Improving enforcement options for serious corporate crime:
Consideration of a Deferred Prosecution Agreements scheme in Australia

Public Consultation Paper

KordaMentha response

2 May 2016
Table of contents

1 Introduction........................................................................................................................................... 3
  1.1 KordaMentha Pty Ltd.................................................................................................................................. 3

2 Our view....................................................................................................................................................... 3
  2.1 Australian DPA scheme: Key issues for consideration ........................................................................... 3
    A. Utility of a DPA scheme......................................................................................................................... 3
    B. Conduct for which a DPA may be sought ............................................................................................. 4
    C. Parties to a DPA – companies and/or individuals ............................................................................ 4
    D. Extent of judicial involvement............................................................................................................ 5
    E. Measures to promote certainty – policy guidance ............................................................................. 5
    F. Whether DPAs should be made public ................................................................................................. 6
    G. Conduct of negotiations....................................................................................................................... 6
    H. Content of a DPA .................................................................................................................................. 7
    I. Breach of a DPA..................................................................................................................................... 8
    J. Other comments in relation to a potential Commonwealth DPA scheme? ....................................... 8
1 Introduction

1.1 KordaMentha Pty Ltd

1. KordaMentha Pty Ltd (KordaMentha) is an advisory and investment firm that provides Forensic, Restructuring, Turnaround and Real Estate support for companies and their stakeholders.

2. KordaMentha’s Forensic practice is made up of professionals from diverse backgrounds, including accounting and finance, law enforcement, regulatory and technology. Many have lived and worked overseas in countries that are regarded as highly corrupt on the Transparency International Corruption Perceptions Index (CPI). They have worked on projects in Australia and overseas assisting clients to deal with incidents involving fraud and corruption. This includes providing services to the Asian Development Bank to investigate misuse of funds (which may form part of Australia’s contribution) loaned to third world governments for various projects. Based on this experience, we provide real world, insightful advice and guidance to clients about implementing responsible business practices that mitigate against these and many other business risks in the global marketplace.

3. In August 2015, we made a submission to the Senate Economics References Committee inquiring into the issue of foreign bribery [Senate foreign bribery submission]. At Section 2.7 of our submission, we recommended that consideration should be given to broadening the resolution options available to regulators. These resolution options included the use of Deferred Prosecution Agreements (DPAs).

4. In this paper we respond to the Australian Attorney-General’s Department’s request dated March 2016 for public comment on whether a DPA scheme should be introduced in Australia.

2 Our view

2.1 Australian DPA scheme: Key issues for consideration

5. The preliminary sections of the Attorney General’s request for responses to its Public Consultation paper (Consultation paper) on this issue provide an excellent overview of the current responses to serious corporate crime in Australia and the key aspects of DPA regimes in the US and UK.

6. In this document, we provide our responses to the specific questions asked in the Consultation paper.

A. Utility of a DPA scheme

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

7. Given the often complex nature of corporate crimes and associated difficulties investigating them, including the collection of evidence and prosecuting them, DPAs provide a viable, alternative tool for regulators to deal with the criminal conduct of corporations. The reduction in cost through avoiding lengthy and costly investigations and prosecutions is one of the key reasons for implementing such a scheme. The apparent increasing incidence of corporate malfeasance combined with finite regulatory resources also make a compelling case for additional or alternate resolution options such as DPAs.

1 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions (Submission 22)
8. A difficulty faced when investigating a ‘corporate’ crime is identifying employees who may be potential witnesses that have information relating to the issue. The company may be a constant entity, however, its employees are free to move around, change jobs, move cities and countries. This presents additional challenges to law enforcement in that the more protracted the investigation the greater the chances of the dilution of available evidence.

9. If the oversight role of the courts is clearly defined and legislated as it is in the UK, then this should reduce concerns about abuse of the scheme by prosecutors/regulators, i.e. coercing corporations into entering into DPAs, as well as concerns in relation to separation of powers and constitutional provisions on the role and functions of courts.

