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By Email

Dear Mr Corrigan

Submission on Corporate Criminal Responsibility Discussion Paper 87

We are grateful for the opportunity to provide a submission on the Australian Law Reform Commission (**ALRC**) discussion paper on Australia's corporate criminal responsibility regime (**Discussion Paper**) and for your consideration of this submission after the closing date.

Our firm has extensively advised clients in corporate criminal and civil liability matters. Drawing on that experience and comments we have received in relation to the Discussion Paper, this submission relates to certain issues canvassed in the Discussion Paper.

We would be pleased to discuss any aspect of our submission with you.

As an overarching comment, although the ALRC's Terms of Reference focus on corporate criminal responsibility, we see this review as necessarily raising more holistic questions about the framework to determine proscribed conduct, underlying penalty provisions (both civil and criminal), and the actors (corporate and individual) who should bear responsibility for such conduct.

This approach is touched on in the ALRC report however, we think it useful to ask the following questions:

1. Is it necessary to have a penalty provision in the first place. This would include looking at the nature of the offence and whether it was required or adds to a system of overregulation.
2. If there is a strong argument for the imposition of a penalty, the first approach should be the imposition of civil liability only. Depending on the offence and the severity of the consequences of not obeying, the penalties could be adjusted.
3. After 1 and 2, it is necessary to consider whether there is any merit in imposing a criminal sanction against a corporation. We comment more specifically on this below in relation to specific proposals in the Discussion Paper.
4. As a separate and distinct investigation, it should only then be asked what personal criminal sanctions are appropriate. This should take account of the severity of imposing a criminal penalty in the business context and the scope of the existing criminal law.

To avoid over-criminalisation (which the ALRC has commented upon in the Discussion Paper), we agree with the ALRC that criminal sanctions should only be imposed with very strong justification. Further clarity and consideration is required of a number of the proposals canvassed in the Discussion Paper, particularly in relation to any changes to the method for attributing liability to corporations, and individual liability for corporate conduct.

We set out some more specific comments below.

1 Chapter 4: Recalibration of corporate regulation

We agree with the ALRC's analysis that there is an over-proliferation of offences that apply to corporations, and in many cases, criminalisation is not reserved for the most serious breaches of the law.[1] This has resulted in undue complexity and duplication which, in our view, necessitates reform. We agree with ALRC's Proposal 1 to recalibrate the regulation of corporations so unlawful conduct is divided into the following three categories:

(a) criminal offences;

(b) civil penalty proceeding (**CPP**) provisions; and

(c) civil penalty notice (**CPN**) provisions.

This recalibration should maintain a principled distinction between criminal and civil regulation of corporations, such that criminalisation is reserved for the most serious forms of misconduct. In this regard, we also agree that the same conduct should not be prohibited by both a criminal offence and a CPP provision, unless the criminal offence captures a greater level of wrongdoing (such as by requiring proof of a fault element beyond reasonable doubt).

We also broadly support Proposals 2 to 4 and, in relation to Proposal 4, consider the mechanisms for withdrawal of and court challenges to a CPN are an important element of that proposal to ensure public accountability of the actions of regulators and confidence in the regulatory system.

We consider the combined effects of these proposals will be to limit the application of criminal offences to corporations to only those where the designation of criminality is warranted. However, as these proposals will affect numerous provisions across a number of different pieces of Commonwealth legislation, it will be important for there to be further consultation when the process of re-categorising existing provisions is undertaken.

In relation to Proposal 5, we hold concerns that the circumstances in which a particular contravention can be escalated within the proposed regulatory pyramid is uncertain. For example, in relation to previous contraventions of a CPP or CPN provision, it is unclear if there would be any requirements in relation to the number or nature of previous contraventions, or for similarity of circumstances or temporal limitations for previous contraventions, or if the ALRC is proposing a strict liability offence for any circumstance in which a company contravenes the same CPP or CPN provision. We note, as well, that the examples provided in paragraph 4.48 of the Discussion Paper relate to escalating penalties for or aggravated forms of criminal offences, rather than escalations from civil prohibitions to criminal prohibitions.

