AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

ALRC Corporate Criminal Responsibility Review

Submission on Discussion Paper

January 2020

1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) welcomes the Australian Law Reform Commission's (**ALRC**) review into Australia's corporate criminal responsibility regime, and the opportunity to make a submission in response to the ALRC's discussion paper.

The ACCC is an independent Commonwealth statutory authority responsible for enforcing the *Competition and Consumer Act 2010* (Cth) (**CCA**), which contains both criminal and civil sanctions for certain types of anticompetitive and unfair conduct. In doing so, we promote competition, consumer protection, and fair trading for the benefit of all Australians.

This submission will address the following key points:

- *The importance of a flexible regulatory toolkit* – this section discusses the importance of regulators having a range of enforcement tools, including infringement notice powers, to appropriately address the full spectrum of corporate wrongdoing.
- *Strengthening the corporate criminal responsibility regime* – this section outlines our support for strengthening the corporate criminal responsibility regime by extending the scope of individual liability for corporate misconduct under Proposals 9 and 10, our opposition to weakening the corporate criminal responsibility regime by introducing into the CCA a due diligence defence against attribution of individual wrongdoing to corporations as per Proposal 8, and our support for a 'director identification number' regime as per Proposal 23.
- *Improving corporate prosecution processes* – this section outlines our support for removing state and territory committal procedures for Commonwealth offences, and for introducing a deferred prosecution agreement regime in line with the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth).

The ACCC is happy to discuss any of the views put forward in this submission.

2. The importance of a flexible regulatory toolkit

The ACCC uses a range of enforcement tools to encourage compliance with the CCA. In deciding which enforcement tool or combination of tools to use, our first priority is always to achieve the best possible outcome for the community and to manage risk and resources proportionately. Our enforcement actions seek to maximise impact and to leverage any outcomes across an industry sector. For example, we use the outcome of one court proceeding to encourage other businesses to change their practices.

A key aspect of making this approach effective is that the ACCC must have a range of enforcement tools available to deal with the full spectrum of behaviour that we may encounter. As the ALRC noted in its *Principled Regulation* report, "flexibility is an important feature of regulation and allows a regulator the ability to tailor appropriate penalties to breaches".[1]

Appropriate responses to misconduct may range from administrative resolutions (such as infringement notices or court enforceable undertakings) to criminal sanctions, with the most appropriate response being dependent on a range of factors, including the nature and seriousness of the conduct, the deterrent or leverage value of different approaches, and the importance of achieving transparent, timely, and cost-effective outcomes.

[1] ALRC, *Principled Regulation*, [11.65], 2003.

For almost all prohibitions in the CCA, including the Australian Consumer Law (**ACL**), contraventions of the same prohibition can be more or less serious depending on the individual circumstances involved in each matter. As such, the ACCC requires a range of enforcement tools for these prohibitions to ensure that any enforcement action we take is proportionate and effective.

The ACCC maintains a public Compliance and Enforcement Policy and annual enforcement priorities to ensure that external stakeholders are aware of the factors that we will take into account in our enforcement decision-making. The ACCC also maintains a public Memorandum of Understanding with the Commonwealth Director of Public Prosecutions (**CDPP**), which sets out the factors that we take into account in determining whether to refer cartel conduct to the CDPP for determination as to whether criminal proceedings are warranted.[2]

The ACCC encourages the ALRC to place a greater emphasis on the importance of maintaining flexibility for regulators to deal appropriately with the full spectrum of corporate behaviour that we may encounter, rather than seeking to develop a strict hierarchy of offending across Commonwealth legislation that would adversely restrict regulators' discretion to pursue the right balance of remedies for each instance of corporate misconduct.

2.1. Infringement notice powers

The ACCC is concerned that the implication of Proposals 1 and 3 is that infringement notice powers would no longer be available for civil penalty provisions. This would remove an important tool from the ACCC's regulatory toolkit, undermining the much needed flexibility to appropriately tailor enforcement responses to the full array of circumstances. The ACCC strongly opposes such a change.

Infringement notices under the CCA are designed to provide, and have proven to deliver, timely and cost-effective enforcement outcomes in relation to contraventions involving relatively minor circumstances.[3] Before issuing an infringement notice, the ACCC will have turned its mind to the prospect of non-compliance and be prepared to proceed to court as a likely alternative.

