Business Council of Australia

SUBMISSION

Australian Law Reform Commission - Review into Australia's corporate criminal responsibility regime

February 2020

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INTRODUCTION

This is the Business Council of Australia's submission in response to the Australian Law Reform Commission's (ALRC) discussion paper on Corporate Criminal Responsibility.

In April 2019, the federal government asked the ALRC to undertake a comprehensive review of the corporate criminal responsibility regime, specifically Part 2.5 of the Criminal Code.[1]

Primarily, the government asked the ALRC to consider what reforms are needed to:

- improve the effectiveness of Australia's corporate criminal liability regime, and
- ensure senior corporate officers are properly held liable for misconduct by corporations.

The Business Council supports strong and effective regulation that deters unlawful conduct by corporations and protects Australian consumers. The Business Council shares the ALRC's concern that corporate regulation in Australia is becoming excessively complex and inconsistent and that it over-reaches in some areas. The ALRC review is an opportunity to set out an appropriate and consistent framework for all existing and future corporate regulation.

The ALRC's review follows a period of substantial reform of laws applying to corporate conduct. Between 2016 to 2019, we estimate that just under 30 business integrity bills passed the Senate.

As is noted in the discussion paper, the ALRC's review is also being conducted in parallel with legislative reform initiatives concerning deferred prosecution agreements, foreign bribery offences and illegal phoenix companies.

At a time of substantial regulatory change, it is important that the ALRC's proposals are cognisant of the interaction of any changes in the law and the cumulative impact on business.

BCA RESPONSE

The Business Council's response to the ALRC's proposals is set out below. The Business Council met with ALRC officials in late January 2020 and understands that revisions to some of the proposals are currently being contemplated.

- The review's final recommendations for corporate regulation should be consistent with the government's objectives for economic growth, its best practice regulation principles and the objectives of the deregulation taskforce to lower the costs of regulation while retaining the benefits.
- The Business Council supports the ALRC's desire for the law to draw a clear and principled distinction between corporate criminal and civil liability, and for criminal prosecution to be limited to offences that rightly deserve such denunciation. The Business Council therefore generally supports Proposals 1 – 7, subject to the below exceptions:

[1] Part 2.5 of the Criminal Code prescribes the methods by which a corporation may be liable for a criminal offence under Commonwealth legislation. The provisions in Part 2.5 are a recognition that the corporate form requires a different approach to ascribing conduct and intent for the purposes of the criminal law to that of an individual.

  - If Proposal 4(a) is accepted and fixed penalties are to apply to all Civil Penalty Notices (CPNs), then the fixed penalties should be appropriately calibrated by the legislature to the circumstances of each contravention.
  - The Business Council is concerned at the potential operation of Proposal 5, which would criminalise repeat or flagrant civil breaches of the law, and seeks further clarity on how this proposal would work in practice.

- All future reforms of corporate regulation should be carried out within a simple and consistent framework, in accordance with the administrative mechanism in Proposals 6 and 7. This will deter ad hoc and fragmented approaches to determining corporate liability.
- The federal government should encourage states and territories to implement reforms in parallel with Proposal 1 to 3. Without consistency across jurisdictions, the efficiency benefits from the proposed federal reforms could be significantly diluted.
- The Business Council is concerned that Proposal 8, which would see the conduct and state of mind of 'associates' of a body corporate be attributed to the corporation, could, if applied indiscriminately as the single attribution method for all categories of offences, unreasonably broaden the potential liability faced by corporations and impose unmanageable compliance obligations.
- The Business Council does not support Proposal 9, which could subject officers in a position of influence to a civil penalty when a corporation commits an offence, as it would unreasonably broaden the potential liability faced by senior office holders within corporations. This could deter experienced and talented staff from accepting employment opportunities due to unmanageable risks.
- The Business Council supports Proposal 11. An effective whistleblower policy is an important corporate governance measure to ensure employees are empowered to report instances of unlawful conduct.
- In response to Question E, the Business Council supports the introduction of Deferred Prosecution Agreements (DPAs) in Australia that is proposed by the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017. In addition, the Business Council suggests the use of DPAs could be expanded to apply to a broader range of offences.
- The Business Council seeks further information on the potential operation of Proposals 15 to 18. It is not clear when some of the more extreme non-monetary penalties would be considered appropriate and how they would operate in practice.
- The Business Council supports Proposal 23. The establishment of a 'director identification number' register is necessary to limit the opportunities for a company and its directors to engage in illegal phoenixing activities.

