



CDPP

Australia's Federal Prosecution Service

Commonwealth Director
of Public Prosecutions

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Dear Sir/Madam

Corporations Amendment (Financial Benchmarks) Bill 2017
Submission on Exposure Draft

1. Thank you for the opportunity to comment on the Exposure Draft of the *Corporations Amendment (Financial Benchmarks) Bill 2017*.

Background

Role of the CDPP

2. The Commonwealth Director of Public Prosecutions (**CDPP**) was established as an independent prosecution service under the *Director of Public Prosecutions Act 1983* (Cth). Cases are referred to the CDPP by Commonwealth investigating agencies including, for present purposes, the Australian Securities and Investments Commission (**ASIC**). Where those investigations reveal alleged offences against Commonwealth law, the CDPP prosecutes those offences through the courts. The CDPP is responsible for prosecuting the majority of offences against Commonwealth law.

The Criminal Code (Cth)

3. Chapter 2 of the *Criminal Code* (Cth) (**Code**) contains the general principles of criminal responsibility that apply to Commonwealth criminal offences. It applies to offences under the *Corporations Act 2001* (Cth) by virtue of section 1308A of that Act.

4. All offences consist of physical elements and fault elements.¹ In order for a person to be found guilty of committing an offence, the Prosecution must prove:
 - a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt; and
 - b) in respect of each such physical element for which a fault element is required, the relevant fault element for that physical element.²
5. Physical elements may be conduct, results of conduct, or circumstances in which conduct or a result occurs.³ Fault elements include intention, knowledge, recklessness and negligence.⁴ A law creating an offence may specify the fault element that applies to each physical element. If the law creating the offences does not so specify, the Code provides the fault elements that apply by default. The default fault element for the physical element of conduct is intention.⁵ The default fault element for the physical elements of result and circumstance is recklessness.⁶
6. A law creating an offence may provide that there is no fault element for one or more physical elements.⁷ The law may do so by stating that strict liability or absolute liability applies to one or more physical element of the offence.⁸
7. Chapter 2 of the Code also deals with mistake or ignorance of the law. It provides that a person cannot be criminally liable for an offence if s/he is mistaken about, or ignorant of, the existence or content of an Act or subordinate legislation that creates the offence.⁹

Submissions on the Bill

Section 908BA(1)(c)

8. The CDPP submits that it would be appropriate to specify that absolute liability, or at least strict liability, applies to paragraph 908BA(1)(c).
9. Section 908AC allows ASIC, by legislative instrument, to declare a financial benchmark to be a significant financial benchmark. Section 908BA(1) creates an offence of administering a significant financial benchmark without a licence. One of the elements of the offence is that 'the period applying under subsection (2) for the financial benchmark has ended'.¹⁰ That element is a circumstance. No fault element is specified. Therefore, as currently drafted, the default fault element of recklessness applies to section 908BA(1)(c). That is, the Prosecution would be required to prove that an accused knew that the relevant period had ended, or had turned his or her mind to the matter and was aware that there was a substantial risk that the period had ended.
10. Subsection (2) defines the period in question in section 908BA(1)(c) by reference to the date on which ASIC made the declaration under section 908AC. By virtue of section 9.4 of the Code, a

¹ s3.1(1)

² s3.2

³ s4.1(1)

⁴ s5.1(1)

⁵ s5.6(1)

⁶ s5.6(2)

⁷ s3.1(2)

⁸ ss6.1, 6.2

⁹ ss9.3, 9.4

¹⁰ s908ba(1)(c)

person can be criminally liable for an offence even if mistaken about or ignorant of the existence or content of subordinate legislation. A declaration under section 908AC falls within the definition of 'subordinate legislation'¹¹ in that it is a legislative instrument.¹² In those circumstances, it is submitted that it is unnecessary that the Prosecution be required to prove that an accused knew or was reckless as to the fact that the relevant period for the financial benchmark had ended. Rather, it is appropriate that absolute, or at least strict, liability apply to section 908BA(1)(c).

11. The real essence of the offence lies in paragraphs 908DA(1)(a) and (b); that is, the physical elements of (a) doing or omitting to do an act or acts and (b) the result of the acts or omissions that a financial benchmark is generated or administered at an artificial level. The Prosecution will still be required to prove fault (intention and recklessness respectively) in relation to those physical elements of the offence.

