MONASH University

Australian Law Reform Commission,
PO Box 12953,
George Street,
Queensland 4003.

31 January 2020.

Re: Discussion Paper 87 on Corporate Criminal Responsibility

Dear Commissioner Derrington,

Thank you for the opportunity to comment on the Australian Law Reform Commission's Discussion Paper 87 on Corporate Criminal Responsibility. These remarks, written by Professor Liz Campbell, Professor Jonathan Clough, and Dr Joanna Kyriakakis, are submitted by the Transnational Criminal Law Group at Monash University, assisted by ALRC student interns Geraldi Mimery and Phoebe Drake.

Summary

Proposal 8:

- Part 2.5 should be retained as is, with the addition of a "failure to prevent" model of corporate liability, including in relation to the extraterritorial crimes presently contained within the *Criminal Code 1995* (Cth);
- More attention should be given to matters related to enforcement of existing law.
- Notwithstanding the inclusion of a due diligence defence, the proposed single model incorporates an approach akin to vicarious liability which is at odds with the normative focus in the discussion paper on high levels of corporate culpability.
- The expansive definition of associate could render corporates directly liable for conduct that does not warrant denunciation and could not conceivably have been prevented even with the exercise of due diligence.
- The proposed single model of attribution could be retained as a prototype for drafters in respect of offences reflecting a lower level of culpability, or those for which Part 2.5 might be a barrier to enforcement.

Question E:

- We suggest that a deferred prosecution scheme as proposed in the 2019 Bill should not be introduced in Australia.
- With significant modifications and limitations, a scheme could be introduced, but the experience overseas gives major cause for concern.
- The effectiveness of DPAs is questionable.
- The appeal of DPAs is predicated on there being a viable and robust alternative in the form of enforced criminal proceedings.

Proposal 18:

- Though we agree that a unified debarment regime should be developed, the interrelationship with DPAs needs to be examined.

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- The creation of a debarment scheme may make the agreement of DPAs rather than the pursuit of criminal proceedings more likely.

Sentencing:

- We support the introduction of a range of sentencing options for courts, beyond the imposition of penalty units, when sanctioning corporate defendants.

Question L:

- We support the recommendation that positive human rights due diligence laws for corporations be considered as one of a suite of measures to better improve Australian corporate compliance with human rights and existing extraterritorial criminal law in their overseas activities.
- However, we consider positive human rights due diligence laws, while related to criminal law, both a different species of regulation and not a sufficient substitute to the actual enforcement of existing criminal laws that apply to corporations in their overseas operations
- With respect to enforcement of existing extraterritorial criminal law, we consider the major obstacle to be one of enforcement, and recommend a specialist international crimes unit be considered to develop expertise and networks necessary to pursue such prosecutions, where appropriate.

Other points:

- While individual liability may be based on corporate liability, it is important that distinct criminalisation and separate enforcement actions against individuals are not overlooked.

Proposal 8

We endorse the principled approach in the Discussion Paper, with its focus on denunciation of corporate wrongdoing. That said, the normative underpinning of the Discussion Paper hinges upon a relatively high level of corporate culpability, which is not reflected in Proposal 8. There is thus a disjunction between the normative model put forward to justify a tiered approach to sanctions for corporate wrongdoing and Proposal 8, which, though elegant in its simplicity, raises issues relating to:

- communication of culpability
- fair labelling
- overinclusiveness.

Proposal 8 appears to be a model of vicarious liability, with a due diligence defence linked to the attribution of the physical element to the corporation. Vicarious liability is generally considered inapposite as a basis for corporate criminal liability in respect of serious fault-based crimes, given that it does not communicate any necessary culpability on the part of the organisation (as opposed to individuals therein). This proposal is thus hard to reconcile with the Discussion Paper's central concept of denunciation for culpable wrongdoing linked to the unique expressive function of the criminal law.

