Corporate Crime Podcast Series – Episode 6 – Individual Liability

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Nadine Davidson-Wall: Welcome to this episode of the Australian Law Reform Commission podcast series. Today we are unpacking the recommendations made in the Final Report on Corporate Criminal Responsibility in Australia.

I'm Nadine Davidson-Wall, Communications Coordinator at the Australian Law Reform Commission and joining me is Sarah Fulton who is a Senior Legal Officer at the ALRC. Sarah has been involved in the Commission's recently released report on corporate crime. Welcome, Sarah.

Sarah Fulton: Hi Nadine, it's great to be speaking to you.

NDW: Within this inquiry you were looking at how the law deals with directors and senior managers when their company breaks the law. There seems to be a widespread public view that those running companies who commit crimes often get off scot free – seen again recently in the wake of the Financial Services Royal Commission. Is that something that was backed up by the ALRC's findings?

SF: Well there was certainly general agreement in consultations that when companies commit crimes directors and senior executives *should* be held to accountable if they have failed in their own responsibilities. There are various different mechanisms through which that can be done. But we regularly heard the view that it didn't seem to be happening in relation to those from very large corporations.

NDW: Did you have any hard evidence that this was the case?

SF: Well we looked at it further, by analysing all the cases brought over the past five years by two major regulators – ASIC and the ACCC. We looked at proceedings they'd brought against corporations and individuals connected to them. The results of that analysis were quite striking. It showed that – except in relation to cartel conduct – proceedings were very rarely instituted against directors or senior executives of the largest companies – such as large banks, telecommunications, and retail companies. For those companies – much more than for other categories of smaller company – court action was much more likely to be taken against the company alone.

Now it may be that some cases against senior executives – even criminal cases – do arise out of the Financial Services Royal Commission, for example. But to date there haven't been any and if they do they will be the exception rather than the rule.

NDW: Were you able to reach conclusions as to why directors and executives from the largest companies are less likely to be taken to court even when the company is found to have broken the law?

SF: There seem to be a number of different issues here. First, it may reflect to some extent the historic enforcement priorities of the regulators – for example, in the context of the Financial Services Royal Commission, Commissioner Hayne criticised ASIC for preferring negotiated outcomes to enforcement action when it came to the big banks, and ASIC has now adopted a new approach to enforcement. We were also told by various people involved in these types of cases about how difficult they are in practical terms to litigate. And these difficulties are increased when the individuals concerned are from large, well-resourced corporations. These include things like blanket claims for legal professional privilege causing very long delays, legal difficulties in coordinating and sharing information between regulators, and practical difficulties of evidence when you have separate proceedings against companies and individuals in relation to the same matter. Some of these are currently being addressed as part of other law reform processes.

However the biggest issue seems to be one of diffused responsibility and a lack of clarity of accountability within companies themselves. Particularly in large companies, there are complex reporting structures that might mean no single executive has enough knowledge of or involvement in wrongdoing to be held legally liable as an individual. This may be the case even if management as a whole incentivised the misconduct or management's negligence allowed it to take place. This was an issue highlighted in the Royal Commission and was also regularly raised in consultations in this inquiry.

NDW: How has the law traditionally dealt with this?

SF: Well there are three main ways in which directors and senior managers have been held responsible when companies break the law. One – and many see as the primary – way is through being held liable as an accessory to the company's act. Just like any person can be held criminally responsible if they aid and abet another person's criminal act, a director or manager can aid and abet a corporation's crime or civil contravention. But as we show in the report, both criminal and civil accessorial liability require proof of a high level of knowledge and intention. Recklessness or negligence is not enough. Quite rightly, many would argue, as you are being held out as morally culpable for the crime or contravention. Often in the corporate context, either that type of culpability does not rest in a single individual, or even if it does it is very difficult to prove.

