Australian Government
Attorney-General's Department

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Senate Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

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 2017.

This submission provides further detail to assist the Committee's consideration of the Bill and seeks to address key issues raised in other submissions. This submission has been prepared in consultation with the Australian Federal Police (AFP) and Commonwealth Director of Public Prosecutions (CDPP).

The measures in the Bill seek to address challenges associated with detecting and addressing serious corporate crime. Corporate crime is estimated to cost Australia $8.5 billion every year. 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. Court proceedings can be long and expensive, particularly against well-resourced corporate defendants.

In particular, 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), and
- introduce provisions to support a Commonwealth Deferred Prosecution Agreement (DPA) scheme for serious corporate crime (Schedule 2).

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 Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO) and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

The reforms also follow extensive public consultation. In March 2016 the Government released an initial discussion paper on the concept of deferred prosecutions agreements.[1] 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.[2] The Government released a public consultation paper on the foreign bribery amendments including draft provisions in April 2017.[3]

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

[1] Deferred prosecution agreements – public consultation, 2016. The discussion paper and the submissions received in response are available online here: https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx.
[2] 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.
[3] 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.

industry, law firms, civil society and academia. The Senate Economics Committee's inquiry into foreign bribery has also considered potential reforms to address foreign bribery in particular, and is expected to report in March 2018.

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

The deferred prosecution agreement reforms are however novel and untested in the Australian context, and it is important that corporations understand the scheme's operation and the ways in which it might be beneficial to self-report misconduct and seek a DPA and provide views on the practical operation of the scheme. The foreign bribery reforms will also require companies to be more proactive in preventing foreign bribery. For these reasons, the department intends to conduct further public consultation on materials to support the measures in the Bill, including:

- a DPA Code of Practice, which will provide guidance on how the scheme will operate, and
- draft guidance for corporations on preventing foreign bribery, to support a new corporate offence of failing to prevent foreign bribery.

The Bill does not prescribe a specific period for a statutory review of the scheme, consistent with the Government's intention to keep the measures under review after the Bill's passage, in consultation with stakeholders where appropriate. Monitoring of the use and effectiveness of the provisions in practice is likely to be more effective, particularly noting that the frequency and pace at which DPAs will be negotiated, while unknown, is likely to be modest. There is a significant degree of variation between the pace at which DPAs are negotiated in the UK and the US, and given that the Australian DPA model is a hybrid of the UK and US approaches it is not possible to predict where Australia will sit on this spectrum. Keeping the scheme under review as it is used will provide the flexibility to monitor and evaluate the Australian DPA scheme as and when lessons from DPA negotiations arise. In addition, Australia's foreign bribery framework is subject to regular peer review by the Organisation for Economic Cooperation and Development. Most recently, Australia was reviewed in December 2017 and will be subject to a follow up review in December 2019, which will likely consider the amendments in this Bill and any further amendments to the foreign bribery offences.

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. The OECD has reported that, across all parties to the OECD Anti-Bribery Convention, it takes an average of 7.3 years to conclude foreign bribery cases.[4] Some of the elements in the foreign bribery offence in its current form pose particular investigation and prosecution challenges.

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. Amendments are needed to expand the scope of the offence to cover the broader

[4] This average relates to the time between commission of the offence and resolution of the prosecution.

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 specific business or an advantage in mind, and that the business or advantage can be obtained for someone else, and
- remove the existing requirement that the foreign public official actually be influenced in the exercise of their official duties 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 corporations to implement these procedures.

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.

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.

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.[5]

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'.[6] 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?

[5] 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.
[6] UK Law Commission, Reforming Bribery, Report No 313 (2008), [4.90].

The amendments remove the requirement that the foreign official must be influenced in the exercise of the official's duties. The requirement put 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 position of power within the foreign country, or candidacy for such a position, is the relevant consideration in criminalising conduct amounting to foreign bribery

Why does the Bill not create a recklessness offence?

The exposure draft provisions released in April 2017 included a proposed foreign bribery offence based on the fault element of recklessness.[7] This would still require proof of intention to provide, promise or offer the benefit. The offence would apply where a person is reckless as to whether that conduct will improperly influence a foreign public official in relation to the obtaining or retaining business or an advantage. The penalty proposed for a recklessness offence was half that of the corresponding offence for intending to improperly influence a foreign official, reflecting the differing degree of culpability attaching to these fault elements.

The benefits of a recklessness offence would be that it would:

- address challenges in obtaining necessary and sufficient evidence from overseas to prove intention—due to the nature of foreign bribery, relevant conduct almost exclusively occurs overseas; the target of the bribe may also be located in a country that is unwilling to cooperate in relation to the bribery of one of its public officials
- address challenges in establishing intention where the conduct is historical – in the foreign bribery context, investigations most often commence after a company has self-reported, after media reporting, or after a whistleblower has come forward
- overcome instances where it is difficult to obtain sufficient documentary evidence – as foreign bribery usually occurs in a business setting, persons involved exercise great caution and transact verbally or face to face, again usually overseas, with witnesses also overseas; and
- serve as a greater deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by this conduct.

