# MTAA Submission to the ALRC on the ToR for the Review into Australia's Corporate Criminal Responsibility Regime



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# Contents

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# 1. Introduction

1.1. **The Motor Trades Association of Australia Limited (MTAA) appreciates the opportunity to provide this *MTAA Submission to the ALRC on the Terms of Reference for the Review into Australia's Corporate Criminal Responsibility Regime*.**

1.2. MTAA is a federation of various states and territory motor trades associations and automobile chambers of commerce. MTAA and members represents, and is the national voice of, the 69,365 retail motor trades businesses which employ over 379,000 Australians and contribute around $37.1 billion to the Australian economy equating to about 2.2% of GDP. MTAA member constituents include automotive retail, service, maintenance, repair, dismantling recycling and associated businesses that provide essential services to a growing Australian fleet of vehicles fast approaching 20 million by 2020.

1.3. As stated on the home page of the *Review into Australia's Corporate Criminal Responsibility Regime* plus on the Terms of Reference (ToR) home page for this *Review*:

> "On 10 April 2019, the Attorney-General [AG] released [ToR] requesting the ALRC to conduct a review into Australia's corporate criminal responsibility regime."
>
> "The ALRC should consult widely with: law enforcement authorities charged with policing and prosecuting corporate criminal conduct; courts; and other stakeholders with expertise and experience in the corporate law and white collar crime sectors."

1.4. **Not only are MTAA and the federation made up of corporate entities, so to are many of the members and others within the automobile sector's various supply chains.**

# 2. Review Objectives

2.1. The ToR home page includes a Media Release upfront from the AG the Hon. Christian Porter MP. It says in part:

> "It is essential that our laws are effective in holding corporations to account for criminal misconduct by their officers. This review will examine ways those laws can be strengthened. Under the Criminal Code, criminal responsibility applies to corporations for the actions of employees, agents or officers of those corporations, where the corporation expressly or impliedly authorises or permits those actions. For example, corporate liability provisions can be used to hold a company liable for any criminal offences where a corporate culture exists that tolerates or encourages culpable conduct. The review will consider reforms to the Criminal Code and other relevant legislation to provide a simpler, stronger and more cohesive regime for corporate criminal responsibility. This includes consideration of any practical challenges to investigating and prosecuting these crimes."

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2.2. The ToR itself states upfront that:

> "[H]aving regard to: the corporate criminal responsibility regime in Part 2.5 of the *Commonwealth Criminal Code* contained in *Schedule 1* of the *Corporate 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."

2.3. **The Media Release appears to MTAA to jump to some conclusions that the ToR does not.** MTAA trusts that these *Review* objectives allow for asking and answering the following sorts of questions: Is there a problem? What is the nature and size of any problem? Is the source a government law, regulation or other instrument? Will repealing or removing be more effective and efficient than adding or amending? What are the net economic and budgetary costs or benefits of the problem, solution and doing nothing? These sorts of questions are consistent with the 2017 *Australian Government Guide to Regulation* including Regulation Impact Statement (RIS).

2.4. Furthermore, MTAA notes the following ALRC functions from s 21(1) of the *ALRC Act*:

> "(a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by: (ii) removing defects in the law; and (iii) simplifying the law;"
>
> "(c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;"
>
> "(d) to consider proposals for uniformity between State and Territory laws about those matters;"

## 3. Policy Rationale

3.1. The ToR states:

> "In particular, the ALRC should review: the policy rationale for Part 2.5 of the Code;"

3.2. The most pertinent general Code provisions here appear to be:

> "2.1 The purpose…is to codify the general principles of criminal responsibility under laws of the Commonwealth."
>
> "3.1 (1) An offence consists of physical elements and fault elements."
>
> "4.1 (1) A physical element of an offence may be: (a) conduct; or (b) a result of conduct; or (c) a circumstance in which conduct, or a result of conduct, occurs. (2) In this Code: conduct means an act, an omission to perform an act or a state of affairs."
>
> "4.2 (1) Conduct can only be a physical element if it is voluntary. (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is."

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"5.1 (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence."