Further, greater clarity should be provided in relation to the circumstances where the ALRC considers that flouting or flagrant disregard of a civil prohibition should be escalated to a criminal offence. It may be that the ALRC intends to propose the creation of a separate criminal offence with an additional fault element, but the substance of that offence and the applicable fault element is presently unclear.

Given the importance of certainty in provisions leading to punitive consequences, in our view, if certain misconduct attracts a civil rather than criminal penalty, a better approach for aggravated or repeated instances of that misconduct would be for that conduct to still be addressed civilly, but with increased penalties. We note, if the ALRC's proposal relating to the availability of broader non-monetary penalties for misconduct is implemented, this will give greater flexibility to address aggravated or repeated instances

[1] See particularly, Discussion Paper, paras 4.9 to 4.11.

of civil misconduct. A further alternative may be to legislate increased penalties where there are aggravating circumstances.

HSF Recommendation 1: We support the recalibration of the regulation of corporations into criminal offences, CPP provisions and CPN provisions, but there should be further consultation and opportunities for submissions when the process of re-categorising existing provisions is undertaken.

HSF Recommendation 2: Aggravated or repeated contraventions of an otherwise CPP or CPN provision should be addressed in the applicable penalty rather than by re-classification of the conduct as a criminal offence.

2 Chapter 6: Single legislative attribution method for corporations

In principle, we agree that a single method to attribute liability to corporations is preferable; indeed, Part 2.5 of the *Criminal Code* represents a policy decision to codify and implement a unified regime.

Unfortunately however, as noted in the Discussion Paper, for reasons which are not entirely clear (and may simply be the legislature's then-satisfaction with the applicable attribution method in use when Part 2.5 of the *Criminal Code* came into effect),[2] the operation of Part 2.5 was excluded from a number of pieces of federal legislation. Multiple attribution methods combined with over-criminalisation of conduct generally has resulted in undue complexity in regimes applying to corporates. However, even if a uniform approach was adopted at a federal level, we note some degree of complexity will remain, because corporations will still need to grapple with differing attribution methods in relation to breaches of State criminal laws.

Nevertheless, recalibrating the regulation of corporations so that there is a principled distinction between criminal and civil prohibitions, coupled with consistent implementation of a unified attribution method will go a long way towards ensuring the regulation of corporations is done on a principled and consistent basis.

It is admittedly difficult, however, to determine what that unified attribution method should be, especially when little explanation has been provided in relation to the decision to exclude Part 2.5 of the *Criminal Code* from numerous federal provisions and prosecutions against corporations for serious offences have been historically low (which limits the source data to assess the effectiveness of the various methods).

In any event, we hold a number of concerns in relation to the single attribution method presently proposed by the ALRC, namely:

(a) **the proposed definition of "associates" is overly broad.** It expands the persons whose conduct and state of mind may be attributed to a corporation to include contractors, subsidiaries and controlled bodies. Further, it does not contain any requirement equivalent to that contained in Part 2.5 of the *Criminal Code* or the "TPA Model" described in the Discussion Paper[3] that, in relation to the physical element of an offence, the relevant individual must be acting with the actual or apparent scope of their employment or actual or apparent authority. The Discussion Paper does not address why this requirement has been removed. While the TPA Model and the proposed definition of "associate" incorporate a concept of acting "on behalf of" a body corporate, the broad definition of "associate" would apparently attribute the conduct of a wider range of actors without any requirement that the conduct was in some way authorised by the body corporate (beyond the existence of a relationship with the

[2] Discussion Paper, para 3.49.

