

SUBMISSION TO THE ATTORNEY GENERAL'S DISCUSSION PAPER ON DEFERRED PROSECUTION AGREEMENTS

DEFERRED PROSECUTION AGREEMENTS ARE NO SOLUTION TO CORPORATE CRIME

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"As crimes pile up they become invisible"

Bertolt Brecht

"Corporate crime poses a significant threat to the welfare of the community. Given the pervasive presence of corporations in a wide range of activities in our society, and the impact of their actions on a much wider group of people than are affected by individual action, the potential for both economic and physical harm caused by a corporation is great."

Law Reform Commission of New South Wales

We welcome the opportunity to make a submission.

1. About the Nemesis Project

1.1 The Nemesis Project is a citizen- led project based in Perth Western Australia. It works to expose the harm caused by markets, corporations and corporate and business practices and supports alternative ideas, language and approaches.

2. Background

2.1 The Federal Government is considering a Deferred Prosecution Agreements (DPA) Scheme¹ which would give corporations accused of wrongdoing, malfeasance and criminality the opportunity to defer prosecution in exchange for compliance with a range of conditions. DPAs involve a shift from prosecution to compliance.

2.2 A DPA is a contractual agreement between government and a corporate entity that allows government to impose sanctions and set up and monitor institutional changes, in exchange for an agreement that government forego further investigation and corporate criminal indictment.

3. Deferred Prosecution Agreements are no solution to the epidemic of serious corporate malfeasance and criminality that has made Australia a haven for corporate crime.

¹ Attorney Generals Department (2016) *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Public Consultation Paper, March 2016, Australian Government.

3.1 It is no coincidence that the impetus to introduce Deferred Prosecution Agreements has come in the wake of recognition of a global and national epidemic of corporate and business malfeasance, lawlessness and criminality, in which Australia has been identified as a haven for corporate and white collar criminality.²

3.2 Since 2008 the world's largest and most influential financial institutions, including many operating in Australia, have regularly engaged in unethical, unlawful and criminal conduct, including:

- Laundering billions of dollars of drug money and proceeds of crime
- Conducting business with countries such as North Korea, Sudan and Iran and concealing those activities
- Turning a blind eye to their links with terror groups
- Enabling tax evasion by clients
- Ripping off trillions of dollars from clients
- Promoting unlawful and misleading financial products to intentionally and knowingly defraud clients
- Submitting false interest rates
- Rigging bank bill rates
- Conspiracy to manipulate foreign exchange currency rates
- Excessive risk taking
- Predatory lending practices and dodgy financial advice
- Marketing toxic products and policies
- Profound lack of fiduciary responsibility
- Mortgage fraud
- Corporate bribery and corruption

3.3 Governments and regulatory authorities (particularly in the USA and UK) have relied primarily on monetary penalties and deferred prosecution agreements, however corporations and business have continued to engage in unlawful and criminal conduct. Indeed, the criminality has intensified and become more brazen.

3.4 In the US, despite an epidemic of criminality, the authorities have been unwilling to charge and prosecute corporate criminals and coupled with the adoption of DPA's, a consequence has been that Federal prosecutions of corporate and white collar crime is at a 20 year low.³

3.5 Here in Australia, the failure of governments and the various regulatory authorities to take action against increasingly egregious and escalating levels of

² The Australia Institute (2016) *Corporate Malfeasance in Australia*, Australia Institute, Canberra, May 2016 <http://www.tai.org.au/content/corporate-malfeasance-australia>; David, L & Soos, P (2016) *Australia: A Haven for white Collar Criminality and Control Fraud*, Submission presented to the Senate Inquiry into criminal, civic and administrative penalties, LF Economics, Submission 63, March 2016.

³ David Cay Johnston (2015) Enforcement for white Collar Crime hits 20 year low, *Al Jazeera America*, August 14 2015, <http://america.aljazeera.com/opinions/2015/8/enforcement-for-white-collar-crimes-hits-20-year-low.html>

unlawful and criminal conduct by corporations, including the FIRE sector⁴ (finance, insurance and real estate) have led to widespread support for a Royal Commission into corporate crime and financial institutions.

