LOGIE-SMITH LANYON
LAWYERS

31 January 2020

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

Dear Sir/Madam

Submissions of Logie-Smith Lanyon in respect of Discussion Paper 87 – Corporate Criminal Responsibility

Logie-Smith Lanyon welcomes the opportunity to provide a submission to the Australian Law Reform Commission (ALRC) Discussion Paper 87: *Corporate Criminal Responsibility.* Appendix A includes our responses to some of the discussion paper proposals and questions.

Should you have any questions concerning our submissions, please do not hesitate to contact David Grant via email at [redacted] or phone on [redacted].

Yours faithfully
LOGIE-SMITH LANYON

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Appendix A

1. Proposal 1, 2 & 3

We are broadly supportive of a recalibration of the regulation of corporations, the reservation of criminal sanctions for the most serious of corporate offences and the concept of principled criminalisation. We support the designations proposed between the criminal offence provisions (**COP**), civil penalty provisions (**CPP**) and civil penalty notices (**CPN**).

With regard to Proposal 2(b), we note that:

(a) the 'stigma' of a criminal sanction attaching to a corporation may also negatively and unfairly attach itself to the current and future guiding minds of the organisation, many of whom are upstanding directors not involved in any contraventions during their own period of directorship; and

(b) a 'stigma' cannot and will not attach to those offending organisations who simply wind-up and re-register as a new entity.

2. Proposal 5

Whilst flagrant and repeated contraventions of offences to which a CPP applies may constitute a criminal offence, we do not support the *automatic* elevation to a criminal offence of an offence to which a CPP ordinarily applies purely on the basis of its subsequent reoccurrence, absent exceptional circumstances. For example, without a temporal limitation similar breaches 8 years apart would trigger the escalation.

Proposal 1 specifically recalibrates the regulation and reserves criminal offences for the most serious of corporate offences. The reoccurrence of an offence to which a CPP applies does not, in and of itself, automatically make it a criminal offence particularly in the absence of recklessness or flagrant disregard for the provision.

3. Proposals 8

We offer the following observations and reservations:

(a) The concept of expanding the individuals whose conduct may be attributed to the corporation to 'associates' will extend the attribution to persons who may have no active control or influence over the offending agent other than via a commercial arrangement. We consider this unreasonable.

(b) Clause 12.3(1)(a) of the proposed redraft of Part 2.5 of the *Criminal Code*[1] is too broad in its application. Under the proposed drafting the fault element is proven when only one associate engages in the conduct. A single rogue associate, especially one over whom the corporation has no active control or influence should not be the determining factor that the corporation has engaged in improper conduct which constitutes a criminal offence.

[1] Page 129

[redacted]

(c) Whilst the corporation may be in a better position to provide evidence of its preventative procedures (due diligence) than the prosecution, it does not follow that it is appropriate for the corporation to bear the legal burden of proving the defence. This proposition creates an expense burden on the company who may be wholly innocent of the alleged contravention. If the proposition is to simply reverse the onus, we submit that there should be a threshold to constrain the expense burden.

(d) The ALRC's suggestion at 6.31 that it may be appropriate for clear domestic guidance raises the question as to who should provide such advice. The ALRC notes at 6.32 and 6.33 that the OECD and Transparency International both provide guidance notes/tools which raise a question as to primacy. We suggest, if it is to be provided, a single source of guidance is required.

(e) The ALRC notes at 6.41 that the ALRC considered whether specific corporate offences were a more appropriate application of the criminal law to corporations. We note that the ALRC considered that this would require a more substantial review of the corporate criminal law which exceeded the current Terms of Reference. If the ALRC considers that there may be other more appropriate models, we consider that the ALRC should explore those prior to making final recommendations on the proposals contained in the discussion paper. Any other position serves to diminish the point of the recommendations in this paper.

4. Proposal 11

(a) A whistleblower policy is arguably, in and of itself, more likely to promote the post offence *reporting* of, rather than the *prevention* of, the commission of a relevant offence.

