Chapter 5

Encouraging self-reporting by corporations—A deferred prosecution agreement scheme

5.1 Given the difficulties that law enforcement agencies have in identifying instances of foreign bribery and corruption, measures that encourage self-reporting by corporations will greatly assist information and evidence gathering. This is particularly evident given that, of the 57 foreign bribery allegations reported by Australia that proceeded to evaluation or investigation, only eight came to the attention of law enforcement authorities through self-reports by companies.[1]

5.2 In considering options to encourage greater self-reporting by companies, the government released a public consultation paper on a possible scheme for deferred prosecution agreements (DPAs) in 2016 (2016 discussion paper);[2] and in March 2017, the government released a second public consultation seeking views on a proposed DPA model (2017 DPA model).[3]

5.3 The 2017 DPA model would give prosecutors the option to invite a company to negotiate a DPA. The DPA's terms would typically require the company to cooperate with any investigation; pay a financial penalty (the amount of which could partly reflect the level of cooperation); and implement a program to improve compliance through ongoing monitoring. In return, the prosecution would be deferred. Under the 2017 DPA model, the final terms of a DPA would then need to be approved by a retired judge and, upon fulfilment of the terms of the DPA, the matter would be considered resolved without prosecution or conviction.[4]

5.4 Following the above consultations, in December 2017, the government introduced the Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) that, in addition to the reforms discussed in chapter 4, seeks to introduce a DPA scheme which would apply to foreign bribery and other specified serious corporate offences.

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1 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 52, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

2 Attorney-General's Department, *Deferred prosecution agreements—public consultation*, 2016, https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 4 January 2018).

3 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

4 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

5.5 This chapter considers the evidence received by the committee in relation to the introduction of a DPA or non-prosecution agreement (NPA) scheme in Australia, including the use of such agreements in the United Kingdom (UK) and the United States (US). It then examines the key features of the proposed model for a DPA scheme contained in the CCC bill.

What are deferred and non-prosecution agreements?

5.6 Under a DPA, a company is charged with an offence, but prosecution is deferred for a period of time agreed by the parties. Within that timeframe, the company must meet certain conditions. For example, the payment of a financial penalty, admission of material facts and establishment of measures to prevent future offending. If the company meets these conditions, the prosecutor will move to dismiss the charges.[5]

5.7 NPAs represent a similar arrangement. However, no charges are laid and the agreement is not filed with a court. Under an NPA, the company must again meet certain conditions, such as waiving the statute of limitations, agreeing to ongoing cooperation, meeting compliance and remediation obligations, and paying a penalty. An NPA may also include an agreement to undertake some form of corporate monitoring or self-reporting. Where any of these conditions are breached, recourse to prosecution remains an option.[6]

Use in United Kingdom and United States

5.8 In February 2014, DPAs were introduced in the UK following a consultation process led by the Ministry of Justice. The power to enter into a DPA was introduced by amendment to the *Crime and Courts Act 2013* (UK).[7]

5.9 This power was first exercised on 30 November 2015 after Standard Bank PLC, who had been charged with failure to prevent bribery under section 7 of the UK's *Bribery Act 2010*, agreed to a DPA. Subsequently, the charges were immediately suspended and Standard Bank PLC was ordered to pay a US$25.2 million fine, as well as paying compensation of a further US$7 million to the Government of Tanzania. Standard Bank PLC also agreed to pay £330,000 towards the UK's Serious Fraud Office's (SFO) costs in relation to the investigation and subsequent resolution of the matter.[8]

5.10 By contrast, there is no statutory basis for the use of such agreements in the US. Rather, the source of authority is the general authority and discretion of

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5 BHP Billiton, *Submission 37*, p. 6.

6 BHP Billiton, *Submission 37*, p. 6.

7 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 12, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 10 May 2016).

8 Serious Fraud Office, *Standard Bank PLC*, 1 June 2016, https://www.sfo.gov.uk/cases/standard-bank-plc/ (accessed 22 July 2016).

prosecutors. Guidance for the use of DPAs and NPAs was issued in 2008 in the US Attorneys' Manual, *Principles of Federal Prosecution of Business Organisations*, Titles 9 28.000 to 9 28.1300.[9]

