Australian Government
Attorney-General's Department

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Senate Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

The Attorney-General's Department thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission to its inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.

This submission has been prepared in consultation with the Australian Federal Police (AFP) and Commonwealth Director of Public Prosecutions (CDPP).

The department previously made a submission to the Committee's inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 introduced into Parliament on 6 December 2017 and which lapsed at the 2019 federal election. The current Bill is substantially similar to the 2017 Bill.

The measures in the Bill seek to address challenges associated with detecting and addressing the bribery of foreign public officials (foreign bribery) and other serious corporate crime. The opaque and sophisticated nature of corporate crime can make it difficult to identify and easy to conceal through complicated structures and transactions. Investigations into corporate misconduct can be hampered by the need to process large amounts of complex data, including evidence that may be held overseas. Court proceedings can be protracted and expensive, and involve well-resourced corporate defendants.

To address these challenges, the Bill would:

- amend the foreign bribery offence in Division 70 of the Criminal Code and introduce a new corporate offence of failing to prevent foreign bribery (Schedule 1),
- introduce provisions to support a Commonwealth Deferred Prosecution Agreement (DPA) scheme for serious corporate crime (Schedule 2), and
- align the test for dishonesty under the Criminal Code with the current High Court test endorsed in *Peters v The Queen* (1998) 192 CLR 493 (Schedule 3).

In developing the reforms, the department has worked closely with key agencies responsible for responding to serious corporate crime, including the AFP, the CDPP, the Department of Home Affairs, the Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO) and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

Consultation on reforms

The reforms follow extensive public consultation. In March 2016 the Government released an initial discussion paper on the concept of deferred prosecutions agreements. Respondents indicated support for a deferred prosecution scheme, and a second discussion paper in March 2017 sought views on a proposed

model for an Australian scheme.[1] The Government released a public consultation paper on the foreign bribery amendments including draft provisions in April 2017.[2]

The reforms were discussed at the Government Business Roundtable on Anti-Corruption held on 31 March 2017. Senior representatives from business and government discussed practical steps to better protect Australian business from the corrosive effects of corruption, and to support them to build corporate cultures of integrity. In April 2017 the Department convened further discussions with representatives from industry, law firms, civil society and academia.

The Bill has been developed with regard to the issues raised throughout these consultation phases.

Committee reviews of the 2017 Bill and Foreign Bribery

The Senate Standing Committee on Legal and Constitutional Affairs reported on its inquiry into the 2017 Bill on 20 April 2018 and made a number of recommendations including that the Bill be passed. Similarly, the Senate Economics References Committee expressed support for the introduction and passage of the 2017 Bill in its report entitled *Foreign Bribery* published on 28 March 2018.

Consultation on draft DPA Code of Practice and Adequate Procedures Guidance

Consistent with recommendations made by both the Senate Standing Committee on Legal and Constitutional Affairs and the Senate Economics References Committee, the Government has conducted public consultation on materials to support the measures in the Bill.

On 2 December 2019 the Government released draft Adequate Procedures Guidance for public consultation (**Attachment A**), as required by section 70.5B of the Bill[3]. The Guidance is designed to assist companies in understanding the types of measures a company could implement and steps it could take to prevent an associate from bribing a foreign public official. This consultation process will conclude on 28 February 2020, consistent with Recommendation 1 of the report by the Senate Standing Committee on Legal and Constitutional Affairs (which recommended allowing a four week consultation period for corporate stakeholders to provide comment). Recommendation 2 of the report recommended that the Government include internal corporate whistleblowing systems as part of adequate procedures designed to prevent foreign bribery. The draft Guidance responds to this recommendation by including this requirement.

On 8 June 2018 the Government released a draft DPA Code of Practice for public consultation (**Attachment B**) which concluded on 9 July 2018[4], consistent with Recommendation 3 of the report by the Senate Standing Committee on Legal and Constitutional Affairs (which recommended allowing a four week consultation period for corporate stakeholders to provide comment). The Code of Practice is designed to assist companies

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[1] Proposed model for a deferred prosecution agreement scheme in Australia, 2017. The discussion paper and the submissions received in response are available online here: https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx.

[2] Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995. The discussion paper, exposure draft provisions and the submissions received in response are available online here: https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx.

[3] https://www.ag.gov.au/Consultations/Pages/adequate-procedures.aspx

[4] https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreement-scheme-code-of-practice.aspx

to understand the scheme's operation and the ways in which it may be beneficial to the company to self-report misconduct. The Government received responses from a broad range of stakeholders[5].

