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Submissions of King & Wood Mallesons
Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia: Public Consultation Paper

This submission has been prepared by King & Wood Mallesons in response to the Public Consultation Paper on Deferred Prosecution Agreements (DPAs) released on 16 March 2016. We welcome the opportunity to make our submissions on this issue and commend the Government for engaging with stakeholders on the possibility of introducing a DPA scheme.

Our responses to the fourteen questions raised by the Consultation Paper are outlined below.

1 Would a DPA scheme be a useful tool for Commonwealth agencies?

Recommendations

A DPA scheme would be a useful tool for Commonwealth agencies.

Comments

We support the introduction of a scheme of DPAs in Australia. In our submissions to the Senate inquiry into foreign bribery we noted that, despite continued encouragement by federal authorities for companies to self-report and cooperate, there is little guidance about the consequences of voluntarily reporting suspicions of bribery or other corporate misconduct. We believe that a scheme of DPAs would assist in remedying this issue.

DPAs have been used successfully as an enforcement option in the United States (**US**) and more recently, in the United Kingdom (**UK**). They represent a midway point between the difficulty of prosecuting corporate crime on the one hand, and the lack of incentives for companies to self-report on the other. DPAs can assist agencies to achieve better enforcement outcomes than would otherwise be the case and provide companies, seeking to be proactive and improve compliance, with greater certainty as to the outcome of their cooperation.

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

Recommendations

The Commonwealth DPA scheme should be available for serious corporate crime as defined in the Consultation Paper.

Comments

We support a DPA scheme which is available for serious corporate crime such as fraud, bribery and money laundering. Equally, we support the approach taken in the UK whereby the specific offences to which the scheme applies are specified.

Australia's current system, as evidenced by its enforcement record over the past few decades, does not deal effectively with complex and serious economic crime. This suggests that a new approach is needed. While the introduction of new offences, such as the recent false accounting provisions, assists in this regard, the difficulties associated with prosecuting economic crimes committed by companies with activities spanning across multiple jurisdictions remains. Encouraging the cooperation of commercial organisations is therefore necessary if enforcement outcomes are to be obtained.

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

Recommendations
DPAs should be available for both companies and individuals.

Comments
While many of the perceived benefits of DPAs are directly relevant to companies, there appears to be no justifiable reason to limit the application of DPAs to corporates only. As noted in the Consultation Paper, in circumstances where an individual has information which may assist in an investigation, the absence of any ability to enter into a DPA is likely to discourage self-reporting. Given that the culpability of an organisation is often intertwined with the culpability of its officers, employees and agents, the effectiveness of DPAs as a tool to encourage self-reporting will be enhanced if they also apply to individuals.

In response to the criticism noted in the Consultation Paper that DPAs in the US context have resulted in lack of prosecution for individual company officers, this is a matter which can be addressed by enforcement guidelines. For example, the 'Yates Memo' in the US sets out a policy framework for pursuing individual prosecutions.[1]

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

Recommendations
The Australian DPA scheme should be modelled after (and adapted where necessary for constitutional reasons) the UK scheme.

Comments
We note the concerns in the Consultation Paper about the effect of limitations posed by Australia's constitutional framework. These limitations, however, are not insurmountable and we believe that a scheme which does not have court involvement is undesirable. Judicial oversight ensures that agreements and their terms are fair, reasonable and proportionate. It also provides a level of transparency that does not exist under the US DPA scheme. Both these factors would serve to ensure public confidence in the DPA scheme.

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

Recommendations
Clear guidance should be made available on the benefits of entering into DPA negotiations and the factors the prosecutor will take into account.

Comments
In order to encourage companies to self-report actual or suspected misconduct, the legislation or a supporting policy document should contain clear criteria which will be considered when deciding whether to enter into DPA negotiations. The UK's Deferred Prosecution Agreements Code of Practice is a good example of the sort of criteria which could be used as a starting point in the Australian context.

