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

The Unit is supportive of a DPA scheme being established in Australia, with safeguards agsinst it being a mechanism for individuals to escape prosecution for serious offences. A DPA scheme should not allow those who have planned, designed and ordered serious criminal activity to be carried out to be able to escape prosecution. In the Unit's view, it is only acceptable for an individual to escape prosecution through a DPA if they went along with the criminal activity at the instruction of others and fully assist authorities in the prosecution of those responsible for ordering the criminal activity. The Unit is concerned that in Australia there is already a strong culture of only prosecutuing corporations for criminal activities, resulting in fines, while the indivduals within the corporation that designed and orchestrated the criminal activity escape prosecution. The Unit would not wish to see a DPA add to that culture. In the US in about two thirds of DPAs, the company was punished but no employees have been prosecuted.[1]

The Unit is concerned that if a DPA scheme is implemented that allows individuals to escape criminal liability, it may actually encourage an increase in corporate crime as individual offenders may peercieve a reduced risk of suffering penalty as the DPA scheme will offer an escape hatch.

The Unit is also concerned that DPAs do not become the dominant form of judicial action for the crime types that such a scheme may cover, because it becomes an easier path for the Commonwealth Director of Public Prosecutions than seeking conviction in the courts. In the US experience, between the end of 2004 and the end of 2014 there had been 84 crminal enforcement actions against corporations under the *Foreign Corrupt Practices Act* (FCPA), of which 70 (approximately 85%) involved a DPA or Non-Prosecution Agreement.[2]

However against this, data from the US shows that in FCPA cases from 2004-2014 there were 42 prosecutions of individuals involved in corporate FCPA cases[3], while the in preceeding decade 1993 – 2003 there were only 7 prosecutions of individuals and in the period 1982 – 1992 there were 21 prosecutions of individuals.[4] This is suggestive that the US DPA scheme has had a positive impact on allowing individuals to be prosecuted for FCPA offences.

The Unit is disappointed that the Commonwealth is moving ahead with consideration of a DPA scheme before attempting to put in place whistleblower protection legislation in the private sector. Such legislation is likely to increase detection of serious criminal activity within corporations, by having insiders come forward.

The Unit notes the extensive critique of DPAs in the US. Past academic review of the use of DPAs in the US has concluded that DPAs, on the whole, have been ineffective, finding that many of them obscure who was personally responsible for the company's misconduct and fail to achieve meaningful structural or ethical reform within the company.

For instance, Pfizer Inc., the huge pharmaceutical company, entered into a DPA in 2002 due to one of its subsidiaries paying large bribes to a managed care company to give preferred status to one of its drugs. Pfizer was required to implement a compliance mechanism that would uncover

[1] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

[2] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 521, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[3] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), pp. 531-538, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[4] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), pp. 539-541, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

illegal marketing activities and bring them to the attention of its board. Two years later, however, the company was again facing prosecution for similar illegal marketing activities that had continued at the same subsidiary. Pfizer then entered into a second DPA but by 2007 further criminal marketing activities by another subsidiary led to yet another DPA. In all these instances not one person was prosecuted.[5]

Despite three DPAs, in 2009 Pfizer, the parent company, was found to be engaging in the same illegal marketing activities and was permitted to enter a fourth DPA, being required to pay US$2.3 billion in penalties, the largest criminal fine ever imposed up until then but most likely a small fraction of the profits derived from its long-term criminal activity. Again, no individuals were charged.[6]

In 2008 the Aibel Group Limited pleaded guilty to violating the US *Foreign Corrupt Practices Act* anti-bribery provisions and "admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct."[7] The US Department of Justice media release stated "This is the third time since July 2004 that entities affiliated with the Aibel Group have pleaded guilty to violating the FCPA."[8]

Similarly, in 2012 Marubeni Corp resolved a US 54.6 million FCPA enforcement action through a DPA concerning alleged improper conduct in Nigeria. In 2014, the company resolved another FCPA enforcement action – an US$88 million action concerning alleged improper conduct in Indonesia.[9]

The US Government Accountability Office rasied concerns that the US Department of Justice has been unable to assess the impact of its DPA scheme:[10]

> *DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs – in addition to other tools, such as prosecution – contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met.*

However, reviews of US DPAs have often stopped short of recommending their abolition, believing the best option is to improve their efficacy, including greater judicial oversight, greater use of court-appointed monitors and greater attention to breaches of the agreements.[11]

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[5] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

[6] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

[7] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 514, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[8] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 514, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[9] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 514, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[10] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 513, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[11] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

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

An Australian DPA scheme should be limited to crimes in which it has been shown to be very difficult to detect the crime without the assistance of an insider.These would include bribery, fraud and money laundering, as in these crimes the parties to crime are often the ones that have the evidence the crime took place.

