



**Australian Government**  
**Attorney-General's Department**

# **Improving enforcement options for serious corporate crime:**

## **Consideration of a Deferred Prosecution Agreements scheme in Australia**

### **Public Consultation Paper**

**MARCH 2016**

# Contents

- EXECUTIVE SUMMARY ..... 3
- INTRODUCTION ..... 4
- CURRENT RESPONSE TO SERIOUS CORPORATE CRIME..... 5
  - Challenges ..... 6
  - Other enforcement options ..... 7
- DEFERRED PROSECUTION AGREEMENTS: AN OVERVIEW..... 9
  - Arguments in favour of DPAs for serious corporate crime..... 9
  - Arguments against DPAs for serious corporate crime ..... 10
- OUTLINE OF EXISTING MODELS..... 11
  - United States ..... 11
  - United Kingdom..... 12
- AUSTRALIAN DPA SCHEME: KEY ISSUES FOR CONSIDERATION ..... 14
  - A. Utility of an Australian DPA scheme ..... 14
  - B. Conduct for which a DPA may be sought..... 15
  - C. Parties to a DPA – companies and/or individuals ..... 15
  - D. Extent of judicial involvement..... 16
  - E. Measures to promote certainty – policy guidance..... 17
  - F. Whether DPAs should be made public..... 18
  - G. Conduct of negotiations..... 19
  - H. Content of a DPA ..... 20
  - I. Breach of a DPA..... 21
- SUMMARY OF QUESTIONS ..... 22
  - Contact details..... 22

## EXECUTIVE SUMMARY

The Australian Government faces challenges in detecting, investigating and prosecuting serious corporate crime.<sup>1</sup> New threats and increasingly sophisticated offending make it difficult to prevent and police this kind of criminal conduct. Identifying corporate wrong-doing often depends on companies cooperating or whistleblowers coming forward, but under current arrangements, there is little incentive for companies to self-report misconduct.

The Australian Government is considering options to facilitate a more effective and efficient response to corporate crime through encouraging greater self-reporting by companies. A key focus of this consideration is a possible Australian deferred prosecution agreement (DPA) scheme. A DPA is a voluntary, negotiated settlement between a prosecutor and a defendant. They are used in both the US and UK in relation to serious corporate offences.<sup>2</sup>

Under a DPA scheme, where a company or company officer has engaged in a serious corporate crime, prosecutors would have the option to invite the company to negotiate an agreement to comply with a range of specified conditions, in return for which prosecution would be deferred. The terms of a DPA typically require the company to cooperate with any investigation, admit to agreed facts, pay a financial penalty, and implement a program to improve future compliance. Upon fulfilment of the terms of the DPA, the prosecution is discontinued. A breach of the terms may result in the prosecuting agency resuming the prosecution and further penalties.

An Australian DPA scheme for serious corporate crime may improve agencies' ability to detect and pursue crimes committed by companies and help to compensate victims of corporate crime. It may help avoid lengthy and costly investigations and prosecutions, and provide greater certainty for companies seeking to report and resolve corporate misconduct. It would be compatible with the Government's policy to tackle crime and ensure that our communities are strong and prosperous.

This discussion paper seeks public comment on whether a DPA scheme should be introduced in Australia and if so, how such a scheme should be structured.

This paper coincides with inquiries underway by the Senate Economics Committee into foreign bribery and white collar crime, both of which are scheduled to report in July 2016.<sup>3</sup> As part of the inquiry into foreign bribery, the Committee is specifically considering 'measures to encourage self-reporting including, but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements.'

Responses to this consultation paper should be sent to: [criminal.law@ag.gov.au](mailto:criminal.law@ag.gov.au) by no later than close of business Monday 2 May 2016.

---

<sup>1</sup> For the purpose of this paper, serious corporate crime includes fraud, bribery and money-laundering.

<sup>2</sup> As discussed later in this paper, in the US, DPAs can be sought more broadly in relation to any crime type or where the defendant is an individual. The legal entities to which a DPA may apply differ in the US and UK, and for ease of reference this paper will mostly use the term 'companies'.

<sup>3</sup> Further details on these inquiries can be found on the Senate Economics Committee homepage: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics).

# INTRODUCTION

Addressing serious corporate crime is a longstanding law enforcement and public policy challenge. Corporate crime is estimated to cost Australia more than \$8.5 billion per year.<sup>4</sup> Other estimates place it as accounting for approximately 40 per cent of the total cost of crime in Australia.<sup>5</sup>

According to PwC's 2014 Global Economic Crime Survey, 57 per cent of surveyed Australian organisations had experienced white collar crime in the past two years.<sup>6</sup> More than a third of organisations lost more than \$1 million.

The opaque and sophisticated nature of corporate crime can make it difficult to detect. It can pose significant challenges for law enforcement and regulatory agencies applying traditional models of investigation and prosecution. Often, corporate criminal activity is only detected because involved individuals come forward, sometimes at significant personal and financial risk (so-called 'whistleblowers') or because the company itself self-reports misconduct.

The increasingly global nature of business has added additional layers of complexity, which pose further challenges for the detection and investigation of suspected criminal conduct. Companies often operate in a number of countries, with different regulatory and legal environments.

Since the early 2000s, DPAs have been used by US prosecutors dealing with corporate crime. In the US, DPAs have provided a middle ground between declining to prosecute and taking matters through lengthy criminal trials and appeals. The US scheme has assisted in compensating victims of alleged corporate offending. Drawing on the US model, the UK introduced its own DPA scheme in February 2014. In late 2015, the UK Serious Fraud Office (SFO) announced the first DPA under the UK scheme, in relation to alleged failure to prevent bribery under the UK *Bribery Act 2010*.<sup>7</sup>

The Australian Government is considering options to improve the flexibility of the criminal justice system in dealing with serious corporate crime. This includes considering the introduction of a DPA scheme. An Australian DPA scheme for serious corporate crime could help to encourage self-reporting and admission of wrongdoing by companies, resulting in more efficient outcomes.

