5 February 2020

Australian Law Reform Commission
PO Box 12953
George St
QLD 4003
By email: corporatecrime@alrc.gov.au

Dear Sir/Madam

Re: Corporate Criminal Responsibility Discussion Paper 87

The Australian Financial Markets Association (**AFMA**) is an industry representative body whose membership includes 110 firms active in the financial markets and wholesale banking. AFMA is an active participant in the development of corporate law particularly as it relates to the financial markets. In this regard, we have made submissions to many consultations and processes that have had effects on the development of the criminal law in relation to corporations, most notably in recent years in our various responses to the ASIC Enforcement Review.

AFMA commends the Australian Law Reform Commission's (**ALRC**) first principles approach in analysing the appropriateness of the developments in the law. We support the view that in many areas the law has developed in ways that are not appropriate or aligned with legal theory, are without community understanding of the concept of criminality, and may result in unfair and disproportionate outcomes.

The law should be clear, consistent and proportionate in its response to breaches. A 'toolbox' approach which seeks to criminalise regulatory or trivial administrative matters, and makes many offences subject to multiple criminal, civil and penalty regimes, is not aligned with law-making that reflects the norms and theory that underpin the legitimacy, history and ongoing community respect for the law.

AFMA also cautions against insufficient consideration of the effect of the corporate criminal, civil and penalty arrangements on the overall business environment. It is important that these arrangements are designed to ensure the jurisdiction remains a fair, balanced and attractive place to do business. A costly, punitive regime that pays insufficient attention to expedition and the needs of business for predictability and certainty risks economic harm that could well outweigh any benefits gained.

Our detailed response to the questions and proposals is attached to this summary letter.

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AFMA generally supports the proposals to better align the law with the fundamental principles and in this regard supports much of Proposals 1 through 4 inclusive, with some proposed additions to ensure a more refined division between criminal and civil matters, to avoid excessive litigation, and ensure proportionality of fines.

These proposals in themselves are important would represent a substantial reform agenda. They may be an appropriate first step in the reform process.

In their present form AFMA does not support Proposals 5, 6, 8, 9 or 10. We outline our reasons for this in our attached response. Briefly, we find Proposal 5 irreconcilably incompatible with Proposal 2. There are no substantive arguments provided in support and examples of the automation type provided could readily be used to make the opposing case.

In relation to Proposal 6 and the removal of Ch 2.2.6 we do not believe that protections around strict liability should be removed on the basis that successive governments have compromised these protections. On the contrary there is a role for the ALRC in reminding governments of the importance of protecting fundamental rights and freedoms. Similarly, that the Government has introduced disparities in penalties in recent times does not suggest that a reference guide for penalties is not appropriate.

While we support the project of a single method of attribution of corporate responsibility, we oppose Proposal 8 as it is currently drafted on the grounds it may produce unjust outcomes for corporations, their employees, shareholders, and office bearers. While the effect of Proposal 8 provides a simple and expedient way to increase convictions, the quality of justice should not be so compromised to achieve these outcomes. We propose that work on this important proposal be moved to a project that is able to continue past the April reporting date.

Similarly, Proposal 9 as drafted may risk undue compromise to some of the fundamental protections of the justice system, risks discouraging prudent persons from taking risk management positions and is at odds with the nature and practical realities of individual responsibilities in relation to corporate actors in relation to risk management. For related reasons we also oppose Proposal 10 in its current form.

As with Proposal 8 we suggest there is still substantial work required to develop a more consistent regime for individual liability for corporate misconduct. We suggest that this be undertaken for both these areas through a collaborative process over a longer time period that works openly with multiple stakeholders to agree on principles, aims, and agreed standards of justice and fairness prior to developing a fully formed proposal for wider consideration.

AFMA is broadly supportive of Proposals 11 to 23, however, due to time constraints we limit our commentary in relation to these Proposals.

A longer process is required

AFMA recommends that the ALRC revisit its timetable for the proposed final report. Given the substantial amount of further work that is required in relation to the key proposals of concern we have noted above, in the time currently allocated it will not be possible to conduct a development process with the appropriate due diligence and further consultation that is warranted.

