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International Bar Association

Anti-Corruption Committee

**Submission to Australian Attorney General's Department
on Considerations of a Deferred Prosecution Agreement
Scheme in Australia**

2 MAY 2016

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International Bar Association Anti-Corruption Committee

Submission to Australian Senate Economics Reference Committee on Australia's Foreign Bribery Laws

1 Introduction

1.1 *International Bar Association*

- (a) The International Bar Association (**IBA**) is the global voice of the legal profession and includes over 45,000 of the world's top lawyers and 197 Bar Associations and Law Societies worldwide as its members.
- (b) The IBA has had a longstanding interest in, and advocacy of, issues concerning transparency and probity in the public and private sectors and steps that countries around the world can take to combat foreign bribery and corruption and serious financial crime.
- (c) The President of the IBA has launched a Judicial Corruption Initiative that seeks to create a body of knowledge dealing with corruption in and affecting the judiciary and proposes to help national judiciaries overcome corruption within and affecting the judiciary. This Initiative reflects the critical importance the IBA places on supporting legal and policy reforms which focus on combating foreign bribery, fraud and corruption in all forms, domestic and foreign in all countries.

1.2 *IBA Anti-Corruption Committee*

- (a) The IBA's Anti-Corruption Committee (the **Committee**) draws its members from around the world made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants with legal qualifications. This membership gives the Committee a unique opportunity to comment upon important initiatives that affect anti-bribery and anti-corruption laws, policies and how they are implemented and enforced around the world and in particular countries.
- (b) The Committee has formed a working group in relation to the matters the subject of this submission¹. The Committee is pleased to take this opportunity to make a submission to the Australian Attorney General's Department in response to its Public Consultation Paper on *Consideration for a Deferred Prosecution Agreements Scheme in Australia* dated March 2016 (the **Consultation Paper**).
- (c) The working group is made up of experienced practitioners practicing in the area of foreign bribery and anti-corruption compliance, investigation, prosecution and defence. The spread of the group cover the expertise both the common law and civil jurisdictions.

1.3 *Scope of this Submission*

- (a) The scope of this submission considers the issues surrounding whether the Commonwealth Government should introduce a Deferred Prosecution Agreement (or **DPA**) scheme in Australia to cover Commonwealth laws.
- (b) This submission will focus on how and in what manner individuals and companies should be treated under the criminal law in Australia where they might be encouraged

¹ Members of the working group are listed in Annexure A to this Submission.

to voluntarily report potentially criminal conduct and the consequences of reporting that conduct on both a company and an individual.

2 Executive Summary

2.1 *The Role of DPAs in Australia*

- (a) Australia criminalised foreign bribery in 1999 under section 70.2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). Australia codified the principles relating to corporate criminal liability as from 15 December 2001 for all Commonwealth offences. Australia has a raft of financial crime offences. There are two foreign bribery prosecutions currently before the courts in Victoria and New South Wales². There has been a range of other financial crime offences tackled by the Australian authorities over the last decade, particularly in the area of insider trading, market manipulation, fraud, tax fraud and money laundering. Thus, complex cases are run and run hard by the Australian authorities. Since 1999 however, there have been no published convictions for any foreign bribery cases against any individuals or companies³. Australia companies are fined by foreign authorities but not in Australia⁴. Something appears to be wrong in Australia where bribery and corruption occurs, it is regularly exposed in the media, yet we rarely see substantive criminal prosecutions (either for domestic or foreign conduct).
- (b) The question is why? There is no easy answer. The Committee filed a detailed submission to the Australian Senate Economics Legislation Committee in 2015. The Committee will not repeat those submissions save to say that it remains of the opinion that substantial reforms are necessary if the targeting of serious financial commercial crime is to be proactively and robustly addressed by Australia and for the risks of being caught and prosecuted to far outweigh the benefits of a complex offshore transaction to secure a commercial advantage that may never be discovered.
- (c) The Committee is pleased to support the process of substantive reform in Australia and to address the issues of how companies may be encouraged to voluntarily report potential illegal conduct and by doing so, obtain some certainty in how the company might be treated by the authorities.

2.2 *The Committee's Recommendations*

- (a) On the basis of the material set out in this submission, the Committee makes a number of recommendations in answer to the questions posed by the Consultation Paper.
- (b) The recommendations are set out below.
 - (i) There is considerable benefit in the introduction of a Commonwealth DPA scheme (**sections 3 and 4**).
 - (ii) A Commonwealth DPA scheme should apply to all serious financial crime offences. If it is to apply more broadly, the offences subjected to a Commonwealth DPA scheme should be identified (**section 5**).

² The Securrency prosecutions arise out of allegations that Securrency International Pty Ltd and Note Printing Australia Pty Ltd, then two subsidiaries of the Reserve Bank of Australia engaged in conduct to bribe foreign public officials in various countries to secure banknote printing contracts. The prosecutions commenced in July 2011 and are ongoing, subject to Australia-wide suppression orders. The Lifese Pty Ltd prosecution arises out of the conduct of Lifese Pty Ltd and its directors in allegedly procuring construction contracts in the Middle East by the payment of bribes. The prosecution is ongoing.

³ The former Chief Financial Officer of Securrency, David Ellery pleaded guilty to a charge of false accounting, see *R v David John Ellery* [2012] VSC 349.

⁴ BHP Billiton was fined US\$25 million by the US Securities Exchange Commission for failings in its internal controls concerning its hospitality program for foreign officials at the Beijing Olympics. No action has been taken by any Australian authority.

- (iii) A Commonwealth DPA scheme should be available for companies and other incorporated entities (similar to the United Kingdom model) and not to individuals (**section 6**).
- (iv) A Commonwealth DPA scheme should be subjected to close judicial oversight and review. Any DPA proposed as between a company and the prosecutor should be subject to review and if considered appropriate (in the “interests of justice”), may form the basis of a court’s imposition of a sentence (as agreed between the parties) (**sections 7 and 8**).
- (v) A Commonwealth DPA should be subject to transparency and all court judgements, agreed statements of facts and the DPA should be published, except where the court is satisfied that exceptional circumstances exist that warrant non-publication (for a defined period of time and no longer than is reasonably necessary) (**section 9**).
- (vi) The negotiations for a Commonwealth DPA should be confidential as between a company and the prosecutor. If a DPA is accepted by the court, its terms must be published (subject to exceptional circumstances to the contrary) (**section 10**).
- (vii) In relation to the future use that may be made of information and/or documents (**negotiating material**) provided by a company to a prosecutor during the negotiations for a DPA, the following should apply to any Commonwealth DPA scheme (**section 10**):
 - (A) all negotiations between a company and the prosecutor relating to a DPA should be, and remain, confidential and not be disclosed to any third party;
 - (B) if a DPA is concluded, negotiating material held by the prosecutor may only be used by the prosecutor against the company (and any other person only on a derivative basis and not as constituting any direct evidence or admission by that other person) in any subsequent criminal or civil proceeding, subject to there having been a breach or a termination of the DPA (other than by compliance with its terms or its expiry);
 - (C) if a DPA is not concluded and negotiations for a DPA cease (for whatever reason), any negotiating material held by the prosecutor may not be used by the prosecutor against the company (or any other person) and all negotiating material provided on a voluntary basis must be either destroyed or returned to the company;
 - (D) all material and information held by the prosecutor supplied to it on a voluntary basis or otherwise by the company for the purposes of negotiating a DPA should not be accessible from regulatory agencies or the CDPP by class action litigants or others bringing civil proceedings against the company (or any other person); and
 - (E) these conditions and the permitted use of any negotiating material provided by a potential offender seeking to negotiate a DPA should be clearly set out in the supporting legislation.
- (viii) A Commonwealth DPA should include certain mandatory terms (including an acceptance of guilt) and other terms to provide a broad discretion to the company and the prosecutor and ultimately, the court, on the appropriate orders to be made in each case (**section 11**).
- (ix) Funds raised through a DPA should not be applied simply to Consolidated Revenue on behalf of the Commonwealth, but be used for specific projects, funding or the provision of resources so that anti-bribery and anti-corruption efforts are adequately maintained and not constantly operating under a regime of cost-cutting (**section 12**).

- (x) The consequences of a breach of a Commonwealth DPA should involve firstly, notice of breach with a period of time to remedy the breach and secondly, where there has been a failure to remedy the breach, re-listing the criminal prosecution for directions for trial (**section 13**).
- (xi) A Commonwealth DPA scheme should allow for the use and appointment, at the company's cost, of independent monitors (who should be subject to judicial oversight as to the scope of the monitor's work and fees) (**section 14**).

3 The Current Position in Australia and Overseas

3.1 *The current Australian landscape*

- (a) Australia's criminal law has, and is still largely focused on the prosecution of individuals. Where an individual is investigated and charged with an offence, he or she can seek to negotiate a plea deal with a prosecutor⁵. How and the extent to which this can be done and taken into account by an Australian court is primarily determined by established sentencing principles set out under Commonwealth legislation⁶. The position for a company the subject of an investigation and potential prosecution is similar, although given the artificiality of the corporate person it may be less clear in terms of how and the extent to which it can negotiate a settlement⁷.
- (b) The Committee considers there are a number of important principles to state up front:
 - (i) there is no reason in principle why corporations should not be subject to criminal sanctions as they are, and must not be placed, above the law;
 - (ii) there is also no reason in principle, other than that one is a real person and can therefore be imprisoned, why an individual or a company should be treated differently in terms of the imposition of criminal sanctions for breaches of the criminal law;
 - (iii) while critics of this approach suggest that innocent shareholders and employees bear the burden of fines and sanctions, they forget that shareholders and employees may receive benefits from corruptly or improperly secured contacts to drive up profits by way of shareholder dividends and individual bonuses; and
 - (iv) in order to promote positive corporate behaviour, the Committee considers that there should be a structured, transparent and predictable process for corporations to report offences and then, if appropriate, for the company to cooperate with enforcement agencies and to ultimately know and perhaps agree upon what sanctions, if any, will be applied to it.
- (c) The starting point is a consideration of the role of a prosecutor under Australian criminal law. The High Court of Australia has clearly limited the prosecutor's role in terms of how any submission on sentence can be made (or more correctly, not made)⁸:

Even in a case where the judge does give some preliminary indication of the proposed sentence, the role and duty of the prosecution remains the duty which has been indicated earlier in these reasons; to draw to the attention of the judge what are submitted to be the facts should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is

⁵ However, in criminal cases, the prosecution and the defendant cannot bind the sentencing court to impose an agreed penalty.