Subject to the passage of the measures in the Bill, feedback received through these respective consultations will inform the finalisation of the DPA Code of Practice and Adequate Procedures Guidance.

Proposed DPA scheme

In Report No. 10 of 2019, the Selection of Bills Committee queried whether some of the measures may in fact make it easier for corporate criminals to avoid prosecution, thereby reducing deterrence and increasing the incidence of corporate crime.

A proposed DPA scheme would not make it easier for corporate criminals to avoid prosecution and would not reduce deterrence of corporate crime. As explained below (see 'Schedule 2—Amendments relating to deferred prosecution agreements'), the scheme is designed to be used by the AFP and CDPP as an additional enforcement tool and not as a substitute for the robust investigation and prosecution of corporate criminals which will continue alongside introduction of the scheme. The DPA scheme incorporates a number of safeguards to ensure the scheme cannot be used by corporate criminals to evade liability. For example, the scheme requires a company to admit to agreed facts detailing the nature and scope of their misconduct, which can later be taken to be agreed facts for the purposes of any criminal proceedings in the event the company contravenes the DPA. Furthermore, the Director will not offer a company a DPA unless the Director is satisfied that entering into a DPA is in the public interest, and an approving officer must not approve the DPA unless the approving officer is satisfied the DPA is in the interests of justice.

While the DPA reforms are novel in the Australian context, they reflect the international community's increasing support for and reliance on DPAs as an additional tool in combatting foreign bribery and other economic crimes. As part of it monitoring and peer-review processes, the Organisation for Economic Cooperation and Development (OECD) Working Group on Bribery routinely monitors the effectiveness of non-trial resolution mechanisms and has previously made recommendations supporting the introduction and implementation of DPA-like schemes. Studies by the OECD have found that DPA-like resolutions have proved an important enforcement mechanism in the foreign bribery context since the entry into force of the OECD Anti-Bribery Convention[6]. During Australia's Phase 4 follow-up review in December 2019, the Working Group on Bribery welcomed the reintroduction of the Bill including the proposed introduction of a DPA scheme into Australia[7].

Similar schemes have been used successfully in jurisdictions including the United Kingdom and United States to uncover and enforce penalties for corporate misconduct. In these jurisdictions, DPA and DPA-like schemes have led to stronger, not weaker, enforcement outcomes. This is because such schemes have incentivised voluntary reporting and cooperation with law enforcement as well as the longer term implementation of stronger internal compliance mechanisms to uncover, address and prevent future misconduct. Such schemes have also provided law enforcement with alternative avenues for resolution of cases where no further

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[5] Nine of the ten submissions published are available at https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreement-scheme-code-of-practice.aspx.
[6] See *Resolving Foreign Bribery Cases with Non-trial Resolutions* published by OECD on 20 March 2019.
[7] https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Two-Year-Written-Follow-Up-Report-ENG.pdf

investigative steps are possible due to the absence of further evidence (for example, where that evidence is held overseas).

Furthermore, the Bill as a whole is likely to increase deterrence through the introduction of an absolute liability-based offence for companies that fail to prevent the commission of a foreign bribery offence by an associate. Introduction of the new corporate offence within the same bill is designed to complement the proposed DPA scheme by simultaneously broadening the range of offences that can be enforced against companies, thereby strengthening deterrence, and incentivising companies to self-report and cooperate with law enforcement.

Schedule 1 – Amendments relating to foreign bribery

Schedule 1 of the Bill would amend the offence of bribing a foreign public official in Division 70 of the Criminal Code.

Foreign bribery is an inherently challenging crime to investigate. As noted in the April 2017 discussion paper, challenges arise in the investigation of foreign bribery cases because they often involve the use of third party agents or intermediaries, instances where senior management turn a blind eye to activities occurring within their companies and a lack of readily available documentary evidence. The OECD has reported that across all parties to the OECD Anti-Bribery Convention, intermediaries are involved in 3 out of 4 foreign bribery cases. In many cases, the intermediaries are corporate vehicles, such as subsidiary companies, local consulting firms, or companies located in offshore financial centres or tax havens.

Some of the elements in the foreign bribery offence in its current form pose particular challenges to investigation and prosecution. Amendments are needed to expand the scope of the offence to cover the broader range of conduct amounting to foreign bribery and to remove undue impediments to a successful prosecution.

