

## Consideration of a Deferred Prosecution Agreements scheme in Australia Public Consultation Paper, March 2016

### Introduction

We set out below our response to the questions posed in the Attorney-General's Department consultation paper dated March 2016 concerning a potential Australian Deferred Prosecution Agreement (DPA) scheme.

This response is made further to our submission dated 26 August 2015<sup>1</sup> to the Australian Senate Inquiry into Foreign Bribery.

In broad terms, our submission to the Senate Inquiry focussed on the promotion of a change of culture within Australian corporates concerning the prevention, detection, reporting and remediation of foreign bribery, together with the implementation of effective and flexible enforcement mechanisms and sanctions. We consider that a DPA scheme would form a key part of a matrix of developments which will improve Australia's response to corporate crime.

These responses draw on our international experience of legislation and enforcement involving corporates and individual misconduct, including deferred prosecution agreements, with particular reference to the United Kingdom and the United States.

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

- 1.1 We consider that a DPA scheme would be a valuable addition to the armoury of the Australian authorities.
- 1.2 It is imperative that a DPA scheme is supported by the enhancement of the law of corporate criminal liability, increased and more sophisticated frameworks for calculating penalties, support for well-funded regulators and prosecution agencies, and strategic government plans to reflect developing international standards.
- 1.3 Commercial organisations will hope that a proposed DPA scheme will in appropriate cases facilitate the conclusion of an investigation and prosecution more quickly, cheaply, with greater certainty and without the adverse publicity of a criminal prosecution.
- 1.4 From a UK perspective the DPA framework was introduced in response to perceived deficiencies<sup>2</sup> in the existing prosecution framework involving economic crime, including:
  - 1.4.1 investigations and trials for offences of economic crime becoming "forbiddingly long, expensive and complicated";
  - 1.4.2 UK regulators suffering from a lack of "flexibility to secure appropriate penalties for wrongdoing, at the same time as achieving better outcomes for victims";
  - 1.4.3 difficulties in proving that the "directing mind and will" of an organisation was at fault, thereby founding criminal liability;
  - 1.4.4 commercial organisations having "little incentive to self-report" making the investigation of matters involving hidden, specialist or technical fields very difficult;
  - 1.4.5 existing criminal penalties having "unintended detrimental consequences", such as a disproportionate impact on a company's share price, or collapse of a business;

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<sup>1</sup> [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Foreign\\_Bribery/Submissions](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions)

<sup>2</sup> UK Ministry of Justice "Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements" (May 2012): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236065/8348.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236065/8348.pdf)

- 1.4.6 civil proceedings allowing regulators to recover the proceeds of unlawful conduct and avoid the imposition of a criminal penalty, but not compensating victims;
  - 1.4.7 the absence of a wider and more flexible range of enforcement tools in England and Wales impacting “negatively upon enabling closer cooperation between foreign jurisdictions and the UK, and achieving resolution across several jurisdictions”;
  - 1.4.8 investigations and prosecutions being disproportionately expensive and time-consuming; and
  - 1.4.9 the lack of flexible enforcement tools for UK prosecutors making negotiations between UK and its overseas counterparts, particularly in the US, and ultimately resolution of the case, difficult.
- 1.5 From a USA perspective DPAs have been available as a tool for prosecutors as set forth in the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). The US Department of Justice (DOJ) began to use DPAs increasingly after the criminal conviction of the public accounting firm of Arthur Anderson arising from its work for Enron which resulted in the firm shutting down, leaving thousands of employees jobless. On appeal, the conviction was eventually overturned; however, the damage was already done.
- 1.6 The US Securities and Exchange Commission (SEC) recently began to use DPAs to resolve civil cases within its jurisdiction.
- 1.7 DPAs, along with other non-criminal resolutions such as non-prosecution agreements (NPA) and declinations are meant to provide US prosecutors with flexibility when exercising their prosecutorial discretion.
- 1.8 The ability to enter into DPAs provides companies with some comfort when making determinations about whether to self-disclose misconduct to authorities.
- 1.9 While DPAs are part of a US prosecutor’s toolkit, they are but one option when investigating and prosecuting cases. Commonly, DPAs are used in conjunction with NPAs, guilty pleas, and declinations when the DOJ resolves major corporate crimes.
- 1.10 In practice, companies negotiating a DPA in the US generally engage external legal counsel and consultants to conduct internal investigations. Facts uncovered during the investigation are then used as the basis for the DPA. In this way, the DOJ can investigate and prosecute cases while minimising the expenditure of its own resources.
- 1.11 Under the US scheme, DPAs enable regulators to enforce laws and impose fines while allowing companies to avoid criminal convictions that could result in substantial losses and other collateral consequences (e.g., violation of debt covenants).
- 1.12 The US DPA scheme, however, is also subject to a number of criticisms. For example, in an effort to attempt to meet the DOJ’s interpretation of self-disclosure and cooperation, companies may, in the end, disclose conduct that is not criminal.
- 1.13 The increased use of DPAs has also led to a limited judicial review and oversight of the prosecution of laws such as the FCPA. Additionally, the facts set forth in a DPA are negotiated by the parties and do not necessarily provide the full extent of the conduct at issue. As a result, key issues, such as the extent of the law’s extraterritorial jurisdiction, remain open.
- 1.14 DPAs are not yet available in Canada. The federal Department of Justice’s position is that DPAs must be expressly authorized by legislation, and that legislation similar to that introduced in the UK would be required in order for DPAs to become available in Canada. There are others in Canada who have argued that DPAs do not require specific legislation in order to be available in Canada, and that they could be incorporated into Public Prosecution Service of Canada’s

Deskbook which contains the directives of the Attorney General and guidelines of the Director of Public Prosecutions.

A number of industry groups, corporate organizations, and think tanks in Canada have advocated for the introduction of DPAs in Canada. Calls for DPAs in Canada have become more vocal since amendments to the federal government's procurement department amended its Integrity Regime. The Regime provides for debarment from contracts with the federal government where a bidder has been found or pleads guilty to offences including anti-corruption and anti-competition offences. Introduction of DPAs would allow on-going monitoring of companies, while not eliminating an otherwise potential bidder from federal contracting for five to 10-years.