This discussion paper seeks public views on whether a DPA scheme should be introduced in Australia, and if so, how such a scheme should be structured. The paper outlines the key features of US and UK DPA schemes, as models to consider in the Australian context. It then poses questions about the possible structure of an Australian DPA scheme.

---

<sup>4</sup> Bell P, Frain MF, & Lauchs M, 'Investigating international bribery and the applicability of routine activity theory: a literary review', *International Journal of Business and Commerce* (2013 vol 2(10) pp 79-94) at p 81.

<sup>5</sup> Sanyal R and Samanta S, 'Emerald Article: Trends in international bribe-giving: do the anti-bribery laws matter?' *Journal of International Trade Law and Policy* (2011 vol 10(2), pp 151-164), cited in Bell et al, above.

<sup>6</sup> Available online at <http://www.pwc.com.au/consulting/assets/risk-controls/global-economic-crime/global-economic-crime-au-may14.pdf>.

<sup>7</sup> Media release, SFO agrees first UK DPA with Standard Bank, accessed 7 December 2015, <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sfo-agrees-first-uk-dpa-with-standard-bank.aspx>

# CURRENT RESPONSE TO SERIOUS CORPORATE CRIME

Australia's framework for addressing corporate crime spans criminal, civil and administrative schemes. At the Commonwealth level, there are relevant offence and civil penalty regimes in the *Criminal Code Act 1995* (Criminal Code) and the *Corporations Act 2001* (Corporations Act) and a range of other laws. State and territory laws, such as fraud offences, may also apply to corporate misconduct.

Commonwealth offences can apply to companies as they do to individuals.<sup>8</sup> Under the Criminal Code, companies can be held liable for offences committed by employees, agents or officers where a company expressly or impliedly authorised the commission of the offence. In certain circumstances, companies may also be liable for the behaviour of employees or third party representatives or where the company failed to maintain a corporate culture of compliance.

Key operational Commonwealth agencies responsible for responding to serious corporate crime include:

- The Australian Federal Police (AFP) – responsible for investigating serious or complex fraud and corruption against the Commonwealth. The launch of the AFP-led Fraud and Anti-Corruption Centre in July 2014 has strengthened law enforcement capability to respond to serious and complex fraud, foreign bribery, corruption by Government employees and complex identity crime.
- The Australian Securities and Investments Commission (ASIC) – responsible for investigating breaches of the Corporations Act. As Australia's corporate regulator, ASIC takes action to enforce this law and deals with misconduct that puts investors, financial consumers and market integrity at risk.<sup>9</sup>
- The Australian Competition and Consumer Commission (ACCC) – responsible for ensuring compliance with Australian competition, fair trading, and consumer protection laws, in particular the *Competition and Consumer Act 2010*.
- The Commonwealth Director of Public Prosecutions (CDPP) – responsible for prosecuting corporate offenders for Commonwealth offences based on briefs of evidence provided by investigative agencies. The decision to prosecute is made in accordance with the *Prosecution Policy of the Commonwealth*.<sup>10</sup>

The Government is taking action to combat corporate crime. In May 2015, the Government announced the establishment of the Serious Financial Crime Taskforce to fight serious and organised financial crime, noting the threat it poses to Australia's economy, financial markets,

---

<sup>8</sup> In the case of offences committed by companies, the maximum fine which can be applied is five times the fine that could be imposed on a natural person convicted of the same offence.

<sup>9</sup> *Australian Securities and Investments Commission Act 2001*, s 13.

<sup>10</sup> The Prosecution Policy is available online at [www.cdpp.gov.au/prosecution-process/prosecution-policy](http://www.cdpp.gov.au/prosecution-process/prosecution-policy).

regulatory frameworks and tax revenue collection.<sup>11</sup> The Government is providing \$127.6 million over four years to the Taskforce for investigations and prosecutions that will address superannuation and investment fraud, identity crime and tax evasion.

## Challenges

Despite having a well-developed legal and regulatory framework for corporate misconduct, Commonwealth agencies face challenges in effectively detecting, investigating and prosecuting serious corporate crime. It is an inherently complex crime type, and it can be relatively easy for offenders to conceal their crime.

Under the current model, investigating agencies must develop a comprehensive brief of evidence to provide to the CDPP before it can consider whether it is appropriate to commence proceedings. Compiling such briefs is often a difficult task, as the evidence of corporate misconduct can be harder to identify and access compared to evidence of physical crimes. Investigations can be hampered by the need to process large amounts of complex data and lengthy negotiations over claims of legal professional privilege. Evidence may be held overseas and therefore require investigators to go through mutual assistance processes. Identifying corporate wrong-doing often depends on companies cooperating or whistleblowers coming forward, but companies have little incentive to self-report.

The most effective deterrent to corporate crime is successful prosecution of individuals involved, resulting in terms of imprisonment. However, the complexity of corporate crime can make investigating and prosecuting such matters challenging. At the prosecution stage, court proceedings can be long and expensive, particularly against well-resourced corporate defendants. It can also be difficult in some cases to establish corporate criminal liability.

While criminal prosecution can effectively punish a company, it can also result in unintended impacts on innocent third parties, such as the employees of the company, its customers, suppliers and investors.

To ensure effective and efficient responses to serious corporate crime, investigators and prosecutors need a range of tools. Officials tackling serious corporate crime currently have two key approaches available to them: criminal prosecution or, where this is not appropriate, pursuing a civil or administrative action against the company. Negotiated settlements are used in some contexts for the regulation of companies, including ASIC's use of enforceable undertakings.<sup>12</sup> These are used as a supplementary tool in matters in which criminal proceedings are undertaken.

