Allens > < Linklaters | 200

Allens submission to the Senate Standing Committee on Legal and Constitutional Affairs

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023

17 July 2023

Allens is an independent partnership operating in alliance with Linklaters LLP.

Contents

1 Introduction 1

2 Adequate Procedures Defence (s 70.5A(5)) 1

2.1 The role of the board of directors, senior management and delegations of authority 1

2.1 The expectations for partially owned subsidiaries and joint ventures 2

2.2 Additional introductory commentary 2

2.3 Failures that undermine the defence 3

2.4 Prosecutorial guidance 3

3 DPA Scheme 3

3.1 Benefits of a DPA scheme 3

3.2 Proposed model for a DPA scheme 4

4 Next steps 4

Schedule 1 5

Allens submission to the 'Attorney General's Department: Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials' 5

Schedule 2 6

Allens submission to the 'Consultation on Improving Enforcement Options for Serious Corporate Crime' 6

1 Introduction

Allens welcomes the opportunity to make this submission as part of the Senate Legal and Constitutional Affairs Committee's consultation process for the *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023* (Cth) (***Bill***).

Allens' disputes and investigations practice and anti-bribery & corruption practices are recognised as 'Band 1.' We have a long history of representing many of Australia's largest companies in regulatory investigations, civil penalty proceedings and criminal prosecutions. We also have extensive international experience of corporate criminal regimes in other jurisdictions, most notably in the United States and the United Kingdom.

Our submission focuses on two ancillary matters to the introduction of a 'failure to prevent' offence and associated 'adequate procedures' defence which we think are important in the overall operation of this regime. These are:

- the issuing of guidance in relation to the adequate procedures defence, noting that draft guidance has previously been published in respect to the 2019 iteration of the Bill, on which Allens made submissions;[1] and
- the consideration of a deferred prosecutions agreements (***DPA***) scheme.

2 Adequate Procedures Defence (s 70.5A(5))

The Bill requires the Minister to publish guidance on the 'adequate procedures' defence within six months of the royal assent of the Bill. Allens welcomes this guidance and believe it will assist Australian businesses to better understand and comply with their obligations and effectively guard against foreign bribery.

As noted by the Attorney-General during the second reading of the Bill,[2] guidance was released by the previous government in 2019. Allens has made comments and recommendations on this earlier guidance, which it reiterates for the purpose of this submission and summarises below.

Additionally, the earlier guidance, albeit in draft form, has been influential in the market since it was published. We are aware of a number of companies who taken it as reflective of what 'good' compliance looks like and have therefore sought to align their procedures with this guidance.

Given this, although some small amendments for greater clarity may be made (as discussed below), Allens does not believe any significant changes are required.

2.1 The role of the board of directors, senior management and delegations of authority

The Australian Law Reform Commission (***ALRC***) has previously emphasised the importance that Commonwealth criminal law address the division of responsibility between the board of directors and senior management more clearly.[3]

We recommend that any updated guidance clearly clarify the respective roles of boards of directors and senior management in preventing foreign bribery, including the delegation of authority and extent to which the board ought to be involved in the compliance function and the implementation of promotion of bribery prevention policies. For example, in larger corporations, one or more members of senior management may be delegated day-to-day operational

[1] A copy of this submission titled 'Allens submission to the Attorney General's Department: Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials' (28 February 2020) is inserted at Schedule 1.

[2] Commonwealth, *Parliamentary Debates,* House of Representatives, 22 June 2023 (Mark Dreyfus, Attorney-General).

[3] See Chapter 7, 'Individual Liability for Corporate Conduct' at <https://www.alrc.gov.au/wp-content/uploads/2019/11/Corp-Crime-DP-87.pdf>.

Allens is an independent partnership operating in alliance with Linklaters LLP.

responsibility for the compliance function and the implementation of bribery prevention policies and report periodically to the board.

The updated guidance should realistically reflect the governance role of directors on the one hand, and managerial role of senior managers on the other. This could be achieved through the inclusion of commentary to the effect that the board should consider potential foreign bribery risks and ensure an appropriate framework is adopted, and that senior management should be responsible for implementing and promoting bribery prevention policies and periodically reporting to board of directors as appropriate.

2.1 The expectations for partially owned subsidiaries and joint ventures

The proposed definition of 'associate' (s 70.1) includes 'a subsidiary', but does not distinguish between wholly- and partially-owned subsidiaries. In light of this ambiguity, we consider that corporates will likely be concerned about the perceived accountability of a parent company under the Criminal Code in respect of any bribe paid by either a joint venture or a partially-owned subsidiary. For example, on a strict reading one might expect that a partial parent will be held responsible for bribes made by a subsidiary that it does not have operational control over, even when the partial parent has 'adequate procedures' overall in circumstances where we do not think this is intended.

