company only	Involving directors and/or senior managers (corporate misconduct)	Involving directors and/or senior managers (private misconduct)	Involving lower level employees or agents
Small	174	33 (19%)	102 (59%)	34 (20%)	13 (7%)
Large	45	15 (33%)	21 (47%)	8 (18%)	6 (13%)
Very Large	25	10 (40%)	12 (48%)	4 (16%)	3 (12%)
Largest	109	74 (68%)	12 (11%)	6 (6%)	6 (6%)

9.135 Taking the ASIC and ACCC samples together, proceedings involving directors and/or senior managers in relation to corporate misconduct made up only 11% of cases in the 'largest' size group, and a much higher proportion of cases brought against the other size groups.

Figure 9-3: ASIC and ACCC —Subject of proceedings



Findings by mode of liability

9.136 The review identified 82 proceedings in the ASIC sample and 20 proceedings in the ACCC sample in which a finding or findings of criminal responsibility or liability to civil penalty was made against one or more directors or senior managers in relation to corporate misconduct.[217] This is 68% of the total number of proceedings involving directors and senior managers in relation to corporate misconduct, with the remainder either ongoing (not resolved during the sample period), or having resulted in a finding that the individual or individuals was not liable. Where a director or senior manager was found liable, the ALRC tracked the mode/s of liability proved.

217 Successful applications for disqualification orders under s 206E of the *Corporations Act* (Court power of disqualification — repeated contraventions of Act) were not included in this figure. Three such orders were included in the sample. This figure also does not include findings made against directors or senior managers for alleged private misconduct.

Table 9-5: ASIC — Liability of directors and senior managers in relation to corporate misconduct

	Largest	Very Large	Large	Small	Total
Total proceedings where liability proved against director or senior manager (corp. misconduct)	4	7	13	58	82
Proceedings where **direct liability** proved against director or senior manager (corp. misconduct)	4 (100%)	7 (100%)	11 (85%)	52 (90%)	74 (90%)
Proceedings directors'/officers' duties proved	*1 (25%)*	*3 (43%)*	*6 (46%)*	*20 (34%)*	*30 (37%)*
Proceedings other direct liability	*3 (75%)*	*4 (57%)*	*5 (38%)*	*32 (55%)*	*44 (54%)*
Proceedings where **accessorial liability** proved against director or senior manager (corp. misconduct)	-	1 (14%)	5 (38%)	7 (12%)	13 (16%)
Proceedings where **extended management liability** proved against director or senior manager (corp. misconduct)	-	-	-	-	-

Note: *Percentages shown in this table are the percentage of total proceedings in that category where liability of directors and/or senior officers was proved. Some proceedings involved a finding of more than one mode of liability, so the percentages in each column do not add together to make 100% of the total.*

9.137 In the ASIC sample, when directors and senior managers were found liable for corporate misconduct:

- The vast majority (90%) of proceedings involved findings of direct liability.
- As a discrete subset of primary liability, 37% of proceedings involved breach of directors' and officers' duties.
- Accessorial liability was proved in a much smaller proportion of the proceedings where liability was found. There were no findings of extended management liability in the sample.

9.138 Broken down according to corporation size, when directors and senior managers were found liable for corporate misconduct:

- Direct liability was the only form of liability proven in the 'largest' corporations (in four proceedings in total). One of those proceedings involved breach of directors' and officers' duties.

- Breach of directors' and officers' duties was proved in 43% of those proceedings for 'very large' corporations, 46% for 'large' corporations, and 34% for 'small' corporations.

Table 9-6: ACCC — Liability of directors and senior managers for corporate misconduct

	Largest	Very Large	Large	Small	Total
Total proceedings where liability proved against director or senior manager (corp. misconduct)	1	1	1	18	21
Total proceedings where **direct liability** proved against director or senior manager (corp. misconduct)	-	-	1 (100%)	-1 (6%)	2 (10%)
Proceedings directors'/officers' duties proved	-	-	-	-	-
Proceedings other direct liability	-	-	*1* *(100%)*	*1* *(6%)*	*2* *(10%)*
Proceedings where **accessorial liability** proved against director or senior manager (corp. misconduct)	1 (100%)	1 (100%)	-	17 (94%)	19 (90%)
Proceedings where **extended management liability** proved against director or senior manager (corp. misconduct)	-	-	-	-	-

Note*: Percentages shown in this table are the percentage of total proceedings in that category where liability of directors and/or senior officers was proved. Some proceedings involved a finding of more than one mode of liability, so the percentages in each column do not add together to make 100% of the total.*

9.139 As discussed above, the vast majority of the ACCC's court enforcement actions were brought against the corporation only. However, when directors and senior managers were found liable for corporate misconduct:

- 90% of those proceedings involved findings of accessorial liability.
- 10% of those proceedings involved findings of direct liability.

The overwhelming majority of cases in which accessorial liability was proved were in the 'small' size category. However, in the same period, the ACCC took enforcement action against a significant number of larger corporations themselves, without findings of liability made against relevant individuals.

9.140 Given the clear differences in application of modes of liability between ASIC and ACCC proceedings, the ALRC has not included a table showing combined figures.

9.141 There are limitations to the conclusions that can be drawn from a high-level review and relatively small data sample.[218] However, the review does support some tentative conclusions and proffer some further questions about mode of liability and corporation size.

9.142 The findings on mode of liability obviously reflect the modes available to each regulator under their legislative regimes. As a major component of ASIC's legal tool kit, the *Corporations Act* contains a significant number of positive duties on directors and senior managers (see illustrative examples in Appendix A, Table 6.3 of the *Data Appendices*). These are not available to the ACCC under the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law*. However, while ASIC does have the option of using accessorial liability in relation to any criminal or civil penalty provision under the *Corporations Act*, it appears to favour the use of direct liability.

9.143 Although the legislation administered and enforced by ASIC contains very few extended management liability provisions, the absence of any findings of liability on this basis is nevertheless noteworthy, given concerns raised in previous reviews that such provisions strongly favour regulators.[219]

9.144 In ACCC enforcement actions, the majority of findings of accessorial liability are made against individuals associated with corporations on the small end of the corporate size spectrum. This may reflect the difficulties highlighted above at [9.76]–[9.82] in showing actual knowledge of individuals with diffused responsibilities along management hierarchies in large corporations.

9.145 The ASIC sample indicates that directors' and officers' duties have been used successfully against directors and officers of listed companies, including those in the 'very large' category.[220] However, to date, breach of these duties has only been proved in one of the 53 proceedings reported during the period under review concerning misconduct related to the 'largest' corporations.[221] This may provide some support

218 These include that the ALRC did not track a success rate for each size group — that is, modes of liability proved as a proportion of modes of liability alleged. In addition, the findings do not account for allegations of misconduct that were the subject of live proceedings during the time period covered. It was also noted in the ALRC's consultations that proceedings involving individuals associated with large corporations take many years to complete, especially in the context of protracted corporate collapse, so the impact of any recent change in approach to enforcement (as discussed later in this chapter) may not yet be reflected in the data.

219 The ALRC Legislation Review did not identify any extended management liability provisions in the *Competition and Consumer Act 2010* (Cth) or the *Australian Consumer Law* (see Appendix A, Table 6.2 of the *Data Appendices* (n 48)).

220 This echoes the findings of Ramsay and Saunders that s 180(1) of the *Corporations Act* was successfully used against individuals of publicly listed companies. One reason the authors suggest for that finding is that public interest factors are relevant to ASIC's decision to commence enforcement action: Ramsay and Saunders (n 60) 506.

221 Although note that some of these proceedings are ongoing.

for the view expressed in consultations and a submission that one reason individual managers are not pursued in relation to misconduct of the largest corporations is because the law is unsettled as to how far down complex management structures the definition of 'officer' extends.[222]

An accountability gap in relation to the largest corporations?

9.146 The small number of proceedings brought by two major regulators against directors and senior managers of the largest corporations in Australia supports the perception raised in consultations that such individuals are less likely to be held personally liable for corporate misconduct.[223]

9.147 Some submissions expressed the view that the lack of litigation of cases against boards and senior management in the largest companies reflects regulators' past enforcement priorities, and the ALRC considers there may be some force in those views.[224] In the Final Report of the Financial Services Royal Commission, Commissioner Hayne welcomed ASIC's strengthened enforcement agenda following the criticism of negotiated outcomes expressed in the Interim Report.[225]

9.148 However, consultations with regulators and lawyers involved in such proceedings suggest that legal and evidential difficulties also play an important role, and in fact inform those enforcement priorities.[226] According to some, the lack of proceedings against directors and senior managers of the largest corporations does not necessarily mean that regulators are not investigating those individuals. Consultations 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 and procedure.[227] This is supported to some extent by the lack of success regulators have had in high profile proceedings against senior management of such corporations in the period prior to that covered by the ALRC's data review,[228] although there have also been high profile successes.[229]

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222 See, eg, Business Council of Australia, *Submission 63*.

223 See, eg, Samuel W Buell, 'The Responsibility Gap in Corporate Crime' (2018) 12(3) *Criminal Law and Philosophy* 471; Gilchrist (n 8) (referring to an 'accountability gap'). See also House of Lords and House of Commons Parliamentary Commission on Banking Standards, United Kingdom Parliament (n 8).

224 See, eg, Australian Financial Markets Association, *Submission 48*.

225 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) 425.

226 These are not new issues – see further Fisse and Braithwaite (n 4) 494–5.

227 As to this issue, note Commissioner Hayne's discussion of uncertainty in litigation and the proper role of a regulator in this regard: Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) 432–3.

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

229 Including proceedings brought against senior executives of James Hardie Industries: *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465, [2012] HCA 18; in relation to the collapse of

The problem of diffused responsibility

9.149 Although responsibility in a general sense for corporate misconduct is often viewed as resting with boards and senior management, the question is whether this moral responsibility of those 'who managed and controlled' errant corporations correlates with legal responsibility. In a number of case studies from the Financial Services 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.[230] In such cases, the law should be capable of holding relevant individuals liable. In many other examples serious failings in management were found to have incentivised the misconduct or to have allowed it to take place.[231] However, although there are reports some senior bank executives may face criminal charges,[232] only low-level employees or agents of the largest corporations have been subjected to litigation to date.[233]

9.150 Misconduct uncovered by the Financial Services Royal Commission often resulted from a series of cumulative actions taken along a management hierarchy, and those corporations were unable to disentangle how the results of those actions might be attributed to individual decision makers. Discussing the APRA Prudential Inquiry into the Commonwealth Bank of Australia, Commissioner Hayne agreed with APRA Chair, Wayne Byres, who submitted that for Australian banks the

> general concept of clarity of accountability, or, more to the point, the problem of diffused responsibility and no clarity of accountability has been at the heart of many problems that have happened. No one had responsibility. No one has actually taken responsibility for issues. Boards have not known how to apply consequences because it's not clear who was responsible for things.[234]

HIH Insurance: *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, [2002] NSWSC 171; and in the context of a takeover bid for GIO Insurance *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, [2007] NSWCA 75.

230 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 and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69.

231 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 (n 230).

232 See, eg, Daniel Ziffer, 'AMP Executives Facing Potential Criminal Charges', *ABC News* (8 February 2019) <www.abc.net.au/news>.

233 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).

234 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) 407.

9.151 Commissioner Hayne further heard in evidence that

> it was unclear who within a financial services entity was accountable for what. Without clear lines of accountability, consequences were not applied, and outstanding issues were left unresolved.[235]

9.152 This echoed findings in the 2016 report of the House of Representatives Standing Committee on Economics on its review of the four major banks (the 'Coleman Report').[236]

9.153 Some argue that any accountability gap in relation to individuals in 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.[237] In such corporations responsibility is often diffused as a matter of fact, not in a deliberate attempt to avoid accountability. This point was made in the submission of Allens, which remarked that, generally

> larger organisations having complex reporting structures is more likely reflective of the size, scale and complexity of those organisations, than of an attempt to shield corporate executives from liability.[238]

9.154 However, large corporations have the potential to do great harm to employees, consumers, the environment, the economy or to the wider public.[239] Recent royal commissions, including the Financial Services Royal Commission, show that the organisations implicated 'have already been recognised as sites of specific risks'.[240]

9.155 Boards, and particularly senior executives, also play a major role in shaping risk culture within an organisation, either promoting compliance or driving misconduct.[241] Managers below the C-suite may also have a significant impact. Research within major banks in Australia and Canada demonstrates that risk culture can vary significantly between business units within organisations.[242]

9.156 The legal responsibilities of the officers who take on oversight and senior management positions should reflect the potential harm such corporations can cause and boards' and management's important role in shaping the corporation's approach

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235 Ibid 395.
236 House of Representatives Standing Committee on Economics, Parliament of Australia (n 13) [3.4]–[3.8].
237 See, eg, Buell (n 223).
238 Allens, *Submission 31*. See also Australian Financial Markets Association, *Submission 48*; Chapter 4, particularly [4.15].
239 See, eg, Law Council of Australia, *Submission 27*. See further Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 154) [2.3].
240 Associate Professor P Crofts, *Submission 61*.
241 Australian Prudential Regulation Authority, *Information Paper: Risk Culture* (2016) 16.
242 Elizabeth Sheedy and Barbara Griffin, 'Risk Governance, Structures, Culture, and Behavior: A View from the Inside' (2018) 26(1) *Corporate Governance: An International Review* 4, 20.

to risk in that respect.[243] While imposition of criminal liability without an appropriate standard of personal fault may only be justified in very limited circumstances, there should be systems of internal accountability and in some circumstances allocation of at least civil penalty 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'.[244]

9.157 It is for precisely these reasons that boards and senior managers have particular duties of care and diligence, of oversight, of prevention, and why particular provisions extend liability beyond ordinary principles of accessorial liability when corporations contravene the law, as discussed in detail above. In fulfilling their duties, boards and senior management must clearly engage with the key drivers of misconduct, including those identified by the Royal Commission: culture, governance, and remuneration.[245] As Commissioner Hayne recognised, corporate culture, in particular, cannot be prescribed or legislated.[246] In relation to governance and remuneration, evolving 'best-practice' voluntary standards applicable to large, and in particular listed, corporations may both contribute to addressing diffused responsibility by clarifying lines of internal accountability, and ensure that those overseeing the corporation receive the necessary information to properly do so.[247]

Clarifying responsibility: proposals for extending the BEAR

9.158 A process is now underway to introduce legislation to address some of the problems of diffused responsibility in the largest corporations, at least in the financial services sector. This new legislation is designed to build on the BEAR (discussed above at [9.110]–[9.113]).

9.159 The BEAR was inspired by the UK's Senior Managers & Certification Regime (the 'SMCR'), although the BEAR is much more limited in scope.[248] The SMCR

243 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [7.94]–[7.95].

244 House of Lords and House of Commons Parliamentary Commission on Banking Standards, United Kingdom Parliament (n 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 (n 47) 407.

245 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) ch 6. On the important role of internal disciplinary procedures see further Fisse and Braithwaite (n 4).

246 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) 376.

247 This includes, for example, ASIC Regulatory Guides and the ASX Corporate Governance Standards.

248 Under the SMCR, 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)

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 UK 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.[249]

9.160 Commissioner Hayne made two key recommendations in relation to expanding the BEAR to address the problem of 'diffused responsibility and no clarity of accountability'[250] that he had identified. First, he said responsibilities set out in the BEAR 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'.[251] Secondly, provisions modelled on the BEAR should be extended to all APRA-regulated financial services institutions (such as insurance companies and superannuation funds), to be jointly administered by ASIC and APRA.[252]

9.161 Commissioner Hayne noted that:

> A necessary step in implementing provisions of the kind under consideration is to identify who in the regulated entity has senior executive responsibility for certain functions. Those responsibilities should either already be identified or, at least be readily identifiable. If that is correct, and it should be, preparation of accountability statements and accountability maps, though a burden, should not be a large burden. Performance of the obligations would then entail no reporting or recording beyond what prudent administration would require anyway.[253]

9.162 On 22 January 2020, the Treasury publicly proposed a new 'Financial Accountability Regime' (FAR) to implement these recommendations.[254] The FAR is proposed to apply to all APRA-regulated entities, with the potential for later

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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.

249 House of Lords and House of Commons Parliamentary Commission on Banking Standards, United Kingdom Parliament (n 8) [237].

250 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 47) 407.

251 Ibid rec 1.17.

252 Ibid rec 6.8.

253 Ibid 265.

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

extension to solely ASIC-regulated entities.[255] Based on experience with the BEAR, the FAR focuses 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.[256] The following metrics are proposed to determine whether an entity falls within the category enhanced compliance:

Entity type	Metric used to determine Enhanced Compliance
ADIs	Total assets > $10b
General insurance	Total assets > $2b
Life insurance	Total assets > $4b
Private health insurers	Total assets > $2b
RSE licensees	Total assets > $10b *This refers to combined total assets of all RSEs under the trusteeship of a given RSE licensee.

9.163 The FAR would require enhanced compliance entities to prepare and submit to APRA and ASIC accountability maps and statements, showing lines of reporting and responsibility within the entity and an accountability statement for each accountable person that details the areas of responsibility over which the person has effective management or control.[257]

9.164 The FAR proposes a broader class of persons as 'accountable persons' than the BEAR. It proposes to impose a general duty of due skill, care, and diligence on accountable persons.[258] It would also require accountable persons 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).[259] It 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.[260] Like the BEAR, the FAR is proposed to prohibit entities 'from indemnifying or paying the cost of insuring accountable persons against the consequences of breaching the FAR'.[261] However, there would be no bar to executives 'obtaining insurance that they would otherwise be permitted to obtain to cover the financial loss arising as a result of a civil penalty being imposed against them for a breach of the FAR'.[262]

255 Ibid 10.
256 Ibid 4.
257 Ibid 7.
258 Ibid 6.
259 Ibid 5–6.
260 Ibid 9, 14.
261 Ibid 9.
262 Ibid.

Striking the right balance on individual liability

9.165 Despite the availability of a range of mechanisms to hold individual senior corporate officers liable in relation to corporate misconduct, there is support for the contention that gaps in accountability exist. These gaps may exist or may have existed in particular regulatory areas (for example, the financial services sector as examined by the Financial Services Royal Commission), and more generally in relation to accountability of senior corporate office holders of very large corporations.

Feedback on the Discussion Paper proposals

9.166 In the Discussion Paper, two proposals aimed to simplify the imposition of individual liability and to address concerns that accountability was not sufficiently focused on management as opposed to boards.[263]

9.167 Both of these proposals adopted a failure to prevent model. Proposal 9 was that the *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 was to introduce an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of the civil penalty provision created in accordance with Proposal 9.

9.168 These two Proposals did not receive support. Of the 19 submissions addressing the Proposals directly, only four supported the Proposals,[264] one expressed qualified support,[265] and 14 did not support them.[266]

9.169 Among those submissions in support, the view was expressed that the Proposals would 'encourage senior officers to be more proactive in ensuring their businesses do not engage in corporate misconduct'.[267]

9.170 Among those against the Proposals, concerns were raised about the breadth and uncertainty of potential application of the term 'officer in a position to influence'

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263 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) Proposals 9 and 10.

264 Australian Competition and Consumer Commission (ACCC), *Submission 25*; Australian Shareholders' Association, *Submission 30*; Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*; Condon Associates, *Submission 41*.

265 NSW Young Lawyers, *Submission 59*.

266 T Game SC and Justice D Hammerschlag, *Submission 17*; Professor J Gans, *Submission 18*; Justice T Payne, *Submission 19*; Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Insurance Council of Australia, *Submission 55*; Australian Banking Association, *Submission 57*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

267 Australian Competition and Consumer Commission (ACCC), *Submission 25*.

in relation to a relevant offence,[268] and the uncertainty inherent in what would be considered to amount to 'reasonable measures' to defend a claim, especially without further guidance.[269] According to BHP:

> The Proposal does not appear to contemplate the actualities of how the management of sizable corporations and corporate groups must occur. Given the breadth and nature of their roles, officers such as the Chief Executive Officer, Chief Operating/Commercial Officer, Chief Financial Officer, General Counsel and Chief Compliance Officer (or equivalently titled roles) would almost always be deemed to be 'in a position to influence' all or significant components of the whole business, and so could be exposed in relation to a very broad range of offences.[270]

9.171 Allens suggested that this could have the perverse impact of encouraging senior executives to view their accountabilities narrowly and to act less vigilantly than they otherwise would to avoid suggestion that they occupy a position to influence the conduct.[271] A number of others raised the potential of the reforms to discourage appropriately qualified individuals from taking up directorships and senior management roles, and to increase the costs of directors' and officers' insurance.[272]

9.172 A number of submissions noted that the Proposals were made as part of a package of reforms, including significantly limiting the number of criminal offences applying to corporations, and that there were dangers of piecemeal implementation.[273] Many submissions expressed concern that there was insufficient justification for reversing the onus of proof when the scope of application of the provisions was so wide.[274]

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268 Justice T Payne, *Submission 19*; Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Australian Securities and Investments Commission (ASIC), *Submission 54*; Insurance Council of Australia, *Submission 55*; Australian Banking Association, *Submission 57*; BHP, *Submission 58*; NSW Young Lawyers, *Submission 59*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

269 T Game SC and Justice D Hammerschlag, *Submission 17*; Justice T Payne, *Submission 19*; Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Australian Banking Association, *Submission 57*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

270 BHP, *Submission 58*.

271 Allens, *Submission 31*.

272 T Game SC and Justice D Hammerschlag, *Submission 17*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Australian Financial Markets Association, *Submission 48*; Insurance Council of Australia, *Submission 55*; Australian Banking Association, *Submission 57*; NSW Young Lawyers, *Submission 59*; Business Council of Australia, *Submission 63*.

273 Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; BHP, *Submission 58*.

274 Professor J Gans, *Submission 18*; Justice T Payne, *Submission 19*; Law Council of Australia, *Submission 27*; Australian Institute of Company Directors (AICD), *Submission 37*; Professor P Hanrahan, *Submission 38*; Australian Financial Markets Association, *Submission 48*; Insurance Council of Australia, *Submission 55*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

9.173 Some stakeholders also suggested that the Proposals would operate quite differently for large multinationals, compared to small and medium-sized corporations including not-for-profits, imposing a regulatory burden and significant legal risk without commensurate evidence of misconduct justifying such an approach.[275] On the other hand, some submissions expressed concern about potential overlap with the BEAR and proposed FAR in relation to financial services corporations, and the difficulty of imposing two new regimes on those corporations simultaneously.[276]

The proposed Financial Accountability Regime

9.174 The proposed FAR has the potential to significantly alter the legal framework for individual liability in the financial services sector, especially in relation to large, complex corporations.[277] Publication of details of the proposal after the release of the Discussion Paper and shortly before the end of the consultation period for this Inquiry significantly affected the ALRC's thinking.

9.175 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.[278] 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.[279]

9.176 In the view of the Australian Institute for Company Directors:

> The 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.[280]

The proposed FAR meets many of the concerns raised in submissions about Proposals 9 and 10 in the Discussion Paper (see [9.170]–[9.173]). First, the scope

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275 Law Council of Australia, *Submission 27*; Justice Connect, *Submission 32*; Australian Institute of Company Directors (AICD), *Submission 37*.

276 Australian Securities and Investments Commission (ASIC), *Submission 54*; Insurance Council of Australia, *Submission 55*; Australian Banking Association, *Submission 57*; NSW Young Lawyers, *Submission 59*; Herbert Smith Freehills, *Submission 62*.

277 The Treasury (Cth) (n 254).

278 See, eg, Australian Institute of Company Directors (AICD), *Submission 37*, Australian Securities and Investments Commission (ASIC), *Submis*sion *54*.

279 Australian Banking Association, *Submission 57*.

280 Australian Institute of Company Directors (AICD), *Submission 37*.

of application will be clear, and organisation specific, as accountable individuals will be determined by the corporation itself and mapped in a document that must be maintained. This means that accountable persons will have clarity regarding their responsibilities, and applicable responsibilities can be tailored to their role, such that it should not lead to senior executives (who are actually responsible for certain areas of business) viewing their responsibilities narrowly. Rather, it should encourage accountable persons to act vigilantly.

9.177 Secondly, as the responsibilities for each individual are more narrowly defined than in Proposals 9 and 10, the scope of 'reasonable steps' that an individual would be expected to take is also more easily identified. This is particularly the case in the financial services sector, which is highly regulated and subject to significant corporate governance standards.[281]

9.178 Thirdly, as the proposed FAR imposes a duty on accountable persons, breach of which must be proven by the regulator, the issues around onus of proof identified in relation to Proposals 9 and 10 do not arise.

9.179 Fourthly, unlike Proposals 9 and 10, the FAR is specifically targeted at a sector in which significant misconduct and problems of accountability have been demonstrated, and compliance obligations are graduated depending on the size of the corporation or corporate group, with the most significant obligations reserved for the largest corporations.

