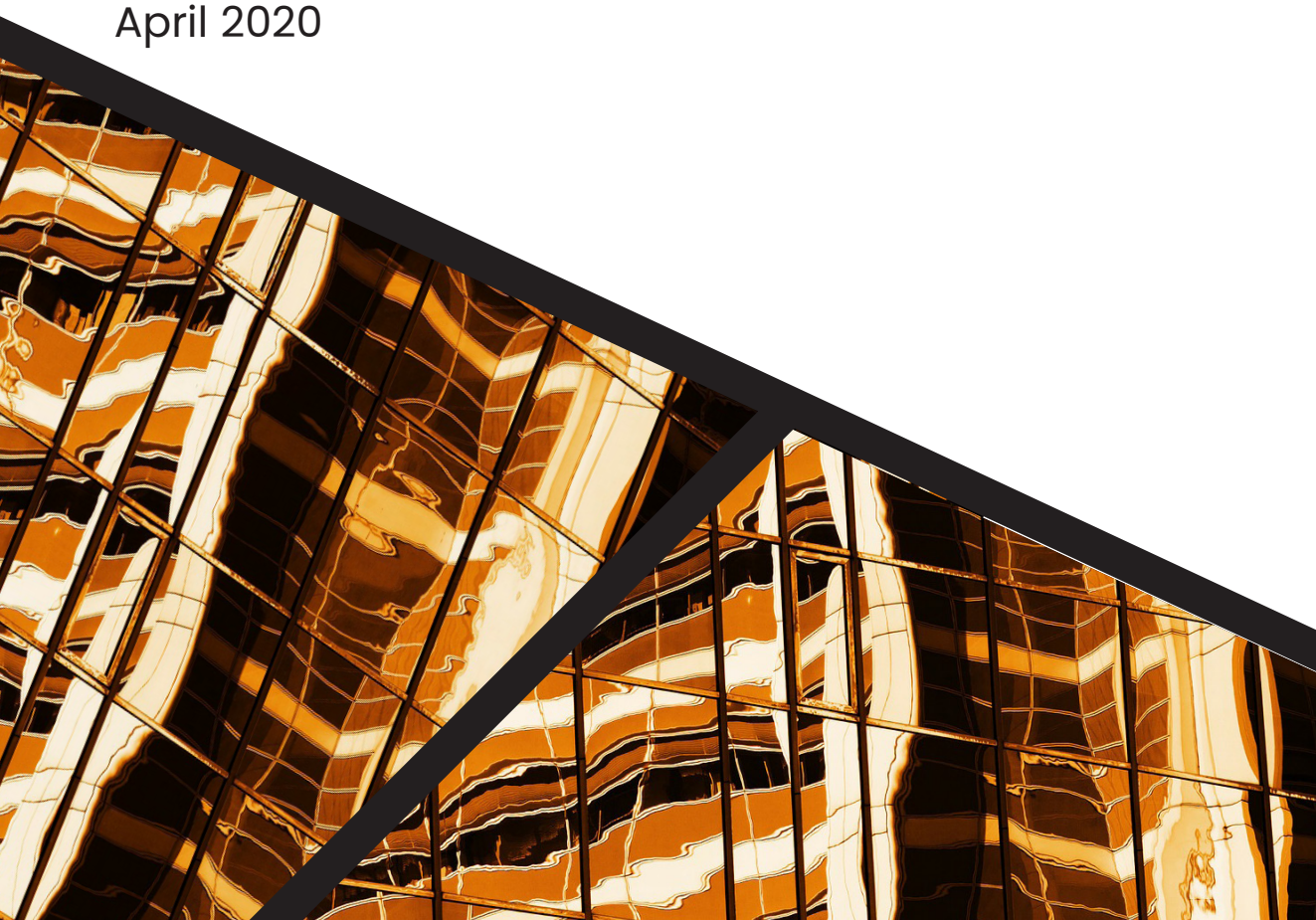
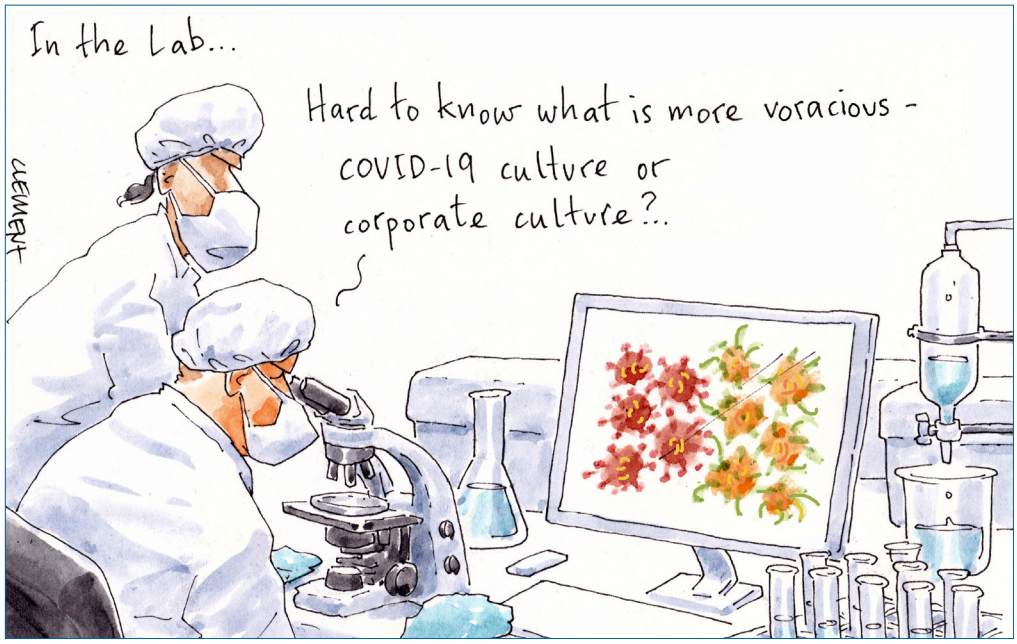
Australian Government
Australian Law Reform Commission

