



ASIC

Australian Securities & Investments Commission

Consideration of a Deferred Prosecution Agreements scheme in Australia:

Submission by ASIC in response to Public Consultation Paper

May 2016

Introduction

- 1 ASIC welcomes the opportunity to contribute to the Australian Government's consideration of a Deferred Prosecution Agreement (DPA) scheme.
- 2 After providing some preliminary information regarding ASIC's roles and responsibilities that give rise to ASIC's interest in any DPA scheme, responses will be provided to the questions set out in the Public Consultation Paper.
- 3 ASIC would be happy to provide further information upon request.

ASIC's roles and responsibilities

- 4 ASIC has legislative responsibility for the enforcement of the *Corporations Act 2001* (Cth) ("**Corporations Act**"), *Australian Securities and Investments Commission Act 2001* (Cth) ("**ASIC Act**") and other pieces of legislation.¹
- 5 As Australia's *corporate regulator*, ASIC is required to ensure that companies, managed investment schemes and associated individuals and entities fulfil their obligations under the Corporations Act.
- 6 As Australia's *markets regulator*, ASIC is required to supervise Australia's domestic licensed equity, derivatives and futures markets and those who participate in them.
- 7 As Australia's *financial services regulator*, ASIC is required to protect investors and consumers in the financial system.
- 8 As Australia's *consumer credit regulator*, ASIC is required to ensure that individuals and entities engaging in credit activities fulfil their obligations under the *National Consumer Credit Protection Act 2009* (Cth) ("**NCCP Act**").
- 9 Section 1(2)(g) of the ASIC Act provides that: "In performing its functions and exercising its powers, ASIC must strive to: ... take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it".

¹ Including, but not limited to, the *National Consumer Credit Protection Act 2009* ("**NCCP Act**").

- 10 ASIC's functions include (but are not limited to) the following:
- (a) conducting investigations² into suspected contraventions of the law,³ which are variously punishable or enforceable by criminal prosecution, civil proceedings and/or administrative action;
 - (b) commencing, and conducting or supporting the Commonwealth Director of Public Prosecutions (“CDPP”) to conduct, criminal prosecutions⁴ in respect of such contraventions;
 - (c) commencing and conducting various types of civil proceedings⁵ in respect of such contraventions, such as proceedings for the imposition of penalties, proceedings to seek compensation for victims and interlocutory proceedings for injunctions in connection with investigations or proceedings being pursued by ASIC (e.g. to freeze assets or prohibit persons from travelling overseas); and
 - (d) taking various forms of administrative action⁶ in respect of such contraventions, (e.g. proceedings to ban persons from managing corporations, providing financial services or engaging in credit activities).
- 11 Further in respect of ASIC's criminal prosecutions function identified above, it is noted that pursuant to the Memorandum of Understanding (“MOU”) between ASIC and the CDPP⁷, ASIC will refer a brief of evidence to the CDPP in cases where it believes a criminal offence may have been committed and has gathered sufficient evidence to enable it to support that view. However, the MOU also enables the CDPP and ASIC to agree to ASIC itself prosecuting summary regulatory offences. Pursuant to such agreement ASIC currently prosecutes a range of summary offences against the Corporations Act and the NCCP Act.

Key Issues for Consideration

² See, e.g., ss.13-15 of the *Australian Securities and Investments Commission Act 2001* (“ASIC Act”); ss.247-248 of the *National Consumer Credit Protection Act 2009* (“NCCP Act”).

³ Including (but not limited to) the *Corporations Act 2001* (“Corporations Act”), ASIC Act, NCCP Act and (in certain circumstances) Criminal Codes and Crimes Acts at both the Commonwealth and State/Territory level.

⁴ See, e.g., s.49(2) of the ASIC Act, s.1315 of the Corporations Act; s.274 of the NCCP Act.

⁵ Civil penalty and civil compensation proceedings: see, e.g., part 2 & s.50 of the ASIC Act; parts 9.4B & 9.5 and chaps 5 and 5A of the Corporations Act; and chap 6 of the NCCP Act. Injunctions: see, e.g., ss.12GD and 12 GN of the ASIC Act; ss.1323 and 1324 of the Corporations Act; s.177 of the NCCP Act.

⁶ See, e.g., Part 2D.6 & 920A of the Corporations Act; part 2-4 of the NCCP Act.

