



Corporate Crime Podcast Series – Episode 5 – Specific Offences

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Matt Corrigan: Hello, My name is Matt Corrigan and I'm the General Counsel at the Australian Law Reform Commission. Thank you for joining us for podcast five in our series looking at corporate criminal responsibility. I'm joined by Samuel Walpole, legal officer at the ALRC. We are going to dive into the details of specific offences.

So Sam, could you start by perhaps explaining why the traditional criminal law is not a perfect fit when applied to corporate defendants?

Samuel Walpole: So, much of the practical and theoretical difficulty surrounding corporate criminal responsibility stems from the fact that a corporation is not a natural person, like you and I. It is an artificial entity, constructed by law. Criminal law was traditionally designed with real people in mind. We need principles of attribution to attribute the acts and states of minds of a natural person, or persons, to a corporation for a corporation to be criminally responsible. This is not a perfect fit. While corporations are comprised of, and act through, individuals, corporate action is greater than individuals. Corporations are greater than the sum of their parts. They can also act – or fail to act – in different ways to individuals. In a corporate context, systems of conduct, patterns of behaviour, policies, procedures and culture are critical parts of acts and omissions by corporations.

There are many recent, prominent examples of this. The fees for no service allegations from the Financial Services Royal Commission are rather vivid illustrations. These involved allegations of the systematic charging of fees to thousands of clients for ongoing advice services that were not in fact delivered, over several years.

MC: How do specific offences address these problems with corporate systems?

SW: Specific offences are framed so as to apply only to corporations. They better reflect the reality of modern corporate action – it is often the application of deficient corporate policies, procedures, culture, norms of behaviour and omissions that result in corporate misconduct.

MC: What are some examples of specific offences?

SW: There are two main existing types of specific offences: duty-based offences and failure to prevent offences. In the Final Report, the ALRC recommended a failure to prevent offence be created for certain transnational offences.

MC: Now, the ALRC also recommended enactment of a third type of specific offence, which it has termed a “system of conduct” offence. What misconduct might such an offence address?

SW: So in the Final Report, the ALRC has provided two hypothetical scenarios to which the offence might apply if enacted. We showed that the offence might be appropriate in cases of

systematic charging of fees for no service, a scenario I mentioned earlier. Another example we discuss is where a business model is based entirely around prohibited advertising of therapeutic goods. In the Final Report, the ALRC has worked through these hypotheticals and explained what sort of evidence would be required to establish the offence in these scenarios.

What the ALRC has recommended is that, 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. This is novel in the criminal sphere, but it draws upon the established “system of conduct or pattern of behaviour” concept used in a number of existing civil penalty provisions. It reflects the fact that corporations act through systems and processes, as well as through individuals.

MC: Why did the ALRC see the need for the enactment of offences focused on “systems of conduct”? Why is the offence linked to contraventions of civil penalty provisions?

SW: The ALRC recognised that certain systematic contraventions of civil regulations could amount to criminal conduct. The two key issues the ALRC sought to address were as follows. Firstly, business practices conducted without regard to the requirements of civil regulatory provisions. Secondly, business practices in contravention of civil penalty provisions adopted in a calculated decision to absorb the penalty and profit from the conduct. We are talking about systematic and deliberate failures to put in place appropriate controls here.

MC: What would this type of offence look like?

SW: In the Final Report, the ALRC presented a Draft Model Offence to illustrate what a “system of conduct” type offence might look like.

- The prosecution would have to prove particular conduct – acts or omissions – by a corporation. The fault element for this element would be intention or recklessness.
- It would then have to prove that, objectively, this conduct constituted a system of conduct or pattern of behaviour. As this is an objective assessment, the fault element would be absolute liability.
- Finally, it would be necessary to prove 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.

MC: How does the offence appropriately capture conduct that is actually criminal, rather than just multiple civil contraventions?

SW: This was a concern that we were alive to throughout the Inquiry. It was emphasised in submissions. The type of offence recommended is directed at systematic corporate misconduct that is such that it warrants criminal sanctions. The draft offence is *targeted*, and some of the concepts used deliberately narrow its scope – for example, the system or pattern concept, and the requirement to prove fault elements to a criminal standard. These confine the possible factual scenarios that the offence might apply to.

MC: Would the draft offence apply to all regulatory regimes? Or to all civil penalty provisions within such a regime?

SW: No. We have recommended the offence apply only to prescribed civil penalty provisions. We did recommend that a charge may be able to be proven through a system of conduct or pattern of behaviour that would result in two or more contraventions of the *same* prescribed civil penalty provision, or one with *similar characteristics*. 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.

This recommendation is about providing an additional regulatory tool in respect of systematic misconduct that should be denounced, or where the deterrent effect of a civil penalty proceeding would be insufficient. It is also possible, of course, that there may be scope for greater use of the “system of conduct or pattern of behaviour” concept both in civil regulation and in a criminal offence detached from civil penalty contraventions altogether.

MC: Thank you, Sam, for talking us through these recommendations from the ALRC’s Final Report on Corporate Criminal Responsibility. Can you provide listeners with one key takeaway regarding specific offences and the ALRC’s recommendations?

SW: Good to speak with you, Matt. We think the key point is that specific offences are a promising avenue for developing more effective corporate criminal law. They have the benefit of paying greater regard to the reality of contemporary corporate behaviour, with less of the artificiality of traditional attribution principles.

MC: Thanks Sam. I encourage listeners to head over to the ALRC website to download the Final Report. The full list of recommendations can also be found in the Summary Report if you would like an overview. Join us for the next episode in this series covering individual liability with Sarah Fulton.

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