BHP Submission to the Australian Law Reform Commission, *Corporate Criminal Responsibility: Discussion Paper* (DP 87, 2019)

Introduction

BHP welcomes the opportunity to provide comment on the Proposals for reform to the Commonwealth's corporate criminal law regime and the Questions on particular areas of reform raised by the Discussion Paper.

BHP has considered its responses from the standpoint of seeking clarity and consistency in order to enable corporations and individuals to know what needs to be done to discharge applicable obligations and avoid wrongdoing. We have also sought to provide a perspective informed by the essential governance structures of larger corporations.

BHP strongly supports the overarching objective of the Australian Law Reform Commission (**ALRC**) to develop a new model for corporate regulation based on a coherent and 'principled distinction' between criminal and civil regulation of corporations and to resolve the over-proliferation and illogical variability between offences subject to a civil penalty and those constituting a criminal offence that the ALRC has identified in its analysis.

As indicated in prior submissions on anti-bribery law reforms, we also support the objective of improving the effectiveness of efforts to prevent and deter criminal conduct by corporations. Consistent and effective enforcement to deter conduct that constitutes a criminal offence (based on sound public policy grounds) plays an important role in building public confidence and in levelling the playing field to allow ethical corporations to compete.

However, we do have concerns about the potential impacts of certain of the Proposals, specifically Proposals 8 and 9 (and the associated elements of Proposal 10), particularly if applied to a broad range of conduct, which at this stage is unspecified (noting the ALRC's intention that Proposals 1 to 3 should clarify and limit the range of serious criminal offences before subsequent reforms). We understand the ALRC already intends to revise its approach to the subject-matter of these Proposals (and also to aspects of Proposal 5), but provide our responses on the basis of the Discussion Paper.

We offer some suggested modifications to Proposal 5 and considerations with respect to the non-monetary penalty options under Proposals 15, 16 and 17. It would be useful to have further information about how the potential reform being tested under Question L would apply. We would appreciate an opportunity to comment on the draft amendments to the Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, but are supportive of the intent of Proposals 6 and 7.

We would also welcome an opportunity to review any guidance that might be proposed for due diligence or 'reasonable measures' defences before or together with release of the Exposure Drafts for any legislative reform arising from the ALRC's review.

We set out our comments in this submission using the structure provided by the ALRC's Proposals and Questions supplement to the Discussion Paper and, in some instances, address our input to a number of Proposals or Questions collectively. We did not have specific comment on the Proposals relating to 'Illegal Phoenix Activity' or on Question B (subject to our concerns with respect to Proposals 9 and 10).

The Proposals put forward by the ALRC are largely interdependent. As a general observation, the Proposals that impose liability appear to pre-suppose that the Proposals that reorder and rationalise criminal and civil liability have been adopted. Consequently, BHP believes it will be essential that the ALRC's Proposals are not 'cherry-picked' or introduced in a piecemeal fashion, given their interdependence and the significant risk that partial implementation of the Proposals, without the rationalising and/or mitigating effects of others, would create an unsound regime that unfairly imposes liability for an unmanageably wide range of offences. Possible exceptions are Proposals 1 to 3, Proposal 4, Proposal 5 (if our suggested amendments are adopted), and Proposals 6 and 7, all of which could be independently implemented to positive effect.

4. Appropriate and Effective Regulation of Corporations

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.

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.

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

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

BHP response to Proposals 1 to 3

Support for rationalisation of offences

BHP fully supports the ALRC's objective to achieve a coherent and 'principled distinction' between criminal and civil regulation of corporations. We appreciate that such reform would require significant commitment and resources from Government to 'clean-up' multiple pieces of legislation and so emphasise that corporations such as BHP would value a clear and

consistent delineation of unlawful corporate conduct to enhance their regulatory compliance efforts.

Proposals 1 to 3 would have a strong public benefit in that they create a clear hierarchy of offences and enable corporations and their officers to more effectively focus resources towards compliance with the various categories of wrongdoing.

We also strongly support the overarching objective to reserve criminalisation only for offences where societal denunciation and condemnation is required and there is a public interest in pursuing the corporation itself. The current state of the law, whereby a range of minor regulatory contraventions are criminal offences and civil penalties and criminal prosecution are increasingly available for substantially the same conduct, clouds the logic of corporate criminal responsibility.