⁶ See section 16A, *Crimes Act 1914* (Cth).

⁷ Corporate criminal liability arises under sections 12.1 to 12.6 of the *Criminal Code Act 1995* (Cth).

⁸ *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58; [2014] HCA 2

neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that resolve should fail.

- (d) The High Court has made it clear, as have other appellate courts, that the sentencing task remains that of the sentencing judge and that judge alone.⁹ A prosecutor can do no more than make submissions on general sentencing principles, not on what a sentence or a range of sentences should be. The court found that a criminal prosecutor could not nominate a quantified range of sentences as being open to the sentencing judge. The rationale for this approach is grounded upon the following principles¹⁰:
- (i) it is impossible to define the precise limits of the “available range” of terms of imprisonment that may be imposed on a criminal offender;
 - (ii) in light of the above, there cannot be a positive statement of the upper and lower limits within which a sentence may properly be imposed (as such a statement can only be an expression of opinion and in a criminal proceeding, the Crown’s opinion is irrelevant); and
 - (iii) to permit the Crown to state the bounds of the available range could lead to erroneous views about the importance of the Crown’s opinion, blurring the sharp distinction between the role of the judge and the role of the prosecutor.
- (e) While there is a strong jurisprudential basis in the criminal law justice system to clearly separate the role of a trial and sentencing judge from that of the prosecutor, the Committee believes that the law must evolve to keep pace with the complexity of modern financial crime and accommodate changes when they are for the benefit of society without infringing individual rights (of a company or of an individual)¹¹. To properly provide a prosecutor with a statutory basis upon which to submit an agreed sentence or a range, subject to the discretion of the sentencing judge is not, in the Committee’s opinion, to infringe on the clearly independent role a sentencing judge plays in the criminal system. It is to provide an informed view, of both the prosecutor and the offender, what the sentence, or range of sentences should be, and thereafter, it should be for the judge to exercise the judicial function and to decide what, in all the circumstances, is the proper sentence.
- (f) To shut out any agreed submissions in cases of serious corporate financial crime is, in the Committee’s opinion and experience, not conducive to encouraging corporations to self-report a potentially serious criminal offence with the result that it, in effect, flips a coin and leaves its unknown and uncertain fate in the hands of, firstly the investigators (the Australian Federal Police (**AFP**)), secondly the prosecutor (the Commonwealth Director of Public Prosecutions (**CDPP**)) and ultimately, the court. Certainty, or at least a clearly structured and transparent procedure, is in the Committee’s opinion, likely to be a greater incentive for corporations to voluntarily self-report potential offences than not to do so.

3.2 The current overseas landscape

⁹ *Wong v The Queen* (2001) 207 CLR 584 at 611; [2001] HCA 64 at [75]; *Barbaro* at [41]; *R v MacNeil-Brown* (2008) 20 VR 677 at 711 [1320] per Buchanan JA, 716 [147] per Kellam JA; *CMB v Attorney General for NSW* (2015) 89 ALJR 407 where the prosecution may submit that an identified sentence (by the Trial Judge) is manifestly inadequate, so avoiding appealable error by the Trial Judge.

¹⁰ *Commonwealth of Australia & Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] HCA 46 at [33] to [37] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.

¹¹ In *Lipohar v The Queen* [1999] HCA 65 at [37], Gleeson CJ observed, in the context of a discussion on the law of conspiracy, “*Trans-jurisdictional commerce and intercourse, whether within the Australian Federation or international, is now accomplished with such speed and facility, that for many purposes jurisdictional boundaries are irrelevant. They remain relevant for purposes of criminal law, but there is every reason to apply the law in a manner which accommodates the reality, especially in relation to transactions occurring within the Federation, where considerations of international comity do not inhibit such accommodation.*”

- (a) The Committee has noted in the Consultation Paper the features of DPAs in the existing models used in the United States and the United Kingdom.
- (b) In relation to the United States, DPAs are used by the Department of Justice (**DOJ**) and the Securities Exchange Commission (**SEC**) to resolve criminal and civil bribery-related prosecutions under the Foreign Corrupt Practices Act (**FCPA**¹²). However, there has been an increasing groundswell of criticism of the use of DPAs, particularly on the basis that under the United States system, there is little effective judicial supervision and the scheme is operated primarily by United States' authorities in securing settlements which has allowed the perception to develop that companies can simply buy their way out of expensive, time consuming criminal investigations and prosecutions, perhaps factoring that sort of cost into the price of doing business. In addition, in the United States it appears that DPAs are offered almost exclusively to companies and not to individuals.
- (c) In *United States of America v Saena Tech Corporation; United States of America v Intelligent Decisions Inc*¹³, the companies each sought judicial approval of a DPA. The court's role was to assess the reasonableness of the DPA and to decline to approve any agreement that was not genuinely designed to reform an offender's conduct. The court made it clear that the US Congress intended judicial scrutiny in the decision to divert a criminal prosecution while recognising the expertise of the executive branch in making such a decision whether or not to prosecute or whether or not to enter into a DPA.
- (d) However, in the recent *Fokker Services BV* litigation, while Judge Richard Leon of the District Court refused a motion to vacate time and to approve a DPA¹⁴, (describing the overall DPA as "*grossly disproportionate*" to the gravity of the conduct and for the proposed DPA to "*promote disrespect for the law for it to see a defendant prosecuted so anaemically for engaging in such egregious conduct for such a sustained period of time and the benefit of one of our country's worst enemies*" (Iran and/or Sudan), on appeal, the US Court of Appeals for the District of Columbia Circuit had this to say (the first occasion where a US appellate court had to consider a ruling refusing to vacate time limits for a criminal trial under the US Speedy Trials Act and to approve a DPA)¹⁵:
- The Executive's charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought...those determinations are for the Executive – not the courts – to make...a DPA involves no formal judicial action imposing or adopting its terms. Whereas a district court enters a judgment of conviction and then imposes a sentence in the case of a plea agreement, the court takes no such action in the case of a DPA. Rather, the entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence by demonstrating good conduct and compliance with the law. And a DPA's provisions are agreed to by the parties, not the court, with no occasion for the court to adopt the agreement's terms as its own...it instead merely approves the prosecution's judgment that further pursuit of criminal charges is unwarranted.
- (e) Importantly, in the *Saena Tech Corporation* case, the court reviewed the existing law, holding that the US Congress did not limit DPAs to a process amenable only to companies, but to companies and individuals where there was a genuine attempt or proposal at rehabilitation. That is not something that the United States authorities have yet adopted. Indeed, in the well-known "*Yates Memorandum*" issued under the name of Deputy United States Attorney General, Sally Q Yates¹⁶, the focus of the US authorities perhaps always was and now continues to be more pointedly, the prosecution of individuals unless there are exceptional reasons not to do so.

¹² 15 U.S.C. §§ 78m and 78dd-1.

¹³ Case 1: 14-cr-00066-EGS, Judgment dated 21 October 2014.

¹⁴ *United States v Fokker Services BV*, Case No: 14-cr-121 (RJL), Memorandum Opinion dated 5 February 2016.

¹⁵ *United States v Fokker Services BV* Case No: 1:14-cr-00121-1 dated 5 April 2016, pages 2, 4 and 19.

¹⁶ Memorandum dated 9 September 2015, *Individual Accountability for Corporate Wrongdoing*.

- (f) There are a number of good reasons why corporate settlements are a good idea and not necessarily simply an expedient way for a company to buy their way out of the criminal justice system¹⁷.
- (i) The significant prosecution and trial (including appeals) costs are avoided.
 - (ii) The prospect of a favourable settlement incentivises companies to voluntarily report potential illegal conduct.
 - (iii) If a settlement is secured, the company avoids the adverse consequences of a criminal prosecution and a potential criminal conviction.
 - (iv) Companies care about doing business and despite the significant investment in compliance, any prosecution hits the bottom line and is not good for business.
 - (v) If there is a complaint as to the level of settlements, it is not the settlement that is the issue; rather, it is the level of applicable fines (historically, very low in Australia compared to the United States and the unlimited fines under the United Kingdom *Bribery Act*).
 - (vi) Ultimately, the public benefit of incentivising companies to invest in robust, proactive compliance programs and to voluntarily report potential illegal conduct is likely to outweigh the significant costs of trying to pursue every individual, so a degree of compromise is inevitable.
- (g) However, as a matter of principle, while the targeting of individuals remains, in the Committee's opinion, at the heart of any successful campaign to target bribery and corruption, individuals are no less prone and amenable to rehabilitation and to proffer significant evidence to prosecuting authorities in return for a resolution of claims against them that, in particular circumstances, might well warrant a deferral of any criminal prosecution and the immediate sanction of a criminal conviction.
- (h) The United States is moving towards greater transparency in how it will treat companies who look to self-report potential criminal conduct. On 5 April 2016, the Fraud Section of the Criminal Division of the DOJ responsible for criminal investigations and prosecutions of FCPA offences published an *Enforcement Plan and Guidance* (the **Guidance**). The Guidance set out 3 steps to enhance the DOJ's enforcement strategy:
- (i) substantially increasing FCPA law enforcement resources by more than 50%;
 - (ii) strengthening cooperation with foreign counterpart agencies; and
 - (iii) conducting a 1 year FCPA enforcement pilot program designed to promote greater accountability and to motivate companies to voluntarily report misconduct, to fully cooperate and to receive substantial reductions in fines and penalties, even declinations of prosecutions.
- (i) The Guidance sets out clear criteria on what the DOJ expects of companies who self-report, what companies must ordinarily do and how that cooperation translates into material benefits. The three principal criteria are set out below.
- (i) Voluntary self-disclosure requirements:
 - (A) the disclosure occurs "prior to an imminent threat of disclosure or government investigation;

¹⁷ See *The Case for Corporate Settlements in Foreign Bribery Cases*, Prof M Stephenson at www.globalanticorruptionblog.com dated 5 April 2016.

