

Senator Rex Patrick

Additional Comments: To publish or not to publish—there is no question

Introduction

1.1 I thank the Committee and Secretariat for the work that has been put into this inquiry. In general, I welcome the introduction of deferred prosecution agreement (DPA) scheme.

1.2 However, I have some concerns over the discretion granted in the provisions for the Commonwealth Director of Public Prosecutions (the Director) not to publish details of a DPA.

1.3 I draw attention to controversies created by the Australian Tax Office (ATO) engaging in secret tax liability deals with companies in preference to engaging in litigation to recovery monies due. These secret deals have been attacked in the media and elsewhere, but a good example of the concerns over secret deals in preference to litigation is provided by the testimony of Mr Lock, an ex-ATO official, to the Senate Economics Reference Committee Inquiry into corporate tax evasion at a hearing in Melbourne on 10 April 2015:

Mr Lock: Under public service rules, when somebody comes into the ATO they obviously have to sign certain documents as far as confidentiality. There are also public service rules about breaching confidentiality when one leaves. But there are problems where I see it—and I did have an example. I was working on an audit of one of the big four banks in Australia. The audit ended up going through the full litigation process. It concerned part 4A assessments around \$100 million. It ended up being negotiated for about \$30 million, from what I understand. My immediate SES at that time was involved in those negotiations. Those negotiations were conducted with PwC, who were the representatives for the taxpayer bank at the time. Shortly after the negotiation settlement took place, that particular officer left the ATO and took up a position with PwC.

Senator MILNE: That is pretty extraordinary evidence. You are saying that it got to the point where \$100 million was owed and a decision was made not to prosecute but to negotiate.

Mr Lock : Yes.

Senator MILNE: Who makes a decision not to prosecute?

Mr Lock : It was not so much a prosecution; it was a matter of not proceeding with the case to litigation, to have the issue tried. They determined a settlement instead.

Senator MILNE: Nevertheless, it was determined that the bank owed \$100 million.

Mr Lock : That was our view.

Senator CANAVAN: And they were contesting that view?

Mr Lock : They were contesting our view.

Senator MILNE: Yes. So, rather than have it proceed to court, it was negotiated by your senior with PricewaterhouseCoopers, and then the person went to work with PricewaterhouseCoopers.

Mr Lock : Some months later, I recall; that is right.

Senator MILNE: How often does it happen that negotiations occur rather than going to court? The tax commissioner himself talked about how expensive it is to go to court and how long it takes, and I appreciate that in this context as well, but nevertheless it is pretty amazing. How often does it happen that people negotiate with the big four on behalf of their client and then end up working for the big four?

Mr Lock : I can only give that particular instance. I do not have that knowledge as to what happened with other officers.¹

1.4 Joseph Pulitzer once said:

There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy.

1.5 While I direct no accusation at the ATO in the secret tax liability deals it has negotiated, the mere fact that the deals are secrets opens an authority to criticism which can erode the public's confidence in it. This is undesirable.

1.6 ATO settlements are now subject to an independent assurance of settlements program being established. The intent of this program is to provide the community with assurance that settlements were undertaken fairly and reasonably. It largely addresses the issue of public confidence.

1.7 Noting the importance of the office The Commonwealth Director of Public Prosecutions (CDPP) and the Director, it is an office and position that needs to be viewed with the utmost public confidence and, to the extent possible, not be open to claims of impropriety nor to controversy that may flow from secrecy attached to any DPA.

1.8 We need to avoid the possibility of a controversy within the CDPP because of 'secret' DPAs. We do not want to be establishing an independent assurance of DPAs program in the years to come.

Publication of Deferred Prosecution Agreements

1.9 The bill provides for a number of mandatory terms for all DPAs:

- a statement of facts relating to each offence specified in the DPA;
- last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;

1 Senate Economics References Committee, *Committee Hansard*, Melbourne, 10 April 2015, p. 13.

-
- 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.²

1.10 The bill also provides for a broad discretion in which the Director may, if they consider it to be in the interests of justice, publish a version of a DPA that does not disclose the name of the person or any other material the Director considers should not be disclosed.³

1.11 However, the interests of justice must be properly balanced against the public interest and the need for transparency. In all circumstances, a minimum level of information should be published.

Recommendation 1

1.12 That the bill be amended to remove the discretion to not publish a DPA.

A minimum disclosure standard

1.13 A minimum disclosure should occur with that minimum being as follows:

- detail the provisions of which an offence has been made against⁴;
- last day for which the DPA will be in force; and
- the amount of financial penalty to be paid by the person to the Commonwealth.

Recommendation 2

1.14 That the bill be amended to include a minimum disclosure standard for all DPAs.

Recommendation 3

1.15 In circumstances where a DPA has not been published in full because of a concerns that it is not in the interests of justice to do so, full publication of the DPA must occur once this concern is no longer present.

2 Schedule 2, Item 7, subsection 17C(1)

3 Schedule 2, Item 7, subsection 17D(8)

4 For example, section 1043A of the Corporations Act 2001 would be disclosed if a DPA is entered into in relation to an offence of insider trading.

Committee Recommendations

I support Recommendations 1, 2 and 3 of the Committee's recommendations. With regard to Recommendation 2, I make a further recommendation that the Government adopt the recommendations contained in my Dissenting Report to the inquiry into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017.

Rex Patrick

Senator for South Australia