Australian Government
Australian Law Reform Commission

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CORPORATE CRIMINAL RESPONSIBILITY

November 2019

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TERMS OF REFERENCE SUMMARY

Review of Australia's corporate criminal responsibility regime

I, Christian Porter, Attorney-General of Australia, having regard to:

- the corporate criminal responsibility regime in Part 2.5 of the Commonwealth Criminal Code contained in Schedule 1 of the *Criminal Code Act 1995* (Cth) ('the Code'); and,
- the complexity of this regime and its challenges as a mechanism for attributing corporate criminal liability;

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime. In particular, the ALRC should review the following matters:

- the policy rationale for Part 2.5 of the Code;
- the efficacy of Part 2.5 of the Code as a mechanism for attributing corporate criminal liability;
- the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness, including mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct;
- the appropriateness and effectiveness of criminal procedure laws and rules as they apply to corporations; and
- options for reforming Part 2.5 of the Code or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime.

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View the full Terms of Reference

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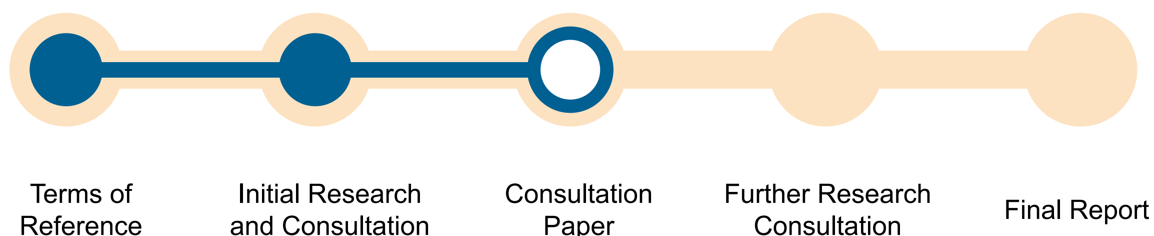
INTRODUCTION

1. On 10 April 2019, the ALRC received Terms of Reference from the Attorney-General, the Hon Christian Porter MP, to conduct the first comprehensive review of Australia's corporate criminal responsibility regime since the enactment of the Criminal Code in 1995. Over the past 7 months, the ALRC has conducted nearly 60 consultations across industry, regulators and legal professionals. The ALRC is seeking submissions to the Consultation Paper until 31 January 2020. The Final Report is due to the Attorney-General on 30 April 2020.



2. The ALRC seeks stakeholder submissions on 22 proposals for reform to the Commonwealth's corporate criminal law regime, and asks 12 questions on particular areas of reform. The Consultation Paper addresses a number of aspects of corporate criminal liability, including:

- the principled division between criminal offences and civil penalty provisions;
- the method for attributing criminal liability to corporations;
- individual liability for corporate offences;
- deferred prosecution agreements;
- penalties and the sentencing process;
- illegal phoenix activity (deliberate liquidation with the intent to avoid creditors and continue operations through a new entity); and
- the implications of the transnational nature of business and extraterritorial offences.

3. Building on the work of the Hayne Royal Commission, the ALRC has found that Commonwealth criminal law as it applies to corporations is impenetrably complex and in need of significant reform. There is an overregulation by the criminal law of low-level contraventions and a failure to effectively use the criminal law for serious contraventions. As a result, there is no principled regulation in any meaningful sense — diluting the efficacy of corporate criminal responsibility and undermining the rule of law.

4. This Inquiry comes at a time of renewed focus on protecting Australian consumers from egregious conduct by corporations. Corporate regulation must both improve corporate behaviour and be alive to the impact that corporations have on the health of the Australian economy as a whole. Accountability for misconduct must be necessarily balanced with the need to ensure that corporations have flexibility to innovate.

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MAKING A SUBMISSION

5. The ALRC seeks submissions from a broad cross-section of the community, as well as those with a special interest in the Inquiry. These submissions are crucial in assisting the ALRC to develop its recommendations.

6. Submissions made using the form on the ALRC website are preferred. Alternatively, submissions may be emailed in PDF format to corporatecrime@alrc.gov.au. It is helpful if comments address specific proposals or questions in the Consultation Paper.

7. Stakeholders may make a public or confidential submission to the Inquiry. Public submissions may be published on the ALRC website. Submissions that are public are preferred. The ALRC also accepts confidential submissions. Private addresses and contact details will be removed from submissions before they are made public.

8. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public.

9. The ALRC will not publish submissions that breach applicable laws, promote a product or a service, contain offensive language, express sentiments that are likely to offend or vilify sections of the community, or which do not substantively comment on the issues relevant to the particular Inquiry.

MAKE A SUBMISSION

www.alrc.gov.au/about/making-submission/submission-form/

Submissions due by 31 January 2020

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PRINCIPLES

10. The proposals and questions in this Consultation Paper are framed by the following principles developed by the ALRC:

Principle 1:	The application and enforcement of the criminal law against corporations should be coherent and consistent
Principle 2:	There should be a clear principled framework for the use of different types of regulation, having regard to the unique role of the criminal law.
Principle 3:	The laws that regulate corporations, and the individuals associated with them, need to be appropriately calibrated to ensure that regulation is effective, without being unduly complex and burdensome.

BACKGROUND PAPERS

11. This Consultation Paper seeks stakeholder responses exploring reforms to Australia's corporate criminal responsibility regime. This is the primary document which the ALRC seeks stakeholder input on. The ALRC has also prepared 10 background papers. These provide context for the questions posed in this Consultation Paper. The Background Papers are designed to provide interested stakeholders with a broader understanding of the issues that surround the specific questions that the ALRC seeks submissions on.