Further discussion on the ALRC proposed reforms is provided in Appendix A. The Business Council is looking forward to the ALRC's release of supplementary policy papers in mid-February, as was foreshadowed in our recent consultation session with ALRC staff. We will respond to any revised proposals at the ALRC's seminars scheduled to commence in late February.

Appendix A: Policy discussion

This section provides further comment on the ALRC's individual proposals under the subject headings in the ALRC's discussion paper.

Appropriate and Effective Regulation of Corporations (Proposals 1-7)

The ALRC has proposed a new model for corporate regulation in proposals 1-7 that adopts a 'principled distinction between criminal and civil regulation'.

As stated by the ALRC in its discussion paper, Proposals 1 to 4 and 6 and 7 have the potential to 'reduce the number of criminal offences applicable to corporations and ensure criminalisation is reserved for the most serious misconduct'.[2] A simplified, targeted and proportionate corporate liability regime would benefit regulators, business and the broader community.

The ALRC's report provides examples of trivial matters that are currently subject to criminal sanction, such as a failure to place an Australian Company Number on certain company documents or a failure to notify ASIC of a change in company office hours.

The report also notes that the ACCC has indicated that given the civil penalties available under the Australian Consumer Law, 'the ACCC has not referred any consumer protection matters to the CDPP with a recommendation for criminal prosecution over the past 10 years'. It is not clear then, why criminal prosecution is available for consumer matters, when the regulator has determined such legal powers are unnecessary to perform their role effectively.

The Business Council supports the ALRC's desire for the law to draw a clear and principled distinction between corporate criminal and civil liability, and for criminal prosecution to be limited to offences that rightly deserve such denunciation.

Proposal 4(a)

The Business Council is concerned that Proposal 4(a) would mean that regulators would have to impose a fixed penalty to all relevant contraventions. At present, a penalty payable under an infringement notice is generally set as a percentage of the maximum penalty that a court could impose under the relevant offence or civil penalty provision.

Because this means mitigating circumstances would not be considered, the fixed penalties should be appropriately calibrated by the legislature to the circumstances of each contravention

Proposal 5

Under Proposal 5, the ALRC has proposed that repeated offences of a civil provision would constitute a criminal offence, as would breaching a civil provision in such a way as to demonstrate a flouting of or flagrant disregard for the relevant law.

The Business Council is concerned that the ALRC has not provided guidance as to how long between offences this proposal would operate. Nor has it provided an example of where a civil breach would be deemed to be "flagrant" and therefore deserved of criminal prosecution.

[2] The Australian Law Reform Commission, Corporate Criminal Responsibility discussion paper, p. 90

The potential for criminal prosecution for minor offences under Proposal 5 is contrary to the purpose of Proposals 1 to 7, which seek to reduce the range of minor offences that attract criminalisation.

Regulators and the courts can already consider such factors when determining whether to take enforcement action and when deciding on an appropriate penalty, so it is unclear what circumstances Proposal 5 is seeking to address.

As discussed in our consultation session with the ALRC, we are pleased to hear that the ALRC is re-considering the legislative construction of Proposal 5 and look forward to responding to the soon to be released paper clarifying the amended proposal.

Reforming Corporate Criminal Responsibility (Proposal 8)

The Business Council does not support Proposal 8.