The Bill seeks to facilitate the investigation and prosecution of foreign bribery by amending Division 70 to:

- ensure that the foreign bribery offence includes the bribery of candidates for public office (not just current holders of public office)
- extend the coverage of the foreign bribery offence to include bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain business or a business advantage)
- replace the existing requirement that the benefit and business advantage be ‘not legitimately due’ with the broader concept of ‘improperly influencing’ a foreign public official
- clarify that the offence does not require the accused to have had a particular business (or a particular business or personal advantage) in mind, and that the business (or business or personal advantage) can be obtained for someone else, and
- remove the existing requirement that the intention must be to influence the foreign public official ‘in the exercise of their official duties’ and instead require that the intention must be to ‘improperly influence a foreign public official’, for an offence to be established.

The Bill would also create a new corporate offence of failing to prevent foreign bribery. This is modelled on section 7 of the *Bribery Act 2010* (UK). This offence would apply where an associate of a body corporate has

committed bribery for the profit or gain of the body corporate. The offence would not apply if the body corporate was able to demonstrate that it had 'adequate procedures' in place to prevent the commission of foreign bribery by its associates. The Bill would require the Minister to publish guidance on the types of measures that are likely to constitute 'adequate procedures'. Schedule 1 of the Bill will commence 6 months after Royal Assent, to allow sufficient time for Government to publish guidance and for companies to implement these procedures. As noted above, the draft Adequate Procedures Guidance was released for public consultation on 2 December 2019.

These reforms are consistent with recommendations made by the Senate Economics References Committee.

The Bill would also make consequential amendments to the *Income Tax Assessment Act 1997* (ITAA) to ensure the continuation of the existing prohibition against claiming a deduction for a loss or outgoing that a person incurs for a bribe to a foreign public official.

Why extend the foreign bribery offence to candidates for office?

The Bill would amend the definition of foreign public official to include a person standing or nominated as a candidate for public office. Law enforcement experience indicates that individuals or companies may seek to bribe candidates for public office, with the intent of obtaining an advantage if the candidate takes office. It is appropriate to criminalise this conduct given that it has the potential to undermine good governance and free and fair markets and to otherwise cause the same harm as bribery of a public official.

Expansion of the definition of foreign public official to candidates for office was specifically recommended by the Senate Economics References Committee (Recommendation 5).

Why extend the foreign bribery offence to retain a personal advantage?

The current offence is limited to bribery of foreign public officials to obtain or retain business or business advantages. The proposed new offence would also apply where the bribe was to obtain or retain a personal advantage. Law enforcement experience has shown in some cases that foreign bribery can occur where the advantage sought is personal. Personal advantages could include influencing a foreign public official to bestow a personal title or honour, or in relation to reducing personal tax liability. It is appropriate to criminalise this conduct given that it equally undermines good governance.

This reform was also specifically recommended by the Senate Economics References Committee (Recommendation 6).

Why remove the concept of 'not legitimately due' from the offence?

Under the existing foreign bribery offence, the prosecution must prove that both the benefit offered/provided/promised (i.e., the bribe) and the business advantage sought were 'not legitimately due' (paragraphs 70.2(1)(b) and 70.2(1)(c)). In some cases, the threshold of 'not legitimately due' presents challenges. Bribes can be concealed by disguising them as contractual obligations (for instance, commissions pursuant to contractual arrangements with third party agents) making it difficult to prove, beyond a reasonable doubt, that the payments are not legitimately due.

The Bill would amend the offence to replace these elements with the concept of 'improperly influencing' a foreign public official to obtain or retain business or an advantage. This concept would ensure the offence more accurately reflects the conduct of foreign bribery.

It will be a matter for the courts to determine whether there has been improper influence on a case-by-case basis and the amendments set out factors that are relevant. For example, a payment to a foreign public official made through unofficial or undisclosed accounts, or a payment that is not properly recorded in a company's records could indicate an intention to improperly influence a foreign public official.

Why 'improper influence' and not dishonesty?

As noted in the discussion paper, the Government considered alternative approaches to reframing the foreign bribery offence, including replacing the threshold of 'not legitimately due' with the concept of 'dishonesty'. Submissions received in response to the April 2017 discussion paper were divided on this issue.[8]

The Department, AFP and CDPP have closely considered the points raised in submissions. On balance, the Department considers that the proposed approach of 'improper influence' is preferable. Some bribery does not involve dishonesty. For instance, where a company provides an open 'scholarship' to the child of a foreign public official. The scholarship is not necessarily intended to have a 'dishonest' influence, if it is done transparently. However, it could still be done with the intention of improperly influencing the foreign public official in favouring the company when business is being awarded. The UK Law Commission has observed that not all bribes are 'dishonest' in the sense required. An advantage conferred may be 'illegitimate, unreasonable, disproportionate or otherwise "improper" without being dishonest'.[9] Proposed subsection 70.2A(3) of the Bill details matters that a trier of fact may have regard to when determining whether influence is improper (the list is non-exhaustive). These matters are based on the experience of foreign bribery investigators and prosecutors, and provide the trier of fact with relevant factors on which to inform his or her determination.