Proposal 8 would incorporate both direct and indirect corporate liability, in criminalising in the same manner the corporate which commits an offence through its associate, and one which fails to prevent such an offence. These are not the same normatively, and should be separate legally.

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While the reverse onus defence of due diligence may seek to reflect organisational blame, this in our view does not offset the fact that the proposal is one of vicarious liability and the implications of this. Indeed, if the failure of the corporation is ostensibly a failure to ensure due diligence, without something more as a basis for attributing the crime directly to the corporation (for example, the complicity of corporate culture with the commission of the offence or the involvement of persons of relative seniority in the offence), it is not clear how the culpability of the corporation is normatively distinct to a failure to prevent.

While we appreciate the need to balance pragmatism and normative purity in the case of corporate crime, we are concerned that the disconnect of a vicarious liability model with true organisational culpability will undermine the distinctive function of the criminal law in this sphere. There is also the potential unintended consequence of a reluctance on the part of prosecutors to deploy a single model that encompasses offences that require condemnation based on corporate fault as well as indirect liability.

We are concerned that the definition of associate, meaning any person who performs services for or on behalf of the body corporate, is both too expansive and potentially too restrictive. For example, it may capture an unduly large range of personnel who may not necessarily be acting within the scope of their employment or within the reasonable control of the corporation. At the same time, it should not be the case that a relevant person must be acting in some way for the benefit of the corporation in order to be capable of attributing liability to it. An overly expansive category of persons is arguably justifiable in relation to the attribution of the physical element to the corporation, where this is offset by rules regarding fault attribution that sufficient restrict corporate culpability to appropriate cases. It becomes more acute where both the physical and fault element can be attributed to the corporation from such an actor. We would recommend more clarity as to the meaning of “performing services for or on behalf of”.

Proposal 8(a) rightly states that the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation. This ensures that subsidiary conduct and states of mind are to be attributed to the corporation. That said, of course ascribing the state of mind of one corporation to another is predicated on the existing scheme of corporate liability in relation to that first (or lower order) corporation, which introduces a second (and possibly further) layer of attribution.

The proposed section 12.2 states that any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in by the body corporate also, unless it proves that it exercised due diligence to prevent the conduct. If retained, we suggest this should be clarified to mean due diligence to prevent the particular conduct, rather than (any) such conduct. Otherwise, there is a risk that due diligence could be approached as a technical or box-ticking type of enterprise, rather than being directed (and reviewed) towards particular risks as they become known.

The proposed sections 12.2 and 12.3 indicate that ‘any conduct engaged in by one or more associates’ is attributed to the body corporate and that it is “sufficient to show that: (a) one or more associates of the body corporate who engaged in the conduct had that state of mind”. It is not clear whether this refers to associates acting in collusion or whether an aggregation of the associates is envisaged.

The proposed section 12.3 also states that alternatively “it is sufficient to show that:... (b) the body corporate authorised or permitted the conduct.” It is not clear how the body corporate would need to have authorised or permitted this.

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Excising Part 2.5 would remove the statutory explanation of the means by which fault elements must be attributed to a body corporate that authorised or permitted the commission of the offence. The replacing explanations would need to be developed by the courts if not statutorily, which may potentially lead us back to *Tesco/Meridian* and associated complexity and uncertainty associated with that jurisprudence.

Our preference is for retention of Part 2.5, perhaps with minor improvements as are necessary, with the introduction of a failure to prevent scheme. This would incorporate the normative and practical differences in behavior and wrongdoing, between committing an offence, and failing to prevent one. The failure to prevent scheme as it exists in the UK, and is proposed in the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019,* includes an "adequate procedures" defence, which is not dissimilar to the due diligence defence in Proposal 8. Though concerns may be raised about due process rights and likely effectiveness of this scheme, on balance it is preferable in ensuring corporate accountability where there is no direct fault for the commission of the offence. The failure to prevent scheme provides an incentive to create and implement compliance procedures, which should prompt at least incremental changes in corporate reflection and practice. Moreover, it may be particularly appropriate in respect of the oversight by corporations of associated partners overseas in order to avoid the commission of extraterritorial crimes.