The scope of the discussion paper and proposals is wide, and the potential of the reforms proposed to markedly change the nature of corporate criminal responsibility is high. Associated with the nature of the changes are substantial risks both for fairness of the justice system to individuals and corporate entities, and in part flowing from this, significant risks to the business environment, this latter risk being one to which more consideration needs to be given. In our view this timeframe is unlikely to be sufficient for thoroughgoing revisions of the proposals. Given the significant nature of the changes proposed, time for serious review should be accommodated in a substantive consultation process.

Need to review the processes that create inconsistent law

As the ALRC notes there have been many reviews that have influenced or touched on the corporate criminality landscape over the years. Our experience in recent times is that there remains scope for reviewing the processes themselves that drive change. More than once significant change has been enacted without due consideration of merits and arguments each way. These processes are often progressed without sufficient time for a full consideration of the issues and careful resolution that is appropriate for significant change. There are also often unmanaged conflicts in these processes.

Frequently the outputs of these processes do not sit consistently with the existing law or the government's own guidance on the standards which such laws and regulation should meet, such as the Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The result is that the already high level of inconsistency with principles of the existing law continues to increase.

We would encourage ALRC to review these processes themselves as to some extent they are the source of many of the problems that ALRC is now tasked to remedy.

Concluding remarks

We thank you for the opportunity to comment on the Discussion Paper. We stand ready to assist further in the revision of the Proposals we have noted above.

Please do not hesitate to contact us via the Secretariat for further information.

Yours sincerely

[redacted]

Damian Jeffree

Senior Director of Policy

AFMA Response to ALRC Discussion Paper

Corporate Criminal Responsibility

Proposal 1 Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness):

a) criminal offences;

b) civil penalty proceeding provisions; and

c) civil penalty notice provisions.

AFMA supports the ALRC's aim to produce a principled approach to regulating corporations and the simplified three categories proposed of criminal offences; civil penalty proceeding provisions and civil penalty notice provisions. Such a simplifying reorganisation is overdue.

At a high level we are supportive of Proposals 1 through 4 inclusive with some amendments.

We generally support Proposal 1 as long as there is a proper threshold for criminal matters. As the ALRC notes in the paper there have been many developments of the criminal and civil law that have risked compromising its philosophical integrity.

As the Discussion Paper notes, at present trivial infractions of an administrative nature have been unnecessarily and inappropriately criminalised, including the examples given of failure to place an ACN on certain documents or failing to notify ASIC of changes to company office hours. The trend to make offences concurrently subject to criminal, civil proceedings, strict liability and penalty notice regimes similarly denies the important philosophical distinctions within the law.

The distinctions between criminal and civil matters matter if the law is to continue to be held in esteem by the community as reflective of its values. The law is more than a 'regulatory toolbox' as it is sometimes promoted. Laws and regulations need to be properly grounded in the framework of the legal system in order to have sustainable legitimacy. They should not be appropriated for the attainment of certain ends.

When the law treats trivial matters as appropriate to include with offences attracting the highest moral opprobrium it risks both the diminishment of its reputation for fairness and reasonableness and the compromise to concepts such as criminality that underpin the system.

A more principled approach to categorising offences taking into account the broader context of law in society and the inherent nature of offences rather than reducing the law to a collection of 'tools' to be administered and leveraged, is very much welcomed.

Proposal 2 A contravention of a Commonwealth law by a corporation should only be designated as a criminal offence when:

a) the contravention by the corporation is deserving of denunciation and condemnation by the community;

b) the imposition of the stigma that attaches to criminal offending is appropriate;

c) the deterrent characteristics of a civil penalty are insufficient; and

d) there is a public interest in pursuing the corporation itself for criminal sanctions.

The proposed criteria for criminal matters is broadly aligned with the types of matters that should be considered. While we believe they are necessary, in their current form the criteria do not yet sufficiently delineate criminal conduct by corporations.

Our comments support the intention of ALRC to reserve criminal matters for the most serious offences to ensure a unifying moral principle and principled distinction between civil and criminal matters.