⁷ Dated 1 March 2006.

Utility of an Australian DPA scheme

Q1: Would a DPA scheme be a useful tool for Commonwealth agencies?

- 12 Australian courts have long recognised that detecting, investigating and prosecuting serious corporate crime is difficult and expensive⁸. For these reasons it is essential that the fear of being caught, prosecuted and punished is effectively utilised to deter offending.
- 13 The tasks of detecting, investigating and prosecuting serious corporate crime can be significantly facilitated by obtaining the cooperation of persons and entities involved in the offending. This cooperation can take a variety of forms including self-reporting and providing admissible evidence that incriminates others.
- 14 At present, the two principal mechanisms or tools available to secure cooperation of this type in cases of serious corporate crime are the sentencing "discounts" that will be applied by the courts to recognise the value of such cooperation and, less frequently, the power of the CDPP⁹ to provide an undertaking (or "immunity") that will operate to preclude the prosecution of an accomplice in order to secure their testimony for the prosecution.
- 15 As set out in the *Prosecution Policy of the Commonwealth*¹⁰, ideally it would not be necessary to grant concessions such as immunity from prosecution to those who have participated in alleged offences in order to facilitate the prosecution of other participants. It is preferable, and accordingly remains the "general rule", that an accomplice should be prosecuted, with their cooperation recognised by a reduction in the sentence imposed.
- 16 However, it has been recognised that practicality and the interests of justice may justify departing from this ideal and the general rule when certain conditions are met.
- 17 In ASIC's view, the possible introduction of a Commonwealth DPA scheme should be viewed in this context. Just as the granting of "immunity" is regarded as a useful tool to be applied to appropriate cases to advance the interests of justice, so DPAs could properly be employed for this purpose.
- 18 Due, however, to the fact that DPAs – like the granting of immunity – would involve making an exception to the ordinary and fundamental

⁸ See, for example, *DPP v Bulfin* [1998] 4 VR 114 at 131-2 and *EPA v Caltex Refining Co P/L* (1993) 178 CLR 477 at 533 (per Deane, Dawson & Gaudron JJ) and 554 (per McHugh).

⁹ Pursuant to s.9(6), (6B) or (6D) of the *Director of Public Prosecutions Act 1983* (Cth)

¹⁰ At paragraphs 6.4 and 6.5.

principle of prosecuting criminality, it is important that this concession is only made available in circumstances that are perceived to, and do in fact, advance the interests of justice. To do otherwise would run the risk of undermining public confidence in the capacity of Commonwealth agencies and the criminal justice system to deal with serious corporate crime.

- 19 For these reasons, ASIC's responses to the following, more specific, questions concerning the possible form of any Commonwealth DPA scheme are characterised by a preference for features that maximise the potential benefits – particularly in the area of self-reporting – within prudent boundaries.

Conduct for which a DPA may be sought

Q2: In relation to which offences should a Commonwealth DPA scheme be available?

- 20 ASIC supports an approach similar to that adopted in the United Kingdom ("UK"), in which the offences in relation to which a DPA is available are enumerated as part of the legislative structure.
- 21 In the Australian context this might be achieved by allowing the relevant offences to be prescribed by regulation. This would have the benefit of permitting the scope of the scheme to be adjusted in the future without the need for amending legislation.
- 22 Also consistent with the UK model, ASIC is of the view that the scheme should, at least initially, be limited to "economic" crimes such as foreign bribery, false accounting and fraud.
- 23 In relation to offences contained in legislation administered by ASIC, particularly the Corporations Act, ASIC would seek to undertake the detailed process of identifying all those offences that would be appropriate to include within a DPA scheme at a later time. It would be anticipated, however, that those offences might include, for example, continuous disclosure (s674), carrying on a financial services business without a licence (s911A), market manipulation (s1041A) and insider trading (s1043A).

Parties to a DPA – companies and/or individuals

Q3: Should DPAs be available for companies only, or for both companies and individuals?

- 24 In ASIC's view, DPAs should not be available to individuals. Once again, this is the approach adopted under the UK model.