SUMMARY REPORT

CORPORATE CRIMINAL RESPONSIBILITY

ALRC Report 136
April 2020





Reproduced with kind permission of the artist and The Australian newspaper.

CONTENTS

TERMS OF REFERENCE

Review of Australia's corporate criminal responsibility regime

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

- the corporate criminal responsibility regime in Part 2.5 of t
  the *Criminal Code Act 1995* (Cth) ('the Code'), a
- the complexity of this regime and its challenges as a mechanism

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of
Commission Act 1996 (Cth), a consideration of whether, and if so what, reforms are necessary or desirable to impro
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
- options for reforming Part 2.5 of the Code or other re
  corporate criminal responsibility regime.

Scope of the reference

The ALRC should have regard to existing reports relevant to Australia's corporate
corporate misconduct; corporate criminal law; corporate governance; court procedure
actions; and law enforcement arrangements relating to corporate misconduct/crime. The re
should include but not be limited to the:

- 2019 Final report of the Royal Commission into Misconduct in the Banking, Superannua
  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.

... 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;

... 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.

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.

KEY POINTS

- Following the Financial Services Royal Commission in particular, there are widespread concerns that corporations, and senior officers within those corporations, are not adequately held to account for serious corporate misconduct. While further data is required to thoroughly assess the validity of those concerns it is true that prosecutions of corporations, relative to individuals, are extremely rare, even in heavily regulated sectors where corporations are most active.

- Corporations are most often prosecuted for relatively minor regulatory offences. Smaller corporations are more likely to be prosecuted than larger corporations.

- Prosecutors withdraw a significantly higher number of charges against corporations than they withdraw against individuals for corporate crimes. This suggests that existing laws present real difficulties for prosecuting corporations.

- An unsophisticated response, such as simply initiating more criminal prosecutions against corporations, is not the solution. Instead, the ALRC has endeavoured to understand why there are so few prosecutions against corporations. The ALRC has examined the fundamental principles underpinning the regulation of corporations, and the proper role of the criminal law.

- For corporations, regulators, investigators, and prosecutors, there is significant complexity in the Commonwealth legislative landscape. Despite the emphasis on civil enforcement, there has been a proliferation of criminal offences applicable to corporations. The ALRC has identified over 3100 offences across the 25 Commonwealth statutes most relevant to corporate misconduct. The unnecessary complexity and over particularisation of offence provisions may enable misconduct to go unchecked.