3.6 In our submission to the *Senate Inquiry into Penalties for White Collar Crime*⁵ we argued that:

- Over recent decades legal and regulatory systems have been dismantled or loosened to remove constraints against corporate and investor profit-making and profit-taking.
- Corporate and white-collar crime is traceable to a gross failure of the law. Legal constraints have been cast aside or not applied to their fullest. Corporations and business groups have worked to limit the effectiveness of efforts to stamp out corporate crime. They make it more difficult to prosecute crimes.
- Corporations and business have actively subverted the law, as well as government regulation and ethical standards, in order to maximize their profits and ensure that resources flow to them. There has been a pervasive legal and political failure to control unlawful conduct by corporations and business.
- For decades, the regulatory authorities have failed to investigate and take action against corporate and white collar crimes. Governments, corporate regulators and law enforcement authorities and politicians have been unwilling to take serious action against corporate criminals who knowingly swindle and harm ordinary Australians.⁶
- The dominant response to corporate and business offending has been regulation rooted in co-operation. These strategies work predominantly to the advantage of powerful corporate and business interests

3.7 Our view is supported by numerous other submissions to the Senate Inquiry.

3.8 In a submission to the *Senate Inquiry into Penalties for White Collar Crime*, the Economic Consultancy *LF Economics* provides a damning indictment of corporate criminality and control fraud within the FIRE sector (finance, insurance and real estate)⁷. They contend that systemic criminal activity exists in the FIRE

⁴ David, L & Soos, P (2016) *Australia: A Haven for white Collar Criminality and Control Fraud*, Submission presented to the Senate Inquiry into criminal, civic and administrative penalties, LF Economics, Submission 63, March 2016.

⁵ Penter, C (2016) *Submission by the Nemesis Project to the Senate Inquiry into Criminal, Civil and Administrative Penalties for White Collar Crime*, Submission 18, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/White_collar_crime/Submissions

⁶ Schwab, A, (2010) *Pigs at the Trough: Lessons from Australia's Decade of Greed*, John Wiley; Sydney Morning Herald (2010) Where are They Now? *SMH*, June 12, 2010

⁷ David, L & Soos, P (2016) *Australia: A Haven for white Collar Criminality and Control Fraud*, Submission presented to the Senate Inquiry into criminal, civic and administrative penalties, LF Economics, Submission 63, March 2016.

sector, with the full knowledge of ASIC, APRA, ATO and the RBA, and places consumers at grave risk of having their finances and livelihoods destroyed.

3.9 LF Economics calls for much greater enforcement and prosecution:

*Australians have been betrayed by the regulatory agencies' neglect and continual siding with lenders and corporate management, despite their full knowledge of the catastrophic pain endured by many who have lost their homes, assets and life savings. A strict focus on rules, regulations, standards, codes and penalties will have a negligible effect on control frauds because these crimes are simply ignored in reality. Two decades of fruitless inquiries and tweaking of innumerable rules and regulations has merely contributed to the losses endured by typical 'mum and dad' investors, now into many tens (perhaps hundreds) of billions of dollars. The nation already has an abundance of appropriate laws and regulations to contain and dismantle these control frauds, yet regulators are averse to enforcement, rendering these powers null and void.*⁸

3.10 The Australia Institute has published a report *Corporate Malfeasance in Australia* showing that corporate malfeasance is endemic and widespread in Australia. Its findings include:

- Budget cuts enacted by the current government have compromised the ability to investigate corporate wrongdoing.
- There are hundreds of cases against corporations and business being pursued by Australian regulators each year, however progress is seriously impaired by the lack of staffing and resources.
- There are fewer regulators 'patrolling the corporate beat' in Australia with government agencies responsible for monitoring corporate wrongdoing and malfeasance having their staffing cut between 14-16% since the 2013-14 Budget.

4. Concerns about Deferred Prosecution Agreements

4.1 DPAs have become the mainstay of white-collar and corporate crime enforcement in the UK and US and occupy a middle ground between declining to prosecute and trials or guilty plea.

4.2 However, we have serious concerns about DPAs and don't support the adoption of a DPA scheme in Australia for serious corporate crime. We oppose DPAs as there is no evidence that they prevent, deter or punish corporate and business crime.

