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The ALRC President  
Australian Law Reform Commission

**Email [corporatecrime@alrc.gov.au](mailto:corporatecrime@alrc.gov.au)**

Dear Hon Justice S C Derrington

## **Discussion Paper – Corporate Criminal Responsibility**

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- 1 McCullough Robertson welcomes the opportunity to provide this submission in response to the Australian Law Reform Commission's Discussion Paper - Corporate Criminal Responsibility (**Discussion Paper**) for its inquiry into Australia's corporate criminal responsibility regime (**Inquiry**).
- 2 The themes dealt with in the Discussion Paper are broad and it is not our intention to address them all in this submission. This submission is directed at responding to Question E of the Discussion Paper, being:

*Should a deferred prosecution scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017, or with modifications?*

- 3 The content of this submission does not constitute legal advice and should not be taken to reflect the views of our clients.

### **McCullough Robertson**

- 4 McCullough Robertson has significant experience in providing legal advice and specialised representation to corporate and government clients who are the subject of enforcement proceedings and investigations.
- 5 We believe that the Inquiry provides an important, and timely, opportunity to reflect on the operation of our corporate criminal responsibility regime. McCullough Robertson is conscious that the law should be robust and cohesive in order for corporations and their officers to be best placed to ensure compliance.
- 6 While Australia is yet to introduce a deferred prosecution scheme for corporations, McCullough Robertson has been extensively involved in the negotiation of a number of conceptually similar enforceable undertakings offered and accepted by regulators in lieu of criminal prosecutions for safety-related offences.
- 7 With this in mind, we make the following comments in response to the Australian Law Reform Commission's invitation to comment on the Discussion Paper.

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## Summary

- 8 McCullough Robertson supports the introduction of a deferred prosecution agreement (**DPA**) scheme in Australia. In our view, the introduction of a DPA scheme would provide an effective additional tool for prosecutors to address corporate misconduct, increase certainty of outcomes for defendants and reduce the costs of litigation for both prosecutors and defendants.
- 9 Although McCullough Robertson agrees in principle with the introduction of a DPA scheme, in our view the scheme proposed by the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (**Bill**) may benefit from modification in some respects. In this regard, we are of the opinion that:
- (a) there could be further consideration of whether the scope of the DPA scheme as set out in the Bill is appropriate in certain respects and whether it should also extend to individuals;
  - (b) restrictions on the use of information obtained by prosecutors during the course of the DPA scheme could potentially be tightened in order to encourage cooperation with corporations; and
  - (c) the proposed use of retired judges to approve the terms of DPAs has the potential to limit adoption of the scheme, and for this reason alternatives should be seriously considered.

## General comments with respect to a DPA scheme

- 10 The current state of the criminal law in Australia has been criticised in some circles for failing to provide adequate financial incentives for corporations to self-report conduct. Although there is scope for immunities to be offered in limited circumstances, flexibility for prosecutors is often recognised to be narrow and there is a perception that a lack of certainty of outcomes impedes cooperation with enforcement agencies.
- 11 In theory, DPAs have the potential to mitigate these issues and become an effective tool to address corporate crime in Australia. By promoting cooperation between corporations and prosecutors, DPAs have the potential to be a cost effective way for business and government to resolve issues surrounding corporate criminal activity. Given the increased complexity of certain aspects of corporate crime and the expanding resources needed to prosecute and defend these proceedings, there are clear benefits to such an approach, both for the taxpayer and business.
- 12 A well-constructed DPA regime obviously has the potential to increase self-reporting by offering discounts on financial penalties and to incentivise corporations to improve corporate governance. In our view, that is more likely in circumstances where access to the DPA scheme is not limited to circumstances where participation is at the invitation of the CDPP. DPAs also have the potential to increase the successful prosecution of individuals, as authorities are made aware of offending that may otherwise have remained hidden. This in turn means that DPAs have the potential to deter individuals from committing corporate crimes.
- 13 Further, as we have observed from the increasingly common and effective use of enforceable undertakings in lieu of criminal prosecutions for safety-related offences, DPAs could be used to improve outcomes for the community, industry and workforce in which a particular corporation operates in a manner that cannot be achieved through the application of traditional criminal sanctions.
- 14 The introduction of a DPA scheme would bring Australia into alignment with similar schemes in the UK, USA and elsewhere. However, as identified in the Discussion Paper and in commentary more broadly, the adoption of DPAs in other jurisdictions has not been without controversy. Notably, the failure of the Serious Fraud Office to successfully prosecute any individuals arising out of the five DPAs agreed to date in the UK has led some to wonder whether the UK's DPA scheme is fit for purpose.

## Potential modifications to the Combatting Corporate Crime Bill

- 15 In order for a DPA scheme to be effective, corporations must be willing to cooperate with prosecutors. In order to encourage such cooperation, it is vital that corporations are confident that a DPA scheme provides a high level of procedural certainty and transparency, as well as adequate safeguards protecting a corporation's interests.
- 16 We note that paragraph 10 of the Explanatory Memorandum to the Bill indicates that under the DPA scheme, the CDPP 'can invite a person (other than an individual) that has engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions'. However, on our review of the Bill, there is no such requirement that the negotiation of a DPA be at the invitation or initiative of the CDPP. In our view, it is important that any negotiation between the CDPP and a corporation in relation to a corporation's participation in the DPA scheme be at the initiative of either the CDPP or the corporation. That will ensure that corporations are not discouraged from fully cooperating with the CDPP at an early opportunity with a view to participating in the DPA scheme.