Missing from Proposal 2 at present is a requirement that links the contravention back to intention of the corporation. The ALRC has previously stated its support for the centrality of intention to criminality. ALRC's *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia* (*Principled Regulation*) noted:

> Central to the concept of criminality are the notion of individual *culpability and the criminal intention* for one's actions.[1] [Emphasis added]

In the context of corporate criminal responsibility this intentionality, though not necessarily directly attributable to the mind of an individual, must continue to be present to validly apply the criminal law and criminal sanctions.

It is not enough that an individual undertook an activity, or failed to do so, and harm occurred. There must be sufficient connection between the action and their employment and an element of intentionality on the part of the firm. The connection that creates guilt cannot be based solely on association with a guilty individual.

While it is difficult to precisely frame the requirement at the high level of the proposal, we would suggest the ALRC explore drafting along the following lines:

"e) there is a sufficient level of (non-constructive) intentionality on the part of the corporation so that moral blameworthiness is appropriate"

We note also the list in the Attorney General's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (AG's Guide) includes a number of criteria that might add more clarity to Proposal 2.

We support Proposal 2 (a). When read appropriately it should act as a brake on trivial offences being made criminal. We suggest, however, that there is a risk of it being read too lightly in the sense that some might argue that any trivial contravention should be condemned to some minor extent.

The AG's Guide uses the following language to indicate the type of matters to which criminal sanctions should be limited:

- whether the conduct causes serious harm to other people

[1] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95: 2003.

- whether the conduct in some way so seriously contravenes fundamental values as to be harmful to society[2]

We suggest the ALRC looks to incorporate similar tests into the requirements.

It may be of assistance to the criteria to include a requirement to consider whether the offence is proposed to assist with the maintenance of the regulatory system *mala prohibita* or is wrong in itself *mala in se.* There is a reasonable case that matters are not wrong in themselves should not, in the general case, and noting there may be exceptions, be categorised as criminal.

> There is, however, a perceived distinction which has been made by some judges between *mala in se*, conduct which is 'wrongful in itself' and which is thus treated as 'criminal' in societies with very different social and economic values, and *mala prohibita*, conduct which cannot be so characterised and which is the subject of specific proscription. The paradigm of criminal responsibility involves the notion of individual wrongdoing, generally with a degree of awareness of the act or its consequences. By contrast, the defining characteristic of laws which are aimed at regulating economic and social activity is that the breach of such laws does not commonly attract the same degree of moral condemnation which accompanies the commission of traditional crimes. Regulatory law is primarily concerned to facilitate the achievement of collectivist goals by discouraging behavior which is considered to be inimical to those goals and thus detrimental to collective welfare. [3]

Such a requirement would be aligned with the ALRC's statement of principle in *Principled Regulation* that "Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal"[4].

In relation to the list of matters identified from existing offences that might be relevant considerations in determining criminality we advise caution when attempting to extract principles from one particular law or area of law. Particularly where these laws have been controversial [5] these laws may be exceptions to the principled approach and best considered in these terms, rather than as the basis for a bespoke 'principle'.

Proposal 3 A contravention of a Commonwealth law by a corporation that does not meet the requirements for designation as a criminal offence should be designated either:

> *a) as a civil penalty proceeding provision when the contravention involves actual misconduct by the corporation (whether by commission or omission) that must be established in court proceedings; or*

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[2] AG's Guide, p. 13.

[3] Yeung, K., "Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective" [1999] *MelbULawRw* 18; (1999) 23(2) *Melbourne University Law Review* 440

[4] Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Final Report No 95, 2002) 25.

[5] https://www.lawcouncil.asn.au/media/media-releases/livestream-laws-could-have-serious-unintended-consequences-chilling-effect-on-business

b) as a civil penalty notice provision when the contravention is prima facie evident without court proceedings.

While we are generally supportive of a clearer distinction between levels of offending as proposed, we caution that too rigid a distinction and a lack of flexibility in reducing civil matters to penalty matters by agreement of the parties, may risk creating too litigious and costly a business environment.