---

<sup>11</sup> The Taskforce includes the AFP, ASIC, Australian Taxation Office, Australian Crime Commission, Attorney-General's Department, Australian Transaction Reports and Analysis Centre, CDPP and Australian Border Force.

<sup>12</sup> Enforceable undertakings aim to improve compliance with the law through an administrative settlement as an alternative to judicial or administrative action. Generally speaking, an enforceable undertaking is a settlement that may be enforced in court if the party who agreed to the undertaking does not comply with them. While ASIC will not accept an enforceable undertaking as an alternative to commencing criminal proceedings, an EU will be available as a supplementary tool in a matter in which criminal proceedings are undertaken. Enforceable undertakings are also available to other regulatory bodies as a dispute resolution mechanism.

Faced with an increasingly complex and serious threat environment, there may be scope to increase the options available to respond quickly and effectively to offending by companies, by allowing for negotiated settlements through a DPA scheme. To this end, the Government is exploring whether measures that have been successful in combatting corporate crime in other jurisdictions could be implemented in Australia.

DPA's could also provide a useful tool for investigators. In instances where the police or regulators have a strong suspicion of criminal behaviour by a company, DPA's can be used as an incentive to encourage the company to come clean and cooperate.

## **Other enforcement options**

While this paper is focussed on DPA's, there are other options which could help to improve the enforcement of serious corporate crime.

This paper is set against a backdrop of a broader discussion on responses to corporate crime. The Senate Economics Committee is currently inquiring into foreign bribery and the penalties available for white collar crime.<sup>13</sup> As part of the foreign bribery inquiry, the Committee will explore measures to encourage self-reporting including civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements. Broader options for law reform also forms part of the Committee's terms of reference.

Regardless of whether a DPA scheme is implemented in Australia, the Australian Government is considering whether it may be beneficial to develop publicly available guidance on the factors that the CDPP would ordinarily take into account when determining whether it is in the public interest to commence a prosecution against an alleged offender for serious corporate crimes. These factors could potentially be based on the public interest considerations outlined on pages 17 and 18 of this paper.

Two further options to encourage reporting of corporate misconduct are private sector whistleblower measures and a False Claims Act scheme. Experience in the US has demonstrated that the threat of either potential disclosure by a whistleblower or a claim under the US False Claims Act provides a robust incentive for companies to report suspected internal criminal activity. A summary of these two options is presented below.

### **Private sector whistleblower measures**

Noting the importance of whistleblowers to the detection of corporate crime, existing protections for private sector whistleblowers could be extended and strengthened where appropriate. Stronger private sector whistleblower protections were recommended by the Senate Economics Committee following its 2014 inquiry into the performance of ASIC, as well as the OECD Working Group on Bribery following its 2012 examination of Australia's implementation of the OECD Anti-Bribery Convention. A review of these protections could build on the efforts of ASIC in establishing a new Office of the Whistleblower, which monitors the handling of all whistleblower reports, and manages training on handling the relationship with whistleblowers.

---

<sup>13</sup> Further details on these inquiries can be found on the Senate Economics Committee homepage: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics).

## **False Claims Act scheme**

The US False Claims Act (FCA) scheme provides a tool to combat fraud against government, including by corporations. The US scheme creates a statutory right of action, which may be taken by a third party (typically a whistleblower) against a person or company that has defrauded the US Government. The US Department of Justice (DOJ) has the right to take over the action. The courts have the power to award the third party a portion of any recovered damages and penalties. Although fraud against the Government constitutes only a small proportion of the total instances of fraud, the US FCA scheme has seen very significant penalties and damages recovered from companies for crimes against the US Government. These occurrences of fraud were only detected and proved because a whistleblower came forward with evidence of criminality.

According to the Australian Institute of Criminology, there was nearly \$700 million in reported fraud against the Australian Government in 2013-14. An Australian FCA scheme may assist to recover some of the proceeds of such fraud.

# DEFERRED PROSECUTION AGREEMENTS: AN OVERVIEW

A DPA is a voluntary, negotiated settlement between a prosecutor and defendant. Under a DPA scheme, where a company has engaged in a serious corporate crime and the crime has either been self-reported by the company or identified by investigators, prosecutors would have the option to invite the company to negotiate an agreement to allow it to avoid a conviction (ie, defer the prosecution). The terms of a DPA typically require the company to comply with conditions, cooperate with any investigation, and pay a financial penalty. A breach of the terms would result in the prosecution resuming with the possibility of additional penalties. This decision to enter into DPA negotiation is at the discretion of the prosecuting agency.

The US also uses non-prosecution agreements (NPAs) as an alternative to DPAs. Under an NPA, a prosecutor agrees not to prosecute a defendant at all if the defendant complies with the agreed conditions. DPAs are typically filed with a court whereas NPAs are not.

## Arguments in favour of DPAs for serious corporate crime

DPAs may offer advantages because they:

- Encourage greater self-reporting by companies – DPAs may encourage companies to self-report internal misconduct by:
  - allowing a company to avoid a formal conviction, which may damage its reputation and limit its ability to win future contracts
  - providing greater certainty of outcome, which allows the company to continue business and maintain investor confidence
  - avoiding the cost of lengthy litigation, which can involve considerable costs to the company and result in reputational damage, and
  - providing the possibility of a reduced financial penalty based on cooperation.
- Strengthen investigations and prosecutions – by providing a greater incentive companies to self-report misconduct, DPAs may help to mitigate challenges currently faced in detecting and investigating serious corporate crime.
- Improve enforcement outcomes – a DPA scheme could increase the amount of corporate misconduct that agencies are able to detect and pursue, including by enabling prosecutorial resources to be focussed on the most egregious cases.
- Improve compliance and corporate culture – DPAs can provide a general incentive for companies to proactively improve internal compliance, as a company's internal controls are considered in determining the availability and terms of DPAs. Conditions in DPAs can prevent further misconduct by a company by requiring improvements in internal controls or removing staff involved in, or who had oversight of, the misconduct.
- Avoid flow-on consequences on third parties – DPAs may help mitigate the potential consequences of prosecuting companies, such as job losses, losses to investors and damage to

related businesses and markets. This was a motivating factor for the increased use of DPAs in the US, following the collapse of accounting firm Arthur Andersen in 2002, which resulted in thousands of job losses.