12. All Background Papers can be downloaded from the ALRC website.

1	Overview of Commonwealth Criminal Law
2	Theory of Corporate Criminal Responsibility
3	Understanding the Corporate Criminal Law Landscape
4	Appropriate and Effective Regulation of Corporations
5	Attribution of Criminal Responsibility to Corporations
6	Individual Liability for Corporate Conduct
7	Whistleblower Protections
8	Deferred Prosecution Agreements
9	Sentencing Corporations
10	Illegal Phoenix Activity
11	Transnational Business

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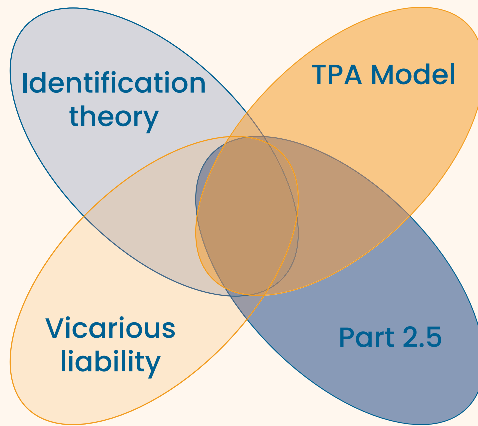
PROBLEMS IDENTIFIED

ATTRIBUTION CONFUSION



PROBLEMATIC SUBSTANTIVE LAW

Lack of corporate accountability

Complex, confusing, and incoherent criminal law applicable to corporations

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13. The proposals made in this Consultation Paper are aimed at addressing the following problems with the existing state of the law identified by the ALRC:

1. the overproliferation of criminal offences relevant to corporations and the lack of a principled distinction between criminal and civil regulation of corporations;
2. the lack of effective administrative processes to ensure that the criminalisation of regulatory provisions relevant to corporations occurs only in a principled way;
3. the risk of corporations treating civil penalty provisions merely as 'a cost of doing business';
4. the absence of a standardised method under Commonwealth criminal law for attributing criminal responsibility to a corporation, resulting in a lack of certainty, clarity, and effectiveness;
5. the absence of a harmonised mechanism for securing the individual accountability of corporate officers with responsibilities to prevent corporate misconduct;
6. limitations in the protection framework for corporate whistleblowers, even after recent amendments;
7. concerns about the appropriateness of the deferred prosecution agreement scheme proposed in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth);
8. the lack of a flexible, nuanced and appropriately adapted sentencing toolkit for courts imposing punishment on corporations found to be guilty of a criminal offence;
9. scope for improvement of aspects of the reforms proposed in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth); and
10. the need for greater clarity as to the due diligence obligations of Australian corporations in relation to extraterritorial offences.

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CONSULTATION QUESTIONS AND PROPOSALS

Appropriate and Effective Regulation of Corporations

The new model

14. Proposals 1 to 7 address Problems 1 to 3 and seek to establish a new model for the appropriate and effective regulation of corporations. Central to this is the adoption of a principled distinction between criminal and civil regulation of corporations. The ALRC proposes that criminal offences be reserved for conduct where criminalisation is justified. Proposals 1 to 7 should be read together, as they form a suite of reforms.

	CONSULTATION 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.

15. Under this model, the primary form of corporate regulation would be civil rather than criminal. A clear delineation between criminal offences, civil penalty proceeding (CPP) provisions, and civil penalty notice (CPN) provisions would be established. Such a distinction addresses the increasing availability of civil penalties and criminal prosecution for substantially the same conduct which is discussed in Background Paper 3 – Understanding the Corporate Criminal Law Landscape and Background Paper 4 – Appropriate and Effective Regulation of Corporations.

16. The ALRC's preliminary view is that as a matter of principle, a CPP should not address identical conduct to that which would constitute a criminal offence where a corporation is the respondent. This is in contrast to the "dual track regulation" that is common in many statutory regimes. If there is no distinction, there is no justification for corporate criminal responsibility. Where a criminal offence captures a greater level of wrongdoing (such as by requiring fault elements to be proven beyond reasonable doubt), the existence of dual-track regulation would be consistent with the model proposed.

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Principled criminalisation

CONSULTATION 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.

17. This proposal aims to provide a principled basis for the criminal responsibility of corporations. It reduces the exposure of a corporation to criminal prosecution so that criminality will only attach where justified. Proposal 2 reflects the ALRC's view that the criminal responsibility of a corporation *itself* can only be justified if the contravention captured by the offence makes the condemnatory force of the criminal law appropriate. The role of stigma is important as the 'bad publicity and stigma of a conviction far outweighs the consequences of administrative sanctions or an adverse decision in civil proceedings and/or the making of civil penalty orders'.

18. The principles operate as a restraint to ensure the framer of legislation has considered whether there is a real need for criminal (rather than civil) regulation of the particular conduct.

Reform of civil penalty provisions

CONSULTATION 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.

19. The distinction between CPP provisions and CPN provisions is based on whether court proceedings are required to properly establish contravention – that is, whether contravention is prima facie evident. Many existing low-level offences are already framed this way (for example, failures to provide information or lodge documents). The proposed distinction between CPP provisions and CPN provisions is consistent with the principles in the Attorney-General's Department (Cth) Guide to Framing Commonwealth Offences,

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Infringement Notices and Enforcement Powers (AGD Guide to Framing Offences) for determining when an infringement notice should be available.

20. Lack of availability of a CPN for a particular contravention does not mean enforcement must always be by CPP. A regulator may enter into an enforceable undertaking or other settlement with the corporation.

Operation of CPN provisions

	CONSULTATION 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.

21. Proposal 4 is broadly consistent with current procedures relating to infringement notices, with some modifications to reflect that issuing a CPN would be the sole response to certain contraventions.

22. Contravention of a CPN provision would result in a fixed quantum of penalty units payable under statute. Accordingly, it would not be appropriate to give the regulator a discretion to set the penalty under a CPN. Imposing a specified penalty would be consistent with administrative penalties imposed under certain statutes such as the *Taxation Administration Act 1953* (Cth).

23. Under the CPN scheme proposed, issue of the CPN is the default remedy for the particular contravention, rather than a choice of enforcement mechanism by the regulator. It is appropriate to:

- allow a contravenor to make representations to a regulator to withdraw the notice; and
- if the notice is not withdrawn, allow a contravenor to challenge the CPN in court.

24. The costs of a court challenge to issuance of a CPN would follow the event, with the possibility of cost consequences for both the alleged contravenor and the regulator. This would ensure there is a disincentive for contravenors to challenge a CPN, while also protecting a contravenor's interests if a regulator issues a CPN without a proper basis. It should be open to the court to impose costs on an indemnity basis where the court considers it appropriate.

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Punishing repeat or flagrant offending

	CONSULTATION 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.

25. A repeated or flagrant contravention of a civil prohibition could be seen as deserving of criminal sanctions consistently with Proposal 2. It addresses concerns that a corporation may treat civil liability as a mere cost of doing business.

Repeated contraventions

26. The first limb of the proposal is directed to repeated conduct. It would require the corporation to have previously been found to have contravened the relevant CPP provision or to have had a CPN issued that has not been withdrawn or successfully challenged. The escalation of penalties for repeated misconduct already exists within Commonwealth criminal law.

