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Submission of the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to the Senate Legal and Constitutional Affairs Committee on the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes the opportunity to provide a submission on the Senate Legal and Constitutional Affairs Committee on the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017.*

Recommendations

The Unit makes the following recommendations:

- That the Parliament pass the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, ideally with the amendments outlined in these recommendations.
- Include the fault element of recklessness in Section 70.2 of the *Criminal Code*, to reduce the difficulty of law enforcement agencies being able to mount prosecutions for foreign bribery offences.
- Ensure the Bill makes it is a criminal action to pay bribes to third parties in order to win government contracts in foreign jurisdictions, such as bribing a competitor to put in an uncompetitive bid for the contract.
- The DPA scheme should be subject to a comprehensive review in five years' time to determine its effectiveness in encouraging corporations to come forward and reveal serious criminal offences to law enforcement agencies and in assisting in the prosecution of individuals responsible for the serious criminal conduct.
- In addition to the items detailed in subsection 17C(1) the Unit believes a DPA should also require:
    - Details of any financial gain or loss, with supporting material, in the statement of facts relating to each offence specified in the DPA; and
    - The company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence.
- The Unit suggests there be provisions in the Bill to ensure that company personnel involved in DPA negotiations not disclose information provided to them by the prosecutor or an investigative agency. The Unit is concerned that there be safeguards in the negotiation guidelines to protect against employees of the company that were involved in the criminal conduct using DPA negotiations as a fishing expedition to try and understand how strong any case is against them.

Uniting Church concern regarding bribery

Combating corruption is a factor in efforts to eradicate poverty globally. The Uniting Church in Australia at its Inaugural Assembly in 1977 stated that in response to the Christian gospel:

> *We pledge ourselves to seek the corrections of injustices wherever they occur. We will work for the eradication of poverty and racism in our society and beyond.*

The 2007 annual meeting of approximately 400 representatives of the Synod of Victoria and Tasmania passed a resolution acknowledging "there is a need to address corruption within developing countries to work towards the eradication of poverty" and "some wealthy countries continue to maintain laws and practices that foster, reward and allow them to benefit from corruption in developing countries". The resolution commended the Australian Government for the steps it had taken to combat corruption globally and urged that a number of further measures be taken.

Comments on Schedule 1 of the Bill

The Unit welcomes the measures in Schedule 1 of the Bill to amend Section 70.2 of the *Criminal Code* with changes to the existing offence so that:

- the definition of foreign public official is extended to include a candidate for office;
- the requirement that the foreign official must be influenced in the exercise of the official's duties is removed;
- the requirement that a benefit and business advantage must be 'not legitimately due' is removed and replaced with the concept of ;improperly influencing' a foreign public official; and
- the offence to cover bribery to obtain a personal (i.e. non-business) advantage is extended so that the bribery offence applies to where the bribe was paid to obtain or retain an advantage of any kind.

The Unit strongly urges that the Bill be amended to include a fault element of recklessness in the payment of bribes, to allow for a lowering of the bar on the level of evidence needed to successfully prosecute a case involving foreign bribery. The current bar of proof needed to prosecute a case of bribery of a foreign official is one of the reasons there have been next to no successful prosecutions in Australia.

The Unit supports that in determining whether influence is improper subsection 70.2A(2) provides that the following factors are to be disregarded:

- the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation;
- any official tolerance of the benefit; and
- if particular business or a particular advantage is relevant to proving the matters referred to in paragraph 70.2(1)(b):
    - the fact that the value of the business or advantage is insignificant;
    - any official tolerance of the advantage;
    - the fact that the advantage may be customary, or perceived to be customary, in the situation.

An example of the case where there have been allegations that an Australian company made bribes to opposition parliamentarians to influence their behaviour when they formed government is the case of Australian phosphate company Getax. It was named by *The Sunday Age* in January 2013 as one of the 28 companies that the OECD had identified as having allegations of foreign bribery made against it.[1] *The Sunday Age* reported that the AFP had interviewed two

[1] Maris Beck and Ben Butler, 'Police reopen OZ, Cochlear bribery cases', *The Sunday Age,* 13 January 2013, http://www.smh.com.au/business/police-reopen-oz-cochlear-bribery-cases-20130112-2cmrt.html

complainants on claims that Getax had bribed parliamentarians in Nauru in order to obtain a phosphate mining permit, but that the investigation could not continue due to lack of jurisdiction.[2] Leaked emails to the Australian Broadcasting Corporation (ABC) alleged to show hundreds of thousands of dollars being paid to current Nauruan politicians whilst they were in opposition to allegedly help install a government amenable to allowing Getax to buy phosphate at prices below market value.[3]