While the offence is founded on 'improper influence', dishonesty is included as a relevant factor for determining whether influence is improper. Proposed paragraph 70.2A(3)(f) provides that a possible factor for determining improper influence is whether the benefit was provided, offered or promised dishonestly.

Why remove the requirement of influencing a foreign public official in the exercise of their official capacity?

The amendments remove the requirement that the intention to influence the foreign official must be directed towards the exercise of the official's duties. The requirement puts an unnecessary burden on the prosecution to prove the scope of a foreign public official's duties. Additionally, proof of foreign official duties relies on international legal assistance processes, which can be protracted or unsuccessful.

The AFP has noted that foreign public officials can be bribed to act *outside* of their official duties to secure business or an advantage. For example investigations have identified instances where senior ministers in foreign countries may have been bribed to act beyond their official duties. The foreign public official's

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[8] Submissions in favour of 'improper influence' include those from Allens, Red Flag Group, Control Risks, Woodside, BHP, Transparency International, and the Uniting Church in Australia. Submissions in favour of 'dishonesty' include those from the International Bar Association, the Australian Institute of Company Directors and the Law Council of Australia.
[9] UK Law Commission, Reforming Bribery, Report No 313 (2008), [4.90].

position of power within the foreign country, or candidacy for such a position, is the relevant consideration in criminalising conduct amounting to foreign bribery

Corporate offence of failing to prevent foreign bribery

Due to the complicated corporate structures of international corporations involved in foreign bribery, it can be challenging to establish criminal liability for corporations particularly where companies seek to avoid liability through wilful blindness to the conduct of their employees.

The Bill would introduce a new offence of failure to prevent foreign bribery. This means that bribery by an associate of a corporation would automatically trigger corporate liability where the bribery was committed for the corporation's benefit. A similar offence has been successfully implemented in the UK and has reportedly had a significant positive influence on the adoption of effective corporate compliance programs to prevent bribery.

A body corporate will commit the offence of failing to prevent bribery if an associate of the body corporate commits the offence of foreign bribery for the profit or gain of the body corporate. An associate is defined as an officer, employee, agent, contractor or subsidiary of the body corporate or a person who otherwise performs services for the body corporate. The conduct by the associate would automatically trigger the liability of the body corporate. However, the offence will not apply if the body corporate had adequate procedures designed to prevent its associates from committing foreign bribery.

The maximum penalty for the proposed failure to prevent bribery is the same as that for the existing foreign bribery offence (100 000 penalty units (currently $21 million), three times the value of the benefit obtained if the court can determine its value, or 10% of the body corporate's annual turnover (if the value of the benefit cannot be determined) during a 12 month period ending at the end of the month in which the body corporate committed or began committing the offence). This reflects the serious nature of bribery and corruption. It will ensure that the offence serves as an appropriate deterrent to companies being wilfully blind to corrupt practices within their business. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* recognises that in some circumstances, a specified maximum penalty may not provide sufficient deterrence. It reflects that, in such circumstances, a maximum penalty expressed as a multiple of the gain obtained through wrongdoing may be more appropriate. This rationale applies to foreign bribery, where wrongdoing can lead to substantial financial benefits and could involve large corporations, for whom a specified maximum penalty may be an insufficient deterrent. It is appropriate that all companies can be held accountable for bribery by their associates where they do not take steps designed to prevent such conduct from occurring. In the UK, corporations that commit or fail to prevent foreign bribery are punishable by an unlimited fine.

The introduction of a new corporate offence for failing to prevent foreign bribery was recommended by the Senate Economics References Committee (Recommendation 7).

Should the definition of associate be broadened?

The Department notes comments in the International Bar Association's submission to the Committee in relation to the definition of associate. The IBA's view (at 3.3) is that the definition of associate should not be limited, and should 'clearly and unambiguously capture conduct by a natural or incorporated person,

including any association (incorporated or unincorporated) or persons operating through a trust or any other structure designed or created to facilitate the relevant conduct in a manner to shield others from potential liability'.