We suggest a mechanism that allows civil matters to be downgraded to penalty matters as a means of guarding against the development of an overly litigious environment.

In addition, we note the existence of other enforcement schemes that sit outside the paradigm described by the proposal. These can be very effective, some having evolved over many decades. Litigation tends to be slow, costly, and often does not provide sufficiently prompt or clear answers to questions around regulations. In financial markets various processes have evolved over time that provide for faster fairer responses from bodies that have a deep understanding of the underlying norms of market practice. One such body is the ASIC Market Disciplinary Panel which considers breaches of the Market Integrity Rules. The body was previously run by the ASX in relation to its own Market Rules before the move of the Panel and the Rules to ASIC. We caution against moving away from these proven approaches.

Proposal 4 When Commonwealth legislation includes a civil penalty notice provision:

a) the legislation should specify the penalty for contravention payable upon the issuing of a civil penalty notice;

b) there should be a mechanism for a contravenor to make representations to the regulator for withdrawal of the civil penalty notice; and

c) there should be a mechanism for a contravenor to challenge the issuing of the civil penalty notice in court if the civil penalty notice is not withdrawn, with costs to follow the event.

AFMA strongly opposes a fixed penalty notice regime. The adjustment of penalties for the circumstance of the offending, as occurs in most penalty notice regimes is appropriate. In relation to the Market Integrity Rules, the Market Disciplinary Panel has long adjusted substantial penalties to the particular circumstances of the case.

For all the same reasons that the courts find benefit in adjusting penalties to encourage self-reporting, early action to make good where possible, to punish egregious behaviour more than minor technical infractions, etc. it is also appropriate that penalties be allowed to be adjusted.

Prima facie elements vary greatly from one infringement to another. We encourage the ALRC to review the history and rulings of the MDP for more information in this regard.

AFMA supports the other elements of the proposed approach in Proposal 4.

Proposal 5 Commonwealth legislation containing civil penalty provisions for corporations should be amended to provide that when a corporation has:

> *a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or*
>
> *b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition;*
>
> *the contravention constitutes a criminal offence.*

Proposal 5 may not set the needed boundary between civil and criminal matters with sufficient clarity and firmness. Particularly in the current regulatory environment there is a risk that a regulator may be encouraged to characterise civil matters as showing flagrant disregard and so appropriate for criminal prosecution. The characterisation by a prosecutor would be enough to start criminal proceedings and result in reputational damage. ALRC should design a system that is robust to the potential for regulators to vary from the actions expected of a model litigant.

The proposed mechanism for dealing with repeat or flagrant offending is problematic and inconsistent with the suggested adoption of a distinction between criminal and civil regulation of corporations.

In particular, the proposal 5(a) to amend Commonwealth legislation to provide that a contravention is a criminal offence when a corporation has previously "contravened a civil penalty proceeding provision or a civil penalty notice provision", and "is found to have contravened the provision again", does not remove the issue identified relating to the criminalisation of low-level contraventions.

In practice, the application of this to civil penalty notice provisions could include minor contraventions such as failing to notify ASIC of a change in office hours. This result is in direct contradiction to the move to limit the designation of criminal offence to instances of the most serious misconduct.

In addition, it is unclear what is meant by “flouting of or flagrant disregard for the prohibition” at 5(b), particularly as the sole example used, involving the inadvertent failure at a bank to configure reporting processes, does not appear to be a wilful, or "flagrant disregard" in the ordinary sense.

In a highly automated business world, unintentional coding errors may arise in any number of circumstances that might produce a high number of regulatory offences. As a case in point, in financial markets trading now occurs on a scale of nanoseconds. This provides literally billions of opportunities for repetition of errors (for example, the regulatory offence of mis-tagging of orders) every few seconds.

It is not clear why an undetected repetition of an error created by an erroneous algorithm even in theory should be considered flagrant. If there was not intentionality to breach initially then each individual instance accretes no additional intentionality where it is performed by an automated process.