In September 2016, the ABC made a further report about e-mails from 2009 and 2010 which suggested Getax was sending money to Nauru a number of politicians, including Nauru's current President Baron Waqa and Justice Minister David Adeang.[4] From 2008 amounts of $10,000 were transferred on several occasions from Getax's Westpac account into the ANZ bank account of Madelyn Adeang, the late wife of Minister David Adeang.[5] The payments were described as "Consultancy fees", or "Fees for Adeang". The transactions included:
$20,000 in April 2008
$10,001 in June 2008
$10,000 in July 2008
$10,000 in September 2008
$10,000 in October 2008.

This case also highlights an alleged attempt to disguise payments as a legitimate business expense.

The Unit supports removing the requirement from the bribing of a foreign public official of having to prove the payments were not legitimately due, for the reasons outlined in the Explanatory Memorandum (pp 12-13).

The Unit requests that the Bill ensure that it is a criminal action to pay bribes to third parties in order to win government contracts in foreign jurisdictions. Rolls Royce used intermediaries to pay bribes to competitors to ensure they submitted an uncompetitive bid.[6] In 2007 Rolls Royce employees engaged an intermediary to act in relation to an open competitive tender for a energy-related Long Term Service Agreement on Samarinda Island. Through the intermediary a commission was paid to a member of a competitor consortium to ensure that it submitted an uncompetitive bid.[7] In addition, the intermediary was used to pay bribes to employees working for the state-owned customer.[8] Rolls Royce won the contract.

Rolls Royce between 2009 and 2013 also made corrupt payments to a Nigerian partner company in order to receive confidential information (including competitor pricing) about the bidding processes and influence over the requirements of the customer in the tendering process.[9]

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[2] Maris Beck and Ben Butler, 'Bribery Cases Reopened', *The Sunday Age,* 13 January 2013.
[3] Hayden Cooper and Alex McDonald, 'Narua President and Justice Minister face bribery allegations involving Australian company', 7:30 Report, ABC, 8 June 2015, http://www.abc.net.au/7.30/content/2015/s4251115.htm
[4] Hayden Cooper, 'Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang', 7:30 ABC, 14 September 2016, http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170
[5] Hayden Cooper, 'Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang', 7:30 ABC, 14 September 2016, http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170
[6] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 16.
[7] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 17.
[8] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 17.
[9] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 17.

The Unit welcomes the introduction of a new offence of failure of a body corporate to prevent foreign bribery by an associate. The Unit welcomes that the definition of associate is broad to capture any person who provides services for or on behalf of another person, not limiting the definition to an officer, employee, agent, contractor, subsidiary or controlled entity. The Unit believes it is very important that subsection 70.5A(3) be included so that a body corporate may be convicted of an offence against this section even if the associate has not been convicted of an offence against section 70.2. This is very important as it is common for the associate paying the bribe to not be prosecuted through lack of cooperation of the jurisdiction in which the bribe was paid or due to the very high threshold of proof often required in a bribery base where the only two parties that concretely know the bribe was paid is the person paying the bribe and the person receiving the bribe.

The Unit supports the level and range of possible maximum penalty options set out in subsection 70.5A(6) for the new offence of failing to prevent foreign bribery.

The Unit supports subsection 70.2(8) so that the offence against subsection 70.5A(1) will apply even if the offence occurs wholly overseas provided the offender is a body corporate incorporated by or under a law of the Commonwealth or of a State of Territory.

The legislative change to make it an offence for a body corporate to fail to prevent foreign bribery by an associate is highly necessary to prevent Australian corporations from being able to pay bribes through intermediaries. These provisions of the Bill will help deter those businesses that set up intermediaries to make business arrangements through which bribes are paid. Under the current law it is very difficult to gain a prosecution in such as case as the company can always argue they did not know what their intermediary was doing.

