Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

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The submission is offered in their personal capacity.

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1. Purpose of Submission

1.1 The focus of many prior published submissions on the **Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017** (the Bill) relate to the importance of reforms which have the potential to change corporate culture. Drawing upon and extending upon submissions made to various inquiries and consultations in 2015, 2016 and 2017,[1] this identifies areas where the Bill may be further strengthened, informed by the latest available research, published and in press.

2. What is a Deferred Prosecution Agreement (DPA): A Tool in Search of an Object?

2.1 The Bill, as drafted, does not include an objects or purpose clause that sets out the aims of the DPA scheme. The Government's Consultation Paper, released in April 2017, identified that DPA schemes serve two broad aims: punitive and restitutionary. However, as noted in prior publication and submissions, linking the negotiation of the DPA to a punitive purpose is problematic for several reasons.[2] As a legal instrument with administrative rather than judicial characteristics, the DPA should be viewed neither as a form of punishment (or hybrid 'quasi-punitive' measure akin to a civil penalty), nor as a legal measure to 'settle' or determine (conclusively or otherwise) matters of guilt or innocence. The preferable approach is to design the DPA instead as a tool of preventive and restorative justice.

2.2 Removing 'penalties' and punitive measures from the DPA negotiating table offers significant collateral advantages. Since the approving officer is not being called upon to impose penalties in the conventional criminal justice sense, it alleviates or mitigates the risk of Chapter III incompatibility. It also avoids an issue of 'double jeopardy' in cases where the DPA is breached and the corporation is then prosecuted – as structured at present, there is a strong argument that in cases of breach that lead to prosecution and conviction, any subsequent penalties imposed on the corporation following trial will be a form of 'double punishment', bearing in mind the prior penalties imposed on the corporation under the DPA arise from the *same* facts and charges. The argument in the Explanatory Statement that the penalties paid under DPA are 'voluntary' (and hence not double punishment) is not persuasive – see discussion below at para 5.2.

[1] See S Bronitt, N Passas, W Pei and C Widmaier, 'Submission to the Senate Standing Committee on Economics Committee', Submission 35 (2015); S Bronitt, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement (DPA) scheme in Australia,* 10 May 2016; S Bronitt, Submission to the Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement (DPA) scheme in Australia*, 10 May 2017; S Bronitt and Z Brereton, Submission to the Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995* (Cth) *Public consultation paper*, 10 May 2017.

[2] See S Bronitt, 'Regulatory Bargaining In The Shadows of Preventive Justice: Deferred Prosecution Agreements' in T Tulich, R Ananian-Welsh, S Bronitt and S Murray (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211-226; S Bronitt, 'New Paradigms for Regulating Institutional Child Sexual Abuse: Lessons from Corporate Crime and White-Collar Criminals' in Y Smaal, A Kaladelfos and M Finnane, *The Sexual Abuse of Children: Recognition and Redress* (Monash University Press, 2016) 190.

2.3 Reflecting the multifunctional nature of the DPA, the Bill permits the inclusion of a wide variety of 'terms and conditions'. These terms include imposing a penalty (which is contentious for the reasons above), undertakings to refrain from future unlawful conduct, compensating for harms and losses (including costs of enforcement action), disgorging unlawful profits, and instituting independent monitoring and ongoing governance reform. There is also scope for the DPA to fund programs of research and community education in the field of corporate crime prevention.

2.3.1 By adopting a preventive/restorative model, the regulatory focus of the DPA scheme is forward-looking rather than backward-looking: the past misconduct of the corporation is evidence for assessing the risk of non-compliance, and for determining the appropriate level and focus of surveillance, monitoring and preventive action taken against the corporation. The preventive/restorative model focuses on the 'acceptance of responsibility' (which is not the same as formal admission of legal guilt) for the corporate wrong and harm caused (which is not tied narrowly to the formal offence-definition). The DPA is a future-oriented measure for preventing and redressing corporate crime, as well as reforming corporate cultures that facilitate, and fail to prevent, corporate crime.

2.4 The Bill should insert a new purpose/objects clause into the relevant Part of the *Criminal Code* (Cth. This clause should state expressly that the aims of the DPA are preventive and restorative. It should further clarify that the DPA is not intended to be a vehicle for punishment or preliminary determination of criminal guilt. As noted above, the clarification that the DPA is *not* punitive avoid concerns about Chapter III incompatibility, and the potential argument that the Bill, as drafted, vests judicial functions in the (administrative) functions of an approving officer.

