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Criminal v Civil Penalties: The Art of the Deal with Regulators in Australia

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CRIMINAL V CIVIL PENALTIES: THE ART OF THE DEAL WITH REGULATORS IN AUSTRALIA

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1. EXECUTIVE SUMMARY

The current Australian regulatory regime does not provide significant incentives for companies to self-report misconduct. A deferred prosecution agreement (DPA) scheme has been proposed to address this issue. This report will examine the proposed DPA scheme in Australia with reference to those in the UK and US. Case studies involving DPAs in foreign jurisdictions will demonstrate the issues that could arise in the proposed DPA scheme. Specifically, the question of whether DPAs enhance the rule of law will be examined. It will be noted that DPAs can lead to an absence of equality before the law and interferes with the separation of powers. This is evident through the dependence on retired judges to approve DPAs and potential breaches. There is a lack of transparency in the DPA negotiation process and companies could this to avoid public accountability for their corporate offences.

Due to these issues, the report will show that while DPAs are a good addition to the corporate scheme in Australia, there are certain aspects of DPAs that fall outside the rule of law. DPAs can improve the ability for corporate regulators to resolve corporate offences as they encourage companies to self-report, create flow-on consequences to third parties and avoid costly litigation. Therefore, if the proposed scheme was to be implemented, improvements will be needed. It will be recommended that the scheme should adopt the following:

- Judicial oversight in an open court
- Confidentiality that is conditional on company actions
- Publication of DPAs including negotiations if terms are breached
- Legislation to regulate the distinction between a 'minor' and 'material' breach
- Introduce whistle-blower protections



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2. INTRODUCTION

The Rule of Law Institute of Australia is responsible for upholding the rule of law in Australia. It is an independent, not-for-profit organisation founded in 2009 under the *Associated Incorporations Act 2009* (NSW), which aims to promote a discussion on the importance of principles, which underpin the rule of law.¹ The Rule of Law is best described by Meyerson as being ‘opposite to the rule of power’, in which the supremacy of the law is highlighted and considered above all individuals and other legal personalities.² In pursuing these principles, the Institute engages with the community and government by commenting on Bills before Parliament, writing media articles and reports, holding an annual conference on current rule of law issues and speaking at conferences.³

Deferred Prosecution Agreements (DPAs) are a negotiated agreement between an offender-company and a prosecutor. This agreement requires the company to comply with certain conditions such as paying a fine or implementing a program to better their future compliance with the law. In return, their prosecution is deferred and if the agreement is successfully completed, the prosecution is discontinued altogether, and no conviction is recorded.⁴ A proposed DPA scheme was introduced in Australia by the Attorney-General’s Department in March 2017 and is detailed below. The Institute has an interest in this scheme and the enactment of DPA’s as there is a potential that certain elements of DPA’s erode the rule of law. As it will be seen in this report, there are a few areas in which DPA’s have the potential to fall ‘out-of-line’ with rule of law principles.

¹ Rule of Law Institute of Australia, *About Us* < <https://www.ruleoflaw.org.au/about-us/>>.

² Denise Meyerson, ‘The Rule of Law and the Separation of Powers’ (2004) 4 *Macquarie Law Journal* 1, 1.

³ Rule of Law Institute of Australia, above n 1.

⁴ Attorney-General’s Department, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*, Public Consultation Paper (2017).

3. DPA PROPOSED SCHEME

The proposed DPA scheme is only available to companies in relation to corporate crimes specified in a list.⁵ The initial list includes the following:

- Fraud
- False accounting
- Foreign bribery
- Money laundering
- Dealing with proceeds of crime
- Forgery
- Exportation or importation of prohibited or restricted goods, and
- Any other ancillary or specified offences detailed in the scheme and *Corporations Act 2001* (Cth).⁶

Future review of the scheme is expected to consider the inclusion of other crimes such as environmental and tax offences.⁷

The proposed scheme requires the Commonwealth Director of Public Prosecutions (CDPP) to identify cases suitable for a DPA.⁸ These cases are then considered by Prosecutors engaged by the CDPP who can initiate DPA negotiations at their discretion. This involves the prosecutor giving a formal letter of offer to a company to initiate the DPA negotiation process.⁹ Prosecutors will be required to abide by legislation and prosecutorial guidelines during DPA negotiations.¹⁰ These will be developed prior to the implementation of the proposed scheme.

⁵ Attorney-General's Department, above n 4, 6.