We recommend that any guidance clearly acknowledge that circumstances may exist where a parent corporation has limited capacity to set bribery prevention policies and foster effective compliance for partially owned subsidiary or joint venture. Further guidance should also be provided in respect of what those circumstances might be.

2.2 Additional introductory commentary

While we recognise that it may be necessary for Australian companies that have framed their bribery prevention policies on existing international guidelines and the earlier draft guidance to incorporate additional policies relevant to the any developments in the Australian context with the publishing of updated guidance, we suggest that the updated guidance include a general introductory comment that, pursuant to the principle of effectiveness, there is no general expectation that corporations with mature and tested bribery prevention procedures and compliance functions pitched at the international high-watermark will be required to update their procedures, provided those procedures are robust and effective.

We also suggest the updated guidance make plain that the fact that a bribery event has occurred is not ex-post proof that bribery prevention procedures within a corporation were inadequate – even, for example, if a senior manager was involved. We recognise that there is a tension in proving that procedures are 'adequate procedures' after a bribery event has been committed in violation of those procedures. This tension has the potential to undermine business confidence in the utility of the defence of adequate procedures.

The updated guidance could note that the new corporate offence is not intended to penalise ethically run corporations that encounter an isolated incident of bribery. A single instance of bribery does not necessarily mean that a corporation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate policy requirements, instructions or guidance.

Similarly, additional commentary in the updated guidance should highlight that a bribery event committed by a senior figure within a corporation – for example, a director – does not definitively mean the corporation's bribery prevention procedures were inadequate and cannot be relied upon. A corporation can have comfort in its ability to rely on the adequate procedures defence in such circumstances.

2.3 Failures that undermine the defence

The earlier draft guidance illustrated six procedures for implementing a compliance framework, read against the overarching principles of proportionality and effectiveness. We appreciate the difficulties in stating that a particular combination of steps would constitute 'adequate procedures'. However, it would be helpful for the updated guidance to highlight that a failure to take at least certain prescribed steps would likely result in procedures being assessed as inadequate.

2.4 Prosecutorial guidance

We recommend that the CDPP-AFP Best Practice Guideline and Corporate Cooperation Guidance be updated in line with any guidance and the proposed expansion of the Criminal Code, particularly given the role of the AFP and CDPP in enforcing the Criminal Code.

3 DPA Scheme

The Bill, in its present form, does not contain a DPA scheme. This is a material point of difference between Australia's proposed approach to combatting foreign bribery, and that of the United States and the United Kingdom – both of which rely on DPAs as a cornerstone of their enforcement approach.

We acknowledge the Attorney-General's comments during the second reading speech,[4] in which he states that the introduction of a DPA scheme is 'premature' and should only 'be entertained after the measures in this bill have been enacted and given time to work'. The Attorney-General also acknowledges that a DPA scheme can help to 'strike a balance between encouraging companies to self-report serious offending and holding companies to account for serious corporate crime'.

Allens maintains its strong support for the introduction of a DPA scheme, in line with our earlier comments as well as international best practice. We remain of the view that DPAs can provide an effective and efficient means of addressing corporate misconduct in suitable cases. This has been seen in practice in both the US and the UK and aligns with the OECD's landmark anti-bribery guidance[5] issued in 2021 which strongly suggests that signatories, like Australia, should have in place non-trial resolution mechanisms for foreign bribery matters – such as a DPA scheme.

Given this, absent a DPA scheme being introduced through the Bill, Allens believes that the introduction of a DPA should be considered within a formally defined period (for example, within 12 months of the Act's commencement).

3.1 Benefits of a DPA scheme

As we detailed in our previous submission to the Attorney-General's Department, 'Consultation on Improving Enforcement Options for Serious Corporate Crime' (***Consultation***),[6] there are numerous potential benefits to the establishment of a DPA scheme, including the following.

- DPA schemes have the potential to increase self-reporting by corporates, and therefore bolster enforcement efforts by the AFP and CDPP. As DPA schemes incentivise self-reporting, efficiency and cooperation, it is likely that the introduction of such a scheme in Australia would see an increase in self-reporting, and therefore assist in addressing the

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2023 (Mark Dreyfus, Attorney-General).

[5] See OECD, '2021 Recommendation on Anti-Bribery', <https://www.oecd.org/corruption/2021-oecd-anti-bribery-recommendation.htm>.

[6] See Schedule 2 for a complete copy of this submission.

current difficulties and delays suffered by the AFP and CDPP in gathering information and evidence through mutual assistance programs.

- DPA schemes have the potential to facilitate more expeditious resolutions of foreign bribery investigations and prosecutions. In our firsthand experience, major foreign bribery investigations can take five to ten years to resolve. The inherent uncertainty of outcomes inherent in contested criminal proceedings, and the risk proceeding to trial carriers for both a prosecuting agency and a corporate defendant is a major contributor to this. DPA schemes have the potential to create greater certainty of outcome for corporates, while ensuring appropriate penalties are still imposed.