9.180 In addition, the general duties of due skill, care, and diligence proposed to be imposed on accountable persons under the FAR will mirror the existing duties for directors and officers. When there is uncertainty as to whether an accountable person would be considered to be an officer (for the reasons discussed at [9.42]–[9.49]), the FAR will nevertheless impose the same duties of due skill, care, and diligence as required by s 180 of the *Corporations Act*. Accordingly, the FAR may assist to recalibrate individual liability 'to realistically reflect the governance role of directors on the one hand and the managerial role of senior managers on the other hand',[282] an objective strongly supported by a number of submissions to this Inquiry.[283]

9.181 Research from the UK on the SMCR, on which the proposed FAR is modelled, suggests that, although the SMCR met with some resistance when introduced, it has had a positive impact in the three years or so it has been operational. According to

281 See above [9.157].

282 Allens, *Submission 31*.

283 Including Allens, *Submission 31*; Australian Securities and Investments Commission (ASIC), *Submission 54* ('ASIC supports strengthening liability for corporate misconduct for those 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'); BHP, *Submission 58* ('directors (particularly non-executive directors) may not be the most appropriate target for responsibility in relation to misconduct arising from the day-to-day management of a corporation'). See also NSW Young Lawyers, *Submission 59*.

a study published in September 2019, drawing on interviews from nearly 60 senior managers in 25 banking institutions:

> 93% of all respondents and 88% of senior managers regard the introduction of the SMCR regime as a positive development which has led to improvements in behaviours and processes within firms.
>
> More than three quarters (79%) of senior managers consider that SMCR has changed culture at their firm for the better.
>
> Two thirds (65%) of all those in governance functions feel that there is also now more risk aversion in the industry since SMCR was implemented. 100% of smaller firms have observed the greatest increase in risk aversion as compared to larger firms (43%).
>
> 79% of senior manager respondents considered their responsibilities to now be clearer
>
> …
>
> 58% of firms reported that the SMCR brought about significant extra workload however smaller firms deemed SMCR more burdensome than larger firms.[284]

9.182 To date, the SMCR has not resulted in significant enforcement outcomes, with only one fine having been imposed on the Chief Executive of Barclays Bank.[285] However, given the long lead time on many corporate investigations, only limited enforcement action would have been expected to date.[286] In addition, the Financial Conduct Authority, responsible for administering and enforcing the SMCR, has emphasised that prevention, rather than enforcement, is the main purpose of the regime, and that smaller numbers of enforcement actions (as a result of less misconduct occurring) would signal success.[287]

9.183 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 when appropriate, legal liability) in the largest corporations in the financial services sector. When corporate crime occurs, the FAR should assist regulators and prosecutors to identify appropriate defendants (and high managerial agents for the purposes of attributing misconduct to the corporation).[288]

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284 UK Finance and Ashurst, 'Senior Managers and Certification Regime Three Years On' <www.ashurst.com/en/news-and-insights/legal-updates/uk-finance-ashurst-smcr-report/>, summarising the findings made in UK Finance and Ashurst, *SMCR: Evolution and Reform* (2019).

285 Financial Conduct Authority, 'FCA and PRA jointly fine Mr James Staley £642,430 and announce special requirements regarding whistleblowing systems and controls at Barclays' (Media Release, 11 May 2018).

286 Marialuisa Taddia, 'Crash Landing' (2020) 117(5) *Law Society's Gazette* 18.

287 Mark Steward, 'Tackling the Hard Questions' (Speech, Thomson Reuters Annual Compliance and Risk Summit, London, 26 April 2016) <www.fca.org.uk/news/speeches/tackling-hard-questions>.

288 This argument has been made in relation to the UK's SMCR, see Nicholas Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime

The proposed FAR (as at April 2020) reflects a number of principles that the ALRC considers particularly important, including that:

- obligations are differentiated according to the size of the corporation or corporate group, focusing compliance efforts where the problems in enforcement are most acute;
- 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 justifiable in principle (as these obligations reflect statutory officer duties of due care and diligence), and is in line with community expectations as reported by stakeholders in this Inquiry.

9.184 The proposed FAR should provide a greater degree of certainty for both responsible individuals and regulators as to where accountability lies. In doing so, the FAR would provide flexibility by allowing corporations to align accountable persons with their own corporate governance structures and define the appropriate level within their own management structure for each responsibility.[289] In crafting the legislation, the Government should also be cognisant of the role that executives and directors senior to the accountable person may play, and consider (in addition to the duties already imposed on them) specifically prohibiting executives and directors from giving an accountable person a direction contrary to the person's obligations under the FAR.[290]

Legislation Against Corporations in the USA and the UK' (2018) 82(3) *Journal of Criminal Law* 245, 262.

289 In its submission, BHP noted that 'in practice, senior executives in large, varied and/or complex businesses have extensive portfolios and necessarily depend on the expertise and accountabilities delegated to the management structure below them. They also must rely on compliance programs and due diligence processes designed to ensure lawful and ethical conduct across the business, rather than individually implement their own program. Inefficiency, duplication, and potentially inconsistency and confusion could arise from each officer being compelled (by Proposal 9) to implement their own bespoke set of "reasonable measures", or from each of those officers seeking to direct the design and implementation of the company-wide programs and processes': BHP, *Submission 58*. See also Allens, *Submission 31*.

290 See the discussion of accountability mapping under certain mining safety and health legislation discussed at [9.109] above.

9.185 The FAR provides a promising framework for enhanced director and senior manager liability in large, complex corporations within the financial services sector. The ALRC agrees with submissions to this Inquiry that it would be inappropriate to introduce a significant further reform to individuals' legal obligations and liability concurrently. It therefore considers that a reasonable period of time should be provided for implementation and operation of the FAR before considering any further significant changes to individual liability in this sector.

Other areas for potential review and reform

9.186 Apart from the general difficulties (both legal and practical) of holding individuals in large, complex organisations liable for their role in corporate misconduct, consultations and submissions did not indicate any particular regulatory areas where significant accountability gaps exist in relation to individual liability. However, this possibility merits further examination, given the number of scandals uncovered and further inquiries into corporate wrongdoing currently before government bodies highlighted at [9.120] above.

9.187 Given the lack of support for a single model provision imposing a negligence standard of liability on directors and senior managers across multiple regulatory contexts for corporate criminal offending (such as Proposal 9), the ALRC is persuaded that extensions of liability should at this point be considered on a case by case basis.[291]

Individual liability for corporate misconduct in large, complex corporations

9.188 In relation to the general difficulties associated with holding individuals within large corporations liable in relation to corporate misconduct in sectors other than financial services, the ALRC suggests that the Australian Government could consider, if the FAR proves successful, introducing similar schemes in other highly-regulated sectors with large corporate actors and demonstrated accountability deficits, or with potential for significant public harm.[292]

9.189 In addition, given the additional clarity on the definition of 'officer' for the purposes of directors' and officers' duties provided by the High Court's decision in *ASIC v King*, ASIC may be more confident to pursue proceedings for breach of officers' duties against senior executives of large corporations more broadly,

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291 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [8.39]. Support for regimes tailored to specific areas of regulation as opposed to a one size fits all approach were expressed in a number of submissions. See, in particular, Law Council of Australia, *Submission 27*; Allens, *Submission 31*.

292 The Australian Institute of Company Directors also considered that 'it may be more appropriate for a BEAR-like regime to be applied in certain sectors (i.e. those where there is considered to be an accountability deficit or where there is scope for considerable consumer harm) rather than proposing a one-size fits all approach': Australian Institute of Company Directors (AICD), *Submission 37*.

including below the C-suite, who have day to day operational control over large aspects of a corporation's business. The interpretation of the definition of officer in this context should be kept under review, and legislative amendment considered, if necessary, to ensure that those with real influence over parts a business's operations are clearly covered by officers' duties.

Other areas where accountability gaps are identified

9.190 In other areas, where the use of accessorial liability alone leads to gaps in accountability, there are good reasons to impose either direct obligations on directors and senior management to exercise due diligence or take reasonable steps to ensure corporate compliance with particular provisions, or to impose extended management liability on appropriate individuals for certain corporate offences or contraventions. 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.[293]

9.191 When derivative liability is used, the ALRC is 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).[294] Therefore, 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.

Future directions

9.192 Given the potential for significant legislative development and judicial clarification in this area, the ALRC does not recommend any specific law reform at the present moment. However, addressing individual liability for corporate misconduct is an area in which there do appear to be gaps 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 hold directors and senior managers liable when appropriate for corporate misconduct, further law reform may be required.

293 Australian Law Reform Commission (n 6).
294 See further Australian Securities and Investments Commission (ASIC), *Submission 54*.

Recommendation 18 The Australian Government should undertake a wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years of the entry into force of the proposed Financial Accountability Regime or equivalent. In undertaking such a review, consideration should be given to the effectiveness of:

a) accessorial liability of individuals for corporate crimes and civil contraventions;

b) directors' and officers' duties;

c) specific duties imposed on directors and senior management of corporations to take reasonable measures or exercise due diligence to comply with or secure corporations' compliance with statutory obligations;

d) sector-specific accountability-mapping regimes such as the Banking Executive Accountability Regime and the proposed Financial Accountability Regime; and

e) extended management liability provisions, including deemed liability and failure to prevent provisions.

9.194 At the time the proposal for the FAR was released, in January 2020, Treasury stated that the Australian Government intended to introduce legislation by the end of 2020 to implement the model proposed.[295] However, in the time between that announcement and the release of this Report, the serious health and economic crisis brought about by the worldwide spread of COVID-19 has made it difficult to predict whether that timeline will be met. For that reason, the ALRC recommends a timeline for the review based on the entry into force of the FAR. However, if the FAR, or an equivalent regime, is not enacted within a reasonable period of time, the wide-ranging review of individual accountability mechanisms should nevertheless proceed within the next six years.

9.195 Although the ALRC has concluded the time is not yet ripe for rationalisation of individual liability, developments over the next six years may tend in that direction. The FAR is a promising approach to identifying accountability in complex management chains, and could prove an important model for other highly regulated areas. In addition, a preference noted in some sectors for legislating and litigating direct due diligence duties rather than derivative extended management liability, and increasing harmonisation in this area, may continue.[296]

295 The Treasury (Cth) (n 254) 3.

296 Such as been seen in related fields such as WHS, mining safety, and heavy vehicle transport: see above [9.52]–[9.59].

9.196 In addition, it is important to note that Proposals 9 and 10 were put forward as part of a package of reforms.[297] If Recommendation 2 in this Report is implemented, so that only the most egregious corporate conduct is criminalised, one of a number of alternative approaches to individual liability may be more straightforward to implement, including:

- adoption of a single default model of extended management liability based on principles of negligence and/or and recklessness; or
- amending accessorial liability as it applies to the more limited set of offences (for example by adjusting the fault element to intention or recklessness)[298] or clarifying that active participation includes 'doing something to bring the offence about or failing to do something that [the person] ought to have done to prevent it';[299] or
- imposing general duties to exercise due diligence to secure corporate compliance with criminal laws.

If circumstances were to change in future such that it was feasible to introduce a single default method for extending individual liability to directors and senior managers for corporate misconduct beyond the ordinary principles of accessorial liability, how to best reflect the moral culpability of boards and senior management would be a central question to the choice of approach, in addition to issues of simplification and effectiveness.

9.197 Finally, although it is not within the Terms of Reference of this Inquiry, feedback from lawyers, regulators and criminal justice agencies in consultations and submissions has suggested that significant evidentiary, procedural, and practical challenges also hinder the progress of investigations and the ability to bring cases concerning corporations to trial.[300] These challenges 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.[301] A number of these issues are also currently under review by the Australian Government, and reforms are in the process

297 A number of submissions to the Inquiry noted this, and raised this as a potential concern with Discussion Paper Proposals 9 and 10. See, eg, Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; BHP, *Submission 58*.

298 A recommendation to this effect was made by the Senate Standing Committee on Legal and Constitutional Affairs in its 1987 review of company directors' duties, taking up a suggestion put to the Committee by Professor Fisse: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 154) [12.30]. See also Ranieri (n 118) 205 (in the context of accessorial liability to civil penalty). Note that this standard is already applied to two criminal accessorial liability provisions in the *Corporations Act 2001* (Cth) identified in the ALRC Legislation Review: see [9.68].

299 Professor P Hanrahan, *Submission 38*.

300 See Allens, *Submission 31*; Australian Securities and Investments Commission (ASIC), *Submission 54*. See further, Chapter 1.

301 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 60) 517.

of being adopted.[302] Consideration of the impact of these reforms and continuing issues impacting on accountability should be considered in any further inquiry into the effectiveness of mechanisms to hold individuals liable for corporate misconduct.

302 Australian Law Reform Commission (n 68) [55].

10. Transnational Business

Contents

Introduction

10.1 In the past half century, the globalisation of trade has created new economic opportunities and benefits for corporations, workers, consumers, and economies. As corporations have profited from the ability to source employees and materials from different corners of the globe, consumers have enjoyed the benefit of cheap goods. Workers have also enjoyed new opportunities for employment, and some local producers have grown rich on their exports.

10.2 The regulation of transnational business poses special challenges for regulators and law enforcement, as well as for corporations that aim to do business in an ethical and responsible manner.[1] Jurisdictions with weak regulatory systems or inadequate labour and environmental protections can provide opportunities for the exploitation of workers and natural resources. Some corporations have taken advantage of this to extract significant profits in unethical ways. Even for ethical corporations, however,

1 In the Discussion Paper, the ALRC sought to highlight some of these challenges by reference to corporate conduct that had been reported in the media: Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.78]–[12.80]. The ALRC does not suggest that any inference of criminality should be drawn against BHP from those media reports and disavows any suggestion to that effect that may have been drawn from those paragraphs or from [12.5].

the challenges of operating in weakly-regulated jurisdictions can undermine efforts to prevent abuse and exploitation from occurring in their supply chains.

10.3 For regulators, it can be particularly difficult to identify and prosecute criminal conduct by multinational corporations when it takes place offshore. Corporations may have significant activities or operations in jurisdictions where they are not registered, and potentially have no or few assets. The effective regulation of large multinational corporations often depends on close cooperation between states and their respective law enforcement agencies, which can be challenging. Despite the extraterritorial application of many serious offences under the *Criminal Code*, prosecutions of corporations for these offences are extremely rare.[2]

10.4 There is a significant public interest in ensuring that Australian corporations do not engage in serious crimes offshore, and that goods entering Australia are not tainted by slavery or other forms of abuse. There is also significant and growing international consensus on the responsibility of states to regulate corporations domiciled in their jurisdiction but operating extraterritorially.[3]

10.5 Perversely, while an increasing number of Australian corporations are taking steps to address offshore risks,[4] they are disadvantaged and disincentivised by the lack of ambitious state-led regulation with respect to transnational crime, which enables more ruthless competitors to profit from unethical behaviour.

10.6 As detailed in this chapter, an increasing number of business actors are joining long-standing calls from civil society to improve and increase the regulation of transnational crime. These campaigns promote regulatory reforms that would provide clarity, support, and a level playing field to those corporations already leading the field; that would reduce the number of unethically produced goods entering the Australian market; and that would ensure that Australian corporations are disenabled from profiting from criminal behaviour overseas.

10.7 In the first part of this chapter, the ALRC recommends that the Australian Government consider a failure to prevent model for specific extraterritorial offences. It then suggests that the Australian Government also consider undertaking a holistic review of the regulation of transnational crime and corporate human rights impacts, and sets out a possible roadmap for doing so.

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2 See discussion at [10.109] below.

3 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) Principles 2 and 3. These are discussed further at [10.103] below.

4 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) <www.humanrights.gov.au/our-work/corporate-social-responsibility-human-rights>. See, eg, the Minderoo Foundation's 'Walk Free' campaign to end modern slavery.

Failure to prevent offences for transnational crimes

Recommendation 19 The Australian Government should consider applying the failure to prevent offence in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 to other Commonwealth offences that might arise in the context of transnational business.

10.8 Chapter 7 outlines the failure to prevent model of corporate criminal responsibility, and concludes that it may be an appropriate regulatory tool in relation to certain offences. The ALRC recommends that the Australian Government extend the failure to prevent model set out in s 8 of the CLACCC Bill to other serious extraterritorial offences.

10.9 The failure to prevent model may be appropriate in relation to offences that might occur in a transnational business context, such as tax evasion,[5] slavery and slavery-like offences,[6] human trafficking,[7] violation of foreign sanctions,[8] torture,[9] crimes against humanity,[10] war crimes,[11] genocide,[12] and financing of terrorism.[13] Each of these offences apply extraterritorially, and most attract universal jurisdiction,[14] indicating an intention by legislators that these offences should be regulated domestically even when the offending conduct takes place offshore.

10.10 The recommendation is consistent with the views of stakeholders and developments in comparable foreign jurisdictions, and aims to address some of the particular difficulties of enforcing existing offences with extraterritorial application.[15]

10.11 Several submissions supported the creation of a failure to prevent offence in relation to extraterritorial crimes in the *Criminal Code*.[16] Other submissions supported

5 *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*') ss 134.1(1), 134.2(1), 135.4(3).
6 Ibid div 270.
7 Ibid div 271.
8 *Autonomous Sanctions Act 2011* (Cth) ss 16, 17; *Charter of the United Nations Act 1945* (Cth) ss 27, 28.
9 *Criminal Code* (n 5) div 274.
10 Ibid ss 268.8–268.23.
11 Ibid ss 268.24–268.101.
12 Ibid ss 268.3–268.7.
13 Ibid ss 102.6–103.2.
14 Of the offences listed, universal jurisdiction applies to tax evasion, slavery, torture, crimes against humanity, war crimes, genocide, and financing of terrorism. Several of these universal jurisdiction offences were incorporated into the domestic criminal law in fulfilment of Australia's obligations under international law: see generally Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25(4) *Sydney Law Review* 507.
15 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019), [12.62]–[12.77].
16 Monash Transnational Criminal Law Group, *Submission 35*; Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*. See also Associate Professor P Crofts, *Submission 61*.

the need for additional regulatory clarity on the obligations of corporations with respect to preventing extraterritorial offences.[17]

10.12 The ALRC considers that the failure to prevent model of corporate criminal liability better captures the nature of corporate offending in a transnational setting, compared to the existing (and recommended) corporate attribution methods under the *Criminal Code*. Both consultations and literature indicated that in a transnational setting, crimes such as foreign bribery and modern slavery are more likely to occur in the form of an omission or failure to prevent the relevant conduct by a person associated with the corporation, rather than as a specific act knowingly or intentionally committed by a corporation.[18] However, some corporations may also intentionally seek to obscure their apparent involvement with known risks, rather than seeking to address them.

10.13 The failure to prevent model incentivises corporations to create and maintain a culture that meaningfully engages with relevant risks by adopting measures to prevent the commission of offences by associates of the corporation.[19] This form of liability for omissions is appropriate in this context, given the nature of multinational corporations (typically large, well-resourced, and significantly complex entities); the capacity for wide-spread and irreversible harm; and the potential for criminal offending to be (intentionally or inadvertently) concealed, both from boards and regulators.

10.14 A defence of reasonable measures ensures that corporations that engage in good faith with the specific risks posed by their operations and operational context, and take reasonable measures to address those risks and prevent offending, will not be liable. Corporations are therefore incentivised to proactively manage risk, but are still protected from liability for the actions of 'rogue actors'.

10.15 Recommendation 19 supports recent initiatives by the Australian Government such as the *Modern Slavery Act 2018* (Cth). While that Act encourages corporate transparency, it does not impose any requirements to actually address modern slavery risks. It would therefore be buttressed by an offence of failing to prevent modern slavery, which would encourage corporations to take genuine steps to prevent modern slavery in their supply chains in order to have access to a reasonable

17 Professor J Nolan and N Frishling, *Submission 26*; Monash Transnational Criminal Law Group, *Submission 35*; Australian Institute of Company Directors (AICD), *Submission 37*; Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*; Australian Securities and Investments Commission (ASIC); *Submission 54.*

18 See generally Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57. See also Associate Professor P Crofts, *Submission 61*.

19 Australian Federal Police, Submission No 8 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia*, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (20 January 2020) 2.

measures defence, should the offence be committed by an associate acting for the benefit of the corporation.

10.16 Recommendation 19 is also consistent with the Australian Government's support of the United Nations Guiding Principles on Business and Human Rights ('UN Guiding Principles'), which reaffirm the state duty to prevent human rights abuses by third parties, including businesses, and the corporate responsibility to respect human rights.[20]

10.17 Finally, as highlighted in the Discussion Paper, a number of foreign jurisdictions, including the European Union and other trading partners of significance to Australia, are pursuing novel approaches to the regulation of transnational crime. These include examples of the UK's failure to prevent model relating to foreign bribery, foreign tax evasion, or serious human rights violations, as well as mandatory due diligence obligations in other jurisdictions. In this context, and particularly in light of ongoing negotiations towards an Australia-European Union Free Trade Agreement, it is important to ensure that Australian corporations remain competitive in the world economy and are prepared to meet standards of conduct across different jurisdictions.

10.18 The ALRC's views on the failure to prevent foreign bribery offence proposed in the CLACCC Bill are set out in Chapter 7 at [7.93]–[7.177]. The following sections outline the ALRC's views in relation to expanding that model to apply to other specific offences of a transnational nature, as well as the views of stakeholders.

Stakeholder support for failure to prevent offences

10.19 Consultations by the ALRC and studies in other comparable jurisdictions have indicated support within the business community for additional regulation of transnational business, in order to 'level the playing field' in favour of corporations that are already taking steps to reduce the risk of foreign bribery, modern slavery, and other forms of misconduct in their supply chains and offshore activities.[21]

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20 United Nations Office of the High Commissioner for Human Rights (n 3); United Nations Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Human rights and transnational corporations and other business enterprises*, 17th sess, UN Doc A/HRC/RES/17/4 (6 July 2011); Department of Foreign Affairs and Trade, 'Business and Human Rights' <www.dfat.gov.au/international-relations/themes/human-rights/business/Pages/default>.

21 Irene Pietropaoli et al, *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (British Institute of International and Comparative Law, 2020) 5; BHP, *Submission 58*.

10.20 As the ALRC did not make any specific proposals regarding the failure to prevent model of corporate criminal responsibility in the Discussion Paper, it was not widely commented on in written submissions. However, those submissions that did discuss the model were generally highly supportive of the failure to prevent approach in relation to specific offences. A number of submissions supported the creation of a failure to prevent offence in relation to extraterritorial crimes in the *Criminal Code*.[22]

10.21 The Human Rights Law Centre and Australian Centre for International Justice called for a new criminal offence of failing to prevent gross human rights violations.[23]

10.22 The Monash Transnational Criminal Law Group also supported the introduction of an offence of failing to prevent certain extraterritorial crimes currently prohibited in the *Criminal Code*. They considered that the failure to prevent model 'has a particular purchase in respect of transnational corporate activity' and 'may be particularly appropriate in respect of the oversight by corporations of associated partners overseas in order to avoid the commission of extraterritorial crimes'.[24] They suggested that the

> failure to prevent scheme provides an incentive to create and implement compliance procedures, which should prompt at least incremental changes in corporate reflection and practice.[25]

10.23 In highlighting the expressive normative function of the criminal law, Associate Professor Crofts supported the potential flexibility offered by the failure to prevent model. She argued that

> the structure of the criminal law has prevented any inquiry whatsoever into the ways in which the corporate organisation is at fault for facilitating, tolerating, or failing to prevent harms such as institutional child sexual abuse and elder abuse. We need imagination and creativity to develop and structure notions of collective liability that adequately reflect and reinforce the fault and responsibility of organisations for crime.[26]

10.24 Crofts suggested that it could be appropriate to create new offences of failing to prevent breaches of existing duties of care, or it may be appropriate to have specific offences targeted at preventing particular harms.[27]

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22 Monash Transnational Criminal Law Group, *Submission 35*; Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*. See also Associate Professor P Crofts, *Submission 61*.
23 Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*.
24 Monash Transnational Criminal Law Group, *Submission 35*.
25 Ibid.
26 Associate Professor P Crofts, *Submission 61*.
27 Ibid.

10.25 The model also attracted support from a variety of stakeholders in submissions, consultations, and at the seminar hosted by the ALRC and Allens.[28]

10.26 In its submission, BHP considered that specific features of foreign bribery make it well suited to a failure to prevent offence, but questioned whether it would be appropriate to apply this model to other offences more generally.[29] A growing body of literature supports the extension of the failure to prevent model to other types of offending, including transnational offences and corporate human rights violations.[30] However, in light of the scope of this Inquiry, the ALRC has limited Recommendation 19 to a small set of existing criminal offences that are uniquely transnational in nature. The ALRC has not rejected the possibility of expanding the failure to prevent model to other types of misconduct, including human rights violations more generally, but such an investigation was beyond the scope of the present Inquiry. The ALRC supports further inquiry on this point.