"5.5 A person is negligent with respect to a physical element of an offence if his or her conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence."

"9.2 (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if: (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element."

"10.1 A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if: (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and (b) the person could not reasonably be expected to guard against the bringing about of that physical element."

3.3. The most pertinent Part 2.5 provisions here appear to be:

"12.1 (1) This Code applies to bodies corporate in the same way as it applies to individuals. … (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment."

"12.3 (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission."

"12.5 (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to: (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate."

"12.5 (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if: (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and (b) the body corporate proves that it exercised due diligence to prevent the conduct.

"12.6 A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate."

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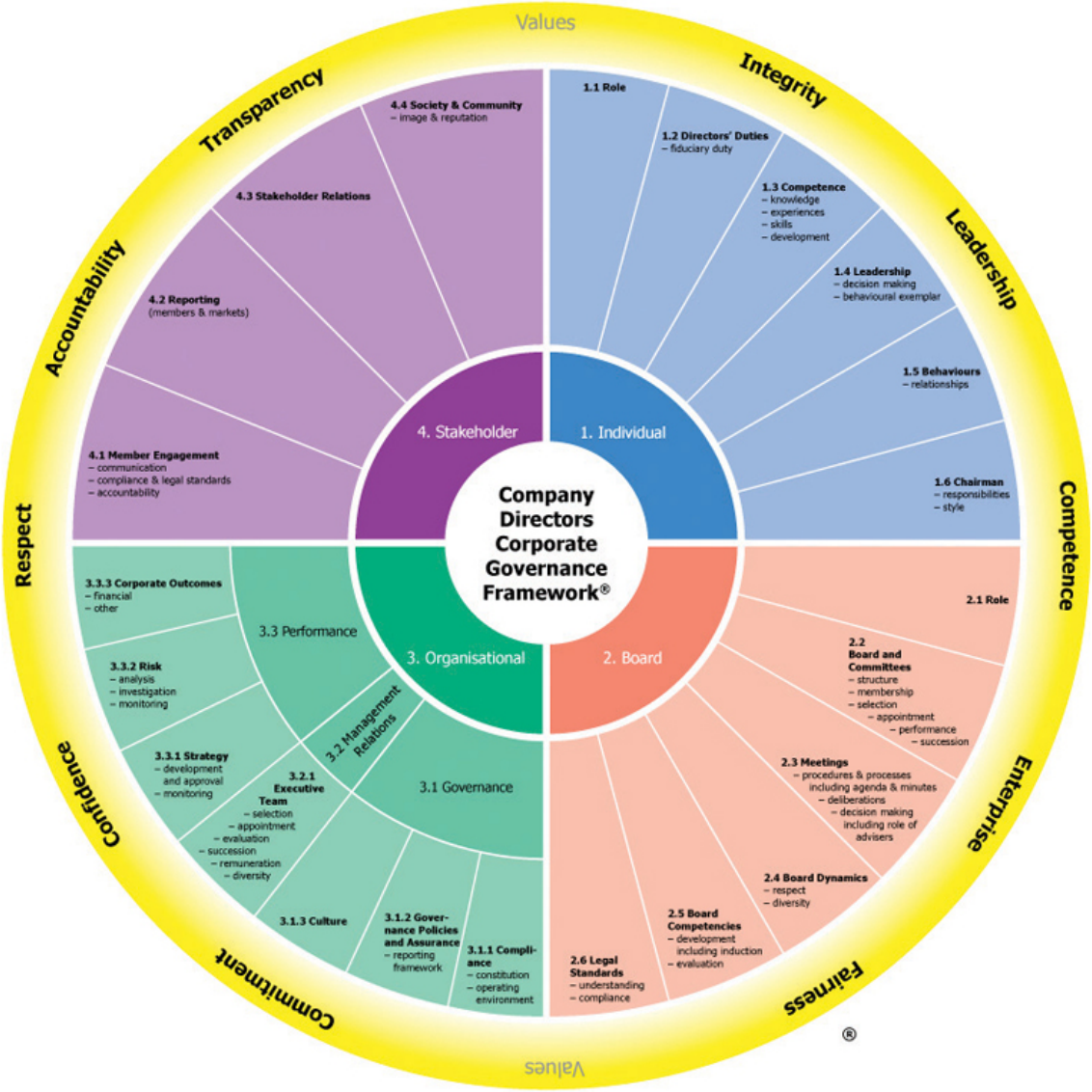
3.4. **The CEO, Management Committee and Board of MTAA have, are and will always take *corporate governance* very seriously. That of course includes not engaging in, nor in any way encouraging or facilitating, corporate crimes whether by action or inaction.**