In this context, enforcement rather than more law-making is key.[1]

Question E:
Should a deferred prosecution agreement scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or with modifications?

In short, no, a deferred prosecution scheme as proposed in the 2019 Bill should not be introduced in Australia. With significant modifications and limitations, a scheme could be introduced, but the experience in the UK, for instance, gives major cause for concern and we are sceptical about the effectiveness of DPAs. The introduction and proposed use of DPAs in this respect must be considered carefully.

Our comments in respect of this question examine: 1. whether these are deferred or non-prosecution agreements; 2. the initiation of DPA discussions; 3. the relationship and coherence with enforceable undertakings; 4. if and how DPAs might displace the criminal law for corporate wrongdoers; 5. DPAs' availability for recidivist offenders; 6. the impact on individual criminal liability, and 7. the link to corporate criminal liability overall.

While these mechanisms are described as DPAs in the 2019 Bill, the Bill makes it clear that if a DPA were approved, criminal proceedings must not be commenced against the corporation in respect of the offences covered by the DPA. This, in fact, makes it akin to a *non*-prosecution agreement, in contrast to England and Wales, where proceedings are preferred but then suspended ((Crime and Courts Act 2013, sch 17). Proceedings will be commenced only if the DPA is breached or if the corporation has provided inaccurate, incomplete or misleading information in

[1] c.f. Gomez-Jara Diez, C. "Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay Between Self-Regulation, Corporate Compliance, and Corporate Citizenship" (2011) 14(1) *New Criminal Law Review* 78.

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connection with the DPA (ss 17A(2)-(3)). This should be altered, or DPAs should be renamed NPAs in the Bill.

There is some inconsistency between the content of the Bill and the Code in respect of the initiator of DPA negotiations. The Bill refers to the Commonwealth Director of Public Prosecutions "negotiating, entering into, or administering" a DPA without indicating who initiates the proceedings, but the Draft Code of Practice appears to permit a corporation to seek a DPA (para.2.1), though resiles from this position in paragraph 2.3. We suggest that there is no reason to limit the initiation of DPA discussions to the CDPP. Requesting a DPA does not guarantee negotiation or approval. That said, if corporations are to be able to request a DPA this must be predicated on self-reporting of wrongdoing and a commitment to cooperate to the greatest extent possible.

DPAs are cognate to and have common rationales as enforceable undertakings, in seeking to remedy and improve corporate behaviour through negotiation and agreement. Despite some commonalities between DPAs and enforceable undertakings, such as the imposition of compliance system reviews and the appointment of an independent expert, there are key differences between DPAs and enforceable undertakings that are worth flagging up. According to the Bill, DPAs will be available to corporations only, they would replace criminal proceedings, and may be negotiated by the CDPP for a limited range of offenses. In contrast, EUs may be 1. chosen or offered, by 2. an individual or entity; 3. criminal proceedings may ensue in parallel; 4. they are used by numerous regulators at federal and state level, and 5. they are available in relation to a wide range of offences.

Questions have been raised about the agreed facts in enforceable undertakings. Commissioner Hayne found that ASIC had agreed to EUs in situations where the entity admitted no more than that ASIC had reasonably based "concerns" about its conduct, rather than any detailed or critical appraisal of the corporate behavior.[2] We raise comparable concerns as regards DPAs, which would lead to issues about accuracy, fairness, consistency, and possible undue leniency.

A major concern relating to DPAs, not just in relation to the 2019 Bill, is that they could supersede and ultimately replace criminal prosecution and conviction. This would mean moving away from the stigma inherent in criminal conviction. Prosecution involves exposition and contestation of arguments, both in terms of putting the prosecution to proof, as well as exposure of witness testimony, through cross-examination and media reporting as the trial proceeds. Indeed, it was the absence of this calling to account that Commissioner Hayne highlighted in the Final Report of the Banking Commission (2019: 4). This matter goes to the core of the Bill overall, rather than to any particular element of the proposed legislative scheme.