- (B) the disclosure is “within a reasonably prompt time after the company becomes aware of the offence”; and
 - (C) the company discloses all known facts including facts about the individuals involved in the conduct.
- (ii) Full cooperation to secure credit:
- (A) full disclosure of all conduct of company officers, employees and agents;
 - (B) proactive cooperation, identify opportunities where evidence might be located;
 - (C) preservation, collection and disclosure of documents and information;
 - (D) provision of timely updates on any internal investigation;
 - (E) when requested, give any government investigation priority over an internal investigation;
 - (F) provision of all facts relevant to assess conduct of any third parties;
 - (G) make company officers and employees available for interviews;
 - (H) disclosure of all material gathered during an internal investigation (but excluding material subject to legal professional privilege claims (or attorney-client privilege)¹⁸;
 - (I) disclosure and where possible, access to overseas documents subject to any applicable overseas laws preventing or limiting access or disclosure;
 - (J) provision of documents in a foreign language translated into English.
- (iii) Timely and appropriate remediation¹⁹:
- (A) implementation of an effective compliance and ethics program and to look within the company at how such a program is implemented in fact;
 - (B) appropriate discipline of employees involved in the conduct and those with responsibility for such employees; and
 - (C) any additional steps that reflect a recognition of the seriousness of the alleged misconduct.

The Committee considers that these clearly articulated criteria set a welcome line in the sand and would add greatly to a Commonwealth DPA scheme if similar criteria are set out in a Commonwealth DPA scheme which (1) set out what is expected of a company when it self-reports; (2) states what a company needs to do to satisfy the criteria so objectively, it can then seek to negotiate a DPA and (3), the material benefits that should ordinarily result by way of any substantial reduction of any penalty in an agreed DPA (subject to the court’s overriding discretion when imposing a sentence).

¹⁸ The Guidance makes it clear that eligibility for full cooperation credit is not predicated upon waiver of attorney-client privilege or work product protection.

¹⁹ The DOJ Fraud Section Compliance Counsel is refining the DOJ’s benchmarks for assessing compliance programs and to evaluate a company’s remediation efforts.

- (j) In relation to the United Kingdom, the traditional position applied under United Kingdom criminal law until 2013²⁰. Sentencing was the domain of the judiciary and the Serious Fraud Office had no power to enter into an agreement with an offender as to the penalty²¹. The United Kingdom amended its criminal law procedures by the *Courts and Crime Act 2013* (UK) which introduced a statutory DPA scheme into the United Kingdom legal system. Until 2013 and the statutory DPA scheme, the United Kingdom courts had no power, for example, to make orders for compensation. Thus, in *R v BAE Systems Plc*, the agreement between the company and the SFO for the company to pay compensation to the people of Tanzania, of “£30 million less any financial orders imposed by the Court” was described as a payment of “voluntary reparation”²².
- (k) The first case under the United Kingdom DPA scheme did not eventuate until late 2015. It is worth noting the concluding remarks of Lord Justice Leveson, President of the Queens Bench Division of the High Court in *Serious Fraud Office v Standard Bank Plc*²³ where His Lordship considered the efficacy of DPAs generally:

It is obviously in the interest of just that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self-report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately enhancing its reputation and, in consequence, its business.

- (l) There are a number of lessons and issues that arise from the *Standard Bank* case.
- (i) Any voluntary disclosure to an authority will almost inevitably result in the authority’s investigators interviewing the company’s staff about the implementation of policies and procedures, which may expose a gulf between what the company says (in compliance policies) and what a company does (in practice).
- (ii) The United Kingdom SFO impresses upon companies to voluntarily disclose conduct early, so the SFO can conduct its own investigation. But at what price is the cost of an early report when more considered (but prompt) analysis might lead to the view that no offence has been committed. This may then result in the exposure of information and documents that authorities might not otherwise obtain in any formal criminal prosecution.
- (iii) The vexed role of legal professional privilege is still a cause of disputes, with authorities wanting companies to hand over communications that might

²⁰ *R v Underwood* [2004] EWCA Crim 2256; approved in *R v BAE Systems Plc* Crown Court at Southwark, Case No: S2010565 dated 21 December 2010 per Bean J, to the effect that whether or not pleas have been agreed the judge is not bound by any such agreement and that any view formed by the prosecution on a proposed basis of plea is deemed to be conditional of the Judge’s acceptance of the basis of the plea. In *Regina v Innospec Limited* [2010] EW Misc 7 dated 18 March 2010, in sentencing the company on a count of conspiracy to corrupt contrary to the old UK Criminal Law Act 1977, Lord Justice Thomas said (at [46]) “It is essential for the future that, unless any change is made to the rules of procedure..., it is appreciated this court must and will sentence in the way set out in the law...this applies as much to companies as to individual defendants; in the case of individual defendants, a suggested agreed sentence is not only impermissible, it can raise false hopes...it is for the court to decide on the sentence and to explain that to the public.”

²¹ *R v Dougall* [2010] EWCA Crim 1048 at [24].

²² *R v BAE Systems Plc* Crown Court at Southwark, Case No: S2010565 dated 21 December 2010 at [16] per Bean J.

²³ Case No: U20150854, Crown Court at Southwark dated 30 November 2015.

properly be privileged and yet when a company declines to do so, it is told that is not consistent with cooperation.

- (iv) The question of how a company might be financially penalised under a DPA as opposed to a fine imposed by a court after a conviction is unclear. In the *Standard Bank* case, the parties agreed and the court accepted a multiplier of 300% on the bank's gross profit on the tainted transaction. Yet in two other cases, one under the Bribery Act, the multiplier applied by the courts was little different, so giving rise to the financial incentive to self-report²⁴.
- (v) Unless there are real incentives to voluntarily report potential criminal conduct, these factors may mean that, given the complexity of foreign bribery cases and the requirement for a prosecutor (at least in Australia without any strict liability offence as under section 7 of the United Kingdom Bribery Act) to prove a case beyond reasonable doubt, companies will still take a chance, see if a prosecution occurs or survives a committal and then look to an early plea of guilty if the real incentives to voluntarily report potential criminal conduct are in reality less attractive than appears to be the case..
- (m) Under the World Bank sanction procedures, Article XI allows for settlement to take place between a relevant party and the World Bank, and for negotiations to take place and for sanctions, processes and procedures, including any potential disbarment, to be deferred pending the implementation of any agreement which may be subject to conditions as agreed to between the parties. The World Bank can offer a Negotiated Resolution Agreement (which ends a sanction proceeding) or a Deferral Agreement (which as its name suggests, defers the sanctions process pending compliance with certain conditions)²⁵. Whilst that process is administrative in nature, it nevertheless illustrates the desire of the World Bank to allow for appropriate negotiated resolutions between it and other parties where bribery, corruption and fraud have occurred in relation to World Bank financed or executed projects.
- (n) In France, French criminal law only provides for a specific guilty plea agreement procedure (*Comparution sur reconnaissance préalable de culpabilité*). However, this process requires the imposition of a final conviction although amounts of a fine can be reduced. The consequence of such a conviction in France is that a legal entity is subject to a five year prohibition on submitting public tenders and participating in public procurement procedures.
- (o) In 2015, the French Ministry of Economics & Finance announced some amending laws to be introduced to the French Government and to the French Parliament. These will be known as *Loi Sapin II pour la transparence de la vie économique* or (**Sapin II**). While these laws have yet to be presented to the French Government and examined by the French Parliament, it was proposed that they include settlement procedures similar to that in place in the United Kingdom and the United States. This would allow for the possibility of legal entities charged with corruption to enter into a criminal settlement with French authorities. That would involve criminal charges being dropped or deferred upon payment of a fine capped at 30% of an entity's annual turnover over the past 3 years, together with various compliance commitments. Any settlement would have to be ratified by a Judge.

²⁴ In the *Sweett Group Plc* case under section 7 of the Bribery Act, the company was convicted and the Court applied a multiplier of around 250% together with a one third discount for an early guilty plea. In *Smith & Ouzman*, the company was charged under the old Prevention of Corruption Act 1906, it lost the case, and it received a 300% multiplier on the fine with no discount for any early plea. While in Scotland, Braid Group (Holdings) Ltd Braid self-reported certain conduct to the Crown Office. The company admitted that it violated Sections 1 (bribery) and 7 (failure to prevent bribery) of the Bribery Act 2010 and on 5 April 2016 was ordered to pay £2.2 million under a civil settlement with the Crown. The money recovered under the self-reporting initiative will be used in community projects across Scotland while certain individuals face ongoing prosecutions.

²⁵ See Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, World Bank 2012, pages 20 – 22.