5.11 The US Securities and Exchange Commission (SEC) has entered into a number of DPAs in relation to offences under the *Foreign Corrupt Practices Act* of 1977 (FCPA). For example, a DPA was entered into in a case involving an engineering firm, and one of its former executives, who were charged with violating the FCPA by offering and authorising bribes and employment to foreign officials to secure Qatari government contracts. The DPA together with the executive's employer, PBSJ Corporation: deferred the charges for two years; required the company to pay a US$3.4 million fine (which reflected the company's significant cooperation with the authorities' investigation); and required the company to comply with certain undertakings.[10]

5.12 Some submitters commented on the impact of the US DPA scheme. Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, opined of the US model:

> An environment was created in which we had much more detection and it allowed us more prosecution, and hopefully there will be more deterrents going into the future…[P]rosecutors were not to engage in deferred prosecution agreements that gave immunity to individuals and…there should be active pursuit of the individuals. At the end of the day, it's not the company that pays the bribe; it's individuals within the company who made the decision, authorised it and made the payment.[11]

5.13 The International Bar Association Anti-Corruption Committee (IBAACC) also commented that the US system has been criticised for 'allowing the criminal justice system to be conducted by administrative fiat'.[12] However, it argued that the system had been nonetheless effective in producing settlements that are transparent, subject to oversight by the court and ultimately publicly available.[13]

Current situation in Australia

5.14 Australia does not have a DPA scheme for serious corporate crime, including for the offence of foreign bribery. As such, under the current legal framework in

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9 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 11, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

10 US Securities and Exchange Commission, *SEC Charges Former Executive at Tampa-Based Engineering Firm With FCPA Violations*, https://www.sec.gov/news/pressrelease/2015-13.html (accessed 11 December 2017).

11 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 5.

12 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 29.

13 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 29.

Australia, there are limited tangible legal incentives for companies to proactively report any potential instances of foreign bribery identified internally, and a lack of certainty as to whether any meaningful benefit will flow from cooperation during a criminal investigation. The Attorney-General's Department (AGD) explained that:

> The Australian Government faces challenges in detecting, investigating and prosecuting serious corporate crime. New threats and increasingly sophisticated offending make it difficult to prevent and police this kind of criminal conduct. Identifying corporate wrong doing often depends on companies cooperating or whistleblowers coming forward, but under current arrangements, there is little incentive for companies to self-report misconduct.[14]

5.15 Notwithstanding the above, Mr Neville Tiffen highlighted that there is some flexibility in the manner in which a prosecution can be pursued in Australia. He referred to the *Prosecution Policy of the Commonwealth* (the Prosecution Policy) and noted that the Commonwealth Director of Public Prosecutions (CDPP) may enter into an agreement with a defendant to provide immunity.[15] While the Prosecution Policy does provide for such agreements, they are only available in circumstances where the defendant is an accomplice or the charges relate to cartel conduct under sections 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010*.[16]

5.16 There are no such provisions for foreign bribery. However, Mr Tiffen noted that antitrust regulators in several countries have indicated the benefits of self-reporting in the context of cartel behaviour. Mr Tiffen argued that there is therefore no reason that similar arrangements cannot be made in the context of foreign bribery.[17]

5.17 Mr Tiffen also noted that the CDPP may enter into an agreement whereby the defendant pleads guilty to some charges or to lesser charges.[18] This is embodied in paragraphs 6.14 to 6.21 of the Prosecution Policy, which provides for charge negotiation.[19] There are a range of factors that must be considered before a charge

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14 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 3, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

15 Mr Neville Tiffen, *Submission 16*, p. 7.

16 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, pp. 12–14, 20–23, https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf (accessed 11 December 2017).

17 Mr Neville Tiffen, *Submission 16*, p. 7.

18 Mr Neville Tiffen, *Submission 16*, p. 7.

19 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, p. 13, https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf (accessed 11 December 2017).

negotiation proposal can be agreed to, including whether the defendant is willing to cooperate in the investigation or prosecution of others.[20] These measures have a general application and could be applied in the context of foreign bribery investigations.

5.18 Finally, Mr Tiffen referenced the discretion of the CDPP to proceed with a charge summarily rather than by indictment, which may include an agreement that the CDPP will not oppose a defence submission to the Court on the appropriate sentence range.[21]

Implementing a deferred prosecution agreement scheme in Australia

5.19 Since March 2016, the government has been considering whether to introduce a DPA scheme in Australia. The AGD suggested that:

> An Australian DPA scheme for serious corporate crime may improve agencies' ability to detect and pursue crimes committed by companies and help to compensate victims of corporate crime. It may help avoid lengthy and costly investigations and prosecutions, and provide greater certainty for companies seeking to report and resolve corporate misconduct. It would be compatible with the Government's policy to tackle crime and ensure that our communities are strong and prosperous.[22]

5.20 This part of the chapter considers the views expressed by stakeholders in relation to the proposed introduction of a DPA scheme in Australia, before looking at the DPA scheme proposed in the CCC bill which would apply to foreign bribery and other specified serious corporate offences.