Sections 908DA(2)(b)(i), 908DB(2)(b)(i) and 908DC(2)(b)(i)

12. Similar considerations apply in relation to section 908DA(2)(b)(i), 908DB(2)(b)(i) and 908DC(2)(b)(i). Since a financial benchmark is declared, by legislative instrument, to be a significant financial benchmark, it is submitted that it is unnecessary that the Prosecution be required to prove that an accused knew or was reckless as to that fact. Rather, it is appropriate that absolute, or at least strict, liability apply to those provisions.

Section 908BW(4)

13. This provision allows ASIC to share assessments of licensees' compliance with various other bodies, including the CDPP, where the assessment relates to a serious contravention of a law of the Commonwealth. 'Serious contravention of a law of the Commonwealth' is not defined either in the *Corporations Act 2001* or the amending Bill. We note that there are similar information sharing provisions in other sections of the *Corporations Act*.¹³ To our knowledge, there has not been any dispute over the propriety of such information sharing. However, to avoid the potential for dispute, it would be useful to add a definition of 'serious contravention of a law of the Commonwealth'.

Sections 908DA(2)(a), 908DB(2)(a) and 908DC(2)(a)

14. Sections 908DA, 908DB and 908DC read, in part:

(1) A person contravenes this subsection if:

- (a) the person does, or omits to do, one or more acts; and
- (b) the acts or omissions have or are likely to have the effect of a financial benchmark being generated or administered at a level that is artificial (whether or not it was previously artificial).

.....

(2) A person contravenes this subsection if:

- (a) paragraphs (1)(a) and (b) apply in relation to the person, one or more acts or omissions, and a financial benchmark; and

¹¹ s9.4(3)

¹² s908ac(2)

¹³ Eg, ss794C(5), 823C(5), 823CA(4), 904J(4)

15. The wording of paragraph (2)(a) is curious and, it is submitted, confusing. It could be adequately expressed as ‘paragraphs (1)(a) and (b) apply in relation to the person’, omitting the words ‘one or more acts or omissions, and a financial benchmark’.

Extended geographic jurisdiction – category B

16. The Exposure Draft Explanatory Memorandum states that the offences in sections 908DA, 908DB and 908DC are broken into two limbs, the second of which is intended to apply to foreign nationals and bodies. It is intended that a foreign accused will commit an offence under Division 4 if the relevant act(s) or omission(s) occur in relation to a significant financial benchmark or, if the affected benchmark is not a significant one, an Australian entity suffers some disadvantage as a consequence. This is said to be achieved by section 908DE, which provides that section 15.2 of the Code (extended geographical jurisdiction – category B) applies to the offences in Division 4.¹⁴ The CDPP questions whether that category is sufficient to achieve the stated aim.

17. Section 15.2 of the Code relevantly provides:

- (1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
- (a) the conduct constituting the alleged offence occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
 - (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

.....

18. Where an offence is committed outside Australia by a foreign accused and the acts or omissions cause disadvantage to an Australian entity (that is, where section 908DA(2)(b)(ii), etc operates to create the offence), section 15.2 of the Code clearly applies. However where an offence is committed outside Australia by a foreign accused and no result is felt in Australia, section 15.2 of the Code does not operate to create an offence by reason of the fact a significant financial benchmark is involved. If it is desired to create an offence in those circumstances, it would be necessary to apply section 15.3 or 15.4 of the Code.
19. It is noted that this issue is, however, largely hypothetical. Even if section 15.3 or 15.4 were applied, there remain practical impediments to prosecuting foreign accused. It would be necessary to seek extradition of natural persons. There is no method to compel foreign corporations to submit to Australian criminal jurisdiction.

¹⁴ paragraphs 4.6-4.7 of the Explanatory Memorandum

No offence of dissemination of information about illegal transactions

20. Sections 908DA, 908DB and 908DC loosely mirror the market misconduct offences in Part 7.10 Division 2 of the *Corporations Act 2001*. However there is no equivalent of section 1041D, which creates the offence of disseminating information about market manipulation conduct in certain circumstances. The CDPP considers that there would be merit in including a similar offence of dissemination of information about conduct that generates or constitutes administration of an artificial financial benchmark.

If you require any further information about this submission, please contact Fiona Thompson on 03 9605 4480 or fiona.thompson@cdpp.gov.au.

Yours faithfully



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