The Department agrees that the definition of associate should be cast broadly. The proposed definition of associate in the Bill includes any person who 'otherwise performs services for or on behalf of the other person [ie the corporation]'. The Department believes that this appropriately captures, in addition to the expressly listed categories of person, any natural or legal person who is effectively acting for or on behalf of the company.

What will a body corporate need in order to show it had 'adequate procedures'?

The new failure to prevent offence will not apply if the body corporate had in place adequate procedures designed to prevent an associate from committing foreign bribery. The company would bear a legal burden in relation to this matter. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code). The imposition of a legal burden on the body corporate creates a strong positive incentive to adopt measures to prevent foreign bribery.

It is reasonable to expect companies of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business. Prescribing absolute liability with respect to the company's state of mind towards the actions of its associate means the prosecution would not need to prove a fault element, and removes the ability for a company to avail itself of the honest and reasonable mistake of fact defence (section 9.2 of the Criminal Code) in relation to the associate's actions. This is designed to capture circumstances where a company is wilfully blind towards the wrongful conduct of its associates, and encourage companies to be proactive and accountable and to adopt effective anti-bribery compliance measures. The only way a company would avoid liability is by having adequate procedures in place and to rely on the proposed defence in 70.5A(5) of the Bill.

As noted in the Explanatory Memorandum to the Bill, what constitutes 'adequate procedures' would be determined by the courts on a case-by-case basis. It is envisaged that this concept would be scalable, depending on the relevant circumstances including the size of the body corporate and the nature of its business and activities.

Proposed new section 70.5B would provide that the Minister must publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials. This will provide guidance to corporations on appropriate mitigations, and support the development of adequate procedures to prevent foreign bribery. The Government released the draft guidance for public consultation on 2 December 2019.

This is consistent with Recommendation 1 of the report by the Senate Legal and Constitutional Affairs Committee and Recommendations 7 and 8 of the report by the Senate Economics References Committee.

The guidance will be similar to that provided by the UK in relation to its offence for failure to prevent foreign bribery. This will address industry stakeholder concerns about the challenges of operating internationally and reconciling even modest variations in legal frameworks. The Government recognises that guidance that is consistent with international models where possible will better contribute to effective prevention of foreign bribery.

Consistent with Recommendation 9 made by the Senate Economics References Committee, the Government is working to finalise and publish the guidance with sufficient time before the commencement of the new corporate offence, noting the offence if passed would not commence until six months after passage of the Bill.

Why does the Bill not repeal the facilitation payment defence?

Under Australian law, the offence of foreign bribery is subject to a facilitation payment defence (section 70.3). A facilitation payment is a payment of minor value provided in return for a minor, routine government action. Such a payment, if properly documented, does not constitute foreign bribery.

The Bill does not propose amending the existing facilitation payment defence. As noted in the public discussion paper, operational experience has indicated that the defence has not been an impediment to the enforcement of the foreign bribery offence.

Facilitation payment defences are not prohibited under the OECD Convention and its related recommendations. The Australian Government will continue to review the operation of this defence, as required under the *OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions 2009*.

In line with the OECD Recommendation, government agencies strongly discourage Australian businesses from making facilitation payments. Such payments, while permissible under Australian law, may constitute an offence in the jurisdiction they are made. They can also create a business risk by opening companies up to bribe requests.

The Senate Economics References Committee recommended the facilitation payment defence be abolished over a transition period (Recommendation 18). The Government is considering this recommendation and will respond in due course.

Improved enforcement of foreign bribery offence

While foreign bribery is particularly challenging to detect, investigate and prosecute, Australia's enforcement has improved significantly in recent years. As at January 2020, eight offenders have been convicted of foreign bribery offences and a further two offenders of related false accounting offences. Other matters are currently before the courts.

The prosecution of Note Printing Australia Ltd and Securency Pty Ltd in 2011 highlights Australia's strong commitment to the prosecution of corporate criminals. In this case the two companies paid a combined total of $21,666,482 in pecuniary penalty orders in addition to criminal fines; these remain the highest pecuniary penalties ever ordered in Australia.

Improvements in operational response, including the creation of the AFP's dedicated foreign bribery team and foreign bribery panel of experts and close cooperation with domestic and international agencies, have had a significant positive effect on addressing and combatting foreign bribery. In the 2019-20 Budget, the Government announced funding of $25.9 million over four years for the AFP to strengthen its approach to countering and responding to foreign bribery.