3.5. MTAA notes that the Australian Institute of Company Directors (AICD) provides the following best practice framework for *corporate governance* on their website:

> "The Company Directors Corporate Governance Framework™ ('Framework') outlines the practices (skills, attributes and expertise) that comprise good director practice. The Framework was developed in consultation with an expert panel of leading directors, our members and through a review of international governance and director guidelines and reports."



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"It applies not only to directors, but also to executives, whose support in working with their boards is a vital component in the system of corporate and organisational governance. There are also aspects of the Framework which are important to small businesses that may or may not have a formal corporate governance structure or board."

"The Framework also serves as a tool that underpins our Director Professional Development (DPD) system. It enables members to: consider their contribution to the achievement of excellence and continuous improvement in governance; and identify areas of opportunity for professional development, or help / mentor others seeking to extend their skills and capabilities."

"The Framework is designed as a "wheel" with four quadrants depicting the four areas of focus and engagement applying to board and director practice: Individual, Board, Organisational and Stakeholder."

"Each quadrant is divided into a number of slices representing the practices essential to the quadrant focus. The Framework provides the basis for a common language regarding director, governance and performance practices. We have developed tools to enable both members to assess their individual capabilities and enable organisations to analyse their system of governance."

## 4. Attribution Efficacy

4.1. The ToR states:

"In particular, the ALRC should review: the efficacy of Part 2.5 of the Code as a mechanism for attributing corporate criminal liability;"

4.2. The most pertinent Part 2.5 provisions here appear to be:

"12.2 If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate."

"12.3 (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence."

"12.3 (2) The means by which such an authorisation or permission [attributed to a body corporate] may be established include: (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or (c) proving that a corporate culture existed within the body corporate that directed,

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encouraged, tolerated or led to non-compliance with the relevant provision; or (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision."

4.3. **Regarding attribution, MTAA respectfully reminds that, as in statistics, correlation is a *necessary but not sufficient* condition for establishing causation.**

4.4. Pages 2 and 3 of an online 2009 essay by Matt Mortellaro entitled *Causation and Responsibility - A New Direction* notes:

> "In the case of a [crime], it is not sufficient that the [crime] resulted from the action of an accountable (sane) person; as an additional requirement of a punishable offense, intent and deliberation (premeditation) or intent without deliberation (negligence) or, as we can summarily say, fault must be present as well. Causation of success and fault are requirements of punishment.—Fault must always be found."
>
> "People can be held liable only for their actions, whether intentional or negligent (but not for accidents involving them). Actions, however, involve both 'objective' (external) and 'subjective' (internal) elements. Hence, the exclusive inspection of physical events can never be considered sufficient in determining liability (there must be fault, too, and one can only speak of fault if an event is caused by an action)."

## 5. Other Mechanisms

5.1. The ToR states:

> "In particular, the ALRC should review: the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness …;"

5.2. The most pertinent Part 2.5 provisions here appear to be:

> "12.4 (1) The test of negligence for a body corporate is that set out in section 5.5. (2) … if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers)."
>
> "12.4 (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to: (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

5.3. **Further regarding attribution, MTAA respectfully suggests that much can be learned from the common law of tort (eg chain of causation in negligence) and even the statutory and case law of other areas of law like intellectual property (IP) and account of profits (AoP).**

5.4. Regarding IP and AoP, the High Court of Australia (HCA) noted in *Dart Industries Inc v The Decor Corporation Pty Ltd and Another* (1993) 179 CLR 101 at 111 that:

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> "[I]t is notoriously difficult in some cases, particularly cases involving the manufacture or sale of a range of products, to isolate those costs which are attributable to the infringement from those which are not so attributable. Whilst it is accepted that mathematical exactitude is generally impossible, the exercise is one that must be undertaken, and some assistance may be derived from the principles and practices of commercial accounting." Accounting principles, however, being primarily concerned with recording and reporting, do not provide much guidance on measuring and attributing 'true' economic costs.