We do not believe that self-reporting should be a condition of inviting a company to enter into a DPA. However, to provide a level of certainty to companies which do self-report, the criteria should, at the very least, specify that self-reporting is to be given greater weight in determining whether or not to

[1] Department of Justice, Deputy Attorney-General, *Memorandum – Individual Accountability for Corporate Wrongdoing* (9 September 2015) <www.justice.gov/dag/file/769036/download>.

enter into DPA negotiations.[2] This would also help to ensure that those companies which do self-report are not disadvantaged compared to those which, for a variety of legitimate reasons, may not.

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

Recommendations

DPAs should be made public once the terms of the agreement are finalised.

Comments

To ensure public support for, and confidence in, DPAs it is essential that the terms of them be made public once finalised. In this regard, the UK scheme which requires the prosecution to publish the DPA once it has been approved by the court is a suitable option.

While we note the concern in the Consultation Paper that companies may be less willing to voluntarily disclose wrongdoing where the details are to be published, there are additional benefits to having details made publically available, such as the guidance that DPAs can provide to other companies. Further, we would argue that the benefits of entering into a DPA when compared with the risk of a potential prosecution, would outweigh any consideration of the details of the agreement being made public.

7 How should DPA negotiations be structured?

Recommendations

The prosecuting agency should retain discretion as to whether to enter into DPA negotiations.

Comments

The DPA negotiation process should not be overburdened with legislative requirements by way of steps which must be taken by the prosecuting agency. Retaining a degree of flexibility is essential to ensuring that just and satisfactory outcomes are reached.

That being said, there is a benefit to having the decisions of the relevant agency underpinned by a Policy. Again, the UK's Deferred Prosecution Agreements Code of Practice, and in particular Chapter 3 which outlines the process for invitations to enter into negotiations, is a good example of the sort of policy which could be developed in Australia.

8 What factors should be considered in agreeing a proposed settlement?

Recommendations

The factors contained in chapter 2 of the UK Deferred Prosecution Agreements Code of Practice are a starting point for developing factors to be considered in any Australian DPA scheme.

Comments

Chapter 2 of the Deferred Prosecution Agreements Code of Practice (UK) contains the various factors that must be taken into account by the prosecutor when deciding whether to enter into a DPA. It outlines the legislation and codes of practice that the prosecutor will have regard to. It also identifies the various factors which will be considered when determining whether or not it is in the public interest to enter into a DPA.

Without purporting to provide an exhaustive list of the factors which should be considered, the following should be taken into account:

[2] We note in this regard that under the UK's Deferred Prosecution Agreements Code of Practice, self-reporting is a factor to be considered but does not appear to have any greater weight than the other factors which may be considered by the prosecutor in deciding whether to enter into DPA negotiations.

- the conduct of the company during the negotiations;
- the fulsomeness of the company's disclosure at the self-reporting and negotiation stage;
- the timeliness of the self-reporting;
- the quality of any internal investigations;
- the robustness of existing compliance programs and steps taken to minimise the opportunity of misconduct occurring both before and after the relevant incident; and
- the seriousness of the relevant conduct.

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

Recommendations

The circumstances in which material disclosed during negotiations can be used for subsequent criminal and/or civil proceedings should be strictly limited.

Comments

We agree, as outlined in the Consultation Paper, that there is a balance to be struck between encouraging full and frank disclosure by companies and individuals during DPA negotiations and the risk that companies or individuals might use the DPA process to insulate themselves against future prosecutions.

In accordance with the approach taken in the UK, if a company or individual provides inaccurate, misleading or incomplete information in circumstances where the company or individual knows or ought to have known that the information was inaccurate, misleading or incomplete, then that information should be available for subsequent criminal prosecutions. This addresses the concern of potential defendants using the DPA process to prevent the use of evidence in subsequent criminal or civil proceedings.

