THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission on the Australian Law Reform Commission's Discussion Paper 87 – *Corporate Criminal Responsibility*

9 February 2020

Australian Law Reform Commission
PO Box 12953, George Street QLD 4003
corporatecrime@alrc.gov.au

Contact:

David Edney
President, NSW Young Lawyers

Olga Kubyk
Chair, NSW Young Lawyers Business Law Committee

Lauren Mendes
Chair, NSW Young Lawyers Criminal Law Committee

Contributors: Ara Daquinag, Sarah Ienna, Olga Kubyk, Adam Herman, Timothy Tan, Sarah Hedberg, Claudia Harper, Sarah Gresham, Jessica Maher, Isaiah Mercado, Ravi Nayyar, Soraya Pradhan and Michael Tangonan

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

The NSW Young Lawyers Business Law Committee and Criminal Law Committee (**the Committees**) make the following submission in response to the Australian Law Reform Commission's Discussion Paper 87 – *Corporate Criminal Responsibility* (**Discussion Paper 87**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers Business Law Committee

The Committee comprises of a group of approximately 1,600 members in all aspects of business law who have joined together to disseminate developments in business law and foster increased understanding of business law in the profession. The Committee reviews and comments on legal developments across corporate and commercial law, banking and finance, superannuation, taxation, insolvency, competition and trade practices.

NSW Young Lawyers Criminal Law Committee

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

As the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that concluded on 1 February 2019 demonstrate, there is an increasing need for regulators to be able to address issues of corporate culture and governance and impose suitable penalties.

In this context, the Committees welcome the Australian Law Reform Commission ("ALRC")'s review into Corporate Criminal Responsibility as a timely opportunity to re-examine how liability for misconduct is attributed to corporations and their officers. The Committees support proposals aimed at simplifying and clarifying Australia's corporate regulatory framework, and are of the view that reforms to legislation should aim to deter corporate misconduct, and encourage corporations to take pre-emptive steps to comply with relevant provisions. Further, the Committees are concerned to ensure that there is a principled distinction between criminal and civil liability, and that sentencing for corporate offenders effectively responds to the particular nature of corporate crime, which may warrant particular matters to be taken into account. The Committees also support the use of pre-sentence reports and victim impact statements when sentencing corporate offenders.

The Committees believe that the current ALRC inquiry also provides the opportunity to consider how corporate whistleblowers can be better protected and compensated. With these aims in mind, the Committees provide the following responses to Discussion Paper 87.

Appropriate and Effective Regulation of Corporations

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 public interest in pursuing the corporation itself for criminal sanctions.

1. There should undoubtedly be a principled distinction between corporate conduct that is subject to criminal rather than civil liability. The Committees are concerned by the examples referred to by the ALRC in Discussion Paper 87, which demonstrate the absence of a consistent basis in differentiating criminal conduct from civil conduct. The Committees are in support of a comprehensive review of those offences identified by the ALRC so that criminal liability attaches to more serious and morally reprehensible conduct.
2. The principles presented at Proposal 2 are, subject to the concerns expressed below, useful tools to ensure that criminal liability is appropriately limited on a principled basis.
3. The Committees understand that Proposal 2 represents an intentional simplification of the Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,[1] but are of the view that Proposal 2 in its current form should provide further guidance to legislators. The Committees submit that consideration could be given to including a principle that states:

> *When considering factors a) to d) above, legislators should give particular regard to: the nature of the conduct; the state of mind of the relevant actors (i.e. objective or subjective, considered in light of the nature of the conduct); and the extent and nature of the likely impact of the conduct. This guidance is not intended to limit the matters that can be considered when assessing whether factors a) to d) are met.*

---

[1] Australian Government, Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011). <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>.

4. The Committees submit that inclusion of this principle would serve to focus the legislators' attention on those factors identified by the ALRC at 4.29 of Discussion Paper 87 which, in the Committees' submission, are particularly important in determining that the considerations in Proposal 2 are met and that conduct appropriately attracts criminal liability. Further, the Committees submit that Proposal 2 should be amended to specifically refer to the need for legislators to consider whether the conduct is already proscribed by an existing offence, and if yes, whether that conduct attracts civil or criminal liability. This is particularly important given the proliferation and complexity of offences, as well as examples of inconsistent criminalisation referred to by the ALRC in Discussion Paper 87.

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.

5. The Committees support the recalibration of the test for attributing criminal and civil liability to a corporation. The ALRC's proposal of a singular method of criminal responsibility across Australia's corporate regulatory regime (including criminal offences and civil penalty provisions where a state of mind test is currently incorporated into the provision) is important to ensure consistency in the application of laws, and that laws creating offences are sufficiently certain so that it is made clear what conduct will result in civil or criminal liability.
6. As it stands, Proposal 8 does not include language that would explicitly allow for a state of mind to be imputed to a corporation on the basis of the "corporate culture". It is recognised that this is a deliberate omission on the basis that attribution on the basis of "corporate culture" may lead to uncertainty and has not appeared to be useful in prosecutions.[2] While this may be true, recent commentary indicates that a company's corporate culture is influential in the perpetuation of misconduct, reinforcing that it remains of significance.[3] The findings of the *Royal Commission into Misconduct in the Banking,*

---

2 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) 130 [6.15] ("*Discussion Paper 87*").

3 Xiaoding Liu, 'Corruption Culture and Corporate Misconduct (2016) 122(2) *Journal of Financial Economics* 307. See also Muel Kaptein, 'Understanding Unethical Behavior by Unraveling Ethical Culture (2011) 64(6) *Human Relations* 843.