3. Negotiating Prosecutorial Discretion: Balancing Private versus Public Interest?

3.1 The DPA offers many benefits for corporate offenders. Early resolution of an investigation mitigates the potential harm to local and global markets, as well as to the interests of shareholders, employees and consumers of the affected corporations. As a number of recent settlements demonstrate, prompt 'settlement' of high-profile investigations into corporate crime swiftly restores market confidence and may even boost corporate profitability.[3]

3.2 The discretion in the public interest not to proceed with prosecution - in cases where there is sufficient evidence and reasonable prospects of conviction - is a well-established feature of our criminal justice system. The DPA is one form of regulating how this aspect of prosecution discretion is operationalized in the context of corporate crime.[4] The Bill itself does not contain detailed guidance on how public interest factors should be assessed and weighed – it is envisaged, following the UK model, that the list of public interest factors would be set out in DPA Guidelines. It is recommended that there is additional public consultation on the DPA Guidelines, and that these be periodically reviewed to ensure that they reflect current

[3] Upon announcement of the 'settlement' with US regulators, Takata's share prices increased by 17%: 'Takata fined $1bn in US over exploding airbag scandal' *BBC News* (online) 13 January 2017 <http://www.bbc.com/news/business-38613030>.
[4] This is discussed in Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt and Sarah Murray (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211-226.

community expectations of the public interest, as well as the legitimate interests of the law enforcement, regulatory and corporate sectors.

3.3 The Bill or the accompanying DPA Guidelines should impose upon the approving officer an obligation to consider whether the grant of the DPA is likely to be *effective* in preventing future corporate offending. Under the Bill, cl 17D(4) provides that the approving officer must approve the DPA if the approving officer is satisfied that: (a) the terms of the DPA are in the interests of justice; and (b) the terms of the DPA are fair, reasonable and proportionate. In relation to latter, the key issue is the likely *punitive* effect, specifically whether or not the terms satisfy the tests of fairness, reasonableness and proportionality. Proportionality encourages the approving officer to impose a penalty that correlates with the degree of corporate blame and harm done, as well as the desired outcome (namely desistance from future corporate crime). To achieve deterrence the approving officer must weigh the cost imposed by the penalty upon the corporate 'bottom-line' against any benefits of reaping criminally-derived profits.

3.4 It is rarely asked whether applying penalties to corporations for the purpose of deterrence (either general or specific) actually works. Corporate compliance, consistent with the 'rational actor' model, is viewed as an amalgam of assessments relating to likelihood of detection, as well as the severity and consistency of penalties – under this model, the approving officer would seek to fix the penalty so that the costs imposed outweigh the benefits of future rule-breaking.[5] However, there is limited research to support the assumption that zero tolerance policies and tougher mandatory penalties for corporate crime *significantly* maximize corporate, as opposed to individual deterrence. A systematic review of available empirical research found that legal interventions, such as penalties, had only a 'small deterrent effect' on corporate behaviour.[6] Although more research is needed to understand why corporations obey the law, as the systematic review concluded, it is plausible that there exist other factors, including attitudes of corporate peers, that affect corporate wrongdoing. The detection, prosecution and severity of punishment for serious corporate crime may be part of the picture, but they are not the *only* forces motivating corporate compliance. Reframing DPAs around preventive and restorative aims would refocus the attention of the regulatory agency, corporate defendant and the approving officer upon whether the DPA is an effective measure likely to **prevent** future corporate crime, **reform** corporate cultures and provide **redress** for the harms caused.

4. Constitutional Concerns: Using an Administrative rather than a Judicial model

4.1 Previous submissions identify a range of Chapter III issues, which the Bill seeks to address by vesting powers in an 'approving officer', which is defined as a retired judge of any Australian jurisdiction. Although this person is clearly *not* a judge exercising federal power, there remain a number of unresolved concerns relating to Chapter III.