A relevant case of a company using intermediaries to pay bribes is that of Rolls Royce that used a network of intermediaries and agents to pay bribes, with apparent knowledge by some employees inside Rolls Royce that an intermediary was acting corruptly on behalf of the company.[10] An intermediary was classified as customer to allow it to earn substantial mark-ups, far in excess of the commissions allowed under Rolls Royce's policy on intermediaries.[11] In Indonesia, Rolls Royce used an intermediary to bribe employees of Garuda International in respect of contracts for engines and maintenance.[12]

A relevant case of a company being forced to enter into a settlement based on their failure to maintain internal controls to prevent bribery is that involving Alcoa. Alcoa and a joint venture it controlled agreed to pay US$384 million to resolve charges around the bribing officials of a Bahraini state-controlled aluminium smelter, marking one of the largest US anti-corruption settlements of its kind.[13] It was alleged that officials were bribed for years so Alcoa could supply raw materials to Aluminium Bahrain, or Alba.[14] Alcoa's mining operations in Australia were the source of the alumina that Alcoa supplied to Alba.[15]

Alcoa failed to maintain adequate internal controls to prevent or detect more than US$110 million in improper payments funnelled to Alba through a consultant between 1989 and 2009,

[10] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 15.
[11] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 15.
[12] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 17.
[13] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109
[14] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109
[15] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936

according to the US Securities and Exchange Commission (SEC), which brought civil charges under the *Foreign Corrupt Practices Act*. In the words of the SEC:[16]

> *An SEC investigation found that more than $110 million in corrupt payments were made to Bahraini officials with influence over contract negotiations between Alcoa and a major government-operated aluminum plant. Alcoa's subsidiaries used a London-based consultant with connections to Bahrain's royal family as an intermediary to negotiate with government officials and funnel the illicit payments to retain Alcoa's business as a supplier to the plant. Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa's books and records as legitimate commissions or sales to a distributor.*

The Department of Justice brought criminal charges under the same law.[17]

The US SEC said Alcoa's subsidiaries used a London-based consultant to funnel the payments to officials. The subsidiaries cited by the US SEC were Alcoa World Alumina and Alcoa of Australia, both of which were parts of the joint venture.[18] The SEC stated:[19]

> *According to the SEC's order, Alcoa's Australian subsidiary retained a consultant to assist in negotiations for long-term alumina supply agreements with Alba and Bahraini government officials. A manager at the subsidiary described the consultant as "well versed in the normal ways of Middle East business" and one who "will keep the various stakeholders in the Alba smelter happy…" Despite the red flags inherent in this arrangement, Alcoa's subsidiary inserted the intermediary into the Alba sales supply chain, and the consultant generated the funds needed to pay bribes to Bahraini officials. Money used for the bribes came from the commissions that Alcoa's subsidiary paid to the consultant as well as price markups the consultant made between the purchase price of the product from Alcoa and the sale price to Alba.*

The Department of Justice's settlement was with Alcoa World Alumina LLC, a joint venture with Australia's Alumina Ltd. The venture, 60 percent-owned by Alcoa, agreed to plead guilty to a single count of violating the *Foreign Corrupt Practices Act* and pay US$223 million in five installments over four years.[20] There was no legal action against Alcoa in Australia for the conduct under the existing anti-bribery provisions of the *Criminal Code.*

The Unit also welcomes the consequential amendments to the *Income Tax Assessment Act 1997* to ensure the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to a foreign public official.

Comments on Schedule 2 of the Bill – Deferred Prosecution Agreement Scheme

The Unit welcomes the introduction of a Deferred Prosecution Agreement (DPA) scheme. The Unit continues to cautiously support the introduction of such a scheme provided that it is

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[16] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936

[17] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109

[18] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109

[19] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936

[20] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109

designed to not allow individuals or corporations to escape being held to account for serious criminal activity, while encouraging greater detection of such criminal activity. The Unit also sees DPA's as part of a suite of measures needed to deter, detect and prosecute corporate criminal behaviour with additional measures being whistleblower protection and reward in the private sector, a public beneficial ownership register and making it easier to for law enforcement agencies to prosecute money laundering offences.

We agree that the DPA scheme should only apply to corporations and not individuals. We agree that a DPA should only be available where a corporation admits to agreed facts detailing their misconduct, pays a financial penalty to the Commonwealth and is required to disgorge profits and benefits obtained through the conduct. Further the corporation receiving the DPA should be required to fully cooperate with law enforcement in any investigation towards prosecuting the individuals responsible for the serious corporate crime.

Data from the US shows that in *Foreign Corrupt Practices Act* (FCPA) DPAs appear to have led to an increase in the number of individuals subsequently subjected to prosecution. From 2004-2014 there were 42 prosecutions of individuals involved in corporate FCPA cases[21], while the in preceeding decade 1993 – 2003 there were only 7 prosecutions of individuals and in the period 1982 – 1992 there were 21 prosecutions of individuals.[22]

The Unit notes that the US Department of Justice issued instructions to its prosecutors in 2015 to pull back from DPAs that grant immunity from prosecution for individuals. The US Department of Justice's Yates Memo (issued by Sally Yates, US Deputy Attorney General at the time on 9 September 2015) emphasised the importance of holding individuals to account for corporate criminal activity they are involved with. It stated:

> *One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system….*
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> *The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.*
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> *The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and*

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[21] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 531-538, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[22] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 539-541, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay….