Superannuation and Financial Services Industry highlight the increasing need for regulators to be able to address issues of corporate culture and governance and impose suitable penalties.[4] The Committees submit that, in this context, it is desirable that attribution of the *mens rea* of an offence to a corporation on the basis of corporate culture continues to remain available to prosecutors and regulators. The Committees suggest that this would be achieved by retaining the method of attribution of fault that currently exists in s 12.3(c) of the *Criminal Code Act 1995* (Cth) sch 1 ("*Criminal Code*"), i.e. by "proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision". In the Committee's view, this is an appropriate way of attributing liability in cases where the Board of Directors or a "high managerial agent" have not intentionally, knowingly or recklessly engaged in conduct, or authorised or permitted the conduct either tacitly, impliedly or otherwise. The Committees are of the view that whilst the number of cases falling into this category is likely to be few, there is benefit in retaining the provision.

7. The Committees do not however support the retention of s. 12.3(d), namely "d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision". The Committees are of the view that it is inappropriate to attribute liability on the basis of a culture that does not exist.
8. Historically, there has been a focus on only holding a corporation accountable where the misconduct is traceable to an employee or "directing mind" of the corporation.[5] As allowing for corporate culture to be used as a method of attributing liability is a "marked deviation from the common law",[6] if the effect of Proposal 8 is to exclude the concept of corporate culture, the scope of conduct amenable to prosecution under the *Criminal Code* is likely to be reduced. While this may be defensible on the basis of common law principles, if the intention of the proposal is to allow regulators and prosecutors discretion to pursue a range of misconduct, it would be of benefit to ensure that the drafting of the section encompasses s. 12.3(c) of the *Criminal Code*.
9. The Committees support the ALRC's proposed definition of "associate" as adequately reflecting the structure of corporations, and the practical realties of the relationship between corporations and other corporate entities, and contractors. In light of this arguably expansive notion of corporate liability and expansive definition of "associates", the Committees support the need for a "due diligence" defence, which is discussed below.
10. The Committees also note that the term "associate" should be limited to those persons falling within the definition who are acting within the actual or apparent scope or authority of their position. If an

---

4 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 375.
5 M Connor and M Gwynn, *Australian Corporation Law Principles & Practice*, LexisNexis [2.1.0160]; Ian Ramsay and Robert Austin, *Principles of Corporations Law* (LexisNexis Butterworths Australia, 2017) [16.280].
6 *CDPP v Brady* [2016] VSC 334, [1099].

"associate" is acting outside this scope, it would be illogical to say that the actions of that associate are those of the corporation. In certain circumstances however, it may be that the corporation should be liable for a failure to ensure that appropriate measures are in place to prevent associates acting outside the scope of their position (without being liable for the conduct engaged in by the associate).

11. Finally, the Committees support the use of the term "state of mind" to allow the singular method of attributing corporate responsibility to be applied to the relevant offence creating provision.

Due Diligence Defence

12. Given that Proposal 8 allows for the conduct of a broad class of associates to be attributed to a corporation, beyond the directing minds of the corporation, the inclusion of a due diligence defence is an appropriate and important safeguard.
13. Discussion Paper 87 indicates that the most prevalent defence to vicarious liability includes both due diligence and reasonable precautions.[7] Despite the specific phrasing in the proposal, to the extent that these may be considered to be separate elements, the reference to "due diligence" in Proposal 8 appears to be inclusive of both due diligence and "taking reasonable measures".[8]
14. A due diligence defence in this context does not appear to have been subject to extensive statutory consideration. As explained in the context of the statutory defence to environmental offences in the Land and Environment Court of New South Wales, the due diligence test requires "that the commission of the offence was due to causes over which the person had no control, and that the defendant took reasonable precautions and exercised due diligence to prevent the commission of the offence".[9] In the liquor licensing regime of Western Australia, a similarly phrased due diligence test from the Federal Court of Australia "was to be taken to require (1) the establishment of a proper system to provide against contravention of the statute, and (2) the provision of adequate supervision in the operation of that system".[10]
15. Issues that may arise from the concept of taking "reasonable precautions" are well-established in the fields of negligence, contract and insurance.[11] The concept requires consideration of the nature and likelihood of risk, and commercial reality of taking the precaution.[12] The duty of "care and diligence" under s 180 of the *Corporations Act 2001* (Cth) ("Corporations Act") is similarly well-established.

---

7 *Discussion Paper 87* (n 2) 74 [3.51].
8 Ibid [6.42]–[6.44].
9 M Bradley, "The reception of novel defences to environmental crimes — Environment Protection Authority v Unomedical (No 3)" (2011) 26(7) AE 191.
10 *Woolworths Ltd v Liquor Licensing Board* (1998) 144 FLR 409; [1998] ACTSC 198, [15]; *Universal Telecasters (Qld) Ltd v Guthrie* [1978] FCA 9; (1978) 32 FLR 360.
11 Shaheeer Serco, 'The obligation of a policyholder to exercise reasonable care and precautions' (2019) 35(4) *Australian Insurance Law Bulletin* 43.
12 *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40.

Recurrent issues in these fields, such as the partial subjectivity of the tests, external factors to be considered and standard of reasonableness, may also arise in the context of corporate criminal responsibility. Given the lack of judicial consideration, further specificity in the statutory provision as to the operation of the defence and relevant considerations is likely to be of assistance.

16. In relation to the legal burden of proving such an offence, the Committees agree that the onus should be on the corporation to prove, on the balance of probabilities, that it exercised due diligence; particularly in the context of historical difficulties in prosecuting corporations and given that, if proven, the defence would absolve the corporation entirely from liability. The Committees are of the view that the corporation would be in the best position to provide evidence of its policies and practices, and the effect of the legal burden being placed on the corporation may encourage corporations to take pre-emptive steps to prevent such conduct occurring in the first instance. The Committees note that this approach is similar the defence of mental illness, which if successfully proved by the accused in accordance with the M'Naghton Rule, leads to a special verdict in criminal proceedings,[13] and the deeming provision in s. 29 of the *Drug Misuse and Trafficking Act 1986*. Whilst not without controversy, this approach reflects the practical realities of prosecuting corporations, and also attempts to rectify the low numbers of successful prosecutions of corporations to date.