10. The success of a DPA scheme will hinge on creating an environment in which the incentive to report serious corporate crimes is greater than that of remaining silent. Appropriate guidelines and legislation that govern any DPA scheme should provide the degree of certainty necessary for an increase in corporate self-reporting and a means by which to control, to some extent, the damage associated with any wrongdoing.

11. Ethical corporations recognise the financial and reputational benefits of behaving responsibly and the benefits of ‘prevention versus cure’. They proactively implement systems and processes to ensure that responsible business practices are adopted in day to day operations so that even in the event that a rogue employee steps outside the company’s code of conduct they should have nothing to fear in terms of incurring additional costs.

12. Any additional costs incurred by a corporation entering into a DPA are a direct consequence of corporate criminal misconduct. In an environment where there are high levels of enforcement, criminal liability for the wrongdoing of employees is a business risk like any other, and any penalties imposed as a result of wrongdoing are a consequence of that wrongdoing. If a corporation incurs these costs, it will be a case of them bringing it on themselves.

B. Conduct for which a DPA may be sought

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

13. We agree that DPAs should be used for the purposes of settling Commonwealth indictable offences that could be classified as ‘serious corporate crime’ as defined in the Discussion paper. However, the array of offences that could be classified as fraud, for example, are many and therefore a schedule of applicable offences should be compiled similar to Part 2 of Schedule 17 of the UK Crime and Courts Act 2013 (CC Act).

14. DPAs should also include state and territory indictable offences where these may form part of the matter.

15. Under no circumstances should DPA’s be made available for offences against the person or the state.

C. Parties to a DPA - companies and/or individuals

Q3. Should DPA’s be available for companies only, or for both companies and individuals?

16. It is our view that DPAs should only be made available to corporations, partnerships or unincorporated associations in line with Section 4 of Schedule 17 of the CC Act.
17. We believe the deterrent effect for corporations can be achieved through DPAs, but not as much for individuals. A corporation may generally have adequate procedures in place, however, an individual or individuals may circumvent these procedures to achieve a criminal purpose for their own benefit or that of another, but in doing so, expose their corporation to criminal liability. Criminal prosecution and penalties for individuals in our view, will bring about a greater disincentive for other employees to adopt similar conduct. We agree that the unavailability of DPAs for individuals and the likelihood of criminal prosecution sends a stronger message of deterrence.

18. Where an individual who is implicated in criminal conduct, but is not the architect of the criminal act cooperates with regulators, other arrangements to minimise the severity of penalties are available. These arrangements include indemnity from prosecution or courts taking into account an accused’s level of cooperation when imposing penalties.

19. There may be a need for additional policy considerations as to the suitability of a DPA scheme where the corporation is a private limited company with a single director/shareholder where in effect, this corporation is the alter ego of this single director/shareholder.

D. Extent of judicial involvement

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

20. For the sake of transparency, we believe that the courts should have an oversight role in any DPA scheme implemented in Australia.

21. We believe this role is far from ‘rubber stamping’ a DPA, the independence of the courts should be relied upon to review the circumstances of the case and the terms of a DPA to ensure that it is in the public interest as well as in the interests of justice. The time and cost involved in such applications will be minimal compared to the time and cost involved in conducting full investigations followed by lengthy and costly criminal trials. In extreme cases of corporate criminal activity where, in the opinion of the courts, the public interest and the interests of justice are not met, the courts should have the power to intervene and order a criminal prosecution. Where a court grants an application for a DPA, the court should give its reasons for making its decision ensuring that the proposed terms of the DPA are fair, reasonable and proportionate to the alleged criminal conduct.

E. Measures to promote certainty - policy guidance

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

22. We believe that to bring about an effective incentive for self-reporting, detailed guidance should be provided about when and how a DPA may be used. This guidance will provide the framework upon which prosecutors should act and assist the courts in assessing the individual merits of each DPA application.

23. Any guidance should include the factors to be considered when determining whether offering a DPA is in the public interest. We agree that these factors should include those under the US and UK regimes (shown at page 18 of the Consultation paper).

