Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

31 January 2020

Australian Law Reform Commission
PO Box 12953
George St
Brisbane QLD 4003

Via email: *corporatecrime@alrc.gov.au*

Dear Australian Law Reform Commission (**ALRC**)

ALRC review into Australia's corporate criminal responsibility regime

Thank you for the opportunity to provide feedback on the ALRC Corporate Criminal Responsibility Discussion Paper 87 (the **Discussion Paper**).

The Australian Institute of Company Directors (**AICD**) has a membership of more than 45,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

The terms of reference for the ALRC's review of Australia's corporate criminal responsibility regime respond to a heightened public focus on accountability post the Financial Services Royal Commission, and the review presents an important and timely opportunity to consider the strength and efficacy of our legal framework. The community needs to have confidence that poor corporate behaviour is addressed swiftly and proportionately, and that corporations as well as individuals will be held to account. Equally, especially where personal liability is concerned, the law must operate justly and with due respect for fundamental legal principles.

The AICD commends the ALRC on the comprehensive work that has been undertaken to form the basis for the proposals set out in the Discussion Paper. The AICD supports important elements of the proposals, including drawing a principled distinction between corporate criminal and civil liability and more effectively targeting corporate criminal liability and defences.

We do, however, have a number of material concerns around the proposed approaches to individual liability and the attribution of criminal liability to corporations. While we acknowledge the importance of the matters raised in the Discussion Paper, we are concerned that the proposals deviate too far from well-established legal principles and ultimately would not achieve the objective of improving the effectiveness of the current legal framework.

An executive summary of the AICD's position (including on key proposals) is set out below, with our full responses to select discussion questions included in Appendix 1.

1. Executive Summary

As noted above, the AICD commends the ALRC on the substantial work undertaken in the preparation of the Discussion Paper.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

We have a number of overarching observations including the following:

Broad application of proposals

It is a key concern that the proposals set out in the Discussion Paper would apply broadly and impact corporations and individuals across all sectors of the economy including small charities, not-for-profits and SMEs, as well as large, listed entities.

Many of the proposals seem to have been drafted with large complex organisations in mind, in particular, those examined by the Financial Services Royal Commission. This should not be the starting point for such a wide-ranging and comprehensive review of corporate criminal law. Importantly, the proposals, if implemented, would create a significant legal risk for small-medium charities, not-for-profits and SMEs, as well as their executives, without commensurate evidence of misconduct to justify such an approach. Conversely, we note that a suite of sector-specific policy reforms will be implemented over the coming year in response to the Financial Services Royal Commission. Notably, Treasury is currently consulting on a proposed extension of the BEAR regime that includes penalties for individual accountable persons for a breach of accountability obligations.

Accordingly, we urge a cautious approach to broad-sweeping legislative change including greater consideration of impacts on organisations beyond large corporations.

Risks associated with “piecemeal” implementation

The proposals have been appropriately presented as a package of reforms and our view is that there are significant risks if the proposals were to be implemented in a fragmented way (particularly if the substantive concerns outlined in this submission and those that may be raised by other stakeholders throughout the consultation are not addressed).

As an illustration, as the ALRC notes in the Discussion Paper, there is a proliferation of criminal offences in the Commonwealth law (more than 2,800 corporate criminal offences, including for trivial matters). If the range of criminal offences is not reduced and the principled overlay set out in Proposals 1-4 is not applied, the consequences of implementing Proposal 9 (in relation to individual liability for corporate criminal liability) would expand the scope for individual liability dramatically and, in our view, inappropriately.

We urge the ALRC to emphasise the inter-reliance of the proposals in its final paper, including that Proposal 9 in relation to individual liability should not be implemented without recalibration of the corporate criminal law in accordance with the approach proposed in the Discussion Paper.

Non-executive director liability framework

The AICD welcomes the ALRC's recognition of the oversight role of the board, distinct from executive management, and the importance of targeting liability for corporate conduct. Boards have a monitoring, oversight and strategic role, distinct from management. As Commissioner Hayne commented in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, “the task of the board is overall superintendence of the company, not its day-to-day management.”

We note that based on legal analysis previously provided by the AICD to the ALRC, Australia’s director liability is already complex and, in many regards, uniquely burdensome, compared with other jurisdictions.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

While non-executive directors can and should be held accountable for breaches of their core duties, they are not in a position to prevent all instances of corporate misconduct and cannot be made guarantors of corporate compliance through the imposition of personal liability.

Summary of position on key proposals

In terms of the key proposals outlined in the Discussion Paper, the AICD:

- Supports in principle the proposed model to recalibrate the regulation of corporations by making the civil law the primary tool for regulating corporations and preserving the condemnatory force of the criminal law for the most serious misconduct. However, we have concerns about the proposed mechanism to automatically escalate a civil contravention to a criminal offence in certain circumstances. In our view, this proposal is at odds with the principled approach to criminal liability that is otherwise supported by the Discussion Paper and would contribute to the blurring of the line between civil and criminal liability.