- Many Commonwealth corporate offences do not reflect any underlying concept of criminality. Many offences are duplicative of equivalent civil penalty provisions. Criminal offence provisions should only apply to the most egregious corporate misconduct. All other misconduct should be subject to civil penalties instead.

- Commonwealth law contains a variety of complex mechanisms for attributing criminal responsibility to corporations. The attribution mechanisms do not necessarily reflect the moral blameworthiness of the corporate entity itself. Commonwealth law should contain just one standard mechanism for attributing criminal responsibility to corporations. In order to focus squarely on corporate blameworthiness, fault should be attributed to corporations with a poor compliance culture. A corporation should be able to avoid liability by demonstrating it took reasonable precautions to prevent misconduct (ie by demonstrating an absence of corporate fault).

- More recently, legislators have sought to address corporate misconduct with offence provisions that require corporations to exercise 'due diligence' or to take 'reasonable measures'. Offence provisions drafted specifically for corporations may be more effective in addressing corporate misconduct.

- There is concern that the paucity of corporate criminal prosecutions, and regulators' frequent reliance on civil penalty provisions, have led to a mindset that the penalties imposed are little more than a cost of doing business.

- It should be a criminal offence for a corporation to engage in a system of conduct, or a pattern of behaviour, that leads to breaches of civil penalty provisions.

- Existing penalty and sentencing options for corporations are inadequate and often disproportionately affect shareholders, employees and third parties who were not connected with the corporation at the time of the offending.
- New penalty and sentencing options should be introduced to empower courts to take into account impacts on third parties, and to punish those most involved in the wrongdoing.

SUMMARY OF THE ALRC'S MAIN RECOMMENDATIONS

PROBLEM ONE: Corporations are not adequately held to account for serious corporate misconduct.

A. No principled limits on the type of corporate misconduct that is treated as criminal	
• There is no principled basis underpinning the provisions that apply the criminal law to corporations.	
Recommended reform	**Main benefit of change**
Recommendation 2 Corporations should be subject to a criminal offence only when: a. denunciation and condemnation of the conduct is warranted; b. the stigma of being a 'criminal' would be appropriate; c. the deterrence from a civil penalty would be insufficient; d. the potential harm that may occur justifies a criminal offence; or e. it is in the public interest.	Breaches of the criminal law by corporations will more readily be recognised as serious, with 'criminal corporations' experiencing significant reputational harm. Corporations will be more likely to direct their attention and efforts to preventing criminal conduct, and less likely to take a tick-a-box approach to regulatory compliance.

B. Too many criminal offence provisions relevant to corporations	
• The law contains too many criminal offences. Many of them prohibit low-level misconduct. Most of them are never enforced. • Too often, the law contains both a 'civil penalty provision' and a 'criminal offence' for essentially the same misconduct by a corporation. • Corporations are rarely taken to court for committing a criminal offence, even when there has been evidence of serious corporate misconduct.	
Recommended reform	**Main benefit of change**
Recommendation 4 If a proposed law includes a new criminal offence provision for corporations, government should be required to explain publicly why it is appropriate and necessary.	Simpler, clearer laws will reduce the regulatory compliance burden on corporations. Ensuring criminal offence provisions only apply to the most serious corporate misconduct will enable criminal investigators and prosecutors to apply their efforts and resources more appropriately. Greater scrutiny of proposed new criminal offence provisions for corporations will help to prevent the spread of criminal law to lower level misconduct. Over time, there will be fewer offence provisions directed at corporations. Those that do exist will reflect serious misconduct by corporations.

C. Infringement notices are used inappropriately to regulate criminal conduct	
• Infringement notices (equivalent to speeding tickets) are used regularly as an enforcement response to criminal offences committed by corporations. These notices do not convey adequately the seriousness of criminal misconduct.	
Recommended reform	**Main benefit of change**
Recommendation 3 Infringement notices should not be available as an enforcement response for criminal offences committed by corporations.	Public confidence in the criminal justice system will improve when serious corporate misconduct is subject to more formal criminal law processes and safeguards.