## **Arguments against DPAs for serious corporate crime**

There have been some criticisms and limitations noted regarding the use of DPAs in the context of serious corporate crime.

The formal prosecution and conviction of responsible individuals is a significant deterrent for corporate crime. Some regard DPAs as weakening the deterrent effect of prosecution.<sup>14</sup> There is a perception that DPAs can allow companies to 'buy their way out of trouble'.<sup>15</sup>

Another possible argument against the introduction of DPAs is that serious corporate crime should not be treated differently to other forms of crime. Why should companies be invited to settle allegations of criminal conduct, while individuals facing criminal charges for non-white collar crime may not have this option?

There are also questions about whether a DPA scheme would provide sufficient incentive to companies to encourage them to self-report misconduct. For a company, there can still be a level of uncertainty with a DPA, including:

- whether a prosecutor will invite a company which has self-reported misconduct to negotiate a DPA
- whether the prosecutor will invite a company to enter into a DPA at the end of the negotiations
- the possibility that the prosecutor may launch a prosecution on the basis of evidence disclosed in the DPA negotiations
- the possibility that even if a DPA is offered, the terms proposed by the prosecutor may not include penalties lower than those that may have been imposed following a conviction, and
- whether the DPA will be approved by the court.

If an Australian DPA scheme is to be developed, these issues would need to be closely considered. Thought would also need to be given to whether DPAs should be confined to economic corporate crimes, or whether they could apply to a broader range of offences by corporates, such as environmental crime.

---

<sup>14</sup> Peter Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, Brigham Young University Law Review, 25 September 2014.

<sup>15</sup> Lindsay Fortado, *Anti-corruption groups warn SFO against deferred prosecution*, *Financial Times*, 23 June 2015. Paul Peachey, *Justice for sale: Big companies could soon escape prosecution for corporate corruption - by paying their way out*, *The Independent*, 25 July 2015.

## OUTLINE OF EXISTING MODELS

This section outlines the key features of the US and UK DPA schemes. These provide useful models to consider in the context of a possible Australian scheme.

### United States

DPAs have been a mainstream tool for US prosecutors dealing with corporate crime, particularly since the early 2000s. Both the US DOJ and Securities and Exchange Commission (SEC) are able to enter into such agreements. The two agencies have entered into at least 290 agreements, with more than half coming since 2010. DPAs have led to monetary penalties totalling more than \$US42.5 billion from 2000 to July 2014. Since 2010, 86% of corporate enforcement actions under the Foreign Corrupt Practice Act involved either an NPA or DPA.

The source of authority for DPAs in the US is the general authority and discretion of prosecutors (they do not have a statutory basis). In 2008, the DOJ issued guidance for the use of DPAs in the *United States Attorneys' Manual, Principles of Federal Prosecution of Business Organisations, Titles 9-28.000 to 9-28.1300 (Attachment A)*.<sup>16</sup> The SEC provides guidance on the conduct of DPAs in its *Enforcement Manual*.<sup>17</sup>

### How DPAs operate in practice

DPAs may be used in the US when a defendant is charged with an offence.<sup>18</sup> Prosecutors have discretion to initiate DPA discussions with a defendant if they believe it is appropriate. This may occur at any point before the trial. Factors taken into account by the prosecutor in this decision include the impact on innocent third parties of a criminal prosecution, the need to provide restitution to victims of crime and, in the case of a company, the adequacy of existing compliance programs.<sup>19</sup>

Only prosecutors have the authority to open negotiations for a DPA. However, prosecutors will often open negotiations for a DPA following self-reporting of a matter by a defendant. Participation in negotiations for a DPA is voluntary. Admissions made by defendants during negotiations may be used in any later prosecution, but the defendant is not required to admit guilt as part of the DPA process.

A DPA comprises terms such as a statement of facts relating to the alleged offence, the imposition of penalties and corporate compliance agreements.

In the US, DPAs are entered into and conducted with comparatively limited judicial oversight. While DPAs are filed with a court, and a judge is required to approve the terms of the DPA, no judicial hearing

---

<sup>16</sup> See especially Titles 9–28.200 *General Considerations of Corporate Liability* and 9–28.1100 *Other Civil or Regulatory Alternatives*.

<sup>17</sup> Securities and Exchange Commission, Division of Enforcement, *Enforcement Manual* (June 4 2015), <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>, (see especially para 6.2.2).

<sup>18</sup> This differs from NPAs, where the prosecution agrees not to lay any charges on the defendant in exchange for the defendant paying a fine and agreeing to other conditions.

<sup>19</sup> *United States Attorneys' Manual, Principles of Federal Prosecution of Business Organisations, Title 9–28.1100*.

is required and the level of ongoing judicial involvement in the DPA varies from case to case.<sup>20</sup> Once the court has approved a DPA, there is no obligation to publish the agreement, but they are in many instances publicly available. DPAs initiated by the SEC must be published on the SEC website.<sup>21</sup>

To oversee the defendant's compliance with the DPA, external independent monitors may be appointed at the cost of the defendant. Upon fulfilment of the requirements in the DPA, the US Attorney will formally decline the prosecution. However, if the defendant breaches the terms of the DPA, the prosecution may be recommenced.

### Availability of DPAs

Prosecutors in the US may enter into a DPA with a company or an individual. The DOJ has broad discretion as to the types of crime for which DPAs may be negotiated. DPAs in the US are used in a wide range of federal crimes. There is a limited list of offences for which DPAs cannot be used, including matters involving national security, foreign affairs, matters against an individual with two or more felony convictions or a matter where a public official has violated the public trust.<sup>22</sup>

As noted above, the US also makes use of NPAs as an alternative to DPAs. Unlike DPAs, an NPA may be entered into without any judicial involvement.