- Supports in principle the formulation of a single model to attribute criminal liability to corporations. However, further consideration will need to be given to particular offences that may require bespoke approaches (e.g. continuous disclosure). We also have material concerns with aspects of the model proposed by the ALRC, particularly in relation to the proposed reversal of the onus of proof and the overly broad definition of "associate".

- Does not support Proposal 9 in relation to individual liability for corporate criminal conduct in its current form. While the AICD acknowledges that it is critical that individuals as well as corporations are held liable for corporate misconduct and that it is appropriate in some circumstances to pierce the corporate veil, a catch-all proposal that creates individual liability for any corporate misconduct based on the ability to "influence" that conduct is not appropriate. In addition, the proposal is too broad in its application and reverses the civil onus of proof.

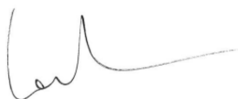
  In addition to legal principles discussed in further detail in Appendix 1, there are practical implications that warrant careful consideration. For example, it could deter individuals from taking on senior executive positions, further entrench a risk-averse corporate culture, and negatively impact the cost and availability of directors and officers' insurance costs.

Our detailed comments on select ALRC proposals are included in Appendix 1.

2. Next steps

If you would like to discuss any aspect of this letter further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au, Christie McGrath, Senior Policy Adviser at cmcgrath@aicd.com.au or Sally Linwood, Senior Policy Adviser at slinwood@aicd.com.au.

Yours sincerely



LOUISE PETSCHLER
General Manager, Advocacy

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

APPENDIX 1: DISCUSSION PAPER PROPOSALS AND QUESTIONS

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.

The AICD agrees with the ALRC's finding that there is an over-proliferation of offences in the Commonwealth criminal law, which dilutes the rationale for criminal liability and creates a significant regulatory burden. The AICD also agrees that the lack of a principled rationale for distinguishing between conduct subject to a civil penalty and conduct subject to a criminal offence is problematic.

The AICD supports the recalibration of the regulation of corporations proposed by the ALRC and the proposed new regulatory pyramid for corporations. We endorse the principled distinction between civil and criminal regulation proposed and agree that the primary form of regulation should be civil.

In principle, the AICD supports the distinction between civil penalty proceeding (**CPP**) provisions and civil penalty notice (**CPN**) provisions. However, a clear process will need to be established for determining which criminal offences would become CPN provisions and ensuring, for example, that the set penalty units for a CPN provision are appropriate recognising that, under the current law, penalties that attach to infringement notices are not set and are subject to regulator discretion.

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.

The AICD agrees that the current division of Commonwealth corporate regulation between civil contraventions and criminal offences is incoherent. As acknowledged in the Discussion Paper, the AICD agrees that the distinctive role of corporate criminal responsibility lies in its ability to achieve objectives of retribution and condemnation, and that this should be reserved for the most reprehensive conduct.

Overall, the AICD supports the ALRC's straightforward principles for the criminalisation of conduct by a corporation as they focus on the distinctive attributes of the criminal law. We agree that it is appropriate for the framers of legislation to consider whether a particular form of conduct or its consequences mean that a civil penalty is insufficient. As previously noted, the AICD supports the guidance contained in the Attorney Department's Guide to Framing Offences and is pleased to see that the ALRC suggests that these factors would continue to be relevant under the principles in Proposal 2. We would support such an approach.

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

Further, we strongly support the simplification and reduction in the number of criminal offences, particularly where there is overlap with civil provisions and where criminal liability can attach to minor regulatory infractions.

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.

In principle, the AICD agrees with the designation of civil penalties as proposed.

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.

The AICD supports the proposed procedure by which CPNs would operate. The proposal will give corporations and individuals certainty around penalties for CPN contraventions as well as the ability to challenge the CPN, which is appropriate given the mechanisms contemplated.

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.

We have concerns that the scope and application of this proposal is insufficiently certain as a basis for imposing criminal liability and that it is not necessary to ensure a proportionate response to repeated breaches and flagrant breaches.

We acknowledge the ALRC's concerns about the risk that corporations will treat civil penalties as a cost of doing business and agree that this is unacceptable. As the Financial Services Final Report highlighted, compliance with the law is not a matter of choice.

However, we note that the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* (**Corporate Penalties Bill**) was passed last year which significantly increased the quantum of civil penalties for corporate misconduct. The Explanatory Memorandum makes it clear that increased penalties will "further ensure that incurring a civil penalty is not considered a cost of doing business, and the amount is appropriate to deter and punish misconduct".[1]

[1] *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* Explanatory Memorandum, p 39.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

The AICD is of the view that increased civil penalties, together with ASIC's "why not litigate" approach to enforcement, will address the risk that the ALRC has identified.

In relation to the ALRC's proposal, our primary concern is that it blurs the line between civil and criminal liability and detracts from the principled approach to criminal liability set out in the balance of the Discussion Paper. This proposal could be particularly problematic for large organisations where decision-making is necessarily devolved, and multiple contraventions could have occurred within separate business units due to inadvertent failure to satisfy the civil law requirement.