Though history of offending is included in the draft Code of Practice indicating whether a particular action or decision is in the public interest, this Code does not refer to recidivist offenders in particular nor preclude the availability of DPAs to them. As John Braithwaite and Ian Ayre's work on responsive regulation emphasises,[3] if corporations continue to exploit and breach the rules, law enforcement responses need to be escalated – in this instance from the option of a DPA to criminal

[2] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Interim Report* (2018) 2.2.

[3] Ayres, I. and Braithwaite, J. *Responsive Regulation: Transcending the Deregulation Debate* (1992); Braithwaite, J. *Restorative Justice and Responsive Regulation* (2002).

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prosecution. This is not evident in how DPAs have been applied in the US.[4] We suggest that the Bill should be amended to indicate that DPAs are not available for recidivist corporate offenders.

DPAs may also supplant individual criminal liability. Commissioner Hayne in the Royal Commission interim report was concerned about the lack of corporate prosecutions being brought by ASIC, in that its criminal prosecutions have all been directed at individuals.[5] The introduction of DPAs could lead to the pendulum swinging the other way, so to speak, by focusing on corporate rather than human actors. This concern is borne out in the US, where DPAs and NPAs typically are not accompanied by prosecutions of individuals.[6] When employees *have* been charged, most have not been "higher-up officers of the companies, but rather middle managers of one kind or another and also some quite low-level individuals".[7] The situation in England and Wales is comparable, where no individual implicated in the wrongdoing admitted by corporate actors in any of the DPAs to date has resulted in domestic conviction.[8] On this note, the Draft Code of Practice provides that a corporation participating in DPA negotiations typically will be expected to cooperate in any investigation and prosecution against culpable individuals (1.5). We endorse Professor Brent Fisse's suggestion in responding to the 2017 iteration of this Bill that this should be a prerequisite and thus a standard term of the DPA, not a typical expectation.[9] Full and accurate disclosure about the individuals involved in the relevant offence should be a precondition for the opening of DPA discussions.

Finally, we emphasise that while DPAs are proposed to be introduced as a way of mitigating and remedying the issues with existing law on corporate criminal liability they still are predicated upon it. If DPAs are to be a useful addition to the legal landscape then there must be mutual incentives to agree one, as well as a possible alternative for the CDPP to deploy. Even if prosecution is a last resort, it must be viable and feasible. The corporate incentive to agree to a DPA depends on the nature of the process and the possible penalty discount, when compared to the likelihood of conviction under in the conventional corporate criminal liability model. If there is no possibility of prosecution/conviction, then we may see corporate actors refusing to agree DPAs, and "taking their chances" in contested proceedings. The case of Tesco in the UK exemplifies this.

While we understand the rationale mentioned at para.9.57 for aligning Australia with overseas jurisdictions that have DPA regimes, this factor should not be decisive. We are not concerned that the prospect of prosecution in Australia may impede the entry of a multinational company into a DPA in the UK or US.

Proposal 18

This suggestion to develop a unified debarment regime is very welcome. We endorse the comment at para.10.77 that rather than courts being given the power to disqualify a corporation from government contracts, a national debarment regime should be introduced. We suggest that this

[4] Garrett, B. *Too Big to Jail; How Prosecutors Compromise with Corporations* (2014) 165.
[5] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Interim Report* (2018) 2.2.
[6] Garrett, n 4.
[7] Garrett, B. "The Corporate Criminal as Scapegoat" (2015) *Virginia Law Review* 1789-1853.
[8] Campbell, L. "Trying corporations: why not prosecute?" (2019) 31 *Current Issues in Criminal Justice* 269-291; Hawley, S., King, C. & Lord, N. "Justice for whom? The need for a principled approach to deferred prosecution in England and Wales" in T. Søreide & A. Makinwa (eds), *Negotiated settlements in bribery cases: A Principled Approach* (2020).
[9] Fisse, B. "Submission on Proposed Model for Deferred Prosecution Agreement Scheme": https://www brentfisse com/images/FisseSubmissiononDPA1May2017 pdf (2017).