## United Kingdom

In 2012, the UK's Ministry of Justice (MOJ) consulted publicly on the possible introduction of a DPA scheme.<sup>23</sup> Following this process, DPAs were introduced in February 2014 through new Schedule 17 to the *Crime and Courts Act 2013* (UK) (CC Act) (**Attachment B**). The Crown Prosecution Service and the SFO have jointly issued a *DPAs Code of Practice* under the CC Act.<sup>24</sup>

### How DPAs operate in practice

A SFO prosecutor may invite a company to enter DPA negotiations. As in the US, companies in the UK have no right to be invited to enter into DPA negotiations and no obligation to accept if an offer is made. Before the prosecutor invites a company to enter into DPA negotiations, the prosecutor must be satisfied that:

- there is a reasonable suspicion that the company has committed an offence

---

<sup>20</sup> US Government Accountability Office, *Report to Congressional Requesters: Corporate Crime* (December 2009), pp 25-29.

<sup>21</sup> US Securities and Exchange Commission, *Enforcement Manual* (4 June 2015), para 6.2.2.

<sup>22</sup> *United States Attorneys' Manual*, Title 9-22.100, *Pre-trial Diversion Program: Eligibility Criteria*.

<sup>23</sup> UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (Consultation Paper CP9/2012)* (May 2012) (available at [https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting\\_documents/deferredprosecutionagreementsconsultation.pdf](https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf)); UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations (Response to Consultation CP(R)18/2012)* (23 October 2012) (available at <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf>).

<sup>24</sup> Available at: <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>.

- there are reasonable grounds to believe that an investigation would establish a realistic prospect of conviction, and
- it is in the public interest to seek a DPA instead of a prosecution.

DPAs are subject to ongoing judicial scrutiny through two judicial hearings to determine if the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. If a court approves the DPA, it will publish a declaration to that effect together with the DPA.

In November 2015, the SFO announced that it had entered into the first DPA under the UK scheme.<sup>25</sup> The company party to the agreement (Standard Bank Plc) was the subject of an indictment alleging failure to prevent bribery contrary to section 7 of the *Bribery Act 2010*. Under the DPA, Standard Bank has agreed to pay \$44.3m (£21.7m) in fines and repayments of bribes and profits and also implement recommendations of an independent review of its existing anti-bribery and corruption controls.

### Availability of DPAs

Under the CC Act, DPAs are only available for a company, partnership or unincorporated organisation (not an individual). DPAs are only available for specific corporate criminal offences, such as fraud, bribery of a foreign official and money laundering, which are listed in Schedule 17 to the CC Act.

### Comparison of key features of US and UK DPAs

Issue	US	UK
Source of authority to use DPAs	General authority and discretion of prosecutors.	<i>Crime and Courts Act 2013</i> (UK)
Guidance on the use of DPAs	<i>United States Attorneys' Manual: Principles of Federal Prosecution of Business Organisations and SEC Enforcement Manual</i>	<i>DPAs Code of Practice</i>
Judicial involvement	DPAs must be filed in court and approved by a judge, but are often negotiated and conducted with limited judicial involvement.	DPA negotiations are considered during at least two court hearings and the court remains involved throughout the DPA.
Offences to which a DPA may apply	DOJ and SEC have broad discretion as to the types of crime for which DPAs may be entered into, with some offences excluded.	DPAs may only apply in respect of those offences listed in the CC Act.
Kind of agreement	Both DPAs and NPAs are available.	DPAs only are available.
Parties to the DPA	Defendants can be business organisations or individuals.	Defendants can be commercial organisation, including companies, partnerships and unincorporated associations, but not individuals.
Publishing	The DOJ has no obligation to publish DPAs, though they are often publicly available. SEC DPAs must be published on the SEC website.	The prosecutor must publish the DPA, unless it is in the interests of justice to postpone publication.

<sup>25</sup> <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sfo-agrees-first-uk-dpa-with-standard-bank.aspx>.

# AUSTRALIAN DPA SCHEME: KEY ISSUES FOR CONSIDERATION

The Australian Government seeks views on whether a DPA scheme should be adopted in Australia, and if so, how such a scheme should be structured.

The following questions are intended to guide responses. Interested parties can provide answers to some or all of these questions. A summary list of these questions is provided on page 22.

## A. Utility of an Australian DPA scheme

We seek views on the possible introduction of a DPA scheme in Australia, taking into account the core purposes of the scheme to encourage corporate self-reporting while providing adequate penalties for corporate misconduct.

The US and UK schemes outlined above provide models to consider in the context of a possible Australian scheme. It should be noted that there are differences in the legal and regulatory environments in the US and UK which may contribute to the effectiveness of their DPA schemes.

Should a decision be made to progress an Australian DPA scheme, consideration would need to be given to Australia's federal structure, constitutional arrangements and legal traditions. For instance, the role of courts in a DPA scheme may raise issues in relation to Australia's doctrine of the separation of powers and constitutional provisions on the role and functions of courts.

Notwithstanding this, the concept of negotiated settlements for corporate and regulatory matters is not foreign to Australia. There are mechanisms already in place in Australia which are similar to DPAs, such as the ACCC's cartel immunity scheme and the enforceable undertakings available to ASIC and other regulatory agencies.