While we acknowledge that contraventions of a civil penalty provision that demonstrate flagrant disregard for the prohibition are entirely inappropriate, our additional concern about the specific escalation mechanism proposed by the ALRC is the uncertainty about when a breach would be sufficiently "flagrant". This is undesirable in a provision creating criminal liability. If the ALRC remains of the view that a form of escalation is appropriate and necessary notwithstanding the recent increase in civil penalties, we believe that further consideration of this proposal is required to ensure the principled approach to civil and criminal liability is not undermined.

For the above reasons, the AICD is of the view that the proposed escalation mechanism is not appropriate and, given recent increases to civil and criminal penalties under the Corporate Penalties Bill, is unnecessary.

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.

Proposals 1 to 4 should be incorporated into the Attorney-General's Department (Cth) Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. However, Proposal 5 should not be incorporated for the reasons set out above.

We do, however, query the proposal to remove Ch 2.2.6 (Guidance on Strict and Absolute Liability Offences). Although we recognise that legislators often depart from the guidelines, this is not a good reason to simply remove the guidance (indeed it may highlight the need for it). In our view, it would seem sensible and appropriate to maintain guidance regarding strict and absolute liability offences.

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.

The AICD supports this proposal in order to encourage greater consistency in the development and application of the criminal law.

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

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.

The AICD sees merit in consolidating and simplifying methods for attributing criminal liability to a corporation to encourage greater certainty for regulators and corporations, and promote consistency. However, we note that there may be sound reasons to adopt different methods for attributing criminal liability in some instances.

In particular, we understand that the continuous disclosure rule in section 674 and the prohibition on insider trading under section 1043A link to a special rule of attribution in section 1042G, which deems a company to possess information that is possessed by an officer and which came into his or her possession in the course of performance of duties as an officer. Changing the attribution model would change the operation of these important rules.

In particular, we are concerned that it would make the already onerous continuous disclosure rule virtually unworkable because it would mean that information possessed by any "associate" would be information known to the company for the purposes of the rule.

We support reform to ensure that corporate defendants have consistent recourse to a due diligence defence. As noted in the Discussion Paper, currently corporate defendants do not necessarily have recourse to a defence (meaning, for example, that they may be culpable for the actions of a rogue employee). We agree with the ALRC that this is at odds with notions of culpability and blameworthiness in the criminal law.

In addition to noting that a new single model for attributing criminal liability should not replace an existing special method without proper consideration of the policy bases for the adoption of the existing method, we have several substantive concerns about the ALRC model. These concerns are outlined below.

Due diligence defence, and reversal of onus of proof

We do not consider the reversal of the onus of proof under the proposed attribution model (which in effect makes a corporation liable for the actions of an associate unless it can demonstrate due diligence) to be justifiable.

We note the ALRC's view that the corporation is in a better position to provide evidence of its preventative procedures than the prosecution, and that it is appropriate for the corporation to bear the legal burden of proving the defence.

Our concern with this approach hinges on the practical difficulties of proving a due diligence defence in the context of court proceedings (where misconduct by an "associate" has presumably already occurred, given the operation of the attribution model). As the Discussion Paper accepts, due diligence is an "elastic concept". Recognising the risk of hindsight review, we are concerned that the approach proposed by the ALRC would grant the prosecution an unfair advantage over a defendant in a court proceeding.

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

As noted in the ALRC's Report 129 *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* in 2015, reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification[2]. Given a corporation's due diligence or preventative measures are central to its organisational blameworthiness, the proposed reversal of the onus of proof should be considered in this light.

A further relevant consideration is the consequences that would flow from a corporate criminal conviction given Proposal 9 regarding individual liability for corporate criminal misconduct, as well as the potential sentencing options. For example, we are concerned that a senior executive could be individually liable in circumstances where: a report acting far outside their authority commits an offence; the senior executive did not cause relevant due diligence to be undertaken, as the offence was not reasonably anticipatable; and the offence is attributed to the corporation due to the operation of the onus of proof and the unavailability of the due diligence offence.

While we acknowledge the ALRC's statement that the arguments against corporations having a legal burden to prove a due diligence defence should be weighed against the current state of the law (in which corporations may have no recourse to a defence at all), in our view the lack of coherency and consistency under the current law only serves to highlight the need to ensure that any new reforms are balanced and fair in their application.

In light of the above, the AICD is of the view that the ALRC should reconsider the reversal of the legal onus of proof in its attribution model.

Definition of "associate"

We note the ALRC's position that a broad definition of "associate" is appropriate to prevent body corporates using the corporate structure to avoid criminal responsibility, either through wilful blindness or the deliberate use of third-party agents or intermediaries. We support this objective but have a number of suggestions on possible refinements to the proposed definition.

As currently drafted, the definition captures all employees, agents, contractors and subsidiaries who perform services for or on behalf of the corporation.

In our view, it would be preferable to confine the definition of "associate" to those officers, employees, agents and contractors acting under delegation and/or within the actual or apparent scope of their authority but exclude subsidiaries and controlled bodies.