We note also that is an unfortunate feature of the public discourse that there is often conflation between failure of corporations to follow regulatory requirements designed to make it more difficult for others to offend in a particular area (a *mala prohibita*) and the far more serious offences of breaches in that particular area (a *mala in se*). Indeed, penalties for the *mala prohibita* regulatory rule breach often far exceed those for the actual *mala in se* offence they are designed to inhibit. An element of caution is appropriate before concluding that the current regulatory processes and practices produce proportionate and appropriate outcomes that should drive further policy development.

The escalation approach proposed would not achieve the overarching objective of a principled distinction between crimes and civil penalty provisions. Misconduct of a serious nature should be classified as a criminal offence at the outset.

The escalation proposal does not distinguish between civil penalty notice and civil penalty proceeding provisions. If there is to be escalation of civil penalty notice provisions flowing from repeat offending (where not driven by automation), then logically from the regulatory pyramid these should become civil penalty proceeding provisions. Such an escalation might also avoid the larger theoretical distinction between civil and criminal matters.

There is a need for a firmer approach in Principle 5 to delineating which matters can be even in principle matters of criminality. It is not acceptable to have all civil matters of potential criminal consequence.

In addition to the issues of principle noted it also creates unacceptable amounts of uncertainty for business. When considering participating in Australian markets corporations would be advised that in Australia almost any regulatory offence could be a criminal matter.

Proposal 6 The Attorney-General's Department (Cth) Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers should be amended to reflect the principles embodied in Proposals 1 to 5 and to remove Ch 2.2.6.

There has been some commentary that the Discussion Paper effectively ends strict liability for corporate matters. While not expressly stated in the paper it has been argued by others that the proposed structure appears to remove strict liability in relation to corporate matters given the intention to restrict criminal offences to the most egregious conduct and the movement of matters that do not require evaluative judgement to be penalty matters. If this is the case it would be welcomed.

Strict liability at present includes matters that have the potential for imprisonment, in direct contravention of the AG's *Guide to Framing*. In this regard we note that at present a breach of s1021E of the Corporations Act, which relates to the preparation of a defective disclosure document or statement or giving the document or statement, whether or not it is known to be defective has a maximum criminal penalty of 2 years imprisonment.

We strongly object to the proposed removal of Ch 2.2.6 from the Attorney General's *Guide to Framing.* There will remain in the law many instances of strict liability and it is

important that given the potential impositions on individual liberty that the protections and reservations proposed by the Attorney General remain in place.

The *Guide* is designed to set a principled standard against which legislative outcomes can be objectively judged.

The *Guide* places restrictions on strict liability because it compromises a fundamental liberty, as it notes:

> *The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).*
>
> *The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and where there is adequate justification for doing so.*

The *Guide* stands as a reminder through less principled times of the enduring principles of the law that should be adhered to by Governments that wish to respect the founding values of liberal societies. That some Acts have failed the test presented by the *Guide* is not a reason for removing the test from the *Guide*.

We are concerned that the reasoning appears to support the view that where a principle of legal liberty is not being met by the Government then it is appropriate that benchmarks supporting the existence of the principle should be removed.

While we understand the ALRC's role includes ensuring that "The rules which govern the relationship of persons with each other and with the Government should reflect current values and philosophies"[6] , equally the Commission should be concerned to balance this with ensuring that the law retains its core values, including that of protecting individual liberty.

Similar reasoning applies to our support for the maintenance of Appendix A to the Guide. The failure of an initiative to encourage governments to conform to a consistent penalty regime is not a reason to abandon the initiative. As the ALRC noted in *Same Crime, Same Time (Report) Sentencing of Federal Offenders*[7] (*Same Crime, Same Time*)*:*

> It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner.

This principle should not be abandoned.

AFMA has argued in our previous submissions that consistent with ALRC's stated principle similar crimes should receive similar punishment. Part of ensuring this outcome requires that crimes of a similar nature have similar maximum penalties. Oftentimes there will be political pressures to introduce inconsistencies in maximum sentences, the same crime in a different context attracting a significantly different sentence. While it is probably

[6] Senator Murphy, Parliamentary Debates, Senate Hansard, 23 October 1973, 1345, 1346.
[7] https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC103.pdf

beyond any administrative check to successfully resist these pressures, we would suggest that it is appropriate to support the continued existence of such checks.

