

10 May 2019

Australian Law Reform Commission
19 Martin Place
SYDNEY NSW 2000

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 to the ALRC on the scope of the inquiry into Australia's corporate criminal responsibility regime.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 43,000 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.

1. Response to review and Terms of Reference

The AICD believes that the community needs to have confidence that poor corporate behaviour is addressed swiftly and proportionally and looks forward to closely engaging with the ALRC in relation to its review of Australia's corporate criminal responsibility regime.

While the AICD has no specific comments on the proposed Terms of Reference, the AICD notes that it will be critical that any changes to the regime (should any be made as a result of the review) are consistent with fundamental principles of criminal justice, corporate law and corporate governance. While the public's desire for greater accountability is legitimate, this should not lead to a framework that derogates from well-established principles. Further, it should be acknowledged that any reforms to the corporate criminal responsibility regime, and especially laws that have a direct impact on directors and the way they operate, could have very significant flow-on impacts for the Australian economy.

2. Relevant background

The issue of personal liability for corporate fault is a longstanding one and has been the subject of numerous comprehensive reviews.

The AICD notes that in conducting their inquiry the ALRC will need to have close regard to the extensive work already done on this issue, particularly the Council of Australian Government (**COAG**) principles and guidelines on personal criminal liability for corporate fault which were agreed to by the Ministerial Council for Corporations (**MINCO**) in 2009 with one of the six fundamental principles being that "directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act." In 2012, COAG agreed to a set of supplementary guidelines that should apply when drafting future legislation.

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These developments were the product of a number of years of significant work between Commonwealth and State and Territory Governments along with stakeholders. The clear object was to achieve a nationally consistent and principles-based approach to the imposition of personal criminal liability of directors or other corporate officers for corporate fault.

The COAG principles establish important safeguards to prevent individuals being unjustly held liable for offences that can carry with them lengthy terms of imprisonment. As much as the community needs confidence that directors will be held accountable where appropriate, the community equally needs confidence that our system is fair and balanced in its application.

There is an important and necessary distinction between an individual's criminal liability for his or her own misconduct in a corporate context, and an individual's criminal liability arising out of misconduct by a company of which they are a director.

A criminal offence is the ultimate sanction for breaching the law and there can be far reaching personal and professional consequences for those who are convicted. Consequently, it is also imperative that the ALRC has regard to the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the **Framing of Offences Guide**) and the established principles for determining whether corporate misconduct should be criminalised. In particular, the AICD notes that the Framing of Offences Guide provides that legislative drafters *must* apply the COAG principles when considering imposing criminal responsibility on directors. As part of this review, the ALRC should consider how closely the COAG principles and guidelines have been followed in practice.

The AICD also suggests that it will be important for the ALRC to consider the overall totality of both the civil and criminal director liability framework as part of the inquiry rather than focus on one area in isolation, noting the important distinction between the two frameworks and recognising that the civil penalty regime may give rise to liability in the absence of criminal offences.

In this regard, we refer to the following Statement of Principle included in the ALRC's report on Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95) from 2002:

The distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.

Notably, the report closely considered the criminal/civil distinction, ultimately recommending that the clear distinction between criminal offences and non-criminal contraventions be maintained.

Consequently, it will be essential to consider the ways in which directors can already be held liable (both criminally and civilly) for corporate fault before evaluating any gaps which may exist (if any) and how they should be filled (which will not necessarily involve any changes to the regulatory settings). Currently, there are already a number of avenues by which criminal liability can be established, including through accessorial liability (where a person is held liable if he or she was an accessory to corporate misconduct) or "stepping stone" liability (where liability is imposed on a director for a breach of their statutory duty in circumstances where the company has been exposed to a risk of prosecution or liability). It is a separate

issue as to whether the current set of laws have been appropriately enforced over recent years, noting that AISC has only recently shifted to a “why not litigate” approach.

3. Key issues for consideration

The AICD notes that the Terms of Reference list a number of matters for consideration as part of the review.

It is critical that the role of the board and the delineation between the roles and responsibilities of the board and management is carefully considered as part of the review. Boards have a monitoring, oversight and strategic role, and are not responsible for the day to day operations of corporations. 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.” This can often be overlooked in public discourse, and even in the policy-making process. Directors cannot be made guarantors of corporate compliance, and are simply not in a position to prevent all instances of corporate misconduct.

That said, we acknowledge the importance of the role of the board and where directors have breached their fiduciary duties, they should be held accountable. A fundamental part of a board’s task is being able and willing to effectively oversee and challenge management. As Commissioner Hayne noted:

It is the role of the board to be aware of significant matters arising within the business, and to set the strategic direction in relation to those matters. When management is acting in a way that is delaying the remediation of customers, and damaging the bank’s relationship with regulators, it is appropriate for the board to intervene and say ‘Enough is enough. Fix this, and fix it now.’

In addition to fundamental principles of criminal justice and corporate law, close regard should be had to potential unintended consequences of any recommended reforms to ensure that directors who oversee Australia’s corporations are not unfairly targeted and that entrepreneurialism, productivity and innovation are not stifled.

The AICD would oppose recommendations that seek to impose personal criminal liability on directors where they have acted honestly and diligently. It is important that our legal and regulatory framework creates an environment where directors that act appropriately are free to pursue and harness new opportunities, drive organisational performance and create jobs without being overly focused on personal liability concerns.

It is also imperative that Australia’s regulatory settings do not deter qualified and skilled individuals from accepting director positions. Unless directors that act honestly and diligently feel confident that the law will treat them appropriately, there may be a negative impact on the willingness of directors to accept board appointments. This would be an adverse outcome, given the importance of board composition – and in particular having the right mix of skills, experience and diversity around the table – for board effectiveness. In order for Australian companies to drive employment and economic growth, and for not-for profits to effectively contribute to the community, it is critical that organisations can attract appropriately skilled and experienced directors.

We are pleased to note that the review is to encompass consideration of comparative corporate criminal responsibility regimes in relevant foreign jurisdictions. It will be important to assess international comparators, including to enable proper assessment of how onerous the Australian regime is and to sensibly consider its impact on directors pursuing opportunities that involve responsible risk taking.

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4. *Next steps*

The ALRC review will be a core focus of the AICD over the coming year and we look forward to contributing to this important inquiry.

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

Yours sincerely



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