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.

17. The Committees note that Proposal 9 extends the bases on which particular individuals may be liable for conduct committed by corporations, even in circumstances where that individual did not necessarily carry out the conduct which gives rise to liability. Rather, the effect of Proposal 9 would be to encourage certain high ranking individuals in corporations to take affirmative steps to ensure

[13] *Mental Health (Forensic Provisions) Act 1990* (NSW) ss. 22, 25 and Pt. 4; *R v M'Naghton* (1843) 10 CL & Fin 200; *Hawkins v The Queen* (1994) 179 CLR 500 at 512–51.

that such breaches do not occur in the first instance. As such, the Committees agree that the proposals would go beyond the accessorial liability provisions found in s 79 of the *Corporations Act* and Part 2.4 of the *Criminal Code*.

18. The Committees note that the implementation of this proposal could have unintended consequences; for example, difficulties in encouraging persons to take senior management roles and thereby placing upward pressure on the remuneration of such executives, and increasing litigation costs for corporations.
19. Nevertheless, the Committees submit that these concerns are outweighed by the benefits of the proposal. The Committees submit that a carefully drafted provision could achieve the aims of promoting legislative compliance and deterring a certain class of individuals (which the Committees submit should be defined as executive officers, see below at [32]) from influencing corporations to engage in relevant offences. The Committees are of the view that, when regulated entities breach legislation, the executive officer(s) who have responsibility for compliance with that legislation should generally be subject to civil penalties, unless reasonable measures were taken by the officers to prevent the breach. This proposal should especially apply in relation to persons such as designated compliance officers and members of executive committees and similar organs that are the next after boards in terms of seniority and responsibility for assessing and managing compliance with legislation.
20. The Committees consider compliance with anti-money laundering and counter-terrorism financing ("AMLCTF") laws[14] as a useful case study when assessing Proposals 9-10 and Question A. It illustrates how executive management may contribute to compliance shortcomings and provides support for the incorporation of the provision in Proposal 9. The case study is considered at **Appendix A** to this submission.

The drafting of Proposal 9

21. Notwithstanding the Committees' support for Proposal 9, the Committees are concerned that, if not appropriately limited, the combination of deemed liability provisions and the breadth of the deeming section would go too far and create significant difficulties for the effective running of corporations.
22. Further, the Committees are concerned that, in practice, there may be inconsistency in the application of the "reasonable measures" defence contained in Proposal 9 to different officers of the corporation.

---

[14] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('*AMLCTF Act*'); *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulations 2018* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth).

There was some concern expressed by members of the Committees that Proposal 9 may present particular risks for specialised senior executives who may have an appreciation of a particular subject area without knowledge of the broader corporate risks. An example of this is a senior IT specialist who has the ability to influence the internal monitoring system of a financial services firm, but is unaware of the full scope of compliance risks to be addressed. Without being aware of the risks, the IT specialist would be unable to take steps to address this risk.

23. The Committees are concerned that, as currently worded, executive officers may be liable even if they took steps to rectify the breaches and cooperated with the regulators in investigations of the same. Imposing blanket liability for failure to *prevent* the underlying contravention on such executive officers would arguably go against the fabric of any regulatory regime by failing to recognise steps taken to ensure compliance therewith.
24. The Committees recognise the importance of executive officers taking proactive steps to prevent breaches of relevant legislation. The Committees note, however, that in some circumstances breaches may occur although reasonable preventative measures may be taken. In those circumstances, if the executive officer took reasonable steps to rectify the breach, that person should not be liable. These includes circumstances where the executive officer has informed other executive officers and/or the Board of Directors of the breach, but has been prevented from taking further action by the latter persons.
25. The Committees, therefore, would like the proviso in Proposal 9 to be edited like so:

    '… unless the executive officer took reasonable measures to:

    (a) prevent the contravention; and

    (b) in the case of an ongoing contravention, rectify the contravention within a reasonable period of time after first becoming aware of that contravention.

    The executive officer is taken to have satisfied (b) if they:

    i. took reasonable measures to inform the relevant officers and/or management organs that are ultimately responsible for preventing the sort of contravention of which the contravention in issue is an example; and

    ii. took the measures referred to in (i) within a reasonable period of time after first becoming aware of that contravention.
26. The reference to "executive officer" in this provision would be qualified by the proviso in the current Proposal 9; namely that the officer be in a position to influence the conduct of the body corporate in relation to the contravention. On balance, and despite the concerns raised above, the Committees are satisfied that if individual liability for relevant offences only applies to an executive officer who was "in a position to influence the particular conduct and take steps to prevent or stop the conduct", this places a sufficient limitation on the types of officers who could be caught by the deeming provisions.

Statutory requirements in relation to who is in a position to influence the corporation have warranted a consideration of "the particular contravention and the particular position held by the defendant".[15] On this view, a senior IT specialist without the influence or knowledge in relation to compliance risk would not be caught by the terms of Proposal 9. This is further qualified by the Committees' response to Question A below. The Committees submit that this is an appropriate limit on liability.

27. Although mixed views were expressed by members of the Committees, on balance, given the breadth of the deeming provisions for individual liability, the Committees are of the view that the burden for raising the reasonable measure defence should be an evidentiary burden only. The Committees note that in practice, however, an officer charged with liability may feel compelled to adduce evidence that goes beyond merely satisfying the evidentiary burden.