- 1.15 In order to address perceived shortcomings, a DPA scheme in Australia should provide:
- 1.14.1 *a mechanism to reflect the multi-jurisdictional nature of economic crime:* cross-border corporate fraud, bribery, and money laundering, demands a sophisticated response which existing prosecution mechanisms to currently available in Australia do not allow.
  - 1.14.2 *an additional option to deal with crimes committed by commercial organisations.* Prosecutors are currently reliant on the often time consuming and often uncertain binary civil-criminal prosecution enforcement system. In the UK, for example, full criminal prosecution of corporates remains difficult<sup>3</sup>. The authorities have, for the most part, been unsuccessful in bringing prosecutions against companies, including after very costly investigations and trials, suffering reputational damage in light of these shortcomings. A criminal indictment, irrespective of conviction, can have catastrophic repercussions for a corporate and its employees, without addressing the cultural failures within the organisation<sup>4</sup>;
  - 1.14.3 *emphasis on the importance of proactive compliance.* An effective approach to compliance, genuine commitment from the top levels of the organisation, and a proactive approach to improving compliance should be key factors in determining that a DPA is an appropriate method of resolution; the absence of effective compliance, or failures to demonstrate improvement, should be a factor in favour of full prosecution;
  - 1.14.4 *resolution of investigations which provides corporates with an incentive to report suspected offences.* Offending entities will have the chance to be a part of the DPA process, working with a prosecutor to tailor a DPA to its case and prosecutors will have the opportunity to not only impose financial penalties on a corporate but also creative conditions for fulfilment, encouraging a change in corporate culture;
  - 1.14.5 *a mechanism for proper reparation of victims which achieves better outcomes than full criminal prosecution or civil proceedings;*
  - 1.14.6 *a basis for the imposition of corporate monitors.* If used sensibly, monitors can provide effective redress by ensuring that corporates comply with DPA conditions;
  - 1.14.7 *a clear factual basis for the imposition of the DPA.* Unless DPAs provide a full accounting of the factual and legal basis for the prosecution, companies will still face uncertainty when determining whether prosecutors consider certain types of conduct to be illegal and the potential sanctions for such conduct.
- 1.16 The implementation of a DPA scheme will push Australia to the forefront of global developments in taking significant steps to investigate, prosecute and remediate issues of corruption and other

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<sup>3</sup> In the UK, due to the "directing will and mind" principle.

<sup>4</sup> The indictment of Arthur Andersen in 2002 contributed to the collapse of the global business:  
<http://www.forbes.com/2002/03/15/0315topnews.html>

economic crimes. It would also send a message to across the Asia-Pacific region which promotes international standards and encourages other nations in the region to make similar advances.

- 1.17 It is acknowledged that a DPA scheme has apparent limitations. In the UK, for example, it has been argued that the Serious Fraud Office (SFO)'s first DPA, agreed with Standard Bank in November 2015<sup>5</sup>, provided a "natural case" for a DPA: limited illegal conduct; swift reporting to the authorities; change of ownership; an opportunity for the bank to negotiate terms within the SFOs publicly stated timetable for a DPA; limited exposure of the corporate to civil claims arising out of the conduct; and confirmation from the US authorities that the settlement was acceptable. In different circumstances, the offer of a DPA may not be so readily offered or accepted.
- 1.18 The scope of what amounts to co-operation for the purposes of a UK DPA, and how the SFO views claims of legal privilege, remains subject to debate. Issues can also arise in connection with how individuals should be dealt with as part of the DPA, and requirements for public companies to make announcements to the markets. An Australian DPA scheme should be underpinned by significant guidance to address these issues.
- 1.19 International regulators and prosecutors are likely to co-operate in the DPA process when cross-border issues arise. This will present challenges for corporates when considering the timing of reports, to whom to report, admissions, and settling penalties. An Australian DPA scheme should examine how it can respond to cross-border settlement issues. In *Standard Bank*, the compensation figure was approved by the government of Tanzania and the disgorgement of profit was taken into account by the SEC when considering its own settlement agreement with Standard Bank. Standard Bank is required, as a condition of the DPA and as directed by the SFO, to co-operate with any agency or authority, domestic or foreign, in all matters relating to the conduct at issue in the DPA. Companies operating in Australia and internationally will need to consider the potential impact in other jurisdictions and seek to co-ordinate its co-operation with regulators globally, including whether they might take advantage of the DOJ pilot programme concerning disclosure, co-operation and remediation benefits in FCPA investigations<sup>6</sup>.
- 1.20 There is (and should be) no guarantee that a self-report will avoid a criminal prosecution. Further, nothing in the UK DPA scheme circumvents the English law evidential requirements for establishing corporate liability. This test has limited the SFO's success in the past, and corporates will still be able to benefit from the protections those requirements afford them. It will be interesting to see whether the addition of a new mechanism will expand the number of potential opportunities for the prosecutors to show their teeth in combatting economic crime; or whether similar numbers of cases will be dealt with, albeit in a greater variety of ways.
- 1.21 The Australian authorities should not dismiss the extent to which civil settlements<sup>7</sup> remain available as a potentially effective mechanism to settle corporate misconduct. A DPA scheme which includes judicial process can be subject to delay, inflexibility and complexity which civil resolution may avoid. The Australian authorities should examine the extent to which civil settlements will be retained and used, subject to greater transparency and enhanced conditions of settlement.
- 1.22 In the UK, the implementation of DPAs came at a time when the SFO leadership was emphasising that its role should be as a prosecutor, rather than, as previously perceived, a quasi-advisor to companies. One view was that DPAs might be inconsistent with this role, since

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<sup>5</sup> SFO press release dated 30 November 2015, with links to the DPA and related judgments:  
<https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>

<sup>6</sup> <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program>

<sup>7</sup> *Cth v CFMEU* [2015] HCA 46 at [57 - 59]

they would permit a company to follow the instructions of prosecutors in order to avoid prosecution. It will be important that the terms of an Australian DPA scheme retain a sufficiently penal quality such that they will satisfy the requirement – both internally and in the public eye – for the Australian authorities to punish criminal behaviour. There will need to be clear messages to prosecutors and commercial entities that it is an alternative but equally forceful enforcement method to criminal prosecution. Whilst DPAs may help to avoid the cost, complexity and length of a full trial, careful implementation and monitoring will be required to provide a scheme which preserves organisations and individuals' reputations.