1. ***To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.***

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 el seq. Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process - before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.…

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability clue to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

It has been recognised that where a company is fined, rather than the sanction applying to the individuals involved, it fails to act as a general deterrent to the illegal behaviour. Associate Professor Soltes gives an example:[23]

For instance, the day after settling criminal charges with federal prosecutors for helping wealthy individuals evade taxes, executives at Credit Suisse held a conference call to reassure analysts that the criminal conviction would have "no impact on our bank licenses nor any material impact on our operational or business capabilities." And, ironically, fines levied on offending firms are ultimately paid by shareholders rather than by executives or employees who actually engaged in the misconduct. Without the spectre of the full justice system hanging over them as is the case with individual defendants, labelling firms as criminal often has surprisingly weak, or even misdirected, effects.

Also, it is necessary that individuals responsible for serious corporate crimes are held to account to maintain the public's faith in the fairness of the criminal justice system. As US Senator Elizabeth Warren said in the US Senate Banking Committee Hearing in March 2013, in relation to the DPA with HSBC for extensive money laundering including of Mexican drug cartel money:[24]

…. if you get caught with an ounce of cocaine, the chances are good you're going to go to jail... if you launder nearly a billion dollars for drug cartels and violate our international

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[23] Eugene Soltes,'Why they do it', Public Affairs, USA, 2016, 325.

[24] Corruption Watch, 'Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements fail to deter overseas corruption', March 2016, 10 https://docs.wixstatic.com/ugd/54261c_423071d2a88f4af0be0a0309f6c51199.pdf

> *sanctions, your company pays a fine and you go home and sleep in your own bed at night. I think that's fundamentally wrong.*

However, there is reason to be cautious about the introduction of a DPA scheme and it should be subject to a review in five years' time to assess its effectiveness. Past academic review of the use of DPAs in the US has concluded that DPAs have at times been ineffective in deterring future criminal behaviour by the same corporation, finding that some of them obscure who was personally responsible for the company's misconduct and failing to achieve meaningful structural or ethical reform within the company.

For instance, Pfizer Inc., the huge pharmaceutical company, entered into a DPA in 2002 due to one of its subsidiaries paying large bribes to a managed care company to give preferred status to one of its drugs. Pfizer was required to implement a compliance mechanism that would uncover illegal marketing activities and bring them to the attention of its board. Two years later, however, the company was again facing prosecution for similar illegal marketing activities that had continued at the same subsidiary. Pfizer then entered into a second DPA but by 2007 further criminal marketing activities by another subsidiary led to yet another DPA. In all these instances not one person was prosecuted.[25]

Despite three DPAs, in 2009 Pfizer, the parent company, was found to be engaging in the same illegal marketing activities and was permitted to enter a fourth DPA, being required to pay US$2.3 billion in penalties, the largest criminal fine ever imposed up until then but most likely a small fraction of the profits derived from its long-term criminal activity. Again, no individuals were charged.[26]

In 2008 the Aibel Group Limited pleaded guilty to violating the US *Foreign Corrupt Practices Act* anti-bribery provisions and "admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct."[27] The US Department of Justice media release stated "This is the third time since July 2004 that entities affiliated with the Aibel Group have pleaded guilty to violating the FCPA."[28]

Similarly, in 2012 Marubeni Corp resolved a US 54.6 million FCPA enforcement action through a DPA concerning alleged improper conduct in Nigeria. In 2014, the company resolved another FCPA enforcement action – an US$88 million action concerning alleged improper conduct in Indonesia.[29]

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[25] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

[26] Jed S. Rakoff, Justice Deferred Is Justice Denied, The New York Review of Books, Volume 62, Number 3, February 2015 http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

[27] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 514, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[28] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 514, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[29] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 514, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

The US Government Accountability Office raised concerns in 2010 that the US Department of Justice has been unable to assess the impact of its DPA scheme:[30]

> *DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs – in addition to other tools, such as prosecution – contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met.*

