



Corporate Crime Podcast Series – Episode 1 – Overview

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Nadine Davidson-Wall: Thanks for joining us on the first episode of the ALRC’s series, about corporate criminal responsibility in Australia. I’m Nadine Davidson-Wall, Communications Co-ordinator at the Australian Law Reform Commission, and in this podcast series you will hear from several members of the ALRC team, discussing key issues raised in the Final Report. Each short interview will unpack the current landscape, and the final recommendations made by the ALRC. Today I’m joined by the President of the Australian Law Reform Commission, the Honourable Justice Sarah Derrington.

The Hon Justice SC Derrington: Thank you for that introduction Nadine. Today, we’re here to discuss the overarching issues raised in the ALRC’s Final Report, which was recently tabled in Parliament.

NDW: For those who may not be familiar with the processes of the ALRC, can you give us a quick explanation of how this Final Report was produced?

Judge: Certainly. Last year, the ALRC received its Terms of Reference from the Attorney-General, the Honourable Christian Porter. We invited comments on the Terms of Reference, and then produced a Discussion Paper. After receiving submissions on the Discussion Paper, we delivered the Final Report. Throughout the process, the ALRC has been consulting widely with stakeholders, enforcement agencies, experts in corporate criminal responsibility, and the general public. We have been assisted by the Honourable Justice Bromwich as part-time Commissioner, and our Advisory Committee.

NDW: So that’s the beginning of the process, but what is corporate criminal responsibility?

Judge: In Australia, the regime of corporate criminal responsibility forms a small part of the broader system of corporate regulation. This seeks to promote compliance and ensure that corporate entities adhere to norms of conduct prescribed by Parliament.

NDW: Can you tell us why corporate criminal responsibility is particularly important at the moment?

Judge: Well, in recent times, there has been a renewed focus on the protection of Australian consumers from egregious misconduct by corporations, and increasing regulation in the area of corporate wrongdoing. 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.

NDW: It seems quite troubling to think that there might be a lack of accountability for corporations and senior officers. But why is this the case?

Judge: This is precisely the question at the heart of this Inquiry. 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. To start; 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 unnecessary complexity and over particularisation of offence provisions may enable misconduct to go unchecked.

NDW: Surely, though, there are reasons that these criminal offences exist in the first place?

Judge: That is a fair assumption. However, 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.

NDW: So if the criminal offences concerning corporations are not being utilised; then how do we currently address corporate misconduct?

Judge: This Inquiry has revealed that the predominant approach to the enforcement of corporate regulations in Australia is through civil penalties. Importantly, 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.

NDW: Okay. So I have to ask a basic question – how can corporations be held criminally responsible in the first place? If corporations are legal entities, aren't they essentially intangible?

Judge: They are, and it is for this reason that the legal mechanism of attribution exists. In short, attribution is a means of determining what constitutes the actions or the state of mind of a corporation. Crucially, 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.

NDW: If attribution deals with how to hold corporations criminally responsible; what about the punishment of corporations? To state the obvious, it's not possible to imprison corporations like individuals.

Judge: You've touched on a very important issue. Indeed, 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.

NDW: Based on what you've just told me, there are clearly a number of significant issues that require reform in the Commonwealth regime of corporate criminal responsibility. If our listeners were to take one message away from the Inquiry, what would it be?

Judge: I would urge all listeners to consider that 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 nor the true responsibility of the corporation. In cases where there has been serious corporate misconduct, 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 remains manifestly at odds with the realities of the diffusion of managerial powers in large corporations.

NDW: Thank you very much for providing an overview of the Inquiry.

Judge: Thank you, and I encourage all listeners to read the ALRC's Final Report, available to download from our website.

NDW: And for all our listeners, stay tuned for the rest of our series on corporate criminal responsibility. You can also follow the ALRC on Twitter and Linked In to receive updates, or head over to our website – alrc.gov.au – to subscribe to our e-news.

Download the Corporate Criminal Responsibility Final Report:

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