24. To produce a real incentive to self-report and co-operate with regulators, any guidance should also clearly provide a framework for determining the penalties to be applied under a DPA. These penalties should be determined by the extent of co-operation. To guide negotiations as to the terms of agreements, particularly in relation to pecuniary penalties, a sentencing schedule specifying penalty ranges and discounts for co-operation should be produced. It should also provide guidance about the applicability of other penalties including, but not limited to, the liability and formulas for determining civil penalties, disgorgement of profit and debarment from government contracting. Factors to be taken into account when determining the level of co-operation include, but are not be limited to:
a. Self-reporting - Whether and when, i.e. how soon after becoming aware of the conduct, the entity self-reported
b. The extent and quality of any internal investigation that the company has conducted relating to the identified criminal conduct. Was it independent, transparent, comprehensive and objective
c. The disciplinary action taken against individuals found to have been instrumental in the criminal conduct and whether the identity of and full extent of evidence against those individuals has been provided to the regulator
d. Generally, the manner in which the corporation has interacted with the regulator and fulfilled requests for information
e. The extent to which the corporation has taken remedial action in terms of its compliance programs with an emphasis on dealing with any corporate cultural issues that may have led to the misconduct.

25. To satisfy 25. b. above, these investigations should be conducted using accredited, independent forensic investigation providers.

F. Whether DPAs should be made public

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

26. Often, the misconduct of a corporation enters the public arena via the press prior to any regulatory action being instituted.

27. For purposes of transparency in Australia’s criminal justice system, DPA’s should be made public so that the wider community is made aware that action has been taken to appropriately deal with the conduct of a specific corporation. These details could be published on regulatory websites as in the US and UK. The published facts surrounding the conduct that led to a DPA will also provide other corporations with valuable learnings about the types of conduct that led to a breach of legislation, e.g. foreign bribery laws, and the compliance measures they should be focussing on.

28. Where employees of a corporation that is being offered a DPA are being individually prosecuted, the publication of the terms of a DPA may prejudice the fair trial of these individuals. In this situation, the details of the relevant DPA could be redacted or publication deferred pending the outcome of the prosecution of these individuals. As such, the decision not to publish the details of a DPA’s should be a matter for the courts to decide taking into consideration all the circumstances.

G. Conduct of negotiations

Q7. How should DPA negotiations be structured?

29. As prosecuting authorities have a vested power to prosecute and any DPA scheme will provide an alternative resolution option to criminal prosecution, they should have the prerogative of inviting a company to enter into negotiations for a DPA. The key factors to be taken into account in order to reach this decision should be that it is in the public interest and the interests of justice to do so.

30. The extent of co-operation, including when or if the corporation self-reported and the quality of any internal investigation, amongst other reasons, will be factors in determining whether to make an offer to enter negotiations and later on, the penalties to be applied.
31. Legislation should stipulate that negotiations between the parties should be conducted in good faith. This imposes statutory obligations on prosecutors to act with fairness, but also means that once a corporation agrees to enter negotiations they do so on the basis of full disclosure. The purpose of imposing this statutory obligation would be to minimise concerns about coercion on the part of prosecutors and create a greater incentive for corporations to fully co-operate.

32. In the event that a corporation has been found not to have acted in good faith, this could lead to discontinuance of negotiations or the removal of any penalty discounts that would have applied if greater co-operation had been provided by the corporation.

33. If the courts are to be involved in overseeing DPA negotiations and ultimately, ratifying agreements then a process where hearings to commence and finalise negotiations as per the UK scheme should be adopted.

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

34. In order to bring consistency to DPA negotiations, we believe that the factors taken into consideration by the US and UK regimes mentioned at Section E on page 18 of the Consultation paper should be taken into consideration when agreeing settlements.

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

35. Our comments in relation to this question, relate to the possible prosecution of the entity that has entered into a DPA.

36. Where a corporation complies with the terms and conditions of a DPA for the entire period of the agreement, then at the expiration of that period, material disclosed during negotiations for that DPA should not be available for criminal and/or civil proceedings relating to the original facts. However, this information should be able to be used in the parallel investigations and prosecutions, particularly of individuals.