3.2 Proposed model for a DPA scheme

Certainty and transparency should be central to any DPA scheme. Clear, detailed and publicly available guidance to which the CDPP will be required to have regard to throughout the DPA process will therefore be vital, and international guidance – such as the UK and US – will be a valuable starting point.

Allens' earlier submissions to the Consultation engages with each phase of a proposed model for a DPA scheme, namely the:

- availability of DPAs;
- initiation of DPA negotiations;
- negotiations process;
- approval;
- oversight and response to breaches; and
- conclusion of a DPA.

Further consideration of each of these phases is found at Schedule 3 of this submission.

4 Next steps

Allens welcomes the opportunity to answer any queries the Senate Standing Committee on Legal and Constitutional Affairs may have in relation to our submissions. For further information, please contact:

Chris Kerrigan
Partner
Allens

James Campbell
Partner
Allens

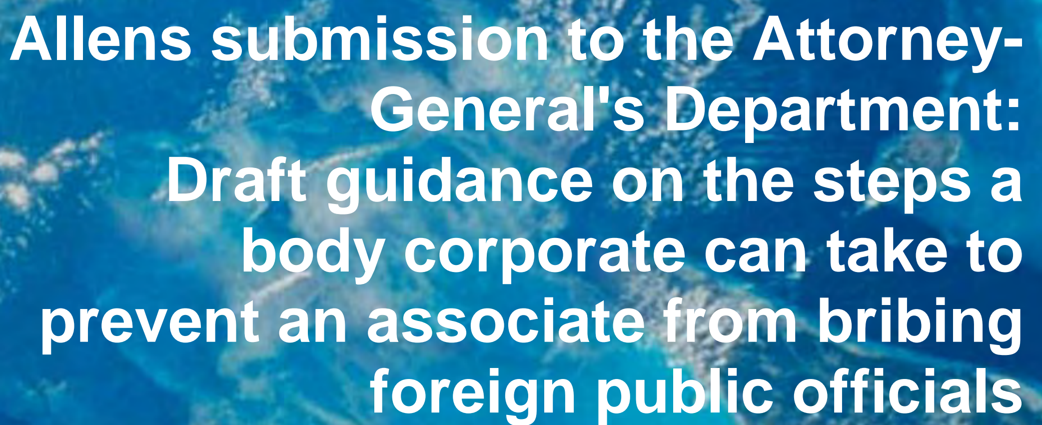
Cindy McNair
Managing Associate
Allens

Andrew Wilcock
Managing Associate
Allens

Schedule 1

ALLENS SUBMISSION TO THE ATTORNEY GENERAL'S DEPARTMENT: DRAFT GUIDANCE ON THE STEPS A BODY CORPORATE CAN TAKE TO PREVENT AN ASSOCIATE FROM BRIBING FOREIGN PUBLIC OFFICIALS (28 FEBRUARY 2020)

Allens > < Linklaters



Allens submission to the Attorney-General's Department: Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials

28 February 2020

Allens is an independent partnership operating in alliance with Linklaters LLP.
© 2020 Allens, Australia

Allens submission to the Attorney-General's Department:
Draft adequate procedures guidance

Allens > < Linklaters

1 Introduction

Allens welcomes the opportunity to make this submission on the draft guidance issued by the Attorney-General's Department on 2 December 2019 on the steps a body corporate can take to prevent an associate from bribing foreign public officials (the ***Draft Guidance***).

Allens' disputes and investigations practice and anti-bribery & corruption practices are recognised as 'Band 1'. We have a long history of representing many of Australia's largest companies in regulatory investigations, civil penalty proceedings and criminal prosecutions. We also have extensive international experience of corporate criminal regimes in other jurisdictions, most notably in the United States and the United Kingdom.

Allens strongly supports the introduction of guidance on adequate procedures to prevent the commission of foreign bribery. We consider this guidance will assist Australian businesses to better understand and comply with their obligations and effectively guard against foreign bribery.

Our submission focusses on a few key areas raised in the Draft Guidance where we think there are important issues that the Attorney-General's Department should consider before finalising the document. Those areas are as follows:

- the roles of the board of directors, senior management and delegations of authority;
- expectations for partially owned subsidiaries and joint ventures;
- additional introductory commentary;
- failures that undermine the defence; and
- prosecutorial guidance.

2 Submissions

2.1 The roles of the board of directors, senior management and delegations of authority

The Australian Law Reform Commission (***ALRC***) in its November 2019 Discussion Paper on Corporate Criminal Responsibility[1] emphasised that the Commonwealth criminal law should address the division of responsibility between the board of directors and senior management more clearly. In essence, the reason for the ALRC's shift in focus is based on the fact that directors may not always be the most appropriate target for responsibility in relation to misconduct arising from the day-to-day management of a corporation and we share these views.