[3] See Discussion Paper, paras 5.78 to 5.83.

associate). As an example of its broad reach, under the proposal, a contractor supplying services to a company could enter into a cartel to fix the price of those services to the detriment of the company, but the company might also technically be liable for that misconduct of the contractor as an 'associate'. While this example is artificial in that it is unlikely the company would be prosecuted in those circumstances, it nevertheless demonstrates the breadth of the proposal;

(b) **the proposed attribution method does not appropriately capture the notion of corporate fault or organisational blameworthiness.** Given any conduct of an associate of a body corporate is deemed to have been engaged in also by the body corporate[4] and the state of mind of that associate may be attributed to the body corporate,[5] to avoid automatic liability for what may be the action of rogue individuals, it will be necessary for the body corporate to prove it exercised due diligence to prevent that conduct. It would be a significant shift in the criminal law to universally apply an attribution method which effectively deems a body corporate liable for a wide variety of actors to all crimes regardless of whether the corporate's actions are morally blameworthy. As set out below, we do not consider the availability of a due diligence defence sufficiently addresses this concern;

(c) **availability of a due diligence defence.** while the ALRC considers a due diligence defence, which allows a corporation to prove a lack of culpability, would ensure the criminal law regime captures the notion of corporate fault or organisational blameworthiness,[6] in our view, it ought be the prosecution who is obliged to establish organisational culpability. We also do not agree that a corporation is necessarily in a better position than the prosecution to provide evidence in relation to due diligence,[7] because, in practice, corporate misconduct is often first investigated by regulators which have robust investigatory powers and can obtain information on the preventative procedures the corporation had in place. Accordingly, if any burden is to be imposed on the corporation in relation to due diligence measures, we consider it should be an evidentiary burden only.

Further, while the availability of a due diligence defence is ostensibly attractive, in practice, it can be difficult to establish. This is particularly so in circumstances where the proposed defence requires the corporation to prove due diligence was exercised to prevent conduct, when, as a matter of fact, the conduct has not been prevented. Accordingly, clear guidelines will be necessary so that corporations know the requirements that must be met;

(d) **greater clarity is needed with respect to the proposed changes to Part 2.5.** While we appreciate the ALRC is not a legislative drafting body, the proposed revised draft of key sections of Part 2.5 of the *Criminal Code* is unclear in a number of respects. For example, it is not entirely clear whether the ALRC intends for the non-exhaustive list of ways a prosecution may establish a corporation authorised or permitted misconduct presently contained in s 12.3(2) of the *Criminal Code* is to remain in the legislation. That list includes having regard to the culture of the corporation. We understand the ALRC intends its proposed redraft of ss 12.2 and 12.3 of the *Criminal Code* would entirely replace those existing provisions and, in this regard, the ALRC has

[4] See proposed redraft of s 12.2 of Part 2.5 of the *Criminal Code*, Discussion Paper, p 129.

[5] See proposed redraft of s 12.3(1)(a) of Part 2.5 of the *Criminal Code*, Discussion Paper, p 129.

[6] Discussion Paper, para 6.21.

[7] Discussion Paper, para 6.25.

indicated it considers the list in s 12.3(2) to be unnecessary.[8] However, the ALRC has also indicated that it remains open to a prosecutor to prove that a corporation authorised or permitted the conduct by reference to a particular corporate culture,[9] which is seemingly inconsistent with repealing an express reference to corporate culture in the legislation. In our view, legislative guidance on the ways in which a corporation may authorise or permit misconduct should be maintained, as to provide no legislative guidance will result in ambiguity and uncertainty;

(e) **implications for charities.** the proposal will create different compliance burdens on charities, as those charities that operate as a public company limited by guarantee will be impacted by the proposal, whereas those charities that are not companies will not. Further, it is difficult to see how this expansion of criminal responsibility for corporations is justified for charities that have a corporate structure. It would represent a significant regulatory burden not commensurate to the risks for the charity or the public. Further, the proposed due diligence defence may add significant compliance burden and costs to charities, particularly if any guidance is not relevant to areas of operation for most charities. Most charities will neither have the legal expertise, nor resources to obtain the legal expertise, to put in place additional compliance procedures for such an expansion of how corporate criminal responsibility could arise. This would disadvantage the public due to the application of funds intended for the public benefit being caught up in administration.