PROBLEM TWO: The law does not facilitate fair, consistent prosecution of corporations

A. Multiple inconsistent mechanisms for attributing criminal responsibility to corporations

- The law is currently inconsistent as to when a corporation (rather than individuals, like directors or managers) will be held responsible for a crime.
- The law contains many different methods of determining whether a corporation is responsible for a crime.
- The law does not respond appropriately to instances of systematic misconduct by corporations.
- These aspects of the law cause confusion for corporations, regulators, and prosecutors.

Recommended reform	Main benefit of change
Recommendations 5 and 6 The law should contain one clear method of determining when a corporation is responsible for a crime. That method should apply in the vast majority of situations. A corporation should be criminally responsible for the conduct of a person acting on its behalf. The nature of the relationship between the person and the corporation should be more important than the person's job title or job description, when determining whether the person is acting "on behalf of" the corporation.	Simpler, clearer laws will reduce the regulatory compliance burden on corporations. There will be greater certainty for regulators, investigators and prosecutors. Prosecutors will have greater confidence in laying charges against corporations when appropriate. Fewer withdrawals of prosecutions will occur due to the ability to undertake timely investigations and evidence gathering.

B. Inconsistency in attributing fault to corporations

- The law contains multiple inconsistent ways of determining whether a corporation has the requisite state of mind for an offence.
- One of the main existing tests is whether a "high managerial agent" of the corporation has the necessary state of mind. This test is more difficult to apply to large corporations than to smaller corporations.

Recommended reform	Main benefit of change
Recommendation 7 The law should contain one way of determining whether a corporation is considered at fault for particular misconduct. This should reflect the moral blameworthiness of the corporation. A corporation should be considered at fault when an employee, officer or agent of the corporation has the relevant state of mind for the particular criminal offence. A corporation should have a defence of having taken 'reasonable precautions'.	Simpler, clearer laws will reduce the regulatory compliance burden on corporations. There will be greater certainty for regulators, investigators and prosecutors. Small and large corporations will be treated equally when attributing fault to a corporation. There will need to be evidence of the moral blameworthiness of the corporation itself before it is found to be criminally liable.

C. Little accountability for corporate conduct overseas	
• Overseas crimes by Australian corporations are rarely, if ever, prosecuted.	
Recommended reform	**Main benefit of change**
Recommendation 19 The Government should consider applying the new model of 'failure to prevent' offences to misconduct overseas by Australian corporations.	Corporations will be more likely to comply with key Australian laws in their operations overseas.

PROBLEM THREE: The consequences of corporate misconduct are inadequate

A. Repeated civil penalties may be treated as a "cost of doing business"

- The criminal law is not designed to address corporate misconduct which occurs due to failures in (or the deliberate design of) the corporation's systems, practices, procedures and policies.
- Civil (ie non-criminal) regulation primarily involves financial penalties, and so may be treated by corporations as merely a cost of doing business.

Recommended reform	Main benefit of change
Recommendation 8 There should be new criminal laws that address systems of conduct or patterns of behaviour that result in multiple contraventions of civil penalty provisions.	Corporations will have significant incentive to improve their compliance systems. Corporations will be less likely to ignore regulatory requirements. Clearer and simpler laws will reduce the regulatory compliance burden on corporations and provide greater certainty for regulators, investigators and prosecutors.

B. Current penalty and sentencing options for corporations are inadequate	
• The law contains little statutory guidance for courts when sentencing a corporation, leading to uncertainty and inconsistency.	
Recommended reform	**Main benefit of change**
Recommendation 10 The law should require courts to consider a number of specified factors when sentencing a corporation.	Corporations and the general public will be able to have greater confidence that corporations are being sentenced appropriately and consistently for criminal corporate misconduct.

- Sentencing options are generally limited to financial penalties, which may be viewed as a "cost of doing business".
- Financial penalties are often not imposed until several years after the offending conduct, at which time they impact disproportionately on shareholders, employees, and others who were not connected with the corporation at the time of the offending.