We consider that the division of responsibilities between the board of directors and senior management in the Draft Guidance is unclear in parts. By way of example, paragraph 100 in relation to *'management dedication'* notes that responsibility for developing, implementing and promoting a corporation's anti-bribery policies applies to top-level management – the owners, board of directors, or equivalent persons – and may also extend to lower tiers of management for implementation and promotion.

We recommend that the Draft Guidance more clearly clarify the respective roles of the board of directors and senior management in preventing foreign bribery, including the delegation of authority and the extent to which the board ought to be involved in the compliance function and the implementation and promotion of bribery prevention policies. In larger corporations for example, one or more members of senior management may be delegated day-to-day operational responsibility for the compliance function and the implementation of bribery prevention policies and report periodically to the board.

Further, the Draft Guidance should realistically reflect the governance role of directors on the one hand and the managerial role of senior managers on the other hand, which we consider could be achieved by

[1] See chapter 7 'Individual Liability for Corporate Conduct', available at https://www.alrc.gov.au/wp-content/uploads/2019/11/Corp-Crime-DP-87.pdf.

Allens is an independent partnership operating in alliance with Linklaters LLP.

including additional commentary to the effect that the board of directors should consider the potential foreign bribery risks and ensure that an appropriate bribery prevention policy and delegation framework is adopted, and that senior management should be responsible for implementing and promoting the bribery prevention policies and reporting periodically to the board of directors as appropriate.

2.2 Expectations for partially owned subsidiaries and joint ventures

The proposed definition of '*associate*' at section 70.1 of the Criminal Code includes, inter alia, *'a subsidiary'*. However, the Draft Guidance does not distinguish between wholly-owned and partially-owned subsidiaries. In light of the current lack of clarity, we consider that corporates will likely be concerned about the perceived accountability of a parent company under the Criminal Code in respect of any bribe paid by either a joint venture or a partially-owned subsidiary. For example, on a strict reading one might expect that a partial parent will be held responsible for bribes made by a subsidiary that it does not have operational control over, even when the partial parent has *'adequate procedures'* overall in circumstances where we do not think this is intended.

Pursuant to the principle of effectiveness, we recommend that the Draft Guidance contain a clear acknowledgment that circumstances may exist where a parent corporation will have limited capacity to set bribery prevention policies and foster an effective anti-bribery compliance function for a partially owned subsidiary or joint venture. Further, we recommend that some guidance be provided in respect of what those circumstances may be.

2.3 Additional introductory commentary

While we recognise that it may be necessary for Australian companies that have framed their bribery prevention policies on existing international guidelines to incorporate additional policies relevant to the Australian context and the Draft Guidance, we suggest that the Draft Guidance includes a general introductory comment that, pursuant to the principle of effectiveness, there is no general expectation that corporations with mature and tested bribery prevention procedures and compliance functions pitched at the international high-watermark will be required to update their procedures, provided those procedures are robust and effective.

We also suggest the Draft Guidance make plain that the fact that a bribery event has occurred is not ex-post proof that bribery prevention procedures within a corporation were inadequate (even, for example, if a senior manager was involved). We recognise that there is a tension in proving that procedures are *'adequate procedures'* after a bribery event has been committed in violation of those procedures. We consider that this tension has the potential to undermine business confidence in the utility of the defence of adequate procedures.

The Draft Guidance could also comment that the new corporate offence is not intended to penalise ethically run corporations that encounter an isolated incident of bribery; a single instance of bribery does not necessarily mean that a corporation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate policy requirements, instructions or guidance.

Similarly, additional commentary in the Draft Guidance would be beneficial to highlight that a bribery event committed by a senior figure within a corporation (for example, a director) does not definitively mean that the corporation's bribery prevention procedures were inadequate and a corporation can have comfort that it can still rely on the adequate procedures defence in those circumstances.

2.4 Failures that undermine the defence

The Draft Guidance illustrate six procedures for implementing a compliance framework, read against the background of two overarching guiding principles: proportionality and effectiveness. While we appreciate the difficulties in stating that any particular combination of steps would be considered to be *'adequate procedures'*, it would be helpful for the Draft Guidance to highlight that a failure to take at least certain

prescribed steps would be likely to result in procedures within a corporation being characterised as inadequate.

2.5 Prosecutorial guidance

While we note that the Attorney's General's Department is not in a position to revise prosecutorial guidelines in relation to foreign bribery, for the sake of consistency, we recommend that the *'CDPP and AFP Best Practice Guideline: self-reporting of foreign bribery and related offending by corporations'*[2] (the ***Best Practice Guideline***) be updated in line with the Draft Guidance and the proposed expansion of the Criminal Code to cover the new corporate offence of failing to prevent foreign bribery, as guidance does in the United Kingdom – particularly given the AFP and CDPP's role in enforcing the Criminal Code.