Proposal 7 The Attorney-General's Department (Cth) should develop administrative mechanisms that require substantial justification for criminal offence provisions that are not consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers as amended in accordance with Proposal 6.

AFMA agrees with this proposal to bring life to the AG's Guide in its current form and increase its effectiveness. As noted above we are strongly opposed to some of the amendments proposed in Proposal 6.

Proposal 8 There should be a single method for attributing criminal (and civil) liability to a corporation for the contravention of Commonwealth laws, pursuant to which:

> *a) the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation; and*
>
> *b) a due diligence defence is available to the corporation.*

While we agree with the aims of the project and support having a single method for attributing criminal (and civil) liability to a corporation we are concerned that Proposal 8 as currently drafted inappropriately compromises the principle of a requirement of intention by attributing too wide a category of actions of an overly broad category of actors to the corporation. This approach risks individuals that are outside the control of the corporation, or acting outside their capacity or in direct contravention of the aims, policies and direction of the corporation having their actions inappropriately attributed to the corporation purely by their association.

The proposed approach effectively abandons the connectivity with the intention of the corporation. In doing so, the regime disconnects itself from traditional notions of justice, and the rights of legal people (in this case the corporation).

There are parallels here with utilitarian approaches to ethical questions. Utilitarianism is not compatible with traditional notions of justice and individual rights and often does not deliver principled morality[8], but instead outcomes that are at direct odds with moral intuitions. It does this as the ends are seen as justifying the means, but this is not aligned with ethics or justice.

Similarly, an approach to corporate liability that fails to sufficiently tie the intention of the corporation to the action moves away from the philosophical approach of law to justice. The outcomes that result may have some utility in driving social outcomes but they are not just outcomes, and are not appropriate for a justice system as they do so at a high cost to fairness.

[8] See for example Section 5 https://plato.stanford.edu/entries/consequentialism/

We note that the ALRC justifies this proposal by stating:

> 5.98 Thus it is already well accepted that persons who influence the conduct of another may themselves be liable or responsible for that conduct. Proposal 8, discussed in Chapter 6, uses the language 'for or on behalf of' in defining 'associate', which is consistent with these doctrines as it reflects the substantive nature of the relationship between an individual and the corporation.

There is nothing in the discussion preceding this point that supports the view that the language 'for or on behalf of' in the definition of associate establishes sufficient connection between the actions of the individual(s) and the intention of the corporation.

The innocent agent doctrine involves a direct connection between the intention of the party to which the action is attributed and the action. This therefore provides no support for the proposed scheme.

Similarly, the example of attributed conduct in the case of statutory schemes relies on an intentional link provided by the person 'acting at the direction or with the consent or agreement'; again, there is a strong intentional connection between the party to whom the conduct is attributed and the action.

In contrast the 'for or on behalf of' lacks this intentionality on the part of the party (the corporation) to whom the conduct is attributed. It might be possible for an actor to undertake an action 'for' another party but for that action to be in fact against that party's intention.

Unlike the language in the current statutory schemes which define the nature of the link between the individual, their actions and the corporation, it is unclear what conditions have to consider the action 'for' the corporation. Would an honestly held but mistaken belief on the part of the individual suffice? Or would an objective test be used that would consider whether the action was in the course of employment? If so, we would prefer the current arrangements that are explicit about this connection.

It may be of assistance to consider the potential application of the proposed approach to a branch of government. In such an arrangement an 'associate' of the government which could be a contractor engaged for a limited purpose who acted in a way that was intended to be 'for' the government, but which was illegal could have their actions attributed to the government. There are of course many instances where officers of various arms of government have been found to have breached laws, yet it would not seem fair to attribute these actions to the government if there was no element of intention present on the part of the government.

