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Australian Law Reform Commission
PO Box 12953
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By Email

Dear Colleagues

Review into Australia's corporate criminal responsibility regime

We welcome the referral of a review of corporate criminal liability to the Australian Law Reform Commission (**ALRC**) and are grateful for the opportunity to make a submission concerning the scope of the inquiry and issues relevant to the terms of reference.

We have a long history of representing corporate clients and individuals in corporate criminal matters, as well as extensive international experience of corporate criminal regimes in other jurisdictions, most notably in the United States and the United Kingdom. We would be pleased to assist the ALRC and provide perspectives throughout its review.

At the outset, we draw to the ALRC's attention the observations of Commissioner Hayne in the Financial Services Royal Commission's Interim Report:

I begin from the premise that breaches of existing law are not prevented by passing some new law that says 'Do not do that'. And given the existing breadth and complexity of the regulation of the financial services industry, adding any new layer of law or regulation will add a new layer of compliance cost and complexity. That should not be done unless there is a clearly identified advantage. ¹

With reference to that observation, there are two principles that we would encourage the ALRC to have regard to during its review:

- First, it is important to distinguish a deficiency or gap in the existing law from issues with how the existing law has been enforced by regulators or approached by corporations.
- Second, the review should consider not just the policy rationale of Part 2.5 of the Code, but also the broader policy rationale of corporate criminal liability and of individual criminal liability for corporate misconduct. Regard should be had to the severity of the consequences that flow from a criminal conviction and the totality of existing pathways by which corporations and their directors and officers can be held liable for misconduct under current criminal and civil law. Only where there is a clearly identified gap that does not address this policy rationale should additional laws, or changes to law, be recommended.

Below we outline some ways in which those principles are relevant in relation to the terms of reference.

¹ *Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* p 290.

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The efficacy of Part 2.5 of the Commonwealth Criminal Code (Code)

Corporate culture

Part 2.5 of the Code has been in place for over 20 years and has rarely been used in prosecutions. In particular, we are aware of no published judgment applying sections 12.3(2)(c) or (d) of the Code, which provide for corporate criminal liability on the basis of a corporate culture that directed, encouraged, tolerated or led to non-compliance, or for failing to create and maintain a corporate culture that required compliance.

In considering this aspect of Part 2.5 of the Code, we consider that the ALRC should be guided by the first principle above. In particular (in addition to the factors set out in the terms of reference), the ALRC should have regard to the following factors in determining whether the historical absence of enforcement action through the 'corporate culture' pathways is an artefact of how the law has been enforced and understood by corporations, or a deficiency in the law itself:

- there is a marked difference between the historically preferred approach of regulators to enforcement (as summarised in the Final Report of the Royal Commission and the ASIC Enforcement Review Taskforce) and more recently articulated approaches. Our experience is that there has been a paradigm shift in the approach of ASIC and APRA (and other regulators) to enforcement over the last year. They are now manifestly more willing to take assertive enforcement action and are engaging with the criminal aspects of the law. These regulators, law enforcement bodies such as the AFP, the Office of the Commonwealth Director of Public Prosecutions and the Federal Court are all receiving additional funding to deal with a greater number of corporate criminal prosecutions;
- regulators are increasingly focussing on corporate culture as a subject of regulatory supervision and monitoring (as well as enforcement);
- there are numerous fields in which the legal meaning of corporate culture, and associated practical guidance, is developing at a rapid rate, including in the context of the 'French factors' considered by courts in determining the civil penalties for corporations, in guidance and reports from regulators, for example the CBA Prudential Inquiry Report by APRA, and in the Final Report of the Royal Commission; and
- analogous legal standards and guidance have been developing at a rapid rate, including the considerations relating to the 'adequate procedures' defence to bribery offences under the *Bribery Act 2010* (UK) (legislation is before Parliament to introduce a similar regime in Australia for foreign bribery offences) and published guidance from prosecutorial agencies (including in the UK, US and Australia) as to the circumstances in which they may decline to prosecute companies that have effective compliance cultures.

