Our Ref: AUSTLA01/16/SGC:GK:cb
Reply To: Parramatta

31 January 2020

Ms. Sarah Derrington
Australian Law Reform Commission
PO Box 12953
George Street QLD 4003

***Via Online Lodgement***

Dear Ms Derrington,

**Re: ALRC Discussion Paper 87, 2019**

We refer to your request for submissions to the Australian Law Reform Commission in relation to the proposed *"Corporate Criminal Responsibility: Discussion Paper"* and take pleasure in providing the following submissions.

## A. CONDON ASSOCIATES

Condon Associates is a specialist Firm of Forensic, Insolvency and Turnaround Practitioners headquartered in Parramatta, NSW. The Firm undertakes Liquidations (Official and Voluntary), Receiverships, Voluntary Administrations and Deeds of Company Arrangement under the provisions of the Corporations Act 2001 (Corporations Act), as well as the formal administration of Bankrupt Estates and Part X Arrangements pursuant to the Bankruptcy Act 1966 (Bankruptcy Act). In addition the Firm provides services within the related areas of Forensic Accounting, and Litigation Support as well as business and financial Turnaround and Advisory Services not involving formal appointments.

It should be noted that the general focus of our corporate work is in the small to medium, proprietary companies rather than Publicly Listed entities.

The Firm's Managing Principal, Schon Gregory Condon, was an Official Liquidator, and continues as a Registered Liquidator and Registered Trustee in Bankruptcy with in excess of 40 years of experience in the business recovery/insolvency field, with almost 30 years plus at the Principal/Partner/Director level.

## B. SUBMISSIONS RELATING TO CHANGES OR AMENDMENTS

We note that we have adopted the ordering and sequence of the Proposals and Questions provided.

CONDON ASSOCIATES
FORENSIC INSOLVENCY TURNAROUND

Head Office
Level 6, 87 Marsden Street, Parramatta NSW 2150
T 02 9893 9499 | F 02 9891 1833
P PO Box 1418, Parramatta NSW 2124
E enquiries@condon.com.au

NSW Offices
Sydney
Central Coast
Penrith
Bankstown
Central West

ABN: 47 868 173 966
Liability limited by a scheme approved under Professional Standards Legislation.

National Offices: AUCKLAND ADELAIDE BRISBANE CANBERRA MELBOURNE PERTH

**Generally**

We note that we have purposefully not made any commentary on areas to which we hold limited expertise, as such we have focused on the areas where we can provide some expert comment.

**Appropriate and Effective Regulation of Corporations**

***Proposal 1***

We do not disagree that by providing the regulator with an ability to issue civil penalty notices could assist in some control of certain types of corporate criminal activity. However, we consider that the following concerns should be taken into account: -

- There would need to be a precise pass/fail test otherwise the infringement notices will possibly clog up the Court system with challenges creating potentially confusing and/or detrimental precedents,
- Can the regulator actually act with the speed necessary to identify the early stages of corporate crime and thus impose civil penalties to curb the conduct,
- It could rationalise certain behaviours as acceptable by simply the payment of a fine.

***Proposal 2***

We categorically agree that there is a need for a more consistent approach to corporate crime, and that only those behaviours warranting criminal status be declared as such.

We also agree that it should be for only those of the most serious nature that require criminal proceedings, and in doing so it beggars the construct that the penalty should also stretch to the 'mind', i.e. person, behind the behaviour. In saying so the 'mind' should not be automatically deemed to be a director, but rather should be the someone, or someone's, connected by both thought and deed that caused the corporate activity.

***Proposal 3***

We have no difficulty with this point as it flows from the two prior proposals and makes sense in that regard to have a clear point where Court proceedings are required, or in the alternate an infringement notice is issued. As raised above, the infringement style must be clear and precise as to its existence and validity.

***Proposal 4***

We agree that there ought to be an appropriate mechanism for a party receiving a notice to challenge the penalty notice. However, there should be specific limits imposed on this process, and it should not necessarily have to begin with an application to Court. It is potentially appropriate that there can simply be an initial ability to have the penalty decision internally reviewed.

***Proposal 5***

We agree that there should be significant increase in penalty units, or progression to criminal proceedings for repeated conduct. One should also consider a point, for example that being convicted of say five criminal corporate offences will deem the person unfit to manage corporations for the remainder of their life.

***Proposal 6***

This appears reasonable and logical.

***Proposal 7***

This appears reasonable and logical.

**Reforming Corporate Criminal Responsibility**

***Proposal 8***

This appears reasonable and logical.