Proposals 1 to 3 would appropriately balance the purpose of the grant of separate legal status to a corporation with contemporary expectations about corporate responsibility and accountability.

Extend Proposals 1 to 3 to State/Territory laws

We recommend that the ALRC consider a further proposal that the Commonwealth encourage the States (and Territories) to implement the effect of Proposals 1 to 3 in parallel with Commonwealth reform for legislation under concurrent powers that mean corporations must reconcile two tiers of regulation to achieve compliance.

The ALRC's key conclusions about the Commonwealth corporate criminal liability landscape (i.e., there is an over-proliferation of corporate offences, inconsistent approaches to criminal liability, and a lack of principled rationale for distinguishing between conduct subject to criminal and civil liability) are likely also to be equally applicable to State (and Territory) laws.

From BHP's perspective, we expect that the public policy benefits and the effectiveness of corporate compliance programs would be considerably enhanced if the ALRC's proposed new model to achieve a principled distinction between civil penalty provisions and criminal offences, as set out in Proposals 1 to 3, were to be implemented consistently at both state and federal level.

Without this outcome, the simplicity and consistency benefits from the proposed Commonwealth laws reform could be significantly negated or diluted.

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.

BHP response to Proposal 4

BHP supports the intention of Proposals 4(b) and (c) to have a sound and appropriate process to allow representations for withdrawal of a civil penalty notice, and for review if the notice is not withdrawn, where a contravention has been determined without court proceedings.

In relation to Proposal 4(a), it would be useful to consider whether it would be feasible for the legislative specification to enable the penalty to be appropriately calibrated to the circumstances of the contravention (without giving discretion to a non-judicial officer), rather than only a fixed quantum of penalty units.

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.

BHP response to Proposal 5

We note the ALRC is considering an alternative formulation for Proposal 5.

While we support the overall intention of Proposal 5 (in its original form), BHP recommends clarifying the proposal in order to avoid automatic escalation to a criminal offence:

- for repeat offences, if there has been a significant lapse of time between the first and subsequent breach (sufficient to remove an inference of indifference or disregard); and
- in circumstances where a particular regulatory provision of general application is contravened a second time by an entirely different factual circumstance that bears little or no similarity to the circumstances of the first contravention.

These exceptions would be important to align with the 'principled rationale' elements required for a criminal offence as outlined in Proposal 2. Consistently with this, we would expect any escalation of a civil penalty to a criminal offence to cause the applicable onus and burden of proof, defences and the rights of appeal to alter to those applicable for a criminal offence.

Additionally, in relation to the 'flouting / flagrant disregard' limb of Proposal 5, BHP notes that the proposed liability mechanism would need to be clearly identified. As it stands, it is unclear whether mental culpability would be required to establish the flouting of or flagrant disregard for a provision (which we would support), or whether an absolute or strict liability mechanism would attach. If mental culpability were required, it is unclear who would need to have the intention to flout or flagrantly disregard the prohibition to constitute the requisite state of mind for the corporation and so trigger escalation to a criminal offence.

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.*

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.*

BHP response to Proposals 6 and 7

We are supportive of the intent of Proposals 6 and 7, and would appreciate an opportunity to comment on the draft amendments to the Guide.

Proposals 6 and 7 are consistent with the logic of the new model for corporate regulation proposed by the ALRC under Proposals 1 to 3 and would seem essential to prevent a repeat of the progressive evolution of new offences away from the intended regime, such as occurred following introduction of the current corporate criminal responsibility regime in Part 2.5 of the Commonwealth Criminal Code contained in Schedule 1 of the *Criminal Code Act 1995 (Cth)*.

6. Reforming Corporate Criminal Responsibility

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.

BHP response to Proposal 8

BHP is attracted to the simplicity and consistency of a single method for attributing criminal and civil liability to a corporation and we note and support the adoption of the attribution model in Proposal 8 for specific categories of offences where there are sound grounds (including public policy) for its adoption, such as in the context of foreign bribery. However, we question whether it is suitable to apply generically for all contraventions of Commonwealth laws. We understand the ALRC is reviewing its approach to a single attribution method.