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should make disqualification from government contracts an automatic consequence of certain convictions, rather than a court-imposed penalty. While we understand the sentiment behind the "undesirability of a court distributing government largesse", in this instance it is less about largesse and distributors, rather about debarment from contracts. We also agree that the lack of clear guidance on the relevance of criminal convictions to Commonwealth procurement decisions in the Procurement Rules underlines the need for such a scheme (para.10.121).

There is a direct link to DPAs here. The paradox is that DPAs are introduced to remedy problems with corporate criminal liability, yet also to mitigate the inevitable consequences of successful use of corporate criminal liability.[10] In the European Union, for instance, certain criminal convictions carry the possibility of debarment, given public sector procurement rules under Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

This possibility of debarment was considered expressly by Sir Brian Leveson in *SFO v Rolls-Royce* 17/1/17 ([52]-[54]), where a DPA was agreed in a case involving "extensive systemic bribery and corruption" ([35]). Rolls-Royce Civil Aerospace and Defence Aerospace as well as its former energy business used a network of agents to bribe officials in at least seven countries to win contracts over three decades. There were a number of aggravating features, such as the level, persistence, extent, and sophistication of the offending which resulted in an overall estimated profit of £258m [471m AUD]; the harm to the integrity and confidence of markets; the provision of substantial funds for bribe payments; and the involvement of very senior Rolls-Royce employees ([35]). The resultant charges were twelve counts of conspiracy to corrupt, false accounting, and failure to prevent bribery.

That said, Sir Brian Leveson emphasised that a conviction (rather than a DPA) would affect the company's ability to trade globally, that at least 15% of its orders were from entities subject to public sector procurement rules in countries with mandatory debarment, that debarment would cause loses to revenue for decades, and that debarment and exclusion could impact on share price, shareholder confidence, future strategy, and therefore viability. So, one possibility of introducing a debarment scheme is that conviction might be less likely and circumvented by the use of DPAs. This interrelationship needs to be considered carefully.

Sentencing

Proposals 12 - 17

We welcome and endorse the recommendations by the ALRC in relation to expanding the range of sentencing options available to courts in relation to corporate crime. Pluralising sanction options can provide a court with the discretion it needs to adopt measures that are best directed to the circumstances at hand. The Council of Europe (COE), for example, in its Recommendation No. R (88) on the Liability of Enterprises for Offences, took the view that a wide range of corporate criminal sanctions should be introduced by states, on the basis that 'it is doubtful … whether pecuniary sanctions – be they criminal or quasi-criminal – are sufficiently effective to produce the desired deterrent effect.'[11]

[10] Campbell, L. "Trying corporations: why not prosecute?" (2019) 31 *Current Issues in Criminal Justice* 269-291
[11] Council of Europe, *Liability of enterprises for offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (COE 1990) [28].

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Sanctions alternative or additional to financial penalties can serve to demonstrate the moral condemnation attendant on a finding of entity guilt for serious crimes. It can also provide a court with the capacity to intervene directly in the operation of the corporation in ways likely to engender behavioural changes or to punish meaningfully, as well as to navigate potential secondary effects for related third parties. The COE, in its list of suggested sanctions, include: prohibition from doing business with public authorities, exclusion from fiscal advantages and subsidies, prohibition upon advertising goods or services, annulment of licences, removal of managers, appointment of provisional caretaker management, closure or winding up, and publication of the decision to impose a sanction or measure.[12]

These kinds of orders are reflected in the language adopted in Proposal 15, albeit in more general terms. Given the long-standing tradition of limiting corporate sanctions to financial penalties, it may be worthwhile additionally recommending the creation of sentencing manuals or guidelines that would assist courts in determining the appropriate sanction in a given case.