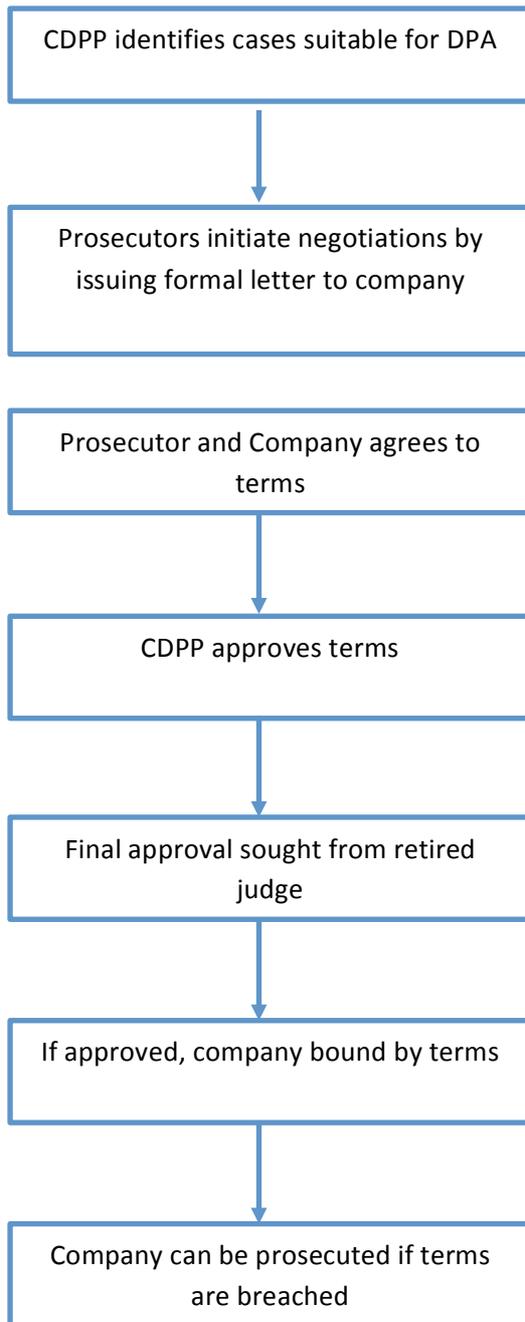
⁶ Ibid.

⁷ Ibid.

⁸ Ibid 7.

⁹ Ibid.

¹⁰ Ibid 8.



While the terms of a DPA will depend on a case-by-case basis, mandatory elements will be included to ensure consistency and certainty. These elements include an agreed end date, statement of facts, formal admission of liability, agreement to cooperate, termination provisions and agreement to publicly publish the DPA.¹¹ However, the details of any materials used in the DPA negotiations will not be publicly disclosed.¹² This is intended to encourage companies to self-report their misconduct, as companies would be more willing to cooperate if they know that DPA negotiations will be confidential.¹³

Once the terms of the DPA are agreed to by both the prosecutor and company, the Director of the CDPP will need to approve those terms before final approval of the DPA is sought from a retired judge.¹⁴ After final approval the company is then bound by the terms of the DPA and can be prosecuted later if the terms are breached.

¹¹ Ibid 9.

¹² Ibid 14.

¹³ Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Public Consultation Paper (2016) 18.

¹⁴ Above n 4, 10.

3.1 DIFFERENCE BETWEEN A MATERIAL AND MINOR BREACH

A minor breach would allow the DPA to remain in effect, subject to the company addressing the breach or renegotiating terms of the DPA.¹⁵ However, a material breach gives the CDPP the power to terminate the DPA and commence prosecution.¹⁶ The proposed scheme allows the CDPP to refer the matter to a 'third party' to determine whether or not there has been a 'material' breach. It is proposed that the 'third party' could either be a retired judge, a court or the Director of the CDPP.¹⁷

There is an issue with the CDPP determining the nature of a breach, as there is a lack of independence as they have an interest in DPAs.¹⁸ There are also concerns with relying on retired judges, as they are not subject to the same judicial standards as active judges in a court. Despite the procedural requirements, it is ideal to have courts determine the significance of a breach, as they are required to make unbiased and impartial decisions.