HSF Recommendation 3: We support the implementation of a uniform attribution method, but further consideration should be given to: (a) the proposed method so that it better aligns with notions of corporate fault and organisational blameworthiness, and (b) whether the method should be applied to charities which are companies.

3 Chapter 7: Individual liability for corporate conduct

We understand Proposals 9 and 10 are intended to adopt a single deemed liability model in relation to the circumstances in which senior corporate officers may be liable for corporate misconduct.

We accept the policy position that there can be a need to hold senior officers to account for serious corporate misconduct in circumstances where accessorial liability may not be established, and a unified method is preferable so that individuals know the standards they are required to meet.

As part of its review, the ALRC has identified, in Appendix I to the Discussion Paper, 26 separate provisions which currently establish individual liability for corporate conduct;[10] however, the ALRC has indicated that it has not yet determined which of the existing provisions should be replaced by the proposed uniform method, or if there any other provisions which should be replaced.[11]

The ALRC has indicated that the proposals are intended to harmonise the current law[12] and do not introduce a new kind of liability or impose any new obligations or burden on

[8] Discussion Paper, paras 6.14.

[9] ALRC, *Corporate attribution – principled simplicity* (27 November 2019) <https://www.alrc.gov.au/news/corporate-attr bution-principled-simplicity/>.

[10] Discussion Paper, para 7.36 and Appendix I.

[11] Discussion Paper, para 7.126 and Question B, page 171.

[12] Discussion Paper, para 7.82.

officers in relation to corporate fault.[13] Further, the ALRC has indicated that its proposed liability model is tied to the corporation committing one of a specified set of serious offences.[14]

However, it appears that Proposals 9 and 10 do introduce a new kind of personal liability on senior officers. In particular, for a number of provisions in Appendix I, the proposals may impose liability on officers where none likely previously existed under those provisions. For example, s 233(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (*AML Act*) which is included in Appendix I covers the situation where an individual has deemed liability for the conduct of another person (which includes a corporation) where that other person is an employee or agent of the individual. This situation is seemingly fundamentally different to a situation where a senior officer of a corporation is liable for misconduct of a corporation, as the corporation (or the individuals through whom the corporation acts) would rarely also be an employee or agent of the officer.[15] Greater clarity is therefore needed on the specified set of serious offences to which the ALRC proposes individual liability is to apply.

In relation to the uniform method currently proposed by the ALRC, we hold the following reservations:

(a) **the degree of influence an individual must have over the corporation's conduct is unclear.** Although the proposals are aimed at senior executives, in practice, the concept of "influence" may set too low a bar, particularly in large groups where many roles have a degree of influence (though not necessarily control) over the corporation's conduct. We suspect the intention is to impose liability on senior officers who have some level of control or supervision over the particular conduct, but the concept of "influence" may not achieve this intention and, instead, have broad and unintended consequences. For example, an individual who sits on a decision-making or risk committee might be considered to be in a position to "influence" the actions of a corporation, regardless of whether they have a role in managing the particular conduct in issue;

(b) **procedural concerns arising with prosecution of an individual absent prosecution of the corporation.** The Discussion Paper indicates that it would not be necessary to secure a conviction against the corporation before prosecuting an individual, but that the elements of the offence engaged in by the corporation would need to be made out during the prosecution of the individual.[16] This raises a number of procedural concerns from the perspective of the individual. For example, if a due diligence defence for corporations is introduced as proposed by the ALRC, who bears the burden of establishing that the defence would not have been available to the corporation? Further, it is unlikely that an individual will have the same means or information to challenge the prosecution's case that the corporation engaged in the relevant conduct. As indicated above, it should be the responsibility of the prosecution to establish the organisational blameworthiness of the corporation before a burden of proof shifts to the defendant;

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[13] ALRC, *When should officers be liable for corporate crime?* (19 November 2019) <https://www.alrc.gov.au/news/when-should-officers-be-liable-for-corporate-crime/>.