We believe that further work is required to determine, on a case-by-case basis, whether there are equivalent grounds (to those that justify application to foreign bribery) to warrant the adoption of the Proposal 8 model for other specific categories of conduct giving rise to criminal

and/or civil offences. This could be examined together with any reforms to apply a suitable single attribution method for all other categories.

We support the proposed 'corporate failure to prevent bribery' offence (to which an 'adequate procedures' defence attaches) combined with the broad definition of associate in the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019*, which is consistent with a similar offence in the UK Bribery Act.There are specific features of foreign bribery that justify the adoption of this model that were addressed and debated at length over many years before being adopted in the UK Bribery Act[1], including two consultations by the UK Law Commission and extensive debates in the House of Lords and House of Commons. These deliberations identified some specific features of foreign bribery that justify adoption of a Proposal 8-style attribution model, with its inherent reversal of the onus of proof coupled with a broad defintion of 'associate'. The features include specific enforcement challenges (such as the ability of authorities to obtain evidence of conduct ocurring in foreign jurisdictions) and public policy justifications (such as the significant harm caused by corruption particularly in developing economies).

In addition, the proposed 'failure to prevent bribery' offence brings Australian law into line with similar laws in other jurisdicitons, such as the UK Bribery Act, meaning corporations are able to take advantage of well developed concepts, experience and published guidance as to what constitutes an adequate compliance program[2]. By increasing the effectiveness of enforcement against this serious form of corporate criminal conduct, the legislation should also meet the objective of levelling the playing field.

Reversal of onus combined with broad definition of 'associates'

Outside the context of foreign bribery, the impact of Proposal 8's reversal of the burden of burden of proof has the potential to be significantly amplified by (i) the breadth of the definition of 'associate'; and (ii) its use to attribute to the corporation both the physical and any fault elements of the contravention. This means the state of mind of persons beyond those who would normally be considered to represent a corporation could cause it to be liable. We are concerned that the due diligence defence is not sufficiently defined or practicable to counterbalance this effect, if Proposal 8 applied to a wide and diverse range of offending conduct.

Avoid 'cherry picking'

It would be essential that the reforms in Proposals 1 to 3 were implemented to rationalise the corporate offence provisions prior to any application of a suitable single attribution method. Otherwise, corporations' exposure to the Commonwealth criminal law would be unreasonably expanded. This point provides an example of our general principle (articulated in the Introduction to this submission) that there would be adverse unforeseen consequences if the ALRC's Proposals were implemented in an incomplete or piecemeal manner.

[1] Law Commission 2007-8 Consultation Paper and Report: http://www.lawcom.gov.uk/project/bribery/; Law Commission 1997-8 Consultation Paper and Report: http://www.lawcom.gov.uk/project/corruption/; http://services.parliament.uk/bills/2009-10/briberyhl/stages.html for details of all House of Commons and House of Lords debates.

[2] The UK and US enforcement agencies have published guidance on anti-corruption compliance programs and an international standard on anti-bribery management systems has been developed and published: ISO 37007.

7. Individual Liability for Corporate Conduct

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.*

BHP response to Proposals 9 and 10

We understand that the ALRC does not now propose to recommend Proposals 9 and 10, but provide our comments for the record.

As with Proposal 8, the simplicity and consistency of a single method to determine the circumstances in which individuals ought to be held liable for corporate misconduct is attractive (subject to proper consideration of whether special methods to determine individuals' liability for select offences should be retained where their particular policy rationale already reflects a principled approach).

BHP also welcomes any clarification of the liability environment for senior management (distinguishing their role from the duties of directors), and when and why an individual's conduct is criminalised. We support the principle that senior management should face individual liability for corporate failures in appropriate circumstances, but the method to determine liability must be clearly defined and delimited. This is essential to convey what must be done, in practice, to fulfil the senior manager's responsibility, and to avoid exposing individuals who act diligently and faithfully.

We have significant concerns about selecting the 'deemed liability' model under Proposal 9 (and extended to criminal liability under Proposal 10) as the single model to replace and streamline the various provisions under current law. The proposal that any officer be subject to a civil penalty if they were 'in a position to influence' is too broad and indefinite and the 'reasonable measures' defence too narrow.