Support for the introduction of a DPA scheme

5.21 The overwhelming majority of responses to the AGD consultation on the 2017 DPA model (and the 2016 consultation), as well as submissions to this inquiry, endorsed the introduction of DPAs in Australia.[23] These submissions also cautioned

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20 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, p. 13, https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf (accessed 11 December 2017).

21 Mr Neville Tiffen, *Submission 16*, p. 7.

22 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 3, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

23 Attorney-General's Department, Deferred prosecution agreements—public consultation, 2016, https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 4 January 2017); Attorney-General's Department, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

the need to apply learnings from the existing US and UK models, and ensure clear guidance accompanies any such legislative change.[24]

5.22 Mr William Brind Zichy-Woinarski, Member of and Consultant to the IBAACC, told the committee that the use of DPAs in Australia could lead to resource efficiencies:

> …if you can have a deferred arrangement situation, it will in many cases save the AFP, the CDPP, whoever the respective agency is that is responsible, a lot of money also, so you have a better use of your resources. We have touched upon it briefly, but one of the real problems, first of all, is you have to find out where foreign bribery is occurring, but when you do it is a very expensive thing to do and the demands on any of the agencies involved in these are very high.[25]

5.23 A number of submissions to the inquiry also advocated for the use of DPAs or NPAs as a measure to encourage organisations to self-report any foreign bribery offences.[26] By encouraging self-reporting, it is possible that instances of foreign bribery could be detected in higher numbers with a lower cost to the taxpayer. Further, DPAs may lead to greater transparency in the prosecution of foreign bribery.

5.24 Mr Tiffen endorsed the adoption of a DPA system similar to that of the UK, where a DPA must go before a judge before it can be adopted. Mr Tiffen suggested that the Australian Competition and Consumer Commission and Australian Securities and Investment Commission (ASIC) could be consulted with a view to identifying how enforceable undertakings are used, and to see if the same principles could be applied in the context of foreign bribery, particularly in the context of DPAs.[27]

5.25 Mr Tiffen stressed that DPAs should only be available if a company fully cooperates with regulators, including disclosure of all relevant facts (even where those facts may be covered by legal privilege).[28]

5.26 In evidence before the committee, Mr Nick McKenzie explained that companies and their legal advisers are reluctant to come forward because there is a lack of certainty about what may happen. While cautioning that DPAs 'are simply one tool in a toolbox',[29] Mr McKenzie acknowledged that:

> A deferred prosecution agreement where there is a more certain process that can be adopted—and that companies are aware of and know that there is a

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24 See, for example, Mr Neville Tiffen, *Submission 16*, p. 8; ANZ, *Submission 20*, p. 6; BHP Billiton, *Submission 37*, p. 5.

25 Mr William Brind Zichy-Woinarski, Member and Consultant, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, p. 22.

26 See, for example, Mr Neville Tiffen, *Submission 16*, p. 8; ANZ, *Submission 20*, p. 6; BHP Billiton, *Submission 37*, p. 5.

27 Mr Neville Tiffen, *Submission 16*, p. 8.

28 Mr Neville Tiffen, *Submission 16*, p. 8.

29 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 8.

> commitment by the regulators to working with corporations through these issues—would lend itself to an environment which is more inductive for companies to come forward. If there's more certainty about what the process is and what might happen, then therein lies the incentive for people to come forward.[30]

5.27 Mr David Lehmann, Director, KordaMentha Forensic, also supported the introduction of a DPA scheme in Australia, suggesting that such a regime would help:

> …foster a willingness on the part of corporations to appropriately and effectively investigate alleged bribery and self-report it to regulators when there is evidence to support the alleged misconduct.[31]

The need for clear guidance

5.28 The 2017 DPA model (and the 2016 discussion paper) contemplated that detailed guidance would be issued outlining when a prosecutor is likely to offer DPA negotiations. A number of stakeholders emphasised the importance of the quality and clarity of this guidance in setting out when a company may be invited to enter into DPA negotiations, and suggested that the range of outcomes that they might expect would be particularly important.[32]

5.29 For example, in recommending that clear guidance should be made available on the benefits of entering into DPA negotiations and the factors the prosecutor will take into account, King & Wood Mallesons suggested that:

> In order to encourage companies to self-report actual or suspected misconduct, the legislation or a supporting policy document should contain clear criteria which will be considered when deciding whether to enter into DPA negotiations.[33]

5.30 In this context, King & Wood Mallesons suggested that the UK's DPA Code of Practice would serve as a good example of the sort of criteria which could be used as a starting point in Australia.[34] The UK's DPA Code is issued by the Director of

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30 Mr Nick McKenzie, Private capacity *Committee Hansard*, 7 August 2017, p. 17.