The AFP and CDPP support the creation of such an offence, noting that it would effectively capture instances of wilful blindness by suspects, including senior company officers (such as directors). Most foreign bribery cases involve bribes paid by third parties in circumstances where the suspects (individuals and companies) are wilfully blind as to the activities of their agents (including employees, subsidiaries and third party agents). While the offence of failing to prevent foreign bribery would go some way to addressing this scenario, it is

[7] Recklessness is defined in section 5.4 of the Criminal Code. A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

possible that companies and individuals may still be able to structure their affairs in ways which allow them to limit or avoid exposure to criminal liability for conduct that should be criminalised.

After balancing these arguments against other views expressed in submissions received in response to the April 2017 discussion paper, the Government elected not to proceed with a recklessness offence.

A number of submissions received in response to the 2017 discussion paper raised concerns that the offence would set too low a standard for culpability. 'Recklessness' is defined in section 5.4 of the Criminal Code, which provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk. Submissions to the April 2017 discussion paper emphasised that it would be difficult for corporations to develop policies and procedures that govern the assessment of an unjustified substantial risk in the context of foreign bribery, which is complex by nature and can be particularly difficult to identify and easy to conceal.[8]

Submissions also identified that a recklessness offence would be inconsistent with international standards. Some submissions also recalled that a recklessness offence was considered by the Australian Government when the foreign bribery offence was introduced in 1999, and not pursued. Other matters considered by Government in deciding not to implement a recklessness-based foreign bribery offence in the current package of reforms include:

- a recklessness offence for foreign bribery is not required for Australia to meet its obligations under the OECD Anti-Bribery Convention. Furthermore, the proposed failure to prevent foreign bribery offence (explained in further detail below) goes beyond the requirements of the Convention, and would also enhance the capacity of Australian law enforcement to address instances of wilful blindness by corporations which might otherwise fall within the scope of a recklessness offence.
- the US and UK have not adopted a recklessness offence. The US Congress has previously considered and rejected a 'reckless disregard' fault standard with respect to the *Foreign Corrupt Practices Act 1977*, and in 2008 the UK Law Commission rejected the inclusion of recklessness as a fault element for foreign bribery in the now *Bribery Act 2010*.

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 under the existing corporate criminal liability provisions in the Criminal Code.

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 United Kingdom and has reportedly had a significant positive influence on the adoption of effective corporate compliance programs to prevent bribery.

[8] Submissions which argued against the introduction of a recklessness offence include those provided by the Association of Mining and Exploration Companies, the Australian Institute of Company Directors, BHP, Woodside, Allens, and the Law Council of Australia.

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 company's annual turnover (if the value of the benefit cannot be determined)). 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 deterrent. 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 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 United Kingdom, corporations that commit or fail to prevent foreign bribery are punishable by an unlimited fine.

The Department is not persuaded by arguments that the offence should be characterised as a regulatory breach (i.e. failure to implement adequate procedures) and the penalty lowered accordingly.

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 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 for them to avoid liability is to have 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 intends to publicly consult on the draft guidance shortly.

The guidance will be similar to that provided by the United Kingdom in relation to its offence for failure to prevent foreign bribery. Drawing on the UK guidance will support of consistency with existing guidance, . Industry has particularly noted the challenges of operating internationally and reconciling even modest variations in legal frameworks. Guidance that is consistent with international models where possible will better contribute to effective prevention of foreign bribery.

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.

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 February 2018, seven offenders have been convicted of foreign bribery offences. Other matters are currently before the courts.

Improvements in operational response, including the creation of the AFP-led Fraud and Anti-Corruption Centre, the AFP's foreign bribery panel of experts and close cooperation with domestic and international agencies, have had a significant positive impact in addressing and combatting foreign bribery.

Schedule 2—Deferred prosecution agreement scheme

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.[9] 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 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.

A similar scheme has been used to tackle corporate crime with significant success in both the UK and the US. Since adopting a DPA scheme in 2014 the UK has settled three DPAs. Rolls Royce entered into a DPA after cooperating extensively in an investigation into transnational corruption. The penalty of £497m is the highest penalty against a company in the UK for criminal conduct.

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.

[9] Serious corporate crime is defined with reference to a specific list of offence 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.

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, 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. 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.

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.

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 department is mindful of the separation of powers under the Constitution. The department considers the approach in the Bill of using a retired judicial officer is a 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 United States and the United Kingdom. These schemes do not require a corporation to admit to criminal liability to be able to enter into a DPA. However, in the United States 'an admission or an agreement not to contest the relevant facts underlying the

alleged offenses is generally appropriate'.[10] 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 the bribery of foreign public officials (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, confidentially 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.

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?

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 the

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

conduct the subject of by 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.