4. INTERNATIONAL INFLUENCE

4.1 UNITED KINGDOM (UK)

The proposed Australian DPA scheme has similarities with the DPA model in the UK. They both offer DPAs to companies to ensure there is deterrence against similar offences as it leaves open the possibility to prosecute individuals in a company. Similarly, both allow prosecutors to initiate DPA negotiations and those prosecutors are subject to legislation and prosecutorial guidelines.¹⁹ However, the key difference between the two schemes is the DPA approval process. The UK requires a DPA to be

¹⁵ Ibid 12.

¹⁶ Ibid 12-3.

¹⁷ Ibid 12.

¹⁸ Matt Senko, 'Prosecutorial Overreaching in Deferred Prosecution Agreements' (2009) 19 *Southern California Interdisciplinary Law Journal* 163, 164-5.

¹⁹ Federico Mazzacuva, 'Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice' (2014) 78 *The Journal of Criminal Law* 249, 253.

subject to two judicial hearings and the Court continues to be involved throughout the operation of the DPA.²⁰

4.2 UNITED STATES (US)

While the proposed Australian scheme has similarities with the UK model, the US model is noticeably different due to constitutional and judicial differences. The US allows DPAs to be available to both companies and individuals on the basis that it encourages individuals to self-report company misconduct.²¹ While judges are required to approve DPAs, a judicial hearing is not required.²² Judges enforce judicial oversight at their discretion, which is different to standards laid out in the UK and Australian scheme.²³ Contrary to the proposed Australian scheme, the US model does not require the publication of DPAs. This is intended to encourage companies to cooperate with authorities as they would be reassured that there are no mandatory terms for publication.

5. CASE STUDIES

Article 30 of the *United Nations Convention against Corruption* requires states to ensure that discretionary legal powers are exercised to maximise the efficiency of law enforcement procedures in respect of serious corporate offences while being mindful of the need to prevent reoffending.²⁴ Since DPAs are the preferred tool for regulating economic crime by corporations, with the Organisation for Economic Co-operation and Development (OECD) reporting 69% of bribery and corruption cases having been resolved by settlements,²⁵ this section will explore the employment and effectiveness of such agreements around the globe.

²⁰ Ibid 253-4.

²¹ Attorney-General's Department, above n 13, 15-6.

²² Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements' (2016) 8 *Journal of Legal Analysis* 191, 195.

²³ Ibid.

²⁴ *Convention Against Torture*, opened for signature 31 October 2003, 41 UNTS 2349 (entered into force 14 December 2005).

²⁵ OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing, 2014) 9.

5.1 UNITED STATES

In the US, DPAs have become the ‘mainstay of white-collar criminal law enforcement’, with 70 out of 84 corruption cases between 2004 and 2012 being resolved through deferred or non-prosecution agreements (NPAs), and only two cases resulting in full trials.²⁶ They are administered in the federal system by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), initially used with individuals but now increasingly pursued in relation to corporations for a spectrum of federal crimes.²⁷ The central criticism of the American mechanism is that prosecutors have significant discretion and face little judicial oversight. This results in the DPAs being an over-reach by prosecutors and an ‘extortion behind closed doors’ that undermines the US justice system.²⁸ In the *HSBC money laundering case*, Gleeson J held that judicial oversight of the DPAs was critical to the fairness of the justice system and the absence of the Court’s supervision has led to numerous cases that have undermined the rule of law.²⁹ Additionally, in the *General Motors DPA*, Sullivan J criticised the settlement for misleading the public over a safety defect that led to the loss of lives and cited it as an appalling example of a case where the responsible individuals were not criminally charged.³⁰ When no individuals are held accountable, the real deterrence of financial crime is questionable as the successful prosecution of individuals far outweighs the preventative measures of internal compliance that are often, merely ‘window-dressings.’³¹ Nonetheless, holding individuals responsible should not be a substitute for holding corporations liable and effectively deterring criminal conduct.

Similarly, in the *Massey Energy* case, Massey’s violation of federal mining laws led to twenty-nine deaths and the failure to prosecute Massey for its crimes sent negative messages about how the US justice system regulated corporate misconduct,

²⁶ Mike Koehler, ‘Measuring the impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement’ (2015) 49 *University of California Davis Law Review* 497, 521.

²⁷ Corruption Watch UK, ‘Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements Fail to Deter Overseas Corruption’ (Report, March 2016) 7.

²⁸ *Ibid* 7.

²⁹ *Ibid* 16.

³⁰ *United States of America v Saena Tech Corporation* (D DC, Crim No 14-66, October 21 2015) 71.