31 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

32 King & Wood Mallesons, Mr Neville Tiffen, Norton Rose Fulbright, Responses to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

33 King & Wood Mallesons, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 2, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

34 King & Wood Mallesons, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 2, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

Public Prosecutions and the Director of the SFO.[35] It specifies matters prosecutors should have regard to when:

- negotiating DPAs with an organisation whom the prosecutor is considering prosecuting for a relevant offence;
- applying to the court for the approval of a DPA; and
- overseeing DPAs after their approval by the court, in particular in relation to variation, breach, termination and completion.[36]

5.31 In contrast, Mr Tiffen recommended the US Department of Justice's guidance on what it expects companies to do in order to receive beneficial treatment as a good starting point for Australia. He explained:

> The guidance has three main limbs—voluntary self reporting; full cooperation with the regulators; and remediation inside the company to ensure that the event is not repeated. I submit that, if a company does all of the three elements, it should be entitled to a DPA along lines set out in clear guidance. As the US guidance indicates, the self reporting must be prior to any imminent threat of disclosure or government investigation and within a reasonably prompt time of becoming aware of the conduct.[37]

5.32 Norton Rose Fulbright explained that certainty is essential to engage corporates, and suggested that the introduction of DPAs must therefore be supported by a suite of government guidance, including guidance which explains:

- the weight of a corporate's decision to self-report to the regulator, such as in circumstances in which the corporate is providing information which is otherwise unknown to the regulator;
- the weight afforded to genuine co-operation and remediation; and
- the extent to which corporates will be afforded time to investigate properly and effectively allegations or issues which arise before determining whether any reporting is required.[38]

Impact on foreign bribery

5.33 While commending the introduction of a DPA regime in Australia, some stakeholders submitted that in order to be successful in incentivising voluntary

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35 *Crime and Courts Act 2013* (UK), Schedule 17, para. 6(1).

36 UK Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, p. 2, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed 9 March 2018).

37 Mr Neville Tiffen, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 5, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

38 Norton Rose Fulbright, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 9, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

reporting in the foreign bribery space, the proposed scheme needed to be supported by robust enforcement of the foreign bribery offence.[39]

5.34 For example, Mr Mark Pulvirenti, Partner, Control Risks, suggested that DPAs will not be a success in the current environment where prosecutions are difficult and rare. Mr Pulvirenti stated:

> …in order for DPAs to appear attractive to companies there needs to be an otherwise very real risk of successful prosecution involving greater penalties than would be available via a DPA.[40]

5.35 Mr Tiffen agreed, arguing that the lack of successful foreign bribery prosecutions has resulted in companies ignoring their legal obligations. He stated:

> I would think that at the moment, without clear guidance as to what companies should be doing to really take advantage of a DPA, that a lot of lawyers might be advising their companies to wait and see—perhaps to risk the prosecution. But if we had a clear DPA process and clear guidance from the regulators about what they expect to be an effective compliance program, there would be a lot of companies that would see that as an incentive to actually start an effective compliance program in the first place. I think it would be a real incentive for companies to lift their performance so that they could take advantage of a DPA mechanism. That would also encourage self-reporting, and that would be much better for our investigators and prosecutors.[41]

5.36 Transparency International Australia (TIA) also argued that without appropriate constraints, DPAs may not achieve their desired result. In particular, TIA suggested that DPAs should include:

> …an admission of liability. It should not be just an agreement on a set of facts without an admission at the conclusion and the entry into a deferred prosecution agreement…[42]

Key features of the DPA scheme proposed in the CCC bill

5.37 The CCC bill seeks to introduce a DPA scheme which would only be available for companies (not individuals);[43] and would only apply to a publicly available list of Commonwealth 'serious corporate crime' offences, including foreign bribery.[44]

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39 See, for example, Mr Mark Pulverenti, Partner, Control Risks, *Committee Hansard,* 7 August 2017, p. 26.