- (p) However, in the week of 21 March 2016, the *Conseil d'Etat* delivered an opinion advising the French Government to strike out any changes to the law to permit settlements in criminal prosecutions. This is consistent with critics of the DPA system who say negotiated settlements would lead to increased leniency and lower accountability standards for French companies. The converse view is that French companies are increasingly subject to prosecution by foreign agencies which, at a political level, impacts on the perception of French sovereignty and the rule of law²⁶. What this debate seems to miss is that not one French company has been convicted of overseas or foreign bribery by a French court using traditional criminal means. It seems United States authorities are prosecuting French companies rather than French authorities.
- (q) In Singapore, the focus is very much on prosecuting individuals rather than to criminally prosecute companies, even though individuals are invariably corporate officers, may not benefit themselves, and are acting in accordance with directions of and from within the company.
- (r) The position in Singapore in terms of whether or not to introduce DPAs has been considered by previous Governments. Singapore has presently decided to stay with the prevailing common law approach of not offering any DPAs to companies.
- (s) In many of the civil European jurisdictions, there are countries that do not have a DPA scheme while there are other countries that do.
- (t) In the Czech Republic, there is no operating DPA. Under Czech law, a criminal prosecution may be discontinued either conditionally or unconditionally if certain obligations are fulfilled. However, that only applies to minor offences where there is a penalty of imprisonment of up to 5 years. That does not apply to bribery cases. Even though an agreement on guilt and punishment may be entered into between a prosecuting authority and a legal entity subject to Czech law, a final conviction is still imposed which can, and invariably does have, a detrimental impact with respect to the business activities of a company including prohibitions from public tender work.
- (u) In Italy, there are criminal procedures that must take place in accordance with the Italian Constitution and if that is to change, or the introduction of a DPA is considered, then there will have to be changes to the Italian Constitution.
- (v) Under Italian law, a company can be prosecuted in a criminal proceeding if one or more of its top managers or those directly reporting to them committed a crime in the interests of the company and if the company's compliance programs are unsuitable to prevent the specific crime²⁷. It is mandatory for a prosecutor to prosecute upon the reporting of a crime which of itself may paradoxically, act as a deterrent to voluntary disclosure of crimes due to the mandatory criminal prosecutions. A company may enter into a plea bargain (referred to as a *patteggiamento*) which, although it means that profits must be disgorged, can result, if applicable, in substantially reduced fines and duration of any disqualifying sanctions. While a *patteggiamento* neither affirms liability nor is an acceptance of guilt, it can operate as equivalent to a conviction (for example, for the purposes of applying the double jeopardy or *ne bis in idem* principle) in other proceedings.
- (w) On 3 March 2016, the Italian Minister of Justice and the Minister for Economics and Finance announced a Study Commission to report on regulatory changes and prevention policies covering serious crimes. The Committee understands that the issues of "self-reporting" and the non-conviction punishment options open for companies will be explored.

²⁶The 2013 US prosecution of Total S.A. resulted in fines of US\$398.2 million of criminal and civil fines, penalties and disgorgement of profit. In addition, Total's Chairman and Chief Executive Officer, and two additional individuals were referred to the French criminal courts for alleged violations of French law, including France's foreign bribery law.

²⁷Law d.lgs.vo n. 231/01.

- (x) Under the laws of the Republic of Serbia, there is the possibility of agreement between a legal entity and a criminal prosecutor but that must satisfy certain conditions in the Serbian Criminal Code. The basic principle in Serbian criminal law is that the criminal law of the Republic of Serbia shall apply to anyone committing a criminal offence on or in its territory²⁸. Corruption is not defined in the Criminal Code of Serbia. However, other Serbian criminal regulations/laws, such as the *Law on Organization and Jurisdiction of Government Authorities in Suppression of Organized Crime, Corruption and Other Severe Criminal Offences*, and the *Criminal Procedure Code* explicitly list criminal offenses that are considered criminal offenses of corruption, which entail certain, mainly procedural consequences. These criminal offences, pursuant to the provisions of these laws, include: (i) abuse of power; (ii) influence peddling; (iii) receiving of bribery; (iv) offering a bribe; (v) malfeasance of the responsible person and (vi) abuse in relation to public procurement.
- (y) Some of the above mentioned criminal offences explicitly prescribe responsibility of foreign officials for committing of certain criminal offence (influence peddling and receiving of bribery). The Serbian criminal offence of offering a bribe prescribes responsibility of the person who offers a bribe to a foreign official. Foreign citizens can also be perpetrators of the criminal offences of corruption other than those mentioned in this paragraph. The maximum penalty for corruption offences is between 3 and 15 years imprisonment for individuals. If a criminal penalty exceeds 5 years imprisonment, prosecution is mandatory. If the penalty is less than 5 years imprisonment, the prosecutor has an option to defer prosecution subject to an agreement between an offender (a company or an individual). Any agreement is supervised and must be approved by the court. Usually, where the sentence is less than 5 years imprisonment, the court will accept an agreement where:
- a defendant has consciously and voluntarily pleaded guilty to the crimes the subject of an indictment;
 - the defendant is aware of the consequences of the agreement (waived right to trial and limited appeal rights);
 - there is no evidence inconsistent with the guilty plea; and
 - the agreed punishment is in accordance with the law.
- (z) In Romania, there is a similar concept of a DPA (since 2014) where there are two procedures where a suspect may admit guilt and secure a settlement of a prosecution.
- (i) The “admission of guilt” agreement operates in a manner similar to a DPA.
- (A) The Romanian Criminal Procedure Code entered into force in 2014 provides for the possibility of an admission of guilt agreement consisting, in brief, in a settlement between the suspect and the prosecutor (containing the type of criminal offence perpetrated and the sanctions agreed between the prosecutor and the suspect). Such an agreement must be confirmed by the criminal court.
- (B) The admission of guilt agreement may be concluded only (i) with regard to the criminal offences for which the law provides a punishment by a fine or by imprisonment up to a maximum of 7 years (this includes certain corruption related offences – e.g. giving bribe, buying influence) and (ii) only if the evidence produced reveals sufficient material concerning the existence of the offence for which criminal proceedings were initiated and concerning the guilt of the suspect.

²⁸The Serbian criminal law will also apply to foreign entities outside Serbia if the conduct is to the detriment of Serbia or its citizens.

- (C) In practice, until now, DPAs have been mainly used with respect to individuals. However, the Committee expects DPAs to start being increasingly used for legal entities in Romania. At the same time, the head of the Romanian Anti-Corruption Prosecution Unit has publicly stated that if the 7-year imprisonment threshold was to be increased, an increased number of cases (where the related sanction would currently exceed the 7-year limit) would be handled through DPAs rather than through the extensive and longer court proceedings.
- (ii) The simplified admission of guilt procedure is as follows.
 - (A) The simplified admission of guilt procedure is applicable for all criminal offences that are not punished by life imprisonment. It benefits the suspect, who will receive a lighter sentence calculated as per the relevant legal provisions.
 - (B) Under the simplified admission of guilt procedure, the suspect may request for the judgement to take place only based on the evidence gathered during the criminal prosecutorial investigation phase and documents submitted by the parties, provided that the suspect fully admits the wrongdoings with which he/she/it is being charged with by the prosecutor.
- (aa) On 10 March 2016, four leading NGOs wrote to the OECD expressing their concerns at the prevalence of corporate settlement in criminal cases generally and to call for a global standard for corporate settlements²⁹. While the Committee believes that an aspirational goal of best practice standards is desirable and one that the OECD might be best placed to pursue, there are a number of features of a “global standard” that might cause give rise to more difficulties than otherwise intended, such as:
 - (i) any standard needs to fit into a country’s constitutional and institutional environment, enforcement capabilities and legal traditions;
 - (ii) not all countries recognise corporate criminal liability;
 - (iii) a “global standard” may limit diversity and experimentation as to the “better” process (witness the current differences in the DPA models used in the United States and the United Kingdom); and
 - (iv) ultimately, perhaps the focus should be less on a global standard and more on individual countries (including Australia³⁰) undertaking more serious enforcement.

3.3 International Trends

- (a) The trend of pursuing companies for serious financial crime offences is increasing across the world. Prosecutors want changes to the criminal law that makes their work easier. Ideally, the power of the State through the sanction of the criminal law should not be made easier for prosecutors to wield, thereby threatening the common law heritage that a person is innocent until proved guilty beyond reasonable doubt and it is for the prosecutor to prove the alleged case. While this is so, it is increasingly incumbent upon companies to ensure they have up to date, robust and effective compliance programs and systems. While the United States *FCPA Resources Guide* and the United Kingdom Ministry of Justice *Bribery Act Guidance* provide useful guides to the attitudes and opinions of key prosecution authorities, the well-respected Geneva-based International Standards Organisation is now seeking to finalise its new ISO 37001 Anti-Bribery Management Systems which adds a more formal structure for

²⁹ Letter dated 10 March 2016 from Corruption Watch, Transparency International, UNCAC Coalition and Global Witness.

³⁰ “We are becoming ‘dumping ground’ for dirty money”, Nick McKenzie, Sydney Morning Herald 1 April 2016 noting the urges of United States and European anti-corruption experts for Australia to properly resource and empower its anti-bribery regime.

recommended corporate policies. There is no shortage of international guidance on how companies can address anti-bribery and anti-corruption risks.

- (b) However, foreign bribery cases present investigative and prosecution agencies with unique challenges, not least of which is that most if not all foreign bribery and corruption occurs through a web of companies or other corporate structures, in different jurisdictions applying different legal concepts. In this area in particular, the Committee recommends a much more consistent approach across jurisdictions to ensure bribery and corruption can be properly targeted. This can be greatly aided by a DPA scheme where the courts play a significant oversight role and the culpable individuals are still held accountable for their conduct.

4 Would a DPA scheme be a useful tool for Commonwealth Agencies?

4.1 The utility of an Australian DPA Scheme

- (a) The Consultation Paper makes it clear, in the Committee's opinion, that there is a significant fraud and corruption issue in Australia. There is a significant amount of fraud and corruption both as it affects the Commonwealth and its agencies, and potentially although less easy to quantify, the Australian business community. The Commonwealth now recognises that risks arise in connection with the provision of new Commonwealth benefits, new taxes, procurement practices, government-funded programs and the use of consultants. Corruption and collusion are identified as emerging risks³¹.
- (b) Australia's foreign bribery and anti-corruption laws have been in place since 1999 when they became part of the Criminal Code. Since that time, there have been only two criminal prosecutions for foreign bribery. The prosecutions to date have involved both companies and individuals³².

4.2 Separation of powers and the role and functions of courts

- (a) As outlined above, any DPA scheme in Australia must take into account the constitutional framework and the doctrine of the separation of powers and the role of courts (as outlined in paragraph 3.1 above). However, that is not to say that a properly structured DPA system which, similar to the United Kingdom, ensures that while there is a proper statutory basis for a prosecutor and a defendant to propose a preliminary form of agreement, it is subject to the discretion of the court (the sentencing judge). In the United Kingdom for example, a two stage test of whether or not a DPA is in the public interest and then whether or not its terms are reasonable and proportionate to the circumstances of the case are supported by the Committee and should be reflected in any Australian scheme.