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[5] For example, Greg Medcraft, Chairman of the Australian Securities and Investments Commission (ASIC), while bemoaning the limited penalties available to regulators to promote both general and specific deterrence, called for more action to 'Lift the Fear and Suppress the Greed'. The Senate Inquiry assessing the effectiveness of penalties for white collar crime was heavily influenced by Medcraft's view: Senate Economics References Committee, *'Lifting the fear and suppressing the greed': Penalties for white-collar crime and corporate and financial misconduct in Australia* (March 2017).
[6] The systematic review of corporate deterrence research reported that the deterrent effects upon corporations were 'mixed': S Simpson, Melissa Rorie, Mariel Alper, Natalie Schell-Busey, *Corporate Crime Deterrence: A Systematic Review* (Campbell Systematic Review 2014) <https://www.campbellcollaboration.org/library/corporate-crime-deterrence-systematic-review.html>.

4.2 As noted above, the Bill states that the approving officer must approve the DPA where satisfied that it serves the public interest[7] and interests of justice.[8] The concept of the 'public interest' differs from the 'interests of justice' – the latter having been copied directly from the UK DPA Act.[9] However, the UK DPA model of independent oversight is a judicial rather than administrative model. While the approving officer under the Bill is expressly *not* a judge exercising judicial power – thus avoiding infringement of Chapter III - the statutory criteria against which the terms of the DPA are assessed should avoid formulations commonly used by judicial officers when called upon to exercise 'judicial' functions. There is a danger that linking approval criteria to the 'interests of justice' will convey the impression that Parliament seeks to vest judicial powers in an administrative office-holder (albeit one occupied by a retired judicial officer), risking entrenchment upon Chapter III.

4.3 A similar concern arises in relation to the Bill's criteria upon which the proposed DPA would be assessed (namely, whether it is fair, reasonable and proportionate). To avoid the appearance of vesting judicial functions in the approving officer, the Bill should avoid criteria conventionally associated with the judicial imposition of punishment. Rather the Bill should use conventional administrative criteria (namely, necessary, reasonable, effective and proportionate) which should be tied to the preventive/restorative aims of the DPA scheme [see para 3.3 above]. Assuming a non-punitive model for the DPA scheme is accepted, then the focus of negotiation and agreement is achieving both restorative and preventive outcomes: "[u]nder this model, once aware of the harm caused, the corporation has a duty to take reasonable steps to engage in restorative action, but also to prevent future harms".[10]

5. Compatibility with Human Rights

5.1 In addition to the 'double jeopardy' concern noted above [para 2.2], the Bill presents a range of risks of potential unfairness. The obligation to ensure a fair hearing is derived from Australia's obligation to respect Art 6 of the ICCPR, a duty which is placed not only upon the Judiciary, but also upon the Executive and Legislature. There is clearly scope for enhancing the fairness of the DPA process in relation to the administrative guidance and statutory criteria. The desirability of ensuring fairness during the DPA process is *not* based on claims that the right to a fair trial under Art 6 extends to corporations, which accordingly should be treated as a 'rights-holder' – human rights only attach to *human* beings, not 'legal persons'. That said, there are a range of practical arguments for ensuring that high levels of procedural justice are accorded to corporations that are being investigated for criminal, civil or administrative wrongdoing. Although corporations are 'legal persons' they are constituted by real people engaged in joint endeavors whether as directors, board members, employees or shareholders. There is some recent promising research suggesting that treating corporations with fairness (mediated through interactions with individuals at the middle management level) promotes higher levels of compliance.[11]

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[7] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth), clause 17D(2)(b)
[8] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth), clause 17D(4)(a); 17D(8).
[9] *Crime and Courts Act 2013* (UK), Schedule 17.
[10] S Bronitt, 'Regulatory Bargaining', above n 4, 224.
[11] Procedural justice researchers, drawing on Tom Tyler's foundational research in psychology, have just begun to turn their attention to the what motivates corporate, as opposed to individual compliance: see M Rorie, et al, 'Examining Procedural Justice and Legitimacy in Corporate Offending and Beyond-Compliance Behavior: The Efficacy of Direct and Indirect Regulatory Interactions' (2018) *Law & Policy*, Accepted Author Manuscript (24 February 2018).