The Unit would strongly oppose a DPA being used in Australia in the same way the US authorities used a DPA with General Motors. General Motors was allegedly involved in a long-term cover-up of ignition switch problems in its vehicles which resulted in at least 124 deaths and 275 injuries. The US Department of Justice's DPA in this case included fining General Motors US$900 million, which amounted to less than one percent of the company's annual revenue, and the DPA held no individual accountable. The DPA suspended criminal charges against General Motors, with the charges to be dismissed if the company complied with the agreement.[12]

Q3: Should DPAs be available to companies only, or for both companies and individuals?

The Unit supports DPAs being available to both companies and individuals, but only where the individuals that are the architects and in charge of the criminal acivity do not escape prosecution.

The Unit notes that the US Department of Justice has issued instructions to its prosecutors to pull back from DPAs that grant immunity from prosecution for individuals, which should be a note of caution in the design of an Australian DPA scheme. The US Department of Justice's Yates Memo (issued by Sally Yates, US Deputy Attorney General on 9 September 2015) emphasised the importance of holding individuals to account for corporate criminal activity they are involved with. It stated:

> *One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system….*
>
> *The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.*
>
> *The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay….*

[12] Office of Senator Elizabeth Warren, 'Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy', United States Senate, January 2016 (https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf)

1. ***To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.***

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 el seq. Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process - before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.
Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. ***Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.***

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals,

we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well….

4. ***Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.***

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability clue to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

Also, a DPA should only be available where the corporation has alerted authorities to the criminal activities. If the criminal behaviour was discovered by the action of law enforcement officials or from a whistleblower, prosecution should be pursued wherever feasible. This would encourage corporations to be more willing to seek a DPA when they detect criminal behaviour within their own organisation, before it is detected by law enforcement.

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

The Unit supports a DPA scheme following the UK model in relation to judicial oversight. The U4 Anti-Corruption Resource Centre have pointed out that while trials are usually public, settlements and other related procedures have varying degrees of publicity. For settlements, factors influencing the degree of transparency include whether the hearing is public, whether victims and other affected parties are informed that the settlement is taking place and are made aware of its outcome, as well as whether and at what stage of the process any relevant documents are made public.[13] They raise the concern that in general, cases that settle tend to be less transparent than cases that proceed to full trial, in terms of both the agreements or decisions released and amount of proceedings open to the public. This arguably makes it harder for the home government of the public official who has been bribed to gain access to relevant facts of the settlement and thus to rely on that information for a domestic investigation; it also reduces the potential deterrent effect of foreign bribery laws.[14]

The Unit believes it is important that a DPA scheme allows victims of the criminal activity know that a DPA is being negotiated. Those impacted by the crime should have some ability to have their views considered. For example, where an Australian company has paid a bribe overseas to win a contract under favourable terms to the company, the foreign government should be able to submit a statement of the cost of the crime and this should be taken into consideration in the DPA with the company. For example, it should influence the penalty imposed on the company

[13] Francesco De Simone and Bruce Zagaris, 'Impact of foreign bribery legislation on developing countries and the role of donor agencies', U4 Anti-Corruption Resource Centre, September 2014, p. 18.
[14] Francesco De Simone and Bruce Zagaris, 'Impact of foreign bribery legislation on developing countries and the role of donor agencies', U4 Anti-Corruption Resource Centre, September 2014, p. 18.

and hopefully set the level of reparations that the company is required to pay to the foreign government.

The Unit notes that the 2009 evaluation of DPAs by the US Government Accountability Office concluded that in the US judicial scrutiny of DPAs was essentially non-existent.[15] The GAO found that judges routinely "rubber-stamped" DPAs without inquiring into whether factual evidence existed to support the essential elements of the crime alleged or to determine whether valid and legitimate defences are relevant to the alleged conduct.[16] The Unit believes this would be a highly undesirable outcome for an Australian DPA scheme.