Flouting or flagrant disregard

27. The second limb is directed to the flouting or flagrant disregard of a civil prohibition. This escalation mechanism covers circumstances where a corporation, although not necessarily having been found to have contravened a particular civil provision on a previous occasion, has contravened a particular civil provision to such a degree of magnitude that its conduct demonstrates contumelious disregard of the relevant prohibition. Such a contumelious attitude towards a CPN or CPP provision deserves the condemnatory force of the criminal law. A civil penalty is not enough.

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Improved administrative processes

	CONSULTATION 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

CONSULTATION 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.

28. Proposals 6 and 7 seek to implement Proposals 1–5 within administrative mechanisms of Government.

Amendments to the AGD Guide to Framing Offences

29. The following amendments should also be made. First, the removal of Ch 2.2.6, for corporations, which imposes certain guidelines for strict and absolute liability offences, and which the ALRC has found are frequently departed from, as discussed in Background Paper 3 – Understanding the Corporate Criminal Law Landscape. Second, the removal of Annexure A, which provides a comparison of offences based on penalty, and which is honoured more in the breach than in observance.

30. In addition, it is proposed that a specific principle be added to the AGD Guide to Framing Offences to combat the duplication and complexity that has been identified. This principle is already one of the listed factors to consider when considering whether to create an offence. The ALRC suggests it needs to be given greater prominence.

Requiring drafters to justify creation of criminal offences

31. The success or otherwise of the principled approach to the appropriate and effective regulation of corporations proposed depends upon its adoption by the framers of legislation and the legislature itself. In the main, the principles contained in the AGD Guide to Framing Offences are useful. The problem, identified by the ALRC, is that they are often departed from.

32. The ALRC therefore proposes that the AGD develop administrative mechanisms that require substantial justification for deviation from the AGD Guide to Framing Offences as amended in accordance with the proposals.

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Attribution of Corporate Criminal Responsibility

Single legislative attribution method for corporations

33. There are currently multiple methods of attributing criminal and civil liability to a corporation. Current approaches to the attribution of criminal responsibility to corporations are discussed in Background Paper 5 - Attribution of Criminal Responsibility to Corporations. This runs contrary to the precept of the criminal law that the attachment of criminal responsibility should be coherent and consistent. To address Problem 4, the ALRC proposes that across Commonwealth statutes there should be a single method for attribution to corporations.

CONSULTATION 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

34. A single statutory method will improve simplicity and certainty for corporations (and their directors and officers), as well as regulators and prosecutors. The single approach necessitates the repealing of all other statutory models of attribution, and the ALRC suggests that the single method should apply to both criminal offences and civil contraventions.

35. The ALRC is not a legislative drafting body. However, to aid in conceptualising the proposals, a draft of the revised key sections of Part 2.5 of the *Criminal Code* is provided below.

PROPOSED REDRAFTED PART 2.5

12.2 Physical elements

Any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in also by the body corporate, unless the body corporate proves that it exercised due diligence to prevent the conduct.

Note: A defendant bears a legal burden in relation to defence of exercising due diligence: see section 13.4.

12.3 Fault elements other than negligence

(1) If, in respect of conduct that is engaged in by a body corporate, it is necessary to establish the state of mind, other than negligence, of the body corporate, it is sufficient to show that:

(a) one or more associates of the body corporate who engaged in the conduct had that state of mind; or

(b) the body corporate authorised or permitted the conduct.

Note: Section 12.3(1)(a) does not limit the application of section 11.3 Commission by Proxy or exclude extensions of liability.

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36. Under that single attribution method, the ALRC proposes expanding the individuals whose conduct may be attributed to the corporation from 'officers, employees, and agents' acting within the actual or apparent scope of employment, or within actual or apparent authority, to 'associates' acting on behalf of the corporation. This is a functional approach that looks at the substance of the relationship between the person and the corporation rather than their formal title. To balance this expansion, the ALRC proposes that a due diligence defence should be available to corporations. The absence of due diligence is a critical element in criminal liability for corporations under the model proposed by the ALRC.

Attribution for civil penalties

37. The ALRC is of the preliminary view that the proposed attribution method should also be applied to civil contraventions by corporations, subject to some caveats outlined below. As with attribution of criminal responsibility, there is no single unified statutory approach to attribution in respect of civil contraventions, and common law attribution is also available.

38. There should, however, be some modifications to the proposed attribution method for civil contraventions by corporations. It is not proposed to add fault elements onto a civil penalty provision, in the same way as occurs for criminal offences. Therefore, s 12.3 (or s 12.4) would only apply to a civil contravention where a fault element arises from the text of the provision.

39. Furthermore, the ALRC considers that a due diligence defence should not be available for civil proceedings, unless it is currently available. The due diligence defence exists to ensure that criminal responsibility only attaches where there is moral blameworthiness on the part of the corporation.

Individual Liability for Corporate Conduct

A simplified individual accountability regime

40. Where corporate officers have clear responsibilities to prevent corporate misconduct, and where the relevant individuals fail to take reasonable measures to do so, they should be personally liable. Existing mechanisms of individual liability for corporate conduct are surveyed in Background Paper 6 – Individual Liability for Corporate Conduct. To address Problem 5, the ALRC makes Proposal 9 and asks Questions 9–1 and 9–2. Proposal 9 responds to the Terms of Reference, which specifically request the ALRC to consider alternative mechanisms for attributing liability for corporate misconduct to individuals, including senior office holders. The ALRC's focus is on the liability of senior management (CEOs, CFOs, etc.) rather than the board of directors per se. The ALRC is of the view that the legal framework for director liability is generally not in need of reforms within the purview of this Inquiry.

41. Corporate criminal responsibility is one means of addressing the conduct that constitutes an offence. Individual liability is a necessary accompaniment to that, as it reflects the reality that while corporations are distinct legal entities capable of committing an offence, they are also ultimately comprised of individuals. Additionally, while corporate penalties may achieve deterrence and retribution at a company or industry level, the 'punishment' impact of criminal sanctions will not necessarily be borne by those individuals who caused or permitted the conduct that constituted the wrongdoing. Individuals who personally engaged in or were accessories to the misconduct may be separately liable under accessorial liability provisions, such as s 79 of the Corporations Act 2001 (Cth). The proposal, in contrast, is concerned with senior officers who may not have been directly or indirectly involved in the conduct, but otherwise failed in their responsibility to prevent the conduct. The effects of penalties are easy to displace onto third parties who may not have been involved in (or have been in a position to influence) the conduct.