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

- 2.1 We advocate the application of a DPA scheme to economic crimes, including but not limited to corporate bribery and corruption.
- 2.2 In the UK, DPAs are available in connection with a number of specified offences under a range of legislation<sup>8</sup>. DPAs may also be used in connection with ancillary offences including aiding, abetting, counselling, procuring the commission of the offence, encouraging or assisting crime in relation to the offence, or attempting or conspiring to commit the offence. Significantly, DPAs may be used in connection with offences under the Financial Services and Markets Act 2000, including issuing misleading statements and misleading the UK financial regulator.
- 2.3 In the USA, DPAs can be used in relation to any crimes. The use of DPAs are governed by the standards set forth in the US Attorneys' Manual. Prosecutors are advised to closely consider the collateral consequences of a criminal conviction of a company to determine whether a DPA or NPA may be more appropriate.

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

- 3.1 We believe that as a starting point DPAs should be available for corporates only.
- 3.2 In the UK, DPAs are available only for corporates. The rationale for this position includes:
- 3.2.1 at its most basic, criminal conduct is committed by individuals and not the corporate (which operates through the actions of individuals). As a result, a distinct mechanism by which to sanction corporates is required;
- 3.2.2 "self-reporting" by individuals would contrast with the concept of privilege against self-incrimination which is a fundamental right in criminal proceedings;
- 3.2.3 there may be a perception, at least, that individuals are able to "buy" their way out of misconduct;<sup>9</sup>
- 3.2.4 the concepts of remediation and compliance, and the use of compliance monitors, does not fit to the context of an individual offender;
- 3.2.5 a key aspect of the DPA encourages corporates to assist the authorities in the investigation and prosecution of individuals;

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<sup>8</sup> *Theft Act 1968; Customs and Excise Management Act 1979; Forgery and Counterfeiting Act 1981; Companies Act 1985; Value Added Tax Act 1994; Financial Services and Markets Act 2000; Proceeds of Crime Act 2002 – eg money laundering offences; Companies Act 2006; Fraud Act 2006; Bribery Act 2010 – eg failure to prevent bribery; Money Laundering Regulations 2007 (<http://www.nortonrosefulbright.com/knowledge/publications/134684/a-brave-new-world-key-factors-in-agreeing-a-uk-dpa-and-insight-into-global-settlements>)*

<sup>9</sup> It is acknowledged that the same perception may arise in the context of corporate DPAs.

- 3.2.6 individuals are subject to existing protections in the criminal law system. For example, whistleblowers are afforded statutory protection; current sentencing options provide for some flexibility (for example, fines, conditional discharge, suspended sentences, imprisonment, credit for early guilty pleas) which reflect the conduct of the individual.
- 3.3 In contrast, DPAs can technically be used in the USA for both companies and individuals.
- 3.4 In practice, the DOJ does not regularly use deferred prosecution agreements for individuals. Generally, individuals who co-operate with a government investigation enter into a cooperation agreement pursuant to which they agree to co-operate with the government's investigation and plead guilty to certain criminal offenses in exchange for the DOJ's agreement to request that the judge impose a lesser sentence.
- 3.5 The SEC imposed a DPA on an individual for the first time in 2013<sup>10</sup>, in connection with fraudulent activity. The SEC noted that "*Deferred prosecution agreements (DPAs) encourage individuals and companies to provide the SEC with forthcoming information about misconduct and assist with a subsequent investigation. In return, the SEC refrains from prosecuting cooperators for their own violations if they comply with certain undertakings*". In 2016, the SEC agreed a DPA with an individual in connection with FCPA-related offences.<sup>11</sup>

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

- 4.1 The Consultation Paper recognises that the role of the courts would be a "fundamental issue" for the Australian DPA scheme. We believe that the Australian DPA scheme should include a mechanism for judicial oversight.
- 4.2 The UK, like Australia, has relatively limited experience of corporate enforcement (compared to the US, for example) and limited experience in formal plea bargain-style mechanisms. The authorities in the UK remain in the early stages of developing a regime to facilitate sanctions against corporates in connection with criminal conduct.
- 4.3 In the key English case of *R v Innospec*, [2010] Crim LR 665, in which the SFO sought approval of a 'global settlement' reached in conjunction with the DOJ, prior to the implementation of a DPA framework in the UK, Lord Justice Thomas emphasised the role of the judiciary in sentencing and opined that the SFO "*had no power to enter into the arrangements made and no such arrangements should be made again*". It is against this backdrop that judicial oversight of the UK DPA process has been enshrined.
- 4.4 It is argued that the UK regime provides:
- 4.4.1 close judicial supervision;
  - 4.4.2 independent oversight that the DPA is "in the interests of justice" (and that full prosecution is not more appropriate) and that the proposed terms of the DPA are "*fair, reasonable and proportionate*";
  - 4.4.3 testing that the prosecutors have met the relevant evidential thresholds;
  - 4.4.4 transparency in relation to any application to vary terms;
  - 4.4.5 the right to determine a breach or even terminate a DPA.

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<sup>10</sup> <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540345373>

<sup>11</sup> <https://www.sec.gov/news/pressrelease/2016-29.html>

- 4.5 In contrast, the DOJ has the power to enter into a DPA of its own volition, which only requires judicial approval:
- 4.5.1 in practice, judges rarely interfere in the process and usually approve DPAs with limited intervention;
  - 4.5.2 in some cases, judges have refused to approve a DPA. In February 2015, US District Court Judge Richard Leon rejected a DPA entered into by the DOJ and the Dutch aerospace company Fokker, stating that proposed punishment was not proportionate in light of the egregious misconduct;
  - 4.5.3 in April 2016, the US Court of Appeals for the District of Columbia overruled the decision of Judge Leon, finding that he has “*significantly overstepped*” the court’s authority by rejecting the DPA. The appellate court found that “*authority over criminal charging decisions resides fundamentally with the executive, without the involvement of – and without oversight power in – the judiciary*”.
- 4.6 There are potential downsides to judicial involvement. The prosecutors’ bargaining position may be undermined by a judge’s power to approve the contents of a DPA. As a result, a commercial organisation, willing to enter into a DPA, runs the risk of being prosecuted until such approval is obtained. It may therefore be hesitant to disclose adverse information during the course of the negotiations as a judge may still decide that prosecution rather than a DPA is in the interest of justice. Court involvement in the DPA process, particularly in circumstances in which they are reluctant to approve the terms, may give rise to some delay.
- 4.7 The “interests of justice” test is broad and is yet to be properly defined by judicial commentary. There may be instances where there is a substantial public interest in bringing a criminal prosecution to trial even though a commercial organisation and prosecutor would prefer to enter into a DPA.
- 4.8 If Australia adopts the UK model, we anticipate that once a prosecutor and corporate agree to enter into a DPA, the DPA process and the terms of the agreement will be negotiated during the preliminary hearing, with the judge overseeing the parties’ discussions. It should not be for a judge to assess the merits of the case and/or whether the DPA terms should be weighted in favour of a particular party. The judiciary should focus procedurally on whether the DPA process has been properly followed by the prosecutor and whether the parties have acting reasonably throughout.