In July 2013, Judge John Gleeson in the Eastern District of New York approved a record-breaking $1.92 billion DPA between the DOJ and global bank HSBC for money laundering and associated activities. However, he stated that the court's role was "highly circumscribed"[17] and that it should be stronger in order to ensure that the agreement does not "transgress…the bounds of lawfulness or propriety."[18]

Even where judges in the US have had concerns about DPAs they have sometimes been compelled to accept them. For example, Judge Jed Rakoff in 2011 rejected a proposed US$285 million civil settlement agreement between the SEC and Citigroup, finding that "he could not adequately assess whether the agreement was in the public's interest since it allowed Citigroup to neither admit nor deny violating the law and, therefore, lacked any factual admission."[19] Unlike Judge Rakoff, the SEC Enforcement Division was happy with the settlement, even though Citigroup's debt caused more than US$700 million of investor losses of which the US$285 million did not constitute full reparation. Rakoff's decision was appealed and he was later forced accept the agreement.[20]

Further, based on the first DPA around the foreign bribery case involving Standard Bank in the UK, the Unit is concerned that judicial oversight will not necessarily prevent those who have orchestrated and ordered the criminal activity to escape prosection and individual responsibility. The DPA relates to charges, now suspended, alleged that Standard Bank failed to prevent its Tanzanian subsidiary, Stanbic Tanzania, and its top executives from paying bribes to senior government officials to secure the Tanzanian Government's mandate to raise US$600 million of sovereign debt financing in the form of a bond.[21] The alleged bribes consisted of a US$6 million fee paid by Stanbic to a local agent, Enterprise Growth Market Advisors (EGMA) Ltd, paid out of international investors' money raised by Standard Bank for the Tanzanian Government.[22] EGMA, according to the agreed facts, provided no real services in return for its US$6 million fee. Its

[15] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 505, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[16] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 506, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[17] Elkan Abramowitz and Jonathan Sack, 'White-Collar Crime: Courts Push Back Against Government Deals with Companies', *New York Law Journal,* Volume 250-No. 89, 5 November 2013 http://www.lexology.com/library/detail.aspx?g=111c71fd-5557-4f9c-9fdd-0c0d064e79b2

[18] Elkan Abramowitz and Jonathan Sack, 'White-Collar Crime: Courts Push Back Against Government Deals with Companies', *New York Law Journal,* Volume 250-No. 89, 5 November 2013 http://www.lexology.com/library/detail.aspx?g=111c71fd-5557-4f9c-9fdd-0c0d064e79b2

[19] Elkan Abramowitz and Jonathan Sack, 'White-Collar Crime: Courts Push Back Against Government Deals with Companies', *New York Law Journal,* Volume 250-No. 89, 5 November 2013 http://www.lexology.com/library/detail.aspx?g=111c71fd-5557-4f9c-9fdd-0c0d064e79b2

[20] Elkan Abramowitz and Jonathan Sack, 'White-Collar Crime: Courts Push Back Against Government Deals with Companies', *New York Law Journal,* Volume 250-No. 89, 5 November 2013 http://www.lexology.com/library/detail.aspx?g=111c71fd-5557-4f9c-9fdd-0c0d064e79b2

[21] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 3.

[22] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 3.

chairman at the time, Harry Kitilya, was Commissioner of the Tanzania Revenue Authority, which was responsible for advising the government on financing needs.[23] A key factor behind Standard's eligibility for a DPA was the fact it self-reported the alleged misconduct within days of being alerted by Stanbic Tanzania employees and cooperated with the UK Serious Fraud Office.

Non-government organisation Corruption Watch offered an assessment of the DPA.[24] The case highlights the cautions that need to be addressed if the Australian Government agrees to allow for DPAs in foreign bribery cases.

On the positive side it acknowledged the DPA in this case ensured there would be no immunity from prosecution clauses for conduct that has not been disclosed and provision of extensive detail of the alleged criminal activity in a 55 page Statement of Facts admitted by Standard Bank. The Statement of Facts identified either by name or role key players in the alleged criminal conduct. The UK Serious Fraud Office did approach the Tanzanian Government anti-corruption body, the Prevention of Crime and Corruption Bureau to check whether it had any objections to the Serious Fraud Office going ahead with resolving the investigation into Standard Bank with a DPA before the final approval. The DPA includes a 'muzzle clause', which prevents those charged in the DPA with contradicting the narrative of facts in public.[25]

On the negative side Corruption Watch reported the DPA set some worryingly low standards in other key areas, namely:

- Lack of individual accountability – no single individual in the UK was held to account either by Standard Bank or the UK Serious Fraud Office (SFO) for their failure to prevent the alleged bribery. It was noted by Corruption Watch that there was a high level of control and approval by UK individuals for the transaction. These individuals still operate at senior levels within the financial industry.[26] The team at the Standard Bank PLC in the UK drew up the collaboration agreement with the local agent, supposedly because the local Tanzanian team did not have the capacity or knowledge to do so. The team appears to have deliberately avoided giving any detail about the role of the agent to the compliance team within Standard Bank UK, to the Mandate Approval Committee.[27] Staff in Standard Bank UK also helped draft the Mandate and Fee letters for the transaction. The Mandate letter was specifically drafted to avoid any mention of a partner or third party, while the Fee letter specified that the Government of Tanzania would pay Standard Bank, Stanbic and a 'local partner' a fee of 2.4% without naming who the local partner was.[28]