³¹ Jed S Rakoff. ‘The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?’ (2014) *The New York Review of Books* 9, 9.

undermining the rule of law by failing to prosecute the culpable.³² Moreover, in the *Fokker Services* case, Leon J raised concerns that a DPA dealing with the shipping of aircraft systems to sanctioned countries was inadequately reflected in the fine.³³ He rejected the DPA on grounds that it was not an appropriate exercise of prosecutorial discretion, concluding that the integrity of judicial proceedings would be compromised if the Court approved too lenient sentences but this was overruled in the Court of Appeals.³⁴

The purpose of DPA's in encouraging self-disclosure has been disputed as in 2009, the then assistant Attorney General stated that the majority cases did not come from voluntary disclosures but are the result of proactive investigations such as whistle-blower tips.³⁵ Thus, in 2015, the tripling of the number of FBI agents working on foreign bribery and corruption suggests that the DOJ has been too reliant on investigations by the corporations themselves.³⁶ Furthermore, the high-rate of reoffending among companies who have negotiated DPAs reflect their low deterrent value. Rakoff J cites *Pfizer*, who were offered no less than four DPAs for criminal wrongdoing between 2002 and 2009, to reflect the 'patent ineffectiveness' of DPAs in this respect.³⁷

5.2 UNITED KINGDOM

The UK's version of the DPA differs from its American counterpart in requiring judicial oversight, allowing for more flexibility in the remedies offered to victims and the transparency of information. The UK have avoided NPAs altogether as it considers prosecution a priority where the DPA is not in the public interest, and the Serious Fraud Office (SFO) has taken a 'hard stance', setting the bar for issuing a DPA at a very high level.³⁸ The UK system operates on the basis of two stages of judicial approval, the first being the initial approval to proceed with the DPA, and the second

³² David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2012) 72 *Maryland Law Review* 1295, 1299.

³³ *United States of America v Fokker Services BV*, (D DC Crim No 15-3016, 5 February 2015) 13.

³⁴ Corruption Watch UK, above n 27, 16.

³⁵ Lanny Breuer, Prepared Address to 22nd National Forum on the Foreign Corrupt Practices Act (17th November 2009) 3.

³⁶ Corruption Watch UK, above n 27, 10.

³⁷ Jed S Rakoff, 'Justice Deferred is Justice Denied' (2015) *New York Review of Books* 8, 9.

³⁸ Corruption Watch UK, above n 27, 20.

being approval of the final agreement.³⁹ The judge's ability to ask the corporation and the prosecutor questions increases scrutiny, especially with regard to any documents and evidence tendered. Compared to the US, the UK system has also adopted more stringent conditions in issuing DPAs, with their Code of Practice on Deferred Prosecution Agreements requiring the company to provide a self-report of its wrongdoing as well as information that the prosecutor would otherwise be unaware of, a vital factor in pursuing prosecution.⁴⁰ Leveson LJ in the *Standard Bank DPA* case held that public interest was assessed by the promptness of the report and a 2016 survey shows that companies who do cooperate and provide self-reports in the initial stages of the investigation will not be invited to negotiate a DPA by the SFO.⁴¹

However, it is also argued that the UK system fails in not requiring an admission of guilt in their Code of Practice. The *Standard Bank DPA*, for example, resulted in the Bank agreeing to a statement of facts but no admission of guilt regarding the failure to prevent bribery, which was the basis of that DPA.⁴² The US differs in this regard as corporations are generally required to admit wrongdoing, acknowledging it is important to refute any claim that they are trying to 'cheat' the justice system.⁴³ While the UK Code of Practice holds that individuals whose actions have incriminated the company should be investigated and prosecuted where appropriate, the failure of SFO to investigate if any individuals at the UK branch of Standard Bank were involved sets a disturbing precedent, and faces the criticism of the US regime that individuals are not rightfully held accountable.⁴⁴

5.3 NORWEGIAN PENALTY NOTICES

Norway is ranked second in the World Justice Project's *Rule of Law Index* and is known for its relative absence of corruption, upholding of civil justice procedures

³⁹ Ibid.

⁴⁰ Ibid 22.

⁴¹ Ibid.

⁴² Ibid 23.

⁴³ Uhlmann, above n 32, 1341.