10.27 Professor Campbell has argued that the failure to prevent model adopted in the UK foreign bribery and tax evasion offences should be extended to other offences including labour exploitation and human rights violations.[31] Campbell highlighted the advantages of the model in the context of regulating large multinational corporations. Unlike natural persons, Campbell noted that corporations

> range from single person firms, through to small and medium enterprises (SMEs) and to vast multinational corporations (MNCs) with complex management structures, operation and production processes, supply chains, and systems. These organisational structures create unique opportunities for unlawful behaviour to occur and to be concealed, and day-to-day business activities may entail considerable risk or potential harm. This is often compounded by the size, location and sophistication of the entity.[32]

28 Australian Law Reform Commission and Allens Linklaters, *Interrogating the English Approach to Prosecuting Economic Crime* (Seminar, Federal Court of Australia, Sydney, 10 December 2019).

29 BHP, *Submission 58*.

30 See Campbell (n 18); Pietropaoli et al (n 21); Steven Montagu-Cairns, 'Corporate Criminal Liability and the Failure to Prevent Offence: An Argument for the Adoption of an Omissions-Based Offence in AML' in Katie Benson, Colin King and Clive Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Routledge, 2020) 185.

31 Campbell (n 18) 66.

32 Ibid 57 (citations omitted).

10.28 Campbell argued that the failure to prevent approach (or what she refers to as 'omissions liability') should form part of a 'smart mix' of corporate regulation:

> State legal measures, such as criminal law, are one component of a 'smart mix' that seeks to incentivise and ensure human rights protection and responses by corporate actors. Rather than this being a matter of criminal law solely, with analysis centring on its meaning, boundaries, and purported consistency or internal logic, our focus should extend to how best to prevent and address corporate misdeeds within the existing criminal law framework, with attendant stigma and protections.[33]

10.29 The need for a smart regulatory mix is explored further below at [10.104]–[10.124].

10.30 Andrew Smith and Alice Lepeuple have noted that in the UK, despite the application of broad or universal jurisdiction to various international offences such as torture, it is 'extremely difficult' to prosecute corporate defendants for these offences. The authors suggest this is due, in part, to the challenges of the identification doctrine.[34] They argue that, in light of the apparent success of the failure to prevent foreign bribery offence, the model should be extended to the regulation of corporate human rights violations:

> The dominance of neoliberalism means that multinational companies wield ever-increasing economic and political power. The legislative appetite for criminalising abuses of this power through a 'failure to prevent' model of liability — first with failure to prevent bribery, then failure to prevent the facilitation of tax evasion, and in the future probably failure to prevent economic crime — sees no sign of abating. Given a UK company can be prosecuted for failing to prevent a bribe paid by its overseas agent, it is arguably morally incongruous that it cannot be prosecuted for its failure to prevent its overseas workers being held in conditions amounting to slavery.[35]

10.31 In 2017, the UK Parliament Joint Committee on Human Rights ('JCHR') proposed that it may be appropriate to apply a failure to prevent mechanism modelled on s 7 of the *Bribery Act 2010* (UK) ('*Bribery Act*') to corporate human rights violations.[36] The JCHR recommended that

> the Government should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human

33 Ibid 65 (citations omitted).

34 Andrew Smith and Alice Lepeuple, 'Holding Companies Criminally Liable for Human Rights Abuses', *CorkerBinning* (Blog post, 17 July 2018) <www.corkerbinning.com/holding-companies-criminally-liable-for-human-rights-abuses/>.

35 Ibid.

36 UK Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (House of Lords Paper No 153, House of Commons Paper No 398, Session 2016–17, 5 April 2017).

> rights abuses for all companies, including parent companies, along the lines of the relevant provisions of the *Bribery Act 2010*.[37]

10.32 The JCHR further recommended that the legislation should:

> require all companies to put in place effective human rights due diligence processes (as recommended by the UN Guiding Principles), both for their subsidiaries and across their whole supply chain[;]
>
> … enable remedies against the parent company and other companies when abuses do occur, so civil remedies (as well as criminal remedies) must be provided[; and]
>
> … include a defence for companies where they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate that this has been done.[38]

10.33 In response to the JCHR report, the British Institute of International and Comparative Law ('BIICL') conducted a feasibility study into such a mechanism, and produced a set of detailed recommendations as to how it should be designed and implemented.[39]

10.34 The BIICL study included a survey of businesses that aimed to capture industry sentiment regarding the *Bribery Act* and business support for expanding a failure to prevent mechanism to human rights violations. The study revealed that corporate stakeholders were strongly concerned about the lack of regulatory guidance on the responsibilities of corporations with regard to human rights, and that the majority of respondents supported increased regulation if it would improve regulatory clarity and level the playing field. The authors reported that:

- The majority of respondents (68.97%) indicated that existing law does not provide business with sufficient legal certainty about which procedures are required to avoid legal risks for human rights abuses.
- The vast majority of business indicated that additional regulation may provide benefits to business: through providing legal certainty (82.14%); through levelling the playing field, insofar as it will hold competitors and suppliers to the same standards (74.07%); and by facilitating leverage with third parties, including in the supply chain (75%).
- Of those respondents who have experience with section 7 of the *Bribery Act*, the majority agree that it has provided similar benefits: It has been effective in providing legal certainty (64.71%), in levelling the playing field by holding competitors and suppliers to the same standards (50%),

37 Ibid [193].
38 Ibid.
39 Pietropaoli et al (n 21).

> and in facilitating leverage with third parties in the value chain through setting a non-negotiable standard (52.94%).[40]

10.35 The authors recommended that the UK Government introduce a legal duty, modelled on s 7 of the *Bribery Act*, to prevent 'human rights harms'[41] in a corporation's 'own activities and impacts to which it is directly linked through its business relationships'.[42] A breach of the duty would result in civil liability (not criminal), subject to a defence where a corporation can show that it implemented procedures 'reasonable in all the circumstances'.[43]

10.36 The authors recommended that the term 'human rights' be defined in a schedule to the Act (capable of amendment by statutory instrument) to apply to all internationally recognised human rights, including environmental harms.[44] The authors were concerned that the scope of the harms should not be otherwise limited — as is the case for regimes such as the UK and Australian *Modern Slavery Acts*, and the Dutch *Child Labour Due Diligence Act 2019*, for example — which may cause corporations to focus on those specific rights at the expense of other harms that may be equally or more serious in the particular circumstances.[45]

10.37 The authors of the BIICL study recommended that the duty apply to corporations of all sizes, including small and medium enterprises ('SMEs'), and that guidance should clarify that the requirements of a 'due diligence' or 'reasonable measures' defence must be determined on a case-by-case basis, and must be proportionate to the size and complexity of the corporation in question.[46]

10.38 The authors envisaged that the mechanism should establish a right to civil action by impacted persons, regardless of where the harm occurs, for compensation for damages suffered as a result of the harm. They also noted that the regime should provide for preventative and injunctive orders, and State-based oversight mechanisms.[47]

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40 Ibid 5.

41 The authors considered whether the mechanism should apply to 'impacts', 'violations', or 'harms': ibid 27–8.

42 Ibid 41. The authors recommended that the offence should reflect the UN Guiding Principles on Business and Human Rights in this respect. In particular, the Commentary to the Guiding Principles states that 'a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services': United Nations Office of the High Commissioner for Human Rights (n 3) 15.

43 Pietropaoli et al (n 21) 6, 32–40.

44 Pietropaoli et al (n 21) 29, rec IV.1.3.

45 Ibid 23–9.

46 Ibid 29–32.

47 Ibid 6, 55–61.

10.39 Notably, the BIICL study took a different approach to the JCHR in recommending a civil mechanism, rather than a criminal offence. In light of their concerns that any new regime should be drafted broadly to include all human rights, the authors considered that a criminal offence of such wide application would not be appropriate, particularly as it would create criminal responsibility in relation to 'rights which would not otherwise engage criminal liability'.[48]

10.40 The ALRC agrees, and considers that the Australian Government should inquire further into the possibility of a mandatory due diligence regime, which could apply broadly to all internationally-recognised human rights, and may involve civil penalties for non-compliance.[49] By comparison, the recommended failure to prevent offence would be strictly limited to conduct that is already criminalised under Commonwealth law. In this way, while the recommendation involves a more serious potential consequence (criminal responsibility), it is also limited to the most serious crimes.

10.41 Alison Macdonald QC, a UK-based barrister, has argued that, while the creation of a duty to prevent human rights violations (or a criminal offence to that effect) would not solve expertise and resourcing issues in relation to the enforcement of existing criminal offences, it would nonetheless be 'an important step in the right direction, building on the momentum created by the Modern Slavery Act'.[50]

10.42 Other commentators are more circumspect regarding the possible expansion of the failure to prevent model. The UK Government, for one, responded to the JCHR recommendations by stating simply that it had 'no immediate plans to legislate further in this area'.[51]

10.43 It could be argued that imposing liability on Australian corporations for failing to prevent certain offences may put them at a competitive disadvantage to foreign corporations not subject to those laws. This is mitigated by the limitation of the failure to prevent model to certain serious offences (which would tend to involve serious reputational risks in any case), the reasonable measures defence, and the public interest in ensuring that corporations do not profit from serious crimes by associates acting on the corporation's behalf.

10.44 Moreover, in relation to the failure to prevent foreign bribery offence in the UK, the BIICL feasibility study concluded that:

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48 Ibid 38.

49 See [10.139]–[10.164] below.

50 Alison Macdonald QC, 'Should Companies Have a Duty to Prevent Human Rights Abuses?', *Law of Nations* (Blog post, 20 February 2018) <www.lawofnationsblog.com/2018/02/20/companies-duty-prevent-human-rights-abuses/>.

51 UK Joint Committee on Human Rights (n 36) 15.

> Initial fears about the impact of the failure to prevent bribery mechanism on companies' ability to compete with foreign companies were not borne out in practice. There were no respondents which did not agree that business benefitted from the legal certainty that the Bribery Act mechanism provides.[52]

10.45 The authors of the BIICL study reported that, for 75% of respondents, the failure to prevent foreign bribery offence had 'not had any impact on their competitiveness'.[53] Some 12.5% considered that the regime had put them at a disadvantage internationally, but a further 12.5% considered that it had given them an *advantage* over competitors.[54]

10.46 Some commentators, including Campbell, have argued that there is limited evidence that the UK failure to prevent foreign bribery offence has had the desired effect in terms of generating behaviour change among corporations.[55] However, the authors of the BIICL study reported that more than two thirds (68%) of respondents that were affected by the *Bribery Act* reported that their companies had 'introduced new procedures' in response to the Act.[56]

10.47 While the introduction of new procedures cannot necessarily be equated with improved outcomes in preventing foreign bribery, it is a clear indication that corporations take the regulations and their resulting responsibilities seriously. It is also consistent with the views of senior UK legal practitioners who were consulted by the ALRC. Further, the findings of the BIICL study represent a significantly higher response rate than has been reported with respect to disclosure regimes, such as the *Modern Slavery Act 2015* (UK). (Disclosure regimes are considered in more detail at [10.165]–[10.184] below.)

10.48 Even Campbell considered that, 'on balance, debateable effectiveness is not fatal', on the basis that

> the UK framework 'frontloads' compliance in its inclusion as a legislative defence rather than in later negotiation with the companies, and so may be more positively impactful. The defences provide an *ex ante* incentive to create and implement adequate/reasonable procedures, which, despite a dubious evidence base, should prompt at least incremental changes in corporate reflection and practice.[57]

10.49 While the failure to prevent model has only been implemented in a limited number of cases, and quite recently, the emerging evidence both from corporations and practitioners is favourable, and the approach merits strong consideration by the

52 Pietropaoli et al (n 21) 20.
53 Ibid 17.
54 Ibid.
55 Campbell (n 18) 63–4.
56 Pietropaoli et al (n 21) 17.
57 Campbell (n 18) 64.

Australian Government for application to specific transnational offences beyond foreign bribery.

Scope of the offence

10.50 Under the CLACCC Bill, the new offence of failing to prevent foreign bribery would apply to conduct by an 'associate' of the defendant.[58] An 'associate' is defined as a person that:

> (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.[59]

10.51 The Explanatory Memorandum to the CLACCC Bill explained that the definition was intended to have broad application to a person that provides services for or on behalf of another person, and that they

> would not necessarily need to be an officer, employee, agent, contractor, subsidiary or controlled entity.[60]

10.52 In order to prove the offence of failing to prevent foreign bribery, however, the prosecution must also prove that the associate engaged in the relevant conduct 'for the profit or gain of' the defendant. While the scope of potential associates is nominally broad, it is significantly limited in practice by the requirement that associates must be acting for the benefit of the corporation *when they engaged in the bribery*. It is not sufficient that the associate acted generally on behalf of the defendant corporation; the act of engaging in foreign bribery must itself have been done for the benefit of the corporation.

10.53 This definition was supported by many submissions to the Senate inquiries into the 2017 and 2019 CLACCC Bills, and the AGD Inquiry that preceded the 2017 Bill.[61] Stakeholders in the current Inquiry held mixed views regarding a definition

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58 See [7.122]–[7.133].

59 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 item 2, amending s 70.1 of the *Criminal Code*.

60 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [58].

61 Uniting Church in Australia, Synod of Victoria and Tasmania, Submission 5 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (13 January 2020); Uniting Church in Australia, Synod of Victoria and Tasmania, Justice and International Mission Unit, Submission 1 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (22 January 2018); Control Risks Group, Submission to Public Consultation

of 'associate' proposed in the Discussion Paper, but that was in relation to a general method of corporate attribution under the *Criminal Code*, which is a markedly different context from that under consideration here.

10.54 As set out in Chapter 6, the ALRC now considers that 'associate' may not be the most appropriate concept in relation to a general attribution model for corporate criminal responsibility. However, in the different context of a failure to prevent offence for certain transnational offences, the definition of 'associate' used in the CLACCC Bill — in conjunction with the limitation that the associate engages in the relevant conduct *for the benefit* of the corporation — is appropriate.

10.55 In particular, this approach is more appropriate in a transnational context than in a general attribution context in light of the complex structure of multinational corporations, in which responsibilities and roles may be diffused across borders and throughout different entities within a corporate group or along a supply chain. This definition of 'associate' is sufficiently broad and flexible to ensure that it is not unduly limiting in this context.

10.56 At the same time, while the definition is nominally broad, the limitation that the associate must be acting for the benefit of the corporation is a significant and appropriate limitation. Importantly, this ensures that corporations will not be liable for any and all misconduct that takes place in their supply chains, but only when the particular misconduct was done by an associate for *the purpose of benefiting the corporation*. The implication is that, if the relationship between the corporation and the associate is sufficiently close such that the associate's conduct is intended to benefit the corporation, then the corporation is likely to be in a position to influence that conduct. This ensures that corporations can only be liable for misconduct that they were both in a position to benefit from, and in a position to prevent.

The need for a holistic review of transnational crime

10.57 The regulation of transnational crime and corporate human rights violations necessarily involves questions of international law, foreign policy, and international cooperation, which are well beyond the scope of this inquiry. Domestically, a holistic response to transnational crime and the human rights impacts of business

Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (1 May 2017); Transparency International Australia, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (8 May 2017); Simon Bronitt and Zoe Brereton, Submission to Public Consultation Paper, *Attorney-General's Department (Cth) Inquiry into Combatting Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (10 May 2017).

must include, but go beyond, the regulatory options offered by the Commonwealth criminal law.

10.58 The ALRC therefore suggests that the Government undertake a holistic and wide-ranging review of the regulatory framework applying to transnational crime and the human rights impacts of Australian businesses, including but not limited to the extraterritorial application of domestic criminal law, domestic jurisdiction over torts committed extraterritorially, civil regulatory mechanisms, non-judicial dispute resolution mechanisms, disclosure and transparency regimes, investigation and enforcement capacity, and international cooperation.

10.59 The remaining sections of this chapter set out the views of stakeholders on such an inquiry, provide an overview of some key issues for consideration, and suggest a roadmap for Government in undertaking this future inquiry.

Stakeholder support for increased regulatory clarity

10.60 In consultations and written submissions to this Inquiry, stakeholders from all sectors indicated that there is a strong appetite for greater regulatory clarity regarding the obligations of Australian corporations with regard to extraterritorial offences and human rights impacts in their supply chains. Of course, stakeholder views varied with regard to the meaning of 'clarity' in practice.

10.61 Stakeholders generally welcomed the ALRC's consideration of the role of the criminal law in addressing these issues, but indicated near-unanimous support for a broader future inquiry on the subject of transnational crime and corporate human rights violations.[62]

10.62 As noted above, ASIC suggested that, in addition to the possibility of a mandatory due diligence regime, a future inquiry should also consider whether the extra-territorial reach of existing criminal offences is appropriate and adequate.[63]

10.63 Studies in other relevant jurisdictions have indicated support within the business community for additional regulation of transnational business, in order to 'level the playing field' in favour of corporations that are already taking steps to reduce the risk of human rights violations, environmental damage, and other offences such as foreign bribery in their supply chains and offshore activities.[64]

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62 Professor J Nolan and N Frishling, *Submission 26*; Monash Transnational Criminal Law Group, *Submission 35*; Australian Institute of Company Directors (AICD), *Submission 37*; Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*; Australian Securities and Investments Commission (ASIC), *Submission 54*; BHP, *Submission 58*.

63 Australian Securities and Investments Commission (ASIC), *Submission 54*.

64 Pietropaoli et al (n 21) 5. See also BHP, *Submission 58*.

10.64 As noted by Professor Ruggie, the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises:

> Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.[65]

10.65 In a recent joint project, a number of British and European institutions, including the BIICL, conducted a study on due diligence requirements in supply chains. The study examined and compared four regulatory options, collecting stakeholder views on each option. The options were: status quo (no regulatory change); new voluntary guidance; new disclosure (reporting) requirements; and new mandatory due diligence requirements.

10.66 The authors found very little stakeholder support for maintaining the status quo, and reported that survey respondents

> indicated that the current legal landscape (Option 1) does not provide companies with legal certainty about their human rights and environmental due diligence obligations, and is not perceived as efficient, coherent and effective.[66]

10.67 An earlier study by the BIICL and Norton Rose Fulbright also revealed significant support among corporate actors for increased regulatory clarity with regard to transnational crime and corporate human rights responsibilities. The authors noted that corporations were increasingly moving away from 'traditional code of conduct and audit processes' towards more 'innovative approaches'.[67] One interviewee stated that:

> We would like to see more regulation. It would force our tier two, three and four suppliers to improve their processes — and our competitors. We rely on the whole industry.[68]

10.68 Another interviewee suggested that increased regulation regarding business and human rights would benefit corporations such as their own that are 'already trying

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65 *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,* Human Rights Council, UN Doc A/HRC/8/5 (7 April 2008) [22].

66 Lise Smit et al, *Study on Due Diligence Requirements through the Supply Chain: Final Report* (British Institute of International and Comparative Law, Civic Consulting, Directorate-General for Justice and Consumers (European Commission), and London School of Economics, 2020) 16.

67 British Institute of International and Comparative Law and Norton Rose Fulbright, *Making Sense of Managing Human Rights Issues in Supply Chains* (2018) <www.human-rights-due-diligence.nortonrosefulbright.online>, 'Management summary'.

68 Ibid.

to take the high road in this space', and noted that 'companies who are advanced on the issue don't want others getting a cost advantage from taking the low road'.[69]

10.69 Finally, the Australian Government has recently demonstrated a willingness to regulate the extraterritorial conduct of Australian corporations to prevent serious crimes and human rights violations. The *Modern Slavery Act 2018* (Cth) ('*Modern Slavery Act*') is perhaps the most notable example of this (discussed in more detail below). That Act is due for review after three years from coming into effect. The roadmap set out in the remainder of this chapter will complement this review process by suggesting additional and broader points of inquiry that may be undertaken alongside the review.

Recent developments in international and comparative law

10.70 A number of foreign jurisdictions are pursuing novel approaches to the regulation of transnational crime and the human rights impacts of corporate activity.[70] These include the UK's failure to prevent offences relating to foreign bribery and foreign tax evasion, and recent discussion about a possible duty to prevent human rights violations.[71]

10.71 In 2017, France introduced a mandatory human rights due diligence regime, which was outlined in the Discussion Paper.[72] The first legal action under the new statute was brought in late 2019, regarding the activities of French oil company Total in Uganda.[73] Also in 2019, the Dutch Senate adopted the *Child Labour Due Diligence Act 2019*, which requires corporations to identify child labour risks in their supply chains, and develop and implement procedures to address those risks.[74] Other countries including Switzerland, Finland, Norway, Denmark, Austria, and Germany are considering introducing similar mandatory human rights due diligence regimes.[75]

10.72 The Discussion Paper noted existing human rights disclosure regimes in the US and the UK.[76] Canada, too, appears set to pass a Modern Slavery Bill this year,

69 Ibid.

70 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.81]–[12.85]; see also European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law* (2017).

71 Pietropaoli et al (n 21).

72 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.82]–[12.84].

73 Rebecca Rosman, 'French Judges Tilt in Favour of Total in Landmark Ruling', *Al Jazeera* (online at 31 January 2020) <www.aljazeera.com/ajimpact/french-judges-tilt-favour-total-landmark-ruling-200130223500626.html>.

74 *Wet zorgplicht kinderarbeid*, Stb. 2019, 401.

75 Business & Human Rights Resource Centre, 'National Movements for Mandatory Human Rights Due Diligence in European Countries' (13 March 2020) <www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries>.

76 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.81].

which will likely include a reporting requirement similar to the Australian and UK Acts, but may also create a duty of care for larger businesses, as well as a mechanism to receive and investigate modern slavery complaints.[77]

10.73 At the international level, negotiations have continued towards a treaty on business and human rights.[78] A 'zero draft' treaty and optional protocol were presented to the United Nations Human Rights Council by an intergovernmental working group in 2018, and a revised draft was published in 2019.[79] The draft treaty would commit states to ensure that their domestic legislation requires

> all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent violations or abuses.[80]

10.74 It would further bind states to adopt measures requiring all businesses to undertake human rights due diligence (Art 5(2)), including by identifying, taking steps to prevent, monitoring, and reporting on any actual or potential human rights impacts that may arise from their business activities.[81]

10.75 In this context, and also in light of ongoing negotiations towards an Australia-European Union Free Trade Agreement,[82] it is appropriate to consider how Australian corporations may be impacted by regulatory changes in other jurisdictions, and also how the Australian regulatory environment can keep pace with global developments to ensure that Australian corporations remain competitive in the world economy.

10.76 In addition to these international developments, in the past few years a handful of high-profile cases in foreign jurisdictions have highlighted a potential shift in the appetite of domestic courts to hear civil claims against corporations involving alleged international crimes and human rights violations, including where the claimants were foreign nationals. Two of these cases are outlined below.

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77 Kellie L Johnston and Benedict Wray, 'Modern Slavery: Canada Moves Closer to Supply Chain Legislation', *Norton Rose Fulbright* (April 2019) <www.nortonrosefulbright.com/en/knowledge/publications/447f2d0d/modern-slavery-canada-moves-closer-to-supply-chain-legislation>; Elizabeth Raymer, 'Canada Expected to Pass Legislation on Modern-Day Slavery in Supply Chains', *Canadian Lawyer* (online at 30 January 2020) <www.canadianlawyermag.com/news/general/canada-expected-to-pass-legislation-on-modern-day-slavery-in-supply-chains/325664>.

78 Other international initiatives, such as the UN Global Compact and the Guiding Principles on Business and Human Rights, were outlined by the ALRC in the Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.32]–[12.47].

79 Open-ended Intergovernmental Working Group, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Revised Draft* (Human Rights Council, 2019).

80 Ibid art 5(1).

81 Ibid art 5(2).

82 Department of Foreign Affairs and Trade, 'Australia-European Union Free Trade Agreement' (31 January 2020) <www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/default>.

Vedanta Resources v Lungowe (UK)

10.77 In what is now considered a landmark decision, the Court of Appeal of England and Wales (later affirmed by the UK Supreme Court) allowed a claim by more than 1800 Zambians to proceed against a Zambian mining company, Konkola Copper Mines (KCM), and its then UK-based parent company, Vedanta,[83] on the basis that the claimants would not have access to justice in Zambia.[84]

10.78 The claimants were members of poor rural farming communities, who alleged that their health and farming activities were damaged by the discharge of toxic substances into surrounding waterways by the mine. While the Zambian Government had a significant minority stake in the mine, Vedanta's public reports stated that it had ultimate control over KCM and the mine in practice, which, as the Supreme Court's accepted, 'is not thereby to be regarded as any less than it would be if wholly owned'.[85]

10.79 In 2017, the UK Court of Appeal had considered whether it would be possible for a duty of care to be found between Vedanta and the Zambians, who alleged they had suffered damage as a result of actions by KCM. Without determining whether that duty of care in fact existed, the Court of Appeal held that the case was 'arguable', on the basis of evidence that Vedanta had, among other things:

- published a sustainability report emphasising Vedanta's oversight of its subsidiaries;
- entered into agreements to provide employee training to all subsidiaries, including 'training on specific topics such as health and safety management' and 'environmental incidents'; and
- made public statements acknowledging the problem of toxic pollution discharge into the waterways at the Zambian mine in question, stating that 'we have a governance framework to ensure that surface and ground water do not get contaminated by our operations'.[86]

10.80 The Court of Appeal acknowledged that if the claimants were ultimately successful, it would be the first reported case in which a UK parent company was held to owe a duty of care to a person who, while not being an employee of a subsidiary, was otherwise affected by the subsidiary's activities.[87] Simon LJ noted, however,

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83 In October 2018 Vedanta Resources delisted from the London Stock Exchange and is now Indian-owned.