We appreciate that multiple statutes already allow senior officers to be held liable, despite not being accessories to the conduct, if they were in a position but failed to prevent corporate misconduct. However, Proposal 9 would extend and normalise this significant personal exposure for individuals in management roles, which extends to personal, practical and reputational consequences from the point at which a charge occurs.

'In a position to influence'

We note that 'influence' (as proposed to be used in Proposal 9) would refer to 'the capacity of an individual to make decisions and direct behaviour in the course of their role in the business', rather than by more general notions of influence. However, this would still mean (we consider unreasonably) that an officer who had no involvement in nor knowledge of the offending

conduct and no direct or indirect fault in relation to its occurrence could be exposed to a civil penalty.

Our concerns about Proposal 9 particularly lie in the proposition that an officer should be exposed because they had the capacity to make decisions and direct behaviour, irrespective of whether they had actual knowledge of or directed the contravention (or intentionally, knowingly, or recklessly failed to make a preventative decision or direction).

The Proposal does not appear to contemplate the actualities of how the management of sizable corporations and corporate groups must occur. Given the breadth and nature of their roles, officers such as the Chief Executive Officer, Chief Operating/Commercial Officer, Chief Financial Officer, General Counsel and Chief Compliance Officer (or equivalently titled roles) would almost always be deemed to be 'in a position to influence' all or significant components of the whole business, and so could be exposed in relation to a very broad range of offences.

It would be impracticable for these senior executives individually to make out a 'reasonable measures' defence with respect to all those multiple and diverse offences (see below) and so it would seem that Proposal 9 could almost always expose senior executives to a civil penalty if the corporation (or someone whose action would constitute the corporation's conduct) engaged in misconduct.

Reversal of onus and 'reasonable measures' defence

As a matter of principle, any reversal of the onus of proof requires sound justification, especially in relation to individual defendants. It is unclear whether adequate public policy justifications exist to reverse the onus of proof for individual liability, even for offences such as foreign bribery (where reversal of the onus can be justified for corporations, as discussed above). It is important to note that the UK did not extend the reversal of onus to individuals involved in corporate offences in the UK Bribery Act, requiring instead that the corporate offence was committed with 'the consent or connivance' of a senior officer[3].

BHP notes that the Discussion Paper does not detail[4] what would constitute 'reasonable measures' making it more difficult properly to assess this critical aspect of Proposals 9 and 10. What is clear is that under Proposals 9 or 10 it would be insufficient to show that the corporation has taken reasonable measures. Instead, the officers themselves must have also taken steps and actions to ensure prevention and done so with respect to the full range of offences for which the 'in a position to influence' test could make them liable.

However, in practice, senior executives in large, varied and/or complex businesses have extensive portfolios and necessarily depend on the expertise and accountabilities delegated to the management structure below them. They also must rely on compliance programs and due diligence processes designed to ensure lawful and ethical conduct across the business, rather than individually implement their own program. Inefficiency, duplication, and potentially inconsistency and confusion could arise from each officer being compelled (by Proposal 9) to implement their own bespoke set of 'reasonable measures', or from each of those officers seeking to direct the design and implementation of the company-wide programs and processes.

Proposals 9 and 10 could in effect create a new positive duty on officers to exercise their 'influence' to a requisite standard to ensure corporate compliance in order to avoid civil or

[3] UK Bribery Act, s 14.

[4] Except by reference to the elements of Section 496 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth).*

criminal liability. As the ALRC notes, this is currently undefined at law (outside director's duties, where applicable to senior executives). We doubt it will be possible to codify what would satisfy the 'reasonable measures' defence with sufficient clarity and certainty, yet flexibility, and so it is unlikely to be a fair and robust counterbalance to deemed liability.

Regulatory guidance

The ALRC invited comment on the form of published guidance for the 'reasonable measures' defence under Proposals 9 and 10.

If any alternative reform relating to individual liability included a 'reasonable measures' concept, BHP recommends that guidance published to elaborate 'reasonable measures' should be provided in a combination of statutory and regulatory form; the high-level principles should be contained in the statute and the details to guide implementation of the principles published in regulatory form. We would recommend the same for any guidance published for a due diligence defence, as applicable to any alternative single corporate liability attribution method.