Any expansion of prosecutorial guidance ought to be read in conjunction with the Draft Guidance and make plain the CDPP's approach to prosecutorial decision-making in respect of the new corporate offence. In this regard, and consistent with the UK prosecutorial guidance,[3] we recommend that the Best Practice Guideline indicate that a single instance of bribery does not necessarily mean that a corporation's procedures are inadequate – for example, the actions of an agent or an employee may be wilfully contrary to very robust corporate policy requirements, instructions or guidance.

[2] Available at https://www.cdpp.gov.au/sites/default/files/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf

[3] Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions, available at https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and.

Schedule 2

ALLENS SUBMISSION TO THE 'CONSULTATION ON IMPROVING ENFORCEMENT OPTIONS FOR SERIOUS CORPORATE CRIME'

Allens > < Linklaters

A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia

Allens is an independent partnership operating in alliance with Linklaters LLP

1 Introduction

This submission has been prepared by Allens in response to the Federal Government's consultation on Improving Enforcement Options for Serious Corporate Crime — a Proposed Model for a Deferred Prosecution Agreement Scheme in Australia (the ***Consultation Paper***).

We fully support the Federal Government's commitment to expanding the enforcement options for serious corporate misconduct and offering greater incentives to companies to self-report. We welcome the opportunity to make a submission to the consultation on a proposed model for a Deferred Prosecution Agreement (***DPA***) scheme in Australia and commend the Federal Government for consulting with stakeholders.

We consider that DPAs can provide an effective and efficient means of addressing corporate misconduct in suitable cases. By creating greater certainty of outcome for corporates, they also have the potential to increase self-reporting and therefore enforcement efforts.

Our submissions are limited to observations concerning technical aspects of the proposed amendments, alignment with international models and the anticipated impact on business. None of our submissions should be read as criticisms of the Government's underlying policy objectives.

This submission addresses each phase of the proposed model, as follows:

- Availability of DPAs (**Section 3**);
- Initiation of DPA Negotiations (**Section 4**);
- Negotiations (**Section 5**);
- Approval (**Section 6**);
- Oversight and Response to Breaches (**Section 7**);
- Conclusion of a DPA (**Section 8**).

2 Preliminary Remarks

At the outset, we note the following:

- Certainty and transparency will be central to the success of any DPA scheme introduced. Clear, detailed and publicly available guidance to which the CDPP will be required to have regard throughout the DPA process will, therefore, be vital. We consider the UK DPA Code of Practice to be a useful starting point in this regard. However, we recommend that the Government consider issuing an 'exposure draft' of its guidance for consultation prior to the commencement of any DPA scheme.
- A company's decision to voluntarily self-report and seek a DPA will involve consideration of a number of factors, including whether the 'incentives' are sufficient to embark on this course of action. In this regard, we consider that:
  - the proposed mandatory requirement of a formal admission of liability, discussed further in **Section 5.2** below, is likely to discourage companies from self-reporting and seeking a DPA; and
  - to provide sufficient incentive, the discount available for DPA candidates will need to be greater than what a company could achieve if it entered an early guilty plea. Although ultimately it will be a matter for the court or independent third party considering whether the terms of the DPA are fair, reasonable, proportionate and in the interests of justice, we suggest that implementing legislation should specify that any financial penalty under a DPA must be materially lower than what would have been imposed in the event of an early guilty plea.

3 Availability

3.1 DPAs would be available to companies only

We recognise that this approach is in keeping with international trends. In the United Kingdom, DPAs are only available to commercial organisations.[1] In the United States of America, while DPAs are available to 'eligible individuals', the 'Yates Memorandum' released by the Department of Justice (***DOJ***) in 2015,[2] and the 'FCPA Pilot Program' launched by the DOJ in 2016[3] (and extended in March 2017) indicate that the focus of authorities is on the prosecution of individuals.

The Federal Government should, however, be aware that the absence of availability of DPAs for individuals may impact upon the willingness: (i) of individuals implicated in wrongdoing to come forward (ie, disincentivising whistle-blowing), and (ii) of companies to self-report the conduct of their directors, officers and/or employees. Accordingly, we support the Federal Government's proposal to reassess the scope of availability of DPAs two years after the introduction of the scheme.

3.2 DPAs would only be available for certain 'serious corporate crime' offences

We consider that 'serious corporate crime' is an appropriate focus for DPAs, at least initially. We recommend, however, that the Federal Government consider:

- prescribing offences by regulations (as opposed to legislation), to provide flexibility in adjusting the scope of the scheme; and
- making DPAs available for breaches of sanctions, as is now the case in the UK following the introduction of the *Policing and Crimes Act 2017*.

We also consider that DPAs should be available for offences that were committed prior to the scheme's introduction, as was the case in the UK. This has the potential to expedite the existing caseload of the CDPP and investigative agencies. As it is a matter of enforcement rather than substantive criminal law, providing the CDPP with the option of negotiating a DPA does not create any issues as to retrospective application of criminal offences.