84 Vedanta had offered to voluntarily submit to the jurisdiction of Zambian courts. The United Kingdom Supreme Court stated that, had it not been for the barriers to justice in Zambia, the Court would have likely refused the claimants' request to commence the proceedings against both companies in England: *Vedanta Resources Plc v Lungowe* [2019] 2 WLR 1051, [2019] UKSC 20 [88]–[102], affirming the decision of the Court of Appeal in *Lungowe v Vedanta Resources Plc* [2018] 1 WLR 3575, [2017] EWCA Civ 1528.

85 *Vedanta Resources Plc v Lungowe* [2019] 2 WLR 1051, [2019] UKSC 20 [2].

86 *Lungowe v Vedanta Resources Plc* [2018] 1 WLR 3575, [2017] EWCA Civ 1528 [83]–[90].

87 In two earlier cases, *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC) and *AAA v Unilever Plc*

that the novelty of such a finding 'does not render such a claim unarguable. If it were otherwise the law would never change.'[88]

10.81 In 2019, the UK Supreme Court dismissed a subsequent appeal by Vedanta, and upheld the Court of Appeal's 2017 ruling that Vedanta could be sued in England over the actions of its foreign subsidiary. The decision was novel in affirming that a duty of care *could* exist between a parent company and persons in a foreign jurisdiction that are affected by the activities of a subsidiary. The claims against Vedanta and KCM may now proceed in the English High Court.

10.82 The *Vedanta* decision has been criticised on the basis that it may create a catch-22 for UK businesses: corporations that take steps to undertake due diligence regarding their supply chains — in compliance with standards such as the UN Guiding Principles — may in so doing expose themselves to liability by increasing the likelihood that a court may find they owed a duty of care to persons impacted by the activities of their foreign subsidiaries.[89]

10.83 Conversely, other commentators suggest that the key lesson for corporations following *Vedanta* is that they should 'pre-emptively implement measures to ensure that human rights are respected and protected' throughout their operations, including by

> carrying out thorough human rights due diligence, providing bespoke training and continuing to exercise suitable oversight to ensure that any human rights impacts are effectively managed.[90]

10.84 From this perspective, *Vedanta* reaffirms rather than undermines the need for parent corporations to take an active role in identifying and preventing misconduct by their subsidiaries.

10.85 The *Vedanta* case offers important lessons for Australian legislators in ensuring that regulatory mechanisms are designed to interact in a complementary fashion, and

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[2017] EWHC 371 (QB), the English courts found they did not have jurisdiction to hear claims against the foreign subsidiaries of the UK-based parent companies. Both cases were appealed, and the UK Supreme Court determined to defer its decision on both cases until *Vedanta* was determined. Following the *Vedanta* decision, leave was granted in the *Okpabi* case, but not in the *AAA* case. The *AAA* appeal was dismissed on the basis that the appellants failed to establish the 'proximity point' between Unilever as the UK parent company and its offshore subsidiary: *AAA v Unilever Plc* [2018] EWCA Civ 1532 [5]; *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191.

88 *Lungowe v Vedanta Resources Plc* [2018] 1 WLR 3575, [2017] EWCA Civ 1528 [88].

89 Julianne Hughes-Jennett and Peter Hood, 'Business and Human Rights: How Should English Domiciled Multinationals Manage Their Human Rights Risk in Light of the Judgement in Lungowe v Vedanta?', *The Law of Nations* (Blog post, 3 November 2017) <www.lawofnationsblog.com/2017/11/03/business-human-rights-english-domiciled-multinationals-manage-human-rights-risk-light-judgment-lungowe-v-vedanta/>.

90 Ruth Cowley and Stuart Neely, '*Lungowe v Vedanta* Appeal Highlights Important Points Regarding Parent Company Liability', *Norton Rose Fulbright* (November 2017) <www.nortonrosefulbright.com/en/knowledge/publications/bf5c2c71/emlungowe-v-vedantaem-appeal-highlights-important-points-regarding-parent-company-liability>.

to ultimately encourage corporations to take steps to identify, prevent, mitigate, and remediate human rights violations and other serious crimes in their supply chains and offshore activities.

Nevsun v Araya (Canada)

10.86 In early 2020, the Supreme Court of Canada held that Nevsun, a Canadian mining company that is a majority owner of a mine in Eritrea, could be sued in Canada for violations of international law alleged to have occurred at the mine.[91]

10.87 Eritrea has a 'National Service Program' that requires all Eritreans to undertake military training and work in the military or other public service projects. Eritreans are required to join the program when they turn 18, and are often forced to work for years, or in some cases indefinitely, under harsh conditions.[92]

10.88 Three Eritrean refugees initiated the claim as a class action in British Columbia on behalf of more than 1,000 Eritreans. The workers claimed that they had been 'indefinitely conscripted' through the Eritrean military service, and forced to work at a mine owned and operated by an Eritrean corporation, the Bisha Mining Share Company. That company is 40% owned by the Eritrean National Mining Corporation, and (through subsidiaries) 60% owned by Nevsun Resources, a publicly-held Canadian company.[93]

10.89 The claimants alleged that in the course of this conscription, Nevsun violated customary international law prohibitions against forced labour, slavery, crimes against humanity, and cruel, inhuman or degrading treatment. The claimants also sought damages for breaches of domestic torts including negligence, unlawful confinement, and battery.[94]

10.90 After lower Canadian courts had permitted the claim to proceed, Nevsun appealed to the Supreme Court. Nevsun argued that the claims based on customary international law had no reasonable prospect of success, and should therefore be struck out. The company also brought a motion to strike out the pleadings on the basis of the act of state doctrine, which precludes domestic courts from exercising jurisdiction over the sovereign acts of a foreign government.[95]

10.91 The majority of the Supreme Court held that the act of state doctrine was not a bar to the claim, as it is not a part of Canadian law. The doctrine developed in English

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91 *Nevsun Resources Ltd v Araya* [2020] SCC 5.

92 Supreme Court of Canada, 'Case in Brief: Nevsun Resources Ltd. v. Araya' (28 February 2020) <www.scc-csc.ca/case-dossier/cb/2020/37919-eng.aspx>; *Nevsun Resources Ltd v Araya* [2020] SCC 5 [8]–[11].

93 *Nevsun Resources Ltd v Araya* [2020] SCC 5 [3]–[7].

94 Ibid [4].

95 Ibid [5].

jurisprudence to deal with issues regarding conflict of laws and judicial restraint, but Canadian courts have developed alternative, specific responses to these issues.[96]

10.92 The majority of the Court held that customary international law is automatically incorporated into domestic Canadian law.[97] The Court further held that Nevsun had failed to establish that it is 'plain and obvious' that the claims under customary international law had no reasonable prospect of success.[98]

10.93 The Court noted that, while states have historically been the main (or only) subjects of international law, the global legal system has 'long-since evolved from this state-centric template'.[99] The majority cited Professor Stephens, who has argued that the

> context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors.[100]

10.94 The majority agreed, and concluded that

> it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in … 'complicity offences'.[101]

10.95 The Court did not decide whether the Eritrean workers were entitled to damages for the alleged breaches, but held that the claim should proceed on the basis that customary international law 'may well apply to Nevsun'.[102]

10.96 Finally, in deferring to a future trial judge the matter of how the claims should proceed, the majority offered that:

> The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated

96 Ibid [27]–[59].
97 Ibid [94]–[96]. This question was very closely split, however, with their Honours deciding it 5:4.
98 Ibid [69]–[116].
99 Ibid [106], (Wagner CJ and Abella, Karakatsanis, Gascon and Martin JJ).
100 Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 73.
101 *Nevsun Resources Ltd v Araya* [2020] SCC 5 [113], (Wagner CJ and Abella, Karakatsanis, Gascon and Martin JJ) (citations omitted).
102 Ibid [114]. In dissent, Brown and Rowe JJ considered that 'corporate liability for human rights violations has not been recognized under customary international law; the most that one could credibly say is that the proposition that such liability has been recognized is equivocal. … "customary international law … is not binding law if it is equivocal". Absent a binding norm, the workers' cause of action is clearly doomed to fail': [191] (citations omitted). In a separate dissent, Moldaver and Côté JJ agreed with Brown and Rowe JJ.

> rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.[103]

10.97 It must be noted that there are important differences between the Canadian and Australian legal systems in relation to this case — not least among them is Australia's dualist approach to international law, which does not automatically integrate customary international law into the domestic legal system.[104] Nonetheless, the decision of the Canadian Supreme Court may yet reflect an emerging shift in international law regarding the potential applicability of international human rights law to corporations. Traditionally, corporations have not been subject to liability for breach of customary international law prohibitions related to human rights, but the *Nevsun* case casts doubt over this long-standing position.

Key current Government initiatives

10.98 Any future inquiry into the regulation of transnational crime and corporate human rights impacts must also acknowledge — and aim to complement — existing and planned initiatives by the Government and other stakeholders.

10.99 The Australian Border Force, which administers the *Modern Slavery Act*, recently released a public Consultation Paper regarding the development of its National Action Plan to Combat Modern Slavery 2020–24.[105] The new Action Plan will build on the preceding National Action Plan to Combat Human Trafficking and Slavery 2015–19.[106]

10.100 As the recent Consultation Paper notes, the Australian Government has been committed to implementing a whole-of-government response to modern slavery since the first Action Plan to Eradicate Trafficking in Persons was introduced in 2004.[107] Major initiatives undertaken by Government since then include:

- ensuring that modern slavery practices are comprehensively criminalised;
- creating specialist teams in the AFP to investigate modern slavery cases;
- establishing a Human Trafficking Visa Framework to allow victims and witnesses to remain in Australia during investigations and prosecutions;
- introducing the *Modern Slavery Act*; and

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103 Ibid [129].

104 For discussion of this principle, see The Hon Justice M Kirby AC CMG, 'Domestic Implementation of International Human Rights Norms' (1999) 5(2) *Australian Journal of Human Rights* 109; the Hon Chief Justice R French AC, 'International Law and Australian Domestic Law' (Paper, Supreme Court of New South Wales Annual Conference, Hunter Valley, 21 August 2009).

105 Australian Border Force, *National Action Plan to Combat Modern Slavery 2020–24: Public Consultation Paper* (2019).

106 Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015–19* (2014).

107 Australian Government, *Action Plan to Eradicate Trafficking in Persons* (2004).

- cooperating with neighbouring countries to prevent modern slavery and trafficking, for example, through the Association of South East Asian Nations (ASEAN)-Australia Counter-Trafficking Program 2018–28.[108]

10.101 These initiatives are a critical part of broader efforts to address transnational crime and corporate human rights impacts. However, the ALRC suggests that the Government should pursue a wider inquiry into these issues, of which modern slavery forms one significant part. For example, while the Human Trafficking Visa Framework may be of great assistance to some victims of modern slavery in Australia, a broader inquiry should also consider whether any Australian immigration policies or procedures may inadvertently contribute to the risk of immigrants becoming victims of modern slavery or trafficking, by exacerbating vulnerability. The Joint Standing Committee on Foreign Affairs, Defence and Trade recommended that this issue be considered in the three-year review of the *Modern Slavery Act*, which is discussed below.[109]

Priorities for further inquiry and consultation

10.102 This section provides an overview of key issues that should be the subject of further inquiry. While considerable work has already been undertaken to date on many of these issues, as noted below, further work is required by Government (or an independent body) to determine which approaches may be most appropriate in the Australian context to achieve a smart regulatory mix, and how they could be implemented. Some of the options outlined below may be complementary, while for others Government must ultimately choose whether to pursue one or another.

10.103 These suggestions should be read in light of Australia's commitments under the United Nations Guiding Principles on Business and Human Rights, which require 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;
>
> (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations; [and]

108 Australian Border Force (n 105) 2.

109 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (2017) rec 7.

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.[110]

A smart regulatory mix

10.104 The starting point for a holistic review of the regulation of transnational business must be an acknowledgement of the advantages and limitations of criminal regulation in a transnational setting, and the need for a smart regulatory mix that includes both criminal and non-criminal regulatory mechanisms designed to work in a complementary way. As the Human Rights Law Centre and Australian Centre for International Justice observed in their submission, 'it will take a multi-dimensional approach to ensure Australia has the legislative framework to enable corporate accountability'.[111]

10.105 As set out in Chapter 4, criminal law has important expressive normative value, and this value is most effective when it is reserved for the most serious forms of misconduct. The cross-jurisdictional context of transnational business confers important differences in incentives and availability of information, as well as the relationships between corporations and employees, consumers and communities, and corporations and regulators, as compared to domestic corporate crime. It follows that the normative value of the criminal law in deterring serious corporate misconduct may operate differently in a transnational setting, particularly to the extent that transnational corporations may have a different set of tools and opportunities available to them in responding to regulatory action, compared to wholly domestic corporations.

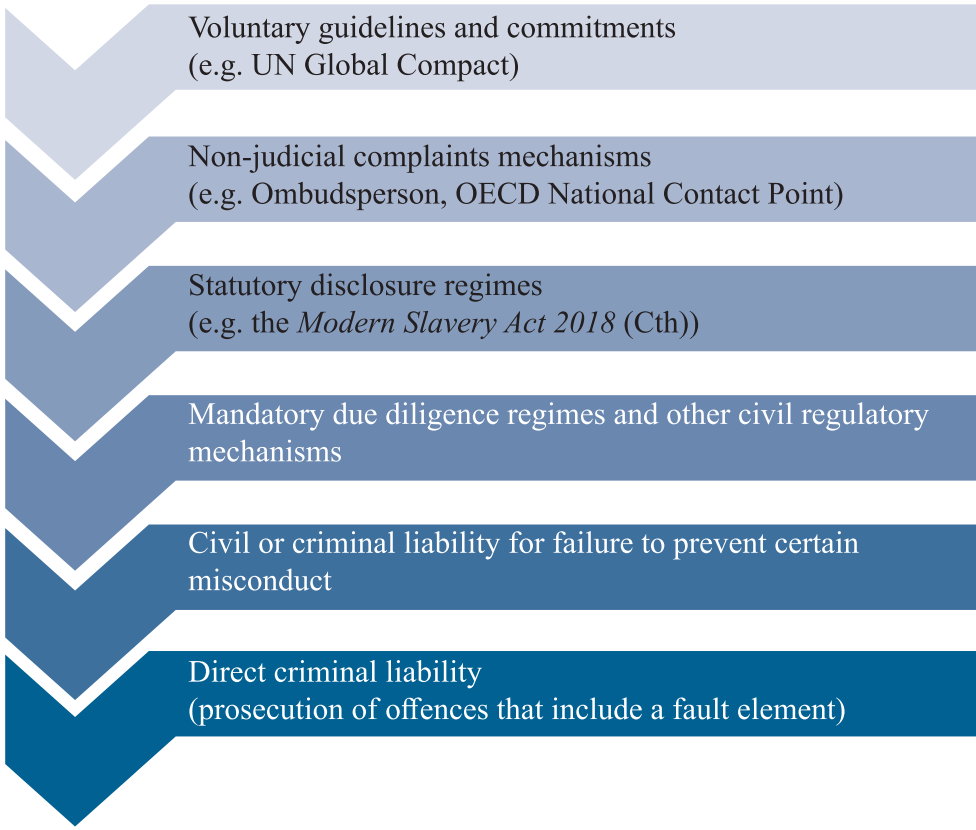
10.106 As set out in Figure 10-1,[112] a smart regulatory mix with respect to transnational crime and corporate human rights impacts should include a variety of criminal and non-criminal regulatory mechanisms that are together capable of responding to — and, importantly, differentiating between — conduct that involves varying levels of seriousness and culpability.

110 United Nations Office of the High Commissioner for Human Rights (n 3) 4, Principle 3. See also Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.36]–[12.39].

111 Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*.

112 For an overview of the UN Global Compact and the OECD National Contact Points (which are established under the OECD Guidelines for Multinational Enterprises), see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.40]–[12.47]. The OECD National Contact Points are also discussed further below at [10.187]–[10.196].

Figure 10-1: Smart Regulatory Mix for transnational crime



10.107 In the context of the most serious offences, and where a corporation has engaged in misconduct in a way that involves maximum blameworthiness (ie, intentionally), criminal prosecution for an offence that includes a fault element is likely to be the most appropriate regulatory response, in order to utilise the full normative force of the criminal law in condemning the conduct and deterring any future such conduct. However, as Professor Bronitt and Zoe Brereton have pointed out, corporations may be involved in misconduct of varying degrees of severity and with varying degrees of culpability.[113]

10.108 For less serious conduct, or conduct for which a corporation may be less culpable (for example due to the relative lack of control or leverage over the persons engaging in the conduct) softer mechanisms such as voluntary guidelines and disclosure regimes may be appropriate. For other types of conduct, there should be a variety of scaled mechanisms capable of appropriately responding to the particular

113 Bronitt and Brereton (n 61) [2.8].

seriousness of the conduct and the level of culpability. In these cases, criminal prosecution may be both undesirable and unfeasible.

10.109 In Australia, as well as other comparable jurisdictions like the UK, conduct such as slavery and human trafficking is already criminalised under Commonwealth law, but prosecutions against corporations for these offences are extremely rare. This has been confirmed by data obtained by the ALRC since the publication of the Discussion Paper. For example, to the ALRC's knowledge, there have not been any successful prosecutions of corporations for slavery, slavery-like offences, human trafficking, or violation of foreign sanctions under the *Criminal Code* in New South Wales criminal courts in at least the past ten years. The ALRC is not aware of any successful prosecutions of corporations for equivalent offences in other Australian jurisdictions.

10.110 The lack of prosecutions is at odds with estimates of the incidence of these types of crimes both in Australia and globally.[114] With limited data on investigations and prosecutions, however, it is difficult to ascertain whether the lack of prosecutions reflects limitations in the drafting of the criminal law, in corporate attribution methods under the criminal law, or in investigation and enforcement. It could also be the case that Australian corporations are simply not often involved in such crimes to the extent that they do occur, although this would need to be interrogated in the face of the recent upwelling of corporate interest in tackling modern slavery and other human rights impacts in supply chains, and evidence of the general pervasiveness of these crimes.[115]

10.111 The Discussion Paper noted that, in the context of transnational crime and corporate human rights impacts, the criminal law can be a relatively blunt instrument in terms of generating positive behaviour change among corporations.

10.112 First, criminal prosecutions are highly resource-intensive, requiring prosecutors to be selective regarding the instances of alleged or potential misconduct they investigate and ultimately prosecute. Criminal prosecution is also risky for prosecutors, as the high evidential bar required by the criminal law is necessarily difficult to meet. As a result, a regulatory system that relies too heavily on criminal prosecutions in the absence of other non-criminal regulatory mechanisms (or one that simply uses those alternative mechanisms too infrequently) risks undermining

114 See, eg, Department of State (USA), *Trafficking in Persons Report* (US Government, 2019) 77; Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (n 109) [3.66]–[3.141]; Joint Committee on Law Enforcement, Parliament of Australia, *An Inquiry into Human Trafficking, Slavery and Slavery-like Practices* (Australian Government, 2017) 6–7; Alliance 8.7, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains* (2019); Human Rights Law Centre, *Nowhere to Turn: Addressing Australian Corporate Abuses Overseas* (2018).

115 See generally the sources listed in previous footnote.

the deterrent value of the criminal law, as corporate actors will perceive that there is a low risk of detection or prosecution.

10.113 Secondly, in the context of transnational business in particular, various commentators and stakeholders in this Inquiry identified the risk that corporate actors may refrain from identifying, investigating, or reporting certain risks or incidents in their supply chains for fear of criminal liability. Smith and Lepeuple noted that the imposition of an offence of failing to prevent human rights violations may deter corporations from reporting or meaningfully engaging with human rights risks.[116]

10.114 Increasing corporate exposure to possible criminal liability may have the perverse effect of incentivising corporations to turn a blind eye to possible misconduct in their supply chains where they otherwise may have taken steps to inquire and possibly remedy the issue. Criminal sanctions may in this way conflict with (rather than complement) non-criminal regulatory mechanisms such as transparency guidelines and disclosure regimes.

10.115 Thirdly, criminal regulation also fails to respond to what some corporate stakeholders identified as the main challenge to improved corporate behaviour with regard to human rights violations and offshore crime, that being the knowledge gap among corporations as to how to effectively identify and address these risks.

10.116 A fourth disadvantage of criminal regulation in this context is that it generally fails to provide remedies to victims.[117] As Smith and Lepeuple noted in relation to an offence of failing to prevent human rights violations

> whilst the offence would benefit victims inasmuch as it would promote a corporate culture that deters human rights abuses, it is questionable whether this is as important as ensuring that victims of those abuses have effective access to civil remedies.[118]

10.117 For these reasons, it is important to consider the problem of transnational crime and corporate human rights violations holistically, including how criminal and non-criminal regulatory mechanisms can be designed to complement each other. While the criminalisation (and prosecution) of certain conduct may have important normative value as a signal of public condemnation, this is not inconsistent with a view that a more flexible regulatory mix of criminal, civil, and non-judicial mechanisms may be more effective at generating behavioural change in the long term.

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116 Smith and Lepeuple (n 34).

117 While Australian courts can make 'reparation orders' as ancillary orders in sentencing proceedings (under s 21B of the *Crimes Act 1914* (Cth)) it would be difficult to make such orders in relation to cases in which the identity of victims and the quantum of their loss are not readily identifiable: see Chapter 8, in particular [8.100].

118 Smith and Lepeuple (n 34).

10.118 Alongside existing criminal offences, a smart mix of civil regulations (such as human rights due diligence) and softer voluntary guidelines or disclosure mechanisms (such as the *Modern Slavery Act*) could focus on incentivising corporations to meaningfully engage with human rights risks in their supply chains. By providing platforms for corporations to learn about and engage with these issues — in a way that does not necessarily lead directly to criminal prosecution — corporations could be incentivised to come forward about these risks in their supply chains.

10.119 These alternative regulatory mechanisms could provide opportunities for learning, cooperation, dispute resolution, and remediation. The regulatory mix should include mechanisms for compensating victims as well as options for corporations to reduce or avoid liability where they have taken genuine steps to identify, prevent, mitigate, and remedy harm that does arise.

10.120 At the same time, the criminal law would still operate alongside these alternative mechanisms, available for those less frequent but particularly egregious cases that may arise in which it is actually possible to mount a successful criminal prosecution. Importantly, however, having a mixture of regulatory mechanisms provides opportunities for corporate engagement and genuine behaviour change, while also addressing the problem that the criminal law is so difficult to enforce extraterritorially that may provide little deterrent value in practice.

10.121 The sections below examine some of these key non-criminal regulatory mechanisms in brief, in order to draw attention to the regulatory options available, existing initiatives and examples of effective regimes in other jurisdictions, and key points of focus for further inquiry. Given that a detailed consideration of these topics is beyond the scope of this Inquiry, the ALRC acknowledges that the following information is not comprehensive. Nonetheless, it is anticipated that the following summaries of research conducted in the course of this Inquiry may be of use in guiding future inquiries and initiatives by Government, civil society, and the business sector.

10.122 Other issues that warrant further consideration may include the question of how any regulations are impacted (or undermined) by corporate group structures (discussed below), and the role of bilateral or multilateral trade negotiations in setting global normative expectations to ensure a level playing field for Australian corporations in the global economy.

10.123 The ALRC endorses the recommendation of the Joint Standing Committee on Foreign Affairs, Defence and Trade that the Government consider possible trade mechanisms to address modern slavery risks in relation to goods entering Australia, such as the import restrictions imposed by the *Trade Facilitation and*

Trade Enforcement Act 2015 (US).[119] Such an inquiry should also go beyond modern slavery to include other human rights risks.

10.124 The ALRC also suggests that the Government consider ratifying and implementing all outstanding human rights conventions, including particularly the *International Convention on the Rights of All Migrant Workers and Members of their Families*.[120]

Aspects of extraterritorial offences requiring further consideration

10.125 The ALRC has formed the view that the failure to prevent approach to corporate criminal responsibility is an appropriate mechanism in the context of specific offences, particularly those of a transnational nature. Additionally, the ALRC suggests that Government should inquiry further into some key concerns raised by stakeholders with regard to the extraterritorial operation of the criminal law.

Impact of the 'local law defence'

10.126 In its submission, ASIC noted that there may be some offences for which extended geographical jurisdiction currently does not, but should, apply.[121] The issue raised by ASIC is that some offences, despite appearing to have extraterritorial application under the *Criminal Code*, may not operate as intended or expected.

10.127 Based on the advice of stakeholders, the ALRC considers that the Australian Government should undertake a review of whether certain extraterritorial criminal conduct is effectively criminalised in practice, and whether it may be appropriate to remove the 'local law defence' provided for many extraterritorial offences.