  In the view of Corruption Watch:[29]

  > *This particular DPA appears to set a precedent that UK employees can approve and draw up agency agreements on behalf of foreign subsidiaries, conduct no due diligence on those agreements, conceal the use of agents from a compliance function and institutional investors, and face no individual penalty. It is questionable whether such a precedent will act as a genuine deterrent to individuals not to engage in high risk behaviour with regards to foreign bribery. It also suggests that the Bribery Act in practice may be significantly weaker in its application than the US Foreign Corrupt Practices Act. Under the FCPA, reckless disregard and wilful blindness, are enough to establish liability for knowledge of an offence.*

- Reliance on the Bank's own internal investigation – Corruption Watch expressed deep concern at the almost complete reliance by the UK SFO on the Bank's own internal

[23] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 3.
[24] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015.
[25] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 4.
[26] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 1.
[27] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 5.
[28] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 5.
[29] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 5.

investigation which means that neither the court or the public will ever truly know whether the full extent of the wrongdoing was exposed, or whether there were systemic problems within the Bank rather than this being an isolated incident.[30] The Synod shares the concern of the head of enforcement at the UK Financial Conduct Authority that where enforcement bodies or regulators appear to rely on internal investigations it can give the perception that they have let firms "mark their own homework."[31]

Even where the company uses an independent law firm to do the investigation, the law firm is entirely reliant on what documents the company provides it with and which staff the company gives it access to. The law firm conducting an internal investigation does not have the search and seizure powers of law enforcement agencies and cannot insist on interviewing certain staff.

- Relatively low financial penalties that do not reflect adequate compensation or disgorgement of profits – Standard Bank agreed to pay US$6 million compensation to the Tanzanian Government based on the calculated harm to the country. However, Corruption Watch raised concern that compensation may have been over 13 times higher – possibly as high as US$80 million – if the full harm to Tanzania had been taken into account. Meanwhile, the profits to be disgorged by the Bank were set at US$8.4 million, which did not take into account revenue streams made by the Bank on the transaction (which could have been up to US$10 million) or the market advantage achieved by the Bank as a result of the alleged criminal activity.[32]

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

DPAs should be made public for the deterrence reasons given by the U4 Anti-Corruption Resource Centre stated above. The Unit supports the UK model where the DPA is published only once the terms of the DPA have been agreed by the parties and approved by the court. A court should be able to postpone the publication of a DPA where it will be likely to prejudice the administration of justice in any legal proceedings, which is a higher bar than simply 'may' prejudice the administration of justice in any legal proceedings.

Q7: How should DPA negotiations be structured?

The Commonwealth Director of Public Prosecutions should be able to invite a company to enter into a negotiation on the terms of the DPA, and the ability to open negotiations should rest solely with the prosecuting authority.

A DPA scheme should be used to leverage full disclosure of wrongdoing within a company.

Q8: What factors should be considered in agreeing a proposed settlement?

As noted in the discussion paper, factors that should be considered in agreeing to a proposed settlement should include:

- Preventing future criminal activity;
- Providing a vehicle for restitution to communities and victims of crime;
- The seriousness of the offence;
- The conduct of the company, including:
    - history of similar conduct;

[30] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 1.
[31] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 6.
[32] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, p. 1.

    - business practices and compliance;
    - self-reporting and cooperation; and
    - whether the alleged offending involved board members or other high managerial agents.
- Saving prosecution and judicial resources for cases where prosecution is most required; and
- If the corporation management has taken a pro-active approach to assisting in investigation of the criminal conduct in question.