⁴⁴ Ibid 23.

and open government.⁴⁵ Økokrim, the Norwegian authority for investigating economic and environmental crime, relies greatly on penalty notices when dealing with large corporations.⁴⁶ However, these penalty notices are effective only because Norway is proactive in bringing individuals to account and requiring an admission of guilt when entering into these settlements.⁴⁷ In 2014, Yara, a chemical company, was fined \$48.5 million by way of a penalty notice for bribes it made in Libya, Russia and India.⁴⁸ As Yara themselves reported the bribe and admitted guilt, with the former CEO and top management staff successfully being convicted in 2015,⁴⁹ this demonstrates the effectiveness of the Norwegian system in upholding the rule of law.

5.4 ITALIAN PATTAGIAMENTOS

A *pattagiamento* is a form of plea bargain that is overseen by judges and allows for a one-third reduction in the penalty, the possibility of obtaining a suspension of the sentence as well as the possibility of the ‘extinction’ of the offence if no other offences are committed after five years.⁵⁰ Even though this plea bargain is overseen by a judge, little information is made public, and the OECD Working Group on Bribery made a recommendation that Italy publicise, as much as possible, the terms of a *patteggiamento* as well as the reasons why it was used.⁵¹

⁴⁵ World Justice Project, ‘Rule of Law Index 2016’ (Report, 2016) 5
<<https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2016-report>>.

⁴⁶ OECD Working Group on Bribery, ‘Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Norway (Report, June 2011) 5 [2].

⁴⁷ Corruption Watch UK, above n 27, 27.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ OECD Working Group on Bribery, ‘Italy: Follow-up to the Phase 3 Report and Recommendations’ (Report, May 2014) 4.

⁵¹ OECD Working Group on Bribery, ‘Phase 3 Report on implementing the OECD Anti-Bribery Convention in Italy’ (Report, December 2011) 53.

6. DO DPA'S ENHANCE THE RULE OF LAW?

6.1 ABSENCE OF EQUALITY BEFORE THE LAW

There are three main, well-known features of the rule of law: the need to curb the discretionary power on government officials in the interests of certainty and predictability; the ability to seek a remedy in independent courts should the government act illegally; and the importance of equality before the law.⁵² Therefore, it follows that a proposed or existing law that provides unequal treatment of individuals or legal personalities inevitably erodes the rule of law. The proposed DPA scheme is only available to one corporate structure: companies. From the outset, it is clear that the law treats certain crimes differently. The aim of the DPA scheme is to 'enhance the accountability of Australian business for serious corporate crime',⁵³ however, the current DPA scheme produces a contradictory result. Namely, if the crime is so serious, why is the government not prosecuting these companies? The whole aim of the legal system is to prosecute someone if they come forward or an offence is discovered however, the DPA scheme 'avoids' the justice system. For companies to face prosecution means deterioration of their reputation, and potentially, public humiliation. However, if companies are given a way to 'pay' for their crimes without facing our courts, their reputation stays intact. There is a public-policy concern, as larger corporations tend to have a flow-on effect on the community they operate within, and being ignorant of a corporation's serious breaches can have a negative impact on the various stakeholders in the company and community.

Further, preventing recidivism is one of the aims of our Australian legal system, and this can be achieved if an individual and/or corporation are punished for their wrongdoings. However, by allowing them to negotiate alternative terms 'outside' the legal system can encourage recidivism.

There is also an issue with DPA's as it is only available to the actual corporation and not the people within it. This means that individuals in the company who are found guilty of committing fraud - or other serious corporate offences - will be unable to negotiate a DPA for themselves and can still be prosecuted. This is problematic as DPA's rely heavily on self-reporting, but corporations may become hesitant to report their wrongdoings where a broad group of individuals has had some involvement.

⁵² Meyerson, above n 2.

⁵³ Attorney-General's Department, above n 4.

6.2 THE EFFECT OF DPA'S ON THE ROLE OF FEDERAL REGULATORS INCLUDING ASIC, ACCC, AND ATO

Oxfam reported that in 2014, the Australian economy lost an estimated 6 billion dollars to tax evasion by multinational corporations.⁵⁴ This figure has been a consistent factor in Australia, and serious corporate crimes continue to be a heavy burden on our society.