- 25 To a significant extent, this limitation on the availability of a DPA is dictated by the outcomes that are envisaged as appropriate to being achieved by way of a DPA. These outcomes are principally pecuniary in nature – financial penalties, reparation and compensation – and are therefore more consistent with the limited outcomes that are currently available when dealing with companies (imprisonment, for example, being unavailable).
- 26 Similarly, with these principally pecuniary outcomes in mind, there would be a risk that applying such a scheme to individuals might unfairly favour those persons who could afford to pay appropriate penalties, reparation and compensation.
- 27 Ultimately, the prosecution of the individuals who have effected the criminality is fundamental to deterring future misconduct. In the exceptional scenario in which the prosecution of an individual offender is considered worth foregoing in order to assist in the prosecution of others, this is appropriately dealt with pursuant to the CDPP's existing powers to grant "immunity".

Extent of judicial involvement

Q4: To what extent should the courts be involved in an Australian DPA scheme?

- 28 ASIC regards a role for the courts in the operation of an Australian DPA scheme as valuable to instilling public confidence in a process that has the capacity to be the source of some debate or controversy.
- 29 The fact that a DPA involves not only a public interest-based decision not to proceed with a prosecution (a decision currently routinely entrusted to the CDPP), but also a determination of appropriate terms (including financial penalties) and the possibility of a finding that a breach has occurred, suggests that the involvement of the courts would be appropriate and desirable.
- 30 While involving the courts in the process may mean that additional time is taken and, perhaps, further uncertainty created, it is submitted that the benefits in terms of transparency and public confidence outweigh such concerns.

Measures to promote certainty- policy guidance

Q5: What measures could enhance certainty for companies invited to enter into a DPA?

- 31 In order for a company to have been invited to enter into a DPA a determination ought to have been made – by the CDPP in consultation

with the investigating agency – that there is both an evidential and public interest basis for doing so. This accords with the "two stage" test contained in the DPA *Code of Practice* issued by the Director of Public Prosecutions and Director of the Serious Fraud Office under the UK model.

- 32 By making guidelines of this type publically available, including the factors that will be taken into account in applying those tests, companies would be provided with a clear understanding that there has been a preliminary determination that a DPA may be appropriate.
- 33 Providing further certainty at this invitation stage, or earlier in respect of self-reporting, is difficult. Clearly, there can be no assurances provided that a DPA will be forthcoming, just as (see response to Question 9 below) there should not be any guarantee that the material provided to the prosecution will not later be utilised if a prosecution is pursued. Ultimately, a company must be willing to assume the risk of coming forward and engaging in the process.

Whether DPAs should be made public

Q6: Should a DPA be made public? If so, are there any circumstances where a DPA should not be published, or its publication postponed?

- 34 In ASIC's view, finalised DPAs should be required to be made public in the interests of open justice.
- 35 It is recognised, however, that there may be cases in which it is necessary to postpone or restrict publication in order to avoid the risk of prejudice to other proceedings. This power should reside with the court.

Conduct of negotiations

Q7: How should DPA negotiations be structured?

- 36 It would not be appropriate, in ASIC's view, for there to be any obligation on the CDPP to enter into DPA negotiations. Accordingly, the commencement of any negotiations should be at the invitation of the CDPP.
- 37 This is not understood, however, to preclude the practical reality that would inevitably see companies who self-report indicate at that time their desire to enter DPA negotiations.

Q8: What factors should be considered in agreeing a settlement?

38 As has occurred in the UK, it would appropriate for the CDPP to develop and publish a non-exhaustive catalogue of factors that will be considered in determining whether or not to settle a DPA.

39 In general terms, the factors identified in the UK DPA *Code of Practice* reflect the type of matters that should be encapsulated in the guidance issued by the CDPP. That *Code of Practice* also, properly in ASIC's view, recognises that "*a prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution*"¹¹ (emphasis added).

40 There are two particular considerations that warrant comment:

- (i) In ASIC's view it is important that self-reporting and cooperation leading to the prosecution of others are elevated to a high level as factors that will determine whether a DPA is deemed to be in the public interest. This reflects ASIC's view that the principal potential benefit to be realised from a DPA scheme is increased self-reporting leading to the prosecution of individual offenders; and
- (ii) It would also be appropriate to recognise, amongst the public interest factors to be considered by the prosecuting agency, any view held by the relevant investigative agency as to the appropriateness of entering a DPA.

Q9: Should material disclosed during negotiations be available for criminal and/or civil proceedings?