5.5. **In thinking laterally as well as vertically, MTAA also respectfully suggests that much can be learned from the economics and regulation of cost attribution.**

5.6. The costs that are the most difficult to attribute are common costs and joint costs. Both are characterised as a single input, and its associated cost, that produces multiple products. Overheads are often referred to as a form of, or equivalent to, these two costs, although they do not have any universally accepted meaning in economics or even accounting.

The Traditional Accounting Costing (TAC) approach of allocating such costs involves the use of application rates. Application rates are essentially averages based on other costs which may or may not be associated with the product under consideration (eg labour or machine hours). The Activity Based Costing (ABC) approach to cost allocation is a significant improvement on TAC. ABC looks behind these costs to the activities that cause these costs to arise. It then links or attributes the activities to these costs and, therefore, to the products and their customers.

## 6. Senior Officers

6.1. The ToR states:

> "In particular, the ALRC should review: … mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct;"
>
> "This review would encompass consideration of: consideration of whether Part 2.5 of the Code needs to incorporate provisions enabling senior corporate officers to be held liable for misconduct by corporations;"

6.2. The most pertinent Part 2.5 provisions here appear to be:

> "12.3 (4) Factors relevant to the application of paragraph (2)(c) or (d) include: (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence."
>
> "12.3 (6) In this section: *board of directors* means the body (by whatever name called) exercising the executive authority of the body corporate. *corporate culture* means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant

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activities takes place. *high managerial agent* means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy."

6.3. **MTAA respectfully reminds that the spirit of the *Corporations Law* is providing liability to the company itself (ie the fully legally responsible person), limited liability to company executives (ie the semi legally responsible persons) and no liability to company staff (ie the not legally responsible persons).**

6.4. Note that the *Corporations Law* generally tries to encourage corporate investment and to protect investors and creditors through the imposition of disclosure requirements and fiduciary duties on the company and its officers. A fiduciary relationship is one between a person in a position of trust, the fiduciary, and the person who is in a position of dependence and for whose benefit the fiduciary acts. A fiduciary's powers are exercised with a degree of independence on behalf of the dependent person in a manner that advances the latter's interests. Fiduciary duties are categorised as the duty to: act *bona fide* in the interests of the company; exercise powers for their proper purpose; retain discretionary powers; avoid conflicts of interest; and exercise reasonable care and diligence. All fiduciaries are under a duty to ensure that they do not allow their personal interests to conflict with the interests of the person for whose benefit they are bound to act.

6.5. Ironically, the need for protection mainly arises from the separation between the ownership of a company (which vests in the members) and the control of its assets (which usually vests in the board) brought about by other provisions of the *Corporations Law*. Much of the law that regulates the internal workings of companies, including a company's financing options, derives from this outcome. This separation has produced an incentive structure which encourages 'officers' to pursue interests besides or in addition to those of the company and its shareholders and creditors, such as 'empire building' as opposed to profit or shareholder value maximisation. This is known as the principal-agent problem that primarily arises in institutional settings where ownership and control are (to some significant degree) separate. According to Investopedia:

> "The principal-agent problem occurs when a principal creates an environment in which an agent's incentives don't align with those of the principle. Generally, the onus is on the principal to create incentives for the agent to ensure they act as the principal wants. This includes everything from financial incentives to avoidance of information asymmetry."

## 7. Criminal Procedure

7.1. The ToR states:

> "In particular, the ALRC should review: the appropriateness and effectiveness of criminal procedure laws and rules as they apply to corporations;"
>
> "Noting the Federal Court of Australia's criminal jurisdiction, the review should consider the effectiveness of present Commonwealth criminal procedural laws with a focus on their interaction with state and territory criminal procedural law, particularly in relation to committal hearings."