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.

28. The Committees consider that the *Corporations Act* should be amended to include an offence of engaging in conduct the subject of a civil penalty provision as set out in Proposal 9 intentionally, knowingly, or recklessly. The Committee's submit that, given the existence of Proposal 9, the fault element in Proposal 10 should be limited to advertent (as opposed to inadvertent) recklessness, so as to create a clearer distinction between conduct attracting criminal and civil liability. In light of the deeming effect of liability in Proposals 9, the Committees view inadvertent recklessness as being more suitable to attracting civil penalty provisions. The Committees are also of the view that a "reasonable measures" defence appears to be inconsistent with the concept of an executive officer intentionally, knowingly or recklessly engaging in conduct that constitutes a relevant offence. As a result, the Committees recommend that Proposal 10 be clarified to specify that the reasonable measures defence does not apply to that proposal.
29. Whilst the Committees are of the view that simplifying the imposition of liability for both civil and criminal offences is desirable in order to reduce complexity in corporate accountability regimes, and increase certainty of application, the Committees are nonetheless concerned that Proposal 10, as currently framed, appears to apply to all "relevant offence" provisions that would attract a civil penalty. The Committees are concerned as to how such "relevant offence" provisions are to be identified, and

[15] *Chevalley v Industrial Court of New South Wales* (2011) 82 NSWLR 634; [2011] NSWCA 357, [29].

are of the view that not all offences attracting a civil penalty are serious enough to warrant a blanket imposition of a criminal penalty, notwithstanding that the conduct was engaged in with the requisite fault element. For example, the Committees are not aware whether, in relation to each of those provisions, it could be said that the considerations referred to in Proposal 2 (discussed above) are met, nor whether principle 4 of the *COAG Principles for the Imposition of Personal Liability for Corporate Fault*,[16] which apply to Directors but nonetheless provide a useful guide for when conduct should be subject to criminal liability, is met.

30. The Committees submit that consideration should be given to narrowing the application of Proposal 10, so that individual criminal liability only applies to offences that currently attract a civil penalty if the considerations referred to in Proposal 2 (with the additional considerations referred to by the Committee above at [3]) are met. The Committees note that if Proposals 1 and 3 of Discussion Paper 87 are implemented, and there is a more principled distinction made between civil penalty provisions and civil notice provisions (so that more serious conduct is subject to a civil penalty and less serious conduct is dealt with by means of civil notice provisions), some of these concerns may be alleviated.

Question A

Should Proposals 9 and 10 apply to 'officers', 'executive officers' or some other categories of persons?

Function role approach

31. The Committees agree that a functional role approach should be adopted relation to imposing individual liability for corporate conduct.
32. The Committees would prefer that Proposals 9 and 10 be expressed to apply to "executive officers". In doing so, the Committees support the "managerial liability" approach referred to at 7.28 of Discussion Paper 87, which is based on the definition of 'executive officer' as it appeared in the *Corporations Act* prior to 2004 which defined this position as follows:

> "***executive officer*** *of a body corporate means a person who is concerned in, or takes part in, the management of the body (regardless of the person's designation and whether or not the person is a director of the body)*".

33. The Committees' view is that this terminology would help to emphasise the seniority level of those persons who would realistically have influence over the conduct of a corporation, while simultaneously

[16] Council of Australian Governments, *COAG Principles for the Imposition of Personal Liability for Corporate Fault* (2009). See also Council of Australian Governments, *Personal Liability for Corporate Fault — Guidelines for Applying the COAG Principles* (2012).

retaining a focus on executive management as distinct from board directors. The Committees note the judicial interpretation of the term "management" in a worker's compensation context, referred to in Discussion Paper 87, and are of the view that this definition is appropriate, namely "as involving something in the nature of the exercise of a discretionary power of control and direction of the business".[17] The Committees are concerned to retain the element that the executive officers need to be in a position to influence the relevant conduct, as in the Committees' view this is the key element that enlivens individual liability for corporate conduct. The Committees also suggest that the term is inclusively defined, with clarification that the title of the officer in the relevant body corporate is not determinative, rather the focus is on the influence of the executive officer in relation to the relevant conduct.

34. The Committees also urge the Commission to also consider how Proposals 9 and 10 may be applied to AMLCTF law (although acknowledging that this legislation is outside the proposals as currently framed, which refer only to the *Corporations Act*) and how the proposals would interact with the Banking Executive Accountability Regime, given that all Australian banks are regulated for AMLCTF purposes. Duplicative penalties across regulatory frameworks for the same conduct should be avoided to ensure sensible, risk-based regulation and a clear deterrent for the sort of compliance failures detailed in Appendix A.

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.

35. The Committees note it is important to provide education to body corporates about the impact and implementation of new legislation, as well as educating their staff about the corporate whistleblowing protection policies. However, a whistleblower policy by itself is not a relevant consideration to show that an organisation has performed due diligence to prevent the commission of an offence. The danger of allowing this consideration is that it encourages a "'tick-the-box' approach to compliance which will inevitably fail to promote positive outcomes for whistleblowers without an ethical culture".[18]

---

[17] *Discussion Paper 86 (n 2) 7.104 citing Barac (trading as Exotic Studios) v Farnell* (1994) 53 FCR 193 [6].
[18] Dennis Gentilin, 'It's a new era for Australia's whistleblowers - in the private sector', *The Conversation* (Web Page, 19 July 2019) <https://theconversation.com/its-a-new-era-for-australias-whistleblowers-in-the-private-sector-119596>.