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

- 5.1 If corporates are to engage confidently in the DPA process, certainty is essential.
- 5.2 The introduction of DPAs must be supported by a suite of government guidance, codes of practice for prosecutors and guidance in relation to impact of DPAs on overseas proceedings, in relation to issues including:
- 5.2.1 the scope of evidential tests applicable;
  - 5.2.2 factors to be taken into account in the decision to offer a DPA and the weight afforded to each;
  - 5.2.3 what amounts to “co-operation”, including expectations relating to waiver of legal privilege and the company’s ongoing co-operation efforts;
  - 5.2.4 the extent to which information provided to the authorities in relation to DPA proceedings might be disclosed at a later date, including to international regulators;

- 5.2.5 the role of the corporate in relation to the investigation and prosecution of individuals;
- 5.2.6 a matrix for the calculation of fines and penalties, including the benefits of self-disclosure and co-operation.
- 5.3 To a certain extent, certainty will come with application and commentary from prosecutors and the judiciary, as appropriate. Navigating the UK DPA process remains relatively unclear in a number of respects:
- 5.3.1 co-operation and agreement between the prosecutor and the organisation is “fundamental”. It remains to be seen how much room for manoeuvre corporates will enjoy in negotiations in practice. Corporates are under no obligation to enter negotiations or to accept a DPA;
- 5.3.2 the regime rests on the decision of the corporate to “self-report” and co-operate fully with the SFO (subject to the risk for the corporate that following a self-report the SFO may determine that a full prosecution is appropriate and that a DPA will be not be offered);
- 5.3.3 while the accompanying guidance for prosecutors confirms that “the legislation and code for prosecutors does not alter the law on legal professional privilege”, the UK authorities may still seek to obtain a waiver of privilege under the theme of cooperation;
- 5.3.4 there is no additional guidance in relation to the impact of entry into a DPA on proceedings outside of the UK. From the perspective of the regulatory environment in South East Asia, for example, various jurisdictions across the region either do not recognise the concept of corporate criminal liability or have a difficult evidential burden to discharge in seeking to establish such liability.
- 5.4 Certainty in relation to the evidential standards applied in the decision to offer a DPA is critical. In the UK, the first limb of the evidential stage, for example, that there is sufficient evidence to provide a “realistic prospect of conviction” against each suspect on each charge, sets out with certainty the bar which prosecutors must meet in order to enter into a DPA. The second limb of the evidential test provides that if the first limb is not met, it will be sufficient for prosecutors to have “*at least a reasonable suspicion that the commercial organisation has committed the offence and there are reasonable grounds for believing that a continued investigation would provide further evidence within a reasonable period of time so that all of the evidence together would be capable of establishing a realistic prospect of conviction [in accordance with the Full Test Code]*”. While the second limb of the evidential test offers a lower bar to prosecutors, the broad scope of the test may leave the prosecutor’s decision open to challenge, with resulting delays and cost implications. The Full Test Code provides that “*prosecutors should identify and, where possible, seek to rectify evidential weaknesses, but, subject to the Threshold Test, they should swiftly stop cases which do not meet the evidential stage of the Full Code Test and which cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution*”.
- 5.5 There has been a concern in the UK that commercial organisations may be reluctant to enter into negotiations for a DPA on the basis of the second limb. The test affords prosecutors the opportunity to gather sensitive information, and embark on a process which will have serious cost and reputational impact for companies when, evidentially, the prosecutors fall short of the standard required to formally prosecute a company and have not had to determine the strength of their evidence.
- 5.6 While the SFO leadership reaffirmed that DPAs do not offer an easy get-out for companies who should otherwise face criminal proceedings, to the extent that commercial organisations enter into DPAs on the basis of the second limb in order to avoid more serious consequences there may be a public perception, which the Australian authorities should address, that the DPA process is devalued as an easy option for prosecutors.



- 5.7 An Australian DPA scheme should include guidance which explains:
- 5.7.1 the weight of a corporate's decision to self-report to the regulator, such as in circumstances in which the corporate is providing information which is otherwise unknown to the regulator;
  - 5.7.2 the weight afforded to genuine co-operation and remediation<sup>12</sup>; and
  - 5.7.3 the extent to which corporates will be afforded time to investigate properly and effectively allegations or issues which arise before determining whether any reporting is required.
- 5.8 In the UK, prosecutors have regard to a suite of guidance and related codes of practice<sup>13</sup>. To the extent that multiple sources of guidance are available in Australia, in the interests of certainty, commercial organisations will welcome insight on how much weight, if any, will be afforded to the respective guidance.
- 5.9 There should be provision in supporting guidance relating to the protection of legal professional privilege in the DPA process. At consultation stage, the UK government promoted a provision concerning the protection of legal professional privilege but the provisions did not appear in the final guidance<sup>14</sup>. This omission, and the lack of guidance on whether the prosecutor shall seek a waiver of legal privilege in connection with information which allows the prosecution of individuals, may be critical in a company's decision to approach prosecutors with information. To the extent that the DPA framework is intended to encourage corporates to approach regulators when issues arise, the lack of provision in an Australian DPA scheme relating to the protection of legal professional privilege would be a concern.
- 5.10 If the authorities intend that a refusal to provide information on the grounds of legal professional privilege will be deemed to amount to a failure to co-operate with the regulator, with the relevant consequences of such an approach, the Australian government should provide express guidance to confirm the position. Alternatively, if the Australian authorities intend that concepts of privilege, including common interest privilege in the cases of multi-party investigations, will be respected within the DPA process, it should make express provision. The omission of any guidance would be inadequate and does not facilitate collaboration and the reporting of issues by corporates.
- 5.11 To the extent that financial penalties are linked to those which would have been imposed had the corporate pled guilty in a full prosecution, it may be unreasonable to expect companies to agree to a fine on such a basis when the prosecution has not reached an evidential standard required to commence formal criminal proceedings.
- 5.12 Guidelines on sentencing should be comprehensive and provide both prosecutors and commercial entities with clear step by step explanations of the DPA process. The following, amongst other points, could be considered:
- 5.12.1 *prosecutor discretion and the decision making process in assessing the appropriateness of a DPA*: Whether a party should enter into a DPA should be considered on a case by case basis. It would need to be made clear that a DPA is an alternative enforcement mechanism to civil or criminal remedies but that it has the potential to be equally if not more powerful as an enforcement option;