40 Mr Mark Pulverenti, Partner, Control Risks, *Committee Hansard,* 7 August 2017, p. 26.

41 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 4.

42 Mr Michael Ahrens, Director, Transparency International, *Committee Hansard,* 7 August 2017, p. 22.

43 CCC bill, Schedule 2, item 7, new ss. 17A(1).

44 CCC bill, Schedule 2, item 7, new s. 17.

5.38 Under the proposed scheme, the Director of the CDPP (Director) will have discretion to negotiate and enter into a DPA on behalf of the Commonwealth.[45]

5.39 The proposed scheme seeks to make the following terms and features mandatory for all DPAs:

- a statement of facts relating to each offence specified in the DPA;
- the last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;
- the amount of financial penalty to be paid by the person to the Commonwealth;
- the circumstances which constitute a material contravention of the DPA; and
- consents to the Director instituting a prosecution of the person on indictment for an offence specified in the DPA without the person having been examined or committed for trial in circumstances where the party to the DPA provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with the agreement; and the party knew, or ought to have known that the information was inaccurate, misleading or incomplete.[46]

5.40 In addition, it provides a non-exhaustive list of terms and features that may be included in a DPA.[47]

5.41 It also outlines the process by which a DPA must be approved.[48] This includes a process for the appointment of 'approving officers' by the minister who must approve a DPA if they are satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate.[49] The process by which a DPA may be varied is also set out in the scheme. Ultimately, after the company and the Director consent to a variation, the varied DPA then follows a process that is similar to that by which a DPA must be approved.[50] Once it is approved the CDPP must publish a DPA unless it would not be in the interests of justice to do so.[51]

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45 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 9, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

46 CCC bill, schedule 2, item 7, new ss. 17C(1).

47 CCC bill, schedule 2, item 7, new ss. 17C(2).

48 CCC bill, schedule 2, item 7, new ss. 17D(1)—(6).

49 CCC bill, schedule 2, item 7, new ss. 17D(1)—(2).

50 CCC bill, schedule 2, item 7, new s. 17F.

51 CCC bill, schedule 2, item 7, new ss. 17D(7)—(10). See also Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 29.

5.42 The DPA scheme limits the use of material generated or provided to Commonwealth agencies during the course of DPA negotiations, and/or in compliance with a DPA in subsequent criminal proceedings.[52]

5.43 Should a DPA be breached, the CDPP may commence prosecution or renegotiate the terms of the DPA.[53] Absent a breach, the DPA would be concluded by fulfilment of its terms, and the company will not subsequently be prosecuted in relation to the offences specified in the DPA.[54]

Content of DPAs

5.44 In their submission to the Legal and Constitutional Affairs Legislation Committee's (L and C committee) inquiry into the CCC bill, the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, suggested that the following terms and features should be mandatory for all DPAs:

> Details of any financial gain or loss, with supporting material, in the statement of facts relating to each offence specified in the DPA; and
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> The company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence.[55]

5.45 While the non-exhaustive list of terms that may be included in a DPA in the CCC bill includes requiring a corporation to forfeit any likely benefits (including profits) accrued as a result of the misconduct specified in a DPA, there is no mandatory requirement for DPAs to include details of financial gain or loss relating to the offence/s specified in a DPA.

5.46 The AGD argued that as the CCC bill requires the terms of a DPA to be in the interests of justice, and to be fair, reasonable and proportionate:

> Information detailing any financial gain or loss incurred by the corporation may often be highly relevant to determining whether the terms of a DPA fulfil these criteria.[56]

5.47 With respect to mandating that companies formally admit criminal liability for specified offences in a DPA, the AGD cautioned that:

> The success of the DPA scheme is contingent on the scheme striking an appropriate balance between the need to encourage corporations to self-

52 CCC bill, schedule 2, item 7, new s. 17H.

53 CCC bill, schedule 2, item 7, new s.17A. See also, CCC bill, explanatory memorandum, p. 3.

54 CCC bill, explanatory memorandum, p. 3.

55 Uniting Church in Australia, *Submission 1* to the L and C committee inquiry into CCC bill, pp. 1 and 11.

56 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

> report serious offending and the need to hold corporations accountable for serious corporate crime.[57]

5.48 The AGD explained that feedback to the government's 2017 DPA model suggested that corporations would be deterred from seeking a DPA if they were required to formally admit criminal liability to obtain a DPA.[58] Therefore, the CCC bill 'does not require a corporation to formally admit to criminal liability in order to obtain a DPA'.[59]