It would also be necessary to consider the possible regulatory impact and costs to Government of a DPA scheme. Such a scheme would not impose additional regulatory and compliance burden on companies generally. Companies which have engaged in criminal conduct and look to settle this through a DPA would likely incur a range of costs, including increased financial penalties as well as compliance and monitoring requirements. It would be at the company's discretion as to whether it would seek to engage with authorities on a possible DPA. DPAs would provide a further option for a company looking to resolve internal misconduct, and potentially avoid lengthy and costly prosecution. In terms of cost to Government, an effective DPA scheme would likely result in an increased resolution of incidents of corporate misconduct, which would likely result in more revenue collected through fines. There may be resourcing implications for Commonwealth

agencies, although it is expected that this would be offset by the reduced costs in investigating and prosecuting complex corporate crime matters.<sup>26</sup>

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

## **B. Conduct for which a DPA may be sought**

For the purposes of this paper, the term “serious corporate crime” includes fraud, bribery and money laundering. However, DPAs need not necessarily be confined to these contexts. We seek views on the kinds of offences to which DPAs could apply.

In the US, the DOJ has broad discretion as to the types of crime for which DPAs may be entered into and DPAs are often used in matters involving a wide spectrum of federal crimes. There is only a limited list of offences and circumstances for which DPAs cannot be used, including matters involving national security, foreign affairs, matters where a public official has violated the public trust, and prosecutions against an individual with two or more prior felony convictions.<sup>27</sup>

In the UK, DPAs may be entered into only for the offences listed in Part 2 of Schedule 17 to the CC Act (see **Attachment B**). These offences comprise a range of serious corporate crimes, including fraud, foreign bribery and money laundering.

Should an Australian DPA scheme be developed, the range of offences to which the scheme could apply would be limited by the scope of Commonwealth legislative power. Consideration would need to be given to whether the scheme would apply to summary as well as indictable offences, and also how DPAs would work in instances where there the company may have breached state or territory laws.

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

## **C. Parties to a DPA – companies and/or individuals**

In the US, a prosecutor may enter into a DPA with either a business organisation or an individual. In the UK, a DPA may be entered into with a commercial organisation, including a company, partnership or unincorporated organisation, but not with an individual.

A key motivation for allowing DPAs for companies but not individuals is to maintain the deterrent effect posed by the possibility of prosecution of individual company officers. However, limiting DPAs to companies poses a risk that insiders who may have some level of criminal liability for the misconduct they are reporting may be reluctant to report it to authorities for fear of prosecution.

---

<sup>26</sup> The specific costs and increased revenue would depend on the nature of the scheme. In considering its DPA scheme, the UK Government prepared analysis of the likely costs and impact associated with the scheme, both for government and the private sector. The impact assessment is available on the Ministry of Justice’s website: <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements>.

<sup>27</sup> *United States Attorneys’ Manual, Pre-trial Diversion Program: Eligibility Criteria*, Title 9-22.100.

In order to encourage self-reporting by individuals, it may be beneficial to allow DPAs for an individual, provided they are not the chief architect of the relevant misconduct.

Despite large settlements with companies, there has been some criticism of DPAs in the US for not flowing on to prosecutions of individual company officers. Formal convictions are a very effective deterrent for corporate crime, and the use of DPAs has been seen by some as weakening this deterrence. While criminal convictions of individual officers can occur alongside DPAs (and provision of evidence by a company to assist with prosecutions of individual officers can be part of a DPA), DPAs can appear as a way for companies to buy their way out of prosecution at the cost of shareholders, with the guilty company officers suffering no penalty or lasting consequences.

Noting this, DPAs can create opportunities for prosecutions of individual company officers where such opportunities would not otherwise have existed, in particular where authorities may not have become aware of the misconduct but for the organisation self-reporting. In addition, as part of the cooperation with authorities that is taken into account in the DPA, companies are expected to provide information to assist with the prosecution of individuals, which can lead to convictions succeeding where they might not otherwise have been successful.

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

## D. Extent of judicial involvement

As noted above, the role of the courts would be a fundamental issue for an Australian DPA scheme.

The arrangements for Australia's federal judicial system are provided in Chapter III of the Constitution. Under these arrangements, courts cannot merely 'rubber stamp' administrative processes or penalties that have been 'agreed' in advance by the parties.<sup>28</sup> To do so would not be consistent with the role and function of courts under the Constitution.

It is possible that this issue could be addressed by adopting an approach similar to that in the US, where a negotiated DPA would be approved by the Commonwealth Director of Public Prosecutions. It could be that the court's approval would not be sought, but that the process would require that any indictment that had been filed by the prosecution would be 'suspended'. The DPA and any other relevant documents could be filed with the court. In the event that the DPA is contravened, the prosecution could be re-commenced.

Judicial involvement in a DPA scheme helps to foster confidence in the process. In the US, DPAs are entered into and conducted with comparatively limited judicial involvement. While DPAs are filed with a

---

<sup>28</sup> This issue was recently considered in cases regarding the prosecution's ability to provide submissions to a sentencing judge on the appropriate sentencing range – see *Barbaro v The Queen* [2014] HCA 2 (in a criminal context); and *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; CFMEU v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (in a civil context).

court, and a judge is required to approve the terms of the DPA, no judicial hearing is required and the level of ongoing judicial involvement in the DPA varies from case to case.<sup>29</sup>

By contrast, the UK scheme involves a greater oversight role for the judiciary throughout the life of the DPA. This includes two judicial hearings to approve the DPA, as well as further judicial determinations to identify whether a breach of a DPA has occurred, or to vary or discontinue a DPA.

There has been criticism in the US that DPAs grant too much authority to prosecutors to determine which defendants are eligible for DPAs and that prosecutors can use the threat of either not offering a DPA or dropping an existing DPA as leverage to pressure defendants to agree to conditions.<sup>30</sup> There are also concerns that the lack of judicial oversight may lead to inappropriate deals between prosecutors and defendants.

The model for judicial oversight in the UK provides greater transparency. The restriction of DPAs to specified offences and their application solely to organisations in the UK maintains a strong message of deterrence, indicating that individuals within organisations who are responsible for the misconduct will be prosecuted. The limited availability of DPAs in the UK also means that they are not expected to impose any significant strain on court resources.