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<sup>12</sup> See by way of example *TPC v CSR Ltd* [1991] ATPR 41-076 at 52,152

<sup>13</sup> In particular the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions, the Bribery Act Guidance and the DPA Code

<sup>14</sup> In contrast to the application of legal professional privilege in a criminal trial, and the UK's Office of Fair Trading concerning the application of privilege in relation to leniency

- 5.12.2 *application of the “interests of justice test” and the DPA process going forward:* A thorough explanation of the tests conducted for assessing the suitability of a DPA is needed. A clear step by step guide to the DPA approval process and clarification of the parameters of the role of corporate monitorships, which monitor compliance with DPA terms, would also be useful;
- 5.12.3 *the international dimension:* A technical review of the impact of a corporate entering into a DPA will also be needed on a case by case basis. Corporates will want to assess the extent to which the admission of confidential information in order to co-operate with the UK DPA process might be used against it in other proceedings or by other regulatory authorities;
- 5.12.4 *impact on group companies:* businesses operating a number of subsidiaries will seek to co-ordinate the application of DPA’s across the group.
- 5.13 A company may be reluctant to come forward and disclose information where there is a risk of waiving legal privilege and uncertainty as to what the receiving body may do with such information. There is a concern that disclosure may alert regulators of certain offences or facts elsewhere, who would not ordinarily have known about them. This may lead to further scrutiny of company actions or prosecutions in different jurisdictions. In order for the DPA process to function effectively, corporates will need to be transparent with prosecutors and the courts. The Australian authorities should consider guidance concerning the sharing of information with international counterparts (at least, above and beyond the existing policies). Companies seek transparency and clarity as to the confidentiality of the information they provide and seek certainty to avoid the risk of further scrutiny and/or prosecution in other jurisdictions (whether overseas regulators knew about the activities of the subject of the DPA, or whether the provision of information in the context of the DPA alerts overseas regulators and prosecutors to opportunities to bring proceedings). Companies operating on a multi-jurisdictional basis will often be negotiating agreements similar to a DPA across a number of countries.
- 5.14 An Australian DPA scheme should be tailored to dovetail with similar regimes overseas, particularly in the United States. Similarly, the mechanism should avoid ‘double-jeopardy’ issues (i.e. the risk that a company will be prosecuted in other jurisdictions in relation to the same conduct or offences provided for under a DPA)

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

- 6.1 While elements of the negotiation process should take place in private, if an Australian DPA scheme is to be creditable approval of the DPA should be made in public and the terms published. As with criminal prosecutions, a corporate may be subject to adverse publicity as a result.
- 6.2 In the UK, the judiciary is engaged early in the DPA process. The court holds a minimum of two hearings; one in private and one in public. During the preliminary private hearing, the judge considers whether a DPA is likely to be in the interests of justice and whether the proposed terms of the agreement are fair, reasonable and proportionate. For the DPA to become effective, however, the court must approve the terms of the agreement in a final, public hearing. Subsequently, the prosecutor publishes on its website the DPA, the Statement of Facts and details of any declarations or refusals to agree terms which were made at both the private and final hearings. In *Standard Bank*, the SFO published the judgment from the private hearing, so companies must be prepared for the details of that hearing to be made public.
- 6.3 The fact that proceedings are finalised in public may raise questions for listed companies who have reporting obligations. The public listing of the final hearing in the case of *Standard Bank* (which occurred three days in advance of the hearing in accordance with usual court practice to name the parties) required the bank to make certain statements to the market.

- 6.4 In the US, DPAs are entered into public court dockets and readily available. In doing so, the prosecutors make clear to other companies and individuals what types of conduct it considers legal violations and how those violations will be punished. In publicly filed documents, companies and individuals who are part of the factual background of the case but are not being prosecuted at that time are generally unnamed in the public document.
- 6.5 An Australian DPA scheme should consider the extent to which individuals will be impacted by publication. Significantly, in the UK the Court may name certain individuals in the agreed Statement of Facts. For example, in *Standard Bank*, the Court held that the Statement of Facts should “*identify those who are named in the proposed indictment, those said to be the recipients of the US \$6 million paid to EGMA [Enterprise Growth Market Advisers Limited] and the head of the corporate team responsible in the Bank, that is to say, the Head of Global Debt Capital Markets, (although, in his case, I emphasise that it is not suggested that there is sufficient evidence to justify his prosecution and nothing I have said should be read as implying the contrary)*”.
- 6.6 We would support:
- 6.5.1 assessment of the suitability and merits of a DPA during a preliminary hearing in private, with the parties in order to decide on whether a DPA would be the best course of action going forward;
  - 6.5.2 DPAs to be negotiated private; and
  - 6.5.3 DPAs and agreed Statements of Facts published when they are in an agreed and final form, with names of individuals and companies who are not being prosecuted kept confidential.

## **7 How should DPA negotiations be structured?**

- 7.1 The UK model provides that a DPA is by “invitation only”. The prosecutor has sole discretion as to whether that discretion will be exercised in favour of offering a DPA. There is no entitlement on behalf of the corporate to request or require the negotiation of a DPA.
- 7.2 The fact of negotiations, and information provided in the context of negotiations, should remain confidential. It should remain open to the corporate to exit negotiations until such time as a DPA is agreed.
- 7.3 Under the UK model, information exchanged in the context of negotiations may be used in the context of subsequent criminal proceedings (if the DPA negotiations are concluded successfully) and in subsequent criminal proceedings against the corporate (if negotiations fail, and unless those materials were produced specifically for the negotiation).
- 7.4 An Australian DPA scheme should consider whether the rigidity of the UK “invitation only” model underpins sufficiently a culture of corporate co-operation. In addition, the scheme should examine whether similar confidentiality safeguards, and exceptions, and the potential privilege issues discussed elsewhere in this paper, including common interest privilege in the context of multi-party investigations, are provided for appropriately.