However, we do not support allowing the material disclosed during DPA negotiations (which do not ultimately result in an agreement) to be used in subsequent proceedings. As noted in the Consultation Paper, this puts the prosecuting agency in a powerful bargaining position which would operate as a disincentive to self-reporting. The benefits obtained from encouraging self-reporting and cooperation outweigh the benefits in allowing information provided to authorities in a good faith attempt to enter into negotiations to be used in subsequent criminal proceedings.

10 What facts and terms should DPAs contain?

Recommendations

There should be a requirement that the terms of the agreement be in the public interest and be fair, reasonable and proportionate. The DPA should also include a statement of agreement facts.

Comments

We agree with the suggestion that to promote public confidence in the DPA scheme, it should require the terms of the agreements to be in the public interest and to be fair, reasonable and proportionate. We also suggest that the DPAs should include a statement of agreed facts which outline the relevant conduct and the circumstances which gave rise to it.

We do not, however, believe that DPAs should contain a requirement for there to be a formal admission of guilt or criminal liability. While admissions should be included in appropriate cases, the utility of DPAs will be maximised if there is no requirement to admit guilt.

In line with the approach in s 5(3) of Schedule 17 of the *Crimes and Courts Act 2013* (UK), we suggest that the other requirements which could be imposed by a DPA as discussed in the Consultation Paper

should be optional and not mandatory. Combined with the requirement that terms be fair, reasonable and proportionate, this would ensure that the terms of DPAs are appropriate and tailored to the circumstances of each particular case.

11 How should funds raised through DPAs be used?

Recommendations

Funds raised through DPAs should be paid into the Consolidated Revenue Fund. Equally, funds raised through DPAs could be paid into special accounts administered by the Australian Financial Security Authority (as is the case with proceeds of crime confiscation actions).

Comments

We suggest that funds raised through DPA settlements should be paid into the Consolidated Revenue Fund. While we recognise that ensuring sufficient funding and resourcing for complex corporate crime is critical, this is a matter to be considered by Parliament when making appropriations. We do not consider it appropriate for the prosecuting agency to be the direct beneficiary of penalties paid under DPAs.

Another possibility, is that funds raised through DPAs could be paid into special accounts administered by the Australian Financial Security Authority (as is the case with amounts confiscated under proceeds of crime legislation). The funds raised could then be used for particular projects which have a connection to reducing the occurrence of economic crime, increasing compliance with Australia's laws or compensating victims. This would not prevent a portion of the funds raised being used to support the prosecuting agency.

12 What should be the consequences of a breach of a DPA?

Recommendations

The consequences for breach of a DPA should include resumption of the deferred prosecution.

Comments

The consequences for breach of a DPA should include resumption of the deferred prosecution. We do not agree that if a prosecution is resumed on breach of a DPA, the delay resulting from the establishment of the DPA will be prejudicial to the prosecution. We also do not believe it is necessary that a financial penalty apply in the event a DPA is breached – the threat of prosecution is a sufficient deterrent to ensure compliance. In addition, as outlined below, through the use of independent monitors this risk can be reduced.

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

Recommendations

The Australian DPA scheme should make use of independent monitors.

Comments

The use of independent monitors as a supervisory mechanism ensures that companies comply with the terms of DPAs. They have been an effective mechanism in the US and have recently been used in the UK. In terms of their benefits, the US Memorandum on 'Selection and Use of Monitors in Deferred Prosecution Agreement & Non-Prosecution Agreements with Corporations', notes:

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> The corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.[3]

Despite the benefits of independent monitors, there are also associated costs to the defendant company who, under both the US and UK scheme, must pay for the monitor. Accordingly, in deciding whether to negotiate for an independent monitor, the prosecutor should be required to consider the cost of the independent monitor and its impact on the operations of a company.

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

Recommendations
N/A

[3] Department of Justice, *Criminal Resource Manual 163. Selection & Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (7 March 2008) <https://www.justice.gov/ usam/criminal-resource-manual-163-selection-and-use-monitors>.