There has also been concerns about DPAs in the UK not being adequately used to prosecute the individuals behind the serious criminal conduct. The DPA granted to Standard Bank was in relation to its failure to prevent its Tanzanian subsidiary, Stanbic Tanzania, and its top executives from paying bribes to senior government officials to secure the Tanzanian Government's mandate to raise US$600 million of sovereign debt financing in the form of a bond.[31] The alleged bribes consisted of a US$6 million fee paid by Stanbic to a local agent, Enterprise Growth Market Advisors (EGMA) Ltd, paid out of international investors' money raised by Standard Bank for the Tanzanian Government.[32] EGMA, according to the agreed facts, provided no real services in return for its US$6 million fee. Its chairman at the time, Harry Kitilya, was Commissioner of the Tanzania Revenue Authority, which was responsible for advising the government on financing needs.[33] A key factor behind Standard's eligibility for a DPA was the fact it self-reported the alleged misconduct within days of being alerted by Stanbic Tanzania employees and cooperated with the UK Serious Fraud Office.

The Statement of Facts in the DPA identified either by name or role key players in the alleged criminal conduct.[34] However, no single individual in the UK was held to account either by Standard Bank or the UK Serious Fraud Office (SFO) for their failure to prevent the alleged bribery. It was noted by UK Corruption Watch that there was a high level of control and approval by UK individuals for the transaction. These individuals still operate at senior levels within the financial industry.[35] The team at the Standard Bank PLC in the UK drew up the collaboration agreement with the local agent, supposedly because the local Tanzanian team did not have the capacity or knowledge to do so. The team appears to have deliberately avoided giving any detail about the role of the agent to the compliance team within Standard Bank UK, to the Mandate Approval Committee.[36] Staff in Standard Bank UK also helped draft the Mandate and Fee letters for the transaction. The Mandate letter was specifically drafted to avoid any mention of a partner or third party, while the Fee letter specified that the Government of Tanzania would pay Standard Bank, Stanbic and a 'local partner' a fee of 2.4% without naming who the local partner was.[37]

In the view of UK Corruption Watch:[38]

> *This particular DPA appears to set a precedent that UK employees can approve and draw up agency agreements on behalf of foreign subsidiaries, conduct no due diligence on those agreements, conceal the use of agents from a compliance function and institutional investors, and face no individual penalty. It is questionable whether such a precedent will act as a genuine deterrent to individuals not to engage in high risk behaviour with regards to foreign bribery. It also suggests that the Bribery Act in practice may be significantly weaker*

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[30] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 513, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf
[31] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 3.
[32] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 3.
[33] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 3.
[34] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 4.
[35] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 1.
[36] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 5.
[37] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 5.
[38] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 5.

> *in its application than the US Foreign Corrupt Practices Act. Under the FCPA, reckless disregard and wilful blindness, are enough to establish liability for knowledge of an offence.*

A former senior bank official in Tanzania alleged that officials in London were "well aware" what was going on but "suppressed key facts" to help it secure the SFO deal.[39] Shose Sinare, the former head of investment banking at Stanbic Bank, claims the bank secured the DPA by "suppressing key facts." She claims the Standard Bank misrepresented the fact it was not aware of a local third party involvement in the deal insisting it was well aware before signing the deal and that a draft collaboration document had been circulated to the entire deal team including senior officials in London.

The Director of the CDPP should conduct DPA negotiations as they see fit within guidance provided by the Prosecution Policy. However, the prosecutors should be required to take into account those who were impacted by the criminal activity of the company and/or its employees in negotiating the restitution and penalty in the DPA. UK Corruption Watch has pointed out that the DPA with Rolls Royce made specific mention of concerns about the impact on innocent employees of the company and shareholders, but made no mention of the victims of Rolls Royce's criminal activity.[40] Further, it appears the Rolls Royce DPA did not accept any input from prosecuting authorities in the countries where the bribes were paid and it would appear no real assessment of the harm from Rolls Royce's corruption was assessed.[41] The Unit opposes consideration of factors such as the impact for the defence industry, which was a consideration in a lower penalty in the Rolls Royce DPA.[42]

The Unit supports the Bill allowing for the prosecution of a party who materially contravenes a DPA, or who provided inaccurate, misleading or incomplete information to law enforcement agencies in connection with a DPA or a DPA negotiation.

The Unit supports subsection 17A(3) that allows the Director of the CDPP to determine if there has been a material contravention of the DPA to mount a prosecution, as the Unit believes that the CDPP is the body to make this assessment. It would then be for the CDPP to prove the case against the company in the courts. Further the company can challenge the assessment of the CDPP that there has been a contravention of the DPA in the court.