Regarding publication or disclosure, the research of Judith van Erp indicates that publication of warnings, fines and penalties generally does not damage business reputations in the field of financial regulation.[13] Reactions from clients and business partners were absent or mild, sometimes even supportive. Professor van Erp suggests that naming and shaming as it is implemented in the field of financial regulation has unpredictable effects. If this research is borne out in Australia, we must not be sanguine about the impact of disclosure. We might remain optimistic that such orders could serve other purposes like bolstering public trust through transparency, even if corporate reputations are not impacted.

Transnational Business

Question L: Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

Given the scope of the ALRC's terms of reference, which includes the goal of strengthening the Commonwealth corporate criminal liability regime in general, and in particular includes consideration of the potential application of Part 2.5 of the Code to extraterritorial offences by corporations, we welcome the inclusion of a dedicated chapter within the Discussion Paper on transnational business.

We agree that the magnitude and extent of the offshore crimes in which Australian companies have been implicated, and the lack of successful domestic criminal prosecution in relation to these alleged crimes, means that consideration as to whether the Commonwealth criminal law can be strengthened to improve corporate compliance in this regard is crucial.

As set out in the ALRC's Discussion Paper (paragraphs 12.65 - 12.80) there have been a number of credible allegations against Australian corporations implicated in serious transnational, international and environmental crimes committed by them or associated entities in overseas jurisdictions but there have been almost no investigations or proceedings that have followed. This is not because of a lack of applicable law. As itemised in the Discussion Paper (paragraphs 12.17 - 12.25) a number of serious crimes contained within the Commonwealth Criminal Code have

[12] Ibid, Articles 6 and 7.
[13] Van Erp, J. (2008) "The impact of 'naming and shaming' on business reputations: An empirical study in the field of financial regulation" http://regulation upf edu/utrecht-08-papers/verp pdf

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extraterritorial reach and make it an offence for Australian corporations to commit or be complicit in those offences in their off-shore operations.

The problem instead is one of enforcement.

We welcome the proposal to create positive human rights due diligence laws for Australian corporations in their supply chain relationships, building upon but going beyond the more limited reporting obligations created by the *Modern Slavery Act 2018* (Cth). Such a move would give fuller effect to Australia's human rights commitments, including to the UN Guiding Principles on Business and Human Rights. It would also ensure Australia is keeping up with its overseas counterparts, as numerous states move towards or have already introduced positive corporate human rights due diligence laws.[14] We recognise the value of this approach as part of a suite of responses to the problem of Australian corporate involvement in serious human rights abuses both at home and abroad. It would be congruent for any such obligation to require appropriate processes and reporting to be put in place for certain corporations to detect abuses in corporate supply chains that are already criminalised under the *Criminal Code 1995* (Cth), given their overlap with most models of corporate criminal culpability. Indeed, the evidence shows that corporations are more effective at undertaking human rights due diligence inquiries when clearly regulated in those terms.[15]

We are concerned, however, with the shift in focus, within the chapter on transnational business, from the effective enforcement of the extraterritorial crime provisions in cases involving credible allegations against Australian corporations, to the creation of positive corporate due diligence laws.[16] While positive corporate human rights due diligence laws have a value in themselves, they are a different species of obligation. While we recognise their potential to impact importantly upon actual corporate behaviours, breaches of such obligations constitute a different kind of wrong to that communicated by the application of the underlying applicable substantive crimes laws to corporations, where such proceedings are appropriate.[17]

Regarding enforcement of existing extraterritorial crimes laws to Australian corporations, the ALRC suggests that a key barrier is the significant information asymmetry between multinational businesses and investigators (para.12.12). While we agree that this may be the case in some corporate transnational crime scenarios, it will not always necessarily be so, particularly in light of federal police powers in respect of Australian parent corporations. We are therefore not convinced that this factor explains the failure in enforcement practices to date. More research and inquiry into the question of Australian law enforcement practices and corporate crime is warranted, and in this regard, we agree with the ALRC on the importance of an inquiry into criminal investigative processes in Australia (para. 1.40).