However, the high level of judicial scrutiny over DPAs in the UK may add an element of uncertainty and delay to DPA negotiations. A company may be reluctant to self-report or share incriminating evidence on the chance that a court may not approve a DPA, in which case the organisation may be subject to a full prosecution based on the evidence disclosed during DPA negotiations.

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

### **E. Measures to promote certainty – policy guidance**

The success of a DPA scheme will depend on whether it provides an effective incentive to self-report. This requires a level of certainty and predictability in the process.

Measures to promote certainty could include early indications from a statutory officer or the judiciary during the proceedings as to the suitability of the terms being discussed. Clear guidance would need to be provided on the factors a prosecutor would consider when deciding whether to invite a company to enter a DPA. These factors could be based on those used in the UK: whether there is a reasonable suspicion that the organisation has committed an offence, whether there is a reasonable prospect of a successful prosecution, and that it is in the public interest to enter into a DPA instead of a prosecution.

---

<sup>29</sup> United States Government Accountability Office, *Report to Congressional Requesters: Corporate Crime* (December 2009), pp 25-29. There are signs that courts in the US are playing a more active role in DPAs. An application for a DPA involving Fokker Services was refused in February 2015 by the lower court judge hearing the application. Among other reasons for refusing the DPA, the judge cited the insufficient penalty proposed under the DPA and the fact that no individuals were to be prosecuted.

<sup>30</sup> Griffin LK, 'Compelled Cooperation and the New Corporate Criminal Procedure', *New York University Law Review* (82(2)) (May 2007), p 328.

In deciding whether the public interest test has been met the prosecutor could be required to consider factors similar to those considered in the US and UK, including:

- preventing future criminal activity
- saving prosecution and judicial resources for cases where prosecution is most required
- providing a vehicle for restitution to communities and victims of crime
- the seriousness of the offence
- the conduct of the company, including:
  - history of similar conduct
  - business practices and compliance
  - self-reporting and cooperation, and
  - whether the alleged offending involved board members or other high managerial agents
- if a conviction is likely to have disproportionate consequences for the offender or collateral effects on the public, employees or other third parties.

After applying the factors outlined in the proposed guidance document, the prosecuting authority (most likely to be the Commonwealth Director of Public Prosecutions) could determine whether it would approach a defendant to open negotiations for a DPA.

The guidance document could also cover factors relevant to the kinds of terms appropriate for inclusion in the DPA, and provide a non-exhaustive list of possible terms.

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

## **F. Whether DPAs should be made public**

In the US, the SEC Enforcement Manual states that ‘unless the Commission directs otherwise, DPAs will be made available on the Commission’s website’.<sup>31</sup> There is no obligation on the DOJ to publish the DPAs that it initiates, though most DOJ DPAs are publicly available.<sup>32</sup>

In the UK, while the preliminary judicial hearing is not public, once the court has approved the DPA the prosecutor must publish the DPA. At the same time, the prosecutor must also publish a declaration by the court that the DPA is likely to be in the interests of justice and that the proposed terms of the DPA are fair, reasonable and proportionate.<sup>33</sup> The Court may postpone the publication of the DPA where it may prejudice the administration of justice in any legal proceedings.

In developing a DPA scheme, a balance would need to be struck between ensuring public confidence in the DPA as a robust prosecutorial approach to criminal wrongdoing, and providing parties with a level of certainty and confidentiality to negotiate the details of any DPA. If the terms of a DPA are not made public, this may erode public confidence that the misconduct is being appropriately addressed. On the

---

<sup>31</sup> Securities and Exchange Commission, *Enforcement Manual*, 4 June 2015, para 6.2.2.

<sup>32</sup> Alexander, C and Cohen M, ‘The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements’ (April 2015), [http://weblaw.usc.edu/centers/class/class-workshops/documents/Alexander\\_paper.pdf](http://weblaw.usc.edu/centers/class/class-workshops/documents/Alexander_paper.pdf), p 28.

<sup>33</sup> CC Act, Schedule 17, subclause 8(7).

other hand, while making a DPA public would increase the transparency of the DPA and the accountability of parties to the DPA, a company may be less willing to voluntarily disclose wrongdoing where the details are to be published. With the aim of balancing these considerations, the UK DPA scheme requires that the DPA be published only once the terms of the DPA have been agreed by the parties and approved by a court.

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

## **G. Conduct of negotiations**

Under the US and UK DPA schemes, the prosecuting authority may invite a company to enter into a negotiation on the terms of a DPA, if they regard it appropriate to do so. Under these schemes the ability to open negotiations rests solely with the prosecuting authority.

Successful negotiations should resolve factual disputes, allowing for the DPA to be agreed on a clear, fair and accurate basis. Conducting the negotiations in private may avoid drawing attention to the negotiations and minimise the risk of interference with the investigation. The US experience shows that defendants in DPA negotiations will often seek to investigate the matter internally and provide the resulting evidence to the prosecuting authority. This saves the Government significant resources, but carries the risk that the defendant's internal investigation may not be thorough or may obstruct the official investigation.

To incentivise genuine internal investigations, it could be an agreed principle of DPA negotiations that the conduct of the defendant during the negotiations and quality of their internal investigations may be taken into account in determining the terms of the DPA. In cases where a defendant has self-reported suspected wrongdoing, the defendant could also be expected to disclose reasonable material to establish the facts of the matter and evidence concerning the role of individuals who may have particular responsibility for the misconduct.

In the US and UK schemes, material disclosed during DPA negotiations may be used in future criminal or civil proceedings against the defendant. If evidence provided during negotiations was not able to be used in further proceedings, negotiations for a DPA could be viewed by a defendant as a way of rendering such evidence unavailable for use in future prosecutions. This may provide a perverse incentive for a defendant who has committed wrongdoing to enter negotiations for a DPA. Such a defendant may subsequently terminate the negotiations and thereby avoid being held accountable for their misconduct.