However, proportionality is one of the key principles governing our compliance and enforcement work, and the ACCC strives to ensure our enforcement responses are proportionate to the conduct and the resulting harm or potential harm. As different contraventions of the same prohibitions of the CCA can be more or less serious depending on the individual circumstances involved in each matter, the ACCC is therefore concerned that the ALRC's proposed model is likely to lead to less effective enforcement action, or less enforcement action altogether, against contraventions at the lower end of the offending spectrum since we are not able to take court proceedings for every matter due to the resources required. Moreover, under the principles of proportionality, commencing proceedings may not be the appropriate enforcement response.

We note that the ALRC's discussion paper suggests that prohibitions involving misleading elements are examples of complex and significant civil penalty provisions which should not be eligible for an infringement notice. However, since the ACCC's infringement notice powers were introduced in 2010, the majority of matters that the ACCC has resolved by way of issuing, and recipients paying, infringement notices have been matters involving some form of alleged false or misleading representations.

---

2 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct*, 15 August 2014.

3 ACCC, *Guidelines on the use of infringement notices*, April 2013.

The ACCC may issue an infringement notice where we have reasonable grounds to believe that a person has contravened certain consumer protection provisions, including:

- The unfair practices provisions (save for certain sections, e.g., section 18 of the ACL, which is a general prohibition on misleading or deceptive conduct)
- Certain unsolicited consumer agreement and lay-by agreement provisions, and
- Certain product safety and product information provisions.

The ACCC may also issue an infringement notice to a person in relation to:

- The failure to respond to a substantiation notice, or
- The provision of false or misleading information to the ACCC in response to a substantiation notice.

The ACCC takes into account a broad range of sometimes competing factors in considering whether to seek to resolve a matter through the issuing of an infringement notice. Examples of circumstances where the ACCC is more likely to consider the use of an infringement notice include:

- Where we form the view that the contravening conduct is relatively minor or less serious
- Where there have been isolated or non-systemic instances of non-compliance
- Where there have been lower levels of consumer harm or detriment
- Where the facts are not in dispute or where the ACCC considers the circumstances giving rise to the allegations are not controversial, and
- Where infringement notices form part of a broader industry or sectoral compliance and enforcement program following the ACCC raising concerns about industry wide conduct.

Generally speaking, the ACCC will only consider issuing an infringement notice where we are likely to seek a court-based resolution should the recipient of the notice choose not to pay.

The CCA's infringement notice regime contains three important safeguards for recipients of infringement notices. First, the recipient is not admitting wrongdoing by paying the notice, and the ACCC is not able to bring an action against them after they have paid. Second, there is no obligation on the recipient to pay the infringement notice, although the ACCC may choose to instigate proceedings for the alleged contravention of the CCA. Third, the recipient may apply for the notice to be withdrawn if they believe they have not engaged in the conduct as alleged by the ACCC or there is information the ACCC should consider that we have not already have considered. We consider that these are appropriate safeguards against any perceived misuse of infringement notice powers.

As a result, the ACCC strongly opposes removing infringement notice powers for civil penalty provisions, as this would undermine the much needed flexibility to appropriately tailor enforcement responses to the full array of circumstances. Removing the infringement notice regime from the CCA will negatively affect the ACCC's ability to take effective enforcement action and lead to less action against contraventions at the lower end of the offending spectrum.

2.2. Automatic criminalisation of repeat or flagrant contraventions

The ACCC opposes Proposal 5, insofar as it would remove regulator discretion about how to take action against repeat or flagrant contraventions of civil penalty provisions. We support the ability to seek a more serious enforcement outcome against repeat offenders, including across the civil/criminal divide in appropriate circumstances. However, the decision to seek a more serious enforcement outcome should be made following an analysis of the specific circumstances of each individual matter where repeat or flagrant contraventions would be one of a number of relevant factors. We consider that, at both regulator and court level, there are already appropriate methods of dealing with repeat or flagrant contraventions of civil penalty provisions.

At a regulator level, the ACCC already has a well-developed triage system for deciding whether to commence or progress investigations into alleged corporate misconduct. Since the ACCC cannot take action in every instance of alleged misconduct, we seek to achieve the best outcome for the community by maximising the impact of our enforcement actions. In deciding which investigations to commence or progress, we already take into account whether a corporation has contravened a provision before, or whether this alleged contravention is flagrant.