⁸ David, L & Soos, P (2016) *Australia: A Haven for white Collar Criminality and Control Fraud*, Submission presented to the Senate Inquiry into criminal, civic and administrative penalties, LF Economics, Submission 63, March, 2016.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/White_collar_crime/Submissions

4.3 DPA's are another example of the historical propensity of governments and regulatory authorities to allow corporations to avoid criminal prosecution.⁹

4.4 Writing in the Brigham Young University Law Review, Peter Reilly describes DPAs in the US as 'a failed experiment in deterring corporate criminal prosecutions'. He argues that DPAs mean that corporations avoid prosecution, while the rest of society pays a costly price for that avoidance.¹⁰ Reilly writes;

"We label matters as criminal because we, as a society, strongly condemn the behavior and we wish to protect people from it. Part of the motive in choosing to label something 'criminal' rather than 'civil' is to engender more severe public shaming, thereby further reinforcing law-conforming standards of behavior throughout society..... One is left to wonder how much public shaming and overall accountability are taking place through the use of deferred prosecution agreements when a former federal prosecutor tells us that — 'Companies are happy to enter into these deferred prosecution agreements because it's become so commonplace now. . . . They take a bath in the press for a finite period of time. The stock markets don't even seem to punish them"

4.5 Reilly calls for legislation to halt the use of DPAs in corporate criminal law enforcement, arguing that they:

- make a mockery of the criminal justice system by serving as a disturbing wellspring of unfairness, double standards and abuse of power.
- compromise the pursuit of justice, consistency in the rule of law and basic notions of fairness.

4.6 DPA's were originally introduced to give the most vulnerable in society another chance by allowing them to demonstrate good behaviour rather than be prosecuted. However, DPAs are now used to give powerful corporations a second chance that is not available to others in the criminal justice system. They are a form of justice reserved for society's most powerful actors and add to the perception (and the reality) that corporations are considered above the law because they are 'too big to fail'.¹¹

4.7 One concern from the USA and UK is that DPAs become the default option. Instead of being convicted for criminal wrongdoing- and perhaps barred from competing for government contracts- a form of plea bargain takes place in which the corporation acknowledges wrongdoing, pays a penalty and promises not to transgress, otherwise the prosecution won't stay deferred. In the US and UK, DPAs have become the primary strategy used to address corporate, business and white-collar criminality.

⁹ Scheider, S (2015) Deferred Prosecution won't put a dent in corporate crime, *The Globe and Mail*, June 2, 2015

¹⁰ Reilly, P (2015) Justice deferred is justice denied: we must end our failed experiment in deferring criminal prosecutions, *Brigham Young University Law Review*, September 25, 2015.

¹¹ Reilly, P (2015) Justice deferred is justice denied: we must end our failed experiment in deferring criminal prosecutions, *Brigham Young University Law Review*, September 25, 2015.

4.8 A review of the UK's first DPAs by Corruption Watch expressed concern that DPAs fail to hold individuals accountable for their actions and allowed the company to escape consequences for the full harm of their wrongdoing.¹² Corruption Watch found

- A lack of individual accountability due to the failure to hold individuals to account for their wrongdoing
- Complete reliance on internal investigations by the company itself meant that the full extent of the wrongdoing was never unearthed
- Low financial penalties did not reflect adequate compensation or disgorgement of profits or the extent of harms caused.

4.9 DPAs allow a corporation to pay what is in essence a civil penalty. There is only the threat of future criminal charges. As Law Professor Rena Steinzor notes, the authorities rarely circle back to repeat violators.¹³

4.10 Corporations use DPAs to avoid publicly admitting wrongdoing and neither admit nor deny the crime. Prosecutors and enforcement authorities don't necessarily acknowledge guilt publicly. They simply say the corporation is agreeing to pay a fine and the amount of the fine. DPA is an agreement to pay without acknowledging culpability and responsibility.

4.11 There are concerns that DPAs encourage repeat criminality. Companies that have entered into DPAs do reoffend. DPAs make the consequence of criminality a financial penalty, simply another cost of doing business. Business people no longer need to fear jail time. The question of whether to engage in unlawful or criminal conduct becomes another business decision as to whether the financial return from the unlawful conduct outweighs the financial cost of the penalty.

5. Conclusion

5.1 There is no evidence that DPAs deter corporate and white collar crime. They may, in fact, encourage crime by reducing the threats of prosecution and incarceration. As the number of DPAs rise, the number of prosecutions decline.

5.2 We do not support the adoption of a DPA scheme in Australia for serious corporate crime.

¹²Corruption Watch (2015) The UK's First Deferred Prosecution Agreement, <http://www.cw-uk.org>

¹³ Steinzor, R (2014) *Why Not Jail: Industrial Catastrophes, Corporate Malfeasance and Government Inaction*, Cambridge University Press, 2014.