



Australian Government

Australian Law Reform Commission

PROPOSALS AND QUESTIONS

CORPORATE CRIMINAL RESPONSIBILITY

Discussion Paper 87 (DP 87)

November 2019





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CORPORATE CRIMINAL RESPONSIBILITY

You are invited to provide a submission or comment on
this Discussion Paper

This Discussion Paper reflects the law as at 1 November 2019.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Proposals and Questions

4. Appropriate and Effective Regulation of Corporations

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

- a) criminal offences;
- b) civil penalty proceeding provisions; and
- c) civil penalty notice provisions.

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

- a) the contravention by the corporation is deserving of denunciation and condemnation by the community;
- b) the imposition of the stigma that attaches to criminal offending is appropriate;
- c) the deterrent characteristics of a civil penalty are insufficient; and
- d) there is a public interest in pursuing the corporation itself for criminal sanctions.

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

- a) as a civil penalty proceeding provision when the contravention involves actual misconduct by the corporation (whether by commission or omission) that must be established in court proceedings; or
- b) as a civil penalty notice provision when the contravention is prima facie evident without court proceedings.

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

- a) the legislation should specify the penalty for contravention payable upon the issuing of a civil penalty notice;
- b) there should be a mechanism for a contravenor to make representations to the regulator for withdrawal of the civil penalty notice; and
- c) there should be a mechanism for a contravenor to challenge the issuing of the civil penalty notice in court if the civil penalty notice is not withdrawn, with costs to follow the event.

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

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

the contravention constitutes a criminal offence.

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

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

6. Reforming Corporate Criminal Responsibility

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

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

7. Individual Liability for Corporate Conduct

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

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

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

Question B Are there any provisions, either in Appendix I or any relevant others, that should not be replaced by the provisions set out in Proposals 9 and 10?

8. Whistleblower Protections

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

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

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?

9. Deferred Prosecution Agreements

Question E Should a deferred prosecution agreement scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017, or with modifications?

10. Sentencing Corporations

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

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

- a) the type, size, internal culture, and financial circumstances of the corporation;
- b) the existence at the time of the offence of a compliance program within the corporation designed to prevent and detect criminal conduct;
- c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;
- d) the involvement in, or tolerance of, the criminal activity by management;
- e) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence;
- f) whether the corporation self-reported the unlawful conduct;

- g) any advantage realised by the corporation as a result of the offence;
- h) the extent of any efforts by the corporation to compensate victims and repair harm;
- i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:
 - i. internal investigations into the causes of the offence;
 - ii. internal disciplinary actions; and
 - iii. measures to implement or improve a compliance program; and
- j) the effect of the sentence on third parties.

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

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

- a) the nature and circumstances of the contravention;
- b) any injury, loss, or damage resulting from the contravention;
- c) any advantage realised by the corporation as a result of the contravention;
- d) the personal circumstances of any victim of the offence;
- e) the type, size, internal culture, and financial circumstances of the corporation;
- f) whether the corporation has previously been found to have engaged in any related or similar conduct;
- g) the existence at the time of the contravention of a compliance program within the corporation designed to prevent and detect the unlawful conduct;
- h) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention;
- i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;
- j) the involvement in, or tolerance of, the contravening conduct by management;
- k) the degree of cooperation with the authorities, including whether the contravention was self-reported;
- l) whether the corporation admitted liability for the contravention;
- m) the extent of any efforts by the corporation to compensate victims and repair harm;
- n) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:
 - i. any internal investigation into the causes of the contravention;
 - ii. internal disciplinary actions; and

- iii. measures to implement or improve a compliance program;
- o) the deterrent effect that any order under consideration may have on the corporation or other corporations; and
- p) the effect of the penalty on third parties.

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

- a) orders requiring the corporation to publicise or disclose certain information;
- b) orders requiring the corporation to undertake activities for the benefit of the community;
- c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
- d) orders disqualifying the corporation from undertaking specified commercial activities; and
- e) orders dissolving the corporation.

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

- a) orders requiring the corporation to publicise or disclose certain information;
- b) orders requiring the corporation to undertake activities for the benefit of the community;
- c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform; and
- d) orders disqualifying the corporation from undertaking specified commercial activities.

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

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

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

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

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

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

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

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

11. Illegal Phoenix Activity

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

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

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

- a) provide the Australian Securities and Investments Commission and the Australian Taxation Office with a power to issue interim restraining notices in respect of assets held by a company where it has a reasonable suspicion that there has been, or will imminently be, a creditor-defeating disposition;
- b) require the Australian Securities and Investments Commission and the Australian Taxation Office to apply to a court within 48 hours for imposition of a continuing restraining order; and
- c) grant liberty to companies or individuals the subject of a restraining notice to apply immediately for a full de novo review before a court.

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

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

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

12. Transnational Business

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