4.3 Relevant prosecuting agency

- (a) The AFP is currently the lead agency in relation to the investigation of foreign bribery and corruption matters. Prosecutions are undertaken by the CDPP. It is the Committee's opinion that if (and when) a Commonwealth DPA scheme is introduced, it should be the CDPP as the Commonwealth prosecutor (working in conjunction with the AFP) that negotiates the terms of a DPA.

4.4 Recommendation

- (a) The Committee is strongly of the opinion that there is considerable utility in the introduction of a Commonwealth DPA scheme.

³¹ *Fraud Against the Commonwealth*, Penny Jorna & Russell G Smith, Australian Institute of Criminology, 2015 at page 52.

³² See footnote 2 above.

5 To which offences should a Commonwealth DPA scheme apply

5.1 Foreign bribery and corruption

- (a) The DPA scheme in the United States broadly covers a range of financial and other serious crime offences. In the United Kingdom, they are more limited (as set out in Schedule 17 to the *Crime and Courts Act 2013* (UK)).
- (b) In the Committee's opinion, any Commonwealth DPA scheme should not be limited to cases of foreign bribery or corruption. It should apply more generally to serious financial crime cases.

5.2 Broader serious financial crime offences

- (a) In the Committee's opinion, the Australian authorities in implementing a Commonwealth DPA scheme should have a broad discretion in terms of the Commonwealth financial crimes to which such a scheme may apply and how and in which circumstances it should be offered.
- (b) The Committee has noted the limited circumstances in which a DPA cannot be used in the United States including matters involving national security, foreign affairs, matters where a public official has violated a public trust and prosecutions against an individual with two or more prior felony convictions. The Committee believes that such limitations are appropriate, but otherwise, a DPA should be available for all serious financial crime offences.

5.3 Other Offences

- (a) There is no reason in principle, if a Commonwealth DPA scheme is properly applied to serious financial crime cases, it cannot otherwise apply to offences under other Commonwealth laws subject to the constitutional limitations of the Commonwealth's legislative power.
- (b) In the Committee's opinion, any Commonwealth DPA scheme, particularly one modelled on the United Kingdom version, is far more likely to result in a more proactive approach by companies and potentially board of directors of companies into voluntarily reporting potential offences, whether indictable or summary, and for those offences to be appropriately dealt with in a way that reflects the seriousness of the offence and a recognition by the company and by the prosecutor that, in particular cases, a resolution is appropriate and does not necessarily constitute buying your way out of the criminal justice system.

5.4 Recommendation

- (a) The Committee is of the opinion that a Commonwealth DPA scheme should apply to all serious financial crime offences and potentially, more broadly to other Commonwealth offences.

6 Should DPAs be available for companies only or for both companies and individuals?

6.1 The traditional enforcement approach

- (a) The traditional approach in the enforcement of serious financial crime is to target the individual perpetrators who engage in the conduct, whether on their own behalf or as officers or employees of a corporate entity.
- (b) In the United States *Yates Memorandum*, the position is set out as follows, which also highlights the conundrum faced by authorities throughout the world:

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons; it deters future illegal activity, it incentivises changes in corporate behaviour, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

- (c) The effect of the *Yates Memorandum* is to reinforce the position in the United States in so far as individuals are concerned. The following principles apply to all prosecutions conducted by the United States authorities:
- (i) to be eligible for any corporation credit, corporations must provide all relevant facts about the individuals involved and corporate misconduct;
 - (ii) those civil and corporate investigations should focus on individuals from the inception of the investigations;
 - (iii) the criminal and civil attorneys handling corporate investigations should be in routine communication with each other;
 - (iv) absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individual;
 - (v) corporate cases should not be resolved without a clear plan to resolve related individual cases before any limitation period expires and any declination in respect of an individual must be set out in writing; and
 - (vi) civil attorneys should consistently focus on individuals as well as the companies in determining whether to bring proceedings against an individual, based on considerations beyond merely an individual's ability to pay any statutory fine.

The *Yates Memorandum* concluded with the observation that only by seeking to hold “*individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimise corporate fraud, and, over the course of time, minimise losses to the public fisc through fraud*”.

- (d) While the terms of the *Yates Memorandum* reflects the historic and current position adopted in the United States and, indeed, in the Committee's experience, in many countries, the question as to whether a DPA should be available only to a company or to both a company and an individual is not a simple question. In this context, it is worth noting the comment of District Judge Emmet J Sullivan in the *Saena Tech Corporation & Intelligent Decisions* judgement, where the court had this to say:

Congress provided the deferred-prosecution tool without limiting its use to individual defendants or to particular crimes. Notwithstanding clear Congressional intent, however, the Court is disappointed that deferred-prosecution agreements or other similar tools are not being used to provide the same opportunity to individual defendants to demonstrate their rehabilitation without triggering the devastating collateral consequences of a criminal conviction.

6.2 The Australian position

- (a) The Australian position is similar to if not identical to the position of the United States. It is the Committee's experience that the focus of investigations in Australia invariably turns towards an examination of the conduct of individuals. Inevitably that must be so

because given the artificiality of the corporate person, it is real persons who control what it does, or does not, do. While the principles of corporate criminal liability were codified by the Criminal Code in 2001³³, there have to date been no published judgments against any company on the basis of the company being criminally liable for a serious financial criminal offence³⁴.

- (b) The Prosecution Policy of the Commonwealth makes little if any distinction between the prosecution of a company or an individual other than to recognise certain matters should properly be put in mitigation upon sentencing when a defendant (a company or individual) has been convicted³⁵.
- (c) There is a substantial difference between criminal proceedings against a company as opposed to an individual. A company is an incorporated entity that only acts through the conduct of a group of individuals. While the corporate criminal liability provisions of the Criminal Code (sections 12.1 to 12.6) recognise that a company can be liable through the conduct, acts or omissions of its Board of Directors or a “high managerial agent”, the penalties that are imposed are monetary fines. A company cannot be imprisoned. The consequences faced by a company facing a potential criminal conviction can be financial and reputational (particularly for potentially innocent third parties such as shareholders, suppliers and customers not involved in any offending conduct) but without the risk of imprisonment. In the Committee’s opinion, any serious steps taken by Australia to target foreign bribery, corruption, indeed all serious financial crime must ultimately focus on the conduct of individuals.

6.3 Recommendation

- (a) While the Committee accepts the views expressed in the *Yates Memorandum*, that the appropriate focus of enforcement authorities should be on individual conduct to help change commercial behaviour, there clearly will be circumstances where, as the US courts have noted, there is a real sense, on behalf of an individual, of remorse and rehabilitation. However, the structured process of a DPA agreement should be limited to incorporated entities (along the lines of the United Kingdom model). Any remorseful individual has his or her options available under the criminal justice system to seek to negotiate a plea deal, even accepted a conviction on lesser charges with the prospect of a mitigated sentence (perhaps even a non-custodial sentence).
- (b) For these reasons, the Committee recommends that a Commonwealth DPA scheme should be available only to companies or other incorporated entities reflecting the United Kingdom model.

7 To what extent should the Court be involved in an Australian DPA scheme?

7.1 The role of the court overseas

- (a) As indicated above, the role of the courts in the United States has been limited, although that limited role has become subject to more focused comment, where there are calls for a more robust judicial oversight of DPAs.
- (b) In the United Kingdom, the *Crime and Courts Act 2013* sets out in clear and unambiguous terms, the independent role of the court in exercising a judicial discretion in terms of the approval process of a DPA under the United Kingdom statutory scheme. While a prosecutor must:

³³Sections 12.1 to 12.6, Criminal Code.

³⁴This does not include tax revenue cases involving fraud against corporate taxpayers.

³⁵The criteria governing the decision to prosecute (sections 2.1 to 2.14 of the Prosecution Policy) are expressed in words that focus almost entirely on the prosecution of an individual without any recognition of the role and position of a company.

- (i) have the relevant suspicion that the company has committed an offence;
- (ii) determine that there are reasonable grounds to believe that an investigation would establish realistic prospect of conviction; and
- (iii) be satisfied that it is in the public interest for the DPA to be accepted,

the court must nevertheless exercise its own independent judgment on these factors at both the preliminary and final approval hearings.

7.2 *The role of the court in Australia*

- (a) As outlined above (section 3.1), the role of the court in a criminal prosecution is to conduct the trial, for the jury (if the trial is by judge and jury) to determine guilt and upon conviction, for the judge to pass sentence. The prosecutor must prove the case beyond reasonable doubt. A defendant need give no evidence and can quite properly put the prosecutor to proof. If a jury (or judge sitting alone) convicts an offender, the sentencing approach is governed by traditional sentencing principles and the role of the prosecutor is, as noted above, very limited.

7.3 *Recommendation*

- (a) While the Committee respects the traditional criminal law approach of a prosecutor representing the Crown deferring any sentencing issues to the sentencing judge, the Committee is strongly of the opinion that the Australian criminal law, particularly for Commonwealth serious financial crime offences, should be statutorily modified or amended in order to permit proper submissions and agreed statements of not only facts but of penalties to be made by a prosecutor and an offender in order to resolve serious financial crime offences under the framework of a statutory DPA scheme.
- (b) The value to the community in negotiated settlements in regulatory cases (where a prosecuting agency seeks the imposition of a pecuniary penalty in adversarial litigation with a defendant) is well recognised. Indeed, the High Court has expressly noted the value of such settlements while nevertheless maintaining a clear distinction with the criminal law which by its very nature is different because the prosecution seeks a criminal conviction³⁶.
- (c) In the Committee's opinion, a Commonwealth DPA scheme should reflect, on this point, the United Kingdom model and statutorily accord to the court a central role in independently supervising, deciding upon (with proper submissions from a prosecutor and an offender) and determining the sentence. While the devil can be in the detail, perhaps what is required is a procedure whereby the court under a Commonwealth DPA scheme "*determines*" the sentence rather than "*approves*" the proposed sentence, thereby making clear the substantive judicial function performed by the court. Any Commonwealth DPA scheme must address the fundamental character of what the court is required to do and whether its acts are of a judicial function and not of an administrative or executive function (such as the determination to charge or an agreement as to a potential penalty). Careful consideration must be given to the role of the court to ensure that its functions under any Commonwealth DPA scheme are not incompatible with Chapter III of The Constitution³⁷.