If the ACCC is required to refer repeated or flagrant contraventions to the CDPP for consideration of criminal charges, and no longer has the ability to bring a civil action in appropriate cases, the result will be *less* effective enforcement, not more, and, at least in some instances, place an unnecessary burden on the already scarce resources of the criminal justice system. This is likely to result in a practical, if not theoretical, regulatory gap for repeat civil penalty contraventions.

In addition, following the Federal Court's decision in *Trade Practices Commission v CSR Ltd*,[4] federal courts take into account a range of factors in deciding a penalty of appropriate deterrent value in the circumstances. These factors expressly include the deliberateness of the contravention. Further, section 76(1) of the CCA and section 224(2) of the ACL require a court, in setting a pecuniary penalty, to consider whether the person has previously been found by a court to have engaged in similar conduct. As a result, the ACCC considers that there is already sufficient scope for a court to impose appropriate penalties for repeat or flagrant contraventions of the CCA.

3. Strengthening the corporate criminal responsibility regime

3.1. Extending individual liability for corporate misconduct

The ACCC supports Proposals 9 and 10, extending the scope of individual liability to those who are not directly involved in a relevant offence but were otherwise in a position to prevent it. This would encourage senior officers to be more proactive in ensuring their businesses do not engage in corporate misconduct.

The OECD has repeatedly noted the value of individual liability for those involved in cartel conduct, as individual sanctions can strengthen the incentive of directors and employees to resist corporate pressure to engage in unlawful activity.[5] Individual liability is also essential in encouraging members of a cartel to apply for immunity from prosecution, by increasing

---

4 [1990] FCA 762, see particularly at [42] per French J. We note the ALRC cites this decision on page 207 of its discussion paper, in footnote 25.

5 OECD (2005) *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* https://www.oecd.org/competition/cartels/35863307.pdf

distrust within the cartel.[6] The Federal Court has recognised the importance of individual liability for cartel conduct, noting that individual sanctions are 'critical' for the anti-cartel regime and that 'heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix process and share markets.'[7] As a result, the ACCC supports Proposals 9 and 10.

However, in response to Question B, we consider that it would be counter-productive for the scheme contemplated by Proposals 9 and 10 to replace the CCA provisions set out in Appendix I. The discussion paper notes that Appendix I contains the individual liability provisions for corporate offences under the reviewed legislation, including sections 139C and 84(3)-(4A) of the CCA. The ACCC considers that these provisions do not in fact provide for individual liability for corporate offences under the CCA. Instead, these provisions provide that:

- Aspects of conduct engaged in by a 'servant or agent' of person 'other than a body corporate' (the **principal**) can be attributed to the principal for the purposes of establishing specified elements of offences particular provisions of the CCA and ACL, and
- That if reliance is placed upon those 'attributing' provisions to establish the offence, the principal cannot be liable to imprisonment for that offence.

Therefore, rather than provide that individuals can be liable for corporate conduct, the sections provide that a person other than bodies corporate can be liable for an individual's conduct carried out on that person's authority. Sections 84(3) and (4) mirror sections 84(1) and (2), but apply to non-incorporated entities, in order to establish a similar framework regardless of the incorporation status of the relevant entity. Likewise, sections 139C(1) and (2) mirror sections 139B(1) and (2), also resulting in a similar framework for incorporated and non-incorporated entities. It is our view that sections 139C and 84(3)-(4A) have been included in error and should not be replaced by the provisions set out in Proposals 9 and 10.

3.2. Introducing a due diligence defence

In response to Proposal 8, the ACCC does not support the introduction into the CCA of a due diligence defence against attribution of individual conduct and states of mind to a corporation, as this would mark a fundamental change in how corporate criminal liability is treated under the CCA and could have unintended flow-on effects.

Firstly, we are concerned that a due diligence defence would undermine the ACCC's ability to detect and investigate cartel conduct by changing the incentives for corporations considering seeking a marker under our *Immunity and cooperation policy for cartel conduct*.[8]

Cartel conduct is notoriously difficult to detect from the outside, and an effective policy to incentivise reporting and cooperation is essential to combatting cartel conduct. However, if a corporation considers that it may be able to make out the due diligence defence, that will reduce that corporation's incentive to report suspected cartel activity. In addition, if the individuals involved know that their corporation may be able to make out the due diligence defence and leave only the individuals criminally liable, that may also reduce the individuals' incentives to report suspected cartel activity independent of their corporation.

---

6 OECD (2018) *Challenges and Co-Ordination of Leniency Programmes* https://one.oecd.org/document/DAF/COMP/WP3%282018%291/en/pdf

7 *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617, 308.