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

- 8.1 An Australian DPA scheme should set out clearly the factors which will inform prosecutors, the judiciary and corporates in determining whether a DPA is a justifiable method of resolution.
- 8.2 From a UK perspective, the *Standard Bank* case is instructive in clarifying the factors that a court will consider in determining whether a DPA is “in the interests of justice”, including:

- 8.2.1 *severity of conduct*: the Court acknowledged that the criminality concerned failure to prevent, rather than participation in, bribery. It was found that Standard Bank had inadequate compliance procedures and had failed to recognise corruption risks in a transaction at an associated financial institution. Also significant was the SFO's conclusion that there was insufficient evidence to suggest that any of Standard Bank's employees had committed an offence;
- 8.2.2 *responding quickly to issues as they arise*: staff at an associated financial institution of Standard Bank first raised concerns about certain transactions on 26 March 2013. This was escalated immediately to the head office of Standard Bank and within one week, Standard Bank Group began an internal investigation. Between 2 and 17 April 2013, Standard Bank in London was informed and on 17 April, without having carried out its own internal investigation, it instructed an independent law firm to report the matter to the authorities. After reporting, Standard Bank conducted an internal investigation with the direction and consent of the SFO. The Court attached "*considerable weight*" to the fact that Standard Bank immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter;
- 8.2.3 *reporting fully and effectively*: it is not sufficient simply to report to the SFO; companies must be prepared to give full and frank disclosure. Material which would assist the effective investigation and prosecution of individuals should not be withheld. Additionally, the provision of information which the SFO would not otherwise discover is important and the Court gave Standard Bank credit for such disclosure. Further, in Standard Bank, the judge indicated that the weight given to a company's self-report depended on the "*totality of information*" provided. Standard Bank conducted a detailed internal investigation that had been sanctioned by the SFO and reported its findings. The Statement of Facts published alongside the judgment was "*substantially reliant*" upon information provided voluntarily by Standard Bank;
- 8.2.4 *engaging in full and continuing co-operation*: the judgment in *Standard Bank* indicates that companies should be prepared to identify relevant witnesses, disclose witness accounts and any documents shown to them and that witnesses should be made available for interview when requested. The SFO expects companies to continue to co-operate with the UK and international authorities and to disclose information and material accordingly. Standard Bank provided the SFO with a summary of first account interviews, facilitated interviews of current employees, provided timely and complete responses to requests for information and access to its document review platform. Standard Bank also agreed to co-operate with the SFO and any other bodies (domestic or foreign) in all further matters relating to the conduct at issue in the DPA. In particular, Standard Bank agreed to disclose all information and material in its possession, custody or control, "*which is not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure, in respect of its activities and those of its present and former directors, employees, agents, consultants, contractors and sub-contractors, concerning all matters relating to the conduct at issue in the present DPA*". Following the DPA, SFO leadership have reinforced their messaging on co-operation, and in particular in relation to their expectations concerning privilege. For example, in March 2016<sup>15</sup> Alun Milford, General Counsel at the SFO, indicated that the SFO seeks genuine co-operation for the duration of an investigation. The SFO will view as uncooperative "false or exaggerated claims of privilege"; "well made-out" assertions of privilege will be respected; but the SFO will "view as a significant mark of co-operation a company's decision to structure its investigation in such a way as not to attract privilege claims over interviews of witnesses";

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<sup>15</sup> <https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/>

- 8.2.5 *previous conduct, convictions and enforcement history*: a history of similar conduct involving criminal, civil and regulatory enforcement actions (including how well a company responded to such action), will be a significant factor in determining whether a DPA is appropriate, according to the *Standard Bank* judgment. The Court noted that Standard Bank had no previous convictions for bribery and corruption, nor had it been the subject of any criminal investigations by the SFO. While the Financial Conduct Authority (then, the Financial Services Authority) had taken enforcement action against Standard Bank in 2011 in respect of inadequate anti-money laundering procedures, the SFO stated that Standard Bank had made “*significant enhancements*” to its compliance programme since then. An independent report highlighted that Standard Bank had taken extensive steps to improve recruitment, risk classification and due diligence on customers, and there was a very clear “*tone from the top*” to remediate the pre-existing failures. Standard Bank agreed to review its anti-corruption policies, procedures and training. Although there are similarities to the failures in compliance discovered by the previous regulatory action, the Court held that they related to different processes and were not connected.
- 8.2.6 *changes in structure and governance*: Although “*by no means a necessary requirement for a DPA*”, it weighed in Standard Bank’s favour that it is now an “*effectively different entity from that which committed the offence*”. ICBC had purchased a majority shareholding in Standard Bank and appointed a new board in February 2015.
- 8.3 Further factors which may also be considered include:
- 8.3.1 *strengths of and improvements to the compliance programme*: factors in favour of prosecution should include the absence of a corporate compliance programme, an ineffective corporate compliance programme and failure to demonstrate a significant improvement in a compliance programme since the time of the offending. In *Standard Bank* the defendant agreed to review its anti-bribery and corruption policies, procedures and training. At its own expense, Standard Bank agreed to engage an independent specialist to report on their findings and, where appropriate, advise and make recommendations which should be implemented;
- 8.3.2 *collateral consequences*, including any disproportionate harm caused to shareholders, pension holders and employees who are not proven personally culpable and the impact on the public arising from the prosecution, the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance, and the adequacy of remedies such as civil or regulatory enforcement actions;
- 8.3.3 *multi-jurisdictional impact*: companies operating in a multi-jurisdictional basis are often faced with regulatory and/or criminal proceedings in more than one country. In determining whether a DPA is appropriate, prosecutors should consider whether the company is negotiating or has agreed similar agreements in other jurisdictions;
- 8.3.4 *proportionality*: a judge will need to assess whether a fine proposed by a prosecutor and an offending company, is proportionate to the offence committed and whether it would compromise the financial integrity of the entity;
- 8.3.5 *company solvency*: the company’s ability to comply effectively with the terms of a DPA, including any financial penalty, should be a factor taken into account in considering whether a DPA is appropriate;
- 8.3.6 *corporate and senior management conduct*: prosecutors should take into account the record of a company’s individual directors or majority shareholders, in addition to the conduct of the company;