36. The implementation of the amendments of the *Corporations Act, Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) is aimed at creating systematic, cultural change across organisations. Ultimately, organisations should be encouraged to create systematic cultural changes within their organisations and a 'just enough' approach to compliance should be discouraged.
37. In saying that, the Committees recognise that, in the event that a corporation can demonstrate that its whistleblower policy was shown to be effective in encouraging persons to call out misconduct and come forward, the whistleblower protection policy should be considered as a relevant factor in assessing the extent of due diligence exercised by that corporation.

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?

38. The Committees recognise that some basis for the opposition to the bounty based system for whistleblowing was the potential prevalence of fraud, improper motivations and the high administration costs of a bounty scheme, which is the current statutory regime in the United States ("US").[19]
39. The Committees submit however that whistleblowers should be given a number of compensation options. For example, whistleblowers should be given fair compensation for the impact that speaking out has on the whistleblowers and their families. In *'"I wanted to die': High Price of Whistleblowing',*[20] multiple whistleblowers discussed facing economic hardship, homelessness and continued victimisation due to speaking out. Although the legislation provides protection for whistleblowers,[21] this fails to adequately protect vulnerable whistleblowers. South Korea's whistleblowing protection legislation," permits whistleblowers to request compensation for their expenses, such as mental or psychological treatment, removal costs due to job transfers and legal fees". [22] The Committees

---

[19] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblowers Protection* (Final report, September 2017) 123.
[20] Alex Turner-Cohen, 'I wanted to Die: High Price of Whistleblowing revealed', *News.com.au* (Web Page, 29 June 2019) <https://www.news.com.au/finance/work/at-work/i-wanted-to-die-high-price-of-whistleblowing-revealed/news-story/4eb21f0dfd11ba2444382f051c8b9b38>.
[21] Ibid.
[22] OECD (2017) The Detection of Foreign Bribery, Chapter 2, The Role of Whistleblowers and Whistleblower Protections <http://www.oecd.org/corruption/anti-bribery/OECD-The-Role-of-Whistleblowers-in-the-Detection-of-Foreign-Bribery.pdf>.

suggest that consideration should be given to putting in place appropriate support and protection measures for vulnerable whistleblowers.

40. The Committees submit that the compensation framework needs to address the financial and non-financial needs of whistleblowers. In *'I wanted to Die: High Price of Whistleblowing'*, a former Origin Energy whistleblower identified the high cost of litigation as a barrier to whistleblower protection.[23] The International Bar Association, in its 2018 report 'Whistleblower Protections: A guide', stated that "most whistleblowers without legal aid or other forms of financial assistance are unlikely to be able to bring a compensation claim in court either for unlawful termination or discrimination or harassment".[24] According to the UK whistleblowing charity, Public Concern at Work, drastic legal aid cuts meant that only 44% of whistleblowers were represented by lawyers, radically reducing their chances for success in subsequent litigation.[25]
41. The past experiences of whistleblowers indicate that it is imperative that any whistleblower compensation scheme take into account that many whistleblowers may not have the financial means or skills to find adequate representation in subsequent or retaliatory litigation. Consequently, any compensation scheme for whistleblowers must include compensation for legal fees and/or access to legal aid. By ensuring that compensation for legal fees and/or access to legal representation is included in any compensation arrangement this ensures that all Australians, regardless of means, are able to speak out against illegal behaviour whilst ensuring their financial and non-financial interests are protected.

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?

42. The globalisation of commerce means that domestic entities trade "multiple international borders through a web of subsidiaries and agents".[26] In order to maintain the integrity of the financial markets, "most countries have enacted some of anti-competitive conduct legislation"[27] to protect their citizens and/or markets.

---

[23] Turner-Cohen (n 20).
[24] International Bar Association, Legal and Policy Research Unit (2018) *Whistleblower Protections: A Guide* 30.
[25] International Bar Association, Legal and Policy Research Unit (2018) *Whistleblower Protections: A Guide.*
[26] Deborah Senz and Hillary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2(1) *Melbourne Journal of International Law* 69.
[27] Ibid [69]-[121].

43. Under a key principle of international law, "sovereign states have the right to extend the application of their laws to their citizens wherever they are located".[28] Accordingly, whistleblower legislation should be amended to apply to extraterritorial matters involving Australian companies operating in Australia and Australian citizens.
44. Many countries have far reaching extraterritorial legislation for financial crimes. For example, the US money laundering legislation explicitly states that it is intended to be applied extraterritorially. It applies to whoever transfers money the "from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States".[29]
45. Australia tends to take a conservative approach, and claims jurisdiction when the "entity involved is incorporated in or carrying on business in, or is a citizen or ordinary resident of Australia".[30] In *Morrison v NAB* (2010),[31] heard in the US Supreme Court, the Commonwealth Government argued that Australia has adequate legal and regulatory frameworks to address market fraud for businesses that operate in Australia. The Committees, however, support whistleblower protections can be applied extraterritorially to ensure the safety and integrity of Australian financial markets for Australian investors.
46. Furthermore, applying whistleblower protection extraterritorially for Australian companies and/or Australian citizens could have an impact beyond the regulation of the financial markets. One such example is the Australian – Canadian joint venture of Anvil Mining.[32] It has been alleged that Anvil Mining, operating a Congolese mining operation, provided transportation for the Congolese military personnel who committed war crimes against a local militia group. A number of expatriate executives (Canadian and South African citizens) were charged with complicity in war crimes but were ultimately acquitted.[33] The Committees are of the view that the application of whistleblower protections extraterritorially may assist in empowering employees of Australian companies or Australian citizens to speak out against illegal activity with legal protections under Australian law.