Including individuals acting under delegation and/or within the actual or apparent scope of their authority would, in our submission, still direct the inquiry to the substance of the relationship between the individual and the corporation but would reduce the risk of liability exposure from conduct of "rogue agents", for example. In practice, individuals typically act on behalf of the organisation in accordance with a formal "Delegations Policy" or similar that sets out what individuals or roles are able to do on behalf of the company. This is an important mechanism for organisations to control the conduct of individuals. Capturing individuals acting under apparent authority would address the risk of the company directing individuals outside the parameters of a formal Delegations Policy.

---

[2] ALRC Report 129, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, December 2015 at 17.

In terms of the exclusion of subsidiaries, the fact that a company is a subsidiary to another company is not justification of itself, to pierce the corporate veil. In some corporate groups a parent company can have a very limited degree of influence or control over the day-to-day management of a subsidiary, despite being a majority owner of the subsidiary. Australian corporations should not be exposed to a serious risk of automatic prosecution for the conduct of persons who they are merely associated with through simple corporate ownership. In the event of misconduct, the relevant subsidiary should be prosecuted.

Attribution for civil contraventions

The AICD is not convinced of the need to apply a further attribution overlay in the context of civil liability, given it is contemplated that specific legislative provisions would still apply (eg, the ALRC notes that it considers that a due diligence defence should not be available for civil proceedings, unless it is currently available).

If the ALRC is of the view that there are compelling reasons to adopt a civil attribution model, our comments regarding the burden of proof and the scope of “associates” set out above are also applicable here.

We do not agree with the ALRC's default position that a due diligence should not be available unless it currently applies, and we suggest this issue be considered on a provision-by-provision basis in the course of Proposal 1 being implemented.

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.

While the AICD supports individual liability for corporate misconduct in appropriate circumstances, any reform in this area must be balanced and fair in its application. Further, as a matter of good governance and in order to promote accountability, individuals within organisations should only be held liable for corporate misconduct where there is some level of direct involvement. Set out below is a summary of the AICD’s key concerns with the proposal.

Proposal pierces the corporate veil

The imposition of personal liability for corporate conduct pierces the corporate veil and conflicts with the separate legal personhood of corporations. While the AICD accepts that it may be appropriate to pierce the corporate veil in certain circumstances, such decisions should be carefully considered by the legislature on an offence by offence basis. By contrast, Proposal 9 permits the corporate veil to be pierced in connection with a significant number of offences, particularly if the proposed recalibration of the corporate criminal law is not undertaken.

Broad application and unintended consequences

This proposal would apply broadly and impact individuals across all sectors of the economy, including small not-for-profits and SMEs.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

On a practical level, if the proposal as currently drafted is enacted into law, it could deter individuals from taking on senior executive positions, further entrench a risk-averse corporate culture, and negatively impact the cost and availability of directors and officers' liability (**D&O**) insurance costs.

The D&O insurance market is currently under enormous stress, largely as a result of shareholder class actions. With some insurers having exited the market and others considering their position, the cost of D&O insurance has increased dramatically and concerns around its ongoing availability is a live issue. If adequate D&O insurance cannot be obtained, it will be difficult to get quality directors onto boards and quality officers into management positions.

In addition, given it is a matter of public policy that a contract of insurance is not enforceable in respect of criminal acts under the common law, it would also be necessary to explore whether directors and officers would have access to D&O insurance for a civil penalty that flows from a criminal contravention.

Existing framework allows for individual liability

As set out in the Discussion Paper, directors and senior officers have existing legal obligations under both the common law and statute in Australia. Although we agree that one model for individual liability may be attractive in principle, it is not appropriate that senior managers could be liable where a body corporate commits *any* relevant offence. There is also a question as to whether any change is needed given existing laws already impose individual liability, including that:

- individuals involved in a civil contravention can already be held civilly liable as the ALRC has identified in Chapter 7 of the Discussion Paper. In this regard, we note that this was recently amended to include new section 1317E(4) (which was introduced through the Corporate Penalties Bill) which operates as a "catch-all" provision that extends civil liability to anyone "involved in" the contravention of any civil penalty provision;
- individuals who are an accessory to an offence can be held criminally liable; and
- sections 180 and 181 of the *Corporations Act 2001 (Cth)* (**Corporations Act**) impose civil obligations in relation to care and diligence and acting in good faith on officers and directors.

Key concerns with the simplified individual accountability regime

If the ALRC determines that the proposal is necessary to impose individual legal liability for an offence committed by a body corporate, the AICD has the following substantive concerns that should be addressed. On the basis these issues are addressed, the model may be workable provided individual liability is not applied in a blanket manner.

<u>Influence</u>

While the Discussion Paper makes clear that the ALRC's intention is to apply liability to a relatively narrow class of persons we are concerned that the drafting actually widens the net. Although the term "influence" is widely used in Federal legislation there is no statutory and little judicial guidance as to its meaning.