Schedule 2—Amendments relating to deferred prosecution agreements

Schedule 2 of the Bill would amend the *Director of Public Prosecutions Act 1983* (Cth) to implement a Commonwealth deferred prosecution agreement (DPA) scheme.

Under the scheme, the CDPP will be able to invite a corporation that is suspected of having engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions.[10] These conditions may require a corporation to admit to agreed facts, cooperate with any related investigation or prosecution, pay a financial penalty and implement or improve a compliance program. If the corporation fulfils its obligations under the DPA, it will not then be prosecuted for the offences specified in the DPA. However, if the corporation breaches the DPA it may be prosecuted for the offences to which the DPA relates.

The DPA scheme is designed to address challenges experienced by law enforcement in detecting, investigating and prosecuting corporate crime. The scheme seeks to encourage corporations to self-report serious criminal offending by offering greater certainty of outcome when compared to criminal proceedings. The scheme provides companies an opportunity to avoid some of the reputational and financial costs associated with lengthy criminal investigations and trial processes while still allowing punitive and remedial measures to be taken against a corporation. At the same time, the scheme includes safeguards to ensure DPAs are in the interests of justice and that companies are held to account for misconduct. A similar scheme has been successfully used to tackle corporate crime in both the UK and the US. Since adopting a DPA scheme in 2014 the UK has settled six DPAs. For example, Rolls Royce entered into DPAs in the UK and in the US after cooperating extensively in investigations into transnational corruption. The company paid financial penalties of approximately $US 800 million following actions taken by the US, UK and Brazil. In the UK, the penalty of £497m paid by Rolls Royce was the highest penalty against a company in the UK for criminal conduct. In the US, seven individuals were charged with offences, four of whom pleaded guilty.

Why is a DPA scheme necessary?

Law enforcement agencies face particular challenges in detecting, investigating and prosecuting serious corporate criminal offences. The opaque and sophisticated nature of corporate crime can make it difficult to identify and easy to conceal. Investigations into corporate misconduct can be hampered by the need to process large amounts of complex data, and evidence may be held overseas. Court proceedings can be long and expensive, particularly against well-resourced corporate defendants.

The DPA scheme is designed to address these challenges by providing incentives to companies to self-report misconduct and assist law enforcement in corporate criminal investigations and prosecutions.

The DPA scheme would serve as an additional enforcement tool and not as a substitute for the robust investigation and prosecution of corporate criminals which will continue alongside introduction of the

[10] Serious corporate crime is defined with reference to a specific list of offences in proposed new section 17B, and includes offences relating to foreign bribery, false accounting, dealing with proceeds of crime, money laundering and dishonest conduct, as well as sanctions offences.

scheme. Where prosecution is in the public interest and consistent with the Prosecution Policy of the Commonwealth[11], corporate criminals will continue to be prosecuted.

Does the DPA scheme give companies a 'free pass' for serious corporate crime?

The Bill contains a number of safeguards to ensure that the DPA scheme does not represent a 'free pass' to corporations that have engaged in serious corporate crime.

A company must comply with strict conditions to attract the benefits of a DPA. Typically, a company will have to admit to agreed facts, pay a financial penalty of an appropriate severity, cooperate with any related investigation or prosecution and implement or improve its compliance program. A company may also be required to compensate victims, forfeit benefits derived from the misconduct and fund the appointment of an independent monitor to assess the company's compliance with the DPA. Further information on relevant considerations and potential terms of a DPA will be included in the DPA Code of Practice.

The DPA scheme includes features that will ensure that DPAs hold companies to account for their misconduct and cannot be used by corporate criminals to evade liability. For example, all DPAs will be assessed by an independent 'approving officer' who will ensure that the DPA is in the interests of justice, and that the terms of the DPA are fair, reasonable and proportionate having regard to the nature of the wrongdoing. A person will only be able to be appointed by the Attorney-General as an 'approving officer' if they are a former judicial officer of an Australian court, ensuring that approving officers have experience in adjudicating matters impartially and making determinations in the interests of justice.

It would be unlikely for a company to be offered a DPA in relation to large scale offending unless it self-reports, provides an exceptional degree of cooperation to law enforcement in uncovering the full nature and scope of its offending and agrees to terms that appropriately reflect the significance of the misconduct. However, even if such circumstances were met, it would ultimately be a matter for the Director as to whether or not a DPA would be in the public interest. Repeat offending and misuse of the DPA scheme would likely suggest that a DPA would not be in the public interest.