Recommended reform	Main benefit of change
Recommendation 12 Courts should be able to impose a range of non-monetary penalties when sentencing a corporation, including: • publication or disclosure; • community service; • corrective action; • facilitating redress; and/or • not participating in certain commercial activities. **Recommendation 13** Courts should be able to make orders dissolving a corporation, if it is the only appropriate sentencing option. **Recommendation 14** Courts should be able to make orders disqualifying a person from managing corporations, if that person managed a corporation that has been dissolved by a court.	Sentences for corporations will better reflect the purposes of corporate criminal law. Sentences for corporations will be less likely to unfairly affect innocent third parties. Victims of corporate crime will be more likely to receive compensation from the responsible corporation. The public will be better protected from corporations and managers who have previously been responsible for serious criminal offences.

- Each government in Australia has different rules about whether a corporation that has been convicted of a criminal offence can be awarded contracts for government work.
- There is no clear guidance in the Australian Government's Procurement Rules on the relevance of a corporation's criminal convictions.
- Permitting convicted corporations to undertake government work can undermine public trust in government, endanger public health and safety, and increase the risk of misuse of public funds.

Recommended reform	Main benefit of change
Recommendation 15 The Australian Government, together with state and territory governments, should develop a national debarment regime.	Corporations with an interest in undertaking government work will have a significant incentive to ensure the corporation is not involved in criminal activity. The public will be able to have greater trust in the process of awarding government contracts.

- When determining a sentence for a convicted corporation, courts are reliant on limited information about the impact of a corporation's offending on any victims and the public at large.

Recommended reform	Main benefit of change
Recommendations 16 and 17 Courts should be able to make orders for the preparation of pre-sentence reports for corporations, and should be able to consider victim impact statements.	Courts will be able to hand down more appropriate sentences to convicted corporations. For example, courts will be able to tailor non-monetary penalties that take into account the corporation's compliance culture, as well as any steps the corporation has taken to improve its procedures, to discipline its personnel, and to compensate victims or repair any harm. Victims of corporate crime will have a voice when corporations are sentenced. Courts will be better able to assess the impact of the misconduct, and the suitability of a compensation or redress order.

C. Proposed Deferred Prosecution Agreement (DPA) scheme does not provide sufficient transparency

- The proposed DPA scheme makes no provision for public oversight of agreements reached between the prosecutor and the corporation.
- The proposed scheme is susceptible to the same criticisms as those made of enforceable undertakings in the Financial Services Royal Commission.

Recommended reform	Main benefit of change
Recommendation 20 There should be judicial oversight of DPAs and publication of the reasons for any approval of a DPA in open court.	The public will have greater confidence in the process and will be less likely to fear that private deals are being done between prosecutors and corporations.

PROBLEM FOUR: There is insufficient data relating to corporate crime

- It is difficult to obtain complete, timely, and accessible data relating to corporate defendants in the criminal justice system. This obscures the nature and extent of corporate crime.

Recommended reform	Main benefit of change
Recommendation 1 National principles and policies for the collection, maintenance, and dissemination of criminal justice data should be developed.	An accurate and thorough picture of corporate crime in Australia will result in better informed policy making.

Please read the full ALRC report for more detail about of the reasoning, intent, scope, and effect of the ALRC's recommendations.

RECOMMENDATIONS

Corporate Criminal Responsibility – the Data

Chapter 3
Recommendation 1

Principled Criminalisation

Chapter 5
Recommendations 2 | 3 | 4

Corporate Attribution

Chapter 6
Recommendations 5 | 6 | 7

Offences Specific to Corporations

Chapter 7
Recommendation 8

Sentencing Corporations

Chapter 8
Recommendations
9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17

Individual Liability for Corporate Conduct

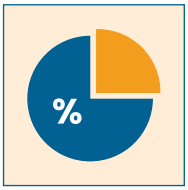
Chapter 9
Recommendation 18

Transnational Business

Chapter 10
Recommendation 19

Further Reforms

Chapter 11 – DPAs
Recommendation 20



Corporate Criminal Responsibility – the Data

Chapter 3

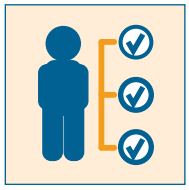
Recommendation	1	The Australian Government, together with state and territory governments, should develop national principles and policies for the collection, maintenance, and dissemination of criminal justice data.

Principled Criminalisation

Chapter 5

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.

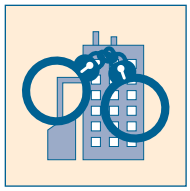


Corporate Attribution

Chapter 6

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).
Recommendation	**7** **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.



