

7 February 2020

Secretariat
Review of Corporate Criminal Responsibility
Australian Law Reform Commission
PO Box 12953 George Street
BRISBANE QLD 4003

Dear Sir/Madam

CORPORATE CRIMINAL RESPONSIBILITY

The Insurance Council of Australia¹ (Insurance Council) appreciates the opportunity to comment on the ALRC's Discussion Paper on Corporate Criminal Responsibility (the Discussion Paper). The main issue that our members wish to raise is that while the ALRC's objective appears to be to streamline and simplify individual liability for corporate misconduct, the proposals in the Discussion Paper will add complexity to individual liability for corporates where the Banking Executive Accountability Regime (BEAR) will apply.

Since the ALRC issued its Discussion Paper, the Treasury has released its Discussion Paper on the Financial Accountability Regime (FAR) which is to extend the BEAR to all APRA regulated entities and provide joint administration to ASIC as the conduct regulator. The FAR appears to take a more granular approach to attributing individual liability for corporate bodies relative to BEAR. However, whatever the outcome in relation to FAR, Insurance Council members strongly prefer consistency in the manner in which individual liability for corporate misconduct applies whether for civil or criminal offences. For present, the comments below are confined to the difference in approach between BEAR and what the ALRC is proposing. The Insurance Council will be making a separate submission on FAR to the Treasury.

The ALRC proposes a functional approach to defining who a corporation's "associates" are for the purposes of determining whether a corporation should be liable for the acts of directors and employees. The term "associates" would replace "officers, employees and agents". This approach looks at the substance of the relationship between the person and the corporation rather than his or her formal title. On the other hand, under the BEAR, ADIs must identify "accountable persons" within the corporation and provide documentation identifying these persons and their respective responsibilities to the regulator (APRA). Broadly, the purpose of BEAR is to ensure that each accountable person is responsible for issues that occur under their management.

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent about 95 per cent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. September 2019 Australian Prudential Regulation Authority statistics show that the general insurance industry generates gross written premium of \$49.5 billion per annum and has total assets of \$128.3 billion. The industry employs about 60,000 people and on average pays out about \$155.1 million in claims each working day. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

The two key ways in which ALRC proposals differ from BEAR and raise concerns for our members are the concept of influence and reversal of the onus of proof.

Firstly, under the ALRC proposals, an Executive Officer will be liable for a civil penalty where they were in a position to influence the conduct of the corporation in relation to an offence and failed to do so. The concept of influence is vague and could capture broad categories of people. This seems to be at odds with the ALRC's objective to target senior rather than middle management. On the other hand, the BEAR which currently applies to ADIs provides a clearer regime for identifying individuals who should be liable for corporate misconduct. Under this regime, an individual will be an "accountable person" if he/she has one or more of a prescribed list of responsibilities.

Secondly, the ALRC's proposals contemplate a reversal of the onus of proof such that individuals liable for corporate misconduct will face a civil penalty unless they can prove that they took reasonable measures to prevent that offence. Not only would there be no fault element (the individual has engaged knowingly, intentionally or recklessly in misconduct) associated with civil proceedings, the onus will be placed on the defendant to prove they took reasonable measures to prevent the misconduct. This proposal would undermine the fundamental principles of natural justice. In addition, an individual faces a practical difficulty in bearing this reversal of onus of proof where they may no longer be an employee of the company and therefore find it difficult to obtain the evidence to satisfy the burden.

A general point that our members wish to make is in regards to the way in which individual liability for corporate misconduct has expanded in recent times under various legislative frameworks. This is likely to result in increased premiums for Directors and Officers' Insurance², with the potential consequence of making it more difficult for firms to attract and retain suitable executive talent.

If you have any questions or comments in relation to our submission please contact Mr John Anning, the Insurance Council's Head of Policy, Regulation Directorate, on telephone: 02 9253 5121 or email: janning@insurancecouncil.com.au

Yours sincerely



Robert Whelan
Executive Director & CEO

² Directors' and Officers' policies provide specified cover for civil penalties not criminal. The civil coverage is subject to a policy limit and extends to legal costs in defending the matter until the wrongdoing has been admitted or the insured has been found guilty.