5.49 Similar to the approach taken by the UK,[60] the CCC bill requires a corporation to admit to agreed facts detailing the nature and scope of their offending, which, if a company subsequently materially contravenes the DPA, will be taken to be the agreed facts for the purposes of the criminal proceeding.[61]

The integrity of the DPA process

Publication

5.50 The consultation paper on the 2017 DPA model stated that 'approved DPAs would be made public' such that '[c]ompanies could draw on these records as an additional source of guidance on the DPA scheme'.[62] However, in its submission to the L and C committee's inquiry into the CCC bill, the IBAACC raised concerns about whether the decision (or reasons) of the 'approving officer' are going to be published.[63] IBAACC explained:

> The Committee is concerned that all that will or may be published is the terms of the DPA and the 'decision' whether or not a DPA will or will not be approved, absent reasons. The Committee strongly believes that the approving officer must give reasons for making a decision and those reasons, together with the DPA (to the extent the Director does so without prejudice to any other ongoing investigation) must both be published. This will enhance the integrity of the process, it will ensure that Australia

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57 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 26.

58 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 26.

59 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 26.

60 In the UK, the statement of facts is treated as an admission of fact by the corporation in any criminal proceedings brought against a corporation for the offences specified in the DPA. See s. 10 of the *Criminal Justice Act 1967* (UK) and Schedule 17, s.13 of the *Crime and Courts Act 2013* (UK).

61 CCC bill, Schedule 2, new ss. 17H(5).

62 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 16, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

63 International Bar Association's Anti-Corruption Committee, *Submission 2* to the L and C committee inquiry into CCC bill, p. 3.

> follows the UK model with reasons, orders and the DPA being published) so the community can see the system working transparently.[64]

5.51 The AGD confirmed that in circumstances where a DPA is not approved, the CCC bill does not require the 'approving officer' or any person or authority to publish a notification or reasons.[65] The AGD indicated that:

> The terms of the approving officer's appointment would specify that this information should not be disclosed by the approving officer to anyone other than the parties to DPA negotiations. The non-disclosure of this particular information is appropriate because the CDPP and corporation may elect to continue to negotiate the DPA and submit a new draft DPA for the approving officer's consideration. The parties should be able to continue negotiations with the same level of confidentiality that attaches to DPA negotiations before an approving officer has considered a draft DPA. This will encourage corporations to continue to engage openly and honestly in DPA negotiations. Further, corporations are unlikely to enter into DPA negotiations if there is a risk that the existence and content of these negotiations may be made public in the event that DPA negotiations fail.[66]

5.52 Likewise, the AGD suggested that the CCC bill does not require the reasons for approving a DPA to be published because:

> It is proposed that the terms of the approving officer's appointment and/or engagement will specify that this information may be published if the parties to the DPA agree. This will ensure that an approving officer may write and publish reasons where appropriate.[67]

Monitoring compliance

5.53 The consultation paper on the 2017 DPA model included discussion around independent monitors and oversight of DPAs. Specifically, the consultation paper stated:

> A DPA would typically include commitments by the company to reform its corporate culture to avoid re-offending. To ensure such commitments are met, it will be important that there is appropriate external monitoring.[68]

5.54 In the US, external independent monitors may be appointed at the cost of the defendant to oversee the defendant's compliance with the DPA.[69] In the UK, the Code

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64 International Bar Association's Anti-Corruption Committee, *Submission 2* to the L and C committee inquiry into CCC bill, p. 4.

65 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 28.

66 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 28.

67 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 28.

68 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 11, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

of Practice for Prosecutors published jointly by the SFO and Crown Prosecution Service sets out a framework for the appointment of monitors, including that companies:

- will be responsible for all of the costs of the monitorship (including the prosecutor's costs); and
- must give the monitor complete access to all relevant aspects of its business.[70]

5.55 The UK Code of Practice for Prosecutors also suggests that prior to the approval of the DPA, the prosecutor and the company should agree between them which monitor will be appointed, the cost and terms of the monitorship and the scope of the first year work plan.[71]

5.56 However, the proposed DPA scheme in the CCC bill does not provide a legislative basis on which the authorities may impose monitors in the appropriate circumstances. In their submission to the L and C committee's inquiry into the CCC bill, Morgan Lewis & Bockius LLP observed that 'monitors have become an important tool for the UK SFO to make sure corporates implement necessary improvements to their compliance programme, reduce the risk of corporate re-offending and ensure compliance with the terms of the DPA'.[72] In this context, they suggested that consideration be given to:

