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REVIEW INTO AUSTRALIA'S CORPORATE CRIMINAL RESPONSIBILITY REGIME

THE ALRC'S DISCUSSION PAPER: WHAT YOU NEED
TO KNOW

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The ALRC’s discussion paper on Corporate Criminal Responsibility: What you need to know

The Australian Law Reform Commission (ALRC) has published a very significant paper on the future of prosecuting corporations and their officers in the post-Financial Services Royal Commission environment. It has sought submissions on a number of proposed reforms to the Commonwealth’s corporate criminal responsibility regime. We summarise the key areas of proposed reforms.

Key areas of proposed reform



Unlawful corporate conduct should be categorised to better reflect the distinction between criminal misconduct, civil misconduct, and low-level civil contraventions.



There should be a single method for attributing corporate criminal liability, subject to a defence of due diligence.



Individuals should be liable where they were in a position to influence corporate misconduct, unless they prove they took reasonable measures to prevent the misconduct.



The utility and appropriateness of deferred prosecution agreements is being considered.



Factors relevant to sentencing corporations and making civil penalty orders should be clarified in statute, and a broader range of non-monetary consequences available, including disqualification from government work (debarment).

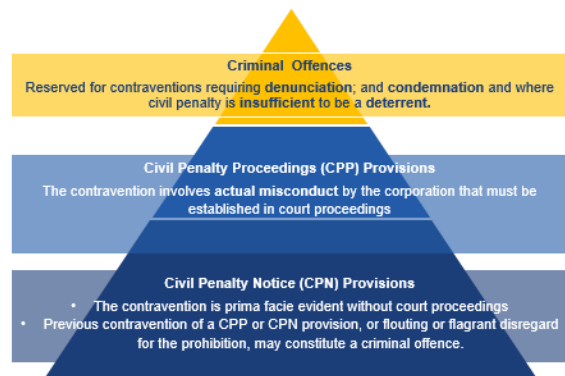


A positive due diligence obligation on corporations to prevent the commission of crimes overseas is being considered.

Over-criminalisation of corporate misconduct

The ALRC’s review has found the current corporate regulatory regime is “over-complicated”, with an “over-proliferation” of criminal offences in Commonwealth law, a number of which criminalise “trivial misconduct”. The ALRC describes the current division between criminal and civil prohibitions as “incoherent”.

The ALRC has proposed a recalibration of corporate conduct attracting criminal sanctions. The primary form of corporate regulation is proposed to be civil. Criminalisation would be reserved for the most serious misconduct. Unlawful conduct would be divided into three categories as follows:



The ALRC appears to be recommending a review of the range of situations that constitute criminal offences, to reflect the seriousness of the transgression and remove criminal consequences for minor administrative contraventions. The ALRC’s preliminary view is that civil penalty proceedings should not address conduct that also constitutes a criminal offence, unless the criminal offence captures a greater level of wrongdoing. This would require the revision of a range of provisions that may be prosecuted *either* as a civil or criminal contravention.

The recalibration forms part of a suite of proposals, including providing guidance as to which provisions should fall into which categories. This is designed to bring greater coherence and consistency to the enforcement regime.

What you need to know: Importantly, the combined effect of these proposals would be to reduce the number of criminal offences applicable to corporations.

Our view: We support simplifying and reducing the number of criminal offences, particularly where there is overlap with civil provisions, to ensure a clear delineation between civil and criminal contraventions and ensure proportionality that reflects the gravity of the given conduct.



New approach to attributing criminal liability to corporations

Another issue identified by the ALRC is the numerous and different methods for attributing criminal liability to corporations under the current law. Importantly, the ALRC has intimated that the corporate culture provisions in Part 2.5 of the *Criminal Code* are vague and inapposite. It has suggested that the innovative approach of using corporate culture to attribute fault to a corporation should be reviewed.