The changes will not be 'counterbalanced'[9] as claimed by the due diligence defence. The compromise to justice that is inherent in the proposed changes is substantial and the introduction of a due diligence defence does not address and may serve only to obscure this compromise. The overextension of liability may result in corporations being unfairly charged and having their reputations damaged and being reliant on an uncertain defence of due diligence. The damage for many corporations would already be done. This creates

[9] Discussion Paper, at 6.21.

a high-risk to reputation business environment, even for businesses that have sound due diligence practices.

The changes proposed to the link between the individual and the corporation combined with the minimal requirement that the associate(s) had the requisite state of mind effectively reverse the legal burden of proof for corporations for matters involving associated persons.

In the case that an individual is associated with the corporation as described (noting this can be as remote as a contractor), and the individual offends and has the requisite mental state then the corporation will be guilty of the offence unless they can prove due diligence. For cases such as this where the physical element is not in question the remaining fault element of connection and intention is effectively presumed.

This would be a significant and fundamental departure for the treatment of corporations under the law.

ALRC has previously held that

> Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.[10]

We would agree with this assessment and do not see the strong justifications required yet put forward.

Proposal 9 The Corporations Act 2001 (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

Proposal 10 The Corporations Act 2001 (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

> *Question A Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?*
>
> *Question B Are there any provisions, either in Appendix I or any relevant others, that should not be replaced by the provisions set out in Proposals 9 and 10?*

AFMA will respond to Proposals 9, 10 and Questions A and B together.

AFMA raises significant concerns around the formulation proposed for individual civil liability flowing from the criminal conviction of a business.

[10] Australian Law Reform Commission, *Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws,* p. 284.

The proposed approach, while likely to result in more civil penalties and criminal convictions, these may come at the cost of a general abrogation of individual rights.

Corporations are group entities and breaches can fail to be prevented from the interaction of a large number of individuals working with imperfect information. Having accepted the validity of group action leading to corporate responsibility, there appears to be a contrary position suggesting that blame can and should be sheeted back to individuals in relation to corporate failings on the basis they had the mere 'potential to influence'. This is a vague construction and risks creating injustice.

As drafted, the CAMAC concern that officers and indeed almost any employee or contractor may be "deemed liable and subject to penalties, for corporate conduct that they could not reasonably have influenced or prevented" is relevant. There is a risk that the broad and assertive stance of the proposed regime could have a negative effect on the business environment. The assumption of such large personal risks when working for an Australian company will decrease the attractiveness of the jurisdiction for globally mobile talent.

They are also likely to weigh down organisations with excessive risk aversion and business processes, distracting them from finding efficient ways to produce goods and services with the need to ensure that record trails are kept in case they are needed to prove that management took all reasonable steps at all times.

In keeping with the general orientation of liberal democratic societies individuals should be free to go about their business doing the right thing without being constantly concerned to create an audit trail that they did every reasonable thing possible at every point to prevent others from breaking the law.

Making employment in any role a substantial personal risk

Applying the provisions to any officer in a position "to influence the conduct of the body corporate in relation to the contravention" is vague and broad, and will create great uncertainty around who is at risk in firms for what.

Particularly if ALRC adopts 'officer' or a wider categorisation in relation to Question A then the proposed drafting could change the nature of employment in Australia significantly in that employees could be put at substantial personal risk for the actions of their employer over which they may have no control and only limited influence. There is a risk that the results will be aligned with the US experience noted by Garrett that the focus of the prosecutions will be low level employees and middle management. It is questionable whether such an outcome would assist with achieving positive firm cultures.

We also note the known perverse effect that making employment in firms more liable to personal risk may discourage those that are careful risk managers from taking these positions. This may result in only those that are happy to take on large personal risk being left in charge of managing risks for firms. This may not be an optimal state of affairs if the aim is to make firms more careful to avoid breaches.

ALRC's view that the 'clear defence' will encourage skilled officers to take up senior roles in problematic companies is entirely misplaced. Skilled officers do not need to put

themselves at substantial additional risk by going to problematic companies. Defences are a poor comfort particularly when civil proceedings alone are enough to seriously damage reputations, end careers. Skilled officers who carefully manage their risk will not expose themselves to the risk of damaging civil and possibly criminal proceedings relying on the availability of a little tested defence of due diligence, they will avoid these roles or companies.