> (i) the extent to which monitorships should be an available term of a DPA in appropriate cases; and
>
> (ii) issuing guidance in relation to the appointment and methodology of monitors.[73]

5.57 In response to questions on notice regarding the government's rationale for excluding monitorships from the DPA scheme, the AGD suggested that the bill:

> Does not limit the terms that might be included in a DPA, and the government envisages that it will often be appropriate for DPAs to include terms requiring the engagement of an independent monitor to carry out particular functions in a manner that is adapted to the circumstances of the case at hand. These functions may include assessing the effectiveness of a

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69 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 12, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

70 UK Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, pp. 13–15, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed 9 March 2018).

71 UK Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, pp. 13–15, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed 9 March 2018).

72 Morgan Lewis & Bockius LLP, *Submission 3* to the L and C committee inquiry into the CCC bill, p. 8.

73 Morgan Lewis & Bockius LLP, *Submission 3* to the Land C committee inquiry into the CCC bill, pp. 1 and 8.

> corporation's existing compliance program, advising on how a corporation can develop an effective (or more effective) compliance program and monitoring a corporation's compliance with DPA terms.[74]

5.58 The AGD went on to explain that they propose to include information on the possible roles and appointment of independent monitors in the DPA Code of Practice which is currently being developed.[75] The DPA Code of Practice is discussed in more detail below.

Judicial involvement

5.59 The consultation paper on the 2017 DPA model included discussion around the extent of judicial involvement in an Australian DPA scheme. The consultation paper stated:

> Judicial involvement in a DPA scheme helps to foster confidence in the process. In the US, DPAs are entered into and conducted with comparatively limited judicial involvement. While DPAs are filed with a court, and a judge is required to approve the terms of the DPA, no judicial hearing is required and the level of ongoing judicial involvement in the DPA varies from case to case.
>
> By contrast, the UK scheme involves a greater oversight role for the judiciary throughout the life of the DPA. This includes two judicial hearings to approve the DPA, as well as further judicial determinations to identify whether a breach of a DPA has occurred, or to vary or discontinue a DPA.[76]

5.60 However, the consultation paper also brought to attention the arrangements for Australia's federal judicial system provided for in the *Australian Constitution*.[77] Specifically, the consultation paper stated:

> …courts cannot merely 'rubber stamp' administrative processes or penalties that have been 'agreed' in advance by the parties. To do so would not be consistent with the role and function of courts under the Constitution.[78]

5.61 In response to questions on notice by the L and C committee in relation to the CCC bill, the AGD argued that:

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74 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 33.

75 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 33.

76 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, pp. 16–17, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

77 *Australian Constitution*, Chapter III.

78 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 16, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

> The Bill ensures that DPAs in Australia are subject to independent and expert scrutiny. 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.[79]

Guidance—The DPA Code of Practice

5.62 As noted above, a number of stakeholders emphasised the necessity for clear public guidance to be provided in conjunction with any DPA scheme. Indeed, the consultation paper on the 2017 DPA model stated:

> …a successful DPA scheme will require clear and detailed guidance on when a prosecutor is likely to offer DPA negotiations. This information could be provided in the *Prosecution Policy of the Commonwealth*…and/or in other public documents produced by Government.[80]

5.63 The consultation paper on the 2017 DPA model went on to explain that such documents would also 'detail the types of public interest considerations' to guide the CDPP's decision-making as to whether to initiate formal DPA negotiations. The consultation paper on the 2017 DPA model explained:

> Where a company has self-reported misconduct and has genuinely cooperated with any investigation and pre-negotiation discussions, this would be given considerable weight in favour of the initiation of formal negotiations. Such cooperation may include providing the CDPP and any investigative agency with complete and accurate details about corporate and individual misconduct. Other considerations would include the likely success of negotiations, and the company's past conduct, role in the offending, cooperation with any ongoing investigations, and apparent willingness to cooperate once offending is brought to its notice.[81]

5.64 Following the introduction of the CCC bill on 7 December 2017, on 8 December 2017 the AFP and the CDPP issued Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations* (Guidelines for self-reporting).[82] These guidelines set out the principles and process that the AFP

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79 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 30.