On the face of it, and if the dictionary definition is used, the word "influence" could and probably will be read very widely. It would automatically capture senior managers such as CEOs and

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

CFOs and could capture non-executive directors. Through their board oversight role, a director will nearly always be in a position to exert some degree of "influence" on a body corporate's conduct. As noted above, expanding director liability is inappropriate given the wide legal exposure they already face.

Although the AICD does not support Proposal 9, if the ALRC does include this proposal in its final report, the AICD suggests that it would be better to use words like "control" or "complicit" instead of "influence". This would clearly exclude individuals who were exercising broad governance of an organisation but were not involved directly in the conduct that was the subject of the contravention.

Reasonable measures

While the concept of a "reasonable measures" defence seems sensible, at this stage it is unclear what would be expected of individuals. Given the potential breadth of offences to which the individual liability mechanism could apply, the AICD is of the view that it would be more appropriate to include high-level statutory guidance on what "reasonable measures" entails.

Reversal of the onus of proof

The AICD does not support the reversal of the onus of proof as it applies to individual liability for the reasons outlined in our response to Proposal 8.

As CAMAC has stated: "the fact that a corporate officer may be able, in the circumstances of a particular case, to make out a relevant defence and thereby avoid conviction does not remove the seriousness of the risk to reputation and the apprehension, effort and expense to which he or she is subject by being exposed to criminal liability on a prima facie basis."[3] Although this is directed to criminal liability, the consequences outlined by CAMAC, including reputational risk and the consequences of being implicated in protracted court proceedings, also apply in the civil context.

Although the AICD does not support Proposal 9, if it is to be legislated, the burden of proof should lie with the regulator to demonstrate the relevant individual failed to take reasonable measures to prevent the corporate misconduct.

BEAR model

While we acknowledge that the ALRC has considered applying BEAR-like principles and discounted the idea given the regime has yet to be assessed, the AICD considers that it may be more appropriate for a BEAR-like regime to be applied in certain sectors (i.e. those where there is considered to be an accountability deficit or where there is scope for considerable consumer harm) rather than proposing a one-size fits all approach.

In this regard, we note that Treasury has released a consultation paper on extending the BEAR to all APRA-regulated entities with ASIC co-administering the regime (the **Financial Accountability Regime** or **FAR**). Under the proposed FAR regime, individual accountable persons will be liable for significant civil penalties for a breach of accountability obligations and an increased number of people will be defined as accountable persons (eg, heads of business units, senior executives responsible for internal audit, compliance, HR, AML, product & service design, breach reporting etc.).

[3] CAMAC *Personal Liability for Corporate Fault* 2006 at p 34.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

As a basic principle, individuals should not be personally liable without having a clear understanding of what their obligations are. The value of a BEAR model (and the proposed FAR model) is that relevant accountable persons will know what is in their specific remit. Further, in the financial services context, there was a specific evidence base of misconduct warranting law reform, namely the matters highlighted at the Financial Services Royal Commission.

Alternatively, personal liability could be reserved only for those areas where there is a compelling public policy justification (eg, WHS or environmental protection laws).

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.

For the reasons set out above in response to Proposal 9, we do not support the Discussion Paper's proposed model for individual liability in its present form. However, if an appropriate model was proposed by the ALRC, it may be acceptable to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of the civil penalty provision in certain circumstances. As noted above, any decision to criminalise conduct should be carefully considered by the legislature on an offence by offence basis. In the AICD's view this proposal would only be necessary if the current law was deemed insufficient, noting that individuals who are an accessory to an offence can be held criminally liable (see above discussion).

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

If introduced it would not be appropriate for Proposals 9 and 10 to capture non-executive directors. As mentioned above, boards have a monitoring, oversight and strategic role, and are not responsible for the day-to-day management of corporations.

We note that based on legal analysis previously provided by the AICD to the ALRC, Australia's director liability regime is already complex and, in many regards, uniquely burdensome, compared with other jurisdictions. We are of the view that current laws already expose non-executive directors who are not involved in the day-to-day management of an organisation to significant legal liability and hence should not be expanded any further.

While non-executive directors can and should be held accountable for breaches of their core duties, they are not in a position to prevent all instances of corporate misconduct and cannot be made guarantors of corporate compliance through the imposition of personal liability.

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?

As the AICD does not support Proposal 9, we will not be commenting on this question.

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

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.

The AICD strongly supports legal whistleblowing protections and believes that robust and effective whistleblower frameworks support governance oversight.

We have consistently emphasised that boards have a strong interest in corporate misconduct being brought to light early, so that it can be addressed and prevented from recurring.

In our view, when considering the exercise of due diligence, it would be preferable to take a general approach and, as is proposed for smaller companies, consider the totality of the policies and procedures of the company having regard to its size and the complexity of its operations.

The substance of an organisation's internal processes, procedures and controls (including the extent to which any policy in place is complied with) will be critical in terms of ability to demonstrate due diligence. This looks beyond the mere fact of the existence of a policy.

Of course, large companies that do not have a whistleblower policy would be in breach of the Corporations Act, and presumably may find it difficult to demonstrate that they have exercised due diligence to prevent the commission of an offence.