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7.2. The most pertinent Part 2.6 provisions here appear to be:

> "13.1 (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant. (3) In this Code: *legal burden*, in relation to a matter, means the burden of proving the existence of the matter.
>
> "13.2 (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt. (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.
>
> "13.3 (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only. (5) The question whether an evidential burden has been discharged is one of law. (6) In this Code: *evidential burden*, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
>
> "13.4 A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly: (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or (b) requires the defendant to prove the matter; or (c) creates a presumption that the matter exists unless the contrary is proved."
>
> "13.5 A legal burden of proof on the defendant must be discharged on the balance of probabilities."

7.3. **MTAA respectfully reminds that the onus of proof and standard of proof are the most important aspects of any criminal versus civil laws and practice of evidence and procedure. MTAA also suggests that the unique difficulties for the prosecution or plaintiff that arise in a corporate setting is, not in-and-of-itself, sufficient reason (in law, economics or ethics) to reverse the onus of proof and/or lower the standard of proof.**

## 8. Reform Options

8.1. The ToR states:

> "In particular, the ALRC should review: options for reforming Part 2.5 of the Code or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime."
>
> "This review would encompass consideration of: consideration of possible alternatives to expanding the scope and application of Part 2.5 of the Code, such as introducing or strengthening other statutory regimes for corporate criminal liability;"

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8.2. **MTAA sincerely suggests that the option of "simplify the Commonwealth corporate criminal responsibility regime" should not be glossed over in the single-minded pursuit of either "strengthen…the Commonwealth corporate criminal responsibility regime" or "introducing or strengthening other statutory regimes for corporate criminal liability".**

8.3. As MTAA pointed out above in paragraph 2.3:

> The Media Release appears to jump to some conclusions that the ToR does not. MTAA trusts that these *Review* objectives allow for asking and answering the following sorts of questions: Is there a problem? What is the nature and size of any problem? Is the source a government law, regulation or other instrument? Will repealing or removing be more effective and efficient than adding or amending? What are the net economic and budgetary costs or benefits of the problem, solution and doing nothing?

8.4. In addition, as stated recently on page 3 in the *MTAA Submission to the Treasury Consultation Paper on Employee Share Schemes (ESS)*:

> "Independent and sound cost benefit analysis (CBA) is needed of the *Options for Reform* versus the *Current Regulatory Framework*. MTAA suggests this process should involve an independent entity to not only take submissions from the stakeholder industries (like auto) on benefits and the costs, but to lead the CBA itself. The most likely candidates are the Australian Competition and Consumer Commission (ACCC), Productivity Commission (PC) or the Parliamentary Budget Office (PBO). An even better option would be to establish a CBA Authority to get more serious about CBA across all policy areas. Some sort of 'Red versus Blue Team' approach could be included in this process – eg *free market v government intervention*. Such a *Red v Blue* approach is currently being explored by the US Federal EPA, as the 'new wave' of world best practice for evidence-based policy."

## 9. Review Scope

9.1. The ToR states:

> "The ALRC should have regard to existing reports relevant to Australia's corporate accountability system, including reports on: corporate misconduct; corporate criminal law; corporate governance; court procedure which applies in corporate enforcement actions; and law enforcement arrangements relating to corporate misconduct/crime."

9.2. In this regard, **MTAA brings to attention** such reports as the 2013 essay entitled *The Historical Development of Corporations Law* wherein the Chief Justice of the NSW Supreme Court wrote:

> "Today, the corporate form is a ubiquitous part of modern commercial life and has a significance to our economy which it is difficult to overstate. … Some attributes of the corporation can be traced back to mediaeval times, but modern Australian company law really began with developments in England in 1825, which were then largely mirrored in Australia. … The earliest types of associations to be known as companies