Offences Specific to Corporations

Chapter 7

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.

Sentencing Corporations

Chapter 8

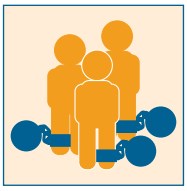
Recommendation	9	The Australian Government should implement Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

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

Recommendation	**11** continued	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.



Individual Liability Mechanisms

Chapter 9

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.

Transnational Business

Chapter 10

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.

Further Reforms

Chapter 11

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.

THE INQUIRY

1.1 This Inquiry has focused on the criminal responsibility of corporations and, in particular, the application of Commonwealth criminal law to a corporation *itself* for conduct done *by the corporation*.

1.2 The Inquiry has been set against the background of a renewed focus on the protection of Australian consumers from egregious misconduct by corporations, and increasing regulation in the area of corporate wrongdoing. It follows the ASIC Enforcement Review Taskforce in December 2017, and the Financial Services Royal Commission in February 2019.[1]

1.3 The ALRC anticipates that implementation of the recommendations in this Report, particularly when considered in the context of the underlying policy rationale for the application of the criminal law to a corporation, will significantly strengthen and simplify the Commonwealth corporate criminal responsibility regime.

1.4 A corporation, as a juristic person, is clearly different from a human person – a corporation comprises individuals but is itself a legal person. Application of the criminal law to a corporation *itself* may be problematic as a corporation has 'no soul to be damned and no body to be kicked'.[2] The appropriateness of applying the criminal law to a corporation, given its particular characteristics, has been challenged. Nevertheless, corporations can be, and are, the subject of the criminal law as a consequence of the *capacity* they are given by law.

1.5 This Inquiry has not revisited the underlying theoretical basis for the application of the substantive criminal law to corporations as a matter of principle, but it has sought to explain the theoretical constraints of using criminal law to regulate corporate behaviour. In so doing, the Inquiry has focused on the circumstances in which criminalisation of corporate misconduct might be justified, noting there is currently extensive recourse to civil penalties in response

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

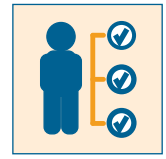
2 Baron Thurlow LC, quoted in John C Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 386.

to contraventions of the law. The ALRC suggests taking a principled approach to distinguishing conduct which is properly criminal in nature, and which requires the unique expressive force of the criminal law, from conduct that is more appropriately the subject of civil regulation.

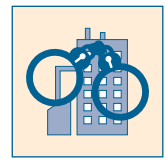
1.6 Consistent with its Terms of Reference, the Inquiry has also focused on clarifying and simplifying the existing variety of mechanisms of attributing criminal responsibility to corporations for offences in Commonwealth legislation. The ALRC has also examined the effectiveness of existing mechanisms that are available to hold individuals liable for corporate misconduct.

The Recommendations

1.7 The ALRC's recommendations are premised on the conclusions drawn in the early chapters of the Final Report; namely, that there is a distinct purpose for corporate criminal responsibility – one that reserves the criminal law for instances of corporate misconduct that cannot adequately be regulated by civil penalties. Consequently, a suite of recommendations relates to a principled model of corporate regulation that distinguishes more clearly between civil and criminal methods of regulation (Recommendations 2, 3, and 4). Implementation of these recommendations would likely result in many fewer criminal offence provisions in Commonwealth statutes, but the criminal offence provisions that remain would recognise the expressive force of the criminal law to denounce particularly egregious conduct.



1.8 The next suite of recommendations relates to mechanisms for attributing criminal responsibility to a corporation (Recommendations 5, 6, and 7). Simplicity and clarity in the law are necessary to ensure that morally blameworthy conduct can be prosecuted. These Recommendations therefore proceed on the basis that, in general, there should be only one mechanism to attribute corporate criminal responsibility. In addition, the mechanism should be sufficiently broad to attribute to a corporation responsibility for the misconduct of any one or more persons, regardless of whether those persons hold named offices within the corporation, and regardless of who is 'functionally' responsible for the conduct and/or state of mind sought to be attributed.