Our primary concerns in relation to expressly stipulating that a 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 are:

- It may serve as a de-facto requirement for all companies to adopt a formal policy, despite the legislature and ASIC recognising the risk of a disproportionate regulatory burden and exempting smaller companies from the relevant legal requirement[4]. In granting relief to small not-for-profit or charitable companies from the whistleblower policy requirement, ASIC specifically noted that it understood that these entities may face a compliance burden that outweighs the benefits a policy might otherwise offer[5].

  We acknowledge that the ALRC proposal extends only to large corporations, but are concerned that, in practice, the proposed guidance could cause confusion about legal requirements and risks, particularly given the importance of being able to demonstrate due diligence under the ALRC's proposed attribution model.

- Those companies exempted from the legislative requirement may still choose to implement a whistleblower policy, particularly recognising that the substantive whistleblower protections under the law still apply. Indeed, as noted above, the AICD believes that robust whistleblower frameworks support governance oversight and our Not-

[4] As noted in the ALRC's Discussion Paper, the legislative requirement to implement a whistleblower policy applies only to public companies, large proprietary companies and corporate trustees of registrable superannuation entities. In November 2019, ASIC granted relief from the requirement to companies that are not-for-profits or charities with annual revenue of less than $1 million.
[5] See https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-308mr-asic-gives-guidance-on-companies-whistleblower-policies-and-relief-to-small-not-for-profits/

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

For-Profit Governance Principles[6] expressly encourage the establishment of a whistleblower policy.

While companies exempted from the legislative requirement should have greater freedom to implement tailored policies and procedures, we are concerned that, in order to gain sufficient comfort on their due diligence steps, the ALRC's proposal may compel exempted companies to comply with ASIC Regulatory Guide 270, which in our view is relatively prescriptive and technical, and goes beyond the legal requirements.

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?

The AICD acknowledges the importance of whistleblowers in detecting and reporting misconduct, the need to foster transparent "speak up" cultures within corporations, and the evidence of the serious and ongoing consequences for whistleblowers.

Preventing whistleblowers from detriment as a result of their disclosure is a key element of a successful whistleblowing framework. The AICD has consistently supported more robust and detailed protections and stronger sanctions against reprisal, and welcomed the passage of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill* in 2019[7].

In particular, it is now unlawful for a person (including a corporation) to engage in conduct that causes detriment to the whistleblower (or an associate of the whistleblower) in the belief or suspicion that a person has made, may make, proposes to make, or could make, a protected disclosure or to purport to terminate an employee because of a protected disclosure.

"Detriment" is defined broadly to include, without limitation, dismissal of an employee, injury in employment, alteration of an employee's position or duties to his or her disadvantage, discrimination, harassment or intimidation, harm or injury to a person, including psychological harm, and damage to property, reputation, business or financial position.

A whistleblower can directly seek uncapped compensation orders from a court in relation to a claim of victimisation. A reverse onus applies, such that once a whistleblower has pointed to the fact that there is a reasonable possibility that victimisation occurred, the corporate and/or any individuals responding to the claim must prove they did not victimise a whistleblower[8].

---

[6] Accessible at https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/not-for-profit-resources/nfp-principles/pdf/06911-4-adv-nfp-governance-principles-report-a4-v11.ashx

[7] See for example AICD submission in response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into whistleblower protections, 10 February 2017, accessible at https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2017/subm_2017_pjccfs_whistleblowing.ashx; AICD submission on the exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017, 3 November 2019, accessible at https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2017/subm-2017-treasury-laws-amendment-whistleblowers-bill-2017.ashx; and AICD submission to the Senate Standing Committee on Economics' inquiry into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, 28 February 2018, accessible at https://aicd.companydirectors.com.au/advocacy/policy/treasury-laws-amendment-enhancing-whistleblower-protections-bill-2017

[8] Discussed further in "Is your board up to date on the new whistleblowing laws?" at https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2017/subm-2017-treasury-laws-amendment-whistleblowers-bill-2017.ashx http://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/november/is-your-board-up-to-date-on-the-new-whistleblowing-laws

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

We note that a review is required to be undertaken of the operation of the new private sector whistleblowing provisions five years after their commencement. This review should consider whether the provisions are operating as intended, including whether there are any gaps in terms of protections and reprisal.

We understand that the ALRC is concerned about the "gap where specific detrimental conduct cannot be proven, but the interests of the whistleblower have nonetheless been affected".

We also acknowledge other concerns, including that the cost and stress of taking legal action disincentivise individuals from seeking compensation[9], and the intangible personal costs to whistleblowers including loss of future job opportunities, the financial cost of stigmatisation and the emotional costs involved in speaking up.

In principle, we support the proposition that whistleblowers should be compensated where they have suffered detriment or adverse consequences as a result of making a protected disclosure and we understand that the strengthened protections and compensation rights in the private sector are intended to go some way to achieving this.