37. Where there are reasonable grounds to believe that significant breaches of a DPA, e.g. failure to implement adequate procedures, or that criminal conduct has continued or occurred since entering a DPA, then material disclosed during negotiations should be able to be used for criminal and/or civil proceedings relating to the original facts. The purpose of this is to ensure that defendants take seriously the consequences of not complying with orders and make their best efforts to implement measures to prevent future criminal misconduct.

H. Content of a DPA

Q10. What facts and terms should DPAs contain?

38. Any DPA should be clear as to the obligations of a corporation entering it. A key element of entering the DPA should be to bring about positive change within a corporation and be the impetus for adopting responsible business practices. To that end, a DPA should include the information mentioned at Section H, page 20, of the Consultation paper.

Q.11 How should funds raised through DPAs be used?

39. A proportion of funds raised through DPA penalties should be allocated for the purpose of defraying the cost of investigations as well as funding other investigations.
40. In addition to this, monies should also be allocated to funding a reward scheme for whistleblowers. There is strong evidence to show that whistleblowing is the key means by which fraud and other types of criminal misconduct is detected. As has been shown in many examples in Australia and other parts of the world, the consequences of whistleblowing for an individual can have significant financial consequences. Where penalties are paid as part of a DPA, a portion of those penalties should be allocated to a fund to reward whistleblowers in cases where their original information leads to the successful resolution of the matter.

41. Where corporate criminal conduct has led to victims of that conduct suffering financial loss, we believe that compensation should be paid to those victims. However, this compensation should be separate to any financial penalties imposed or come from disgorgement of profits. By doing so, it will not dilute the amount of monies that can be provided to fund regulatory efforts or reward whistleblowers.

I. Breach of a DPA

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

42. This should depend on the nature or number of breaches that occur. For example, if the breach consists of failing to implement compliance measures in a particular timeframe, then it may necessitate extending the term of the agreement, directing the involvement of an independent monitor or other action.

43. Where the breach is found to relate to a continuation of criminal conduct or new offending subsequent to entering into a DPA, then serious consideration should be given by the prosecuting authority to terminating the agreement and undertaking a criminal prosecution. Under these circumstances, information provided during the initial negotiations should be able to be used in that prosecution.

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

44. The ability to ascertain whether the terms and conditions of a DPA are being met is fundamental to the success of a DPA scheme. We agree that the use of an independent monitor under such a scheme provides the necessary oversight of corporations subject to a DPA.

45. Where breaches of a DPA’s terms and conditions are identified by the independent monitor, they will report this to the prosecuting authority to determine what action should be taken. In short, such an arrangement reinforces the need for the corporation to make their best efforts to comply with the terms and conditions of the DPA. The resources of regulators are finite, and this type of work is not their core business. Use of an independent monitor will provide an intermediary between the prosecuting authority/ regulator and the corporation. It frees the regulator to concentrate on their core activity of investigating other allegations of corporate criminal against other corporations.

J. Other comments in relation to a potential Commonwealth DPA scheme?

46. Our financial and corporate markets work best when there is stakeholder/investor confidence. Most people will anticipate that regulatory issues will occur from time to time but we believe it is important to have a system in place that is able to deal with regulatory breaches as quickly and efficiently as possible.

47. Corporations are ultimately made up of people / employees. Investigations that drag on unnecessarily can be unsettling for employees, particularly the majority of employees who are innocent of any wrongdoing.
Summary

48. The implementation of a DPA scheme will provide a significant means by which Australian regulators will be able to more effectively enforce Commonwealth criminal legislation against corporations. It also provides corporations that may be criminally liable for certain actions to take responsibility for their actions, but also to some extent, reduce the reputational and financial impact a criminal conviction can bring.

49. We believe that implementing a DPA scheme modelled on the UK scheme is the most appropriate. It will enable Australia to enhance our legislative response to serious corporate criminal conduct such as foreign bribery.

50. In recent times, Australia has on a number of occasions been in the global spotlight for all the wrong reasons. Therefore, we urge the Australian Government to act swiftly to implement an effective DPA scheme.

Paul Curby  
Partner

David Lehmann  
Director

2 May 2016  
2 May 2016