**Individual Liability for Corporate Conduct**

***Proposal 9***

We agree that in order for there to be a proper deterrence it is not sufficient for merely the corporate entity to be dealt with, but that the relevant individual officers involved with the offence should also receive a penalty notice.

***Proposal 10***

We agree that there should be a penalty for the use of a corporate structure to specifically engage in conduct that would make it subject to the receipt of a penalty.

***Question A***

We believe that any of the civil penalty provisions that apply to the corporate entity should also apply to those officers of the entity, who were responsibly for it or those officers who by their negligence allowed it to occur. However, logically to potentially exclude some types of officers from penalty will only result in certain conduct being undertaken by those that have been excluded.

***Question B***

We are not in a position to substantively or constructively comment in relation to the question raised.

**Whistleblower Protections**

***Proposal 11***

We hold no expertise in relation to developing whistleblower guidelines and as such, we have no substantive comments in relation to Proposal 11.

**Sentencing Corporations**

***Proposal 12***

This appears reasonable and logical.

***Proposal 13***

We note that Proposal 13 sets out to provide some salient factors the Court should consider when undertaking the sentencing of a corporation. We agree that there should be some guidance as to what the Court should consider when sentencing a corporation, the size as well as the culture play vital roles in what the corporation does and the size of any likely criminal activity.

However in agreeing with this there must be clarity in how this is applied, otherwise it simply becomes a vehicle by which the selected few are allowed to escape.

***Proposal 14***

We refer to our comments for Proposal 13.

***Proposal 15***

Proposal 15 provides for a number of sentencing options available to the Courts. We are not experts in this area, however we believe there should also be ability for the Court to ensure that compensation is paid where possible, together with some of these alternatives.

***Proposal 16***

We agree with the ability of the Court to impose additional non-monetary penalties on corporations that have committed a criminal offence.

***Proposal 17***

We agree that the Court should have the ability to disqualify a person form managing a corporation if they are found to have been involved with the management of a corporation that has committed an offence.

***Proposal 18***

Whilst we agree that any company that has committed a significant offence should be disallowed for a period of time form winning government contracts, the place for this is actually in the tender process not the Corporations Act. At law if it is not appropriate for the company to be dealing with the government then why should they be unleashed onto the general public? If it is the government's choice not to entertain engaging with such entities then that is the government's right, as it is also the general public's right.

***Proposal 19***

This appears reasonable and logical.

***Proposal 20***

We agree that the victims of the crime should have the ability to provide their views on the matter and the results of the loss due to the offence. They should also be compensated where possible.

**Illegal Phoenix Activity**

***Proposal 21***

We agree that the powers should not be granted to ASIC where these are powers which are unable to be conferred on ASIC due to the Constitution. However, if there is an ability to confer the powers on ASIC, it must be subject to absolute clarity without discretion; where such clarity does not exist then the powers should remain with the Court.

We hold this opinion due to the successful work undertaken by AFSA in relation to similar powers it holds under the Bankruptcy Act.

We question the logic of sub-paragraph b) and the loss would have had to have been incurred to have been in this position, even if it was only from the person who put in the funds thus making them a creditor.

***Proposal 22***

We do not see how such a limited injunction period would be of benefit to Creditors as a whole. In most instances where the proposed Creditor defeating disposition has occurred, it is only after the fact the Creditors become aware. We note the discussion paper at 11.16 notes that illegal phoenix activity is notoriously difficult to detect.

Generally it is through the work of the liquidator that will determine if there has been a Creditor defeating disposition. Further it is also likely that where illegal phoenixing is likely to exist the Liquidator is critically underfunded. This is due to the intent of the parties to leave little or no assets in the corporate entity which would allow the liquidator a fund any legal action with which to seek to prosecute the claims the Liquidator may have. Particularly here there needs to be protection against adverse costs orders against a liquidator attempting the recovery, otherwise the risk will simply outweigh the reasoning.

In additional to the above, it is likely that any phoenix activity that has occurred will only be evidenced after the fact, so having the ability to seek an injunction is unlikely to result in any additional benefit, and ASIC and the ATO time may be better placed in educating directors and the greater business community about what a phoenix is and the consequences of entering into the creditor defeating dispositions.

***Proposal 23***

We are in agreement that there needs to be a director identification number. We also note that part of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, includes provisions for a director identification number. We are active on this task force.

## C. CONCLUSION

We congratulate the ALRC on seeking wide input and thank you for the opportunity to do so. Our responses have been based on experience in the area and the available time, whilst still maintaining an active practice.

Should you have any enquiries in respect of this matter, please contact [redacted]

Yours faithfully
**Condon Associates**
**Forensic, Insolvency and Turnaround Practitioners**

[redacted]

**Schon G Condon RFD**
**Managing Principal**