As a starting point, our preliminary view is that any supplementary compensation scheme should require a nexus between the adverse consequences and making a protected disclosure, and should not require costs to be borne by a corporation where it has not caused the detriment.

That said, given the complex considerations involved in establishing a new compensation scheme as outlined by the ALRC and the relatively new and significantly more robust protections now available to whistleblowers in the private sector (including in relation to compensation), it may be preferable to consider, in the first instance, alternative avenues to support whistleblowers in enforcing existing rights and protections.

For example, the August 2019 report "Whistling While They Work 2 – key findings and actions" (WWTW2 Report) supports the establishment of a fully resourced central whistleblower protection authority to ensure organisations and persons who report wrongdoing have important institutional support[10]. The AICD would support such a step.

The WWTW2 Report also touches on other reforms it considers would enhance the current legal framework, including:

- greater consistency across Australian laws in terms of thresholds and mechanisms for whistleblower protection (eg, while the federal Public Interest Disclosure Act and some State legislation give whistleblowers the alternative of pursuing claims in lower cost tribunals such as Fair Work Australia, in addition to the courts, the Corporations Act provisions allow only for claims to a court); and
- recognition of the range and type of detriment that whistleblowers unjustly suffer, leading to damage, beyond traditional concepts of reprisal.

---

[9] As noted in the August 2019 report "Whistling While They Work 2 – key findings and actions" at http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf, even with an altered onus of proof and protection against adverse cost orders, the costs and stresses of taking legal action explain why many whistleblowers are forced to live with adverse outcomes rather than seek compensation.

[10] Ibid pages 44-45.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

In the case of the public sector, we would support law reform to bring existing public sector laws into line with the new standards for the private sector (including in relation to compensation rights).

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?

The AICD supports extraterritorial application of the whistleblowing protections and would support this being clarified to the extent it is considered necessary.

In this regard, we understand that section 5(4) the Corporations Act provides that "each provision of this Act also applies, according to its tenor, in relation to acts and omissions outside this jurisdiction". In addition, the specific whistleblowing provisions in the Corporations Act also contemplate that they could apply outside of Australia in certain circumstances.

Deferred Prosecution Agreements

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

The AICD supports the introduction of a deferred prosecution agreement (**DPA**) scheme as noted in our submission on the *Crimes Legislative Amendment (Combatting Corporate Crime) Bill 2019* (Cth). In our view, a DPA scheme strikes an appropriate balance between incentivising corporations to self-report and the need to hold corporations accountable for serious corporate crime. Importantly, the implementation of a DPA scheme would bring Australia in line with international standards set by the regulatory frameworks addressing a wide range of economic crimes in the United States and United Kingdom.

Given the criticality of an agreed statement of facts in a DPA, we suggest a clarification, in line with the UK *DPA Code of Practice,* that although a corporation will be required to admit to agreed facts detailing the nature and scope of their offending, there is no requirement for formal admissions of criminal liability in respect of offences.[11] In our view, such a requirement would otherwise deter corporations from seeking a DPA.

Further, we do not agree that only documents related to a corporation's negotiation with the DPA should be inadmissible. We consider that any information or document which is brought to the attention of a Commonwealth agency as an indirect result of information disclosed during DPA negotiations, should not be admissible in proceedings the subject of a new investigation or inquiry. In our view, making this information admissible would not only run counter to principles of natural justice and procedural fairness (including the application of legal professional privilege and privilege against self-incrimination), but also undermine the efficacy of a DPA scheme, by discouraging corporations from self-reporting and engaging openly and honestly in DPA negotiations. We consider that information or documents disclosed in this manner should be on a "without prejudice basis".

[11] Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, 14 February 2014, at 6.3. See: https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf.

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

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).

While the AICD supports the incorporation of the substance of the ALRC's Recommendations 4–1 (purposes of sentencing) and 5–1 (principles of sentencing) of Same Crime, Same Time: Sentencing of Federal Offenders in Part IB of the Crimes Act 1914 (Cth) (**Crimes Act**), we query the utility of incorporating the substance of Recommendations 6–1 and 6–8 (sentencing factors) in addition to the proposed list of factors in Proposal 13. Doing so, in our view, could risk introducing complexity and duplication to the sentencing provisions in Part IB of the Crimes Act. Accordingly, we would encourage a considered approach to this exercise in light of Proposal 13.

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.

The AICD supports the inclusion of statutory guidance on factors relevant to sentencing a corporation for federal offences, in particular, those factors that have not been consistently cited in the case law (for example, whether the corporation has undertaken internal investigations or disciplinary actions, any advantage realised by the corporation and the effect of the sentence on third parties).

We also agree that having regard to factors such as the "measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence" and "extent of any efforts by the corporation to compensate victims and repair harm" as mandatory considerations, which have not typically been considered by the courts, are relevant to sentencing.

However, we are concerned that the reference to "internal culture" is too broad and potentially vague given the nature of the term. A more specific reference to internal compliance culture may be preferable. For completeness we note that while the AICD accepts that internal compliance

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

culture may be appropriate as a sentencing consideration, given the challenges with defining/identifying corporate culture within a specific organisation, we have concerns around its current inclusion in section 12.3 of the Criminal Code which allows a court to find the "fault" element of a crime committed by a corporation by establishing that a poor compliance culture existed.