Conversely, allowing any details disclosed by the defendant to be used subsequently against the defendant potentially puts the state in a powerful bargaining position, where it is able to coerce a company to accept the terms of the DPA (a criticism that has been levelled at the US scheme). This may create a disincentive for a corporate defendant to be full and frank in its disclosure.

***Q7: How should DPA negotiations be structured?***

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

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

## H. Content of a DPA

In order to promote public confidence, an Australian DPA scheme could require the terms of agreements to be in the public interest and to be fair, reasonable and proportionate. Penalties would need to be appropriate and proportionate.

Depending on the circumstances of the particular case, a DPA could include:

- a statement of facts relating to the alleged offence
- a warranty as to the accuracy of the information provided during the negotiations
- a high-level guarantee that the parties enter into the agreement in good faith
- an acknowledgement of responsibility for the conduct and that if the defendant commits similar conduct during the period of the agreement that it may be prosecuted for any crime including that which is the subject of the agreement
- an obligation to cooperate with any current or future investigation
- the consequences for the defendant if it engages in further misconduct
- a prohibition on the defendant from making factual representations contradictory to those in the agreement
- requirements such as:
  - payment of financial penalties<sup>34</sup>
  - payment of the reasonable costs of the prosecution
  - compensation to victims
  - disgorgement of any profits made from the misconduct, and/or
  - garnishing of executive salaries or non-payment of bonuses.
- implementing or improving a corporate compliance program, and/or
- an expiry date.

If an Australian DPA scheme was to be developed, consideration would need to be given to use of penalties imposed by an agreement.

Victim restitution is a key feature of the UK and US schemes. DPAs under both schemes can (and typically do) require companies to compensate victims of their alleged offending, or to set aside funds for restitution in the future. In the UK, a defendant may be required to pay funds to a charity or other third party.<sup>35</sup> In the US such payments are discouraged as they are seen to create actual or perceived conflicts of interest and/or other ethical issues.<sup>36</sup>

---

<sup>34</sup> Some DPAs in the US have required that certain financial penalties can only be paid from director or CEO bonuses, rather than shareholder funds.

<sup>35</sup> CC Act, Schedule 17, para 5(3)(c).

<sup>36</sup> US Office of the Deputy Attorney General, *Memorandum for Holders of the United States Attorneys' Manual: USAM 9-16.325: Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and 'Extraordinary Restitution'* (14 May 2008), p 1.

In both the UK and US, some funds raised through DPA settlements are recovered by agencies. In the UK, the SFO may recover costs incurred in its investigation or negotiating the agreement.<sup>37</sup> In the US, some funds raised through DPAs can be used to fund the SEC's whistleblower program.

Ensuring sufficient funding and resourcing for complex corporate crime is critical. Using some recovered funds for further enforcement activities could be considered in the context of a possible Australian scheme, although a potential conflict of interest may arise if the agencies were to be the beneficiary of the agreement they negotiate. Such a conflict could be mitigated by having clear guidelines setting out how DPAs will be negotiated and an effective oversight mechanism.

**Q10: *What facts and terms should DPAs contain?***

**Q11: *How should funds raised through DPAs be used?***

## I. Breach of a DPA

DPAs in the US and UK may attract a financial penalty if the DPA is breached. In addition, defendants face possible resumption of prosecution if they breach the DPA and evidence from the negotiations may be used against the defendant during criminal or civil proceedings.

DPAs are also intended to improve corporate culture in order to prevent recidivism by companies, by requiring steps be taken to change the conduct within a company which facilitated misconduct.

If a prosecution is resumed on breach of a DPA, the delay resulting from the establishment of the DPA may be prejudicial to the prosecution.

In order to ensure compliance with the terms of the DPA, the US scheme utilises the role of independent monitor. Independent monitors seek to ensure that companies comply with DPAs and take the necessary steps to reform their behaviour. Independent monitors are able to examine changes within the company and report to the company and Government on any concerns they observe. Monitors are paid for and nominated by the defendant and agreed to by the Government.

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

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

---

<sup>37</sup> The UK's first DPA (Standard Bank) included compensation, disgorgement, and penalties amounting to more than \$32.2 million. It also included costs of the SFO's investigation and of entering into Agreement, for the amount of £330,000.

## SUMMARY OF QUESTIONS

The Australian Government would welcome responses to the following questions which have been set out in this consultation paper. Please support your answers with reasons.

- Q1: Would a DPA scheme be a useful tool for Commonwealth agencies?**
- Q2: In relation to which offences should a Commonwealth DPA scheme be available?**
- Q3: Should DPAs be available for companies only, or for both companies and individuals?**
- Q4: To what extent should the courts be involved in an Australian DPA scheme?**
- Q5: What measures could enhance certainty for companies invited to enter into a DPA?**
- Q6: Should a DPA be made public? If so, are there any circumstances where a DPA should not be published, or its publication postponed?**
- Q7: How should DPA negotiations be structured?**
- Q8: What factors should be considered in agreeing a proposed settlement?**
- Q9: Should material disclosed during negotiations be available for criminal and/or civil proceedings?**
- Q10: What facts and terms should DPAs contain?**
- Q11: How should funds raised through DPAs be used?**
- Q12: What should be the consequences of a breach of a DPA?**
- Q13: Should an Australian DPA scheme make use of independent monitors or other non-judicial supervisory mechanisms?**
- Q14: Do you have any other comments in relation to a potential Commonwealth DPA scheme?**

### Contact details

Responses to this consultation paper should be sent to [criminal.law@ag.gov.au](mailto:criminal.law@ag.gov.au) no later than close of business Monday 2 May 2016. Any queries concerning this consultation process may also be directed to this email address.

Submissions may be made public on the Attorney-General's Department website. If you do not want your submission to be made public, please mark it as confidential.

Thank you for participating in this consultation process.