4 Initiation of DPA Negotiations

Certainty and transparency will be central to the success of any DPA scheme introduced. Accordingly, we support there being clearly established factors to which the CDPP must have regard in exercising its discretion to enter into DPA negotiations, which should be set out in the relevant prosecutorial guidelines.

In particular, we note:

- **Self-reporting:** Self-reporting should be a factor that weighs strongly in favour of availability of a DPA. In keeping with the approach in the UK, however, it should not be a prerequisite. As the recent Rolls-Royce DPA demonstrated, in some circumstances, a company's failure to self-report may be outweighed by its subsequent cooperation.[4]
- **Cooperation:** There should be clear factors that go towards establishing a level of 'cooperation' sufficient to warrant a DPA. The factors set out in the UK DPA Code of Practice provide a useful starting point.[5] However, we recommend that the Federal Government consider expressly clarifying that companies will not be expected to waive legitimate claims

[1] See *Crimes and Courts Act 2013* (UK) c 22, sch 17 cl 4.
[2] Sally Q. Yates, Department of Justice, *Individual Accountability for Wrongdoing* (2015).
[3] Fraud Section, Department of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (2016).
[4] *Serious Fraud Office v Rolls-Royce PLC Rolls-Royce Energy Systems Inc* [2017] CC (17 January 2017) (U20170036) (unreported).
[5] Crown Prosecution Service and Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice* (2014) [2.8.2]. The factors include identifying relevant witnesses, disclosing their accounts and the documents shown to them, making witnesses available for an interview when requested, and providing a report in respect of any internal investigation, including source documents.

of legal professional privilege in order to demonstrate cooperation, as is stated in the US Attorney's Manual.[6]

- **Other factors:** In addition to those factors listed in the Consultation Paper,[7] we recommend that the Federal Government consider introducing factors similar to those set out in the UK DPA Code of Practice, including:[8]
  - the company's compliance program at the time the offence was committed, and whether the company is able to demonstrate a significant subsequent improvement to its compliance program;
  - the endeavours of the company to investigate the conduct;
  - whether the offending is not recent and the company in its current form is effectively a different entity from the one that committed the offences; and
  - whether prosecution is likely to be disproportionate or have collateral effects on the public, the company's employees and/or shareholders.

Further, we submit that the company should be permitted to provide, and the CDPP must have regard to, any written reasons why it would be in the public interest for a DPA to be negotiated. We recommend that the Federal Government consider incorporating the right of companies to provide such reasons in the legislation, or at the very least, in any relevant prosecutorial guidelines.

5 Negotiations

5.1 Prosecutor will have discretion as to how to conduct DPA negotiations

We support the Federal Government's proposed requirements of both prosecutors and companies in relation to the conduct of negotiations, as set out in the Consultation Paper. We recommend that the Government also consider including a requirement that:

- the CDPP must not mislead the company as to the strength of its case;[9] and
- the parties exchange undertakings as to the manner in which negotiations are to be conducted and recorded.[10]

If the CDPP decides to withdraw from DPA negotiations, we submit that it would be appropriate for it to provide the company with the 'gist of the reasons for doing so', as is the case in the UK, unless this is not possible without prejudicing the investigation.[11]

5.2 Terms of the DPA would be discretionary, subject to certain mandatory elements

We appreciate the importance for consistency in the application of any DPA scheme, including that organisations should have a clear indication of the likely package of terms to which they may be required to agree. Under the proposed DPA regime, however, the CDPP and the company would be required to agree terms which are fair, reasonable and proportionate. This will necessarily depend on the facts of a particular case.

---

[6] See Department of Justice, *United States Attorneys' Manual* [9-28.700]: 'If a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. To be clear, a company is not required to waive its attorney-client privilege and attorney work product protection in order to satisfy this threshold'. More generally see [9-28.720] which states that 'the attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law'.

[7] Attorney-General's Department, Parliament of Australia, Public Consultation Paper, *A proposed model for a Deferred Prosecution Agreement scheme in Australia*, March 2017, 7. The factors include whether a company has self-reported misconduct, whether a company has genuinely cooperated with any investigation and pre-negotiation discussions, the likely success of negotiations, the company's past conduct, the company's role in the offending, the company's cooperation with any ongoing investigations, and the company's apparent willingness to cooperate once offending is brought to its notice.

[8] See Crown Prosecution Service and Serious Fraud Office, above n 5, [2.1]-[2.10].

[9] Ibid [5.2].

[10] Ibid [3.6].

[11] Ibid [3.2].

Accordingly, we consider that the better approach is for the Federal Government to avoid specifying 'mandatory' terms, except where strictly necessary. For example, in the UK, the only mandatory terms specified are the end date and agreed statement of facts. The legislation then sets out a non-exhaustive list of other 'possible' terms,[12] with the DPA Code of Practice clarifying those that would 'normally' be required.[13] This approach will allow a DPA to be tailored to the corporate conduct involved.