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.

We support statutory guidance on key factors relevant to sentencing being incorporated into the Corporations Act 2001 for the purposes of making civil penalty orders. We agree it is in the interests of transparency and consistency to harmonise the criminal penalty and civil penalty frameworks.

As above, we suggest that "internal culture" is clarified by reference to compliance culture.

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

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.

In principle, we agree with the principle that courts should have access to non-monetary sentencing options for corporations.

We understand that the proposed range is intended to satisfy the sentencing purposes of punishment, denunciation and deterrence, as well as providing the court flexibility to utilise more corrective and restorative functions where appropriate, depending on the nature and circumstances of the offence.

Given some of the options are a significant shift in terms of sentencing of corporations under the criminal law, careful consideration of the proposals and any unintended consequences is required in conjunction with legal experts and other relevant stakeholders. We suggest these proposals would require a dedicated, separate consultation before being taken any further.

As the ALRC recognises, dissolution is an extreme sentencing option. If it is ultimately considered appropriate to include such a step in the potential options, it should be clearly confined to the most egregious offending as contemplated by the ALRC.

Several of the other options would also have potentially serious implications for organisations and the economy more broadly, for example, orders disqualifying the corporation from undertaking specified commercial activities. Further consideration is required of the potential implications.

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.

As above, we agree in principle that the non-monetary penalty options for corporations should be made available for contraventions of civil penalty provisions under the Corporations Act and would welcome further consultation on their application.

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.

The AICD queries whether it is necessary to introduce a new civil penalty order to the Corporations Act as proposed. As outlined above:

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

- individuals involved in a civil contravention can already be held civilly liable and disqualified from managing a corporation under Part 2D.6;
- individuals who are an accessory to an offence can also be held criminally liable; and
- section 180 and 181 impose civil obligations in relation to care and diligence, and good faith on officers and directors.

Given the circumstances in which a dissolution order is proposed to be made, presumably an individual involved in the management of the relevant company would be pursued under one or more of the provisions above.

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.

We strongly support the proposal 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 ASIC.

We share the concerns expressed by the ALRC in relation to the current procedure set out in the Combatting Illegal Phoenixing Bill (ie that it may confer judicial power on ASIC and therefore be unconstitutional). We have previously expressed that view that court oversight has a number of benefits including:

- it ensures a degree of independent oversight over the use of this significant new power;
- it ensures that a body of case law can develop to assist regulators in interpreting the provisions;
- it reduces the possibility that there will be protracted disputes relating to the use of ASIC's administrative powers; and
- it requires ASIC to ensure that it can provide evidence satisfying the legal tests in the section, providing parties with more certainty over the legal authority of the order[12].

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

The AICD has consistently supported administrative measures that will assist in the detection of illegal phoenix activity, including requirements for "director identification numbers" (**DINs**) and stronger identity verification processes for directors.

[12] See for example AICD submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2019, 14 March 2019, accessible at https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2019/subm-2019-combatting-illegal-phoenixing.ashx

Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
t: 1300 739 119
e: contact@aicd.com.au
aicd.companydirectors.com.au
ABN 11 008 484 197

We understand that the Government remains committed to the modernising business registers project and implementation of DINs (through the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019).*

If well-implemented and supported by effective information sharing across agencies and regulators, the DIN framework should enable all current and previous corporate activity and taxation compliance by prospective directors to be tracked and enforcement appropriately targeted. Identity verification requirements, and more visible enforcement action, would make use of so-called "dummy directors" or use of fraudulent identities much more difficult.

Importantly, the establishment of a well-implemented DIN framework with identity verification would also support limiting the general public disclosure of personal information of directors currently held on the Companies Register. The AICD has a number of concerns with the current public availability of these details, relating to issues of privacy, cyber-security and personal safety. While we recognise that there would be cases where access to personal information could be justified, an effective DIN framework could accommodate application for public interest purposes. This issue should be addressed with the introduction of DINs.

Transnational Business

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

The risk of Australian corporations and their associates engaging in, or facilitating, offshore crimes is of particular concern where increasingly globalised economies operate. Accordingly, we consider it is an opportune time to explore options to further bolster the Australian regulatory regime in this regard.

We agree that overseas crimes such as slavery and foreign bribery are inherently cross-jurisdictional and will necessarily involve questions of international law, foreign policy and international cooperation which are beyond the scope of this current inquiry.

Given the seriousness of these crimes and the public interest in ensuring the prevention, detection and enforcement of extraterritorial offences, the AICD considers that any further examination of possible law reform should be the subject of a separate consultation process. We note that such a process should consider the extent to which present enforcement difficulties arise from the processes by which criminal offences are investigated and prosecuted. We further note that such a process should consider other options for further bolstering the Australian regulatory regime, beyond extending the due diligence obligations of corporations.