Following the allegations of corruption surrounding an Australian multinational banking company, the effectiveness of federal regulators in dealing with white-collar crimes has been heavily scrutinized. The chairman for ASIC, Mr. Greg Medcraft, affirmed in his speech at the Australian Centre for Financial Studies Workshop, that regulatory intervention needs to be increased through co-regulatory initiatives.⁵⁵ He upheld that this is necessary in the digital revolution, which calls for more flexible laws to combat corporate crimes.⁵⁶ Medcraft also affirmed that Australia is a 'paradise' for serious corporate crimes as it is 'worth breaking the law to do the trade'.⁵⁷ The current regulatory framework has not deterred large corporations from criminality and federal regulators are often not well equipped to bring these wrongdoings to court. In his 2013 speech at the AmCham Business Leaders Lunch, Medcraft highlighted that federal regulators have limited resources to take corporate wrongdoers to court.⁵⁸ Lack of funding and resources to tackle white-collar crimes have been a recurring theme amongst federal regulators.

Federal regulators like ASIC, ACCC, and ATO have the legislative responsibility to ensure that corporations are fulfilling their obligations under the *Corporations Act 2001* (Cth). DPA's are seen as an alternative method for federal regulators to combat sophisticated corporate crimes influenced by the digital revolution. High-profile

⁵⁴ Oxfam, 'The Hidden Billions: How Tax Impact Lives at Home and Abroad' (2016) *Oxfam Research Reports* <<https://www.oxfam.org.au/wp-content/uploads/2016/06/OXF003-Tax-Havens-Report-FA-WEB.pdf>>.

⁵⁵ Greg Medcraft, 'Code of Conduct and the Widening Perimeter of Regulatory Intervention' (Speech delivered at the Australian Centre for Financial Studies Workshop, King & Wood Mallesons Sydney, 14 September 2017).

⁵⁶ *Ibid.*

⁵⁷ Nicholas Wigham, *ASIC White-Collar Data Tip of the Iceberg in Australia* (23 October 2014) News <<http://www.news.com.au/finance/business/asic-whitecollar-crime-data-tip-of-the-iceberg-in-australia/news-story/8be0680fa30f1aba4b8d982db22e2a96>>.

⁵⁸ Greg Medcraft, 'Setting the Record Straight: ASIC, Bribery, and Enforcement Action' (Speech Delivered at the AmCham Business Leaders Lunch, 11 October 2013).

cases regarding large corporations are extremely costly, timely, and complex. DPA's provide regulators with more tools to investigate and prosecute white-collar crimes.

As a result, federal regulators have primarily welcomed the proposed DPA scheme. ATO asserted in their submission to the Attorney General's department that a DPA scheme would be a 'useful tool' for regulators as corporations would more likely cooperate with the ATO and disclose misconduct if they are not under judicial and public scrutiny.⁵⁹

However, ASIC outlined in their submission that the discounts and confidentiality afforded to corporations by the proposed DPA model goes against the fundamental principle of prosecuting criminal behaviour.⁶⁰ They affirm that Australian courts aim to deter criminality by the fear of being caught and persecuted.⁶¹ Regardless, they have also welcomed DPA's on the condition that it adopts the UK model.⁶² The UK model ensures that the DPA scheme is prescribed by legislation with judicial oversight in an open court. ASIC has made an important distinction from the UK model when it comes to suspected breaches of a DPA. In the UK model, a breach will require the court to invite the parties to propose a remedy or terminate the DPA. Alternatively, ASIC affirms that a breach should require formal action via an application to the court that first allowed the DPA.⁶³

Therefore, DPA's should act as an additional tool for federal regulators to combat serious corporate crimes. It will need to be adopted in such a way that it does not conflict with the rule of law. If adopted with careful consideration of the fundamental understanding of our regulatory framework to provide judicial scrutiny over criminal behaviour, DPA's will have an overall useful effect on federal regulators.

⁵⁹ Australian Taxation Office, Submission to Attorney General's Department, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, 29 April 2016, 3

⁶⁰ Australian Securities & Investments Commission, Submission to Attorney General's Department, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, May 2016, 5.

⁶¹ *Ibid* 4.

⁶² *Ibid* 5.

⁶³ *Ibid*.

6.3 SEPARATION OF POWERS

The separation of powers doctrine is a 'complex and contested'⁶⁴ notion. The purpose of this doctrine and separation is to prevent abuse of power. This directly aligns with the rule of law principle, which upholds the supremacy of the law above all individuals.⁶⁵ The separation of power confirms that *because* the supremacy of the law is important, the power has been divided between three arms of government to ensure no abuse of power exists. The importance of maintaining the rule of law through the separation of powers is highly important in Australia as highlighted by the World Justice Project 2016 which ranked Australia 11th in its adherence to the rule of law.⁶⁶

The role of each arm of the government is well established in Australia. The judiciary is responsible for exercising judicial power, i.e. the Chapter 3 power of the Constitution.⁶⁷ The legislature is responsible for legislative duties such as the creation of new laws and the executive government is responsible for the enforcement of law. However, with DPA's the executive arm of the government is being granted parts of both legislative and judicial power. The executive has the sole power to decide, on an ad-hoc, whether or not the corporation will be entitled to a DPA. A judge would normally undertake this role. This broad grant of discretion to individual prosecutors is inconsistent with the rule of law.