Need to protect individual legal rights

ALRC should work to ensure that the principles that underpin the law are not unduly compromised.

In this regard we are concerned that the proposals are supportive of the abrogation of individual liberties insofar as the proposals:

- can proceed without the corporation being found guilty of any offence. We understand this means that there may not be guilt on the part of the corporation and the civil liability may arise merely because a firm has been charged; and
- the proposals establish a reverse onus in civil proceedings for individuals who have been identified as being in a 'position to influence'.

The ALRC relies on the 'safeguard' of reasonable measures defence. The reasonable measures defence may fail or be put at risk by any deviation of what in hindsight would have been perfection. It is not reasonably characterised as a 'safeguard'.

At 7.95 and 7.96 there appears to be a utilitarian approach taken to the compromise that is reached between the protections the law is designed to afford and a desire to drive outcomes in individuals. ALRC should look to maximise the conformance of criminal responsibility provisions with the principles of the law.

Information challenges

The ALRC notes the difficulty in determining who knew what when misconduct occurs, suggesting this is a deliberate strategic fog. We suggest that in complex large organisations determining who knows what at anytime is an inherently significant information challenge and the Commission's suspicion may be misplaced.

Practical challenges of preventing all breaches with limited resources

The view that being in a position to influence is sufficient to establish culpability does not reconcile with a realistic understanding of the challenges faced by individuals working in large organisations reliant on many others and with limited resources. As such it may lead to lead to unjust outcomes.

Taking reasonable steps to prevent misconduct in large organisations is generally not something that any one individual can do themselves. There are significant information

challenges in determining and assessing for the range of potential areas that a corporation may risk breaches.

There are limited resources to deploy to manage these risks and less likely risks may be deprioritised and assigned less resources in order to efficiently focus on the more likely areas of risk. These risk management programs might involve large numbers of people to implement. They may be bespoke and therefore difficult to benchmark for quality. Their effectiveness can also be difficult to determine as it may be unclear whether a lack of breaches is influenced by program. Even if in a position to influence it may not be possible for a responsible individual to get resources to fully address all known risks. A well designed and documented program may leave some risks minimally addressed given their low likelihood.

Ultimately firms, like governments, rely on individuals taking due care and responsibility to not breach laws. With hindsight a program could always have been put in place to address any issue that occurs, but in practice this will not be possible for firms or governments to do in advance due to resource constraints. It may not be fair to make individuals that took reasonable steps to respond to the *totality of risks* facing a corporation liable for the realisation of a particular risk particularly where that risk was unlikely, unknown, or difficult to prevent.

Further work needed

As with Proposal 8, Proposals 9 and 10 require much more work in order to be fully developed. We do not believe this can reasonably be achieved in the time before the Commission has indicated it will report back to Government.

We suggest at a minimum that these three proposals be moved to a separate work stream to be further developed with industry over a longer time period.

Other Proposals and Questions

In relation to proposals 13 and 14 while we are generally supportive we would support language that clarifies that the inclusion of size and financial circumstance in sentencing considerations does not imply support for turnover fines, which have previously been opposed by the ALRC[11][12]

> 30.24 The ALRC does not consider that equity fines or turnover fines should be introduced as sentencing options for corporations because it is undesirable for the quantum of a financial penalty to be linked formulaically to the financial circumstances of the offender. As discussed in Chapter 5, sentences should be proportionate to the gravity of the offence and should be consistent, in the sense that like cases should be treated alike.

[11] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [26.118].

[12] Australian Law Reform Commission, Same Crime, Same Time (Report) Sentencing of Federal Offenders https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC103.pdf

In relation to Question G, AFMA opposes the removal of maximum penalties for corporations. Maximum penalties give some level of risk management for corporations considering entering or continuing in the Australian market. Unbounded exposures are not conducive to actuarial analysis. We caution against following the UK lead on these matters, Australia does not occupy the same position of centrality to global markets, and so increased risks for businesses may have higher impacts locally.