The ALRC has proposed a single method for attributing criminal and civil liability to a corporation in which:

- the conduct and state of mind of *associates* of a body corporate acting on behalf of the corporation is attributable to the corporation; and
- a due diligence defence is available to the corporation.

Associate is proposed to be broadly defined, covering officers, employees, agents, contractors, subsidiaries and bodies controlled by the corporation. The ALRC asserts that adopting this broad definition is necessary “to prevent body corporates using the corporate structure to avoid criminal responsibility”. It is also likely to make it easier to pursue corporations for offences occurring overseas.

The broad definition of associates is counterbalanced by the availability of a defence in circumstances where the corporation proves it exercised due diligence to prevent the misconduct.

To avoid automatic liability for the misconduct of its associates, a corporation will need to provide evidence of its preventative procedures, as well as steps to detect and respond to misconduct. Such a proposal would heighten the role of compliance and risk teams in ensuring corporations have appropriate frameworks in place, and actively implement those compliance and monitoring procedures, to demonstrate due diligence.

The Discussion Paper is likely to prompt calls for guidance on what due diligence requires. While the ALRC has not provided a detailed view on due diligence requirements at this stage, it proposes that implementing an effective whistleblowing protection policy should be a relevant and necessary condition for a corporation to demonstrate that it exercised due diligence.

What you need to know: Effective compliance policies and procedures, including whistleblowing programs, and their effective implementation, will be key to relying on a due diligence defence.

Our view: While the availability of a due diligence defence is ostensibly attractive, it can be difficult, in practice, to establish and it will be necessary for corporations to have clear guidance on the benchmarks that must be met.

Individual liability for criminal corporate misconduct

The ALRC has taken a strong stance on the need to hold senior executives who are responsible for influencing corporate conduct (and preventing misconduct) to account for failing to take reasonable measures to prevent corporate offending. It has proposed a regime to hold those individuals personally liable. This is contrary to the conclusion of the Corporations and Markets Advisory Committee’s 2005 review.

“Despite widespread support for individual accountability, however, there is also a perception that individuals are not properly held accountable in practice”
ALRC DP87, paragraph 7.20

The proposal is underscored by the ALRC’s conclusion that the law currently presents “too many opportunities for senior executives to evade personal liability” and too many obstacles to shield senior managers from responsibility in relation to “conduct over which they had significant influence or supervision”.

The proposed liability for failing to prevent the corporation from committing an offence would be its own criminal (or civil) contravention, and would not be predicated on a separate corporate conviction being secured, as a precondition of prosecuting the individual. The proposal would also complement (rather than replace) the existing accessorial liability provisions, which require some knowledge or involvement by the individual.

Under the proposal, liability would be based on an individual’s capacity to influence the corporation’s conduct, and to make decisions and direct behaviours in the course of their role, without any requirement of direct knowledge of or involvement in the contravening conduct. The proposal aims to ensure “individual liability cannot be pushed too far down to middle management, shielding the most senior officers, but instead accurately reflect where authority resides in corporations of any size or complexity”.

The categories of individuals to which this “managerial liability” regime would apply is identified as an issue for further consultation and consideration.



What you need to know: Senior executives will be increasingly incentivised to focused on what reasonable measures can be taken to prevent corporate offending.

Our view: The proposal extends individual liability for corporate misconduct beyond the ordinary principles of criminal responsibility. Significant questions arise about whether an individual has “influence” over the corporation’s conduct. While the proposal is said to be focused on senior executives, in practice, it may set too low a bar, particularly in large groups where many roles have a degree of influence (though not necessarily control) over the corporation’s conduct.

Introduction of a DPA regime

The ALRC has re-invigorated debate about implementing a regime for deferred prosecution agreements (DPAs).

DPAs have been employed as an alternative to prosecuting corporate offending in the US for three decades. More recently, they have been introduced in the UK and other jurisdictions.

The Government sought to introduce a framework for a DPA regime in the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017*, which lapsed with the 2019 federal election.