5.2 Another area of potential unfairness relates to the making of admissions under the DPA. The inclusion of non-contradiction clauses in the DPA, following US practice, is designed to prevent corporations from resiling from, or seeking exclusion of, prior admissions of fact in subsequent prosecutions. This potentially limits the right of the defence to challenge the relevance, weight or admissibility of key evidence at the subsequent trial. The Explanatory Memorandum to the Bill asserts that the DPA does not compromise the right to a fair hearing since the DPA was sought by the corporation 'on an entirely opt-in basis', and that agreed statements of fact occur on an 'entirely voluntary basis'.[12] However, the corporate decision to enter into the DPA, a condition of which is to admit to certain statements of fact, is clearly made under threat of prosecution. This threat exerts significant pressure – if no DPA can be agreed, commencing criminal investigation and prosecution may have dire financial consequences for the corporation, but also 'innocent' parties such as shareholder, employees and customers. In the context of confessional evidence, the High Court has said a statement is non-voluntary where it was induced by a threat or promise by a person in authority (which would clearly include the CDPP or regulatory agency).[13] Fear of prejudice and hope of advantage are among the factors which may overbear the will of the person making the confession.[14] Applying this conventional evidence standard to admissions of fact under a DPA suggests that there is a clear risk of involuntariness. Clearly then, to ensure the fairness of the process is not prejudiced, the Bill should require the approving officer to be satisfied of the 'voluntariness' of the DPA conditions (including any admissions of fact). The burden in relation to this matter should rest with the CDPP.

5.3 The second identified risk to the fairness of the process relates to the use of DPA conditions that order the corporation to reimburse the agency for the costs of investigation. The 'financial impact' assessment, under the General Outline to the Bill states that where appropriate, 'a party to a DPA may also be required to compensate Commonwealth agencies for any costs associated with the negotiation and administration of a DPA'.[15] It is submitted that this is never an appropriate condition. It presents a real risk of abuse of process that would undermine public confidence in the administration of justice. Bearing in mind the large sums at stake in a DPA negotiation, and the recurrent budgetary pressures, agencies may be placed under undue pressure to 'cut a deal' over costs, charges, pleas and penalties. There is a real risk that such fiscal pressures will prejudice the integrity of the DPA decision-making process, and for this reason, such orders should not be included in DPAs.

6. Failure to Prevent Bribery Offence: Problems with Absolute Liability?

6.1 Consistent with earlier submissions,[16] there are strong reasons to support the Bill's inclusion of a new offence of 'failing to prevent foreign bribery' (FPFB offence), cl 70.5A. However, two issues need to be considered in relation to imposing this form of precursor liability.

[12] Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, pp 7- 8.
[13] *R v Lee* [1950] 82 CLR 133.
[14] *R v Lee* [1950] 82 CLR 133, 146.
[15] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, General Outline, p 4.
[16] S Bronitt and Z Brereton, Submission to the Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995* (Cth) *Public consultation paper*, 10 May 2017.

6.2 First, the Bill does not place the FPFB offence within a hierarchy of related offences with graded penalties. A corporation may fail to implement adequate procedures to prevent foreign bribery due to inadvertence, carelessness or ineptitude, but equally it may fail to prevent foreign bribery intentionally, knowingly, recklessly or dishonestly. Framed as a form of absolute liability, the FPFB offence is a blunt 'catch all' provision that does not differentiate between different degrees of corporate culpability. There is a risk that the FPFB offence undermines a fundamental tenet of criminalisation that requires distinctions to be drawn between types of crime and penalties based on different levels of culpability (known as the 'representative' or 'fair labelling' principle).[17] As a normative ideal, this principle aims to ensure that 'widely felt distinctions between different kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled to represent fairly the nature and magnitude of the law breaking'.[18] Differentiating between offences based on degrees of fault and harm performs a symbolic function: 'it can symbolise a degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded'.[19]

6.3 Absolute liability is often justified by policy makers and regulators on the basis that it catches corporate offenders which deliberately and knowingly shut their eyes to an obvious risk, putting themselves in a position of 'wilful blindness'. These concerns are overstated, since rather than lacking fault entirely, corporations often satisfy the fault element of recklessness or negligence. The challenges of proving fault under corporate criminal responsibility provisions in Part 2.5 of the *Criminal Code Act 1995* (Cth), we believe, are also overstated. The organisational or corporate culture model in Australia, though not yet tested in courts, offers investigators and prosecutors alternate routes to establishing corporate responsibility. Indeed, sections 12.3(2)(c) and (d) treat 'proof of absence of a culture of compliance and proof of the existence of a culture of non-compliance as equivalent grounds for the conclusion that the corporation gave its authorisation or permission for the offence'.[20] When these principles of corporate responsibility are coupled with the *existing* offence of bribing a foreign official (s 70.2), many culpable failures to prevent bribery may be criminalised through sections 12.3(2)(c) and (d) of the *Criminal Code Act 1995* (Cth).[21] The Code further clarifies that corporate forms of negligence may be evidenced by inadequate corporate management, control or supervision of the conduct of one or more of the corporation's employees, agents or officers or by the failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate (s 12.4(3)).

