



Corporate Crime Podcast Series – Episode 7 – Sentencing

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Nadine Davidson-Wall: Thank you for joining us for this episode of the Australian Law Reform Commission podcast series discussing the ALRC’s recent inquiry into Australia’s corporate criminal responsibility regime. My name is Nadine Davidson-Wall and I’m joined by Phoebe Tapley. Phoebe is a legal officer at the ALRC who has worked on the Final Report and in particular focusing on the sentencing of corporations.

Phoebe, the Terms of Reference for the Corporate Crime Inquiry did not specifically direct the ALRC to consider sentencing, but there is a whole chapter and a number of recommendations in the Final Report devoted to sentencing. What was the basis for considering sentencing as part of this Inquiry?

Phoebe Tapley: A fundamental question in this Inquiry was what is the purpose of attributing criminal responsibility to corporations? Part of the answer to this question relates to the normative role of the criminal law, which has been discussed in an earlier podcast. But answering this question also requires consideration of the *consequences* of holding corporations criminally responsible for misconduct, which are largely determined through the sentencing process. If courts can’t impose sanctions on corporations that are fit for purpose, this necessarily blunts the force of the criminal law as a regulatory tool for addressing corporate wrongdoing. So sentencing really is an important piece of the puzzle of Australia’s corporate criminal responsibility regime.

NDW: When corporations are held to account for misconduct, the headlines often focus on the size of the fine imposed by the court. But can you talk you a little about why fines may not always be an adequate sanction for corporate misconduct?

PT: Yes, record-breaking fines can certainly make for powerful headlines. For example, in June 2018 we saw the Commonwealth Bank of Australia make headlines when it agreed to pay a record \$700 million civil penalty in relation to breaches of anti-money laundering and counter-terrorism financing laws.

Yet when we look at the traditional purposes of sentencing, we see that fines fall short in many respects. For example, there is a concern that fines of any size cannot adequately reflect the gravity of criminal wrongdoing. There is a perceived risk that fines simply put a price on misconduct for corporations and may be viewed by corporations as a ‘cost of doing business’.

Fines fail to promote, in particular, the sentencing purposes of rehabilitating the offender, limiting the capacity of the offender to re-offend, and promoting the restoration of relations between the community, the offender and any victims.

It is often suggested that imposing significant fines, like in the CBA case, has a strong deterrent effect on both the convicted corporation and its competitors. But there is a significant body of literature that suggests that setting a fine at a level that will deter corporate crime is a fraught exercise. For a number of reasons, it cannot be assumed that imposing a fine that outstrips any advantages gained by criminal conduct will have a deterrent effect on corporate crime.

NDW: Given that corporations are artificial entities that have ‘no soul to damn, no body to kick’, what options are there other than imposing fines?

PT: The ALRC recommends empowering courts to impose a range of non-monetary penalties when sentencing corporations.

For example, the court could order a corporation to take certain corrective actions to identify and address the cause of the offending. That might look like the corporation undertaking a review of its compliance program, taking internal disciplinary actions and implementing internal reforms. The court could also order that the corporation pay the costs of a court-appointed monitor who would oversee compliance with the corrective action order and report back to the court. You can see how this kind of order would be particularly well suited to the sentencing purpose of rehabilitating the offender and reducing the likelihood of reoffending. It could also be seen to have a punitive and deterrent effect because it would constrain the autonomy of the corporation’s officers to direct the corporation’s internal affairs.

Empowering courts to impose these kinds of non-monetary penalties in addition to or, in appropriate instances, instead of fines would ensure that the court has the flexibility to impose a sentence that is fit for purpose.

We do already have provision for some of these types of orders in offence-creating statutes, but their availability and application is fairly limited. So the ALRC recommends the introduction of a general power to make these orders in the *Crimes Act*, which would limit duplication, gaps and inconsistencies across the Commonwealth Statute Book.

NDW: And what about if none of these orders are fit for purpose?

PT: That’s where dissolution of a corporation may come into play. In addition to the power to make the types of orders we just discussed, the ALRC recommends that courts should have the power to dissolve, or wind up, a corporation that has been convicted on indictment of a Commonwealth criminal offence – so corporate capital punishment if you will. This power would, however, only be exercisable in circumstances where the court is satisfied that dissolving the corporation represents the only appropriate sentencing option in all the circumstances. This is consistent with restrictions on sentencing individual offenders to a term of imprisonment, which is appropriate because, like imprisonment, dissolution is an extreme penalty.

The ALRC also recommends a consequential power to disqualify persons from managing corporations for a period of time, which is intended to ensure that a dissolution order is not defeated by those responsible for the dissolved corporation recommencing activities through a new corporate entity.

NDW: The ALRC also makes a recommendation in relation to debarment. How does debarment differ from the non-monetary penalty orders that might be imposed by a court under the ALRC’s recommendations?

PT: If a national debarment regime were introduced, debarment from government contracts would be a potential administrative consequence of a corporation being convicted of a criminal offence rather than a court-imposed penalty.

There are a number of international precedents for the use of debarment regimes to deter corporate crime and protect the public interest. But there is significant variation in the design of these regimes. The ALRC defers consideration of the design of an Australian debarment regime to the Council of Australian Governments (or COAG) – which of course has now been replaced by the National Cabinet.

NDW: And finally, what recommendations does the ALRC make to improve the process of sentencing corporations?

PT: To assist the court in imposing the most appropriate penalty for a corporate offender, the ALRC also makes recommendations to:

- provide statutory guidance on the factors relevant to sentencing corporations; and
- strengthen the court's information base for sentencing corporations by introducing pre-sentence reports for corporations and expanding the scope of victim impact statements to better accommodate corporate offences.

The intention behind all of these recommendations is really to ensure that sentencing processes and penalties for corporations are responsive to the nature of corporations and corporate wrongdoing, so that the fundamental purposes and principles of sentencing can be applied effectively to corporate offenders.

NDW: Thanks Phoebe. That's a concise summary of some of the important points made in chapter 8 of the Final Report.

Thanks for joining us on this episode. You can jump into the next podcast episode now to hear more about transnational crime, or you can view chapter 8 and the full report on the ALRC's website: www.alrc.gov.au.

Download the Corporate Criminal Responsibility Final Report:

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