Attribution of legal person liability under Australia’s Criminal Code
Standard method for attribution of liability

• Physical element (conduct)
  • Committed by the legal person if an employee, agent or officer acted within the actual or apparent scope of their employment or authority

• Mental element (state of mind)
  • Attributed to the legal person if the legal person expressly, tacitly or impliedly authorised or permitted the conduct
“Expressly, tacitly or impliedly authorised or permitted the conduct”

- Board of directors carried out the conduct, or authorised/permitted the conduct
- High managerial agent engaged in the conduct, or authorised/permitted the conduct
- Existence of a corporate culture that led to non-compliance
- Failed to create a corporate culture that required compliance
What is corporate culture?

• Relevant factors include:
  • whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the legal person
  • whether the employee, agent or officer who committed the offence believed on reasonable grounds that a high managerial agent would have authorised or permitted the conduct
Defence of due diligence

• Liability will not be attributed if the legal person proves that it exercised *due diligence* to prevent the conduct, or the authorisation or permission of the conduct.

• Only available where liability is attributed because a high managerial agent permitted/authorised the conduct.
Proposed foreign bribery ‘failure to prevent’ model

- An **associate** of the legal person engages in foreign bribery for the profit/gain of the legal person
- **Defence:** Legal person had **adequate procedures** in place to prevent foreign bribery

- **Associate:**
  - officer, employee, agent
  - contractor
  - subsidiary
  - any entity controlled by the legal person or that performs services for on behalf of the legal person