10.128 In setting out the operation of the extended geographical jurisdiction provisions in the *Criminal Code*, the Discussion Paper noted that a 'local law defence' applies in relation to categories A, B, and C.[122] This includes slavery-like offences under Div 270, for example, which attract Category B jurisdiction. The local law defence provides that if a person engages in the relevant conduct in a foreign jurisdiction where the same or similar conduct is not prohibited, no offence is committed for the purposes of the *Criminal Code*. This is significant in light of recent research showing that slavery-like conduct is not criminally prohibited in most countries.[123] It means that, in effect, these offences do not operate extraterritorially

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119 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (n 109) rec 20.

120 *International Convention on the Rights of All Migrant Workers and Members of their Families*, UNGA Res 45/158, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

121 Australian Securities and Investments Commission (ASIC), *Submission 54*.

122 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.18].

123 Katarina Schwarz and Jean Allain, *Antislavery in Domestic Legislation: An Empirical Analysis of National Prohibition Globally* (University of Nottingham Rights Lab, 2020) 11. Specifically, the authors found that 112 states appear not to have penal provisions in relation to forced labour, 170 states appear not to have

in most jurisdictions outside Australia, despite an apparent intention by legislators that they should.

10.129 In this context, the Government should consider whether it is appropriate to retain the local law defence for offences such as slavery-like offences and human trafficking, given the seriousness of these offences, and the evidence that such conduct is not uniformly criminalised in other jurisdictions.

10.130 This issue is also important in the context of creating an offence of failing to prevent an existing offence, in that, even if it is not necessary to secure a conviction for the primary offence, it is still necessary in the course of prosecuting the failure to prevent offence to prove that the relevant primary offence was committed. In the CLACCC Bill, this is addressed by s 70.5A(1)(b), which provides that the defendant may be liable if an associate either commits an offence under s 70.2 (the foreign bribery offence) *or* the associate 'engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence (the notional offence) against section 70.2'.[124]

10.131 In consultations, stakeholders also expressed concern as to whether the Commonwealth criminal law covers a wide enough range of conduct, particularly with regard to conduct that may constitute human rights violations under international law but that may not be criminalised domestically.

10.132 A review of the Commonwealth criminal law to this effect was not undertaken by the ALRC because the criminalisation of certain types of conduct is generally a matter for Government to decide.[125] However, acknowledging the concerns of stakeholders, this may be a relevant point of future inquiry for Government.

Impact of corporate groups

10.133 In responding to the Discussion Paper, ASIC noted further that the extended geographical jurisdiction provisions in the *Criminal Code* and the *Corporations Act* are unlikely to effectively capture offences committed by corporate groups with complex structures.[126] Access to multiple jurisdictions and complex corporate structures can enable corporations to outsource risk and liability by distancing parent companies from misconduct — from which a parent corporation may knowingly benefit — that occurs in the lower levels of a supply chain.

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criminalised practices similar to slavery, and 180 states appear not to have criminalised servitude.

124 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1, item 8, inserting s 70.5A(1)(b)(i)–(ii) of the *Criminal Code*.

125 States may also, however, accept obligations under particular treaties to criminalise certain conduct.

126 Australian Securities and Investments Commission (ASIC), *Submission 54*.

10.134 In its submission to the Senate Inquiry into the CLACCC Bill, the AFP also expressed concern about the impact of corporate groups in undermining enforcement of extraterritorial offences. The AFP noted that

> the complex corporate structures of international corporations can make it difficult to establish the liability of corporations, particularly where there has been wilful blindness to the activities of employees or agents.[127]

10.135 Multinational corporations or corporate groups may profit from conduct such as tax evasion, slavery and slavery-like offences, or circumventing foreign sanctions, while shielding a parent company from criminal responsibility in Australia.[128] As Rachel Nicolson and Emily Howie reported:

> Where corporations are organised in a group structure, the company can reduce the exposure of its assets by establishing a subsidiary with responsibility for high risk operations that has limited liability, thereby effectively quarantining the parent company's assets from liability for the high risk operations.[129]

10.136 Nicolson and Howie also noted the irony that, as an unintended consequence of extending the benefits of legal personhood to corporations, those corporations are often today afforded many rights and protections as if they were *natural* persons,[130] even if it sometimes comes at the expense of the rights of natural persons.

10.137 They highlighted the controversial nature of a system under which corporations are entitled to the benefit of corporate group structures that link them together when it is profitable to do so — for example to minimise tax liabilities and operational costs — but can use the same structures to shield themselves from liability for harm from which the company has benefited, by quarantining that liability in a separate corporation that appears to be *distanced*, via the separate legal personality of each corporation in the group.[131]

10.138 It was beyond the scope of the current Inquiry to examine the impact of corporate groups on the operation and effectiveness of the Commonwealth criminal law as applied to corporations. However, the Australian Government should undertake further inquiry into this issue, particularly as it may affect the operation of any failure to prevent offences.

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127 Australian Federal Police (n 19) 2.

128 See generally Rachel Nicolson and Emily Howie, *The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil - An Australian Law Perspective* (Paper for ICJ Expert Legal Panel on Corporate Complicity in International Crimes, 2007).

129 Ibid [2].

130 Ibid [56].

131 Ibid [89].

Mandatory due diligence regimes

10.139 The Discussion Paper set out an overview of a possible mandatory due diligence regime, including examples of due diligence laws from France, the Netherlands, and Australia.[132] As noted, the French *Duty of Vigilance Law 2017* and the Dutch *Child Labour Due Diligence Act 2019* have been widely praised for setting a new global standard in domestic regulation of the extraterritorial human rights impacts of corporations.[133]

10.140 The Business and Human Rights Resource Centre has noted that there is

> growing momentum worldwide among governments to require companies to undertake human rights due diligence … Major investors and companies are also speaking out in favour of such legislation.[134]

10.141 In the context of transnational crime and corporate human rights impacts, a mandatory due diligence regime (often called Human Rights Due Diligence or Mandatory Human Rights Due Diligence) would impose a duty on corporations to implement processes and policies designed to prevent, identify, mitigate, remediate, and report on any adverse human rights impacts caused by or in connection with the business activities or relationships of that corporation.

10.142 The key difference between a mandatory due diligence regime and a criminal failure to prevent offence is that the former would impose a duty on corporations to undertake due diligence. If a corporation does not comply with that duty, it may be liable for a civil penalty. Under a failure to prevent offence, in contrast, a corporation would only be liable where the primary offence occurs, but would have access to a defence of due diligence (or reasonable procedures) if the corporation could prove that it had in place reasonable policies and procedures designed to prevent the relevant misconduct.

Support for a mandatory due diligence regime

10.143 Consultations indicated that there is considerable interest in and support for a mandatory due diligence regime in Australia among government agencies, civil society, and the business sector. A number of submissions supported further consideration of a mandatory due diligence regime for Australian corporations in relation to extraterritorial offences and human rights impacts.[135]

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132 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.82]–[12.85], [12.102]–[12.119].

133 See, eg, European Coalition for Corporate Justice (n 70); 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* 65.

134 Business & Human Rights Resource Centre, 'Mandatory Due Diligence' <www.business-humanrights.org/en/mandatory-due-diligence>.

135 Professor J Nolan and N Frishling, *Submission 26*; Monash Transnational Criminal Law Group,

10.144 The Human Rights Law Centre and the Australian Centre for International Justice supported the introduction of a mandatory due diligence regime in respect of human rights violations that are currently criminalised under Commonwealth law.[136] Professor Nolan and Nana Frishling also supported a due diligence regime, and recommended that it should go beyond existing criminal offences, to include all potential human rights impacts of Australian corporations.[137]

10.145 The Monash Transnational Criminal Law Group noted that, while such a regime would be welcome in the Australian context, it should not be seen as a substitute for the effective enforcement of existing criminal laws in relation to transnational crime and offshore human rights violations.[138]

10.146 The Uniting Church in Australia supported the introduction of mandatory due diligence in relation to certain criminal offences, but not as a blanket approach.[139] The Uniting Church was concerned that, given the significant resources required by corporations in conducting due diligence, if the obligation covered too wide a range of extraterritorial crimes or human rights impacts corporations may respond by conducting superficial due diligence, undermining the objective of the regime.

10.147 Many corporations will require considerable support and guidance in understanding and implementing the requirements of a broadly drafted human rights due diligence requirement. This issue is addressed in more detail below in the suggested roadmap for Government.

10.148 In a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into establishing a Modern Slavery Act in Australia, the Responsible Investment Association Australasia (RIAA) noted that there had been a poor response by businesses to the *Modern Slavery Act 2015* (UK).[140] In light of this, they recommended that Government instead consider something closer to a mandatory due diligence regime, for example by

> enhancing the scope and remit of an Australian Modern Slavery Act beyond that of the UK to include aspects of the French legislation which require a broader scope of human rights management alongside transparency measures…[141]

Submission 35; Human Rights Law Centre and Australian Centre for International Justice*, Submission 39*; Australian Securities and Investments Commission (ASIC), *Submission 54*.

136 Human Rights Law Centre and Australian Centre for International Justice*, Submission 39*.

137 Professor J Nolan and N Frishling, *Submission 26*.

138 Monash Transnational Criminal Law Group, *Submission 35*.

139 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43*.

140 Responsible Investment Association Australasia, Submission 68 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017).

141 Ibid 4 (emphasis omitted).

10.149 In the UK, a recent joint study by the BIICL and others on due diligence requirements in supply chains found considerable stakeholder support (including among business stakeholders) for a mandatory due diligence regime:

> The majority of stakeholders indicated that mandatory due diligence as a legal standard of care (Option 4) may provide potential benefits to business relating to harmonization, legal certainty, a level playing field, and increasing leverage in their business relationships throughout the supply chain through a non-negotiable standard. The level playing field and legal certainty were amongst the most important considerations for business interviewees, whereas generally interviewees highlighted its potential to address the lack of access to remedies for affected parties and improve implementation of due diligence. Almost all interviewees were in principle in favour of a policy change to introduce a general standard at the EU [European Union] level, although they differed on aspects of liability and methods of enforcement.[142]

10.150 The survey participants expressed support for a statutory requirement that applied to all corporations, including SMEs and charities, but which was adaptable to the particular risks and resources relevant to a particular organisation. Stakeholders preferred a 'duty of care' mechanism rather than a procedural 'tick-box' requirement, and argued that the regime should include a due diligence defence to liability.[143]

10.151 A particularly interesting finding of the study was the divergence between views of industry bodies and individual multinational corporations. The authors found that industry bodies typically preferred 'the least enforceable regulatory options', whereas individual corporations increasingly 'support the introduction of mandatory due diligence regulation'.[144]

10.152 The Business and Human Rights Resource Centre has published a list of corporations that have expressed public support for human rights due diligence regulations, which includes more than 37 statements by individual corporations from various industries; joint statements on behalf of more than 182 companies from different sectors; statements by business associations claiming to represent more than 49,000 individual businesses; and joint statements on behalf of more than 150 investors, banks, and insurance companies.[145]

142 Smit et al (n 66) 17.
143 Ibid.
144 Ibid.
145 Business and Human Rights Resource Centre, 'List of Large Businesses, Associations & Investors with Public Statements & Endorsements in Support of Human Rights Due Diligence Regulation', (6 June 2019, updated 3 April 2020) <www.business-humanrights.org/en/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-human-rights-due-diligence-regulation>.

Advantages of a mandatory due diligence regime

10.153 Operating alongside or in connection with existing criminal offences, a mandatory due diligence regime could bolster the criminal law in several ways. Even if the failure to prevent offences recommended in this chapter were introduced, a broadly drafted mandatory due diligence regime may complement the criminal law in some key ways.

10.154 First, a mandatory due diligence regime may bring business practice into line with community expectations. Under the current criminal law, corporations may be able to evade criminal liability where they were reckless as to the risk of crimes being committed, given the high level of fault and evidentiary standard required by most criminal offences.

10.155 In the example of slavery in supply chains, a 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 or slavery-like practices are being used to provide those goods or services. Currently, a corporation need simply not enquire into such circumstances to avoid liability. A mandatory due diligence regime would instead make it clear that the corporation must make necessary enquiries to satisfy itself (and regulators) that slavery or slavery-like practices are not being used to service their contracts.

10.156 Secondly, a mandatory due diligence regime could provide an important mid-level response to transnational crime and corporate human rights impacts in terms of the smart regulatory mix. While Australia has implemented some softer measures like the *Modern Slavery Act*, which may be appropriate for issues where the harm is relatively removed from the control of the Australian corporation, there are few or no regulatory mechanisms between these soft measures and the full force of the criminal law in responding to the middle range of seriousness and culpability.

10.157 To the extent that the criminal law may in effect be unavailable as a means of regulating much of this conduct (due to high evidential barriers), a considerable range of potential misconduct is, in effect, primarily, if not exclusively, regulated by voluntary guidelines or soft disclosure requirements (which, as noted below, do not require corporations to take any substantive measures to address these risks). A mandatory due diligence regime could fill this substantial gap.

10.158 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.[146]

10.159 Secondly, in relation to those offences for which a failure to prevent offence may be introduced — for example slavery — a mandatory due diligence regime would complement the offence by indicating that *all* corporations should engage in due diligence to prevent, identify, mitigate, and remediate any instances of slavery in their supply chains.

10.160 The due diligence regime may provide that corporations could be liable for a civil penalty in the event that they fail to undertake due diligence, but no particular instance of harm has resulted or been identified. The failure to prevent offence, in contrast, would import criminal responsibility, but only in cases where the conduct was engaged in by an associate who did so *for the benefit* of the corporation, and the corporation failed to implement reasonable measures to prevent such conduct by associates. While the failure to prevent offence carries a far more serious penalty, its application is tightly restricted to cases in which an associate engaged in the conduct for corporation's benefit. A failure to undertake mandatory due diligence would carry a lesser penalty, but apply more broadly.

10.161 In this way, a mandatory due diligence regime may operate alongside a failure to prevent offence in a way that promotes and reinforces the expressive normative value of the criminal law, while ensuring that the regulatory environment is more responsive and targeted. It would simultaneously ensure that corporations have clear expectations regarding their responsibilities to prevent human rights violations and other crimes, and also have access to a mechanism that recognises genuine efforts to do so. A mandatory due diligence regime may therefore be an important aspect of a smart regulatory mix with regard to transnational crimes and corporate human rights impacts.

10.162 A mandatory due diligence regime may impose an additional burden on corporations, and may be perceived to put Australian corporations at a disadvantage compared to foreign corporations not subject to the same requirements. The ALRC reiterates that, on a principled basis, any increased burden is justified by the gravity of the harms 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.

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146 European Coalition for Corporate Justice (n 70).

10.163 Moreover, any measures required by corporations to undertake such due diligence 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, and in line with community expectations. This point has been supported by a variety of corporate actors, who have increasingly called for tougher regulations to 'level the playing field' in favour of those corporations already leading the corporate sector in preventing and addressing human rights impacts and other extraterritorial crimes.[147]

Issues for further consideration

10.164 In a future inquiry, a number of further questions regarding a possible mandatory due diligence regime will need to be considered, including:

- The scope of the obligations, in terms of the practical steps required by corporations to meet the due diligence requirements.[148]
- The scope of the crimes or human rights impacts in respect of which corporations must undertake due diligence.
- How obligations can be designed in a way that is proportionate to the size and type of corporation (including SMEs and charities or not-for-profits), including the nature of the business and business relationships, and the specific risks that are relevant to that business.
- The type of sanctions that may be available for corporations that fail to comply with the due diligence requirements, and how to ensure that these are proportionate to both the corporation and the lack of compliance to ensure corporations are adequately incentivised to comply.
- How to ensure that due diligence obligations are properly integrated throughout a corporation's activities, and not relegated to a box-ticking exercise by the compliance department.
- How to ensure that corporations have access to sufficient support and information to understand and implement their obligations under the regime.

Disclosure regimes

10.165 The Discussion Paper noted that the Government has already introduced some disclosure-based regulations aimed at encouraging corporations to take voluntary measures to reduce the risk of offshore crimes and human rights violations.[149]

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147 See discussion at [10.60]–[10.69] above.

148 As the ALRC noted in the Discussion Paper, considerable guidance is already available on the meaning of corporate due diligence, and the steps corporations can take to address the risk of human rights violations and other extraterritorial offences: see [6.24]–[6.33]. Any statutory regime in Australia should provide specific regulatory guidance in this respect, but may draw on this existing literature, as was done in relation to the *Modern Slavery Act 2018* (Cth).

149 There have also been some state-based initiatives in this field. Nolan, for example, describes the supply

10.166 The *Modern Slavery Act,* which came into effect on 1 January 2019, is an example of this approach.[150] 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 Government has recently released new guidance for reporting entities.[151]

10.167 While the Act was generally considered by stakeholders to be 'a step in the right direction' in terms of raising awareness of modern slavery issues, the ALRC maintains the concern expressed in the Discussion Paper that the Act is unlikely to have much impact on corporate behaviour in terms of addressing modern slavery in supply chains.[152]

10.168 While the Australian modern slavery regime is too new to evaluate in practice, recent data on the business response to the *Modern Slavery Act 2015* (UK) — on which the Australian legislation was modelled — is underwhelming. In 2019, the independent review of the UK Act found that 'a number of companies are approaching their obligations as a mere tick-box exercise' and that around '40 per cent of eligible companies are not complying with the legislation at all'.[153]

10.169 Disclosure-based approaches to regulating transnational businesses have proliferated in other jurisdictions in recent years, including the Californian *Transparency in Supply Chains Act*,[154] the *Dodd-Frank Wall Street Reform and Consumer Protection Act*,[155] and European Union Directive 2014/95.[156]

chain regulation introduced in the early 2000s: 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, 45.

150 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.

151 Australian Government, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* (2019).

152 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.58]–[12.59]; see also Human Rights Law Centre, Submission 27 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (April 2017).

153 Secretary of State for the Home Department (UK), *Independent Review of the Modern Slavery Act 2015: Final Report* (CP 100, May 2019) [15].

154 Civil Code § 1714.43.

155 Pub L No 111–203, 124 Stat 1376 (2010).

156 For a comparison of three market-based disclosure regimes (Dodd-Frank, the Californian law and the UK Modern Slavery Act) and two hard-law due diligence laws (the French duty of vigilance law and the Australian illegal logging law), see Nolan (n 133).

10.170 However, these regimes have been widely criticised on various grounds, not least among them that these regimes simply ask very little of corporations.[157] As O'Brien has written of the *Modern Slavery Act 2015* (UK), corporations are required

> merely to report on what efforts have been made to identify and address labour exploitation in supply chains. This means that a corporation could, in fact, do nothing to address trafficking so long as that lack of action had been reported.[158]

10.171 Second, the disclosure model is self-limiting in that only consumer-facing corporations are likely to be influenced by consumer action in response to increased transparency. Other businesses along the supply chain, such as resource extraction, manufacturing, and shipping, are less likely to respond to consumer pressure.[159]

10.172 Third, disclosure regimes typically do not offer any kind of remedy or dispute resolution mechanism for victims of corporate crime or human rights violations, which is a core component of international human rights law.[160]

10.173 Finally, a number of commentators have argued that many corporations are likely to engage with disclosure regimes in a superficial or 'cosmetic' way that does little to address the underlying risks or harms.[161]

10.174 The limitations of this model notwithstanding, disclosure regimes may yet be an important stepping stone along the path to improving corporate accountability for transnational crime and human rights violations, and form an important part of a smart regulatory mix.

10.175 Stakeholders suggested to the ALRC that disclosure regimes can serve to 'focus the mind' in encouraging corporations to engage more deeply with the human rights impacts of their operations, and can provide a 'soft start' under which

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157 See generally Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 *Melbourne Journal of International Law* 221; Marcia Narine, 'Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts' (2015) 47(1) *Columbia Human Rights Law Review* 84; Ryan J Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17(1) *Melbourne Journal of International Law* 188; Nolan (n 133); C Parsons, 'The (In)Effectiveness of Voluntarily Produced Transparency Reports' [2017] *Business and Society* 1; Stephanie Schleimer and John Rice, 'Australian Corporate Social Responsibility Reports Are Little Better than Window Dressing', *The Conversation* (online at 4 October 2016) <www.theconversation.com/australian-corporate-social-responsibility-reports-are-little-better-than-window-dressing-66037>; Ronald C Brown, 'Due Diligence Hard Law Remedies for MNC Labor Chain Workers' (2018) 22(2) *UCLA Journal of International Law and Foreign Affairs* 119, 129.

158 Erin O'Brien, 'Human Trafficking and Heroic Consumerism' (2018) 7(4) *International Journal for Crime, Justice and Social Democracy* 51, 59–60 (citations omitted).

159 See generally Brown (n 157).

160 Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed, 2015) 58. Corporate disclosures may, of course, assist victims to support their claims in other forums, but the disclosure model itself does not provide such a mechanism.

161 Landau (n 157); Narine (n 157).

corporations can upskill and incorporate the relevant expertise needed to effectively prevent transnational crime and human rights violations.

10.176 Going forward, the *Modern Slavery Act* could be expanded in different ways, or it may simply be the first step in socialising corporations to these issues. It can reinforce the normative expectation that corporations take active responsibility for human rights impacts and other offshore crimes in their supply chains, without the blunt force of criminal liability. However, given the clear limitations, disclosure regimes must not be the end point in regulating transnational business. As Dr McGaughey has argued, the *Modern Slavery Act* should be seen as

> merely the first step on a long road towards a world in which slavery is no longer tolerated and where increasing obligations on business will contribute to this goal.[162]

10.177 Governments must look beyond disclosure regimes to ensure not only that corporations are *encouraged* to engage meaningfully with risks in their supply chains, but that corporations that fail to do so will face serious sanctions. This is necessary to avoid the unintended consequences of the status quo, in which responsible corporations are in effect punished for the ethical actions they take, in the form of the costs incurred.

10.178 The *Modern Slavery Act* is due for review after three years. The ALRC endorses the recommendations made by the Joint Standing Committee on Foreign Affairs, Defence and Trade that the review consider, among other things:

- penalties and compliance mechanisms under the Act;
- the need for a grievance mechanism for victims of modern slavery;
- the possibility of expanding the reporting requirement to other human rights; and
- auditing of suppliers to the Australian Government.[163]

10.179 The ALRC does not agree, however, with the Committee's suggestion to consider possible tax incentives for entities that comply with the reporting requirement, as corporations should not be 'rewarded' for merely complying with their legal obligations.

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162 Fiona McGaughey, 'Australia's Proposed Modern Slavery Act for Business Reporting – Part of an International Trend in Human Rights' (2018) 36(3) *Australian Resources and Energy Law Journal* 29, 35.

163 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (n 109) 90–1, rec 7.

10.180 The option of expanding the regime to include other human rights impacts may be a particularly useful next step, to ensure that corporations are encouraged to engage with other types of human rights impacts. In consultations, stakeholders expressed concern that narrowly drafted regimes like the *Modern Slavery Act* may inadvertently lead corporations to ignore other kinds of risks.

10.181 While noting the limitations of the *Modern Slavery Act 2015* (UK), Macdonald argued that:

> If companies are — through a combination of legislative prodding and growing cultural expectations as to their ethical conduct — starting to do due diligence in respect of slavery and forced labour in their supply chains, it would make sense to extend the [reporting] obligation to include other serious human rights violations. Slavery and forced labour, while exceptionally serious, are far from being the only possible corporate human rights violations.[164]

10.182 The three-year review should also consider whether it may be appropriate to increase the obligations imposed by the regime, for example to include mandatory due diligence, rather than just reporting.

10.183 Finally, the review should consider the advantages and disadvantages of making the same agency responsible for both policing of immigration and administration of the Australian *Modern Slavery Act*. As noted by the Hon John von Doussa AO, former President of the Australian Human Rights and Equal Opportunity Commission,

> The fear of being deported or detained often prevents irregular migrants from reporting human rights abuses to the police or from accessing medical care, social services or legal assistance.[165]

10.184 While there may be cost and efficiency advantages in having the *Modern Slavery Act* administered by the Australian Border Force, this arrangement may also undermine transparency and oversight, increase the risk of conflicts of interest in case handling, and reduce public confidence in government institutions.

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164 Macdonald (n 50).

165 The Hon John von Doussa AO, 'Prevention of Human Rights Abuses against Irregular Migrants: The Role of National Institutions' (Paper, 8th International Conference of National Institutions for the Promotion and Protection of Human Rights, Santa Cruz, Bolivia, 24 October 2006) <www.humanrights.gov.au/about/news/speeches/prevention-human-rights-abuses-against-irregular-migrants-role-national>.

Non-judicial dispute resolution mechanisms

10.185 In a smart regulatory mix, non-judicial dispute resolution mechanisms can provide an important additional forum for victims of harm to seek redress, and for civil society or community groups to drive behaviour change among corporations in cases where state-led regulatory mechanisms may be overburdened and unable to respond.