---

[28] Morrison v NAB, Supreme Court of USA, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in support of the Defendants. <https://www.sec.gov/litigation/briefs/2010/morrison0210.pdf>.
[29] 18 USC § 1956.
[30] *Competition and Consumer Act 2010* (Cth), s 5.
[31] Morrison v NAB (n 28).
[32] Sara Meger, 'Australia needs to act on conflict minerals', *The Conversation* (Web Page, 21 September 2012) <https://theconversation.com/australia-needs-to-act-on-conflict-minerals-9470>.
[33] Adam McBeth, 'Crushed by an Avil: A Case Study on Responsibility for Human Rights in the Extractive sector' (2008) 11(1) *Yale Human Rights and Development Law Journal* 167.

Proposal 14

The *Corporations Act 2001* (Cth) should be amended to require the court to consider the proposed 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.

47. It is the Committees' view that the introduction of statutory guidelines for sentencing factors under the *Corporations Act* is prudent and will assist the imposition of appropriate sentences. This is because such guidelines focus the attention of courts on factors beyond those currently contained in s 16A of the *Crimes Act 1914* (Cth) ("*Crimes Act*"), which are largely focussed on crimes committed by individuals. In addition, factors of particular relevance to corporations which are incorporated in Proposal 14 include the historical compliance of a corporation, whether an offending corporation has acted to repair harm, and the particular size of the corporation in question.
48. The Committees note that in relation to factor (e) of Proposal 14, relevant to the size of the corporation is the corporation's revenue, financial position and size of the corporation's market share. Further, the Committees are concerned that consideration of the size of the corporation should also include consideration of the corporation's subsidiaries, whether controlled directly or indirectly. The Committees note that some of these factors have already been considered in case law relating to civil penalties,[34] but urge the ALRC to consider whether these factors should be specifically identified in factor (e) of Proposal 14. The Committees note that the size of the corporation will be relevant to the size of the penalty that would achieve deterrence, and that deterrence is a relevant principle to consider when sentencing for a federal offence: see *Crimes Act* s 16A(j) and (ja). The Committees also acknowledge that there is some cross over between factor (e) and factor (i), as the corporation's size (including its revenue, financial position and number of subsidiaries) may indicate the corporation's level of sophistication and therefore what can be expected of the corporation in terms of establishing compliance mechanisms, for example, in cases where a court is required to determine the level of foresight of a corporation or its officers. The Committees nonetheless support the retention of factors (e) and (i) as separate factors.
49. The Committees note that factor (d) may be irrelevant, considering that factor (b) requires consideration of "any injury, loss, or damage resulting from the contravention". Further, if undue focus

---

[34] *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153, [1990] FCA 762, at [47]; Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd (2016) 118 ACSR 124, [2016] FCA 1516 at [88]; *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243, [2018] FCAFC 73 [257].

is placed on factor (d), parity in civil penalties may be undermined depending on the victim's circumstances..

Proposal 19

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

50. The Committees are in support of amendments to the *Crimes Act* to allow courts to order pre-sentence reports for corporations convicted of Commonwealth offences. The Committees note that current practice regarding pre-sentence reports varies across states. Therefore, to ensure consistency in pre-sentence reports for offenders in different states, any amendments to the *Crimes Act* need to comprehensively provide for a regime for pre-sentence reports for corporations to avoid s 68 of the *Judiciary Act 1903* (Cth) operating to apply State and Territory laws regarding pre-sentence reports to sentences for Commonwealth offences.[35] In doing so, the Committees do not have a particular preference for either an exclusive Commonwealth regime for such pre-sentence reports, or a roll-back mechanism similar to that supported by the Australian Law Reform Commission in its *Same crime, same time: sentencing of federal offenders* Report.
51. The Committees view this Proposal as particularly sensible should Proposal 15 be implemented, thereby providing more varied sentencing options for corporations that have committed a Commonwealth offence than currently exist. Although not separately addressed in these submissions, the Committees are broadly in agreement with Proposal 15 and would support the introduction of creative (but sufficiently certain) sentencing options that reflect the different nature of corporate offender, but also achieve the principles of sentencing in criminal law.
52. In the Committees' view, a pre-sentence report for a corporation should be prepared by an independent expert appointed by the Court, after both parties have had the opportunity to suggest suitable experts. The relevant expertise of the report writer could vary depending on the likely issues to be addressed in the report and the particular sentencing options under consideration. The

[35] Australian Law Reform Commission, *Same crime, same time: sentencing of federal offenders* (Report No 103, April 2006) [14.67]- [14.74]. See also Judicial Commission of New South Wales, 'Sentencing Commonwealth Offenders', Sentencing Bench Book (webpage) [16-000] <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_commonwealth_offenders.html>.

Committees agree that management consultants and organisational psychologists are likely to be suitable, and in certain cases, lawyers.

53. The Committees are concerned as to the potential delays and expense involved in sentencing corporations, but are nonetheless of the view that the utility of such reports outweighs these concerns.
54. The Committees are concerned about suggestions that corporations should be made to pay for the costs of the report, if this would be inconsistent with the practice of obtaining pre-sentence reports (or equivalent) for individuals. Further, the Committees are concerned that pre-sentence reports must be seen as objective, and wish to avoid a situation where corporate offences may have (or be seen to have) more influence over the process of the preparation of the report, or in choice of report writer, due to paying for reports. Instead, to save expense, the power to order pre-sentence reports should be discretionary, and guidance should be given to judges that it is not usually appropriate to order a pre-sentence report for a corporation in cases where the only sentencing option under consideration is a fine, and sufficient evidence relevant to the imposition of the fine (eg the size of the corporation, its revenue, market share and subsidiaries) can be obtained through other means.

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.