[14] ALRC, *The Banking Executive Accountability Regime: an alternative model of individual liability for corporate fault* (19 December 2019) <https://www.alrc.gov.au/news/the-banking-executive-accountability-regime-an-alternative-model-of-individual-liability-for-corporate-fault/>.

[15] This point applies to a number of the other provisions identified in Appendix I, for example: s 139C(2) *Australian Consumer Law (Competition and Consumer Act 2010* (Cth) Sch 2); s 84(4) *Competition and Consumer Act 2010* (Cth); s 498B(3) *Environment Protection and Biodiversity Conservation Act 1999* (Cth); 145A(4) *Excise Act 1901* (Cth); s 325(1) *National Consumer Credit Protection Act 2009* (Cth); s 338(5) *Superannuation Industry (Supervision) Act* 1993 (Cth); s 576(3) *Telecommunications Act 1997* (Cth).

[16] Discussion Paper, para 7.73.

(c) **significant expansion of liability.** The ALRC has already identified that, in some instances, Proposal 9 would lower the burden for establishing civil liability by removing a fault element that presently exists in the relevant legislation.[17] While the ALRC asserts this is balanced by providing a defence of reasonable measures and retaining a fault element for criminal proceedings in relation to the same conduct,[18] for reasons similar to those outlined in relation to the due diligence defence, we do not consider providing a defence (for which the senior officer bears the legal burden) is sufficient to justify the expansion of liability;

(d) in relation to the reasonable measures defence:

(1) Proposal 9 indicates that it is the senior officer who is to prove that he or she took reasonable measures to prevent the contravention. The ALRC has not specifically addressed why it is appropriate to impose this burden on the officer and, in some cases, the proposal will presumably reverse an existing burden on the prosecution to prove the officer "failed to take reasonable steps to prevent the commission of the offence".[19] In our view, the burden of proof should be on the prosecution; and

(2) If the Proposal were to proceed, guidance on what constitutes reasonable measures should be provided, so that individuals and corporations have clarity on what is required and understand the nature of the procedures to implement to avoid individual liability under the provisions. In this regard, we consider the legislation should contain a conceptual description of the concept of reasonable measures and a non-exhaustive list of factors relevant to establishing them. More specific guidance should then be set out in regulation or in guidelines that have regulatory force.

(e) **Interaction with Financial Accountability Regime (FAR) proposals.** We note that the Australian Government released a proposal paper on 22 January 2020 in relation to FAR, i.e., extending the Banking Executive Accountability Regime (**BEAR**) in line with the recommendations made by the Financial Services Royal Commission. The proposal includes extending the BEAR to all APRA-regulated entities and imposing obligations on accountable persons to take reasonable steps in conducting their responsibilities as an accountable person to ensure the entity complies with its licensing obligations.[20] The Government has also affirmed its commitment to extend the executive accountability regime to entities regulated solely by ASIC and has indicated it will progress this commitment following the initial implementation of the regime to all APRA-regulated entities.[21] The ALRC's proposals in relation to individual liability will necessarily overlap to some degree with the proposed extension of responsibilities of accountable persons under the FAR. Given there may be overlapping, but not identical, obligations under the ALRC's proposals and the FAR, we hold concerns that this will result in increased complexity and uncertainty for individuals required to comply with both sets of obligations.

[17] Discussion Paper, para 7.89.

[18] Discussion Paper, para 7.90.

[19] See, for example, *Therapeutic Goods Act 1989* (Cth), s 54B(1); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 494(1) and 495(1).

[20] Commonwealth, *Implementing Royal Commission Recommendations 3.9, 4.12, 6.6., 6.7 and 6.8 – Financial Accountability Regime*, Proposal Paper (2020) 4 and 6.

[21] Commonwealth, *Implementing Royal Commission Recommendations 3.9, 4.12, 6.6., 6.7 and 6.8 – Financial Accountability Regime*, Proposal Paper (2020) 2 and 10.

HSF Recommendation 4: Greater clarity is needed with respect to the scope of offences to which individual liability is proposed to apply and the individual liability regime proposed should more clearly delineate those individuals at risk of liability and the obligations they are to meet.