10.186 A holistic inquiry into the regulation of transnational business should consider the role of non-judicial mechanisms, how they may complement other forms of criminal or civil regulation, and how their effectiveness could be improved.

10.187 Under the OECD Guidelines for Multinational Enterprises ('OECD Guidelines'),[166] for example, states are required to establish National Contact Points ('NCPs'), whose purpose is to support the implementation of the Guidelines in that country.[167] The NCPs do this via two main functions: receiving complaints from the public against corporations that have allegedly failed to comply with the guidelines; and working with businesses and other stakeholders to raise awareness of the guidelines and the grievance mechanism.[168]

10.188 The Australian NCP may receive complaints regarding an alleged breach of the guidelines occurring domestically, regardless of where the corporation is headquartered, as well as complaints about any corporation headquartered in Australia, regardless of where the alleged breach occurred. The complaint process is focused on resolving incidents through conciliation or mediation. Complaints may be received from impacted persons, unions, or non-governmental organisations.[169]

10.189 As an example of how this mechanism may contribute to corporate regulation, the Dutch NCP received a complaint against ING Bank in 2017. The complaint was made by Greenpeace Netherlands, Oxfam Novib, BankTrack, and Friends of the Earth Netherlands. The complainants alleged that ING had violated the OECD Guidelines regarding environment and climate sustainability, including requirements to implement 'measurable objectives' and 'targets for improved environmental performance'.[170]

166 For an overview of the OECD Guidelines, see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [12.40]–[12.44].
167 OECD, *OECD Guidelines for Multinational Enterprises* (2011).
168 'National Contact Points (NCPs)', *OECD Watch* <www.oecdwatch.org/oecd-ncps/national-contact-points-ncps/>.
169 Ibid.
170 OECD (n 167) 42, Principle VI.1.

10.190 The guidelines additionally encourage corporations to disclose their greenhouse gas emissions, including direct and indirect, current and future, and corporate and product emissions.[171] The complainants requested that ING publish its total carbon footprint, including indirect emissions resulting from the bank's loans and investments, and publish measurable emission reduction targets with respect to its investment and lending portfolio.[172]

10.191 During 2018, the NCP hosted four mediations and two expert meetings with the parties. In early 2019, the parties agreed that ING would adopt a set of existing methodologies with respect to measuring the bank's climate impacts, setting targets to reduce those impacts, and steering the bank's overall approach to managing these impacts in its investment activities.[173]

10.192 The NCP ultimately declined to make a determination on whether ING had in fact violated the OECD Guidelines, considering that it would be counterproductive in light of the genuine efforts made by ING to address the complaints, and to engage in good faith with the mediation process.[174]

10.193 The case provides an instructive example of how non-judicial dispute resolution mechanisms can be an important and effective component of a smart regulatory mix. This mechanism may be particularly appropriate when corporate actors are prepared to engage in good faith dialogue and take meaningful steps to improve their processes. In such cases, it may be more effective and efficient to pursue a non-judicial mechanism than to subject parties to more onerous criminal prosecution or civil proceedings, which may not even be available due to resourcing constraints.

10.194 In Australia, the NCP has recently received a complaint from Friends of the Earth and others against ANZ Banking Group, inspired by the successful outcome with ING in the Netherlands.[175] The Australian complaint similarly requests that ANZ disclose 'scope three' (indirect) emissions resulting from its business lending and investment portfolio, and publish ambitious emission reduction targets in line with the *Paris Agreement* concerning climate change.[176]

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171 Ibid 29, [33].

172 National Contact Point for the OECD Guidelines for Multinational Enterprises (The Netherlands), *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING* (Final Statement, 19 April 2019) 2.

173 Ibid 4.

174 Ibid 6–7.

175 The Australian NCP is currently conducting an Initial Assessment of the complaint: Australian National Contact Point, 'Track an Open Complaint' <www.ausncp.gov.au/complaints/track-open-complaint>.

176 Friends of the Earth Australia, 'Bushfire Survivors Launch Claim against ANZ under International Law for Financing Climate Change' (Blog post, 30 January 2020) <www.foe.org.au/bushfire_survivors_launch_claim_against_anz>; *Paris Agreement*, opened for signature 22 April 2016, ATS 24 (entered into force 4 November 2016).

10.195 Notwithstanding the clear utility of the NCP dispute resolution process, this mechanism could also be improved. In 2017, the Department of Treasury (Cth) commissioned an independent review of the Australian NCP. That review delivered a highly critical report, finding that the body was 'significantly lacking' when measured against each of the 18 criteria examined. Core recommendations of that report included that the NCP should be more independent, more transparent, and better funded.[177]

10.196 In 2018, Treasury implemented a set of reforms that aimed to address these recommendations. Changes included the establishment of a new independent examiner to investigate complaints, and the creation of a new advisory board.[178] The Government should consider whether any additional reforms could further bolster the NCP and support its role in regulating transnational business.

10.197 In addition to the work of the NCP, other non-judicial mechanisms can also provide important support in regulating transnational business, such as commissioners or ombudspersons. In its inquiry into the development of the Australian *Modern Slavery Act*, the Joint Committee on Foreign Affairs, Defence and Trade recommended that Government also appoint an Independent Anti-Slavery Commissioner.[179] The Committee noted that there was strong support for a commissioner among stakeholders in the inquiry.[180]

Investigation and enforcement

10.198 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.

177 Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017).

178 Human Rights Law Centre, 'Australia Appoints First-Ever Independent Examiner to Investigate Corporate Human Rights Abuses Overseas' (Blog post, 31 July 2019) <www.hrlc.org.au/news/2019/7/31/australia-appoints-first-ever-independent-examiner-to-investigate-corporate-human-rights-abuses-overseas>.

179 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (n 109) 88–90, rec 6.

180 Ibid [1.11].

10.199 In 2016, the AFP updated its Case Categorisation and Prioritisation Model (CCPM), which notes that, while the AFP has

> primary law enforcement responsibility for investigating criminal offences against Commonwealth laws, the number of such offences identified or reported far exceeds its investigational capacity. The AFP must therefore ensure that its limited resources are directed to the matters of highest priority…[181]

10.200 Submissions to this Inquiry broadly endorsed the need for further inquiry into the investigation and enforcement of corporate crime, including transnational crime but also more broadly.[182] In relation to transnational crime specifically, the Monash Transnational Criminal Law Group and the Human Rights Law Centre and Australian Centre for International Justice also suggested that the Government consider creating a specialised extraterritorial crimes investigation unit. The Human Rights Law Centre and Australian Centre for International Justice argued that

> extraterritorial corporate crimes pose serious challenges for investigators, requiring them to overcome jurisdictional constraints, language, cultural and technological barriers, difficulties accessing crime scenes and relevant evidence and substantial imbalances in the resources and information available to them in comparison with the company under investigation. One answer to at least some of these challenges would be the establishment of a specialised investigations unit to pursue extraterritorial crimes under the *Criminal Code*. Australia lags behind the global community through not having a specialised investigations unit of this nature.[183]

10.201 Allens called for further inquiry into the investigation and enforcement of corporate criminal law across the board, and also specifically recommended further consideration of the development of formal incentives for self-reporting and cooperation with investigators. They suggested that such an inquiry should have regard to existing models, such as the ACCC's immunity program regarding cartel conduct, and the AFP and CDPP's *Best Practice Guidelines for Self-reporting of Foreign Bribery and Related Offending by Corporations*.[184]

10.202 The ALRC agrees with stakeholders that the Australian Government should undertake further inquiry into the investigation and prosecution of corporate crime, including transnational crime, and also consider the creation of a specialised extraterritorial crimes investigations unit.

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181 Australian Federal Police, *The Case Categorisation & Prioritisation Model: Guidance for AFP Clients* (2016) 1.

182 Allens, *Submission 31*; Monash Transnational Criminal Law Group, *Submission 35*; Australian Institute of Company Directors (AICD), *Submission 37*; Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*.

183 Human Rights Law Centre and Australian Centre for International Justice, *Submission 39*.

184 Allens, *Submission 31*.

A roadmap for Government

10.203 This final section summarises some of the key steps that Government should consider over the next three to five-year period, in pursuing a more effective and comprehensive regulatory mix in relation to transnational crime and corporate human rights impacts.

i. **Further inquiry** — The Australian Government should commission a comprehensive review into transnational crime and corporate human rights violations, including but not limited to the issues set out in this chapter, including failure to prevent offences, mandatory due diligence regimes, disclosure regimes, non-judicial dispute resolution mechanisms, and issues relating to the investigation and prosecution of transnational crime.

   The inquiry should include data-gathering on the effectiveness of existing relevant regulatory regimes, such as the UK failure to prevent offences, the Australian and UK modern slavery laws, the French and Dutch mandatory due diligence regimes, and others as noted above.

   The inquiry should also have regard to the challenge of integrating human rights awareness and expertise throughout the business community, and also throughout a particular corporation. This should also include consideration of the roles that civil society, audit and consulting firms, and statutory bodies such as the Australian Human Rights Commission might play in capacity building.

ii. **Expansion of the *Modern Slavery Act*** — As part of the three-year review of the *Modern Slavery Act*, the Australian Government should consider broadening the scope of that Act to include other human rights, in addition to other matters for consideration set out above.

iii. **Implementation of the UN Guiding Principles on Business and Human Rights** — The Australian Government should revisit and implement a National Action Plan for implementing the UN Guiding Principles on Business and Human Rights.[185] A Multi-Stakeholder Advisory Group was convened by the Department of Foreign Affairs and Trade to provide advice on this issue in 2017,[186] but the process appears to have stalled.[187]

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185 Allens Linklaters, *Stocktake on Business and Human Rights in Australia* (2017).

186 Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, *Advice on the Prioritisation of Issues and Actions to Implement the UN Guiding Principles on Business and Human Rights (UNGPs)* (2017).

187 'Government Ignores Advice of Expert Group on Business and Human Rights', *Human Rights Law Centre* (Blog post, 18 October 2017) <www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights>.

10.204 While soft regulatory mechanisms such as voluntary guidelines and disclosure regimes may be effective at raising awareness among the business sector, these measures are not sufficient to generate meaningful behaviour change in the long run.

10.205 Accordingly, it may be appropriate to consider a long-term process that begins by expanding the *Modern Slavery Act* to other extraterritorial crimes and human rights impacts, and which later progresses to harder measures such as mandatory due diligence and/or failure to prevent offences. It may also be appropriate to limit these stronger measures to a few key offences, at least initially. That way, corporations and regulators will have enough time to understand and implement the requirements of the measures, and to develop expertise in managing these issues.

10.206 Civil society and audit and consulting firms can also play a critical role in supporting the development of knowledge and competence among businesses in relation to extraterritorial offences and corporate human rights impacts.

11. Further Reforms

Contents

Introduction

11.1 In this chapter, four distinct issues relevant to corporate accountability for misconduct are discussed and suggestions are made for further reforms to strengthen Australia's corporate accountability regime.

11.2 The first issue considered in this chapter is the proposed introduction of a DPA scheme for corporations in Australia. The ALRC recommends amendments to the CLACCC Bill to ensure appropriate judicial oversight of such agreements. The ALRC considers that such oversight would enhance the integrity of DPAs and uphold public trust in the probity of negotiated agreements that avoid criminal trials.

11.3 The second issue is the possibility of introducing a form of DPAs for breach of civil penalty provisions. Such a scheme could address some of the limitations of enforceable undertakings as an enforcement mechanism, as noted in the Financial Services Royal Commission.

11.4 Thirdly, the chapter discusses whistleblower protections. Whistleblowers play an integral role in the identification and investigation of corporate crime. In this

section of the chapter, the ALRC suggests reforms that should be considered as part of the five year review of recent whistleblowing reforms.

11.5 Finally, measures to address illegal phoenix activity are discussed. Recent reforms to address illegal phoenix activity are also subject to a five year statutory review. The ALRC suggests refinements and additions to those recent reforms, which should be considered as part of that review.

Deferred prosecution agreements

11.6 The CLACCC Bill was introduced into the Senate on 2 December 2019. It seeks to introduce a DPA scheme in Australia by inserting provisions to enable such a scheme — entitled 'Part 3 Deferred prosecution agreement scheme' — into the *Director of Public Prosecutions Act 1983* (Cth).[1]

11.7 Agreements to defer prosecution are collectively, and commonly, referred to as DPAs, although this label does not accurately capture the diversity in how DPAs (and their variants) are designed 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 are one way in which some overseas jurisdictions have sought to overcome the difficulties associated with addressing corporate crime. DPAs, or similar agreements, are available in a number of foreign jurisdictions, including the US, UK, Canada, France, and Singapore.[2] In the Discussion Paper, the ALRC set out in detail the features of the DPA schemes in the US, France, Canada, and the UK.[3]

11.8 As set out above, since the Discussion Paper, the Australian Government has introduced a new bill that would provide a legislative framework for DPAs. In that sense, the Government has responded to the question the ALRC asked in the Discussion Paper, which was whether a DPA scheme for corporations should be introduced in Australia, as proposed by the Crimes Legislation Amendment

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1 The 2019 Bill is the second iteration of the original Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth). The 2017 Bill was part of the Australian Government's First Open Government National Action Plan 2016–18. The 2017 Bill was introduced in the Senate on 6 December 2017 and lapsed on 1 July 2019. After it lapsed, the Bill was reintroduced in December 2019. The 2019 Bill is substantively similar to the earlier Bill, but incorporates some amendments in light of the report by the Senate Legal and Constitutional Affairs Legislation Committee in 2018; see Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (2018).

2 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.

3 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) 72.

(Combatting Corporate Crime) Bill 2017, or with modifications. Submissions to this Inquiry were also broadly supportive of the CLACCC Bill.[4] As one example:

> The Law Council strongly supports the adoption of a deferred prosecution agreement (DPA) scheme in Australia. The success of the UK system since its introduction in 2014 illustrates the advantages from a regulatory enforcement perspective that can be achieved through the principled application of a DPA regime. A DPA scheme provides opportunities to deal with corporate criminal activity that may avoid some of the cost, delay and uncertainty of traditional criminal prosecutions.[5]

11.9 An opposing view was provided by the Transnational Criminal Law Group at Monash University:

> A major concern relating to DPAs, not just in relation to the 2019 Bill, is that they could supersede and ultimately replace criminal prosecution and conviction. This would mean moving away from the stigma inherent in criminal conviction. Prosecution involves exposition and contestation of arguments, both in terms of putting the prosecution to proof, as well as exposure of witness testimony, through cross-examination and media reporting as the trial proceeds. Indeed, it was the absence of this calling to account that Commissioner Hayne highlighted in the Final Report of the Banking Commission. This matter goes to the core of the Bill overall, rather than to any particular element of the proposed legislative scheme.[6]

11.10 The Senate Legal and Constitutional Affairs Committee has reported on the CLACCC Bill, and a majority of the Committee supported the introduction of DPAs.[7] Noting these developments, and that the ALRC set out in detail both the arguments for and the arguments against the introduction of a DPA regime in Australia in the Discussion Paper, the ALRC does not revisit that analysis in this Report. Instead, the ALRC focuses on improving the legal framework provided in the CLACCC Bill through recommendations for judicial oversight.

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4 McCullough Robertson Lawyers, *Submission 24*; Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; Logie-Smith Lanyon Lawyers, *Submission 44*; BHP, *Submission 58*; Herbert Smith Freehills, *Submission 62*; Business Council of Australia, *Submission 63*.

5 Law Council of Australia, *Submission 27* (citations omitted).

6 Monash Transnational Criminal Law Group, *Submission 35* (citations omitted).

7 See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (2020).

Judicial oversight of DPAs

Recommendation 20 The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 should be amended to:

a. vest the power of approval of a deferred prosecution agreement in a Judge of the Federal Court of Australia (if needs be as a *persona designata*);

b. permit the parties to present oral submissions to the approving officer; and

c. require the publication of the reasons for any approval in open court.

11.11 The Discussion Paper drew attention to the critical role of judicial oversight of DPAs in the UK context. Sir Brian Leveson (who, as a judge, approved many of the DPAs in the UK) 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.[8]

This feature is absent from civil settlements or enforceable undertakings, a matter which attracted the attention of Commissioner Hayne in the Financial Services Royal Commission.[9]

11.12 In the UK, 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 camera 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.[10] 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 initial proceedings were public.[11]

11.13 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'

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8 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper 3030, 14 March 2019) [268].

9 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 440–2.

10 *Crime and Courts Act 2013* (UK) sch 17, para 7.

11 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].

hearing for a declaration that the DPA is not just 'likely' to be fair but is in fact 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 is approved, the reasons must be given in open court.[12]

11.14 The prosecutor will then prefer an indictment, which will be immediately suspended pending the satisfactory performance, or otherwise, of the DPA.[13] 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 other proceedings.[14] As observed by the House of Lords Select Committee, 'the entire process thus becomes open to public scrutiny, consistent with the principles of open justice'.[15]

11.15 The DPA model proposed in the CLACCC Bill differs in two important respects from the UK model, both of which are particularly relevant to the issue of transparency. First, approval of a DPA will be done on the papers without oral submissions, and there appears to be no requirement to publish reasons for the decision. Secondly, an 'approving officer' of a DPA is to be a former judicial officer of a federal court or of a court of a State or Territory.[16]

Hearings and publication of reasons

11.16 Nothing in the CLACCC Bill, nor in the Consultation Draft of the *Deferred Prosecution Agreement Scheme Code of Practice,*[17] contemplates oral hearings in relation to DPAs or imposes any obligation on the approving officer to publish reasons for his or her decision to either approve, or not approve, the DPA, whether in open court or otherwise.

11.17 In *Serious Fraud Office v Standard Bank Plc*, Sir Brian Leveson P observed that:

> In contra-distinction to the Unites States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the propped agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA. … [T]he court retains control of the ultimate outcome.
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> …

12 *Crime and Courts Act 2013* (UK) sch 17, para 8.
13 Ibid para 2.
14 Ibid paras 8, 12.
15 House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010* (House of Lords Paper 303, 14 March 2019) [242].
16 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 2 item 7, proposed s 17G of the *Director of Public Prosecutions Act 1983* (Cth).
17 Attorney-General's Department (Cth), *Deferred Prosecution Agreement Scheme Code of Practice*, (Consultation Draft, May 2018).

> Thus, even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate. To that end, it remains open to continue in private, again on the basis that, if a declaration under para 8(1) is not forthcoming, a prosecution is not jeopardised. Once the court is minded to approve, however, the declaration, along with the reasons for it, must be provided in open court. The engagement of the parties [the prosecutor and the company] then becomes open to public scrutiny, consistent with the principles of open justice.[18]

11.18 In each of the approved DPAs to date in the UK,[19] the judge has given careful consideration to the relevant facts and circumstances to be taken into account in determining whether a particular DPA is in the interests of justice and is fair, reasonable, and proportionate. These factors are:

- the seriousness of the predicate offence or offences;
- the importance of incentivising the exposure and self-reporting of corporate wrongdoing;
- the history (or otherwise) of similar conduct;
- the attention paid to corporate compliance prior to, at the time of and subsequent to the offending;
- the extent to which the entity has changed both in its culture and in relation to relevant personnel; and
- the impact of prosecution on employees and others innocent of misconduct.[20]

11.19 If a DPA regime is to have any acceptance by the public, these matters, and any others that are developed in the Australian context such as the effect on victims,[21] need to be thoroughly ventilated and explained. The Law Council of Australia emphasised the importance of 'transparency of operation of the scheme to potential applicants, law enforcement, and the public.[22]

11.20 Further, in each of the DPAs approved to date in the UK, the judge has acknowledged the assistance provided by counsel in the approval hearings given the usually voluminous material in these types of applications, the need to ensure that

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18 *Serious Fraud Office v Standard Bank Plc* [2015] 11 WLUK 804 [2], [4].

19 *Serious Fraud Office v Standard Bank Plc* [2015] 11 WLUK 804; *Serious Fraud Office v Sarclad Ltd* [2016] 7 WLUK 211; *Serious Fraud Office v Rolls-Royce Plc* [2017] 1 WLUK 189; *Serious Fraud Office v Tesco Stores Ltd* [2017] 4 WLUK 558; *Serious Fraud Office v Serco Geografix Ltd* [2019] 7 WLUK 45; *Serious Fraud Office v Güralp Systems Ltd* (unreported, U20190840, 2019); *Serious Fraud Office v Airbus SE* [2020] 1 WLUK 435.

20 *Serious Fraud Office v Sarclad Ltd* [2016] 7 WLUK 211 [32].

21 Attorney-General's Department (Cth), *Deferred Prosecution Agreement Scheme Code of Practice*, (Consultation Draft, May 2018) [3.3], [3.6], [3.11]–[3.14]; Uniting Church, Synod of Victoria and Tasmania, *Submission 43*.

22 Law Council of Australia, *Submission 27*.

all sides of the argument are properly reflected, and the speed with which approval needs to take place to protect the interests of all concerned.[23] The complexity of the conduct involved in matters likely to be the subject of a DPA in Australia warrants full consideration of the issues that can only be properly illuminated through oral argument of both parties, rather than simply considering the statement in support by the Director, as is contemplated in proposed s 17D of the *Director of Public Prosecutions Act 1983* (Cth).

11.21 Incorporating the requirement for a hearing and for the publication of written reasons by the approving officer may allay some of the concerns that have been expressed about the introduction of DPAs in Australia, including those of the Labor Senators in their Dissenting Report on the CLACCC Bill.[24]

11.22 The ALRC recommends that the reasons for the approval of any DPA should be published in open court,[25] following the opportunity for both parties to present oral submissions to the approving officer.

Approving officer

11.23 As to the issue of 'approving officer', one of the matters that has informed the design of this aspect of the CLACCC Bill is the question of whether the approval of a DPA is, or is not, an exercise of judicial power. The Attorney-General's Department submitted that:

> The Government considers the approach in the Bill of using a retired judicial officer the most constitutionally robust mechanism to provide independent oversight and expert scrutiny within the Australian context.[26]

11.24 The Law Council of Australia indicated that its preferred approach would be for the CDPP to 'be required to make a written application to an independent administrative panel … [h]owever … a retired judge is an acceptable and practical alternative'.[27]

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23 See, eg, *Serious Fraud Office v Airbus SE* [2020] 1 WLUK 435 [122]; *Serious Fraud Office v Serco Geografix Ltd* [2019] 7 WLUK 45 [48]; *Serious Fraud Office v Rolls-Royce Plc* [2017] 1 WLUK 189, [144].

24 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (2020), 27–9.

25 Dr V Comino, *Submission 51*.

26 Attorney-General's Department (Cth), Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019*, 13.

27 Law Council of Australia, Submission No 4 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* [78].

11.25 It is uncontroversial that the judicial power of the Commonwealth is vested exclusively in courts.[28] The classic definition of judicial power was that given by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* that the

> power which every sovereign must of necessity have to decide controversies between its subjects or *between itself and its subjects*, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[29]

11.26 There is, however, general acceptance that there is no exhaustive and complete definition of judicial power. As the Full Court of the Federal Court said in *Westpac Banking Corporation v Lenthall*:

> Judicial power is of a special and protective kind, deriving its essential character from how it is exercised, rather than the presence or absence of some or more features'.[30]

The Court said, the 'conclusion is not definitional, but one of characterisation'.[31]

11.27 At the outset, it is important to analyse the role of the approving officer. This role is different in character from the one exercised by the prosecutor in deciding to commence criminal proceedings against a corporation — that role, uncontroversially, is administrative in nature. As provided for in the CLACCC Bill, the role of the approving officer is to:

1. receive the DPA and a written statement that the Director is satisfied that there are reasonable grounds to believe that an offence specified in the DPA has been committed and that entering into the DPA is in the public interest;[32]
2. review the DPA;
3. on the assumption that the matters in the DPA are true,[33] decide either to approve it, or not;[34] and
4. give written notice of the decision to the company and the Director.[35]

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28 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, [1991] HCA 58

29 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (emphasis added).

30 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21, [2019] FCAFC 34 [97] (citations omitted).

31 Ibid [99].

32 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 2 item 7, proposed ss 17D(1)–(2) of the *Director of Public Prosecutions Act 1983* (Cth).

33 Ibid proposed s 17D(5).

34 Ibid proposed s 17D(3).

35 Ibid proposed s 17D(6).

11.28 As already observed, there is no requirement for the authorising officer to give reasons. If the DPA is approved, the Director of Prosecutions must publish the DPA, but may determine not to do so.[36] This is a matter entirely for the Director, not the authorising officer, unlike in the UK where the DPA must be published unless the court orders otherwise.

11.29 The effect of the decision is to determine, as between the Director acting for and on behalf of the Commonwealth, and a person, whether to defer the institution of a prosecution on indictment for an indictable offence against the laws of the Commonwealth in circumstances where the Director would otherwise exercise the power to do so.[37] To paraphrase what was said in *Mellifont v Attorney-General (Q)*, the decision will not be given in circumstances divorced from an attempt to administer the law, but as an integral part of the process of determining the rights and obligation of the parties which are at stake in the criminal proceedings, which may be deferred or not.[38]

11.30 Further, the approving officer is required to decide whether the matters agreed on a preliminary basis between the Director and the company are fair, reasonable, and proportionate, and in the interests of justice. This will involve a determination, after consideration of the evidence, of the appropriateness of matters such as:

- the proposed compensation of or remedial action to be taken in respect of victims;
- the disgorgement of profits or other benefits obtained by the offending conduct;
- the level of financial penalty; and
- the payment of costs incurred by Commonwealth entities.