We suggest this would suitably balance the benefit of a stable and predictable form of guidance (given the significant time and resources required to establish compliance programs) with greater flexibility to allow the guidance to evolve.

BHP would also find it helpful for relevant guidance to be released in draft together with the Bill for any proposed amendments to individual liability (or corporate liability attribution method) to enable a meaningful review of both elements by stakeholders. Amendments to regulations containing the guidance should also be subject to stakeholder consultation and provided well in advance of their effective date to allow responsive changes to corporate compliance programs.

Question A *Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?*

BHP Response to Question A

BHP welcomes the ALRC's intention to exclude the legal framework for director liability from reforms to individual liability and its view that directors (particularly non-executive directors) may not be the most appropriate target for responsibility in relation to misconduct arising from the day-to-day management of a corporation.

We consider it critical that the Commonwealth criminal law more realistically addresses the role of non-executive directors and reflects (in both its structure and application) the core distinction between the role of the Board of Directors and the day-to-day managerial accountabilities of senior executives under the principles of corporate governance.

As described above, we do not support Proposals 9 and 10, but note that any definition of the relevant individuals in potential alternative approaches to individual liability should: (i) expressly exclude non-executive directors; (ii) clarify, in the case of executive directors, that only their conduct outside their role as a director can be relevant (with the existing legal framework for director liability to govern conduct in the individual's capacity as a director); and (iii) sensibly limit the potential exposure of senior management with very broad

responsibilities (such as the Chief Executive Officer, Chief Operating/Commercial Officer, Chief Financial Officer, General Counsel and Chief Compliance Officer) to avoid the possibility that they be exposed in relation to any corporate offence.

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?*

BHP Response to Question B

BHP does not have any specific provisions to reference here, given our overarching concerns with respect to Proposals 9 and 10, described above.

8. Whistleblower Protections

Proposal 11 *Guidance should be developed to explain that an effective corporate whistleblower protection policy is a relevant consideration in determining whether a corporation has exercised due diligence to prevent the commission of a relevant offence.*

BHP Response to Proposal 11

We understand the reference in Proposal 11 to due diligence to be a reference to the 'due diligence defence' included as an element of Proposal 8, but also to any due diligence elements of existing offence provisions.

We consider that an effective corporate whistleblower protection policy and program are critical components of a robust compliance framework. We therefore welcomed the whistleblower law reforms recently delivered through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth)*. We also support, for example, the emphasis placed on confidential reporting and investigations as a fundamental element of an effective anti-bribery compliance program in the draft guidance published by the Attorney-General's Department in respect of the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019*.

As noted in response to Proposal 8, however, while BHP supports the adoption of the attribution model in Proposal 8 for specific categories of offences where there are sound grounds (including public policy) for its adoption, such as in the context of foreign bribery, we believe that further work is required to determine whether there are equivalent grounds to warrant the adoption of the Proposal 8 model for other categories of conduct.

Consistent with our views in respect of Proposal 8, we consider that while an effective corporate whistleblower protection policy should in principle be a factor in an assessment of whether a corporation has taken reasonable precautions to prevent criminal behaviour, consideration would first need to be given to more clearly identifying the offences for which the statutory 'due diligence defence' would be available. In our view, clarity in respect of the offences to which any due diligence defence is available would greatly assist any proposed

guidance regarding the relevance of an effective whistleblower protection policy to the establishment of that defence.

Question C *Should the whistleblower protections contained in the Corporations Act 2001 (Cth), Taxation Administration Act 1953 (Cth), Banking Act 1959 (Cth), and Insurance Act 1973 (Cth) be amended to provide a compensation scheme for whistleblowers?*

BHP Response to Question C

As noted earlier, we support the whistleblower law reforms recently delivered through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth)*. We recognise that genuine whistleblowers can, at times, be exposed to adverse consequences for making disclosures. In our, view the welcome package of reforms in this area should provide whistleblowers with a much broader array of protections, at the same time as imposing on corporations more stringent obligations regarding the treatment of whistleblowers (including larger penalties for transgressions).