- 8.3.7 *a company's previous experience of DPAs*: if relevant, account should be taken of a corporate's record of compliance with previous settlements when considering whether a DPA will be appropriate for a subsequent matter which arises;
- 8.3.8 *group company impact*: clarification as to whether a prosecutor would be able to enter into one DPA with a group of companies or whether stand-alone agreements would be more appropriate is needed.
- 8.3.9 *the reasons why an offending company is keen to complete a DPA*. The scheme should not be relied on as a way to (i) avoid criminal prosecution and the adverse publicity that may accompany it and (ii) gain a quick result, with no acknowledgment of the severity of a crime committed.
- 8.4 Pursuant to the US Attorneys' Manual, in addition to the standard factors to consider when prosecuting a case (the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches), prosecutors are advised to consider additional factors when investigating and prosecuting individuals:
- 8.4.1 the nature and seriousness of the offence, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- 8.4.2 the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- 8.4.3 the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- 8.4.4 the corporation's willingness to co-operate in the investigation of its agents;
- 8.4.5 the existence and effectiveness of the corporation's pre-existing compliance programme;
- 8.4.6 the corporation's timely and voluntary disclosure of wrongdoing;
- 8.4.7 the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to co-operate with the relevant government agencies;
- 8.4.8 collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (this particular favour is emphasised in the determination of whether a DPA or NPA may be more appropriate than a criminal conviction);
- 8.4.9 the adequacy of remedies such as civil or regulatory enforcement actions; and
- 8.4.10 the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

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

- 9.1 As set out in detail in question 5 above, the extent to which materials disclosed to prosecutors in the context of negotiating a DPA can be critical in determining the corporate's approach.

- 9.2 Admissions in DPAs should be admitted as evidence in civil proceedings if required. A DPA is to sit alongside the civil and criminal enforcement measures already in use by prosecutors. It will be important for a civil court to indicate the weight to be attached to such evidence, the circumstances of the evidence and that it may not make up a complete picture of the facts as hearsay evidence.
- 9.3 Guidance should clarify the extent to which materials disclosed may be made available to regulators outside of Australia.

## **10 What facts and terms should DPAs contain?**

- 10.1 Terms should set out clearly the measures with which the business must comply, be proportionate to the offence and tailored to the specific facts of the case and specify the end date.
- 10.2 There is relative consistency between the US and UK in relation to terms imposed under a DPA, including:
- 10.2.1 payment to the prosecutor a financial penalty, including an explanation for the calculation of such a penalty;
  - 10.2.2 compensation to victims of the alleged offence;
  - 10.2.3 donation of money to a charity or other third party;
  - 10.2.4 disgorgement of profits made from the alleged offence;
  - 10.2.5 implementation of a compliance programme or make changes to an existing compliance programme relating to policies or to the training of employees or both;
  - 10.2.6 co-operation in any investigation related to the alleged offence, both domestically and internationally, and in connection with the prosecution of individuals;
  - 10.2.7 pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA;
  - 10.2.8 prohibiting the organisation from engaging in certain activities;
  - 10.2.9 compliance with financial reporting obligations;
  - 10.2.10 co-operation with sector wide investigations; and
  - 10.2.11 imposition of a monitor, if appropriate.
- 10.3 No “standard” duration of a DPA has been established. Its duration will need to be sufficient to be capable of permitting compliance with other terms such as financial penalties paid in instalments, monitoring, co-operation with investigations, and trials of individuals. In the USA, the majority of recent DPAs are three years in duration.
- 10.4 As stated above, and to the extent not already available, the computation of financial penalties under an Australian DPA scheme must be supported by detailed sentencing guidance which provides a mechanism for the exacting of retribution on corporates found guilty of financial crime and to reinforce the deterrent effect. In this context, the Australian government should examine whether the existing guidelines:
- 10.4.1 support the prospect of large fines being levied on corporates, including in cases of low-level but pervasive conduct, to reflect both corporate culpability and harm caused;
  - 10.4.2 set out clear factors in determining levels of culpability and harm;

- 10.4.3 remove profit gained by corporates from criminal conduct and to impose a penalty of real economic impact on the offender and its shareholders;
- 10.4.4 provide an opportunity to peg fines to revenues gained, including internationally;
- 10.4.5 reflect the level of fines imposed on corporates internationally, including an assessment of fines to be paid to overseas regulators in respect of the same or similar conduct<sup>16</sup>
- 10.4.6 offer discounts in exchange for the provision of assistance to the prosecutors, subject to the comments above concerning the protection of legal privilege;
- 10.4.7 provide an incentive to corporates to engage in the DPA process (whether by reference to fines which would have been imposed if the party had entered a guilty plea, as in the UK, or otherwise); and
- 10.4.8 provide a mechanism for confiscation and compensation orders.
- 10.5 The requirements of judicial oversight and approval of a UK DPA, provide less flexibility for the SFO to determine fines and related sanctions. The overall framework for the imposition of fines is less mathematical than in the US, meaning that it is more difficult to assign value to certain types of conduct, including the financial benefits of co-operation. That said, over time and with further examples of enforcement involving corporates there may be greater clarity concerning computation of corporate fines in the UK.
- 10.6 In the *Standard Bank* case the penalties levied comprised a fine of US\$16.8m; a compensation payment of US\$6 million plus interest of over US\$1 million (to be paid to the government of Tanzania); US\$8.4m in disgorgement of profits; and a payment of costs incurred by the SFO (£330,000). In deciding on these penalties, the Court examined:
- 10.6.1 *compensation and disgorgement*: the loss suffered by the government of Tanzania was deemed to be the necessary starting point for compensation and the Court held that disgorgement of profit arising out of the conduct was a “*legitimate requirement*” of a DPA. The SFO and Standard Bank agreed in this case that the full amount of the fee received would be disgorged rather than the profit on the deal;
- 10.6.2 *culpability*: the Court stated that the “*significant albeit not intentional*” role that Standard Bank played in the conduct suggested medium culpability. It was significant that there was no evidence that executives or employees of Standard Bank intended or knew of an intention to bribe;
- 10.6.2 *regulatory co-operation*: the judge noted the finding in *Innospec* that there should be “*a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state.*” In this case, the SFO consulted with the DOJ and the SEC<sup>17</sup>. The DOJ “*confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the United States*”;
- 10.6.3 *aggravating and mitigating factors*: Standard Bank’s enforcement history was an aggravating factor and the underlying conduct by the associated financial institution resulted in “*substantial harm to the public*”. In mitigation, the Court accepted that Standard Bank (a company without previous convictions) volunteered to self-report

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<sup>16</sup> In *R v Innospec Ltd*, Thomas LJ commented: ‘there is every reason for states to adopt a uniform approach to financial penalties for corruption of foreign government officials...I approach sentencing on the basis that a fine comparable to that imposed in the US would have been the starting point.’