(b) The requirement for certain organisations to introduce and maintain whistleblower policies under the *Corporations Act 2001* and the *Tax Administration Act 1953* has created a difficulty in determining which organisations have adopted a whistleblower policy purely to meet legislative obligations and which have a policy as part of an active, and comprehensive disclosure and reporting regime to prevent corporate wrong-doing.

(c) The existence of a policy does not necessarily evidence an organisations genuine and non mandated attempt to address wrongdoing through a culture. Rather, it evidences compliance with the relevant legislation by those organisations that are required to develop and maintain such a policy.

(d) The existence of an effective corporate whistleblower protection policy is a relevant consideration in determining whether a corporation has a *reporting mechanism*, but offers, we submit, limited evidence, in isolation, of an act of active prevention.

[redacted]

5. Question C

The introduction of a general compensatory scheme which addresses proven disclosure and subsequent and related detrimental personal consequences for whistleblowers is worthy of further exploration, noting:

(a) Such a compensatory scheme needs to be underpinned by a statutory funding regime. Notwithstanding the legislative protections, whistleblowers may still be targeted, deprived of their employment and/or ostracised by virtue of their whistleblowing. For those who are unemployed as a result, or require retraining to move into other fields, the absence of a statutory funding regime imposes a burden on the individual for costs without providing them with alternative support.

(b) We are supportive of the concept of a funding regime which preserves a genuinely disadvantaged person's pre-whistleblowing salary for a period of time while they resettle into, for example, new employment.

(c) Any payment made to a person under such a scheme must not have been involved in the commission of a relevant offence to which the compensation relates.

(d) Any payment made by the company must be after it has been proven that the company:

(i) did not have adequate control mechanisms in place to prevent or deter the commission of the relevant offence, and

(ii) did not make reasonable efforts to limit the related detrimental personal consequences for a whistleblower/s.

We commend the ALRC on rejecting a US bounty style general compensatory scheme.

6. Question E

We support a deferred prosecution agreement scheme (**DPA**) for corporations being introduced in Australia and make the following observations:

(a) As notes the ALRC at 9.47 there needs to be *incentives* for companies to detect corporate misconduct, self-report and fully cooperate with investigative agencies. If it is desirous that an organisation be afforded the opportunity to demonstrate good behaviour, the regime cannot be purely punitive. A DPA should be an attractive proposal for a corporation; one that offers certainty early and quickly. We have reservations that the proposed process achieves the requisite balance.

(b) Inaccuracies, misleading or incomplete information which are the subject of Schedule 2, Part 3 sections 17A(3)(b)(i)-(ii) of the Draft Bill must be material to the decision to grant or continue with the DPA.

(c) The application of the exceptions in subsection 17(A)(3) in the Draft Bill beyond the period when the DPA was in force should be limited to circumstances where a material contravention, as described in the content of the DPA in accordance with s17(C)(1)(e), occurred during the period the DPA was in force.

[redacted]

A properly extinguished DPA should provide a person with certainty that the ongoing prosecutorial threat has lifted.

(d) The Draft Bill contemplates the potential use of corporate monitors under section 17(C)(2)(iv). Guidance on the appointment, termination, and reporting obligations of corporate monitors would be required if a DPA scheme was introduced.

(e) If a variation to a DPA is granted, its publication as contemplated in section 17F(6)-(9) should, wherever possible, mirror the stance taken on the full, partial or non publication of the original DPA is as contemplated in sections17(D)(7)-(10). If an original DPA is fully or partially published, and the Director determines that a varied DPA should not be published, the Director should be required to publish on the Office's website a notation that an (unpublished) variant exists.

7. Proposal 21

With regard to proposal 21(b) we offer the observation that any benefits obtained by a person from a creditor-defeating disposition should be returned to the liquidator for distribution to the creditors, with any 'surplus', which might be returned to the shareholders, being thereafter disgorged to the Commonwealth.

8. Proposal 23

We are supportive of a director identification register subject to clear controls on the privacy of director data and the introduction of an appropriate system to ensure that the relevant party whose number is being used consents to the number being used.

We are supportive of the register extending to company secretaries and potentially also to public officers.

[redacted]