In our view, the recent reforms should be allowed reasonable time to embed before meaningful consideration can be given to introducing a compensation scheme (whether publicly or privately funded) that does not require the whistleblower to provide satisfactory evidence of detrimental conduct. That said, we endorse the ALRC's determination that a bounty system should not be adopted. As we identified in our September 2015 submission to the Senate Economics References Committee into Foreign Bribery, there are arguments both for and against the payment of bounties to whistleblowers. From the perspective of compensating whistleblowers who may suffer detriment as a consequence of making a disclosure, we agree with the ALRC's position that bounty schemes can be problematic in that the value of the harm done by the corporate misconduct, or the size of the penalty imposed on the corporation, may not bear any relationship to the detriment that may be suffered by a whistleblower.

Question D *Should the whistleblower protections contained in the Corporations Act 2001 (Cth), Taxation Administration Act 1953 (Cth), Banking Act 1959 (Cth), and Insurance Act 1973 (Cth) be amended to apply extraterritorially?*

BHP Response to Question D

We consider it arguable that Australia's whistleblower laws already do apply overseas, in relation to conduct that impacts upon the Australian market or an Australian person. However, we think there is merit in clarifying (with legislative amendments if needed) the extraterritorial reach of these whistleblower laws. We think that clarification of this kind can only serve further to increase the confidence of individuals who suspect wrongdoing to raise their concerns in a timely manner without fear of retaliation. This in turn will lend further support to the efforts of organisations seeking to maintain and enhance a culture of 'speaking up'.

9. Deferred Prosecution Agreements

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?*

BHP Response to Question E

We have previously made submissions relevant to the introduction of a Deferred Prosecution Agreement (**DPA**) scheme in Australia, including in response to:

- the Senate Economic References Committee Inquiry into Foreign Bribery;
- the Attorney-General's Department's Public Consultation Paper on 'Consideration of a Deferred Prosecution Agreements Scheme in Australia';
- the exposure draft of amendments to the foreign bribery offence in the *Criminal Code Act 1995 (Cth)* and introduction of a DPA scheme in Australia; and
- the Attorney-General's Department's 'Consultation Draft Deferred Prosecution Agreement Scheme Code of Practice'.

As we have previously set out, we support DPAs, Non-Prosecution Agreements (**NPAs**) and other forms of settlement (including civil resolutions, such as enforceable undertakings) as enforcement options in respect of allegations of serious corporate wrongdoing. In our view, DPAs have an important ability to strike the right balance between the public interest in an appropriate response to serious alleged corporate conduct falling below the standards the community expects (on the one hand) and the public interest in the efficient and cost-effective resolution of criminal matters (on the other hand). We also see the potential for DPAs to play a powerful role in compelling corporations to implement meaningful and effective compliance programs, which serve the broader public interest.

At the same time, we have made clear that we do not view DPAs, NPAs or civil resolutions as a replacement for corporate criminal prosecutions in all cases. We recognise that criminal liability has a critical public role to play in expressing condemnation of illegal conduct, and acts as a strong deterrent against misconduct.

We note that the DPA scheme for corporations proposed in the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* substantially replicates the DPA model set out in the earlier *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*. In our view (including by reference to our earlier submissions noted above), the proposed scheme is well-positioned to become, in appropriate cases, an effective enforcement mechanism for the types of offences set out in Schedule 2 of the 2019 Bill.

We remain of the view that there are a number of matters (set out in our submission responding to the Attorney-General's Department's 'Consultation Draft Deferred Prosecution Agreement Scheme Code of Practice') pertinent to the proposed DPA scheme that would benefit from guidance through a DPA Code of Practice. We do not think it necessary to repeat those aspects in this submission, but would welcome the opportunity to comment on any updated draft DPA Code of Practice prepared by the Attorney-General's Department in light of the responses to the previous public consultation.

10. Sentencing Corporations

Proposal 12 *Part IB of the Crimes Act 1914 (Cth) should be amended to implement the substance of Recommendations 4–1, 5–1, 6–1, and 6–8 of Same Crime, Same Time: Sentencing of Federal Offenders (ALRC Report 103, April 2006).*

Proposal 13 *The Crimes Act 1914 (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:*

a) the type, size, internal culture, and financial circumstances of the corporation;

b) the existence at the time of the offence of a compliance program within the corporation designed to prevent and detect criminal conduct;

c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;

d) the involvement in, or tolerance of, the criminal activity by management;

e) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence;

f) whether the corporation self-reported the unlawful conduct;

g) any advantage realised by the corporation as a result of the offence;

h) the extent of any efforts by the corporation to compensate victims and repair harm;

i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:

i. internal investigations into the causes of the offence;

ii. internal disciplinary actions; and

iii. measures to implement or improve a compliance program; and

j) the effect of the sentence on third parties.