In line with the UK, an Australian DPA scheme should offer a corporation that proactively cooperated with investigating the criminal conduct a discount on financial penalty equal to that which would be given for a guilty plea by the sentencing court after it has taken into account all relevant considerations.[33]

The Unit believes the impact on shareholders and employees should not be a consideration in deciding on a DPA. The impact to such parties from a prosecution is often greatly overstated. As noted in a study by Gabriel Markoff, no publicly traded company went out of business in the US as a result of a federal criminal conviction in the years 2001 to 2010.[34] In 2013, then US Department of Justice Deputy Assistant Attorney General Denis McInerney acknowledged that there is a very small chance that a company would be put out of business as a result of actual US Department of Justice criminal charges.[35]

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

Matrerial disclosed during negotiations for a DPA should be available for criminal and/or civil proceedings, to avoid the DPA scheme being used by companies to escape accountability completely by entering into negotiations and then terminating them. The DPA scheme is offering a company a lighter penalty for serious criminal conduct, that alonme should be an incentive to enter into DPA negotiations. Given the company, or its employees, will have committed serious criminal activities, the State should have the more powerful bargaining position. Courts, in levelling penalties, should be taking into account if a company has known of criminal activity its employees carried out and it chose not to disclose that information to authorities, which would act as an incentive for companies to seek a DPA.

Q10: What facts and terms should DPAs contain?

The DPA should include:

- a statement of facts relating to the alleged offence;
- a warranty as to the accuracy of the information provided during the negotiations;
- a high-level guarantee that the parties enter into the agreement in good faith;
- an acknowledgement of responsibility for the conduct and that if the defendant commits similar conduct during the period of the agreement that it may be prosecuted for any crime including that which is the subject of the agreement;
- an obligation to cooperate with any current or future investigation;
- the consequences for the defendant if it engages in further misconduct;
- a prohibition on the defendant from making factual representations contradictory to those in the agreement;
- requirements such as:

[33] Corporate Compliance Practice, Baker & McKenzie, 'Deferred Prosecution Agreements Now Available in the United Kingdom', Winter 2014.
[34] Gabriel Markoff, 'Arthur Anderson and the Myth of the Corporate Death Penalty', *FCPA Professor,* 23 August 2012, http://www,fcpaprofessor.com/arthur-anderson-and-the-myth-of-the-corporate-death-penalty.
[35] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 511, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

    - payment of financial penalties
    - payment of the reasonable costs of the prosecution
    - compensation to victims
    - disgorgement of any profits made from the misconduct, and/or
    - garnishing of executive salaries or non-payment of bonuses.
- implementing or improving a corporate compliance program.

The Unit notes that under US law individuals are typically required to plead guilty to resolve criminal liability[36], so the DPA settlement for a corporation should include the acknowledgement of responsibility for the conduct.

Q11: How should funds raised through DPAs be used?

Some funds raised from the DPA should require companies to compensate victims of the offending. In The US, one of the reasons Judge Jed Rakoff objected to a SEC settlement with Citigroup was that it did not provide for any remuneration to the investors allegedly impacted by Citigroup's conduct.[37]

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

If a DPA is breached then the prosecution of the company should resume, unless the breach is very minor. In addition a financial penalty should apply.

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

Based on the critique of past US DPAs[38], the Unit believes an Australian DPA scheme should make use of independent monitors to seek to ensure that the corporation complies with its obligations under the DPA.

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

Unlike the US, fines from a DPA should never be able to be counted as a tax deduction. A 2015 study by the Public Interest Research Group found that of the $80 billion paid in fines in out of court settlements between 2012-2014, $48 billion could have been written off as a tax deduction by the companies, even though the US tax code specifically prohibits companies from taking a tax deduction on criminal fines or civil penalties.[39]

The US Department of Justice writes a prohibition of being able to claim fines as a tax deduction in some but not all DPAs and the Public Interest Research Group 2015 study found that only half of the largest criminal settlements during 2012-2014 specified the tax status for penalties while compensation and restitution were not specified. In 2013 the DOJ imposed a fine of US$13 billion on JP Morgan Chase for illegally marketing and selling mortgage backed securities, US$11 billion of which the DOJ allowed the bank to claim as a deduction against tax.[40]

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[36] Joan Meyer and Trevor McFadden, 'When DPA is DOA" What the Increasing Judicial Disapprovals of Corporate DPAs means for Corporate Resolutions with the US Government', Global Compliance News, 4 May 2015.

[37] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), p. 521, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[38] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

[39] Corruption Watch UK, 'Out Of Court, Out Of Mind: Do Deferred Prosecution Agreements And Corporate Settlements Fail To Deter Overseas Corruption', March 2016 http://www.cw-uk.org/2016/03/10/out-of-court-out-of-mind-do-deferred-prosecution-agreements-and-corporate-settlements-deter-overseas-corruption/

[40] Corruption Watch, 'Out Of Court, Out Of Mind: Do Deferred Prosecution Agreements And Corporate Settlements Fail To Deter Overseas Corruption', March 2016 (http://www.cw-uk.org/2016/03/10/out-of-court-out-of-mind-do-deferred-prosecution-agreements-and-corporate-settlements-deter-overseas-corruption/