Of the mandatory terms that are proposed in the Consultation Paper, we are particularly concerned by the requirement that a company make a formal admission of liability. Whether or not a company agrees to a formal admission of criminal liability will ultimately be a matter for negotiation. Any requirement to admit criminal liability (whether 'mandatory' or 'likely') is likely to discourage many companies from self-reporting or entering into DPA negotiations.

While we appreciate that there may often be little distinction between agreeing to a statement of facts and admitting criminal liability, a 'formal admission of criminal liability' has the potential to, among other things, limit substantially the reputational benefits offered by a DPA (a key incentive for entering into a DPA) and increase the risk of follow-on civil litigation, including class actions.

We consider that a DPA should be bespoke to each particular matter, particularly on such critical issues.

5.3 In order to finalise the terms of the DPA, the prosecutor must be satisfied of certain factors

We recognise the importance of the CDPP being satisfied that evidential and public-interest requirements have been satisfied before entering into a DPA. However, the requirement that the CDPP be satisfied that the 'full extent of the company's offending has been identified throughout the course of the negotiations' may, in some instances, be a disincentive for a company considering self-reporting as it may be concerned that it will be exposed to a never-ending investigation.

Although a similar requirement exists in the UK,[14] the case of Rolls-Royce demonstrated that there may be other ongoing investigations into similar corporate misconduct at the time a DPA is concluded.[15] In that case, the SFO concluded that it would not be in the interests of justice to pursue Rolls-Royce for any additional conduct uncovered by these investigations. In respect of any other unidentified misconduct, the DPA stated that it would not provide protection against prosecution for conduct not disclosed by Rolls-Royce prior to the DPA coming into force.

We suggest that the Federal Government consider clarifying that the 'full extent of the company's offending' means the full extent of the conduct the subject of a self-report or investigation. If conduct outside of this is discovered or reported, this would leave the CDPP with the discretion to prosecute or enter into a further DPA in relation to such conduct, depending on the circumstances.

6 Approval

6.1 Prosecutor would need to obtain approval of the DPA terms by a retired judge

We agree that the test applied in the UK — that the terms of the DPA are in the interests of justice and are fair, reasonable and proportionate — is an appropriate test. However, it is our strong preference that this test be applied by a sitting, as opposed to retired, judge.

---

[12] See *Crimes and Courts Act 2013* (UK) c 22, sch 17 cl 5(3). Possible terms include: paying a financial penalty; compensating victims of the alleged offence; donating money to charity or another third party; disgorging any profits; implementing a compliance program, or making changes to an existing program; and paying any reasonable costs of the prosecutor in relation to the alleged offence or DPA.

[13] See Crown Prosecution Service and Serious Fraud Office, above n 5, [7.7]-[7.8].

[14] Ibid [2.2(ii)].

[15] *Serious Fraud Office v Rolls-Royce PLC Rolls-Royce Energy Systems Inc* [2017] CC (17 January 2017) (U20170036) (unreported) [134]-[136]. In that case, it was recognised that the ongoing investigations into Unaoil and Airbus (which were the subject of the US DPA) may have uncovered further misconduct by Rolls-Royce. Lord Justice Leveson noted in his judgment that the SFO had stated that it would not be in the interests of justice to pursue Rolls-Royce for any additional conduct uncovered by these investigations.

It is our view that a retired judge would not have sufficient public confidence, or resources, to preside over this scheme. While we recognise that the constitutional separation between courts and the executive is a potential issue for the introduction of a DPA regime involving judicial oversight, we do not consider this issue to necessarily be insurmountable.

First, as the UK Government observed, the judiciary's role in the DPA regime is not to try an offence, nor sentence an organisation,[16] but rather to consider the terms upon which prosecution is proposed to be deferred. Second, the court will not be 'rubber-stamping' penalties; rather it will be deciding whether the terms of the DPA are in the interests of justice and are fair, reasonable and proportionate.

6.2 Alternatively, the CDPP would be given discretion to approve the terms of the DPA

Independent scrutiny of the DPA process is indispensable in order to instil public confidence in the regime, and to ensure that DPA terms are suitable to address alleged wrongdoing.[17]A lack of independent oversight may risk the development of an opaque and unfair system.

In the event the Federal Government concludes that concerns regarding separation of powers cannot be resolved, our preference would be for the establishment of an independent body, such as a specialised DPA tribunal, appointed for a substantial period of time (for example a five-year term), rather than a retired judge or the CDPP being granted sole discretion to approve DPA terms.

6.3 DPAs would be published

We agree that in order to preserve public support and confidence in the DPA regime and to ensure transparency, once approved and finalised, the DPA should be published. We submit that the CDPP should, however, retain discretion to apply for postponement of publication where appropriate (for example where there are ongoing trials of individuals).