The Unit agrees that a prosecution should be permitted after a DPA has expired if it is found that 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.

The Unit supports the list of offences that can be subject to a DPA as outlined in subsection 17B(1). The Unit would also supports a DPA being available for serious environmental crimes and serious illegal workplace health and safety activities.

In addition to the items detailed in subsection 17C(1) the Unit believes a DPA should also require:

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

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[39] David Connett, 'Tanzanians slam SFO's plea bargain on Africa corruption case', *The Independent,* 15 March 2016, http://www.independent.co.uk/news/business/news/serious-fraud-office-tanzanians-slam-sfo-s-plea-bargain-on-africa-corruption-case-a6931146.html
[40] Corruption Watch UK, 'Failure of Nerve: The SFO's Settlement with Rolls Royce'.
[41] Corruption Watch UK, 'Failure of Nerve: The SFO's Settlement with Rolls Royce'.
[42] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 14.

As allowed for in subsection 17C(2), the Unit believes that law enforcement agencies should be able to recover costs related to the investigation of the company and its employees and of the negotiations of the DPA through the terms of the DPA as is the case in the UK.[43]

The Unit supports that the Director of the CDPP be required to publish an approved DPA on the CDPP's website within 10 business days after the notice of an approving officer's decision to approve a DPA is given.

The Unit supports subsection 17E(4) so that if a DPA ceases to be in force, the validity of anything done by a party to the DPA in accordance with the terms of the DPA is unaffected. It would be completely inappropriate that a party to the DPA would be repaid a fine or compensation payments they had to make as part of the DPA because the DPA ceased to be in force, especially if it ceased to be in force because the party to the DPA contravened its conditions.

The Unit supports section 17G in terms of the suitable people who can be appointed by the Minister to be approving officers.

The Unit supports subsection 17H(3) so that all information obtained through a DPA process can be used against a party to a DPA if the party materially contravenes a DPA, provides false and misleading information in relation to the DPA or gives inconsistent evidence in another proceeding.

The Unit also supports subsection 17H(5) so that in proceedings taken as a result of a contravention of the DPA 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 an agreed fact unless the court gives leave.

The Unit supports subsection 17H(4) so that section 17H does not affect the admissibility in evidence of any information or document obtained as an indirect consequence of disclosure of, or any information contained in, a document mentioned in subsection 17H(1). It is important to have safeguards to ensure that corporations are not able to use DPA negotiations to have evidence excluded from future investigations by law enforcement agencies.

The Unit supports the new offence created by subsection 17J(1).

The Unit supports subsection 17K(3) which allows disclosure of information to:

- an authority of a Commonwealth entity for the purposes of assisting the entity to exercise its powers, or perform its functions or duties;
- an authority of a Commonwealth entity or an authority of a State or territory or a foreign country for law enforcement purposes, or for the protection of public health, or the life or safety of an individual or groups of individuals; and
- a court or tribunal or person that has the power to require the answering of questions or the production of documents for the purposes of proceedings before, or in accordance, with an order of, the court, tribunal, authority or person.

The Unit believes that information sharing with foreign law enforcement is vital to build a global environment to combat bribery and money laundering.

The Unit supports Item 17 that amends subsection 16A(2) of the *Crimes Act* so that a court must consider the fact the corporation entered into a DPA and can impose a sentence that

[43] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 12.

reflects the extent to which, if at all, the corporation maliciously exploited the DPA process to avoid prosecution.

The Government should make it clear that a DPA offered to a company that knew of the serious criminal activity and choose not to disclose it and is offered a DPA for subsequent cooperation after law enforcement detected the crime will be less generous than a DPA where the company alerted law enforcement to the criminal activity. The Unit share the concern of Corruption Watch UK that the DPA negotiated with Rolls Royce will encourage companies to conceal the criminal activity until it is detected by law enforcement and only then offer cooperation.[44]

The Unit questions why there are no provisions in the Bill to ensure that company personnel involved in DPA negotiations not disclose information provided to them by the prosecutor or an investigative agency. The Unit is concerned that there be safeguards in the negotiation guidelines to protect against employees of the company that were involved in the criminal conduct using DPA negotiations as a fishing expedition to try and understand how strong any case is against them.

The Unit supports the appointment of independent monitors to oversee the implementation of the DPA at the company's expense, to ensure that the company adheres to the terms of the DPA. While the company should fund the independent monitor, the employment of the independent monitor should rest with the CDPP.

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[44] Corruption Watch UK, 'Failure of Nerve: The SFO's Settlement with Rolls Royce'.