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42. The ALRC's legislative review has illuminated a number of inconsistencies in the imposition of individual liability for corporate conduct. These inconsistencies have also been highlighted by various academics.

CONSULTATION PROPOSAL

9 The *Corporations Act 2001* (Cth) should be amended to:

a) 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; or

b) include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

43. This proposal aims to clarify the potential liability of senior officers on the basis of their capacity to influence the conduct of the body corporate. This includes individuals who were not directly involved in the conduct that constituted the wrongdoing, but were otherwise in a position to prevent it. The proposal would therefore augment the accessorial liability provisions found in s 79 of the *Corporations Act 2001* (Cth) and Part 2.4 of the *Criminal Code*, which would continue to cover officers directly involved in a contravention. The proposal is targeted at senior executives in charge of business units and divisions who have responsibilities for delivering particular business outcomes, and the capacity to direct and control aspects of a corporation's business on a day-to-day basis.

44. Proposal 9 have two key aims. First, where the statutory regime currently provides that senior officers will only be liable for conduct to which they were accessories, or where they have personally contravened a director's duty, the proposals will ensure that senior officers can also be held liable where they were in a position to prevent corporate misconduct, and failed to take reasonable measures to do so. Second, where the statute already has that effect (overwhelmingly the case, as shown below), the proposal aims to simplify and streamline the various methods currently employed to achieve this, in order to facilitate compliance by executives and corporations, as well as enforcement by regulators.

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45. In this way, the proposal aims to promote corporate compliance by more accurately reflecting the ways in which authority and control are exercised in practice in modern corporations.

46. The proposal is designed to ensure that senior officers can be held liable when serious crimes are committed by the company. It aims additionally to ensure that individual liability cannot be pushed too far down to middle-management, shielding the most senior officers, but instead accurately reflects where authority resides in corporations of any size or complexity. The proposal therefore seeks to reduce corporate misconduct and increase individual accountability for wrongdoing.

The 'reasonable measures' defence

47. Several of the Acts reviewed already provide guidance as to the meaning of 'reasonable measures'. Section 496 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA), for example, calls for consideration of whether the individual:

- took steps to ensure regular compliance monitoring;
- took steps to implement recommendations from such assessment;
- took steps to ensure adequate training and understanding of obligations for employees, agents, and contractors; and
- took any action after becoming aware of the contravention of a relevant Act, or of a relevant compliance management policy or procedure.

48. Based on preliminary consultations, the ALRC considers that it may be preferable to provide such guidance in a regulatory form, rather than in the statute. As consultees pointed out, community standards change over time, as do the practical and strategic approaches to preventing misconduct in corporations. Such guidance must also be capable of being adapted to suit corporations of different characters and sizes, and different types of conduct. The ALRC invites comment on this matter.

Fault

49. In some cases, Proposal 9 would lower the burden for establishing civil liability by removing the fault element (for example, under s 494 of the *EPBCA*, which currently requires that an officer 'knew' or 'was reckless or negligent' regarding the conduct). It could therefore be argued that the proposal undermines fundamental principles of civil justice as it imposes a reverse onus in civil proceedings for individuals who have been identified as being in a position to influence the conduct of the corporation in relation to a contravention. This is balanced, however, by retaining a clear defence (reasonable measures), and also retaining a fault element for criminal proceedings in relation to the same conduct (Proposal 9(b)).

50. The retention of a fault element as a precursor to any criminal liability for individuals is a fundamental aspect of the proposals. The legislative review showed that many of the provisions that impose a reverse onus on officers to prove a defence include a safeguard to the effect that the person cannot be imprisoned as a result of that provision, if such a penalty would not otherwise be available.

51. Proposal 9 would ensure that corporate officers only face criminal liability where the prosecution proves that they personally contravened the relevant provision with the necessary mental element of knowledge, intention, or recklessness.

52. Importantly, Proposal 9 does not expose senior officers to any and all misconduct by a corporation; liability is carefully limited to conduct that the individual was in a position to influence, and could reasonably have prevented by taking 'reasonable measures'.

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Category of persons who may be liable

	CONSULTATION QUESTION
9–1	Should Proposals 9 apply to 'officers', 'executive officers', or some other category of persons?

53. The current diversity of categories of individuals who may be liable under the current personal liability regime requires further consideration of the issue.

54. As the provisions aim to regulate the conduct of senior management, rather than the board, the term 'director' is not appropriate. Ultimately, the most appropriate formulation must balance the need for clarity and certainty, acknowledging the existing (if limited) case law, while ensuring that it targets a sufficiently high level of management to promote corporate compliance, without being unduly restrictive so as to be self-defeating.

Relevant conduct

55. The legislative review revealed that individuals may be held liable for the conduct of a variety of other persons, including:

- A body corporate (or 'corporation');
- An employee or agent acting within the actual or apparent scope of their employment or authority;
- An employee or agent acting within the actual or apparent scope of their employment or authority, who had 'duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the individual'; or
- Any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent.

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56. As with other inconsistencies, the complexity created by this divergence undermines corporate compliance by making it difficult for officers to understand and fulfil their responsibilities. The ALRC considers that it would be appropriate to apply the provision to a broad category of persons on the basis that the scope will be limited in practice to persons within the scope of 'influence' of the individual to be held liable. This safeguard will ensure that, if the relevant actor is so far removed that the individual could not influence the conduct through reasonable measures, they will not be liable for that conduct.

Application of the proposed changes

57. The ALRC has not yet determined which of the personal liability provisions identified in the review should be replaced by the proposed liability model. While the objective of simplicity and consistency calls for as many of the provisions as appropriate to be replaced, there may be important justifications for retaining distinctive formulations in some legislation based on the scope and purpose of that legislation.

CONSULTATION QUESTION

9–2	Are there any provisions that should not be replaced by the provisions set out in Proposals 9?

58. The ALRC maintains the position of its earlier report that, where there are clear justifications for unique individual liability provisions in particular statutes, that distinction should be maintained. Where there is no clear reason for distinction, on the other hand, the ALRC proposes that the various provisions should adopt a common form.

59. The ALRC therefore particularly welcomes submissions from the public as to whether a unified officer liability provision such as that proposed here should apply to each of the Acts identified in Appendix I (or any others), or whether there are particular reasons for maintaining distinct provisions in any of those regimes.

Whistleblower Protections

Enhanced whistleblower protections

60. Whistleblowers play an integral role in the identification and investigation of corporate crime, as one of the key challenges that characterise the investigation and prosecution of corporate crime is the significant information asymmetry between corporations and regulators. This is particularly true in the case of large multinational corporations and corporate groups. To address Problem 6, the ALRC makes Proposal 10 and asks Questions 11 and 12. Proposal 10 responds to the Terms of Reference, which request the ALRC inquire into options for reforming Part 2.5 of the *Criminal Code* or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime. The existing framework for whistleblower protection, as recently amended, is discussed in Background Paper 7 – Whistleblower protection.

Ensuring appropriate whistleblower protections as an aspect of due diligence

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CONSULTATION PROPOSAL

10	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.

61. Proposal 10 requires a corporation to implement an effective whistleblower policy in order to demonstrate that it exercised due diligence in order to defend any criminal offences in respect of which a due diligence defence applies. Given the link between effective whistleblower policies and greater corporate integrity, it is appropriate to link the availability of due diligence as a defence to the attribution of criminal responsibility to a corporation as set out in Proposal 8 with the requirement to have a whistleblower policy under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*

(Cth). Such a link will further incentivise corporations to adopt suitable whistleblowing procedures.

62. The ALRC suggests that Proposal 10 only apply to large corporations. For smaller corporations, the exercise of due diligence would be assessed on the totality of the policies and procedures of the company having regard to its size and the complexity of its operations. Proposal 10 should not be limited by causation. That is, it should not be necessary to demonstrate that the absence of a whistleblower policy or the failure to implement a whistleblower policy caused or was directly relevant to the commission of a crime by the corporation. Rather, these policies are designed to assist in improving the integrity and compliance orientation of the corporation generally, and so their absence should be a factor in determining whether a due diligence defence can be made out.

Whistleblower compensation scheme

CONSULTATION QUESTION

11 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?

63. While recent legislative amendments aim to facilitate access to a remedy where whistleblowers have suffered 'victimisation', there is no general compensatory scheme for whistleblowers who have not been specifically victimised but have nonetheless suffered detriment as a result of the disclosure.

64. Negative labelling of whistleblowers and somehow deserving of reprisals may also indicate the subtle psychologically-based reprisals that may occur subsequent to whistleblowing.

65. A broader whistleblower compensation scheme could strengthen the corporate criminal responsibility regime by ensuring that whistleblowers are compensated for loss arising from detrimental personal consequences of making a disclosure. Therefore such a scheme could be expected to improve enforcement of, and compliance with, corporate criminal laws.

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Extraterritorial application of corporate whistleblower protection laws

CONSULTATION QUESTION

12 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?

66. While the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) widened the scope of whistleblower protections, it was silent as to the potential extraterritorial application of the amended whistleblower protections, causing

some commentators to ask whether they are adequate to protect disclosures in relation to transnational offences such as foreign bribery and human trafficking.

67. A proposal to extend whistleblower protections extraterritorially (or clarify the extraterritorial application of the existing protections) may strengthen the corporate criminal responsibility regime by ensuring that whistleblowers are still adequately protected in making disclosures in relation to crimes of a transnational nature, such as foreign bribery or trafficking.

Deferred Prosecution Agreements

Revisiting a DPA scheme for Australia

68. The detection, investigation, and prosecution of corporate crime is subject to a number of impediments, including information asymmetries, and the inherent complexity of crime in the corporate context. Deferred prosecution agreements (DPAs) are one way in which some overseas jurisdictions have sought to overcome the difficulties associated with addressing corporate crime.

69. Agreements to defer prosecution are collectively and commonly known as DPAs, although this label does not accurately capture the diversity in how DPAs (and their variants) are legally conceived and applied in practice. At their simplest, DPAs are agreements between prosecutors and a corporation that provide for the suspension of criminal proceedings against the corporation in exchange for compliance with agreed conditions. DPAs or similar agreements are available in a number of foreign jurisdictions, including the US, UK, Canada, France, and Singapore.

70. DPAs are not currently used in Australia. However, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 would amend the *Director of Public Prosecutions Act 1983* (Cth) to introduce a DPA scheme in Australia. This Bill lapsed at the end of Parliament on 1 July 2019 and the ALRC understands it is likely to be reintroduced before the end of 2019. The use of DPAs globally and the DPA scheme that was proposed for Australia is discussed in Background Paper 8 – Deferred Prosecution Agreements.

71. It is opportune to reassess the utility and appropriateness of introducing a DPA scheme in Australia, within the framework of reforms to the corporate criminal responsibility regime being considered in this Inquiry. This reassessment can also benefit from insights from recent developments under the UK's DPA scheme. Accordingly, to address Problem 7, the ALRC asks Question 13.

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CONSULTATION QUESTION

13	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?

Sentencing Corporations

Introduction

72. The criminal law has an expressive function that is seen to operate independently of the imposition of sanctions or punishment. The labelling of conduct as criminal serves a denunciatory and retributive function in and of itself. The realisation of the pluralist aims of the criminal justice system is also premised, however, on the imposition of appropriate sanctions through the sentencing process. Sentencing is thus a critical aspect of Australia's corporate criminal responsibility regime, and warrants consideration in the context of this Inquiry. Background Paper 9 – Sentencing Corporations sets out aspects of the current sentencing toolkit in respect of corporate offenders. To address Problem 8, the ALRC puts forward Proposals and Questions 14-25.

73. The most commonly cited purposes of sentencing are denunciation, retribution, deterrence, rehabilitation, incapacitation, and, more recently, restoration. Although these purposes developed in respect of natural persons, they may be translated appropriately to corporate offenders.

Sentencing factors

CONSULTATION PROPOSAL

14 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).

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CONSULTATION PROPOSAL

15 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?

Should this list should be non-exhaustive and supplementary to the general sentencing factors, principles, and purposes as amended in accordance with Proposal 14?

CONSULTATION PROPOSAL

16

Should the *Corporations Act 2001* (Cth) 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;

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m) the extent of any efforts by the corporation to compensate victims and repair harm;

    i. any internal investigation into the causes of the contravention;

    ii. internal disciplinary actions; and

    iii. measures to implement or improve a compliance program;

n) any internal investigation into the causes of the contravention;

o) internal disciplinary actions; and

p) measures to implement or improve a compliance program?

74. Proposals 14 to 16 are aimed at the provision of harmonised statutory guidance on sentencing and making civil penalty orders for corporations. Complexities in the design of these proposals arise as a result of gaps in the existing legislative framework, which have been the subject of previous ALRC recommendations.

Sentencing corporations

Current legislative framework and common law factors

75. There is currently no specific statutory guidance on the factors that are relevant to sentencing a corporation for a federal offence.

76. Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of factors that the court must take into account when sentencing any person for a federal offence, This section has been subject to criticism. Wholesale reforms were recommended by the ALRC in 2006.

77. A number of the factors listed in s 16A(2) will be relevant to sentencing a corporation, such as 'the nature and circumstances of the offence', and procedural factors in relation to cooperation and pleas. However, other factors will not apply, such as 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependents'. More critically, there are a number of factors relevant to sentencing a corporation that are not included in s 16A(2). As previously noted by the ALRC, factors that may indicate the culpability of a corporation in the commission of an offence will differ from those that indicate the culpability of a natural person.

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Introducing statutory guidance on sentencing corporations

78. While the proposed list is generally consistent with the case law, the proposed statutory guidance would highlight certain factors that have not been consistently cited in the case law — namely, whether the company has undertaken any internal investigations or disciplinary actions; any advantage realised by the corporation; and the effect of the sentence on third parties.

79. The list in Proposal 15 attempts to highlight key factors that will typically be relevant to assessment of the culpability of a corporation and the seriousness of the offending conduct. However, it does not attempt to exhaustively identify relevant factors from

the case law. The ALRC invites stakeholder views on whether this proposal strikes an appropriate balance.

The need for broader reform of sentencing factors

80. It seems preferable that the list of factors for sentencing corporations would supplement rather than displace the general list of factors applicable to sentencing federal offenders. This would maintain consistency between corporate and individual offenders. However, the ALRC has previously concluded that the existing list of general factors for sentencing federal offenders (s 16A(2) of the *Crimes Act 1914* (Cth)) is flawed. Fisse recently observed that 'Part IB of the *Crimes Act* has been criticised for complexity, poor drafting, inflexibility, limited scope and impracticality.' As Proposal 13 would build upon the foundations laid by s 16A(2), it is pertinent to reiterate the ALRC's prior calls for reform.

81. Recommendations 4–1, 5–1, 6–1 and 6–8 of the *Same Crime, Same Time* report would revise and restructure legislative guidance on sentencing federal offenders:

- Recommendations 4–1 and 5–1 would introduce separate provisions setting out the purposes and principles of sentencing (see above).
- Recommendation 6–1 would provide a non-exhaustive list of eight broad categories of factors relevant to the purposes and principles of sentencing, with examples of the types of factors under each category.
- Recommendation 6–8 would introduce a separate provision requiring the court to consider factors pertaining to the administration of the federal criminal justice system — guilty pleas and cooperation with authorities — where relevant and known to the court.

82. These recommendations contemplated the inclusion of these provisions in a federal sentencing act. However, as such legislation has not been enacted, Proposal 14 is premised on amendments to Pt IB of the *Crimes Act 1914* (Cth).

Making civil penalty orders for corporations

83. There is no general statutory provision for the factors applicable to making civil penalty orders, for individuals or corporations.

84. Proposal 16, in conjunction with Proposal 15, would promote consistency between sentencing corporations for criminal offences and the imposition of civil penalties. It would promote certainty for corporations and permit the continued parallel development of principles at common law with reference to the analogous statutory factors proposed here.

85. The list of factors in Proposal 16 provides for all of the factors identified in Proposal 15 in respect of sentencing corporate offenders, but also provides for the types of general factors that are currently furnished by s 16A(2) in the criminal context. This is necessary as there is currently no general statutory guidance on the imposition of civil penalties.

86. Proposal 14 would bring civil penalty setting for corporations and individuals out of step, as the process for individuals would remain primarily governed by the common law. This is undesirable. However, in the absence of an effective legislative scheme for civil

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penalties, it is beyond the scope of the ALRC's current inquiry to recommend a statutory provision that would govern both individuals and corporations. Nonetheless, the ALRC has previously recommended the introduction of such a legislative scheme, which would have incorporated a provision governing the civil penalty setting process for individuals and corporations. This would be a sensible approach.

Non-monetary penalties

CONSULTATION PROPOSAL

17 Should the *Crimes Act 1914* (Cth) 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.

CONSULTATION PROPOSAL

18 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.

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CONSULTATION PROPOSAL

19 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.

87. In respect of most Commonwealth criminal offences, the only available sentencing option for a convicted corporation is a fine. This stands in contrast to the array of sentencing options available for individual offenders, which may include imprisonment, community service orders, and probation.

88. It has long been observed that fines are an inadequate penalty for corporate offenders. The availability of non-monetary penalties, in conjunction with monetary penalties as appropriate, would strengthen the ability of the courts to pursue relevant sentencing purposes.

89. The imposition of non-monetary penalties does not provide the same level of transparency and certainty as monetary penalties, because the costs of complying, for example, with community service and probation orders may not be ascertainable at the time of sentencing. This may make it more difficult to assess whether sentences meet the principles of proportionality, consistency, and parity. However, it would still be possible to make qualitative assessments with respect to the imposition of like orders for like circumstances, for example. The availability of the same types of non-monetary penalties in respect of corporations in all cases would facilitate the development of jurisprudence concerning the imposition of the different types of orders.

Dissolution

90. Dissolution is the 'corporate equivalent of capital punishment'. This is an extreme penalty, which is liable to have a significant impact on third parties — namely, employees, shareholders and consumers. It would therefore be rightly confined to the most serious offending, or where the offending corporation was operated primarily for a criminal purpose. As the ALRC has previously noted, the imposition of a dissolution order would be inappropriate in response to a contravention of a civil penalty provision, given the lower standard of proof and lower level of corporate fault involved in a civil contravention.

91. Dissolution purports to permanently remove the capacity of the offender to re-offend — removing 'from the community a corporate entity which has flagrantly violated the rules of society'. However, in order to prevent those who were involved in managing a dissolved corporation recommencing activities through a new corporate entity it is pertinent to provide for disqualification of such individuals in conjunction with a dissolution order (Proposal 19).

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Maximum penalties

CONSULTATION QUESTION

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

CONSULTATION QUESTION

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

92. The penalties imposed on corporate offenders in Australia are typically low when compared to overseas jurisdictions. The ALRC invites stakeholder views on offences for which the maximum penalty for corporations is in need of review.

93. Given that the financial circumstances of corporate offenders and the scale of offending conduct may vary significantly, setting a maximum penalty that will 'deter' misconduct inevitably involves a certain level of arbitrariness. Provisions that allow for maximum penalties to be calculated with reference to a corporation's annual turnover or the benefits gained from the offending conduct go some way to addressing this issue. However, there is concern that these alternative bases for calculation may be of limited utility in practice, given difficulties in determining the value of relevant benefits or detriment, and the complexity in applying turnover provisions.

94. The ALRC invites stakeholder views on whether the removal of maximum penalties and the introduction of sentencing guidelines for corporations should be further explored for certain offences.

Facilitating compensation of victims

CONSULTATION QUESTION

22	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?

95. Corporate misconduct may cause harm or loss on a significant scale, and there is often a public perception that accountability for corporate wrongdoing should result in compensation. Yet, consistent with the traditional aims of the criminal justice system, the focus of state responses to corporate wrongdoing is typically on punishment, deterrence and rehabilitation of the corporation, rather than the compensation of victims.

96. The availability of compensation or remediation orders in criminal or civil penalty proceedings provides a mechanism for access to justice that does not necessitate follow-on civil litigation, which can be prohibitively costly and time consuming. While not within the traditional purview of the criminal law, the availability of compensation or redress facilitation orders is consistent with the sentencing purpose of restoration. Compensation orders in the criminal context are also consistent with broader changes to regulatory approaches internationally that prioritise compensation and redress.

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Debarment

CONSULTATION PROPOSAL

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

97. For individuals, a criminal conviction carries consequences that extend beyond the sentence imposed by a court. For example, a criminal conviction may affect an individual's ability to find employment, secure housing and travel overseas. Yet corporations with a criminal conviction typically only face the possibility of reputational damage, and payment of a monetary penalty.

98. Allowing criminally convicted corporations to enter into government contracts — at both the Commonwealth and state and territory level — may undermine public trust in government, endanger public health and safety, and increase the risk of misuse of public funds. Implementation of a unified debarment regime would limit the involvement of criminally convicted corporations in government work.

Informed sentencing

CONSULTATION PROPOSAL

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

CONSULTATION QUESTION

24–1 Who should be authorised to prepare pre-sentence reports for corporations?

CONSULTATION PROPOSAL

25 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.

Pre-sentence reports

99. The power to require pre-sentence reports in respect of corporate offenders would provide courts with a formal means of obtaining information that will assist in imposing an appropriate sentence, in accordance with the factors listed in Proposal 15. Relevant information would include:

- the financial circumstances of the corporation; and
- what steps the corporation has taken to improve its internal controls, discipline relevant personnel, and compensate victims or repair harm caused by the offence.

100. Detailed information on these matters would be particularly critical to the court's ability to assess the appropriateness and design of non-monetary sentencing options, such as probation and community service orders (Proposal 17).

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Victim impact statements

101. Victim impact statements may only be made for an individual victim of an offence. However, victims of corporate crimes might include other corporations, as well as victims who may be identified more readily as a group (for example, consumers of a particular product, or residents of an area affected by an environmental offence). Individual victim impact statements may be inappropriate or impractical where the harm is spread across a number of individuals, who may not be readily identifiable.

102. Provision of a group victim impact statement may assist the court in assessing: the impact and nature of the offence; the corporation's efforts to compensate victims; and the suitability of a compensation order (see Question 22). Consumer rights groups and other NGOs might be well placed to provide the court with information on the impact of a corporate criminal offence on a broad class of individuals.

103. Questions may arise about the authority of a particular representative to prepare a victim impact statement on behalf of a group. However, principles or procedural requirements could feasibly be developed to address issues of this nature; perhaps in court practice notes.

Illegal Phoenix Activity

104. The concept of illegal phoenix activity, its consequences, and the content of the Combating Illegal Phoenixing Bill is discussed in Background Paper 10 – Illegal Phoenix Activity. The ALRC largely supports the approach to regulating illegal phoenixing adopted by the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 ('Combating Illegal Phoenixing Bill') which is presently before Parliament. In particular, the ALRC supports the proposed amendments setting up a new voidable transaction known as a creditor-defeating disposition and associated criminal offences and civil penalty provisions for directors, officers, and advisors. The ALRC believes this will further both the rationale of providing greater clarity with regard to the prohibited conduct and communicate denunciation through the potential of criminal sanction.

105. The ALRC is particularly supportive of the proposal to establish an offence and civil penalty provision relating to 'procuring, inciting, inducing or encouraging' a creditor-defeating disposition, given the role misconduct by advisors in illegal phoenix activity plays. In order to improve on the legislative approach taken in the Combating Illegal Phoenixing Bill and address Problem 9, the ALRC makes Proposals 26 to 28 and asks Questions 29 and 30.

CONCEPT CONSULTATION PAPER

Improving enforcement provisions in the Combating Illegal Phoenixing Bill

	CONSULTATION PROPOSAL
26	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

106. Proposal 26 improves the enforcement mechanism proposed in the Combating Illegal Phoenixing Bill for the unwinding of creditor-defeating dispositions and the disgorgement of benefits in two key ways. First, it addresses concerns about the constitutionality of the provision contained within the Combating Illegal Phoenixing Bill by proposing the removal of the power for ASIC itself to make orders unwinding a creditor-defeating disposition as currently contained within the Bill. If Proposal 26 were adopted, such orders could only be made by a court. Secondly, the proposal adds a mechanism through which benefits may be disgorged to the Commonwealth where it is not appropriate for them to be disgorged to the original company.

Power to issue restraining notices

	CONSULTATION PROPOSAL
27	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.

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107. Proposal 27 is designed to counter-balance Proposal 26, which proposes removing ASIC's proposed power to make orders unwinding creditor-defeating dispositions. It also addresses concerns that illegal phoenixing occurs too quickly for regulators or liquidators

to act. This proposal provides a means for ASIC or the ATO to prevent the dissipation of assets. The proposal has some similarities to the restraining orders available under the *Proceeds of Crime Act 2002* (Cth), save that ASIC or the ATO may first issue an interim restraining notice without the intervention of a court.

Regulation of directors and advisors

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

108. Proposal 28 puts forward an additional amendment to those outlined in the government's existing Combating Illegal Phoenixing Bill. It seeks to improve the ability of regulators to detect illegal phoenixing.

109. The proposal addresses problems with tracking individuals who are repeatedly involved in illegal phoenix activity by providing a means to identify individual directors through director identification numbers (DINs). Proponents of a DIN scheme argue that it would also overcome obstacles in detecting directors who manage corporations while disqualified and also prevent the use of fictitious identities. Submissions to numerous government consultations in recent years have supported the introduction of DINs. Consultations also suggested that DINs would address concerns relating to serial shadow directors involved in illegal phoenixing schemes.

110. DINs were originally part of the Combating Illegal Phoenixing Bill but were not part of the Combating Illegal Phoenixing Bill that was reintroduced in July 2019. DINs were also among the recommendations put forward by the Senate Economics References Committee in its 2015 report on *Insolvency in the Australian Construction Industry*.

	CONSULTATION QUESTION
29	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?

111. Question 29 asks whether, given the potential involvement of both registered and unregistered insolvency advisors in encouraging illegal phoenix activity, there is a need for a specific power of disqualification in respect of such persons where they are found to have facilitated illegal phoenix activity. No such power is needed for disqualification of directors, as they would be captured by the existing provisions of the *Corporations Act 2001* upon being convicted of a creditor-defeating disposition offence. Providing specifically for the disqualification of advisors recognises that directors often engage in phoenixing on the advice of insolvency and restructuring advisors.

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Evaluating the proposals in context

CONSULTATION QUESTION	
30	Are there any other legislative amendments that should be made to combat illegal phoenix activity?

112. The ALRC seeks the views of stakeholders as to whether further measures are required to combat illegal phoenix activity, given the complexity of identifying and taking action against this type of conduct.

Transnational Business

113. The Terms of Reference specifically request that the ALRC investigate the potential application of Part 2.5 of the *Criminal Code* to extraterritorial offences by corporations. The Terms of Reference request additionally that the ALRC consider 'options for reforming Part 2.5 of the Code or other relevant legislation' to strengthen the corporate criminal liability regime. Background Paper 11 – Transnational Business discusses the issues associated with regulating transnational business. To address Problem 10, the ALRC asks Question 31.

114. A key barrier to the enforcement of extraterritorial offence provisions under the *Criminal Code* is the significant information asymmetry between multinational businesses and investigators. Prosecutors face considerable difficulty in obtaining sufficient evidence to establish the elements of an offence, particularly where it takes place offshore. This is compounded by jurisdictional restraints and barriers to effective international cooperation between law enforcement agencies.

115. This challenge could be mitigated by clarifying or expanding the standard of due diligence required by Australian corporations in order to comply with their obligations to refrain from engaging in extraterritorial offences. Such measures could improve the prevention, detection, and enforcement of offshore crimes by requiring corporations to take greater measures to identify and address risks in their overseas operations, and to make this information available to regulators where appropriate.

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116. This would have the dual effect of both ensuring that underperforming corporations improve their practices, while also rewarding the many corporations that already expend time and resources on voluntarily addressing these issues. It could effectively 'level the playing field' between Australian corporations in a way that promotes greater compliance with the criminal law.

CONSULTATION QUESTION	
31	Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

117. The ALRC does not propose any amendment to the existing obligations and liabilities of corporations in relation to substantive offences (such as slavery), as these offences are already comprehensively prohibited under Commonwealth criminal law. Rather,

this question explores options for clarifying or expanding the standard of due diligence that is required by Australian corporations in relation to avoiding any involvement in the commission of extraterritorial offences, including by their offshore subsidiaries, employees, and agents.

118. Clarifying or expanding the due diligence requirements of corporations in relation to offshore crimes would be consistent with the existing prohibitions on engaging in these crimes. Moreover, it would both promote compliance and enhance enforcement of these obligations by clarifying the expectations of Australian corporations in their offshore activities.

Effect of Proposal 8 on extraterritorial offences

119. There are two key ways in which Proposal 8 would impact the application of extraterritorial offences.

120. Under the revised corporate liability attribution method set out in Proposal 8, the conduct of an employee, agent, or associate can be attributed to a corporation, even if the conduct may not amount to an offence by the associate personally. For example, a corporation can be liable for an offence if the associate who engaged in the relevant conduct (the *actus reus*) did not possess the necessary mental element (*mens rea*), and therefore the conduct would not amount to an offence by the associate. Similarly, the corporation can be liable for an offence if the associate who engages in the conduct constituting the offence does not commit an offence because the conduct is beyond the jurisdiction of the provision (because it took place overseas, for example, or the associate is not an Australian citizen).

121. For offences with standard geographical jurisdiction (territorial), an Australian corporation will only be liable for the conduct of an associate if it takes place within Australia, as s 14.1 of the Criminal Code provides. Where an offence attracts extraterritorial jurisdiction, the corporation may also be liable for conduct that occurs overseas.

122. All slavery-like and human trafficking offences under the *Criminal Code* attract category B extraterritorial jurisdiction, which applies to Australian citizens, residents, and bodies corporate; conduct that occurs in Australia; and overseas conduct the effect of which occurs in Australia. Slavery proper, however, is an offence with unlimited (category D) jurisdiction (s 15.4), as it was imported from the Rome Statute. While a non-Australian individual outside the territory of Australia is not subject to category B offences, the revised Part 2.5 could make the conduct of that individual relevant to the criminal responsibility of an Australian corporation if that individual is an associate of the corporation under the proposed changes. That is because the impugned conduct is deemed to be that of the corporation, and therefore it is, by operation of the revised Part 2.5, an Australian body corporate engaged in the conduct that is the subject of a relevant offence provision.

123. For example, under the proposed revisions, if an associate acting on behalf of an Australian corporation engaged in forced labour as defined under s 270.6A of the *Criminal Code*, even if the conduct occurred in a foreign jurisdiction where the conduct is not prohibited, the Australian corporation can be prosecuted under s 270.6A because the offence has category B jurisdiction.

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124. An Australian corporation would be similarly liable for breaches of foreign sanctions offences under the *Autonomous Sanctions Act 2011* (Cth) and the *Charter of the United Nations Act 1945* (Cth). These offences are typically category A jurisdiction under s 15.1 of the Criminal Code, which is similar to category B but excludes Australian residents who are not citizens.

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

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