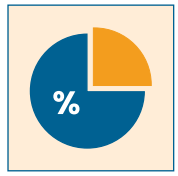


1.9 The ALRC further recommends the creation of a new type of criminal offence to capture corporate systems of conduct or patterns of behaviour in breach of civil penalty provisions (Recommendation 8). Such an offence would speak directly to how corporate malfeasance may occur in practice.

1.10 Recommendation 8 accords with the Inquiry's finding that there is a range of circumstances in which a general mechanism for attributing criminal responsibility may not be appropriate. For example, policy decisions have already been taken by the Australian Government in respect of particular offences, including under workplace health and safety law and environmental law, that specifically criminalise conduct by corporations.

1.11 The CLACCC Bill will introduce to Australia for the first time the concept of a 'failure to prevent offence' in the context of foreign bribery. In this Inquiry, the ALRC has considered other transnational misconduct, such as foreign tax evasion and modern slavery, for which failure to prevent offences might be appropriate (Recommendation 19).

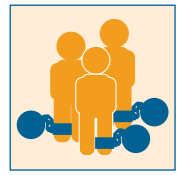
1.12 Another suite of recommendations relates to the sentencing and penalty options that should be available in respect of corporate offenders (Recommendations 9 to 17). These Recommendations are also premised on acceptance of the initial conclusion drawn in this Inquiry – that there is a distinct purpose for corporate criminal responsibility. The recommendations include an enhanced range of sentencing options, because financial penalties are often viewed by some as little more than 'the cost of doing business'. In addition, financial penalties can have a significant and unfair financial impact on innocent third parties (including employees and shareholders), especially when prosecution and sentencing take place years after the commission of the offence. Consistent with the ALRC's recommendation that criminal law should be reserved for the most egregious corporate misconduct, the ALRC further recommends a national debarment regime.



1.13 A significant constraint on this Inquiry has been the lack of complete, timely, and accessible data relating to corporate crime in Australia. There are no published national statistics specifically relating to corporate crime rates, corporate crime victimisation, or corporate enforcement action. The ALRC recommends

the development of national policies and principles for the collection and dissemination of criminal justice data (Recommendation 1).

1.14 During the course of this Inquiry itself, further measures to strengthen the corporate regulatory environment have been introduced or implemented by the Australian Government, including the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth), the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020* (Cth), the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 ('the CLACCC Bill'),[3] and a Proposal Paper for the introduction of a Financial Accountability Regime (FAR)[4]. Consequent upon these developments, the ALRC makes no recommendations in relation to some of the topics canvassed in the Discussion Paper.



1.15 Consistent with the Terms of Reference, this Inquiry considered the availability and effectiveness of mechanisms which could be used to hold individuals (such as senior office holders) liable for corporate misconduct. Relevant questions included whether there was a gap in the substantive law that needed to be addressed through reform, or whether any perceived accountability gap was a consequence of failures in applying the law.[5]

1.16 Ultimately, the ALRC has concluded that, cognisant of current reform proposals being pursued by the Government such as the Financial Accountability Regime, a case for reform of the substantive law to hold individuals liable in relation to corporate misconduct has not been made at this time. The ALRC recommends the government review within five years whether the Financial Accountability Regime is effective in narrowing the accountability gap that the ALRC has

3 Introduced on 2 December 2019 and referred to the Senate Legal and Constitutional Affairs Legislation Committee, which reported on 17 March 2020.

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

5 Ibid [1.5.2].

identified in relation to individual liability for corporate misconduct (Recommendation 18). The ALRC also recommends amending the CLACCC Bill to enhance the transparency of the Deferred Prosecution Agreement process (Recommendation 20).

The impetus for reform

1.17 In the Final Report of the Financial Services Royal Commission, Commissioner Hayne made 76 recommendations concerning aspects of banking, lending, financial advice, and superannuation following findings of misconduct. Commissioner Hayne referred 24 cases of misconduct by financial service companies to financial regulators for civil or criminal proceedings.[6] The Royal Commission's findings, and the response of regulators to those findings, suggest that corporations may be subject to greater legal and regulatory scrutiny than they have in the past and that there will be a particular focus on litigating, rather than negotiating settlements.[7]

1.18 Australia's corporate criminal responsibility regime forms a small part of the broader system of corporate regulation which seeks to promote compliance and ensure that corporate entities adhere to norms of conduct prescribed by Parliament. There are multiple tools for regulators. One of these tools is the content of the legislation—the setting of norms of conduct and the proscribing of unlawful conduct, whether through civil or criminal law. Enforcement of such standards is another tool. Standards can be enforced administratively, civilly or criminally, depending on the particular prohibition and the practice of the regulator.