<sup>17</sup> The SEC settlement in *Standard Bank* is not an FCPA settlement (since Standard Bank is not a US issuer), but rather the SEC’s jurisdiction results from the fact that Standard Bank issued bonds and disclosures to investors were subject to SEC regulation.



promptly and both facilitated and fully co-operated with the investigation which the SFO conducted. The changes in ownership and governance, together with no further indication of bribery risk in Standard Bank, were also mitigating factors;

- 10.6.4 *reduction*: significant discount is available where a corporate reports its own conduct and co-operates fully. In light of those mitigating factors, the Court held that a reduction of one third (equal to the reduction for an early guilty plea) was justified and appropriate.

## 11 How should funds raised through DPAs be used?

- 11.1 Fines imposed in the context of settlements with corporates may provide a significant source of revenue for government agencies. The US and UK authorities have raised hundreds of millions of dollars in fines over recent years.
- 11.2 As discussed in question 10 above, compensation and disgorgement should also form a key element of the financial penalties in order to ensure proper remediation for victims, which is critical from a public perception perspective.
- 11.3 In the UK, the SFO has been subject to constraints on its budget; press reports indicate that the SFO has made several requests for additional funding to support significant corporate investigations.<sup>18</sup> Consequently, the fines imposed by the SFO, including under DPAs, which are provided to HM Treasury, will strengthen the SFO's calls for investment including additional financial support.
- 11.4 Fully-supported enforcement agencies are a key element of the matrix alongside enhanced legislation and enforcement mechanisms. Funds raised through DPAs may provide a useful boost to resources for the enhancement of the Australian authorities' efforts to effectively investigate and prosecute corporate misconduct.

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

- 12.1 There should be some latitude to the parties in relation to the consequences of a breach of the terms of a DPA. A breach should not automatically lead to termination of the DPA and ensuing criminal prosecution, but rather there should be a mechanism to rectify a breach and vary the terms of the DPA. In the case of material breaches, the court (using the UK model) should have the power to terminate a DPA.
- 12.2 An Australian DPA scheme should include guidance concerning the mechanism for dealing with breaches, termination of the DPA, and post-termination proceedings.
- 12.3 In the UK, the guidance provides that "where possible" the prosecutor should ask the corporate to rectify the alleged breach immediately. In cases of minor breaches, it may be possible for a solution to be reached efficiently in this way, without the need for an application to the court. However, there is a requirement that details of a breach are published and that the court is informed of such developments.
- 12.4 If a solution cannot be reached, the prosecutor may make an application to the court. The question of whether there has or has not been a breach is determined by reference to the balance of probabilities.
- 12.5 If the court finds that a corporate is in breach of a term of the DPA it may invite the parties to agree a suitable proposed remedy. If agreement can be reached, that proposed remedy must then be presented to the court by way of an application. The court will approve the variation only if that variation is in the interests of justice and the terms of the DPA as varied are fair,

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<sup>18</sup> For example: SFO plea for extra £21m raises interference concerns (FT, 7 January 2016)  
<http://www.ft.com/cms/s/0/d85e0e04-b533-11e5-b147-e5e5bba42e51.html#axzz45bYRxoqF>

reasonable and proportionate. It is anticipated that this mechanism should generally be used to rectify relatively minor breaches of a DPA where the parties have been unable to agree a remedy without the involvement of the court.

- 12.6 Where the alleged breach is more material or the parties are unable to agree a suitable remedy or the court does not approve a proposed remedy, the court may order that the DPA be terminated.
- 12.7 Where a DPA has been terminated, the corporate will not be entitled to the return of any funds paid under the DPA prior to its termination, or to any other relief for detriment arising from its compliance with the DPA up to that point (for example the costs of a monitoring programme).
- 12.8 The terms of the DPA might reflect the approach of the prosecutor to breaches of the DPA. For example, the DPA in *Standard Bank* failure to pay the compensation payment is expressly in breach of the DPA, but “*At the sole discretion of the SFO late payment of the SFO's costs by up to 30 days will not constitute a breach of this agreement but will be subject to interest at the prevailing rate applicable to judgement debts in the High Court*”.

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

- 13.1 We believe that the creation of a statutory basis on which to impose a corporate monitor<sup>19</sup> on companies subject to a DPA will be an essential feature in ensuring effective remediation and compliance with the terms of a DPA.
- 13.2 A corporate monitor should not be a *compulsory* element of a DPA scheme.
- 13.3 The imposition of a monitor should be supported by guidance on the scope of a monitor’s role and its interaction with the parties, in particular:
- 13.3.1 the negotiation and approval process;
  - 13.3.2 a mechanism to make sure that the costs of the monitor are subject to reasonableness and proportionality tests;
  - 13.3.3 ensuring independence of the monitor;
  - 13.3.4 the primary responsibilities of the monitor, including ensuring that they are no broader than necessary to address and reduce the risk of recurrence of misconduct;
  - 13.3.5 the terms and duration of his or her appointment, tailored to the problems found to exist and the types of remedial measure needed;
  - 13.3.6 the focus and workplans of the monitor; and
  - 13.3.7 a mechanism for the reporting of undisclosed misconduct, at the discretion of the monitor.
- 13.4 The community of “monitors” in the UK and elsewhere with experience of overseeing significant corporate monitorships remains small. It should be recognised that an Australian regime would face a similar issue.

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<sup>19</sup> We have significant experience of monitorships: Sam Eastwood, partner and head of our Business Ethics and Anti-Corruption practice (based in London) was appointed independent compliance *monitor* for Macmillan Publishers in relation to enforcement by the World Bank

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

- 14.1 A DPA scheme, whether based on the UK or other model, is not a panacea, but a valuable addition to the enforcement toolkit available to regulators and prosecutors.
- 14.2 In addition to detailed guidance which provides corporates with the confidence to enter the process, the effectiveness of a DPA scheme will require support for properly funded authorities (who are willing and able to bring full prosecutions where needed), an experienced and well-informed judiciary open to this form of alternative prosecution, and a flexible framework for sentencing which reinforces the message that a DPA is not a soft option but one which reflects the co-operative nature of the process.

**Norton Rose Fulbright  
2 May 2016**