This list should be non-exhaustive and should supplement rather than replace the general sentencing factors, principles, and purposes as amended in accordance with Proposal 12.

Proposal 14 *The Corporations Act 2001 (Cth) should be amended to require the court to consider the following factors when imposing a civil penalty on a corporation, to the extent they are relevant and known to the court, in addition to any other matters:*

a) the nature and circumstances of the contravention;

b) any injury, loss, or damage resulting from the contravention;

c) any advantage realised by the corporation as a result of the contravention;

d) the personal circumstances of any victim of the offence;

e) the type, size, internal culture, and financial circumstances of the corporation;

f) whether the corporation has previously been found to have engaged in any related or similar conduct;

g) the existence at the time of the contravention of a compliance program within the corporation designed to prevent and detect the unlawful conduct;

h) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention;

i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;

j) the involvement in, or tolerance of, the contravening conduct by management;

k) the degree of cooperation with the authorities, including whether the contravention was self-reported;

l) whether the corporation admitted liability for the contravention;

m) the extent of any efforts by the corporation to compensate victims and repair harm;

n) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:

i. any internal investigation into the causes of the contravention;

ii. internal disciplinary actions; and

iii. measures to implement or improve a compliance program;

o) the deterrent effect that any order under consideration may have on the corporation or other corporations; and

p) the effect of the penalty on third parties.

Proposal 15 *The Crimes Act 1914 (Cth) should be amended to provide the following sentencing options for corporations that have committed a Commonwealth offence:*

a) orders requiring the corporation to publicise or disclose certain information;

b) orders requiring the corporation to undertake activities for the benefit of the community;

c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;

d) orders disqualifying the corporation from undertaking specified commercial activities; and

e) orders dissolving the corporation.

Proposal 16 *The Corporations Act 2001 (Cth) should be amended to provide the following non-monetary penalty options for corporations that have contravened a Commonwealth civil penalty provision:*

a) orders requiring the corporation to publicise or disclose certain information;

b) orders requiring the corporation to undertake activities for the benefit of the community;

c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform; and

d) orders disqualifying the corporation from undertaking specified commercial activities.

Proposal 17 *The Corporations Act 2001 (Cth) should be amended to provide that a court may make an order disqualifying a person from managing corporations for a period that the court considers appropriate, if that person was involved in the management of a corporation that was dissolved in accordance with a sentencing order.*

Question F *Are there any Commonwealth offences for which the maximum penalty for corporations requires review?*

Question G *Should the maximum penalty for certain offences be removed for corporate offenders?*

Question H *Do court powers need to be reformed to better facilitate the compensation of victims of criminal conduct and civil penalty proceeding provision contraventions by corporations?*

Proposal 18 *The Australian Government, together with state and territory governments, should develop a unified debarment regime.*

Proposal 19 *The Crimes Act 1914 (Cth) should be amended to permit courts to order pre-sentence reports for corporations convicted of Commonwealth offences.*

Question I *Who should be authorised to prepare pre-sentence reports for corporations?*

Proposal 20 *Sections 16AAA and 16AB of the Crimes Act 1914 (Cth) should be amended to permit courts, when sentencing a corporation for a Commonwealth offence, to consider victim impact statements made by a representative on behalf of a group of victims and/or a corporation that has suffered economic loss as a result of the offence.*

BHP Response - General

BHP supports the intention underpinning Proposals 12 to 14 to promote consistency of sentencing (which the ALRC notes has not been a feature of the case law), without affecting judicial discretion. We consider a form of codified principles and statutory guidance that does not displace common principles and judicial discretion is essential to allow for suitable tailoring to the variable specific contexts.

For example, undoubtedly the question of whether the corporation had undertaken any internal investigation or disciplinary action is a valid sentencing consideration, but the Court would need be able to disregard the omission if the corporation had carefully considered such actions but determined they would have exposed or disadvantaged an innocent person affected by the misconduct.