1.19 The criminal law is, in theory, reserved for the most serious contraventions. This Inquiry has revealed that the predominant

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

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

approach to the enforcement of corporate regulations in Australia is through civil penalties, either negotiated, administrative or court-enforced, despite a proliferation of criminal offences across the statute book. Consequently, the proper role of the criminal law in this context has been obscured. The Commonwealth statute book is replete with offences that should not on any proper view be considered to be criminal. There is also a significant degree of duplication between civil penalty provisions and criminal offences. The lack of principled distinction between civil penalty provisions and criminal offences leads to unnecessary complexity in the law. Reform is needed to reduce the complexity.

1.20 The data collected in the course of this Inquiry also reveal a relative lack of recourse to the criminal law as a means of regulating corporate conduct. Similarly, Commissioner Hayne observed that one regulator's 'stated policies about enforcement did not preclude it from taking much stronger steps than it did'.[8] Reasons for the low numbers of corporate criminal prosecutions are difficult to identify, but include complexity in processes of investigation and enforcement, and complexity in the substantive law. In particular, the various mechanisms for attributing criminal responsibility to a corporation contribute to the high degree of complexity.

1.21 The *Criminal Code Act 1995* (Cth) was initially enacted as the result of a national initiative to standardise the foundations of criminal law in Australia.[9] Part 2.5 of the *Criminal Code* (a schedule to the Act) contains innovative mechanisms for attributing criminal responsibility to a corporation. For example, a corporation can be held responsible if it is proved that the culture of the corporation is a cause of the relevant offence. Had Part 2.5 applied across the Commonwealth statute book, some aspects of the current legislative complexity may have been avoided.

8 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) [3.7.1].
9 Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 2.

1.22 The aspirational goal to standardise the foundations of Australian criminal law did not materialise. Amongst the Australian states and territories, the *Criminal Code* has been adopted only in the Australian Capital Territory. Perhaps more significantly, Part 2.5 applies — as the only applicable attribution method — in less than a third of the legislation reviewed by the ALRC. No justification for these exclusions has been located.

1.23 Instead, the majority of Commonwealth offences use an attribution mechanism that is one of several variations on a model first prescribed in the precursor to the *Australian Consumer Law*, being the *Trade Practices Act 1974* (Cth). This mechanism imposes direct liability on a corporation for the conduct and states of mind of its employees (and others) in specified circumstances. Sometimes, but not always, there is a defence of having taken reasonable measures, or having exercised due diligence, or both. This complexity adds to compliance burdens, the length and scope of investigations, difficulties for prosecutorial agencies in determining whether a prosecution is viable, and difficulties in instructing juries if a matter is ultimately prosecuted. This aspect of the law in particular should be simplified.

1.24 In its current form, the law relating to corporate misconduct is both unjust and unfair. The civil regulatory regime does not adequately reflect the culpability of individuals who commit the crimes for the advantage of a business. For economic crimes where a mental element is an element of the substantive offence, a regulatory response will not reflect the true responsibility of the corporation. In cases where serious economic crimes have been committed, there should be clear public confidence that justice has been done. This is not achieved under the current law, where the model for corporate liability was and remains manifestly at odds with the realities of the diffusion of managerial powers in large corporations because the law 'provides companies with the perverse incentive to decentralise responsibilities so as to make it impossible to identify a senior individual or group in charge of any particular operation.'[10]

10 Amanda Pinto QC and Martin Evans, *Corporate Criminal Liability* (3rd ed, Sweet & Maxwell, 2013) 49-50.

This Summary 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).

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

ISBN: 978-0-6482087-9-2

Commission Reference: ALRC Report 136, 2020

Printed by Fineline Print & Copy Service, NSW

Australian Law Reform Commission

(07) 3248 1224
www.alrc.gov.au
info@alrc.gov.au

PO Box 12953
George Street QLD 4003

Australian Government

Australian Law Reform Commission