The Bill further protects against exploitation of the DPA process by allowing for the prosecution of a corporation who materially contravenes a DPA, or who provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with a DPA or a DPA negotiation. Where a corporation commits a minor breach of a DPA (for example, a breach that is unintended or due to factors beyond the corporation's control), the corporation may be required to rectify the breach or to renegotiate the terms of the DPA with the CDPP.

Why does the Bill limit the admissibility of evidence produced throughout the DPA process?

Section 17H of the Bill limits the admissibility of specific documents in proceedings against a company that is a party to a DPA in civil or criminal proceedings. Specifically, the Bill limits the admissibility of documents (other than the DPA itself) that indicate that the person entered into negotiations for a DPA, or that were created solely for the purpose of negotiating a DPA. These documents include records of DPA negotiations and draft DPAs.

[11] https://www.cdpp.gov.au/prosecution-process/prosecution-policy

Limiting the admissibility of these documents will encourage companies to speak openly and honestly with the CDPP and any other involved Commonwealth agency during DPA negotiations. This will assist agencies to acquire a greater range of information than might otherwise be obtained, and therefore:

- help to ensure that the full extent of the company's offending is identified and reflected in the terms of the DPA, and
- better equip law enforcement to investigate related offending, including offending by individuals.

The provision balances the need to ensure that corporations are encouraged to speak openly and honestly during DPA negotiations with the need to ensure that corporations cannot exploit the DPA process to avoid being held to account. To this end, the limitation on admissibility does not apply if a company:

- materially contravenes the DPA
- provides false, misleading or incomplete information in relation to the DPA in circumstances where it knew, or ought to have known that the information was false, misleading or incomplete, or
- gives evidence in another proceeding that is inconsistent with the evidence in the documents that would otherwise not be admissible against the company.

Furthermore, the limitation on admissibility does not apply to documents that were not generated solely for the purpose of negotiating a DPA, or do not otherwise indicate that a company entered into DPA negotiations. For example, the provision would not apply to books and records that reveal criminal behaviour, or to internal company records that pre-exist DPA negotiations.

Why hasn't the Government adopted the UK model, where DPAs are approved by a court?

The Government considers the approach in the Bill of using a retired judicial officer is the most constitutionally robust mechanism to provide independent oversight and expert scrutiny within the Australian context.

All DPAs will need to be approved by a DPA 'approving officer' before entering into force. DPA approving officers will be former judges, with relevant expertise and knowledge (for example, in business or corporate law). Approving officers will bring expertise in fair and impartial adjudication to the DPA process, and provide independent assurance that all DPAs are in the interests of justice.

Why doesn't the DPA scheme require a corporation to formally admit to criminal liability for the offences specified in the DPA?

The success of the DPA scheme relies on striking an appropriate balance between providing incentives to corporations to self-report serious offending and the need to hold corporations accountable for serious corporate crime.

Feedback to the Government's March 2017 proposed model for a DPA scheme suggested that corporations would be unlikely to enter into a DPA if to do so would require an admission of criminal liability. For this reason, the Bill does not require a corporation to admit to criminal liability in order to obtain a DPA.

However, to ensure corporations are nonetheless held to account for their misconduct and do not exploit the DPA scheme to avoid criminal liability, the scheme would require corporations to admit to agreed facts

detailing the nature and scope of their conduct. Under proposed subsection 17H(5), this agreed statement of facts will be taken to be agreed facts for the purposes of section 191 of the *Evidence Act 1995* (Cth) in criminal proceedings for offences specified in the DPA, and in related proceedings under the *Proceeds of Crime Act 2002* (Cth). As such, in a prosecution for a corporate offence (listed in subsection 17H(5)), the CDPP would not be required to prove the existence of the facts in the statement of facts and neither party would be able to adduce evidence to contradict or qualify these facts unless leave was given by the Court.

This approach is broadly consistent with the DPA schemes of the US and the UK. These schemes do not require a corporation to admit to criminal liability to be able to enter into a DPA. However, in the US 'an admission or an agreement not to contest the relevant facts underlying the alleged offenses is generally appropriate'.[12] Under section 13 of schedule 17 to the UK *Crime and Courts Act 2013*, the statement of facts is to be treated as an admission of fact by the corporation under section 10 of the *Criminal Justice Act 1967* in any criminal proceedings brought against a corporation for the offences specified in the DPA.

How will the DPA scheme accommodate victims of crime?

An important function of the DPA scheme is to provide a mechanism by which victims of misconduct can be compensated. On this basis, where there are identifiable victims who have suffered loss as a result of the corporation's misconduct, it will generally be appropriate for the DPA to require the corporation to pay specified compensation to these victims. Where victims cannot be identified, donations to charities which support the victims of the offending may be appropriate.