³⁶ *Commonwealth of Australia & Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] HCA 46 at [46] per French CJ, Kiefel, Bell, Nettle and Gordon JJ

³⁷ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51; at [13] and [14] per Brennan CJ; at [14] per Gaudron J; at [12] to [16] per McHugh J.

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

8.1 Consultation Paper

- (a) The Committee has noted the suggestion in the Consultation Paper for clear and early guidance, preferably from a statutory officer (the CDPP) on the suitability of whether or not a DPA should be entered into and whether the CDPP will invite a potential defendant to enter into a DPA.
- (b) The Committee prefers the United Kingdom model which articulates the factors that should be taken into account (see section 7.1(b) above) rather than the more open-ended discretion applied in the United States. In addition, the Committee has noted the six factors set out in the Consultation Paper that should form part of the early indication from the prosecutor (the CDPP) as to whether or not the potential offender will be offered a DPA.

8.2 Recommendation

- (a) The Committee recommends that clear guidance and criteria be set out in any Commonwealth DPA scheme which articulates the criteria by which the prosecutor will invite an offender to negotiate a DPA. If necessary, this can be supplemented by a Guidance issued by the CDPP or amendments made to the existing Prosecution Policy. The Committee's preference is for a Commonwealth DPA scheme to follow the United Kingdom model in this respect.

9 Should a DPA be made public and, if so, are there any circumstances where a DPA should not be published or the publication postponed or limited?

9.1 The position overseas

- (a) In the United States, there is no obligation on the prosecuting authorities (particularly the DOJ) to publish DPAs. Having said that, most DPAs are in practice publically available on the DOJ's website, and, indeed the SEC likewise publishes its DPAs on the SEC's website.
- (b) In the United Kingdom, it is a statutory requirement of the DPA scheme that the court must publish a DPA once it is approved although there are limits as to publication where publication may prejudice the administration of justice in any ongoing legal proceedings.

9.2 The position in Australia

- (a) A potential offender and the prosecutor should be able to negotiate a DPA on strictly confidential basis. Once a DPA is concluded and a sentence ultimately imposed by a court, the full terms of a DPA should be published. It is not in the public interest for the terms of any DPA to be suppressed or otherwise not published, unless publication impacts upon ongoing legal proceedings.
- (b) Transparency is at the heart of targeting bribery and corruption and while negotiations leading up to a DPA, including any preliminary hearing, should properly be treated as confidential, once they are finally determined and a sentence imposed by a court, the judgment and the terms of a DPA, subject to the above, should be published.

9.3 Recommendations

- (a) It is the Committee's recommendation that, subject to a confidential process for negotiating a DPA and to limited non-publication in order not to prejudice the administration of justice or ongoing legal proceedings, the terms of all DPAs should be published.

10 The conduct of negotiations

10.1 *The structure of negotiations*

- (a) Under the United States and United Kingdom DPA schemes, there is a discretion vested in the prosecutor whether or not to invite an offender (in those jurisdictions, a company) to negotiate a DPA.
- (b) In the United Kingdom, the statutory DPA scheme requires the prosecutor to be satisfied of certain threshold requirements (see section 7.1 above). In the United States, there is a more general discretion whether, and if so, the extent to which the US authorities will initiate a DPA negotiation.
- (c) In the Committee's opinion, in order for clarity and transparency, there should be a clear set of threshold requirements that should exist which would entitle an offender to seek to negotiate a DPA. These factors can be as applied under the United Kingdom scheme (see section 7.1 above) and if they are different, they should be clearly articulated in the legislation creating the scheme and, if necessary, supplemented by guidelines issued by the prosecutor (the CDPP).

10.2 *Factors to be considered in agreeing to a proposed settlement*

- (a) While there should exist certain threshold requirements in order to trigger the commencement of negotiations for a DPA, the Committee believes that, while factors could be enumerated which either support or do not support an agreement for a proposed settlement, those factors should not be exclusive. Every particular case should turn on its own circumstances and any enumerated factors should not be exclusive but rather a broad description of the type of factors that will be taken into account by the prosecutor. These factors could include:
 - (i) when the offender became aware of the offending conduct;
 - (ii) how quickly the offender reported the conduct to the authorities;
 - (iii) the extent of cooperation provided by the offender and, where relevant, any and all employees, agents or subcontractors of the offender;
 - (iv) the level of documentation provided to the investigating authorities; and
 - (v) an assessment of the significant savings incurred by the prosecutor as a result of the disclosure of the conduct and the request to negotiate a DPA.
- (b) In the Committee's opinion, a set of guidelines should be published by the prosecutor (the CDPP) setting out in clear terms how the prosecutor will conduct negotiations, the factors to be taken into account, and assuming the prosecutor is satisfied of the threshold requirements, the fact that negotiations for a DPA can, in the ordinary course, take place. The Committee is concerned that if the prosecutor has an open-ended discretion whether to offer to negotiate a DPA without there being some certainty that negotiations can be opened, that will operate as a significant disincentive for companies and their senior executives and directors to voluntarily disclose potentially illegal conduct.

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

- (a) In the United States and the United Kingdom DPA schemes, information and documents disclosed during DPA negotiations may be used in further criminal and/or civil proceedings against an offender, whether or not a DPA is negotiated.
- (b) The Committee sees the following options open to the Commonwealth for a Commonwealth DPA scheme.

- (i) *Option One* – while negotiations are confidential for a DPA, all information and documents supplied by a potential offender can be used by a prosecutor against the offender or any other person in any subsequent criminal and/or civil proceedings irrespective of whether a DPA is concluded.
 - (ii) *Option Two* - while negotiations are confidential for a DPA, all information and documents supplied by a potential offender can only be used by a prosecutor against the offender (but not directly against any other person in any subsequent criminal and/or civil proceedings where a DPA is concluded and then subsequently breached by the offender.
 - (iii) *Option Three* - while negotiations are confidential for a DPA, all information and documents supplied by a potential offender can be used by a prosecutor against the offender (but not any other person) in any subsequent criminal and/or civil proceedings irrespective of whether a DPA is concluded.
 - (iv) *Option Four* - while negotiations are confidential for a DPA, all information and documents supplied by a potential offender cannot be used (directly, indirectly or by any derivative means) by a prosecutor against the offender or any other person in any subsequent criminal and/or civil proceedings irrespective of whether a DPA is concluded.
- (c) The Commonwealth DPA scheme is likely to cover, in the Committee's opinion, serious financial crime offences; that is, suspected breaches of the criminal law. While companies do not have rights against self-incrimination, they nevertheless will be subjected to criminal sanctions (including a potential criminal conviction) and are entitled to exercise the same rights as an individual in not being required to prove or disprove any part of an alleged offence and for the prosecutor to prove the case alleged beyond reasonable doubt. A DPA scheme is a mechanism to encourage responsible companies to voluntarily disclose conduct and where appropriate, enter into a DPA. By doing so, the company should not be exposed to the risk that everything it volunteers to a prosecutor can then be used against it if the prosecutor decides, over objections from a company, to terminate DPA negotiations and prosecute. This raises significant risks that information and documents in the possession of the AFP and/or the CDPP will be sought by, for example, class action litigants and others in bringing civil claims against a company or give rise to issues or liabilities³⁸ in other jurisdictions. Public interest immunity grounds to oppose disclosure³⁸ may or may not exist and only add to the complexity and factors bearing upon whether a company should voluntarily disclose information and documents. This factor needs to be assessed as a likely deterrent to companies deciding to volunteer information and documents if they are likely to be accessed by third parties.
- (d) At the most basic level, the Committee is concerned whether there is presently sufficient trust (or indeed understanding) between the business community and investigative agencies like the AFP and the CDPP as prosecutor. This question of trust is one, for example, that Committee members have seen develop over several years between the business community and the ACCC and that as a matter of policy, the ACCC will seek to protect the information it holds from disclosure to third parties on the grounds that if such material became accessible, it would inhibit the success of the ACCC's immunity and leniency program which, like a DPA, encourages companies to voluntarily disclose potentially anti-competitive and illegal conduct³⁹. In

³⁸The difficulty with applying public interest immunity is that while it is a substantive principle that can be raised by any party or the Court, in reality, the prosecutor is unlikely to care about disclosure so long as any disclosure will not jeopardise a potential or existing criminal prosecution; see *Sankey v Whitlam* [1978] HCA 43, applied in *ASIC v P Dawson Nominees Pty Ltd* [2008] FCAFC 123 at [22] and in *Spencer v Commonwealth of Australia* [2012] FCAFC 169 at [27] to [40]. It is reasonably clear that police investigations and the safety of persons involved with them are topics capable of attracting the immunity; see eg *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667; *R v H* [2004] UKHL 3; [2004] 2 AC 134; *Western Australia v Christie* [2005] WASC 214; (2005) 30 WAR 514 at 522-3 and *NSW Commissioner of Police v Nationwide News Pty Ltd* [2007] NSWCA 366 at [35] per Mason P.

³⁹In *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* [2011] FCA 938 at [180] to [224] the Court reviewed the principles of public interest immunity, holding that the identity of an informant should be disclosed.

addition, it is the experience of Committee members that if negotiations between an immunity or leniency applicant and an anti-competition agency ceased, that agency would be obliged to return (or destroy) material given to it by that applicant during those negotiations. It would then be for the agency to use whatever statutory powers it had to lawfully seek whatever information is wanted in order to investigate and prosecute an offender.