Even where information asymmetry is a key challenge, we are not confident that this challenge will be sufficiently mitigated by clarifying or expanding the standard of due diligence required by

[14] For examples, see CORE Coalition, 'Mandatory Human Rights Due Diligence: An Issue Whose Time Has Come' (28 October 2019) https://corporate-responsibility.org/issue-whose-time-come/ .
[15] McCorquodale R et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) *Business and Human Rights Journal* 195, 223.
[16] See, for example, the suggestion at 12.106 that this approach may '...provide a more effective means of enforcing the existing Commonwealth criminal law as it applies to corporations'.
[17] Specifically, a breach of positive due diligence obligations, even where the corporation is thereby credibly linked to the resulting commission of actual human rights abuses, does not denote that the corporation thereby committed or failed to prevent the underlying crime. In that respect, it is also noteworthy that some of the comparative examples given in the Discussion Paper at 12.81 onward involve civil, rather than criminal, sanctions for failures to comply. See, for example, the French Duty of Corporate Vigilance Law, the *California Transparency in Supply Chains Act of 2010,* the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (US, 2010, Pub.L 111-203) and the *Modern Slavery Act 2015* (UK).

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Australian corporations in order to comply with their obligations to refrain from engaging in extraterritorial offences (para.12.13). It is argued that such measures could improve the prevention, detection, and enforcement of offshore crimes by requiring corporations to take greater measures to identify and address risks in their overseas operations, and to make this information available to regulators where appropriate.

Clarifying or expanding the standard of due diligence has occurred through Code of Practices elsewhere, such as in the UK regarding the failure to prevent offences. The information may be made available to regulators where appropriate, such as when requested on a case by case basis, or by means of regular reporting. Experience in cognate fields indicates limited effectiveness and demonstrate the possibility of creative/cosmetic compliance, and a deluge of data that is not always acted upon.

Instead, or at least additionally, thought might be given to the possibility of establishing specialist investigative units focused upon international and transnational crime, as has been adopted in other parts of the world.[18] Transnational crimes raise unique investigative and prosecution challenges, which necessitate specialised expertise among Australian law enforcement.

We also reiterate here our view on the value of a failure to prevent model of corporate crime for certain offences, which has a particular purchase in respect of transnational corporate activity.

Other points

Though we agree in substance with Proposal 1 we question how seriousness is to be determined, and note that in Proposal 2 the categorisation of an offence is determined by four factors, not seriousness. This belies the apparent simplicity of recalibrating the regulatory scheme based on seriousness alone.

It is unclear whether Proposal 2 is being presented as a rule for legislators or prosecutors. While it purports to be the former (para.4.27), the factors integrate general and specific matters – for instance, the public interest factor appears to relate to specific cases rather than providing a general rule for criminalisation. This may be due to the use of the definite rather than indefinite article. So, factor (a) could be reframed as “such a contravention by a corporation deserves denunciation and condemnation by the community”. This would provide a general rule for the imposition of criminal liability for certain conduct.

In terms of factor (c) it is difficult to ascertain the deterrent characteristics of any penalty, not just a civil one as opposed to a criminal one.[19] This may be an intractable issue, but still warrants consideration if it is to comprise a determinative factor in choosing between criminal and civil liability.

[18] See, eg, Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the Netherlands* (HRW, 2014).
[19] See Schell-Busey, N., Simpson, S., Rorie, M., Alper, M., “What Works?: A Systematic Review of Corporate Crime Deterrence” (2016) 15 *Criminology and Public Policy* 387-416.

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We would be pleased to provide further detail on any of the above submissions, should that be of help to the Commission.

Yours faithfully,

Professor Liz Campbell, Professor Jonathan Clough, Dr Joanna Kyriakakis

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15 Ancora Imparo Way, Clayton, VIC 3800
[redacted]
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