The development of this body of guidance, and the more assertive role being played by regulators, is already having a significant impact on Australian corporations' culture.

Other corporate attribution

In considering other aspects of how misconduct can be attributed to corporations, we recommend that the ALRC have regard to the full array of potential consequences for corporations where there is misconduct within their business, including:

- the availability and quantum of existing civil and criminal penalties. In particular, since the passing of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), the scope of civil penalties for financial services and corporations laws has been extended and the quantum of civil and criminal penalties has increased dramatically. Significant financial penalties are now available against corporations, including against financial services licensees for breaches of civil obligations (including, notably, the obligation under section 912A(1)(a) of the *Corporations Act 2001* (Cth) to do all things necessary to ensure that its financial services are provided efficiently, honestly and fairly); and

- the availability of existing alternative mechanisms for attributing criminal liability to corporations, for example under section 769B of the Corporations Act.

In accordance with the second principle above, in our view, changes should only be recommended where they address a gap that existing laws do not address, with reference to the policy rationale.

In particular, we suggest that the ALRC should not approach this from the perspective of whether an alternative approach might make corporate criminal prosecutions simply easier, but rather whether any recommended change would better align corporate liability with corporate fault.

Mechanisms which could be used to hold individuals liable for corporate misconduct

In considering mechanisms that could be used to hold individuals liable for corporate misconduct, it will be particularly important to have regard to the second principle above. In our view, this should include consideration of

- directors' duties under the Corporations Act and at common law, and their enforcement by ASIC;
- criminal accessorial liability and how liability might extend to individuals 'involved' in a contravention of a civil penalty provision; and
- while not imposing personal liability on accountable persons, the BEAR regime, given the disqualification powers it confers on APRA. Consideration should also be given to the Commonwealth Government's proposal to introduce an accountability regime for other areas of the financial services industry.

Again, in our view, changes to the liability of directors and officers of corporations should only be recommended if they represent a clearly superior mechanism for aligning individual liability with individual fault.

Criminal procedure laws and rules

The potential array of considerations for the ALRC in relation to criminal procedure is daunting and liable to being swamped with detail.

We suggest that there are some key higher-level considerations that the ALRC should have regard to in relation to criminal prosecution process as it relates to serious corporate criminal matters:

- the structure of having distinct investigative and prosecutorial agencies in the context of complex corporate criminal matters and the alternative approach in relevant foreign jurisdictions including the UK, the USA and New Zealand, which have adopted a model of having a single investigating and prosecuting agency for complex corporate matters;
- the principles for appropriate interactions between investigating and prosecutorial agencies and corporations in circumstances where the nature and particular status of criminal investigations can have serious consequences for corporations, including potentially triggering disclosure obligations to markets, counterparties and regulators and other obligations. This should include the approach to giving notice of an intention to prosecute and allowing representations to be made by the potential subject of the prosecution given the significant implications that the decision to lay charges (let alone a conviction) can have for a corporation;
- the means by which corporate criminal liability can be resolved without a conviction given the length of time and cost involved with a criminal investigation and prosecution, and the potentially significant implications a conviction can have on a corporation's reputation and ability to transact business. In particular, the ALRC should have regard to the scope and application of proposed legislation providing for deferred prosecution agreements² and the application of the Prosecution Policy of the Commonwealth in corporate matters; and

² Under the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth)

- the merits of various approaches prosecutors and investigative agencies take to issuing guidance in relation to corporate criminal matters, including the Prosecution Policy of the Commonwealth and guidelines published jointly by the Commonwealth Director of Public Prosecutions and the Australian Federal Police in relation to self-reporting of potential foreign bribery offences.

Next steps

Please do not hesitate to contact us if we can be of assistance during the course of the review. We would be pleased to meet with the ALRC to provide perspectives and information on issues under review.

Yours sincerely



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Partner
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