- (e) In the Committee's opinion, the following positions should apply to any Commonwealth DPA scheme:
- (i) all negotiations between a company and the prosecutor relating to a DPA should be and remain confidential, not to be disclosed to any third party;
 - (ii) if a DPA is concluded, material and information held by the prosecutor may be used by the prosecutor against the company (and any other person only on a derivative basis and not as constituting any admission by that other person) in any subsequent criminal or civil proceeding, subject to a breach or termination of the DPA (other than by compliance with its terms and its expiry);
 - (iii) if a DPA is not concluded and negotiations for a DPA cease (for whatever reason), material and information held by the prosecutor may not be used by the prosecutor against the company (or any other person) and all material provided on a voluntary basis must be either destroyed or returned to the company;
 - (iv) all material and information held by the prosecutor supplied to it on a voluntary basis or otherwise by the company for the purposes of negotiating a DPA should not be accessible from regulatory agencies or the CDPP by class action litigants or others bringing civil proceedings against the company (or any other person); and
 - (v) these conditions and the permitted use of any information or documents provided by a potential offender seeking to negotiate a DPA should be clearly set out in the supporting legislation to ensure enforceable rights for the return of such material exist.
- (f) This however, does not avoid the fact that once the prosecutor knows of the existence of the information and/or documents, he will direct the AFP to obtain such evidence as it can by search warrant or other compulsive examination powers. This is simply a fact of life that a company must accept.

11 What facts and terms should DPAs contain?

11.1 The overseas experience

- (a) In the United States, there is broad flexibility as to how an offending company and the investigative and prosecuting authorities (the US DOJ or the US SEC) agree upon a resolution. Terms that are traditionally included in most DPAs are for:
- (i) a statement of facts;
 - (ii) an indictment to which the defendant admits liability for identified offences;
 - (iii) an obligation to cooperate with current or future investigations;
 - (iv) consequences for the defendant if it engages in certain future misconduct or otherwise breaches the terms of the DPA;
 - (v) an acknowledgement of liability;
 - (vi) sanctions which can include:

- (A) payment of financial penalties;
 - (B) payment of costs of the investigating agencies and prosecutors;
 - (C) disgorgement of profit or the proceeds of crime; and
 - (D) compensation to victims;
- (vii) implementation or improving a robust pro-active corporate compliance program;
 - (viii) the appointment of an independent monitor to supervise the implementation of the DPA; and
 - (ix) an end term, often for three years for the term of a DPA.
- (b) In the United Kingdom, section 5 of Schedule 17 to the *Court & Crime Act 2013* (UK) sets out the contents of a DPA. There are two things that must be included in a DPA, being:
 - (i) a statement of facts relating to the offence, including any admissions; and
 - (ii) an expiry date.

Other than those two matters, it is a matter of negotiation as to the other requirements or terms of a DPA and section 5 identifies some of the features noted above (in clause 11.1(a) above).

11.2 *The Consultation Paper*

- (a) The Consultation Paper sets out a variety of matters that a DPA may include. The consultation paper notes that victim restitution is a key feature of the United States and United Kingdom schemes.
- (b) Indeed, as the recent case of *Serious Fraud Office v Standard Bank Plc* in the United Kingdom has made clear, payments can and should properly be made as restitution to the victim country as part of concluding any negotiated settlement of a bribery and corruption claim⁴⁰.

11.3 *Terms for an Australian Commonwealth DPA scheme*

- (a) In light of the practices in the United States and the statutory scheme in the United Kingdom, the Committee believes that a Commonwealth DPA scheme should include certain mandatory terms and then other terms that can be applied to particular circumstances.
- (b) Mandatory terms in a Commonwealth DPA should include the following:
 - (i) agreed statement of facts, including any admissions (as to which, see below, section 11.4));
 - (ii) the consequences of any breach or termination of the DPA (save by effluxion of time);
 - (iii) an expiry date, being a date no later than three (3) years from the date of a formal court determination of sentence;
 - (iv) financial penalties; and

⁴⁰ In the *Standard Bank* case, the agreed compensation amount was US\$6 million plus interest of US\$1,153,125 representing the additional fee paid by the bank through its subsidiary to an intermediary entity controlled by Tanzanian officials in order for the bank to be awarded the sovereign note placement mandate.

- (v) the legal and enforcement costs of the prosecutor and investigating agency (the AFP).
- (c) Other terms that may be included in a Commonwealth DPA may include the following:
- (i) warranties that the information provided during any DPA negotiations is true and correct and not false or misleading in any material manner;
 - (ii) an obligation to cooperate in any ongoing or future investigation (in Australia or overseas) into the subject matter of the offending conduct;
 - (iii) payment of compensation to any identified victim or group of victims;
 - (iv) implementation of a compliance program;
 - (v) prohibitions on the company and prosecutor making public statements contrary to any agreed facts;
 - (vi) appointment of an independent experienced monitor⁴¹, with duties to the Court to report or seek directions.
- (d) By reason of the provisions of the *Judiciary Act 1903* (Cth), the admissibility of an admission or confession under Commonwealth criminal law may be subject to the provisions of Uniform Evidence Acts, the common law principles or the provisions of the Queensland *Evidence Act*⁴². In the Federal Court and the States and Territory⁴³ that have passed Uniform Evidence Acts, the admissibility of a confession or admission will be primarily subject to the provisions of sections 84, 85 and 138 of the Uniform Acts. Under the Uniform Evidence Acts, the admissibility of an admission or confession is similar to, but not identical to, the common law position because the latter sets as its starting point proof that the admission was voluntary. The CDDP would be seen as a person who answers the description set out in sub-section 85(1)(a) of the Uniform Evidence Acts. Given the nature of DPA discussions, sub-section 85(2) of the Uniform Evidence Acts would not result in any admission being inadmissible.
- (e) At common law, the starting point for a confession to be admissible is that it must have been made voluntarily⁴⁴. At common law, there are four established grounds where a court may exclude evidence in its discretion under the fairness discretion and as a matter of public policy, best described in the following terms by the High Court of Australia⁴⁵:

Four bases for the rejection of a statement by an accused person are to be discerned in decisions of this Court. The first lies in the fundamental requirement of the common law that a confessional statement must be voluntary, that is, 'made in the exercise of a free choice to speak or be silent'...The will of the statement-maker must not have been overborne.

⁴¹ The role of a monitor is often used in United States DPAs. Their role can be contentious if the conduct of a monitor is not subject to proper supervision. The monitor should be an experienced lawyer familiar with financial crime, international business and fraud and corruption. The monitor should be required to publish periodic reports to the court (which may or may not be published). The costs incurred by a monitor should be paid by the company and some independent process put in place to ensure the monitor's conduct and level of fees can be independently assessed (perhaps under the court's broad discretion to appoint an assessor should that be necessary).

⁴² Section 10 of the *Criminal Law Amendment Act 1894* (Qld) amends the common law to make a confession induced by threat or promise by some person in authority deemed to be induced unless the contrary is shown.

⁴³ New South Wales, Victoria, Tasmania and the Australian Capital Territory.

⁴⁴ *McDermott v R* (1948) 76 CLR 501, 511-512 per Dixon J; see also sections 84 and 85, *Evidence Act 1995* (Cth), reflected in State evidence legislation.

⁴⁵ *R v Swaffield* (1998) 192 CLR 159 at 189.

The second, third and fourth bases for rejection of a statement made by an accused person proceed on the footing that the statement was made voluntarily. Each involves the exercise of a judicial discretion.

The second basis is that it would be unfair to the accused to admit the statement. The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of the accused person. The third basis focuses, not on unfairness to the accused, but on considerations of public policy which make it unacceptable to admit the statement into evidence, notwithstanding that the statement was made voluntarily and that its admission would work no particular unfairness to the accused. The purpose of the discretion which is brought to bear with that emphasis is the protection of the public interest. The fourth basis focuses on the probative value of the statement, there being a power, usually referred to as a discretion to reject evidence the prejudicial impact of which is greater than its probative value. The purpose of that power or discretion is to guard against a miscarriage of justice.

- (f) Turning to a DPA, it is premised on the voluntary disclosure of illegal conduct and would almost certainly be admissible either under the Uniform Evidence Acts or at common law, even if the company did not retain lawyers to act on its behalf. In most cases, it is likely that the company would retain lawyers to act on its behalf. The company and the prosecutor would reach agreement on the underlying facts. Is an admission necessary at this stage, bearing in mind the threshold tests required of a prosecutor (under the United Kingdom model, see section 7.1 above)? In the Committee's opinion, the answer in light of the fact that the company faces a criminal prosecution is that the company must accept that its conduct breaches the law. It is highly unlikely that a court can impose a criminal sentence on an offender without being satisfied that the facts supporting the offence are conceded⁴⁶ by the offender, voluntarily so without reason to reject the admission upon which the sentence is based. We think it is beside the point that any prosecution under a Commonwealth DPA scheme would then be deferred, to be either discontinued and an indictment withdrawn or enforced subject to the terms of the DPA.
- (g) The question that flows from this is what use might be made of any acceptance by the company of a breach of the law, published as part of the DPA process, by a third party to the company's detriment. The Committee believes that there are sound public policy grounds to encourage companies to voluntarily report serious financial criminal offences and to be required, in a negotiated DPA, to accept that the relevant conduct breached the law.

11.4 *Recommendation*

- (a) The Committee recommends that the terms outlined above as mandatory and recommended are included in any Commonwealth DPA scheme.
- (b) The Committee also recommends that in any Commonwealth DPA scheme, the company should be required to admit to the conduct constituting the relevant offence(s).

12 **How should funds raised through DPAs be used?**

12.1 *The Overseas Experience*

- (a) There are numerous examples where victim restitution is a key part of the DPA schemes in the United States and the United Kingdom.
- (b) While the United Kingdom scheme allows for a payment to a charity or third party, in the United States they are not favoured as they are perceived to create actual or potential conflicts of interest (between a victim government or agency seeking restitution and that same government or agency whose officials participated or facilitated in or who benefited from the corrupt conduct).

⁴⁶An offender may not agree that the conduct constituting the offence was perpetrated by him (or it) but may still concede that to a court.

- (c) In the Committee's experience, it is critical that the victims are granted standing to be heard in any DPA negotiation process and that the rights of the real victims are properly protected with mechanisms to enforce payment should a company breach a DPA.