4 Chapter 9: Deferred prosecution agreements

We generally support the introduction of a deferred prosecution agreement (**DPA**) scheme, and note that the Federal Government introduced the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (**2019 Bill**) into the Senate on 2 December 2019, which seeks to introduce a DPA scheme.

The 2019 Bill is substantially similar to the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, which also sought to introduce a DPA scheme, but which lapsed on 1 July 2019.

The Law Council of Australia has previously made submissions about the DPA scheme proposed in 2017,[22] and we support those submissions.

We note, in particular, for the DPA scheme to be successful, it will be important that there are sufficient incentives and certainty for corporations to self-report and participate in the process; in this regard, we consider there needs to be greater certainty over potential outcomes, clarity over penalty discounts and precise guidance on what is required to qualify.

We also query whether the protections afforded in relation to the admissibility of documents created during the negotiating of a DPA are overly restrictive, as s 17H(1)(b) of the 2019 Bill applies only to documents created "solely" for the purpose of negotiating a DPA. We consider a dominant-purpose test is more appropriate. Further, so as not to discourage corporations from engaging in the negotiation of a DPA, we consider the protection of s 17H(1) should extend to information or documents obtained as an indirect consequence of a disclosure of otherwise protected documents or information, contrary to what is presently provided for in s 17H(4) of the 2019 Bill.

While we agree the DPA scheme should initially only be available to corporations, we consider that any subsequent review of the scheme should consider whether it should be extended to individuals. This may assist with enhancing individual accountability, which seemingly has not yet been achieved in the UK, given no individuals have been convicted for conduct the subject of the DPAs agreed to date under the UK model.

HSF Recommendation 5: The DPA scheme proposed by the 2019 Bill should provide greater certainty in relation to the appropriateness of entering into DPAs, potential outcomes and penalty discounts, and ensure adequate protection of information and material created during the negotiation process.

5 Chapter 10: Sentencing corporations

We support the insertion of sentencing guidelines for corporations in legislation as proposed by the ALRC, which we consider will provide greater certainty and promote transparency and consistency in the sentencing process.

We also consider that it is important for judicial discretion to remain broad and it is therefore important that the factors contained in Proposals 13 and 14, which in our view

[22] Law Council of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (9 February 2018) <https://www.lawcouncil.asn.au/resources/submissions/crimes-legislation-amendment-combatting-corporate-crime-bill-2017>; Law Council of Australia, *A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (3 May 2017) <https://www.lawcouncil.asn.au/resources/submissions/a-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia>.

are sensible, are expressed to be non-exhaustive, with the weight to be applied to the various factors to be determined on a case-by-case basis.

We support the introduction of a range of non-monetary penalties for corporations, in conjunction with monetary penalties as appropriate, as this can assist a court in applying a penalty that is appropriate for the circumstances of the particular case, and facilitate the purposes of sentencing as a result.[23]

In relation to the more severe forms of non-monetary penalties proposed, namely, disqualification and dissolution orders, there should be clear guidance on when those penalties are appropriate and their availability should be limited to circumstances when no other penalty is considered sufficient.

Any development of a unified debarment regime should carefully consider which offences should be subject to that regime, including limiting the regime to those offences of particular concern in a procurement process, such as bribery. If a debarment regime is developed, it will also be important for there to be accountability and transparency in debarment decisions, guidance in relation to potential periods of debarment and an ability for debarment to be lifted if a corporation can demonstrate it has remedied the relevant deficiencies.

HSF Recommendation 6: We support the proposals for sentencing guidelines for corporations to be enshrined in legislation and for a broad range of sentencing options to be available. There should continue to be flexibility for the court to determine, and the parties to make submissions in relation to, the sentencing factors of relevance to and the appropriate sentencing options for a particular case.

6 Contact details

If you have any questions or would like to discuss this submission, please contact any of the following:

Name	Telephone	Email
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[redacted]	[redacted]	[redacted]

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[23] See Discussion Paper, para 10.55.