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[17] Andrew Ashworth, *Principles of Criminal Law* (2006), 88 – 90; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 (2) *Modern Law Review* 217.
[18] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 (2) *Modern Law Review* 217 citing Andrew Ashworth, *Principles of Criminal Law*, 88 – 90.
[19] Ibid.
[20] Olivia Dixon, 'Corporate criminal liability: the influence of corporate culture' in Justin O'Brien and George Gilligan (eds.) *Integrity, risk and accountability in capital markets: regulating culture* (Bloomsbury Publishing, 2013) 260 citing Ian Leader-Elliot, 'The Commonwealth Criminal Code: A Guide for Practitioners', (March 2002) 321. For an excellent analysis of the issues of corporate culture in this context see Radha Ivory and Anna John, "Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations" [2017] UNSWLawJl 43; (2017) 40(2) University of New South Wales Law Journal 1175. See generally Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2001).
[21] See Radha Ivory and Anna John, "Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations" [2017] *UNSWLawJl* 43; (2017) 40(2) University of New South Wales Law Journal 1175. See also Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2001) 159.

6.4 Secondly, there is a risk that this absolute liability 'failure to prevent' offence will become the default Catch-All charge for *all* cases of foreign bribery. As a broad 'fallback' offence, the FPFB offence is likely to assume a key role in DPA negotiations in foreign bribery cases. It is vital that negotiations over foreign bribery allegations do not inappropriately divert away from criminal prosecution cases of *serious* bribery (determined by assessing blameworthiness and harm) that would properly merit investigation, prosecution and punishment through the criminal justice system.

6.5 To avoid the risks outlined above, it is recommended that the Office of the Commonwealth Director of Public Prosecutions publish comprehensive Prosecution Guidelines setting out the following:

a. The FPFB offence should be used only as a 'precursor' regulatory offence in situations where the corporation failed to implement adequate procedures to prevent offending conduct by its officers, employees or agents. The FPFB offence should be framed within a **graded hierarchy of offences**, ranging from the most serious failures (intention, knowledge, recklessness) through to negligent or inadvertent failures.
b. In other cases, where there is prima facie evidence that a corporation **intentionally, knowingly or recklessly** failed to act to prevent bribery, priority consideration must be given to prosecution of the corporation, applying the general corporate criminal responsibility principles in Part 2.5 of the *Criminal Code Act 1995* (Cth);
c. The primary offence of bribing a foreign official (s 70.2) should be amended to provide for **an alternative verdict** for the offence of FPFB in cases where the jury is not satisfied beyond reasonable doubt that there is evidence of the primary offence, though there is sufficient evidence to convict the corporation for its failure to prevent the acts of bribery subject of the charge.

7. Conclusion

7.1 In a recent bestseller exposé on US responses to white-collar crime,[22] Jesse Eisinger paints a damning profile of regulatory culture within the Security Exchange Commission and Department of Justice. In Eisinger's assessment, there is a professional caste of young lawyers working in these agencies who have become risk averse to prosecution, resorting to plea bargains, settlements and DPAs as the default regulatory response. Their fear that prosecutions might fail, tarnishing otherwise unblemished conviction records, produces a culture of regulatory timidity, or in Eisinger'scolourful terms, the 'Chickenshit Club'. It is this regulatory culture that explains waning public confidence in corporate regulation in the US, where white-collar crime prosecutions are at a 20 year low, and the view that the DPA is 'a progressive legal instrument …[that] has been repurposed as a vehicle for corporate impunity'.[23]

7.2 Culture is at the root of social change, and in this respect, it is vital that policy-makers give attention to how the new legal tools being proposed in the Bill impact upon the culture of regulators, as well as the corporations subject to their regulation. We hope our observations assist the Committee assess the strengths and weakness of the Bill under consideration.

[22] Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon & Schuster, 2017).
[23] Patrick Keefe, 'Why Corrupt Bankers Avoid Jail: Prosecution of White-Collar Crime is at a Twenty-Year Low' *The New Yorker* (online) 31 July 2017 <https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail>.