



## Corporate Crime Podcast Series – Episode 3 – Attribution

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**Nadine Davidson-Wall:** Hello, and welcome to the third episode of the ALRC series about corporate crime. I'm Nadine Davidson-Wall, Communications Coordinator at the Australian Law Reform Commission.

**Matt Corrigan:** And I'm Matt Corrigan, General Counsel at the Australian Law Reform Commission.

**NDW:** As you know, the ALRC's Final Report on Corporate Criminal Responsibility was recently tabled in Parliament. Today, we're here to discuss attribution. Now, first things first – what is attribution, and how does it fit into the picture of corporate criminal responsibility?

**MC:** Great question! To fully understand attribution, let's travel back to the origins of the criminal law. Traditionally, the criminal law was designed for individuals. We think about whether the accused committed the crime, by considering their physical actions and their state of mind. Did the accused strike another person with their fist and did they intend to do so? It gets tricky with corporations, since they are legal entities. This is where attribution comes in, as a mechanism to apply the criminal law to corporations.

**NDW:** When we say attribution is a mechanism, what does that mean; how does it work?

**MC:** I'll give you a traditional formulation from the common law of the UK – the identification doctrine. If we can pick out the individuals which constitute the 'directing mind and will' of the corporation, we can say that the corporation acts through them. But as corporations have become larger and more complex – many with turnovers greater than countries - it is much harder to think of any one individual as a 'directing mind and will'. Should a corporation be held criminally responsible for evading Bangladeshi export controls only if the CEO in London was aware of the export controls and devised a strategy to evade them?

**NDW:** Now, the identification doctrine is just one method of attribution, is that right?

**MC:** Yes, that's correct. In fact, there are multiple inconsistent mechanisms for attribution across the common law and the statute books. Which brings us to Recommendation 5: that there should be one clear method of attribution, which applies in the vast majority of cases, unless an alternative method is necessary in the particular instance

**NDW:** Given that there is so much inconsistency, has there ever been an attempt to implement a single method of attribution?

**MC:** There certainly has. The *Criminal Code* was developed in the 1990s by a Committee chaired by Sir Harry Gibbs, former Chief Justice of the High Court. The *Criminal Code* was designed to establish a uniform set of principles – not just for attribution, which is dealt with in Part 2.5 of the *Criminal Code*, but for the most fundamental issues of criminal, such as what constitutes an act or an omission.

**NDW:** That sounds like quite an ambitious project.

**MC:** It was – and Part 2.5 was one of the most radical aspects of the *Criminal Code*, because of its conception of corporate fault. Instead of sticking to individuals – like the identification doctrine – Part 2.5 has provisions which establish criminal responsibility on the basis of corporate culture. And that's really quite unique because we're asking whether the corporation itself was morally blameworthy.

**NDW:** So if the *Criminal Code* was intended to introduce clarity and consistency, is Part 2.5 the end of the story? Does this solve the attribution issue?

**MC:** Look, if that were the case, there would be no Inquiry. The short answer is no. Though it was acclaimed for its innovative nature and conceptual sophistication, Part 2.5 was excluded from many relevant statutes. These include the majority of the *Corporations Act*, and the *Competition and Consumer Act*, including the *Australian Consumer Law*.

**NDW:** Is it, then, a problem with implementation rather than the actual law? Why can't we just apply Part 2.5 across the board?

**MC:** Well, you've hit on an interesting point. The reasons for the exclusion of Part 2.5 are unclear. It seems that many of the statutes simply preferred to retain their existing method of attribution. And while familiarity may make sense from a regulatory point of view; it doesn't from a legal perspective. But unfortunately, it's not just a problem with implementation. There are issues with the actual law.

**NDW:** Are we talking about the legal principles laid down in Part 2.5, or the wording of Part 2.5?

**MC:** We're talking about both. I'll start with the legal principles concerning whether the corporation had a certain state of mind. This is where Recommendation 7 comes in. The ALRC recommends two options – the ultimate decision being one for Government. One option adapts the existing model, which provides several ways of proving that the corporation did have, for example, intention. This option amends one of these ways, which focuses upon particularly important individuals in much the same way as the identification doctrine.

**NDW:** I see that the *Criminal Code* describes this class of individuals as 'high managerial agents', which sounds quite intriguing. But what's the problem with the current formulation?

**MC:** Well Nadine, like I foreshadowed earlier, corporations have become much larger and more complex. The ALRC's recommendation intends to better reflect the reality of modern corporate decision making. This is often not readily reduced to an easily identifiable 'senior' individual but is the result of a much broader array of inputs. To put it another way, we're not looking at job titles or job descriptions. We're focusing on the nature of the relationship between the individual and the corporation itself.

**NDW:** Just to confirm – under Part 2.5, is this just one way of establishing the state of mind of the corporation?

**MC:** Exactly. Under Part 2.5, you can also rely on other methods of proof. As I mentioned earlier, there are provisions based on the idea of corporate culture.

**NDW:** Now Matt, looking at the other option of Recommendation 7. It looks totally different and there's no mention of corporate culture there.

**MC:** That's right Nadine. The second option is based on a popular statutory method of attribution modelled after s 84 of the *Trade Practices Act*, as it was then called. It focuses on whether the state of mind of officers, employees or agents of the corporation, depending on the particular circumstances, can be directly ascribed to the corporation itself.

**NDW:** That sounds a bit like the identification doctrine.

**MC:** Well, that's essentially what the second option is; though it does cast a wider net than the identification doctrine. Here, the ALRC's recommendation is really intended to invoke a relatively simple, longstanding test. And while this option doesn't retain the corporate culture provision, the corporation does have a defence of reasonable precautions, which does emphasise moral blameworthiness of the corporation.

**NDW:** You've summarised a lot about attribution, but is there anything else that you would like to add about the ALRC's recommendations?

**MC:** I do think that it is quite important to note that throughout Recommendations 6 and 7, you'll see a number of technical amendments to the wording of the relevant provisions. These are designed primarily to remove ambiguity and provide clarity on how these provisions should be interpreted.

**NDW:** Thanks for that explanation Matt, and for demonstrating why the legal mechanisms of attribution really does require reform.

**MC:** Thank you Nadine. I've enjoyed being on this podcast, and I certainly welcome all listeners to read the Final Report, or if you're a bit short on time, the Summary Report, both of which are available to download on the ALRC's website.

Download the Corporate Criminal Responsibility Final Report:  
<https://www.alrc.gov.au/publication/corporate-criminal-responsibility/>