



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

30 January 2020

The Hon. Justice S C Derrington
President
Australian Law Reform Commission
PO Box 12953
George Street Post Shop
Brisbane QLD 4003

via upload of Submission Form on website www.alrc.gov.au

Dear Justice Derrington

Review into Australia's corporate criminal responsibility regime

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) advocates for small and family business. We work to ensure that government policies are 'small business friendly', and provide direct support to small and family businesses, particularly in respect of dispute resolution.

This submission focuses on the topics that are most critical to small and family business, noting that we have previously submitted to Treasury and the Senate Standing Committee on Economics that we do not support "strict liability" offences in relation to circumstances where a small business can unknowingly be in breach of the law.

Criminal sanction

We note and agree with Proposal 2 that specifies that a criminal sanction should apply only in limited circumstances and Proposal 3 that provides that otherwise offences should be subject only to civil penalties. We also agree with proposal 4 that specifies that there should be easily accessed mechanisms to have civil penalties withdrawn in appropriate circumstances. However, Proposal 5 then allows re-categorisation of civil penalty provisions into criminal offences where there is repeat offending (or flagrant disregard). It is possible that a small business might contravene a civil penalty provision more than once through technical breaches; however, as framed Proposal 5 does not distinguish administrative breaches. We believe that the proposal, if enacted, could have a similar effect to strict criminal liability provisions and therefore oppose it in the current form.

Corporate whistleblowing

We agree with Proposal 11, supporting further the development of guidance material to explain what constitutes an effective corporate whistleblower protection policy. Small business' engagement with Government and larger organisations is from a less powerful position and experience shows that whistleblowers can improve the relative strength of small business in the economy and society. Question C under this Proposal then asks the question whether and how to compensate individuals for the loss of employment and future earnings, which can reach into decades. This question warrants further investigation and consultation, especially to ensure that there are not unintended impacts if introduced.

Illegal phoenixing

Proposals 21 and 22 provide suggested amendments to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* to help take speedy action when illegal phoenixing is suspected. We agree that quick action by regulators (and others) in such cases is critical to protect impacted small businesses. However, such speedy action would need to be accompanied by effective and low cost

T 1300 650 460 E info@asbfeo.gov.au
www.asbfeo.gov.au

Office of the Australian Small Business and Family Enterprise Ombudsman
GPO Box 1791, Canberra City ACT 2601

mechanisms to dispute, say, the imposition of restraining notices by the Australian Securities and Investments Commission (ASIC) or the Australian Taxation Office. External oversight of such notices would be critical.

Proposal 23 highlights the positive impact of implementing Director Identification Numbers (DINs). In future reviews of the operation of the DINs, it will be critical to check that historical behaviour has been captured and appropriately reported. This may include review of whether there may be a need to include in reports any individual associated with the management of a company who holds a DIN whether or not they hold a statutory position in the company.

Question J under Proposal 23 asks whether there should be an express statutory power to disqualify insolvency and restructuring advisors. Since these advisors are not necessarily licensed, any disqualification will be difficult, and illegal phoenix activity is normally discovered only retrospectively through investigation, an approach could be for liquidators to be able to seek recovery from insolvency and restructuring advisors who proposed the strategy, not directors following strategies in good faith. This approach would recognise that small and family businesses do not have expert legal teams within the business and seek advice from advisors trusting that the advisors recommend strategies within the law. Please note that we are currently conducting an investigation into insolvency practices and the impact on small and family businesses and will provide recommendations on actions that need to be taken in this area, including an option to seek recovery from advisors.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact [REDACTED] on [REDACTED] or by email to [REDACTED]

Yours sincerely

[REDACTED]

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman