



31 January 2020

Australian Law Reform Commission
PO Box 12953
George Street
QLD 4003

email: coporatecrime@alrc.gov.au

ASA – RESPONSE TO ALRC DISCUSSION PAPER CORPORATE CRIMINAL RESPONSIBILITY

Dear Madam or Sir

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by, and operating in the interests of, its members. These are primarily individual and retail investors and self-managed superannuation fund (SMSF) trustees, and in relation to this consultation paper ASA particularly represents the increasing number of disintermediated shareholders, or those shareholders who are not represented by full-service stockbrokers

ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

ALRC has been charged with a comprehensive review of the corporate criminal responsibility regime, with a particular focus on the need for effective laws to hold corporations to account for criminal misconduct.

ASA supports the general thrust of the discussion paper to increase the level of criminal responsibility for 'white collar' crimes. We will not respond to all aspects of the discussion paper but will touch on selected proposals. ASA notes that penalties for misconduct are often directed at the shareholders rather than the individuals responsible for perpetuating the misconduct or charged with preventing the misconduct. This ultimately punishes shareholders, which is only appropriate where shareholders have facilitated and encouraged wrongdoing, and more concerning, fails to deter offenders.

Section 6 *Reforming Corporate Criminal Responsibility* incorporates Proposal 8 reads: 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.

Retail shareholders generally seek a good profit, earned in an ethical and lawful manner over the longer term. The revelations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial

Services Industry were disturbing and unexpected. We believe shareholders have a role to play in holding directors to account and expecting lawful and ethical behaviour, including directors acting with appropriate diligence to prevent poor behaviour by executives and officers and encourage an ethical culture within the organisation they oversee. Shareholders should ensure the corporations in which they hold shares are aware of the expectation of ethical conduct. We support Proposal 8 (b) being a due diligence defence is available to the corporation. While it is impossible to prevent all fraud and misdeeds by individuals, it can be made difficult, and systemically unusual.

ASA supports Section 7 *Individual Liability for Corporate Conduct* Proposal 9 and 10. In respect of Question A, it is difficult to envisage any officer who was in a position to influence the conduct of the body corporate in relation to the contravention, being other than an 'executive officer' or a shadow executive officer. We support a defence of taking reasonable measures to prevent the contravention.

Section 8 *Whistleblower Protections*. ASA support the creation of a safe environment for protection of whistleblowers.

ASA comments on Question E Section 9 *Deferred Prosecution Agreements* appear similar to enforceable undertakings and similarly effective. The practice, if permitted, needs to be assessed periodically to ensure systemic issues are dealt with.

ASA supports the suggestions under Proposal 13 (Section 10 *Sentencing Corporations*) for requiring the court to consider certain factors when sentencing a corporation, to the extent they are relevant and known to the court. However, ASA highlights when incorporating subsection g) any advantage realised by the corporation as a result of the offence, should be made clear to shareholders who may have been misled about the corporation's prospects, performance and way of achieving performance. Shareholders have a role in maintain good corporate behaviour by holding directors to account. Additional knowledge about the nature and size of the illegal gains may soften the blow of lower investment incomes (i.e. dividends). With Australian individuals required to save for their own retirement and shares being one of a limited number of asset classes available for investment, it is important early detection of criminal conduct is encouraged and supported. We reiterate retail shareholders expect ethically derived profits to fund their retirement incomes.

ASA supports the factors to be taken into account when imposing a civil penalty on a corporation outlined in proposal 14, and note the importance of o) the deterrent effect, while highlighting p) 'the effect of the penalty on third parties' should incorporate the impact on shareholders (and the consequently the economy as more superannuants move into the pension phase).

ASA supports Proposal 17 and 18, being the amendment of The Corporations Act 2001 (Cth) allowing the court to make an order disqualifying a person from managing a corporation for a court-determined appropriate period, if that person was involved in managing a corporation dissolved in accordance with a sentencing order, and a unified debarment regime, respectively.

ASA also supports the proposals under Section 11 to address illegal phoenix activity.

Thank you for considering our views on this important issue. If you have any questions about this submission, please do not hesitate to contact Fiona Balzer, Policy & Advocacy Manager on (02) 9252 4244.

Yours sincerely,

A handwritten signature in black ink that reads "John Cowling". The signature is written in a cursive style with a large initial 'J' and a distinct 'C'.

John Cowling
Chief Executive Officer
Australian Shareholders' Association