DPAs have attracted considerable controversy. The ALRC supports active consideration of whether to institute a DPA regime in Australia. The Discussion Paper acknowledges that a DPA regime would seek to address the impediments to prosecuting corporate crime. That is, they may address the “under-enforcement problem”, rather than any flaw in the substantive law.

The model proposed by the Bill would facilitate “deals” being brokered between the CDPP and accused corporations, whereby the CDPP would agree not to commence proceedings in respect of the alleged offending in exchange for the corporate accused’s compliance with the terms of the DPA (which would not be filed with, or require the approval of, a court). Those terms may involve making public admissions, engaging in internal corporate governance audits / reforms and instituting remediation programs. The ALRC identifies that, for such a regime to be successful, there must be an incentive, i.e., less severe consequences and penalties, for companies that self-report.

What you need to know: The ALRC has invited further consultation and submissions concerning the desirability and optimal operation of a DPA regime in Australia.

Our view: We are generally supportive of introducing a DPA regime in Australia, but recognise the framework needs to more clearly establish incentives for companies to engage (e.g., greater certainty over potential outcomes, clarity over penalty discounts and precise guidance on what is required to qualify).

Sentencing

The ALRC is also considering the consequences for corporations that are convicted, having regard to the wide range of stakeholders who are affected.

The ALRC recommends statutory guidance for sentencing corporations. It proposes that a harmonised statutory guidance on sentencing corporations and making civil penalty orders ought to be incorporated into the *Corporations Act* and *Crimes Act*.

The ALRC has also proposed that a greater range of criminal penalties ought to be available to the court when sentencing a corporation, including:

- non-monetary penalties (e.g., orders requiring the corporation to undertake activities for the benefit of the community, orders requiring the corporation to publicise certain information, orders requiring the corporation to take corrective action within its organisation, and orders disqualifying the corporation from undertaking specified commercial activities);
- severe penalties including orders dissolving the corporation; and
- a national debarment regime, to limit the involvement of criminally convicted corporations in government work.

An augmented penalties toolkit would, no doubt, align the available armoury of criminal penalties with the more “commercial” civil penalty regime.

What you need to know: Corporations will likely be exposed to a wider range of serious sanctions following a successful prosecution.

Our view: We support greater clarity in sentencing options. Further consideration is needed on proposals to introduce novel sanctions for corporations.

Due diligence to prevent offshore crimes

The ALRC is considering options to strengthen obligations on Australian corporations to prevent their involvement with crimes offshore (including in relation to modern slavery, human rights, environmental, foreign bribery and sanctions issues).



“Despite the extraterritorial application of many serious offences under Commonwealth criminal law, there persist examples of Australian corporations that have been implicated in – but ultimately never responsible for – alleged offshore crimes”

ALRC DP87, paragraph 12.11

The Discussion Paper tables various options, including widening the recently introduced reporting regime for modern slavery.

The ALRC has called for comments on a proposal to introduce new positive stand-alone due diligence obligations on Australian corporations, which would require them to actively avoid involvement with extraterritorial offshore crimes. Such a proposal would apply to conduct that is already criminalised under Commonwealth law and require corporations to take steps to identify risks of crimes occurring and take measures to address those risks.

What you need to know: The onus on Australian corporations to show due diligence in their oversight and involvement in offshore activities is increasing.

Our view: Significant further consideration is needed to determine what a positive due diligence obligation would, practically, require companies to do, to ensure that there is a clear benchmark for regulatory expectations.

Wide-ranging report

The Discussion Paper is wide-ranging, focussing on the rationale for prosecuting corporations.

The paper also covers a range of other proposals, including in relation to protections for whistleblowing (including potential compensation), and illegal phoenix activity (where a company transfers assets to a new company with the intent to defraud creditors).

Submissions in response to the Discussion Paper are open until 31 January 2019.

The ALRC will publish its Final Report on 30 April 2020.

Please contact your HSF team should you wish to discuss the Discussion Paper and any implications for your business.

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