This encroachment of power may have been balanced if courts were involved in the decision-making process surrounding DPAs. Judicial review enforces the rule of law over executive action and in this way, prevents the executive from exceeding its powers and functions assigned to the executive and the interests of individuals are protected accordingly. However, this power is given to retired judges. Although retired judges are learned and can serve an important function in society, they are being given power of the courts. This is contradictory to what the common law in Australia stands for. The well-established principle in the case of *Boilermakers*⁶⁸

⁶⁴ Meyerson, above n 2.

⁶⁵ Ibid.

⁶⁶ World Justice Project, above n 45.

⁶⁷ *Australian Constitution*.

⁶⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10.

makes it clear that judicial power can only be vested in Chapter 3 Courts and only a Chapter 3 Court can exercise judicial power.⁶⁹

A final issue that arises with separation of powers and rule of law is the issue of freedom of information and lack of predictability. Because DPA's avoid the court system, the dealings between the prosecutor and the company remain strictly confidential. There is a need to better balance the need of freedom of information for the public and privacy afforded to corporations.

7. WHETHER THE USE OF RETIRED JUDGES ENHANCES THE RULE OF LAW?

7.1 THE PROCESS

In the proposed scheme, a DPA is subject to a retired judges approval. A prosecutor will need to make a written application to a retired judge, who then has the ultimate power of approving or rejecting the terms.⁷⁰ In accordance, the DPA will either be in effect, negotiated further, or terminated completely. During the decision-making process, the retired judge will need to deliberate whether the terms of the DPA are reasonable, fair, and proportionate.⁷¹ They will need to consider whether the DPA upholds the interests of justice, and once approved, it will become accessible to the public on the Commonwealth Director of Public Prosecutions (CDPP) website.⁷²

7.2 AN ENHANCEMENT OR AN IMPOSITION?

As aforementioned, the rule of law in its essence is the requirement that every individual follows our legal framework.⁷³ In conjunction, the legal framework must

⁶⁹ Ibid.

⁷⁰ Attorney General's Department, above n 4, 10.

⁷¹ Ibid 8.

⁷² Ibid 10.

⁷³ Attorney General's Department, *Rule of Law*
<<https://www.ag.gov.au/about/pages/ruleoflaw.aspx>>.

be fair, impartial, and must provide just outcomes for parties.⁷⁴ The law must be clear and transparent.

In the proposed scheme, there is a lack of regarding how retired judges are to determine the suitability of a DPA, particularly in relation to the penalties and discounts that will be enforced. In upholding the rule of law, courts are typically invested with the power to determine penalties based on prescribed legislature and common law.⁷⁵ The retired judge is no longer a part of the court system, and there is no clear guidance on how the penalties and discounts will be afforded. Furthermore, the decision-making process is confidential.⁷⁶ The outcome is publicly available upon approval.⁷⁷ Regardless, essential details about the serious corporate crimes will not be disclosed. Under the rule of law, justice is to be done and usually must be seen to be done.⁷⁸ If the wrongdoings committed by a corporation went through an actual court process, the proceedings would be available to the public. This will not be the case for the proposed DPA scheme. Corporations that have committed serious corporate crimes will not be brought under public and judicial scrutiny. As a result of the lack of clarity surrounding how penalties are imposed, as well as the lack of transparency on how retired judges will make decisions, the proposed DPA scheme does not enhance the rule of law.

8. DPAs AND DISCLOSURE REQUIREMENTS

The proposed scheme will require the CDPP to publish DPAs in full once they have been concluded. These publications will include details on the actions the company has taken to comply with the DPA, any breaches, variation of terms or reasons for termination of a DPA.⁷⁹ However, any materials disclosed by a company during DPA negotiations would not be publicly disclosed or be able to be used in future criminal or civil proceedings unless a prosecutor can show that it falls under an exemption.⁸⁰ This raises rule of law issues because a prosecutor, as opposed to the law, has the

⁷⁴ Ibid.