These are matters that involve consideration of rights and obligations arising from the operation of the law upon past events or conduct. A decision to approve a DPA, or not, is determinative of the rights and obligations as between the corporation and the Commonwealth.

11.31 The matters that an approving officer must consider require a balancing of competing interests, including those of third parties, and the rights of the Commonwealth and the corporation (the parties). The approving officer is resolving, for the time being at least, the legal rights and duties of the parties. As was said by Edelman J in *BMW v Brewster*, 'a process of balancing interests is quintessentially judicial'.[39]

36 Ibid proposed ss 17D(7)–(10).
37 *Director of Public Prosecutions Act 1983* (Cth) s 6.
38 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289, 303, [1991] HCA 53.
39 *BMW v Brewster* (2019) 94 ALJR 51, [2019] HCA 45 [226].

11.32 The decision differs in character from a declaration of legislative incompatibility with human rights, which does not enable, nor support, nor facilitate, the exercise by the court of its judicial function, as discussed in *Momcilovic v The Queen*,[40] and from the types of decisions that create new rights and obligations that did not exist antecedently and independently of the making of that decision as described in *Precision Data Holdings Ltd v Willis*.[41]

11.33 For these reasons, the ALRC is concerned that the approval procedure established by the CLACCC Bill confers judicial power on an approving officer and that the procedure is therefore unconstitutional. This view is strengthened by the feature that there is no right for *de novo* review of any decision.

11.34 McCullough Robertson Lawyers and Allens urged the appointment of an acting judge within the proposed scheme.[42]

11.35 The ALRC considers it preferable that the power be conferred on a judge of the Federal Court of Australia. If doubt remains about the constitutionality of such conferral, then the conferral of that power should be on a judge as a *persona designata*.[43] Any such appointment should be of a judge with suitable experience in corporate criminal law, and be for a fixed period (preferably of not less than three and not more than five years) to facilitate consistency in the application of the deferred prosecution scheme. There are sound precedents for such an approach including the President and Deputy Presidents of the Australian Competition Tribunal,[44] all of whom are Federal Court Judges; the judges prescribed to issue special powers warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth);[45] and the power of magistrates to issue warrants and exercise other powers under the *Navigation Act 2012* (Cth).[46]

11.36 The ALRC recommends the power be vested in a judge (if needs be as a *persona designata*) for the following reasons:

1. If the model for the approval of DPAs is amended to allow for oral hearings and to require the publication of reasons, it is appropriate that this be done in a judicial setting and in circumstances where reasons can

40 *Momcilovic v The Queen* (2011) 245 CLR 1, [2011] HCA 34 [91].
41 *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 189, [1991] HCA 58.
42 McCullough Robertson Lawyers, *Submission 24*; Allens, *Submission 31*.
43 *Hilton v Wells* (1985) 157 CLR 57, [1985] HCA 16
44 See *Competition and Consumer Act 2010* (Cth) pt III.
45 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34 AB.
46 *Navigation Act 2012* (Cth) s 290: The Explanatory Memorandum to the Bill, states expressly that this 'clause clarifies that magistrates exercising functions or powers under this Part perform these functions or exercise these powers in a personal capacity and not as a court or a member of a court. This reflects the doctrine of persona designata, which holds that Parliament may confer a non-judicial function on a justice of a court constituted under Chapter III of the Constitution if the function is conferred on the justice as an individual rather than a member of the court': Explanatory Memorandum, Navigation Bill 2012 (Cth) 69.

be delivered in open court, consistent with principles of transparency and open justice.

2. The development of the jurisprudence that informs an understanding of the circumstances in which a DPA will be fair, reasonable, and proportionate, and when it is in the interest of justice is critical to the transparency of and public confidence in the DPA scheme. It is particularly important in the early years of the scheme that appropriate and consistent guidance is given to prosecutors, regulators, legal advisors, and the corporate sector.

3. Australia is unlikely to be overwhelmed with DPAs. The workload for one nominated judicial officer is unlikely to become onerous. Since the enactment of the *Crime and Courts Act 2013* (UK), only 7 DPAs have been approved. None has been approved in Canada since its legislation was enacted in September 2018. Even in the US, only 19 DPAs were agreed in 2019.[47]

4. The likely paucity of DPAs gives further weight to the desirability of the power being vested in a nominated judicial officer. Within the ordinary working life of a judicial officer, the nominated judge will be exposed to current practices and developments in corporate misconduct. That judge will remain in touch with current tariffs for offences and modern approaches to corporate sentencing and penology. A retired judicial officer is unlikely to have similar exposure to developing trends in corporate crime and will be unlikely, if the UK experience is replicated in Australia, to see more than one DPA annually.

Deferred enforcement agreements for civil penalties

11.37 In the final report of the Financial Service Royal Commission, Commissioner Hayne was critical of ASIC's use of Enforceable Undertakings ('EUs') as an enforcement tool in response to alleged contraventions of the law.[48]

11.38 EUs are one form of negotiated outcome that may be accepted by a regulator in lieu of court proceedings or certain other administrative actions.[49] In the event of non-compliance with an EU, the regulator may apply to the court for appropriate

47 Gibson Dunn, *2019 Year-End Update on Corporate Non-Prosecution and Deferred Prosecution Agreements*, Appendix <www.gibsondunn.com>.

48 See Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report: Volume 1* (2019) 440–2.

49 See Australian Securities and Investments Commission, *Enforceable Undertakings* (Regulatory Guide 100, 2015) RG 100.4.

orders. A number of statutes make provision for regulators to enter into EUs with corporations.[50]

11.39 ASIC's Regulatory Guide on Enforceable Undertakings notes that ASIC 'will not enter into an enforceable undertaking that does not offer a more effective regulatory outcome.'[51]

11.40 However, Commissioner Hayne observed that:

> 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.[52]

11.41 Commissioner Hayne was particularly critical of EUs agreed on 'terms that the entity admits no more than that ASIC has reasonably based 'concerns' about the entity's conduct'.[53]

11.42 The ALRC suggests that consideration should be given to introducing a DPA-like scheme for civil penalties to overcome some of the limitations of EUs as an enforcement mechanism. A number of stakeholders were receptive to this idea in consultations for this Inquiry. Stakeholders considered such a scheme may ameliorate concerns that regulator preferences for litigation following the Royal Commission had become rigid, with less willingness on the part of regulators to negotiate and achieve settlements. Such a scheme could provide the independent judicial oversight that many EU schemes lack, thus ensuring the public interest is upheld.

11.43 It is envisaged that a deferred enforcement agreement for a civil penalty provision contravention would entail an agreement by a regulator to not proceed with an enforcement action in court, provided that the corporation complies with agreed conditions. Civil penalty proceedings against the corporation would be commenced, but adjourned for the duration of the agreement following court or Registrar approval consistent with Recommendation 20 for criminal DPAs. The enforcement action would then be withdrawn upon satisfactory completion of the agreement. Publication of the agreement should be mandatory, subject to a court

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50 See, eg, *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sch 1, s 145E; *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 197; *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA, 93A; *Competition and Consumer Act 2010* (Cth) s 87B; *Competition and Consumer Act 2010* (Cth) sch 2, s 218 ('*Australian Consumer Law*'); *National Consumer Credit Protection Act 2009* (Cth) s 322; *Navigation Act 2012* (Cth) s 306; *Telecommunications Act 1997* (Cth) s 572B. See also *Regulatory Powers (Standard Provisions) Act 2014* (Cth) pt 6.

51 Australian Securities and Investments Commission (n 49) RG 100.7.

52 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 48) 433 (citations omitted).

53 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report: Volume 1* (2018) 271.

power to suspend publication where doing so is necessary for the administration of justice.

11.44 Detailed consideration of the merits, feasibility, and design of such a scheme is beyond the scope of the current Inquiry. However, in line with the views expressed above in relation to criminal DPAs, the ALRC would endorse judicial oversight of any such regime. Oversight and approval of deferred civil enforcement agreements by a Registrar may also be appropriate.

11.45 The rules and processes of the criminal DPA scheme proposed by the CLACCC Bill would provide a useful starting point for developing an equivalent scheme for civil penalties — although there would be necessary divergences to reflect the differing processes and principles applicable to civil penalty contraventions. Particular consideration should be given to the mandatory contents of a deferred enforcement agreement, having regard to Commissioner Hayne's observation that the facts agreed to in EUs 'often are not sufficient to establish a breach of the provisions said to have been breached'.[54]

11.46 A deferred enforcement agreement scheme for civil penalty contraventions may address some of the concerns surrounding the use of EUs, by providing for negotiated settlements with a greater level of transparency and oversight than EUs. These agreements could represent a valuable middle ground between enforcement proceedings and out-of-court negotiated settlements.

11.47 The ALRC also notes that some of the principled concerns that arise in respect of criminal DPAs carry less weight in respect of a deferred enforcement agreement scheme for civil penalty contraventions, given that the primary purpose of civil penalties is promoting compliance. This stands in contrast to the criminal law's pluralist aims, which notably include denunciation and retribution.

Whistleblower protections

11.48 One of the key challenges that characterises 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.[55] The Australian Government has noted that:

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54 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 48) 441. The CLACCC Bill provides that a DPA must contain 'a statement of facts relating to each offence specified in the DPA', but does not require an admission of responsibility: see Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 2 item 7, proposed s 17C of the *Director of Public Prosecutions Act 1983* (Cth).

55 See, eg, Senate Economics References Committee, Parliament of Australia, *Foreign Bribery Report*, 2018 113–31; David Friedrichs, *Trusted Criminals: White Collar Crime in Contemporary Society* (Cengage

> 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.[56]

11.49 The Discussion Paper set out one proposal and asked two questions with respect to whistleblower protections.[57] It proposed that regulatory guidance be developed to explain that an effective corporate whistleblower protection policy is a relevant consideration in determining whether the corporation has exercised due diligence to prevent the commission of a relevant offence. It asked whether the new whistleblower protections should be extended to apply extraterritorially and whether a compensation scheme for whistleblowers should be established.

11.50 The proposals and questions were framed in the context of the recent enactment of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) (‘*Enhancing Whistleblower Protections Act*’), which included significant reforms to whistleblower protections in the private sector,[58] and has been characterised as a ‘substantial improvement’.[59]

11.51 The Act included two key sets of amendments. The first amended existing whistleblower protection provisions in Part 9.4AAA of the *Corporations Act*. The second amended the *Taxation Administration Act 1953* (Cth), providing protection for whistleblowers in relation to tax matters in a new Part IVD.

11.52 In relation to the first set of amendments, the *Enhancing Whistleblower Protections Act* was designed, in part, to achieve simplification and consistency.

Learning, 2009) 21, noting that because ‘white collar crime cases are relatively invisible, sophisticated, and complex, the use of informers is often indispensable’; Paul Latimer, ‘Reporting suspicions of money laundering and “whistleblowing”: the legal and other implications for intermediaries and their advisers’ (2002) 10(1) *Journal of Financial Crime* 23; ES Callahan, TM Dworkin, D Lewis, ‘Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest’ (2004) 44(3) *Virginia Journal of International Law* 879, 881, writing that whistleblowing ‘is viewed as a mechanism to regain society control over the large organizations that have come to dominate the global community’.

56 Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) [1.2]–[1.3].

57 Australian Law Reform Commission, *Corporate Criminal Responsibilit*y (Discussion Paper No 87, 2019) Proposal 11, Questions C–D

58 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 Univeristy Law Review* 168.

59 Though it is not without limitations: 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.

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 under the *National Consumer Credit Protection Act 2009* (Cth) or the *Data Collection Act 2018* (Cth) were not protected.

11.53 Associate Professor Chaikin explains that the *Enhancing Whistleblower Protections 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.[60]

11.54 The *Enhancing Whistleblower Protections Act* required public companies, large proprietary companies, and corporate trustees of registrable superannuation entities to implement and make public their whistleblower polices from 1 January 2020. ASIC Regulatory Guide 270 sets out the components a whistleblower policy must include to comply with the law, such as setting out how the corporation will protect whistleblowers from detriment, and how the corporation will investigate a whistleblower's concerns. The courts can have regard to a corporation's whistleblower policy, and whether it has been effectively implemented, in deciding on compensation claims from whistleblowers who may have suffered for speaking out.

11.55 The *Enhancing Whistleblower Protections Act* introduced a provision in the *Corporations Act* that requires the Minister to commission an independent review of the provisions of the *Corporations Act* and *Taxation Administration Act 1953* (Cth)

60 Ibid 166.

that provide for protection of whistleblowers after 5 years from the commencement of the section.[61]

11.56 The ALRC suggests that this statutory review could be expanded to review whistleblower protections across the Commonwealth more broadly. This broader review could consider whether whistleblower protections should be extended to apply extraterritorially and whether a compensation scheme for whistleblowers should be established, as was explored in the Discussion Paper.

Ensuring appropriate whistleblower protections as an aspect of due diligence

11.57 The ALRC proposed that 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. By linking whistleblower protection policies with the due diligence defence, the ALRC was seeking to incentivise corporations to adopt suitable whistleblowing procedures as part of addressing corporate misconduct.

11.58 The proposal received mixed support from submissions. The Law Council of Australia suggested such an approach could improve the culture of compliance. Allens suggested that it would be helpful to recognise companies which have implemented an effective whistleblower policy. Law firm Logie-Smith Lanyon raised concerns that it would be difficult to distinguish between corporations that have adopted whistleblower policies because they are required to under the *Enhancing Whistleblower Protections Act* from those that were implementing such policies as part of a genuine regime to prevent misconduct. Similarly, the NSW Young Lawyers suggested that the proposal would encourage a 'tick the box approach'.

11.59 Given the detailed guidance provided by ASIC in Regulatory Guide 270, further guidance would appear duplicative and arguably create confusion. Even in the absence of specific guidance linking whistleblower protection policies with the defence of due diligence under the *Criminal Code*, in many contexts, the existence of (or absence of) a whistleblower protection policy may be a relevant factor in assessing whether a corporation had a culture of compliance and had taken reasonable steps to prevent and detect misconduct. Accordingly, the ALRC does not recommend further guidance be provided.

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61 *Corporations Act 2001* (Cth) s 1317AK. The relevant parts are Pt 9.4AAA of the *Corporations Act 2001* (Cth) and Pt IVD of the *Taxation Administration Act 1953* (Cth).

Whistleblower compensation scheme

11.60 The Discussion Paper asked whether the whistleblower protections contained in the *Corporations Act*, *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) should be amended to provide a compensation scheme for whistleblowers. It noted that the *Enhancing Whistleblower Protections Act* included amendments that aimed to facilitate access to a remedy where whistleblowers have suffered 'victimisation'.[62] However, 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.

11.61 Under existing laws, a claimant must prove detrimental conduct that caused harm to the whistleblower and that the conduct was engaged in because the person believed the whistleblower 'made, may have made, proposes to make or could make a disclosure'.[63] 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 amendments should be made to

> the anti-detriment protections in [the *Corporations Act* and the *Public Interest Disclosures Act 2013* (Cth)], 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.[64]

11.62 The limitations of a scheme that requires proof of specific detrimental conduct have been described by Dr Pascoe and Professor 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.[65]

11.63 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

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62 See, eg, *Corporations Act 2001* (Cth) ss 1317AC, 1317AD, 1317ADA, 1317AE.

63 See, eg, ibid s 1317AD.

64 AJ Brown, 'Safeguarding Our Democracy: Whistleblower Protection after the Australian Federal Police Raids' (130th Henry Parkes Oration, Tenterfield, 26 October 2019) 18.

65 Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review* 144, 154.

also indicate the subtle psychological reprisals that may occur subsequent to whistleblowing.[66]

11.64 A broader whistleblower compensation scheme could strengthen the corporate criminal responsibility regime by ensuring that whistleblowers are compensated for the detrimental personal consequences of making a disclosure. Whistleblowing is essential for the detection of corporate crime and a compensation regime could counteract disincentives to disclosure. Therefore, such a scheme could be expected to improve enforcement of, and compliance with, corporate criminal laws.

11.65 In the context of compensation for whisteblowers, the ALRC expressly rejects a US style 'bounty scheme[67]. 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.

11.66 Submissions suggested that the effectiveness of the compensation provisions under the *Enhancing Whistleblower Protections Act* should be evaluated before further reforms are considered.[68] The ALRC agrees and suggests that the five year statutory review should consider the effectiveness of existing compensation provisions and options for reform.

Extraterritorial application of corporate whistleblower protection laws

11.67 The Discussion Paper asked whether the whistleblower protections contained in the *Corporations Act*, *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) should be amended to apply extraterritorially.

11.68 Legislative amendments 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

66 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* (2011) 433.

67 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [8.27]–[8.30].

68 Allens, *Submission 31*; Australian Institute of Company Directors (AICD), *Submission 37*; BHP, *Submission 58*; Business Council of Australia, *Submission 63*.

> 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.[69]

11.69 In responding to the question on the extraterritorial application of whistleblower protections, submissions either considered that such application already existed,[70] or otherwise supported further clarification.[71] Whether clarification is required should be considered as part of the five year statutory review.

Illegal phoenix activity

11.70 Phoenix activity may cover a range of practices, but is typically concerned with the replacement of a failing corporation with a second (generally new) corporation, which typically has the same controllers and business activities.[72] Illegal phoenix activity occurs where there is a deliberate liquidation of a corporation with the *intent* to avoid paying the creditors of the failing corporation and to continue operating the business through other trading entities.[73] Part of the difficulty in combatting 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.[74] This deliberate misuse of the corporate structure moves the liquidation from the realm of the benign to that of the criminal.

Economic consequences

11.71 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.[75] 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.[76]

11.72 Illegal phoenix activity also has broader systemic and economy-wide impacts. The same report estimates the

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69 OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) [9].
70 Law Council of Australia, *Submission 27*; Allens, *Submission 31*; Australian Securities and Investments Commission (ASIC), *Submission 54*; BHP *Submission 58.*
71 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 43.*
72 Helen Anderson et al, 'Profiling Phoenix Activity: A New Taxonomy' (2015) 33 *Corporations and Securities Law Journal* 133, 133.
73 Ibid 134; PricewaterhouseCoopers Consulting (Australia) Pty Limited, *2018 Taskforce Report–The Economic Impacts of Potential Illegal Phoenix Activity* (2018) 1.
74 PricewaterhouseCoopers Consulting (Australia) Pty Limited (n 73) 2.
75 Helen Anderson, Ian Ramsay and Michelle Welsh, 'Illegal Phoenix Activity: Quantifying Its Incidence and Cost' (2016) 24 *Insolvency Law Journal* 95, 97.
76 PricewaterhouseCoopers Consulting (Australia) Pty Limited (n 73) iii.

> 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.[77]

These statistics indicate the economic imperative for regulators to effectively detect and prosecute illegal phoenix activity.

11.73 Illegal phoenix activity generally comes to light in the context of a liquidation of a corporation. 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.[78]

Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth)

11.74 In an effort to tackle illegal phoenixing, Parliament enacted the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) ('*Combating Illegal Phoenixing Act*'). The Act, which was passed on 5 February 2020:

- creates a new type of voidable transaction, the 'creditor-defeating disposition';
- enables a liquidator 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;
- creates a criminal offence and a civil penalty provision for directors engaging in conduct that results in a company making a creditor-defeating disposition; and
- creates a criminal offence and civil penalty provision for a person who procures, incites, induces, or encourages a company to enter into a creditor-defeating disposition.

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77 Ibid.

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

11.75 When the legislation was first introduced to Parliament, there was some scepticism in industry and academic commentary as to whether a specific prohibition of illegal phoenix activity was required or whether enforcement reforms would be more effective.[79] The ALRC's early 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. ARITA, in its submission, noted that the most urgent response to illegal phoenixing was addressing 'unregulated pre-insolvency advisors'.[80] While beyond the scope of this inquiry, the ALRC agrees that the practices of pre-insolvency advisors warrant further scrutiny.

Approach in the Discussion Paper

11.76 The Discussion Paper acknowledged it is possible that illegal phoenix activity can be addressed through existing general provisions. Nevertheless, the ALRC supported the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth) on the basis that a specific legislative prohibition offers the most compelling way in which to regulate this type of corporate malfeasance. As a consequence, the focus of the Discussion Paper was to propose refinements to the Bill to improve its effectiveness. Those refinements were not taken up by Parliament. Nevertheless, on 4 December 2019, the Government introduced the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) to Parliament. This Bill would establish a director identification number register consistent with Proposal 23.

11.77 The *Combating Illegal Phoenixing Act* requires the Treasurer to commission an independent review of the Act in February 2025.[81] The statutory review would be an opportunity to consider the refinements and additions to that legislation as proposed in the Discussion Paper.

Enforcement powers

11.78 Under s 588FGAA of the *Corporations Act*, ASIC may make an order:[82]

- directing the person to transfer to the company property that was the subject of a voidable creditor-defeating disposition;
- 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

79 See, eg, Australian Restructuring, Insolvency and Turnaround Association (ARITA), *Submission 6*; Helen Anderson et al, 'Illegal Phoenix Activity: Is a "Phoenix Prohibition" the Solution?' (2017) 35 *Corporations and Securities Law Journal* 184; Anne Matthew, 'The Conundrum of Phoenix Activity: Is Further Reform Necessary?' (2015) 23 *Insolvency Law Journal* 116, 134–5.

80 Australian Restructuring, Insolvency and Turnaround Association (ARITA), *Submission 23*.

81 *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) s 4.

82 Section 588FGAA was introduced by the *Combating Illegal Phoenixing Act*.

- 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.

The court would have the power to make an order voiding a creditor-defeating disposition.[83] It does not provide ASIC with a distinct power to restrain the use of assets or freeze assets.

11.79 The powers in s 588FF and 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. However, the ALRC noted concerns that the procedure for unwinding such transactions may confer judicial power on ASIC and therefore be unconstitutional.[84]

11.80 Proposal 21 sought to improve the enforcement mechanism in two key ways. First, it sought to address concerns about constitutionality by proposing the removal of the power for ASIC itself to make orders unwinding a creditor-defeating disposition. Secondly, the proposal sought to add 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.[85]

11.81 Proposal 22 was intended to complement Proposal 21 by giving ASIC and the ATO the 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. The proposal sought to address concerns that illegal phoenixing occurs too quickly for regulators or liquidators to act. The proposal was modelled, in part, on the restraining orders available under the *Proceeds of Crime Act 2002* (Cth).

11.82 A number of submissions supported the aspects of Proposals 21 and 22 that sought to address the perceived concerns in relation to constitutionality.[86] The Law Council of Australia suggested that the restraining power in Proposal 22 should be

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83 As the creditor-defeating disposition would be a type of voidable transaction: *Corporations Act 2001* (Cth) s 588FF.

84 Law Council of Australia, Submission No 6 to Senate Standing Committees on Economics, *Treasury Law Amendment (Combating Illegal Phoenixing) Bill 2019* (13 March 2019) [2.1]–[2.4]. Similar provisions of the *Bankruptcy Act 1966* (Cth) have been found to not confer judicial power on the Official Receiver, see *Re McLernon; Ex parte SWF Hoists & Industrial Equipment Pty Ltd v Prebble* (1995) 58 FCR 391, [1995] FCA 539.

85 Anderson et al (n 79) 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. The aim is to ensure the stripping of all gains from the illegal activity from the controller.

86 Australian Restructuring, Insolvency and Turnaround Association (ARITA), *Submission 23*; Australian Institute of Company Directors (AICD), *Submission 37*; CPA Australia and Chartered Accountants Australia and New Zealand, *Submission 50*.

counterbalanced with a statutory mechanism to compensate companies for loss if assets are frozen and it is determined that the restraining order had no grounds.[87] The Australian Small Business and Family Enterprise Ombudsman suggested that there needed to be an effective low cost mechanism to challenge restraining notices.

11.83 Submissions were mixed with respect to the proposed mechanism to disgorge the proceeds from illegal phoenixing activity to the Commonwealth where it is not appropriate for them to be disgorged to the original company. Pitcher Partners suggested that there would be few instances where this would be appropriate, but otherwise saw no problem with such a power.[88] ARITA 'strongly opposed' the proposal, principally on the basis that it would result in the proceeds being repaid to the Commonwealth over the interests of creditors of an impacted company.[89] However, the ALRC's intention was that payment to the Commonwealth would occur in limited circumstances where there were no legitimate third-party creditors unrelated to the phoenixed company.

11.84 The ALRC suggests that it would be appropriate to revisit these proposals as part of the five year review of the legislation.

Regulation of directors and advisors

11.85 Proposal 23 sought to address 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 prevent the use of fictitious identities.[90] Submissions to numerous government consultations in recent years have supported the introduction of DINs.[91] Proposal 23 received universal support.[92] The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) would implement DINs. The ALRC supports the bill.