But when corporations can cause such harm – to the public, to the environment, to the economy – many argue that there are good reasons to expect more of those in charge. So the law also has developed other mechanisms. The first main type is by imposing specific statutory duties on directors and senior managers – like general directors' and officers' duties and duties to ensure companies comply with Workplace Health and Safety Laws. The other main way is through provisions which 'deem' directors or managers liable if their corporation breaks particular laws – either if it can be shown they were reckless or negligent, or simply because of their position. We examine these in detail in the report, but a key issue is that even these types of provisions are often harder to apply in very large organisations where responsibility is very diffused.

NDW: Given this, how did the ALRC conclude that individual accountability for corporate misconduct could be strengthened?

SF: In its Discussion Paper the ALRC had explored the option of a standard provision deeming certain individuals within a company personally liable to civil penalty when a company committed a crime. This didn't receive strong support – most stakeholders thought

that this would be very onerous on directors and managers and that the different legal mechanisms we have in place already provide an appropriate framework that can be adapted depending on the policy area. And in the meantime, earlier this year the Federal government announced a proposed reform that impacts directly on individual accountability and may go some way to addressing these issues, at least in the Financial Services sector.

Now that proposal – known as the Financial Accountability Regime – comes out of recommendations of the Financial Services Royal Commission about extending existing legislation applying to banks, but it goes further. It's based on a model implemented in the UK following the global financial crisis. It would do a number of things, but among them would require certain very large companies regulated by APRA – including banks, superannuation funds and insurers – to map out exactly which individuals are accountable for particular areas of operation. This might include designating an individual executive responsible for management of a particular financial product or for compliance with licensing obligations in a particular area. It would impose specific responsibilities on those individuals to act with reasonable care and skill and to ensure the company complies with its licensing obligations. If they don't they could be liable to pay a civil penalty. The idea is that the new regime should provide a greater degree of certainty as to where accountability lies – both for individual executives and for regulators.

NW: So how did this new proposal impact on the ALRC's recommendation in this area?

The ALRC thinks that this proposal may address some of the issues it has identified as hindering accountability. So it concluded that the new regime should be given time to be implemented and operational before any other wholesale reform is considered further. Obviously with the current pandemic crisis, the timeline for introducing the legislation is uncertain – it had been suggested it would be enacted by the end of this year but that seems unlikely now. So the ALRC recommended that this issue of individual accountability for corporate misconduct be considered again in a wide-ranging review five years after the new regime comes into force.

NDW: Now the proposed Financial Accountability Regime only applies to the Financial Services sector, but many other corporations who are huge players, including retailers, telecommunications companies, aged care providers and pharmaceutical companies, have been in the news for breaking the law. What about those areas?

SF: Well the Financial Services Sector is one area where there has been an obvious accountability deficit, but you are right – misconduct is certainly not limited to that area and our research suggests lack of accountability at the top isn't either. In the report we've suggested that if the Financial Accountability Regime is successful, similar schemes could be considered in other highly-regulated sectors with large corporate actors. They might be considered where there are clear accountability deficits, or in sectors with the potential for significant public harm. The report also outlines recent High Court jurisprudence in the interpretation of officers' duties which may also help to clarify accountability in other cases.

But it is for exactly this reason that the ALRC has recommended a further review in five years' time. We have concluded that there *is* a problem with accountability in very large corporations, and if the new and existing mechanism don't operate to hold directors and senior managers liable when appropriate for corporate misconduct, there may well be the need for further reform. The report highlights that we may already be on the path towards greater rationalisations in any event, and discusses in further detail the directions in which that reform may go.

NDW: Thanks very much Sarah for explaining the ALRC's reasoning around individual liability, and as Sarah says there is much more detail on the existing mechanisms for holding

individuals responsible for corporate crimes, and the way in which they are evolving, in Chapter 9 of the ALRC's report.

SF: Lovely to speak to you Nadine, thanks for having me.

NDW: Thanks for joining us f or this podcast series. This is the final episode in the series on corporate crime, but there is much more information into the reasoning behind the ALRC's recommendations in this Inquiry. You can download the Final report from our website, or if you're short on time, the Summary Report will provide a concise view. You can also comment on Twitter and Linked In. So head over to our website to find more – www.alrc.gov.au.

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