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were those engaged in foreign trade. The most famous is the East India Company, which was chartered by Queen Elizabeth in 1600. Associations of individuals would petition for the grant of royal charter or a private Act of Parliament, recognising the company as independent in its own right. Once this was granted, it allowed the corporation to exist in perpetuity, sue and be sued, and act separately to its members. Royal charters also generally carried limited liability. … In fact, Royal Charters of incorporation were obtained not so much because of the commercial benefits of having a corporate form, but because they brought with them a grant of monopoly, commonly the exclusive right to conduct trade in a particular geographical area"

9.3. The ToR also states:

> "The reports which the ALRC should consider should include but not be limited to the:2019 Final report of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*; and 2017 report of the *ASIC Enforcement Review Taskforce*."
>
> "This review would encompass consideration of: options for reforming Part 2.5 of the Code (or other corporate liability regimes) to facilitate implementation of the recommendations made by, or to address issues highlighted by, the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* and by the *ASIC Enforcement Review Taskforce*."

9.4. In this regard, **MTAA brings to attention** that it made two submissions to the financial services Royal Commission (FSRC) over the course of 2018. In addition, as stated recently on page 9 in the *MTAA Submission to the Treasury Consultation Paper on the Enforceability of Financial Services Industry Codes*:

> "The *first-best policy* by government and its regulators, for financial services or any other industry, is to review and remove the government regulatory, fiscal and monetary policies that most likely (and probably unintentionally) made possible the market power for one industry over another." This also applies to the government created and maintained incentives for corporations and possible corporate crimes.

9.5. The ToR states:

> "This review would encompass consideration of: comparative corporate criminal responsibility regimes in relevant foreign jurisdictions; potential application of Part 2.5 of the Code to extraterritorial offences by corporations;"

9.6. In this regard, **MTAA brings to attention** such reports as Linklaters from 2016 entitled *Corporate Criminal Liability - A Review of Law and Practice Across the Globe* which observes on page 4:

> "This major comparative review considers the position of the concept of corporate criminal liability in 24 jurisdictions, with the chapters provided by 18 Linklaters offices being enhanced by chapters from our contributor firms [including Allens from Australia]. … Of all the jurisdictions we considered, only Germany, Italy, Poland, Russia and Sweden did not recognise the concept of criminal liability for companies.

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> Nonetheless, all of them provide for measures by which companies can be sanctioned if criminal offences are committed by individuals associated with them. … Unsurprisingly, monetary fines are the main form of sanction imposed on companies. However, most jurisdictions also provide for other forms of sanction, such as disgorgement of profits, publication of the judgment, exclusion from public tenders, temporary operating bans, revocation of licences or, as a last resort, the dissolution of the company. … Obviously, the implementation of effective compliance programs is a must for any corporation. However, no compliance program can be perfect and crimes committed by persons connected with the company will continue to happen."

## 10. Review Process

10.1. As stated on the home page plus the ToR home page for this *Review*:

> "The ALRC is planning to release a Discussion Paper on 15 November 2019 which will set out proposed reforms and ask questions to assist the ALRC to prepare formal recommendations. Submissions on the Discussion Paper will be due by 31 January 2020. The ALRC is due to report on 30 April 2020."
>
> "The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review."

10.2. **MTAA strongly recommends, in line with the ToR and consultation best practice, that the ALRC release a Draft or Interim Report (of 15/11/2019) for public comment in between the Discussion Paper (of 31/01/2020) and the Final Report (of 30/04/2020) which thus may necessitate a much earlier release of the Discussion Paper.**

10.3. In this regard, MTAA notes the following ALRC reporting provision from s 22(1) of the *ALRC Act*:

> "The Commission may, before making its report on a reference, make an **interim report** to the [AG] on its work on the reference."

## 11. Conclusion

11.1. **Please accept this *MTAA Submission to the ALRC on the Terms of Reference for the Review into Australia's Corporate Criminal Responsibility Regime*. MTAA looks forward to being engaged throughout the entire ALRC consultation process regarding this *Review*.**

11.2. For any questions or comments regarding this submission letter, at first instance **contact Mr Darren Nelson**, Director Policy & Industry Relations at MTAA in Canberra, and can be phoned on 0479 001 040 or emailed on Darren.Nelson@mtaa.com.au.

**END OF SUBMISSION**