87 Law Council of Australia, *Submission 27.*

88 Pitcher Partners, *Submission 40*.

89 Australian Restructuring, Insolvency and Turnaround Association (ARITA), *Submission 23*.

90 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) 428–9.

91 See, eg, Productivity Commission (n 90), 40; Senate Economic References Committee, *'I Just Want to Be Paid' Insolvency in the Australian Construction Industry* (2015) 186–8.

92 Morgan Corporate Recovery, *Submission 16*; Australian Restructuring, Insolvency and Turnaround Association (ARITA), *Submission 23*; Law Council of Australia, *Submission 27*; Construction & General Division, Construction Forestry Maritime Mining and Energy Union (CFMMEU), *Submission 45;* CPA Australia and Chartered Accountants ANZ, *Submission 50*.

Further reform

11.86 The Discussion Paper invited stakeholders' views on whether further measures are required to combat illegal phoenix activity, given the complexity of identifying and taking action against this type of conduct. ARITA submitted that:

> The key components in a holistic approach to combatting illegal phoenixing are summarised in the below rubric.

The Law Council of Australia supported licensing requirements for pre-insolvency advisors, along with the Construction & General Division of the CFMMEU.[93] Bruce Mulvaney & Co separately noted that unqualified advisors are difficult 'to identify and locate'.[94]

93 Law Council of Australia, *Submission 27*; Construction and General Division of the Construction, Forestry, Maritime, Mining, and Energy Union, *Submission 45*.

94 Bruce Mulvaney & Co, *Submission 36*.

Appendix A
Preliminary Consultations
May–October 2019

	Name	Location
1	Professor Sally Wheeler OBE MRIA FAcSS FAAL, Australian National University	Brisbane
2	Dr Radha Ivory, University of Queensland	Brisbane
3	Allens	Melbourne
4	Professor Ian Ramsay, University of Melbourne	Melbourne
5	Ms Helen Bird, Swinburne University	Melbourne
6	Professor Liz Campbell, Monash University	Melbourne
7	Mr Dean Luxton, Barrister	Melbourne
8	Professor Jonathan Clough, Monash University	Melbourne
9	Integrity and Security Division, Attorney-General's Department (Cth)	Canberra
10	Dr Olivia Dixon, University of Sydney	Sydney
11	Mr Stephen Speirs	Sydney
12	The Hon Justice Wendy Abraham, Federal Court of Australia	Sydney
13	Mr Alan Cameron AO, NSW Law Reform Commission	Sydney
14	Office of the Commonwealth Director of Public Prosecutions (CDPP)	Sydney
15	The Hon Justice David Hammerschlag, Supreme Court of NSW	Sydney
16	Associate Professor Juliette Overland, University of Sydney	Sydney
17	Australian Institute of Company Directors (AICD) – Directors Roundtable	Sydney

18	Australian Securities and Investments Commission (ASIC)	Sydney
19	Dr Simon Longstaff AO, The Ethics Centre	Sydney
20	Australian Federal Police (AFP)	Teleconference
21	Corrs Chambers Westgarth (Melbourne)	Brisbane
22	Department of Treasury (Cth)	Canberra
23	Professor Jonathan Fisher QC, Visiting Professor in Practice, London School of Economics	London
24	Professor Jeremy Horder, London School of Economics	London
25	Ms Susannah Cogman and Mr Brian Spiro, Herbert Smith Freehills	London
26	Ms Lisa Osofsky and Mr John Carroll, Serious Fraud Office	London
27	Mr Mark Steward, Mr Daniel Thornton and Mr Vincent Coughlin QC, Financial Conduct Authority	London
28	Dame Alison Saunders, Linklaters	London
29	The Rt Hon the Lord Garnier QC, former UK Solicitor General	London
30	Sir Nicholas Green, Chair and Professor David Ormerod QC, Commissioner, UK Law Reform Commission	London
31	Professor Sarah Worthington, University of Cambridge	London
32	Mr Mukul Chawla QC and Ms Rebecca Norris, Bryan Cave Leighton Paisner	London
33	The Rt Hon Sir Brian Leveson	London
34	The Rt Hon Sir Charles Haddon-Cave	London
35	Judge Deborah Taylor	London
36	Sir Ross Cranston	London
37	Faculty Members, Law School and Business School, University of Queensland	Brisbane
38	Professor TT Arvind, University of York	Teleconference
39	Australian Tax Office (ATO)	Teleconference

40	Professor Dale Pinto, Curtin University	Perth
41	Professor Grantley Taylor, Curtin University	Perth
42	Ms Julie Read, New Zealand Serious Fraud Office	Teleconference
43	Australian Financial Markets Association	Teleconference
44	Professor John Braithwaite and Professor Brent Fisse	Teleconference
45	Associate Professor Sarah Jane Kelly, Professor Nicole Gillespie, Professor Matthew Hornsey, University of Queensland Business School	Brisbane
46	Professor Tina Søreide, Norwegian School of Economics	Brisbane
47	Associate Professor David Chaikin, University of Sydney	Teleconference
48	Dr Erin O'Brien, Queensland University of Technology	Brisbane
49	Ms Nana Frishling, University of New South Wales	Teleconference
50	Mr Ben Power, Barrister	Brisbane
51	Dr Vicky Comino, University of Queensland	Brisbane
52	Lord Gold	London
53	Human Rights Law Centre	Teleconference
54	Transparency International Australia	Teleconference
55	Allens and Australian Institute of Company Directors (AICD)	Brisbane

Appendix B
Consultations
November 2019–March 2020

	Name	Location
56	Ms Katherine Brazenor, Barrister	Melbourne
57	Human Rights Law Centre	Teleconference
58	Herbert Smith Freehills	Sydney
59	Mr Philip Crutchfield QC, Barrister	Sydney
60	Australian Federal Police (AFP)	Canberra
61	Australian Prudential Regulation Authority (APRA)	Sydney
62	Ms Ruth Higgins SC, Barrister	Sydney
63	Australian Pesticides and Veterinary Medicines Authority (APVMA)	Teleconference
64	Australian Securities and Investments Commission (ASIC)	Teleconference
65	Mr Michael Wyles QC, Barrister	Teleconference
66	Australian Taxation Office (ATO)	Teleconference
67	Therapeutic Goods Administration, Australian Government Department of Health	Teleconference
68	Mr Dean Jordan SC, Barrister and Ms Ann Bonnor, Barrister	Teleconference
69	Dr Will Thomas, University of Michigan	Teleconference
70	Dr Olivia Dixon, University of Sydney	Teleconference
71	Criminal Law Section, Attorney-General's Department (AGD)	Teleconference
72	Queensland Department of Environment	Brisbane
73	CHOICE	Sydney
74	Australian Institute of Company Directors (AICD)	Sydney

75	Australian Government Solicitor	Sydney and Melbourne
76	Dr Meg Brodie, KPMG Banarra	Sydney
77	Australian Restructuring Insolvency and Turnaround Authority (ARITA)	Sydney
78	Mr Andrew Baker, Slater and Gordon	Teleconference
79	Australian Transaction Reports and Analysis Centre (AUSTRAC)	Teleconference
80	Corrs Chambers Westgarth	Melbourne
81	Monash University Law Faculty	Melbourne
82	Professor Ian Ramsay and Associate Professor Rosemary Langford, University of Melbourne	Melbourne
83	Business Council of Australia	Melbourne
84	Office of the Commonwealth Director of Public Prosecutions (CDPP)	Melbourne
85	Mr Dean Luxton, Barrister	Melbourne
86	BHP	Melbourne
87	Australian Competition and Consumer Commission (ACCC)	Videoconference
88	Department of Treasury (Cth)	Canberra
89	Professor Justine Nolan, UNSW	Teleconference
90	Corrs Chambers Westgarth	Brisbane
91	Freshfields Bruckhaus Deringer	Teleconference
92	Corporate Social Responsibility Business Roundtable	Sydney
93	Business Law Section, Law Council of Australia	Sydney
94	Mr Aaron Guilfoyle, Work Health and Safety Prosecutor	Brisbane
95	Mr Lincoln Crowley QC, Barrister	Brisbane
96	Australian Border Force (Modern Slavery Section)	Teleconference
97	Professor Elise Bant, University of Western Australia	Teleconference

98	Mr Kevin Hyland OBE, former UK Independent Anti-Slavery Commissioner	Sydney
99	Mr Chris Kummerow, Director of Prosecutions, National Heavy Vehicle Regulator	Teleconference
100	Dr Jennifer Wilson, Behavioural Psychologist	Teleconference
101	Professor Joshua Getzler, University of Oxford	Email

Appendix C
Discussion Paper 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?

Appendix D
Comments on Terms of Reference

1. Not published
2. Professor L Campbell
3. Associate Professor J Overland
4. Not published
5. Not published
6. Australian Restructuring Insolvency and Turnaround Association (ARITA)
7. McCullough Robertson Lawyers
8. Dr R Ivory
9. Business Council of Australia
10. Australian Institute of Company Directors (AICD)
11. Law Council of Australia
12. Allens
13. Australian Banking Association
14. Motor Trades Association of Australia

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15. Not published
16. Morgan Corporate Recovery
17. T Game SC and Justice D Hammerschlag
18. Professor J Gans
19. Justice T Payne
20. K Doherty
21. Professor E Bant
22. Not published
23. Australian Restructuring, Insolvency and Turnaround Association (ARITA)
24. McCullough Robertson Lawyers
25. Australian Competition and Consumer Commission (ACCC)
26. Professor J Nolan and N Frishling
27. Law Council of Australia
28. Australian Small Business and Family Enterprise Ombudsman
29. CHOICE
30. Australian Shareholders' Association
31. Allens
32. Justice Connect
33. Dr L Price
34. Nyman Gibson Miralis
35. Monash Transnational Criminal Law Group
36. Bruce Mulvaney & Co
37. Australian Institute of Company Directors (AICD)
38. Professor P Hanrahan
39. Human Rights Law Centre and Australian Centre for International Justice
40. Pitcher Partners

41. Condon Associates
42. Associate Professor J Overland
43. Uniting Church in Australia, Synod of Victoria and Tasmania
44. Logie-Smith Lanyon
45. Construction & General Division, Construction Forestry Maritime Mining and Energy Union (CFMMEU)
46. Bryan Cave Leighton Paisner LLP
47. Not published
48. Australian Financial Markets Association
49. Association of Independent Insolvency Practitioners
50. CPA Australia and Chartered Accountants ANZ
51. Dr V Comino
52. Australian Charities and Not-for-profits Commission
53. Australian Transaction Reports and Analysis Centre (AUSTRAC)
54. Australian Securities and Investments Commission (ASIC)
55. Insurance Council of Australia
56. Commonwealth Director of Public Prosecutions (CDPP)
57. Australian Banking Association
58. BHP
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61. Associate Professor P Crofts
62. Herbert Smith Freehills
63. Business Council of Australia

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Appendix G
Comparison of Attribution Methods

Table 1 — How Part 2.5 of the Criminal Code reflects and builds on existing ways of thinking about attribution

Theory	Interpretation in Part 2.5
Corporate personality	The *Criminal Code* applies to corporations in the same way as it does individuals (subject to necessary modifications). Intervening conduct or event cannot be relied upon if the person who brought about the physical element was an employee, agent, or officer of the corporation.
Identification theory	Fault elements of intention, knowledge, and recklessness can be proved through board of directors and high managerial agents.
Direct liability	Physical elements derived from employees, agents, or officers.
Organisational blameworthiness	Fault elements of intention, knowledge, and recklessness can be proved through the board and/or corporate culture. Fault elements of intention, knowledge, and recklessness cannot be proved through high managerial agents if corporation exercised due diligence. Fault element of negligence may exist on the part of corporation itself. Mistake of fact (strict liability) requires due diligence.
Aggregation[1]	Physical elements implicitly allow aggregation. Fault elements of intention, knowledge, and recklessness potentially allow a degree of aggregation. Fault element of negligence explicitly provides for aggregation of conduct.

1 See Chapter 6 for a detailed discussion of aggregation.

Table 2 — Comparison of persons whose conduct and state of mind can be attributed to a corporation under different methods of attribution

Method	Persons whose conduct can be attributed	Persons whose state of mind can be attributed
Part 2.5 of the *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, or agent acting within scope of actual or apparent authority. Persons acting at the direction of, or with the consent of agreement of, a director, employee, or agent.	Director, employee, or 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,[2] whose 'act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company'.[3]	
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.[4]	

2 See, eg, *ABC Developmental Learning Centres Pty Ltd v Wallace* (2006) 161 A Crim R 250, [2006] VSC 171.

3 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507 (emphasis in original).

4 *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836, 845–6. Subsequently followed by the High Court of Australia in *R v Australasian Films Ltd* (1921) 29 CLR 195, 214, [1921] HCA 11.

Appendix H
Illustrative Amendments to Part 2.5 of the *Criminal Code*

Recommendation 6

12.2 **Physical elements**

If a physical element of an offence is committed by ~~an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority,~~

(a) an officer, employee, or agent of the body corporate, acting within actual or apparent authority; or

(b) any person acting at the direction, or with the agreement or consent (express or implied), of an officer, employee, or agent of the body corporate, acting within actual or apparent authority,

the physical element ~~must also be attributed to~~ is taken to be committed by the body corporate.

Recommendation 7

Option 1

12.3 **Fault elements other than negligence**

(1) 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~~ relevant physical element.

(2) The means by which such an authorisation or permission may be established include:

(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~~ relevant physical element; or

(b) proving that ~~a high managerial agent~~ an officer, employee, or

agent of the body corporate, acting within actual or apparent authority, intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the ~~commission of the offence~~ relevant physical element; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance 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.~~

(3) Paragraph (2)(b) does not apply if the body corporate proves that it ~~exercised due diligence~~ took reasonable precautions to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) ~~or (d)~~ include:

(a) whether authority to ~~commit an offence~~ engage in the relevant conduct of the same or a similar character had been given by ~~a high managerial agent~~ an officer 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~~ an officer of the body corporate would have authorised or permitted the ~~commission of the offence~~ relevant physical element.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or ~~a high managerial agent~~ an officer, employee, or agent of the body corporate, acting within actual or apparent authority, recklessly engaged in the conduct or recklessly authorised or permitted the ~~commission of the offence~~ relevant physical element.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means ~~an attitude, policy, rule~~ attitudes, policies, rules, 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~~ take place.

~~***high managerial agent*** means 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.~~

Option 2

12.3 **Fault elements other than negligence**

(1) If it is necessary to establish a state of mind of a body corporate other than negligence ~~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~~ it is sufficient to show that:

(a) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind; or

(b) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, directed, agreed to or consented to the relevant conduct, and had the relevant state of mind.

(2) It is a defence, if the body corporate proves that it took reasonable precautions to prevent the commission of the offence.

~~(2) The means by which such an authorisation or permission may be established include:~~

~~(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 noncompliance 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.~~

~~(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.~~

~~(4) Factors relevant to the application of paragraph (2)(c) or (d) include:~~

~~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) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.~~

~~(6) In this section:~~

~~***board of directors*** means the body (by whatever name called) exercising the executive authority of the body corporate.~~
~~***corporate culture*** means 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.~~
~~***high managerial agent*** means 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.~~

Consequential Amendments to Options 1 and 2

12.5 **Mistake of fact (strict liability)**

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it ~~exercised due diligence~~ <u>took reasonable precautions</u> to prevent the conduct.

(2) A failure to ~~exercise due diligence~~ <u>take reasonable precautions</u> 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.

Appendix I
Recommendations 4–1, 5–1, 6–1, and 6–8 of ALRC Report No 103[1]

4. Purposes of Sentencing

Recommendation 4–1 Federal sentencing legislation should provide that a court can impose a sentence on a federal offender only for one or more of the following purposes:

(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.

5. Principles of Sentencing

Recommendation 5–1 Federal sentencing legislation should state the fundamental principles that must be applied in sentencing a federal offender in order to achieve any of the stated purposes of sentencing. The principles should be as follows:

(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

1 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006).

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).

6. Sentencing Factors

Recommendation 6–1 Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to a purpose or principle of sentencing, where that factor is known to the court. The legislation should group these factors into categories and provide examples of sentencing factors under each category. These categories and factors include but are not limited to the following, to the extent that they are applicable:

I. Factors relating to the offence

Examples: the nature, seriousness and circumstances of the offence; the maximum penalty for the offence; whether the commission of the offence involved a breach of trust.

II. Factors relating to the conduct of the offender in connection with the offence

Examples: the offender's culpability and degree of responsibility for the offence; the offender's degree of premeditation and degree of participation in the offence.

III. Factors relating to the conduct of the offender other than the specific conduct constituting the charged offence

Examples: the degree to which the offender has shown contrition for the offence, for example, by taking action to make reparation for any injury, loss or damage resulting from the offence; the offender's antecedent criminal history; the offender's antecedent history in relation to civil penalties; whether the offence forms part of a series of proved or admitted criminal offences of the same or a similar character; where an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality comprising uncharged conduct as well as the charged offences—the course of conduct comprising that criminality; other offences committed by the offender of a similar or lesser seriousness to the principal offence to which the offender has admitted guilt and which are required or permitted to be taken into account.

IV. Factors relating to the background and circumstances of the offender

Examples: the offender's character, cultural background, history and circumstances, age, financial circumstances, physical condition, mental illness or condition, intellectual disability; the fact that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness or condition, or intellectual disability that may have contributed to the commission of the offence; other factors relevant to special categories of offenders (see Recommendations 28–5; 30–2).

V. Factors relating to the impact of the offence

Examples: the impact of the offence on any victim; the age of any victim of the offence; the vulnerability of any victim of the offence; the victim's relationship with the offender; any injury, loss or damage resulting from the offence; the impact of the offence on the environment; the impact of the offence on financial markets.

VI. Factors relating to the impact of a finding of guilt, a conviction or sentence on the offender or the offender's family or dependants

Examples: the likely civil and administrative consequences of a finding of guilt or a conviction; the likely impact of a sentence on the offender, including that imprisonment may have an unusually severe impact on the offender; the likely impact of a sentence on any of the offender's family or dependants.

VII. Factors relating to the promotion of sentencing purposes in the future

Examples: the prospect of rehabilitating the offender; the prospect of restoring relations between the offender, the community and the victim; the prospect of deterring the offender and others from committing the same or similar offences.

VIII. Factors relating to any detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence

Examples: any time spent in pre-sentence custody or detention in relation to the offence where a sentence other than a term of imprisonment is imposed; any time spent in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, unless full credit has been given for pre-sentence custody or detention; (subject to Recommendation 6–6) the nature and extent of any confiscation of property that is to be imposed as a result of the commission of the offence; the imposition of any civil penalty as a result of conduct that is substantially the same as conduct constituting the offence.

Recommendation 6–8 Federal sentencing legislation should separately specify that when sentencing a federal offender a court must consider the following factors that pertain to the administration of the federal criminal justice system, where relevant and known to the court:

(a) the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made (see Recommendation 11–2); and

(b) the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities regarding the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence. (See Recommendation 11–3).

Appendix J
Example Extended Management Liability Provisions

Deemed liability

Taxation Administration Act 1953 **(Cth)**

8Y Liability of officers etc. of corporations

(1) 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.

(2) In a prosecution of a person for a taxation offence by virtue of subsection (1), it is a defence if the person proves that the person:

(a) did not aid, abet, counsel or procure the act or omission of the corporation concerned; and

(b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.

Note 1: A defendant bears a legal burden in relation to the matters in subsection (2), see section 13.4 of the *Criminal Code*.

Note 2: Subsection (2) does not apply in relation to a prosecution under Part 2.4 of the *Criminal Code*.

(3) For the purposes of subsection (1), an officer of a corporation shall be presumed, unless the contrary is proved, to be concerned in, and to take part in, the management of the corporation.

(4) In this section, ***officer***, in relation to a corporation, means:

(a) a director or secretary of the corporation;

(b) a receiver and manager of property of the corporation;

(ba) an administrator, within the meaning of the *Corporations Act 2001*, of the corporation;

(bb) an administrator of a deed of company arrangement executed by

the corporation under Part 5.3A of that Act;

(c) a liquidator of the corporation appointed in a voluntary winding up of the corporation; or

(d) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.

Deemed liability: Designated officer

***Corporations Act 2001* (Cth)**

188 Responsibility of secretaries etc. for certain corporate contraventions

Responsibility of company secretaries

(1) A secretary of a company contravenes this subsection if the company contravenes any of the following provisions (each of which is a ***corporate responsibility provision***):

(a) section 142 (registered office);

(b) section 145 (public company's registered office to be open to public);

(c) section 146 (change of principal place of business);

(d) section 178A (change to proprietary company's member register);

(e) section 178C (change to proprietary company's share structure);

(ea) subsection 03AA(6) (notification of resignation day);

(f) section 205B (lodgement of notices with ASIC);

(g) section 254X (issue of shares);

(h) section 319 (lodgement of annual reports with ASIC);

(i) section 320 (lodgement of halfyear reports with ASIC);

(j) section 346C (response to extract of particulars);

(k) section 348D (response to return of particulars);

(l) section 349A (change to proprietary company's ultimate holding company).

Note 1: See section 204A for the circumstances in which a company must have a secretary.

Note 2: This subsection is a civil penalty provision (see section 1317E).

Responsibility of directors of proprietary companies

(2) Each director of a proprietary company contravenes this subsection if:

(a) the proprietary company contravenes a corporate responsibility provision; and

(b) the proprietary company does not have a secretary when it contravenes that provision.

Note 1: See section 204A for the circumstances in which a company must have a secretary.

Note 2: This subsection is a civil penalty provision (see section 1317E).

Defence of reasonable steps

(3) A person does not contravene subsection (1) or (2) in relation to a company's contravention of a corporate responsibility provision if the person shows that he or she took reasonable steps to ensure that the company complied with the provision.

Failure to prevent

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

494 Civil penalties for executive officers of bodies corporate

(1) If:

(a) a body corporate contravenes:

(i) a civil penalty provision of Part 3 (requirements for approval); or

(ii) section 142 (condition of approval); or

(iii) section 390SA (declared commercial fishing activity); and

(b) an executive officer of the body knew that, or was reckless or negligent as to whether, the contravention would occur; and

(c) the officer was in a position to influence the conduct of the body in relation to the contravention; and

(d) the officer failed to take all reasonable steps to prevent the contravention;

the officer contravenes this subsection.

(2) Subsection (1) is a civil penalty provision. Under section 481, the Federal Court may order a person contravening subsection (1) to pay a

pecuniary penalty not more than the pecuniary penalty the Court could order an individual to pay for contravening the civil penalty provision contravened by the body corporate.

495 Criminal liability of executive officers of bodies corporate

(1) If:

(a) a body corporate contravenes:

(i) section 489 (Providing false or misleading information to obtain approval or permit); or

(ii) section 490 (Providing false or misleading information in response to a condition on an approval or permit); or

(iii) section 491 (Providing false or misleading information to authorised officer etc.); and

(b) an executive officer of the body knew that, or was reckless or negligent as to whether, the contravention would occur; and

(c) the officer was in a position to influence the conduct of the body in relation to the contravention; and

(d) the officer failed to take all reasonable steps to prevent the contravention;

the officer commits an offence punishable on conviction by imprisonment for a term not exceeding 2 years.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Subsection 4B(2) of the *Crimes Act 1914* lets a court that convicts an individual of an offence impose a fine instead of, or as well as, imprisonment. The maximum fine (in penalty units) the court can impose is 5 times the maximum term of imprisonment (in months).

(2) If:

(a) a body corporate contravenes:

(i) section 15A (Offences relating to declared World Heritage properties); or

(ia) section 15C (Offences relating to National Heritage places); or

(ii) section 17B (Offences relating to declared Ramsar wetlands); or

(iii) section 18A (Offences relating to threatened species etc.); or

(iv) section 20A (Offences relating to listed migratory species); or

(v) section 22A (Offences relating to nuclear actions); or

(vi) section 24A (Offences relating to marine areas); or

(via) section 24E (Offences relating to water resources); or

(vii) section 27A (Offences relating to Commonwealth land); or

(viia) section 27C (Offences relating to Commonwealth heritage places overseas); or

(viii) section 142A (Offence of breaching conditions on approval); or

(ix) section 390SB (Offence relating to declared commercial fishing activity); and

(b) an executive officer of the body was reckless as to whether the contravention would occur; and

(c) the officer was in a position to influence the conduct of the body in relation to the contravention; and

(d) the officer failed to take all reasonable steps to prevent the contravention;

the officer commits an offence.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(3) An offence against subsection (2) is punishable on conviction by imprisonment for a term not exceeding the term specified in the provision contravened by the body corporate.

Note : Subsection 4B(2) of the *Crimes Act 1914* lets a court that convicts an individual of an offence impose a fine instead of, or as well as, imprisonment. The maximum fine (in penalty units) the court can impose is 5 times the maximum term of imprisonment (in months).