80 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 7, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

81 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 7, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

82 AFP and CDPP Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 12 February 2018).

and the CDPP will apply if a company self-reports conduct involving a suspected breach of Division 70 if the *Criminal Code Act 1995* (foreign bribery).[83] In their submission to the L and C committee's inquiry into the CCC bill, the IBAACC noted that:

> …these Guidelines are a good start for companies (and their advisers) to understand how the CDPP will exercise its discretion in terms of whether or not to initiate negotiations for a DPA.[84]

5.65 The Guidelines for self-reporting are discussed in more detail in Chapter 8. However, it is unclear how the Guidelines for self-reporting will interact with the amendments proposed in the CCC bill, especially the anticipated DPA scheme. The Guidelines state that:

> AFP and the CDPP will review the operation of this Guideline within two years or earlier in the event that a Deferred Prosecution Agreement Scheme commences.[85]

5.66 In addition to the Guidelines for self-reporting, the AGD has indicated that it 'is currently developing a draft DPA Code of Practice (the Code) for public consultation'.[86] The AGD explained that:

> The purpose of the Code is to provide detail on the practical operation of the DPA scheme, including on the types of matters that might be included in a DPA.[87]

5.67 The AGD also indicated that the Code of Practice would include:

- information on how the CDPP would consult with other government agencies throughout the DPA process to ensure relevant matters are included in the DPA (either in the DPA's terms or in the DPA's statement of facts);[88] and

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83 CDPP, *Best Practice Guideline: Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 13 March 2018).

84 International Bar Association's Anti-Corruption Committee, *Submission 2*, L and C committee inquiry into CCC bill, p. 3.

85 AFP and CDPP Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, p. 2, paragraph 3, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 12 February 2018).

86 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

87 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

88 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

- guidance on the level of cooperation expected from corporations seeking a DPA, and on the steps corporations may be expected to take to meet the required degree of cooperation.[89]

Committee view

5.68 The committee considers that Australian regulators should adopt processes that would encourage companies to self-report instances of foreign bribery. The committee is of the view that introducing a DPA scheme will foster a greater willingness on the part of corporations to appropriately and effectively investigate alleged bribery and self-report it to regulators when there is evidence to support the alleged misconduct. The committee notes that any such DPA scheme must be supported by a strong legislative framework, which requires strict compliance and allows for adequate responses in the event of a breach. The committee also notes that both the US and the UK have DPA schemes in relation to serious corporate offences.

5.69 The committee considers that an effective DPA scheme will require clear, public guidance outlining its operation to provide companies greater certainty on DPA processes. The committee is also of the view that it is essential for approved DPAs to be made public, in all but exceptional circumstances, to allow companies to draw on these records as an additional source of guidance on the DPA scheme. The committee is also of the opinion that details on how a company has complied with the terms and conditions, as well as details of any breach, variation or termination, should be published in all but exceptional circumstances. These materials would provide assurance to members of the public as to the transparency and consistency of the DPA scheme.

5.70 The committee notes concerns raised that the proposed DPA model in the CCC bill does not provide a legislative basis on which the authorities may impose monitors in appropriate circumstances. The committee believes that including an avenue to appoint independent external monitors at a company's expense to monitor compliance with a DPA and report to the CDPP is integral to the success of a DPA scheme in Australia; in particular, where the agreed terms of the DPA oblige the company to instigate organisational or cultural change to avoid re-offending. However, the committee considers that providing for the appointment and methodology of independent external monitors in the Code of Practice is appropriate to ensure ongoing compliance with DPAs.

5.71 The committee believes that as the Draft Code of Practice will provide detail on the practical operation of the DPA scheme (including on the types of matters that might be included in a DPA), adequate public consultation on the Draft Code is critical to promote a level of trust between regulators and the corporate sector.

89 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 38.

Recommendation 11

5.72 The committee recommends that the government introduce a deferred prosecution agreement scheme for corporations, supported by a strong legislative framework which requires strict compliance and allows for adequate responses in the event of a breach.

Recommendation 12

5.73 The committee recommends that, other than in exceptional circumstances, deferred prosecution agreements be published, together with details on how a company has complied with the terms and conditions, and any breach, variation or termination.

Recommendation 13

5.74 The committee recommends that the Code of Practice make provision for the appointment and methodology of independent external monitors at the company's expense to monitor compliance with a deferred prosecution agreement.

Recommendation 14

5.75 The committee recommends that as part of the public consultation on the draft Code of Practice, the government publish an exposure draft and allow a period of no less than four weeks for stakeholders to provide comment.