12.2 *Recommendation*

12.3 The Committee recommends that any Commonwealth DPA scheme include the following features:

- (a) funds raised by way of fines, penalties and/or the disgorgement of profit should be allocated not simply to general Commonwealth revenue but to specific uses to promote the ongoing funding of serious financial crime cases (including substantial funding for the AFP, the CDPP and any other relevant agency);
- (b) restitution orders in favour of the victim (subject to a victim properly declaring its losses to the satisfaction of the prosecutor and the court);
- (c) standing for a victim to make submissions to the prosecutor and to the court in relation to any proposed DPA (in terms of restitution orders);
- (d) flexibility for the court to make restitution orders in its discretion including any orders in favour of a third party;
- (e) orders requiring the full (indemnity) costs of the investigators and prosecutors to be paid by the company;
- (f) a discretion permitting the court to make orders directing that any restitution amount (or any part of it) be used in any way manner directed by the court (for example, funding public whistleblower services or whistleblower advocates or use of funds to resource ongoing serious financial crime investigation and prosecutions).

13 **What should the consequences be of a breach of the DPA?**

13.1 *The Overseas Experience*

- (a) A breach of a DPA in the United Kingdom and the United States may result in
 - (i) additional financial penalties;
 - (ii) resumption of a criminal prosecution;
 - (iii) use of evidence obtained during DPA negotiations against the company.
- (b) The topic raises the role of an independent monitor who is usually appointed to test and ensure a DPA is not breached. If a company fails to comply with a monitor's suggestions or recommendations and the monitor forms an adverse view about the company's compliance with a DPA, the monitor may report those concerns to the court.

13.2 *Recommendation*

- (a) The Committee recommends that where a company breaches a DPA, the following should apply:
 - (i) the company receive one formal notice that unless the breach, if capable of remedy, is remedied within a nominated period of time;
 - (ii) if the breach is remedied, then the terms of the DPA continue;
 - (iii) if the breach remains un-remedied, the criminal prosecution should be re-listed for directions before the court (query whether before the DPA judge or

an independent judge) to progress the criminal prosecution in the normal manner (subject to all necessary or applicable criminal procedure rules applying in the court);

- (iv) subject to what the Committee recommends as to the use of information and documents exchanged during the DPA negotiation process, that material may be used against the company in the subsequent prosecution.

14 Should an Australian DPA Scheme make use of independent monitors or other non-judicial supervisory mechanisms?

14.1 The Overseas Experience

- (a) For a period of time the United States DPA regime was replete with the use of monitors⁴⁷. They were appointed by the court as part of a settlement. They were professionals experienced in foreign bribery and/or compliance and often operated under a 1 to 3 year mandate, with reports to the court. The monitor (and his staff) is paid for by the company and over time, over-zealous monitors began to generate massive amounts of work and disputes within companies and between the company and the US authorities.
- (b) It seems that there is no single factor that determines whether the DOJ or the SEC will seek to require a company to retain a monitor. However, the following broad themes emerge from a review of the US authorities⁴⁸:
 - (i) the degree of ingrained corruption where a company's culture promotes, tolerate or condones widespread corruption so that a more wide-spread review of the company's operations is warranted⁴⁹;
 - (ii) the existence of effective compliance programs and in particular, whether such programs are effective; while
 - (iii) whether there is a voluntary disclosure, the amount of the bribes and the amount of business secured by the bribes do not seem to have much predictable effect on the decision whether to seek the appointment of a monitor.
- (c) More recently, the United States has moved towards adopting self-reporting requirements, instead of corporate monitors, which require the company to conduct regularly scheduled internal reviews of its compliance program and to report its findings to the government⁵⁰.
- (d) In the United Kingdom, there is no express provision allowing for the appointment of a monitor under the statutory DPA scheme (although it may fall within the terms of what a DPA can include⁵¹).

14.2 Recommendation

⁴⁷ From 2004 to 2010, more than 40 percent of all companies that resolved an FCPA investigation with the US DOJ or SEC through a settlement or plea agreement retained an independent compliance monitor as a condition of that agreement. While the trend line is somewhat unclear, this practice seems unlikely to abate. In 2007, almost 38% of corporate FCPA settlements entailed monitors; 60% in 2008; 18% in 2009 and 32% in 2010, see *FCPA Monitorships and How They Can Work Better*, F Joseph Warin, Michael S Diamant & Veronica S Root, University of Pennsylvania Journal of Business Law Vol 13.2, page 322.

⁴⁸ *FCPA Monitorships and How They Can Work Better*, F Joseph Warin, Michael S Diamant & Veronica S Root, University of Pennsylvania Journal of Business Law Vol 13.2, pages 337 to 345.

⁴⁹ For example, the Siemens case involved up to 4,283 payments, with a value of approximately US\$1.4 billion paid to bribe officials around the world to win business and despite Siemens great efforts at remediation, they had a monitor appointed.

⁵⁰ Shearman & Stirling *FCPA Digest* January 2015 page 5.

⁵¹ See section 5(3) of Schedule 17, *Crime and Courts Act 2013* (UK).

- (a) The Committee recommends that as part of any Commonwealth DPA scheme, the court has the power to appoint and supervise an independent monitor. The Committee supports the following sentiments⁵²:

Ultimately, irrespective of how companies view FCPA monitorships, they are, by all indications, here to stay. It therefore behoves corporations facing an FCPA enforcement action, the FCPA enforcers at the SEC and DOJ, and monitors themselves to understand the recent history of FCPA monitorships and consider how they can work better. As the US government's FCPA enforcement efforts become more robust, all potential stakeholders need to weigh carefully when the imposition of a monitor will lead to a better corporate citizen and when it is more likely to be a redundant, punitive measure. In situations that may call for an independent compliance monitor, all participants should seek to maximise the value of the monitorship and minimise inefficiency. In the final analysis, this will help reduce the frequency of future FCPA violations and lead to a more effective enforcement regime.

- (b) It is a matter for the prosecutor and the company to draft the DPA so that it carefully sets out the role and reporting obligations of a monitor. Ideally, budgets and a scope of work should be identified between the parties and potential monitors (with foreign bribery and anti-corruption experience).
- (c) A monitor's fees, while payable by the company, should be subject to the overall approval or review by the court.

15 Other comments for a potential Commonwealth DPA Scheme

15.1 Concluding Comments

- (a) The Australian criminal justice system, while old and inherited from past centuries, has to adapt to the modern world, to modern means of finance and modern means of crime and corruption. Financial crimes affect all of society – there is no debate about the pernicious effect corruption has, generally on the poorer, less fortunate members of society.
- (b) Bribery and corruption flourishes because of individual greed and the desire of company and their employees to get the job done to secure that commercial advantage without reference to what is just, sustainable or in the longer term interests of the company. Short term commercial pressures fuel the willingness of otherwise law abiding employees to cut corners, take risks and get the deal done.
- (c) While there are legitimate criticisms directed towards DPAs, and the means companies have to potentially buy their way out of the criminal justice system, the invariable cost of a DPA is far from that in reality. Invariably, serious financial corporate crime is disguised, well-hidden, undertaken through opaque structures known only to a very few and deliberately concealed. In order to encourage ethical companies to value and live by their codes of conduct that promote zero tolerance to crime, mechanisms need to be established to allow companies to report suspected offences and then to be subjected to clear, transparent processes to determine whether a DPA (so avoiding a formal criminal sanction) is warranted.
- (d) The Committee believes that a Commonwealth DPA scheme can play a valuable role in the Australian criminal justice system for the benefit of society as a whole and should be adopted in Australia as proposed in this submission.

⁵² *FCPA Monitorships and How They Can Work Better*, F Joseph Warin, Michael S Diamant & Veronica S Root, University of Pennsylvania Journal of Business Law Vol 13.2, pages 380 to 381.

ANNEXURE

MEMBERS OF IBA ANTI-CORRUPTION COMMITTEE

WORKING GROUP ON COMMONWEALTH DPA SUBMISSION

NAME	POSITION & EMPLOYMENT	EXPERIENCE
Mr Robert R Wyld	Co-Chair, Anti-Corruption Committee (ACC) Partner, Johnson Winter & Slattery, Sydney Australia	Practised in bribery and corruption and economic crime cases for over 25 years in Australia, the Asia-Pacific region, the Middle East and South America
Mr Bruno Cova	Vice-Chair, ACC Partner, Paul Hastings LLP, Milan, Italy	Extensive experience as General Counsel to multinational Italian companies and in private practice focusing on commercial crime
Ms Francesca Petronio	Chair, IBA ACC Double Jeopardy Sub-committee Partner, Paul Hastings LLP, Milan Italy	Extensive practice in anti-corruption, commercial crime and compliance work across Europe
Ms Roberta Guaineri	Partner, Moro Visconti de Castiglione Guaineri, Milan, Italy	Practised for over 25 years in commercial crime in the US and in Italy
Mr Brind Zichy-Woinarski QC	Barrister, Victorian Bar, Melbourne Australia	Barrister with over 40 years' experience in criminal law and economic crime cases, for Chairman of the Criminal Bar Association of Victoria and Consultant Editor to <i>Criminal Law, Investigation and Procedure Victoria</i>
Ms Sophie Scemla	Partner, Eversheds, Paris, France	Head of White Collar Crime practice, with extensive experience in domestic and international corruption defence, fraud, internal and criminal investigations, implementation of compliance programs and risk management
Mr Tomislav Sunjka	Founding Partner, Tomislav Sunjka Law Office, Vojvodina, Serbia	Extensive experience in anti-corruption work, asset tracing, corporate crime and victim restitution cases

NAME	POSITION & EMPLOYMENT	EXPERIENCE
Ms Jitka Logesova	Partner, Kinstellar, Prague, Czech Republic	Head of the firm-wide Compliance, Risk & Sensitive Investigations practices with extensive experience across Europe
Mr Hamidul Haq	Partner, Rajah & Tann, Singapore	Senior Partner with extensive commercial crime expertise across South East Asia and former senior Prosecutor with Singapore Attorney General's Chambers.
Mr David Hamilton	Senior Associate Stephenson Harwood LLP, London, United Kingdom	David has considerable experience in anti-corruption work in the United Kingdom and Europe
Professor Matthew Stephenson	Professor of Law, Harvard Law School, Harvard University, Boston, United States	Prof Stephenson teaches administrative law, legislation and regulation, anti-corruption law, and political economy of public law.