8 The policy also includes information on the CDPP's approach to ACCC recommendations about immunity in criminal proceedings.

These changed incentives would seriously undermine the ACCC's ability to effectively combat cartel conduct.

In addition, the ALRC notes that the lack of a due diligence defence in the United States has led to criticism that "firms with the most effective internal compliance and policing run a higher risk of exposing their own liability".[9] However, this criticism has little force in Australia in relation to cartel conduct because of our immunity policy. Corporations with effective internal compliance and policing are likely to be in a better position to apply for immunity, rather than being victims of their own effectiveness.

Secondly, we note that the ALRC suggests a due diligence defence in part to balance their expanded category of 'associates' whose conduct and states of mind could be attributed to the corporation. However, this expansion is a minor change to the category of persons already covered by the attribution provisions of the CCA, and does not need to be offset by such a fundamental change as a due diligence defence.

Thirdly, we consider that there is no evidence, such as frequent inappropriate corporate prosecutions under the CCA, that could warrant such a fundamental amendment in light of its potential to undermine the ACCC's ability to effectively combat cartel conduct. We consider that a principles-based argument for uniformity across Commonwealth legislation is not a sufficient reason for the change. Regulators charged by Parliament, and relied on by the community, to enforce criminal prohibitions ought not to have their ability to do so undermined for theoretical or methodological reasons, without any evidence of real-world problems.

The ACCC does not take a view on whether such a defence is appropriate for other Commonwealth offences.

3.3. Introducing a 'director identification number' register

The ACCC supports the introduction into the *Corporations Act 2001* (Cth) of a 'director identification number' regime, which would facilitate tracking individuals across multiple companies.

This kind of regime would strengthen our ability to take appropriate action against company directors who repeatedly contravene or are involved in the contravention of the CCA, as well as assisting regulators to detect and disrupt phoenixing activity.

4. Improving corporate prosecution processes

4.1. Removing committal procedures for Commonwealth offences

The ACCC strongly supports the removal of committal procedures for Commonwealth offences by corporations in all states and territories for two key reasons.

Firstly, we agree that harmonisation of the law for corporate offenders in different states and territories is desirable. As a national regulator, the ACCC is regularly involved in proceedings in different courts around Australia. Following ACCC investigations and referrals, criminal cartel charges have been laid by the CDPP in various matters in the ACT Magistrates Court, the Victorian Magistrates' Court, and the NSW Local Court both before and after the 2018 commencement of amendments to the *Criminal Procedure Act 1986* (NSW). As a result, defendants in these criminal cartel proceedings have been subject to four different committal

[9] ALRC, *Corporate Criminal Responsibility*, discussion paper, November 2019, [5.17].

procedures, despite the fact that the substantive law governing their alleged offences is the same. The ACCC considers that this is undesirable.

Secondly, the ACCC considers that the Federal Court is more appropriately resourced to deal with large-scale criminal corporate misconduct (of which Commonwealth offences are a major part) compared to state and territory summary courts. These resources range from increased court expertise in complex commercial litigation to increased court facilities to accommodate large numbers of counsel and legal representation for multiple parties. We consider that corporate criminal matters should be dealt with from the earliest possible date in the forum best equipped to handle them. This would result in a more efficient allocation of judicial resources than is currently the case.

As a result, the ACCC strongly supports the removal of committal procedures for Commonwealth offences by corporations in all states and territories. Any benefits of a committal for an accused corporation can be achieved through pre-trial hearings and other processes in the Federal Court.

4.2. Introducing a deferred prosecution agreement scheme

In response to Question E, the ACCC supports the introduction of a DPA scheme in Australia in line with the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth), noting and supporting that this DPA scheme would not extend to criminal cartel conduct.

The ACCC agrees that a DPA scheme may encourage self-reporting and cooperation regarding corporate crime, which is the rationale behind the ACCC's successful *Immunity and cooperation policy for cartel conduct*. However, we consider that our immunity policy should remain the only method through which immunity-type decisions are made regarding cartel conduct. Our immunity policy sets out a longstanding and well-understood process that has been based on international best practice with a view to encouraging self-reporting. The importance of encouraging self-reporting is unique to cartel conduct.

Any move to replace our targeted immunity policy with a DPA scheme intended to apply across Commonwealth legislation would risk undermining corporations' incentives to self-report cartel conduct to the ACCC, and therefore our ability to effectively enforce the CCA's prohibitions on cartel conduct.