In some instances, the victim of the misconduct may be a foreign country. For example, instances involving foreign bribery may result in corporations obtaining proceeds to which the foreign country is entitled. In such circumstances, it may be appropriate for a DPA to require the corporation to make a payment to the government of the relevant foreign country.

Generally, it will not be possible to incorporate victims into the negotiation of a DPA due to, for example, confidentiality concerns. However, a DPA may nonetheless include a mechanism to identify and compensate victims after the DPA has been finalised and approved. It is also envisioned that, in some circumstances, it may be appropriate for the CDPP to require a corporation to disclose information to victims as a condition of continuing DPA negotiations, in order to assess and accommodate victims' interests in the terms of the DPA. It may also be appropriate to require a corporation to undertake media activity to publicise remedies that may be available to victims as well as the steps it is taking to improve internal governance and prevent future misconduct.

A DPA does not remove any individual's legal rights to bring a civil action against a corporation that is party to the DPA. Failure to pay compensation due to victims under a DPA will ordinarily constitute a material contravention of the DPA.

Will independent monitors be appointed to assess and provide guidance in relation to a corporation's fulfilment of its commitments under a DPA?

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[12] United States Securities and Exchange Commission Enforcement Manual, 28 November 2017, https://www.sec.gov/divisions/enforce/enforcementmanual.pdf, page 101.

It is envisioned that it will often be appropriate for an independent external monitor to be appointed to carry out particular functions specified in the DPA. These functions may include assessing the effectiveness of a corporation's existing compliance program, making recommendations to support the development of an effective (or more effective) compliance program and monitoring a corporation's compliance with DPA terms.

The department proposes to provide further information on the role and appointment of independent monitors in the DPA Code of Practice. It is anticipated that monitoring mandates will be adapted to the facts and circumstances of each case including the nature and size of the corporation.

Why is the new offence of 'destroying evidence' necessary?

Section 17J of the Bill establishes a new offence that applies if a person prevents relevant evidence from being used to negotiate a DPA, assess compliance with a DPA or in evidence in criminal proceedings for conduct that is the subject of a DPA. To be guilty of the offence, the person must intend to prevent the evidence from being used for these purposes.

This new offence is designed to deter people who might otherwise seek to maliciously exploit the DPA process to avoid a criminal conviction. For example, the offence could apply if a person destroyed evidence in order to cover up a breach of a DPA. The offence would also apply if a person destroys evidence and provides the CDPP with an incomplete picture of the extent of the offending to negotiate more favourable DPA terms.

This new offence ensures that a person who maliciously seeks to destroy evidence that is relevant to DPA negotiations or to an approved DPA can be prosecuted for that interference with justice.

Schedule 3—Amendments relating to dishonesty definitions in the Criminal Code

Schedule 3 of the Bill makes amendments to update the dishonesty test under the Criminal Code so that these definitions are aligned with the current High Court test endorsed in *Peters v The Queen* (1998) 192 CLR 493 (*Peters*).

The Criminal Code currently defines the term 'dishonest' in six provisions. These definitions require satisfaction of the following two-limb test: firstly, that the defendant must have been dishonest according to the standards of ordinary people; and secondly, that the defendant must have known that they were being dishonest in this sense. There are approximately 30 offences in the Criminal Code which currently rely on these definitions (for example, section 141.1 – bribery of a Commonwealth public official; section 480.4 – dishonestly obtaining or dealing in personal financial information).

This test is based on outdated English authority (*R v Ghosh* (1982) EWCA Crim 2) which the Australian High Court chose not to follow in *Peters*. The Court adopted a different test which simply requires the defendant to have been dishonest according to the standards of ordinary, decent people.

Updating the test for dishonesty under the Criminal Code will achieve greater consistency in prosecutions of offences involving dishonest conduct, particularly where some offences rely on the Criminal Code statutory definition of dishonesty and other offences the common law definition of dishonesty.

A transitional provision has also been included to facilitate prosecution of cases involving ongoing criminal conduct that begins and then continues before and after the commencement of the proposed amendments. This provision will allow such criminal conduct to be prosecuted under the current unamended test.

The new definition, like the current definitions, would only apply to offences in the Criminal Code and not to Commonwealth offences more generally. The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*, which took effect earlier this year, amended the *Corporations Act 2001* such that the *Peters* test now applies to all Corporations Act dishonesty offences.