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

Submission by Professor Simon Bronitt, The University of Queensland

Q1: Would a DPA scheme be a useful tool for Commonwealth agencies?
Yes. The benefits are set out in Chapter 1 attached.

Q2: In relation to which offences should a Commonwealth DPA scheme be available?
Thus far DPA have been used for corporate crime. The system can be extended, with good justification, to a range of non-commercial crime, see for example, exploration of DPAs to deal with Institutional Child Sexual Abuse offences, Chapter 2.

Q3: Should DPAs be available for companies only, or for both companies and individuals?
DPAs should be widely available to legal organisations. They are not needed for individuals, who may be regulated using range of ordinary options available prosecutors/regulators.

Q4: To what extent should the courts be involved in an Australian DPA scheme?
Judicial officer oversight is valuable, but raises constitutional issues relating to 'Ch III', see Chapter 2. This would need to be addressed using retired judges, or through the usual 'fictions' of characterising these powers as administrative rather than judicial.

Q5: What measures could enhance certainty for companies invited to enter into a DPA?
DPAs are NOT immunity agreements, and hence the degree of certainty or 'comfort' that corporations may wish to obtain from DPA agreements cannot be offered. Provided that corporations 'mend their ways', the threat of prosecution will not materialise. If they don't make amends, however, they may well be prosecuted. The benefits of entering into the DPA nevertheless outweigh potential disadvantages. In fairness to the corporations, non-contradiction clauses or agreed statements of fact should be treated as provisional; for the reasons pointed out in Chapter 1, evidence may emerge in the future which should allow the corporation to revise the factual basis upon which it settled the matter for the purposes of the DPA.

Q6: Should a DPA be made public? If so, are there any circumstances where a DPA should not be published, or its publication postponed?
Yes – transparency is vital, discussed in both Chapters.

Q7: How should DPA negotiations be structured?
The negotiation should not be simply a bi-party process between the prosecutor/regulator and putative offender – other affected parties, such as victims, affected groups and relevant NGOs, should be able to sit at the negotiation table in order make submissions to both parties on appropriate public interest considerations. The process of independent 'judicial' oversight will enable these broader public interests to be addressed. The importance of underscoring the restorative and restitutionary/compensation/rehabilitative aspects of the DPA are vital in this regard – see Chapter 1.

Q8: What factors should be considered in agreeing a proposed settlement?
I believe that the DPA scheme should not be muddled with the 'civil penalties' scheme. In the absence of a guilty plea or conviction, the imposition of sums paid to the state or others equivalent to the relevant penalties under the criminal law is problematic - see Chapter 1. Conflating (quasi)retributive and restorative purposes of the DPA should be avoided, and in my submission, I would prioritise the latter over the former goals for the reasons outlined in Chapter 1.

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

Yes. The counter argument is based on drawing a false analogy with private law settlements. The public interest underscoring the discretion to stay the prosecution changes the nature of the process of 'bargaining' and 'settlement'. In the event that there is a breach of the DPA, and prosecution follows, all evidence adduced by both sides during those negotiations should be admissible.

Q10: What facts and terms should DPAs contain?

A list of model terms and conditions is fine, but any terms included must be necessary, adapted for the purpose, proportionate to that purpose, and reasonable in the circumstances. In every case, parties should be enjoined by the legislation to give due consideration to compensation, and future investment in improving compliance and institute periodic monitoring to avoid future breaches.

Q11: How should funds raised through DPAs be used?

They should NOT be used to fund either the costs of law enforcement or prosecution – to do so, promotes the idea that deferring prosecution is a commodity from which the enforcement community can directly 'profit', as well as generating negative perceptions of, and undue pressures upon, the integrity of public officials – see Chapter 2. The funds should be used for other purposes, for example to established schemes to assist victims of corporate crime and support relevant research projects.

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

Once the relevant decision-maker has determined there is a breach of the DPA, the stay automatically discharges. Prosecution however should NOT be mandatory, but rather left as a matter for the DPP applying the usual public interest tests.

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

Independent monitors should not be required. However Annual Reporting requirements to Parliament on the use of the DPA should be required.

Q14: Do you have any other comments in relation to a potential Commonwealth DPA scheme?

My main criticism of the current DPA schemes in the UK and US, which underlie both Chapters, is the lack of a coherent rationale that guides when DPA should be used and for what purpose. It is vital that the DPA *legislative* scheme contains clear stated purposes, which in my submission, should prioritise future behaviour change and restorative goals over pragmatic or quasi-punitive considerations.