41 It is important in this context to distinguish, as the UK model does, between pre-existing evidence of offending on the one hand and material that either forms part of the DPA negotiation process itself or is created solely for the purpose of preparing the DPA or statement of facts.

42 In order to avoid creating a DPA scheme that could restrict the capacity of investigative agencies and the CDPP to obtain and rely upon properly admissible evidence of offending, it is critical that the disclosure of pre-existing evidence during negotiations does not render such evidence inadmissible.

43 It is similarly important that the offender is not provided with any form of "derivative use" protection that would enable it to seek to exclude evidence on the basis that it was obtained as a result of disclosures made during negotiations. To the extent that equipping the prosecution with potentially incriminating information is a risk attached to self-reporting

¹¹ At paragraph 2.5.

and full and frank disclosure, this is a risk that the company must be willing to accept.

- 44 In light of ASIC's role in relation to civil penalty, civil and administrative proceedings it would also necessary to ensure that engagement in DPA negotiations does not restrict the evidence ordinarily available in these proceedings.

Content of a DPA

Q10: What facts and terms should DPAs contain?

- 45 In accordance with the UK model it would be appropriate to impose an overarching requirement that the terms of the DPA are fair, reasonable and proportionate. Judging whether this requirement is satisfied is a function that would appropriately be entrusted to the courts.
- 46 While the type of terms (e.g. financial penalties, reparation, compliance measures) available to be imposed in a DPA might (as in the UK model) be non-exhaustively set out, ASIC's view is that the DPA should contain not only an agreed statement of the facts that constitute the offence(s) charged but also an acknowledgement of criminal responsibility.
- 47 Such an acknowledgement would be an indication of contrition on behalf of the company and would emphasise that entering into a DPA is a serious and significant step. This should also serve as an additional disincentive to breaching the DPA.

Q11: How should funds raised through DPAs be used?

- 48 In ASIC's view, the available terms of a DPA should be sufficiently flexible to allow funds raised in any particular matter to be directed to specified purposes that contribute to the fairness, reasonableness and proportionality of the DPA. In the absence of such directions, funds may default to Consolidated Revenue with their subsequent use a matter for Government.
- 49 ASIC notes that its policy on the recovery of investigations costs¹² would be a factor requiring consideration in settling any DPAs arising out of ASIC investigations.

Breach of a DPA

Q12: What should be the consequences of a breach of a DPA?

¹² See ASIC Information Sheet 204 "Recovery of investigation expenses and costs".

50 It would be appropriate, in ASIC's view, for the CDPP to exercise its discretion – in consultation with the investigative agency – as to whether a suspected breach of a DPA warrants formal action. If taken, that formal action ought take the form of an application to the court that initially approved the DPA.

51 Under the UK model, if a breach is established the court might then either invite the parties to seek to agree upon a proposal to remedy the failure to comply with the relevant term(s) of the DPA or terminate the DPA. The legislation does not incorporate any presumption toward either outcome. By contrast, ASIC suggests that breaches of DPAs could potentially be deterred by making termination the default outcome of a proven breach, unless the court is satisfied of an appropriate test – for example, that there are exceptional circumstances.

52 The integrity of and public confidence in a DPA scheme is, it is submitted, likely to be undermined if cases involving breaches resulting in the termination of DPAs are not subject to prosecution. Certainty in this regard will be aided by the admissibility of the statement of facts previously agreed by the defendant and the suggested acknowledgement of criminal responsibility.

Q13: Should an Australian DPA scheme make use of independent monitors or other non-judicial supervisory mechanisms?

53 In order to ensure compliance with certain types of DPA terms (such as carrying out remediation processes or implementing internal governance programmes) it will be necessary in appropriate cases for the DPA to be monitored.

54 In such cases this role would be expected to be performed by independent third parties approved by the CDPP and the court. The costs should be borne by the defendant.

Conclusion

Q14: Do you have any other comments in relation to a potential Commonwealth DPA scheme?

55 It is apparent that the introduction of a Commonwealth DPA scheme will require the balancing of a variety of complex, and sometimes competing, considerations involved in the administration of criminal justice. The balance that is ultimately struck will in turn depend upon the detailed terms of the proposed scheme.

56 Accordingly, ASIC would appreciate the opportunity to provide further comment in the future as specific proposed features of the scheme are developed.