55. The Committees support Proposal 20 to amend the *Crimes Act 1914* (Cth) to permit the use of Victim Impact Statements ("VIS") in circumstances where the victim is not a natural person. Therefore, the Committees support the expansion of VIS to other body corporates and entities (for example, trusts or unincorporated associations) that have suffered particular harm due to the actions of a corporation. By limiting the consideration of VIS to assist the court in determining an appropriate sentence, the Committees believe that using VIS in cases of corporate crime would provide valuable information to the sentencing court. The use of such VIS would re-iterate to the Court, and to the broader public, the gravity and consequences of corporate crimes, any avoid a tendency to treat these as "lesser crimes". Further, for the reasons referred to above at [50] in the context of pre-sentence reports, if Commonwealth legislation were to comprehensively provide for the making of such VIS, there would

be greater consistency in the procedures adopted when sentencing corporate offenders, regardless of the state or territory in which the sentencing proceedings occur.

56. The Committees note, however, that there are potential problems with the use of VIS in this manner, and identify important considerations to be addressed in any such amendment.

Primary Purpose

57. The Committees consider that the primary purpose of introducing VIS for victims who are not natural persons should be to provide more information about the consequences and impact of corporate crime to enable the court to appropriately sentence such crimes. Other purposes such as vindicating victim rights and victim harm should be secondary to this primary purpose. That is not to say however, that the secondary purpose is not served at all.
58. This view is consistent with NSW jurisprudence relating to VIS and sentencing as informed by *R v Palu* [2002] NSWCCA 381 where Howie J stated:

> *"the attitude of the victim cannot be allowed to interfere with a proper exercise of sentencing discretion…Sentencing proceedings are not a private matter between the victim and the offender…a serious crime is a wrong committed against the community at large and the community itself is entitled to retribution".*[36]

59. The Committees are of the view that this position is appropriately reflected in the current s 16AB of the *Crimes Act*, and believe that this section should be amended so that it applies to criminal offences committed against corporations and other entities such as trusts and unincorporated associations. The Committees agree that the use of VIS, limited in this way, allows the sentencing court to provide a fair-minded approach to sentencing in order to uphold principles such as fairness and equality of those before the law; providing a balance between the community's interest in ensuring that sentences reflect the harm caused to the particular entity or corporation, and the defendant corporation's interest in the imposition of a sentence which fairly reflects the extent of its criminal culpability.
60. The Committees note a potential risk that sentencing courts will be unduly persuaded by VIS to sentence according to the individual circumstances of different victim corporations or entities. In *R v Previtera* (1997) 94 A Crim R 76 Hunt CJ at CL considered VIS provided by surviving family members, and stated (at 85-6):

> *"it would therefore be wholly inappropriate to impose a harsher sentence on an offender because the value of the life lost is perceived to be greater in one case than it is in another".*

[36] *R v Palu* [2002] NSWCCA 381 [37] (Levine J agreeing at [1], Hidden J agreeing at [2]).

61. By analogy, the risk identified in that passage may also extend to crimes committed against particular corporations or entities. The risk of imposing a harsher sentence because of the individual characteristics of the victim entity or corporation would throw doubt on a sentencing court's ability to uphold principles of equality, fairness and consistency before the law. The Committees submit, however, that sentencing judges are already aware of this risk in relation to VIS made by natural persons, and measures taken to mitigate that risk could be applied to VIS relating to corporations or entities.
62. The Committees are further concerned there may be a distinction drawn between a corporate crime which has an identifiable victim (whether than be another corporation, entity or an individual) and a corporate crime which is considered to be "victimless" or has no identifiable victim. The Committees are of the view that there may be a risk that in the latter case a lighter penalty may be imposed. Nonetheless, the Committees are of the view that any broader impacts caused to the community as a whole by corporate offenders, or even a section of the community, can be the subject of submissions, and taken into account by judges when sentencing.

Informing victims of VIS procedure

63. The Committees support the introduction of procedural requirements to provide victim corporations or entities and their representatives who intend on preparing a VIS with information as to the proper form and purpose of a VIS. In this regard, the creation of a practice note would be beneficial; clearly stating what outcomes the sentencing court is seeking to avoid and what kind of information would be useful to include in the VIS to best assist the court.
64. This would allow management of expectations and transparency of the process to allow victim corporations and entities to participate in proceedings. The Committees note observations that:

    "the ability of victims to prepare and present VIS can enhance their satisfaction and participation in the criminal justice system".[37]

65. The Committees are concerned that issues may be raised as to the authority of a representative preparing VIS to speak on behalf of a corporation or entity. The Committees submit that in the interests of avoiding undue delay and costs, prosecutors serve the VIS on the defendant prior to the sentencing hearing. There should then be a time limit imposed by which any challenge to the authority of the representative making the VIS is to be raised by the defendants (and before the sentencing hearing). If no objection is made, the VIS is to be tendered automatically.
66. The Committees submit that, if the authority to make the VIS is challenged, one way in which the issue of authority could be resolved by the prosecution is by the provision of an affidavit filed by a

[37] Sam Garkawe "Victim Impact Statements and Sentencing" (2007) 33(1) *Monash University Law Review* 90, 93.

representative of the responsible entity or corporation affirming that a majority of the senior management/board of the corporation have agreed that a representative is authorised to prepare the VIS on behalf of the entity or corporation.