⁷⁵ *Australian Constitution* s 73.

⁷⁶ Attorney General's Department, above n 4, 8.

⁷⁷ Ibid.

⁷⁸ *R v Sussex Justices, Ex Parte McCarthy* (1924) 1 KB 256,259.

⁷⁹ Arlen, above n 22, 15.

⁸⁰ Ibid 14.

discretion to disclose materials that are of public interest as they indicate the extent of a company's corporate offences.⁸¹ Hence, the non-disclosure would allow companies to avoid public accountability and misuse DPAs to repeatedly avoid prosecution for similar offences as has happened in the US.⁸² Therefore, the non-disclosure of materials in DPA negotiations should be a privilege that would be removed if a company breaches a term of a DPA.

The absence of any whistle-blower protections in the DPA scheme also raises concern that the scheme is disproportionately favourable to companies. The scheme in its current form is heavily reliant on the cooperation of the company. Hence, companies could selectively disclose materials to minimise exposure.⁸³ Whistle-blower protections in the US have enhanced the success of DPAs by ensuring companies respect public accountability.⁸⁴ It has also improved the transparency of the DPA process as it allows shareholders and the public to be aware of ongoing developments of DPAs. Therefore, whistle-blower protection is needed in the proposed scheme to encourage individuals to report any incriminating materials that companies may have withheld in DPA negotiations.

9. ADVANTAGES AND DISADVANTAGES OF DPA'S

| ADVANTAGES | DISADVANTAGES |
|--|--|
| Addresses the sophistication and complexity of large-scale corporate crimes as a result of the digital revolution. | Prosecutors could repetitively renegotiate the terms of the DPA. |
| Less costly and timely. | It could be more costly and timely if terms are repeatedly renegotiated. |

⁸¹ Arlen, above n 22, 196.

⁸² Ellis W Martin, 'Deferred Prosecution Agreements: "Too Big to Jail" and the Potential of Judicial Oversight Combined with Congressional Legislation' (2014) 18 *North Carolina Banking Institute Journal* 457, 468.

⁸³ Paola C Henry, 'Individual Accountability for Corporate Crimes after the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform' (2016) 6 *American University Business Law Review* 153, 155.

⁸⁴ Mazzacuva, above n 19, 258.

| | |
|---|--|
| Provides privacy and confidentiality measures to companies. | The agreement is not disclosed to the public. |
| Provides regulatory bodies with more tools to combat white-collar crimes. | Certainty issues as dealings are done in private |
| | Imposes upon the separation of powers |

10. RECOMMENDATIONS

In upholding the rule of law, we have made a myriad of recommendations that aim to increase the efficiency of DPA's in Australia:

1. The UK model should be implemented by introducing judicial oversight in an open court. This model allows DPA's to be in effect whilst simultaneously ensuring that corporations that have committed serious corporate crimes are brought under judicial scrutiny.
2. The balance of confidentiality (available to companies entering into DPA's) and transparency (for the general public) should be improved. A level of confidentiality should be afforded to companies to promote self-reporting, but it must be conditional to ensure transparency to the general public.
3. The CDPP should be required to publish the entirety of a DPA including materials used in DPA negotiations if a company breaches any term of the DPA.
4. When a breach occurs, the prosecutor should be able to make a request for formal action to the same court that approved the DPA.
5. Legislation should be introduced which regulates the determination between a 'minor' and 'material' breach to limit the renegotiation capacities of companies when the terms of the DPA are breached.
6. The introduction of whistle-blower protections will encourage reporting of company misconduct.

11. CONCLUSION

The introduction of a DPA scheme in Australia is valuable as it may lead to an increase in the accountability of companies through self-reporting of white-collar crimes, and promotes further cooperation and adherence to regulatory bodies. The proposed DPA scheme is, however, as demonstrated above, ultimately ineffective in its interaction with the rule of law. The lack of appropriate disclosure requirements and absence of judicial oversight by the Courts will fail to instil public confidence in the justice system with regard to their treatment of corporate misconduct. Therefore, while the imposition of a DPA scheme is beneficial, there is still room for improvement in the scheme, especially with regard to transparency and reporting issues. As addressed by the recommendations above, balancing the need for confidentiality with the need for transparency, as well as ensuring the appropriate separation of powers between the executive and judiciary, will increase the effectiveness of DPAs in the pursuit of justice, and more importantly, in upholding the rule of law.

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