We anticipate that a court would find it difficult to quantify the impact of particular non-monetary penalty options under Proposals 15, 16 and 17, and so it would be difficult appropriately to correlate the penalty with the seriousness of the conduct. We suggest further exploration is required to address such implications so that the benefit identified by the ALRC from the 'availability of the same types of non-monetary penalties in respect of corporations in all cases to facilitate the development of jurisprudence concerning the imposition of the different types of orders' is achievable.

Subject to this, we consider that clarification of the principles for sentencing corporations could be implemented on a standalone basis even if the other Proposals did not progress; this is one of the exceptions to our general recommendation that the Proposals be addressed as a package of reforms, not to be adopted individually.

11. Illegal Phoenix Activity

Proposal 21 *The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:*

a) *provide that only a court may make orders undoing a creditor-defeating disposition by a company, on application by either the liquidator of that company or the Australian Securities and Investments Commission; and*

b) *provide the Australian Securities and Investments Commission with the capacity to apply to a court for an order that any benefits obtained by a person from a creditor-defeating disposition be disgorged to the Commonwealth, rather than to the original company, where there has been no loss to the original company or the original company has been set up to facilitate fraud.*

Proposal 22 *The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:*

a) *provide the Australian Securities and Investments Commission and the Australian Taxation Office with a power to issue interim restraining notices in respect of assets held by a company where it has a reasonable suspicion that there has been, or will imminently be, a creditor-defeating disposition;*

b) *require the Australian Securities and Investments Commission and the Australian Taxation Office to apply to a court within 48 hours for imposition of a continuing restraining order; and*

c) *grant liberty to companies or individuals the subject of a restraining notice to apply immediately for a full de novo review before a court.*

Proposal 23 *The Corporations Act 2001 (Cth) should be amended to establish a 'director identification number' register.*

Question J *Should there be an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor- defeating disposition provisions?*

Question K *Are there any other legislative amendments that should be made to combat illegal phoenix activity?*

BHP Response

BHP does not consider illegal phoenix activity to be directly relevant to its business and accordingly does not have specific input in relation to Proposals 21 to 23 and Questions J and K.

12. Transnational Business

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

BHP Response to Question L

BHP considers due diligence an essential tool for a corporation to identify and seek to prevent or mitigate adverse human right impacts and business conduct contraventions associated with its business. For example, due diligence is a key means for BHP to identify and manage our salient human rights risks, such as testing our suppliers' compliance with our minimum business conduct requirements. Due diligence is also a core component of our anti-corruption compliance program.

However, we believe each corporation is best placed to determine which methods, emphasis and degree of external reporting is practicable and most effective for its particular structures, commercial arrangements and operating contexts. For example, we do not publish the specific outcomes of our human rights impact assessments[5] to try to ensure potentially vulnerable external stakeholders can contribute candidly.

To enable proper consideration of such a proposal, it would be helpful to understand more fully and specifically how any mandatory due diligence requirement would apply in practice. Particularly, we would find it helpful to understand:

- to which specific extra-territorial offences such a requirement would apply;
- the precise terms of the requirement; and
- whether the requirement would allow sufficient flexibility to enable corporations to take a tailored approach based on the specific risks in their business (consistent with the conceptual approach taken in US and UK regulatory guidance relating to foreign bribery due diligence).

  Any generic and inflexible requirements may force corporations to divert their time and resources to less efficient and effective approaches. We suggest that any prescription should address required standards (to the extent not already codified), rather than the methods to be employed to meet those standards.

BHP and Samarco references

We note the references to BHP in paragraph 12.5 and to the Samarco dam failure in 2015 in paragraphs 12.78 to 12.80 of the Discussion Paper. BHP rejects the implication of these paragraphs. They proceed on an incorrect premise and contain factual errors. In particular, eight directors of BHP have not been charged in Brazil. Moreover, the charges laid against officers of Brazilian companies in Brazil have been dismissed by a Brazilian Court (some are now on appeal). It is also not correct to suggest that the existence of civil class actions (which do not allege criminality) is indicative of potential criminal liability.

[5] A form of due diligence which our assets must complete at least every three years, or upon changes that may affect the impact profile.