Proposal 8 would see the conduct and state of mind of 'associates'[3] of a body corporate be attributed to the corporation. Due to the expansive definition of associate that is proposed by the ALRC, this could mean that the conduct of a rogue contractor who commits an offence while acting outside of their delegated authority, is attributed back to the corporation they were acting on behalf of.

While the ALRC claims that the due diligence defence tempers the potential scope of this proposal, this approach is inconsistent with ordinary notions of criminal responsibility, including the onus of proof. An earlier version of this Proposal meant that a corporation would be made criminally liable for serious criminal offences if it could be proven that it failed to exercise due diligence to prevent the offence.[4] With that approach, at least the onus was on the regulator to establish the absence of due diligence by the corporation.

Under the ALRC's modified approach in Proposal 8, the onus shifts to the corporation to provide evidence that it should not be liable because it exercised due diligence.

In practice, it is difficult to clearly envisage what compliance processes a corporation could put in place so that it could argue it exercised due diligence in all circumstances.

Due to the uncertainty involved, it is likely corporations would become extremely risk averse and would over-compensate in the design of their compliance programs and commercial arrangements with contractors and other loosely affiliated 'associates'. This could damage competition in the market and impose costs that are passed onto consumers and the broader community.

Individual Liability for Corporate Conduct (Proposal 9)

The Business Council does not support Proposal 9.

Under Proposal 9, when a corporation commits an offence, any officer who was in a position to influence the conduct of the corporation is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

[3] ***'associate'*** means any person who performs services for or on behalf of the body corporate, including: (a) an officer, employee, agent or contractor; or (b) a subsidiary (within the meaning of the Corporations Act 2001) of the body corporate; or (c) a controlled body (within the meaning of the Corporations Act 2001) of the body corporate

[4] Proposed section 12.3(2)(b) of the ALRC's Analysis Paper

As is noted by the ALRC in its discussion paper, Proposal 9 would lower the burden for establishing civil liability by removing the fault element. Merely by being in a position to influence the relevant conduct of the corporation, the officer of the corporation would be held individually liable for the offence.

Similar to Proposal 8, this proposal undermines fundamental principles of justice as it reverses the onus of proof. The ALRC contends that this is balanced by the availability of the reasonable measures defence.

The first point of concern is understanding when an officer of a corporation would be found to be in a position to influence the relevant conduct of the corporation. In a large organisation, where commercial activities can be authorised and overseen by numerous senior employees, it may be difficult to determine whether particular officers had the ability to individually influence the conduct of a corporation.

With such uncertainty as to their potential liability, it is difficult to clearly understand how senior officers could prove they took reasonable measures to prevent instances of unlawful conduct.

Such uncertainty will further complicate decision making within many large organisations and lead to a risk-averse culture which may sound appealing from a compliance point of view, but could have the effect of harming corporate efficiency.

Secondly, within a large organisation, it may not always be clear who (outside a core group) satisfies the Corporations Act definition of an “officer”. If “officers” are to be exposed to deemed liability, it is important (as a matter of policy and fairness) that there should be certainty about who falls within the category.

An unintended consequence of the expansion of individual liability could be to deter experienced individuals from pursuing senior roles due to the risks they would be exposing themselves to. As discussed earlier, with a consistent stream of new regulations being put in place, the liability risks for senior office holders within corporations has increased dramatically in recent years.

As evidence of this increased risk, insurance premiums for senior office holders within corporations are soaring. Over the first three quarters of 2019, Director and Officer insurance premiums rose by 75% on average. Over the last seven years, premiums have risen on average by 250%.[5]

The impact of this trend is not limited to large listed companies alone. Many Small and Medium-sized Enterprises (SME’s) as well as charities are also being impacted by increased insurance costs.

While these increased insurance costs have predominantly been caused by the dramatic increase in shareholder litigation, the introduction of untested and far-reaching liability for senior officers is likely to further increaser costs and act to deter talented and experienced individuals from taking up senior roles within Australian businesses.