Concluding Comments

67. NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:

[redacted]

David Edney

President

NSW Young Lawyers

[redacted]

Alternate Contact:

[redacted]

Olga Kubyk

Chair

NSW Young Lawyers Business Law Committee

[redacted]

Alternate Contact:

[redacted]

Lauren Mendes

Chair

NSW Young Lawyers Criminal Law Committee

[redacted]

Appendix A

AMLCTF Case Study

1. The AMLCTF regime prescribes a series of specific obligations on a regulated entity, targeted at detecting and disrupting financial crime risk. These obligations are contained in the entity's AMLCTF program.[38] Two of the three types of AMLCTF programs are split into "Part A" and "Part B".[39] All obligations apart from customer due diligence are contained in Part A. Part A:

   > *must be approved by its governing board and senior management. Part A must also be subject to the ongoing oversight of the reporting entity's board and senior management. Where the reporting entity does not have a board, Part A must be approved and overseen by its chief executive officer or equivalent.*[40]

2. Also, Part A requires regulated entities to 'designate a person as the "AML/CTF Compliance Officer" at the management level'.[41] Regulated entities are required to comply with Part A.[42] The legislation thus directly targets senior management of regulated entities as well as individuals who are designated as above. This is within the context of the role of senior management in corporate governance and compliance in general:

   > *The Board delegates to the Chief Executive Officer (CEO) and senior management primary ownership and responsibility for implementing sound risk management practices and controls in line with the risk appetite. It is management's job to provide leadership and direction to the employees in respect of risk management, and to control the institution's overall risk-taking activities in relation to the agreed appetite for risk.*[43]

<u>Role of senior management</u>

3. The Commonwealth Bank of Australia ("CBA") provides a useful case study on the role of senior management in serious AMLCTF compliance shortcomings of a regulated entity and provides support for the incorporation of the provision in the Proposal 9. The latter were reported to them by 'personnel

---

[38] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) pt 7.
[39] Ibid ss 84(1)(b), 85(1)(b).
[40] *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) rr 8.4.1, 9.4.1.
[41] Ibid rr 8.5.1, 9.5.1.
[42] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 82(1).
[43] John Laker, Jillian Broadbent and Graeme Samuel, *Prudential Inquiry into the Commonwealth Bank of Australia* (Report, 30 April 2018) 10.

engaged in direct responsibility and oversight of the [CBA's AMLCTF function]'.[44] Through its senior management, the CBA was aware of these deficiencies in compliance, including in relation to high-risk customers whom it was warned about by NSW and WA Police,[45] and yet failed to address them. The inquiry into the CBA raised queries relating to the bank's Executive Committee — its 'most senior management forum' and which 'provides advice in relation to issues, such as CBA's strategic direction and risk appetite, which are within the authority of the Board, CEO or a Group Executive'.[46]

4. The inquiry's report considered the bank's AMLCTF compliance failures to stem 'in part, attributable to a lack of collective ownership and understanding of AML-CTF risk at the Executive Committee level',[47] which could be addressed by a civil penalty provision that would have the effect of deterring compliance breaches. The results of the bank's contraventions partly comprised the laundering of millions of dollars through the CBA by serious organised criminal 'syndicates involved in the importation and distribution of drugs including methamphetamine'.[48] The bank itself was ordered to pay a $700 million civil penalty, the 'largest civil penalty in Australia's corporate history'.[49]
5. One should note that the CBA case represents one in a panoply of penalties for AMLCTF compliance breaches by various multinational financial institutions. HSBC forfeited over US$1.2 billion as part of a deferred prosecution agreement in 2012. Its conduct comprised 'stunning failures of oversight – and worse – that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries'.[50] In 2014, BNP Paribas paid a US$8.9 billion penalty for violations of US sanctions law, going to 'elaborate lengths to conceal prohibited transactions, cover its tracks, and deceive U.S. authorities'.[51] Closer to home, one should also note the application by AUSTRAC for civil

---

[44] Chief Executive Officer of the Australian Transaction Reports and Analysis Centre and Commonwealth Bank of Australia, *Statement of Agreed Facts and Admissions* (Statement of Agreed Facts and Admissions No NSD1305 of 2017, 2018) 28.
[45] Ibid 13.
[46] John Laker (n 43) 22.
[47] John Laker (n 43) 23.
[48] Chief Executive Officer of the Australian Transaction Reports and Analysis Centre and Commonwealth Bank of Australia (n 44) 17.
[49] 'AUSTRAC welcomes Federal Court orders for CBA penalty', *Australian Transaction Reports and Analysis Centre* (Media Release, 20 June 2018) <https://www.austrac.gov.au/austrac-welcomes-federal-court-orders-cba-penalty>.
[50] 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement', *United States Department of Justice* (Press Release, 11 December 2012) [4] <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>.
[51] 'BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions', *United States Department of Justice* (Press Release, 30 June 2014) [3] <https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>.

penalty orders against Westpac in relation to over 23 million alleged breaches of AMLCTF law.[52] In 2018, National Australia Bank also stated that compliance with AMLCTF obligations may be challenged due to the large volume of transactions that the Group processes and the limitations of internal AMLCTF controls, and admitted the following:

> *The undetected failure of internal AML/CTF controls, or the ineffective implementation or remediation of compliance issues, could result in a significant number of breaches of AML/CTF obligations and significant monetary penalties for the Group.*[53]

6. These types of actual and potential compliance failures and challenges — as well as the resultant compromises of national security, and facilitation of organised crime — may not develop in isolation. They may occur due to the limitations of boards and senior management, including designated AMLCTF compliance officers, to exercise their oversight functions under relevant AMLCTF legislation. Individuals are not fulfilling their legal responsibilities and must be held to account where required. The necessity of individual accountability is synchronous with the Commission's own opinion: 'Where corporate officers have clear responsibilities to prevent corporate misconduct, and where the relevant individuals fail to take reasonable measures to do so, they should be personally liable'.[54]

---

[52] 'AUSTRAC Applies for Civil Penalty Orders against Westpac', *Australian Transaction Reports and Analysis Centre* (Media Release, 20 November 2019) <https://www.austrac.gov.au/about-us/media-release/civil-penalty-orders-against-westpac>.
[53] National Australia Bank, *Annual Financial Report 2019* (Report, 15 November 2019) 25.
[54] *Discussion Paper 87* (n 2) 145.