7 Oversight and Responses to DPA Breaches

7.1 The use of independent monitors

We agree that, in certain circumstances, the use of an independent monitor may be appropriate. In our experience, however, the cost, length and scope of activity of monitorships can be disproportionate and may discourage corporates from entering into DPAs. Accordingly, we recommend that the Federal Government consider:[18]

- Ensuring that there is clear and detailed guidance as to when a monitor will be required. In this regard, we note that of the 18 cases the DOJ prosecuted under the FCPA Pilot Program in 2016, none of the companies that self-reported were required to appoint an independent monitor.[19] The guidance should also make clear that a monitor's responsibility is to assess and monitor the company's compliance with the DPA's requirements, and not to further punitive goals.
- Including in legislation, or at the very least in guidance, that the company has the right to indicate its preference for a monitor, and unless the prosecutor considers there to be a conflict of interest or that the monitor does not have the requisite experience or authority, the prosecutor should accept the appointment.

[16] See Ministry of Justice, Parliament of the United Kingdom, Response to Consultation, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (October 2012) [75].
[17] Ibid.
[18] See Crown Prosecution Service and Serious Fraud Office, above n 5, [7.11]-[7.22]; Department of Justice, *United States Attorneys' Manual*, Criminal Resources Manual [CRM 101-199].
[19] Kristen Savelle, 'The FCPA Pilot Program One Year Later', *The Wall Street Journal*, 19 April 2017.

- Including a dispute resolution mechanism for where a company considers a monitor's recommendation to be unduly burdensome, impracticable, expensive or otherwise inappropriate.

7.2 Breaches of DPA

We do not consider the concept of 'material breaches' to be necessary. Instead, our preference is for the 'three options' upon breach of a DPA to operate as follows:

- **Rectifying breaches:** It should be open to the prosecutor to afford the company an opportunity to address any breach. As is the case in the UK, in the interests of transparency and consistency, we consider that the prosecutor should publish details relating to that decision, including the reasons: (i) for the prosecutor's belief that the company has failed to comply; and (ii) why it is affording the company an opportunity to rectify that failure.[20]
- **Varying the terms:** Where the parties wish to renegotiate the terms of the DPA, we consider that the parties should be required to seek a declaration from the court (or retired judge or tribunal, as applicable) that the variation is in the interests of justice, and that the varied terms are fair, reasonable and proportionate.[21]
- **Termination:** Where a breach cannot be resolved between the parties, we consider that it should be open to the prosecutor to apply to the court (or retired judge or tribunal, as applicable) for an order to terminate the DPA.

If the Federal Government intends to proceed with the concept of a 'material breach', we note the following:

- The court (or retired judge or tribunal, as applicable) should be responsible for determining whether there has been a material breach, with the standard of proof being on the balance of probabilities.[22] We consider that it would significantly undermine the success of the scheme if the CDPP could unilaterally determine whether there has been a material breach.
- A breach should not amount to a criminal offence. The threat of prosecution should remain linked to the initial wrongdoing on which the DPA is based.
- We do not consider the following categories of 'material breach' to be necessary or appropriate:
  - *Where 'it has not been possible for parties to agree to a response to an otherwise minor breach'*. We consider that the parties being unable to reach agreement may not, necessarily, be the fault of the company and therefore should not constitute a 'material breach'.
  - *Where a company 'does not otherwise appear to be committed to its obligations under the DPA'*. We consider that this category would create unnecessary uncertainty. A company is either complying with the terms of the DPA, or is not.

8 Conclusion of a DPA

We agree that upon completion of the terms of the DPA, it is appropriate that the CDPP give an undertaking, pursuant to s.9(6D) of the *Director of Public Prosecutions Act 1983 (Cth)* (***DPP Act***), that the company will not be prosecuted for the alleged offences or in respect of the specified acts or omissions identified within the statement of facts. The CDPP Prosecution Policy should be amended

[20] See *Crimes and Courts Act 2013* (UK) c 22, sch 17 cl 9.
[21] Ibid sch 17 cl 10.
[22] As is the approach taken in the UK, see *Crimes and Courts Act 2013* (UK) c 22, sch 17 cl 9.

to allow s.9(6D) of the *DPP Act* to be used for this purpose. Such an undertaking will provide greater certainty and finality to companies upon completion of the terms of the DPA.

It is also important that the DPA scheme is seen by corporations as effecting a resolution of all breaches of law relating to the specified acts or omissions in the statement of facts. Importantly, particularly given the overlapping nature of some Commonwealth, State and Territory offences, a DPA in respect of Commonwealth offences should not be undermined by subsequent prosecution for offences against State and Territory law where the alleged wrongdoing arises from the same acts or omissions the subject of the DPA.

9 Next Steps

Allens welcomes the opportunity to answer any queries the Federal Government may have in relation to our submissions. For further information, please contact:

Rachel Nicolson
Partner

Peter Haig
Partner

Guy Foster
Partner