[5] https://www.marsh.com/au/insights/research/directors-and-officers-hard-market.html

Whistleblower Protections (Proposal 11)

The Business Council supports Proposal 11. Whistleblowers play an important role in helping detect instances of corporate misconduct. In many instances, employees and contractors of a business are the first parties to detect any wrongdoing. The existence of an effective whistleblower policy is crucial for corporations that wish to demonstrate that they exercised due diligence by putting in place processes to help detect unlawful conduct within their organisation.

In response to Question C and the introduction of a compensation scheme for whistleblowers, the recent Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth) should be given more time to operate before further changes to the regime are implemented. For this reason, we also agree with the ALRC that the introduction of bounty / reward system for whistleblowers is not appropriate.

Deferred Prosecution Agreements (DPAa) (Question E)

In response to Question E, the Business Council supports the introduction of a DPA scheme in Australia. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 would see the availability of DPAs limited to specific offences, which does not include breaches of legislation such as the *Competition and Consumer Act 2010*. For consistency and for the policy reasons outlined below, expanding the availability of DPAs to a broader range of offences would be an appropriate modification.

DPAs can help to provide an incentive for corporations to detect and self-report corporate misconduct. By rewarding corporations that fully co-operate with regulators and help to identity the relevant individuals that have engaged in the misconduct, DPAs can help to ensure the individuals responsible for the criminal conduct can be successfully convicted.

DPAs are comprehensive enforcement mechanisms that can impose a broad range of conditions on corporations that have been found to engage in unlawful conduct, including for example waiving the statute of limitations, agreeing to ongoing cooperation, agreeing to meet remediation obligations and paying a penalty.

DPAs have been used regularly in the United States since the mid-1990s and were introduced in the United Kingdom in 2014. In these jurisdictions they have allowed investigations to be concluded, where appropriate, in a more efficient and cost-effective manner.

However, we recognise DPAs will not, and should not, replace the need for corporate criminal prosecutions. There will be circumstances where the illegal conduct is of such a nature that criminal prosecution is the appropriate enforcement response.

Sentencing Corporations (Proposals 15-18)

Proposals 15 to 18 suggests the introduction of non-monetary penalties against both entities and individuals. For instance, Proposal 16(d) suggests the Corporations Act be amended so that a corporation can be barred from engaging in certain commercial activities. While Proposal 15(e) would allow for a court to order the complete dissolution of a company (described as the equivalent of capital punishment).

The ALRC does not provide an explanation as to how such a proposal would work in practice. If such a provision operates in other countries, it would be helpful to understand the

practicalities of what would happen to the assets, employees and consumers of the corporation. If such a provision does not exist in other countries, then the introduction of such an extreme power could be a factor that deters investment in Australia.

It is also not clear when such measures would be considered appropriate and why, in addition to the significant financial penalties that can be imposed, such non-monetary measures are needed. Corporations that have been severely fined for an offence and have suffered the reputation damage that comes with such action being taken, are already strongly incentivised to not re-engage in the same illegal conduct in the future.

Another concern with some of the non-monetary penalties that have been proposed by the ALRC is that their impact is hard to quantify. With monetary fines, the amount a corporation will be penalised is transparent and fixed. But by excluding a corporation from engaging in a certain commercial activity, for example, the financial repercussions of that penalty are hard to quantify over time. There is a risk such penalties will be disproportionate to the relevant offence.

There is also risk that such penalties could have unintended consequences for the community. Eliminating a competitor from engaging in a commercial activity will mean there will be less competition in the relevant market. This means the broader community may be impacted by the penalty.

Illegal Phoenix Activity (Proposal 23)

By requiring each appointed director of a registered body corporate to have a unique identification number, the introduction of the Director Identification Number (DIN) register will not only help deter illegal phoenix activity, it can help to improve trust within the market.

Illegal phoenix activity impacts the business community, employees, contractors, the government and the wider community. The Business Council supports the work of the government's Phoenix Taskforce and their use of data matching tools and sophisticated technologies to help supplement the introduction of the DIN scheme.

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