



THE ALRC PUTS CORPORATE CRIMINAL RESPONSIBILITY UNDER THE MICROSCOPE

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Legal Briefings - By **Grant Marjoribanks, Jacqueline Wootton, Tania Gray** and **Christine Wong**

The Federal Government has announced a review by the Australian Law Reform Commission (**ALRC**) into Australia's Corporate Criminal Responsibility Regime.

The ALRC will focus on how challenges involved in investigating and prosecuting corporate crime can be addressed. The Attorney General has said the review will consider the complexity of the current regime and its challenges as a mechanism for attributing corporate criminal liability. The full media release, including the Terms of Reference, made by the Attorney-General can be seen [here](#).

Key takeaways for businesses, executives and directors are:

1. **The review reinforces the commitment from the Federal Government and agencies to taking serious action on corporate crime.** This announcement follows recent events which signal a rise in expected corporate criminal prosecutions. This includes comments made by ASIC Deputy Chairman Daniel Crennan QC that "any suggestion that ASIC has a limited appetite for criminal prosecutions is plainly incorrect" and the stated intention of ACCC Chair Rod Sims to increase criminal prosecutions as a central enforcement and compliance method.
2. **The review may lead to more strict liability offences for companies.** If the Australian review follows similar reviews in the UK (such as the review which preceded the UK Bribery Act), we may see a shift towards offences creating strict liability for companies, unless the company can show that it had systems or processes in place to prevent the offending.
3. **The review increases the risk of individual liability.** The review will also examine

mechanisms to hold directors and other senior corporate officers accountable for misconduct by the company.

4. There will be opportunities for businesses to participate in the ALRC's consultations and comment on any proposed recommendations.

We outline below the likely areas of focus and reform and how companies might engage with the review process.

1. RECOMMENDATIONS TO SIMPLIFY AND STRENGTHEN CORPORATE CRIMINAL RESPONSIBILITY LAWS

The ALRC will examine how corporate criminal responsibility laws can be strengthened and simplified for prosecuting companies and their senior executives.

CURRENT REGIME UNDER THE CRIMINAL CODE

The ALRC will review the efficacy of Part 2.5 of the *Criminal Code Act 1995* (Cth) (**the Code**), which applies to offences in the Code such as foreign bribery and corruption as well as most offences under the *Corporations Act 2001* (Cth). The Code provides that a company will be liable for an offence where the following elements are established beyond reasonable doubt:

- the physical elements of the offence are committed by an employee, agent or officer of the company acting within the actual or apparent scope of their employment or authority; and
- the company expressly, tacitly or impliedly authorised or permitted the commission of the offence (the 'fault' element). The fault element can be established where:
 1. the board of directors intentionally, knowingly or recklessly carrying out the relevant conduct or permitting the commission of the offence;
 2. a high managerial agent intentionally, knowingly or recklessly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the offence;
 3. a corporate culture existed that directed, encouraged, tolerated or led to non-compliance; or

4. the company failed to create and maintain a corporate culture that required compliance.

POSSIBLE AREAS FOR RECOMMENDED REFORM

A difficult issue that arises in any corporate criminal prosecution is establishing that the relevant individuals held the required mental state. No Australian prosecution has otherwise successfully relied on corporate culture in establishing the fault element.

Reform in this area has already been foreshadowed with the proposed introduction of a new offence for companies of failing to prevent bribery. This offence was first introduced in the UK and has been prosecuted by the Serious Fraud Office. The expansion of the failure to prevent regime to other corporate offences has already been the subject of significant focus in the UK.

We expect the ALRC to examine whether similar reforms are appropriate for other corporate offences. That is, whether the onus of proving the fault element should shift so that once the physical element is established it turns to the company to establish that it had systems or processes in place to prevent that conduct. There is also a possibility that the ALRC will consider whether certain corporate offences should be strict liability offences.

The ALRC will also examine the effectiveness of mechanisms other than Part 2.5 of the Code for attributing corporate criminal responsibility (as well as for senior officers). We expect this to include the regimes under the *Competition and Consumer Act 2010* (Cth) and section 769B of the *Corporation Act 2001* (Cth).

Finally, the terms of reference include consideration of whether Part 2.5 of the Code should be extended to enable senior corporate officers to be held liable for misconduct by corporations. Currently, senior corporate officers will not be liable unless they have been directly involved in the commission of an offence.

It is currently unclear how the review will impact the Federal Government's proposal to introduce a deferred prosecution scheme. The proposed scheme would allow companies to effectively 'settle' a range of specified Commonwealth criminal charges, including foreign bribery matters. Our briefing on the proposal is available [here](#). At a minimum, the ALRC will likely examine the concept of deferred prosecution schemes and how they sit alongside corporate criminal responsibility laws more broadly.

2. RECOMMENDATIONS TO SIMPLIFY PROCEDURE

In addition to corporate responsibility principles, the ALRC will consider the appropriateness and effectiveness of current criminal procedure laws and rules as they apply to corporate crime. The review will consider the interaction of Commonwealth criminal procedural laws with state and territory criminal procedural law, particularly in relation to committal hearings.

At this stage, some of the areas that may be examined are:

The role of the Federal Court in hearing corporate criminal offences

Currently, corporate criminal prosecutions proceed to State Courts (either District or Supreme) for trial (although cartel prosecutions under the *Competition and Consumer Act* can be tried in the Federal Court).

In the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, there has been a push to see corporate criminal offences tried in the Federal Court to enable such prosecutions to be prioritised. The Federal Court has recently been renovated for jury trials and was also awarded \$35 million in funding for corporate criminal matters. Recent judicial appointments to the Federal Court have also added to its criminal capabilities.

We expect that the recommendations will support the expansion of the Federal Court's jurisdiction to corporate criminal matters beyond its existing cartel jurisdiction.

Further simplification of committal procedures

Currently, all criminal matters start in the Local or Magistrate's Court. It is only after the matter passes the committal phase (which is where the evidence is tested to confirm it is sufficient to warrant a trial) that the matter is sent to its trial jurisdiction.

The committal phase is often slow. In some states, it has undergone recent reform. From 30 April 2018 in NSW, the making of the committal decision based on the evidence (including a committal hearing) by a Magistrate was abolished. Instead, the prosecutor certifies in the charge certificate that the evidence is capable of establishing each element of the offence.

The ALRC's review may recommend that the current committal processes be stream-lined and harmonised across states and territories, to the extent state jurisdiction remains.

3. HOW WILL COMPANIES BE ASKED TO ENGAGE?

The ALRC's Discussion Paper is due on 15 November 2019, with its final report due to Government by 30 April 2020.

We expect that there will be multiple opportunities for consultation with the ALRC. In advance of these dates, the ALRC has confirmed that it will be producing consultation documents to ensure that stakeholders have an opportunity to contribute to the review.

The authors thank Mikaela Eldridge for her assistance with this update.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**JACQUELINE
WOOTTON**
PARTNER, BRISBANE

+61 7 3258 6569
jacqueline.wootton@hsf.com



TANIA GRAY
PARTNER, SYDNEY

+61 2 9322 4733
Tania.Gray@hsf.com



**ANNA
SUTHERLAND**
MANAGING PARTNER,
DISPUTES, AUSTRALIA

+61 2 9225 5280
Anna.Sutherland@hsf.com



**ELIZABETH
MACKNAY**
MANAGING PARTNER,
PERTH OFFICE, PERTH

+61 8 9211 7806
Elizabeth.Macknay@hsf.com



LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com



CHRISTINE WONG
PARTNER, SYDNEY

+61 2 9225 5475
Christine.Wong@hsf.com

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