### *Scope of DPA scheme*

- 17 The proposed section 17B to the *Director of Public Prosecutions Act 1983 (DPP Act)* provides that a DPA may be entered into in relation to certain specific Commonwealth offences, being serious corporate crimes. We agree with the scope of the offences listed, but consider that the DPA scheme could also be available for offences that were committed prior to the introduction of the DPA scheme (as in the UK).
- 18 We also suggest that further clarity be included in legislation indicating that prosecutions for State and Territory offences which relate to the same conduct as the Commonwealth offences included in the proposed section 17B, and in relation to which a DPA is agreed, must not be instituted. There may be complex cross-jurisdictional issues in this regard, but we are of the view that any such difficulties may be overcome through either the exercise of the Commonwealth's powers under section 51(xx) of the Constitution or cooperation with State and Territory governments.
- 19 The proposed section 17A(1) of the DPP Act expressly excludes individuals from entering into a DPA. This is consistent with the position in the UK but differs from the US approach. This limitation potentially conflicts with one of the objectives of the DPA scheme, being to encourage self-reporting by corporates. Corporations may be reluctant to self-report or 'admit' the conduct of their officers or employees (i.e. the 'controlling minds') in relation to an offence in which they are involved where there is no potential for a deferred prosecution in relation to those individuals. This may be particularly the case where directors are also suspected of offences, and those directors have effective control of any DPA scheme negotiation process.

### *Content of DPA*

- 20 The proposed section 17C(1) of the DPP Act lists mandatory requirements for the content of a DPA and section 17C(2) is a non-exhaustive list of terms and features that may be included in a DPA. In particular, we welcome the reference to compensation payments to individuals and the implementation of compliance policies and programs as these are outcomes that have been effectively utilised in enforceable undertakings agreed in lieu of criminal prosecutions for safety-related offences that can more effectively improve outcomes for communities, industries and workforces than traditional criminal sanctions. In order to increase take-up of the scheme, DPAs could be mandated to include a statement that entry into a DPA does not constitute a formal admission of criminal liability.

### *Disclosure of information*

- 21 The proposed section 17D of the DPP Act provides a mechanism for the CDPP to unilaterally publish DPAs. The CDPP may publish a version of the DPA that does not disclose names or other material in



certain circumstances. It is important that the CDPP strike the right balance between the general public interest in the outcome of DPAs, and the confidentiality of certain matters. In our view, as a matter of procedural fairness, the proposed section 17D of the DPP Act ought to be amended to provide corporations with a statutory right to be meaningfully consulted in relation to the publication or non-publication of the content of DPAs.

- 22 The proposed section 17H of the DPP Act limits the admissibility in proceedings of specific documents that are likely to be generated or provided to Commonwealth agencies during the course of DPA negotiations, and/or in compliance with a DPA. We support such a limitation as a corporation may otherwise not engage in sufficiently cooperative and frank discussions with the Commonwealth if it believes that such information may be used against it if a proposed DPA is not finalised and agreed.
- 23 The proposed section 17K of the DPP Act provides that information provided by a company to a prosecutor during the course of the negotiation of a DPA can in certain circumstances be disclosed to another Government agency or to a Court or Tribunal. Corporations might consider that there is a real risk that sensitive documents created for the purpose of DPA negotiations may fall into the hands of third parties by way of the issuing of subpoenas or freedom of information requests; the exclusion of this information from publication under such disclosure mechanisms could be considered.
- 24 In addition, in our view, disclosure under section 17K should only be allowed where it is for 'the protection of public health, or the life or safety of an individual or group of individuals'. There is otherwise a real prospect that documents created for the purpose of DPA negotiations could be indirectly utilised by law enforcement agencies and third parties contrary to the interests of the corporation. If that were to occur, it would significantly undermine the trust and confidence that corporations may have in the DPA scheme negotiation process and thereby discourage cooperation.

#### *Approval of terms of DPA*

- 25 The proposed section 17H of the DPP Act provides that the Minister is to appoint a retired judge(s) to approve the DPA. We agree with the proposed test for the approval of DPAs (that is, if its terms are 'in the interests of justice' and 'fair, reasonable and proportionate') but consider that it would be advantageous if such a test was applied by a judicial officer rather than a retired judge.
- 26 We understand that the proposed use of retired judges is ostensibly a means of avoiding potential infringement on the doctrine of separation of powers, as raised in various prior public consultations in relation to a DPA scheme. If these issues can be resolved, our first preference would be that a current judge approve the terms of DPA. Allowing a former judge to approve DPAs is potentially inconsistent with the principle of 'open justice' and DPAs approved in such a manner may lend themselves to a perception of 'deals done behind closed doors'. This may hamper public confidence in the DPA scheme.
- 27 The proposed approval process also has the potential to limit certainty of outcomes. The appointment of retired judges and their findings will obviously not be subject to accepted oversight mechanisms which may discourage corporations from engaging with the scheme.
- 28 In light of the issues raised above, we query whether an independent statutory tribunal (such as an organisation similar to the Australian Competition Tribunal) might not be better placed (and resourced) to approve the terms of DPAs.
- 29 If the current proposal is adopted, consideration could be given to amendments to section 17D of the DPP Act to include a requirement that the approving officer is at least to give reasons for their decision and that those reasons are published in a public forum, in order to improve the transparency of the approval process.

*Breach of DPAs*

- 30 The proposed section 17E of the DPP Act proposes that following the execution of a DPA, should the CDPP be 'satisfied' that there has been a 'material contravention' of the DPA, the DPA may give the corporate notice of the initiation of criminal proceedings. A Court is able to make a declaration that such notice is unwarranted and, presumably, that the DPA remains in force (although the DPA will have no effect in the interim).
- 31 Ensuring adequate responses in the event of a breach of a DPA is vital to the success of the scheme. Corporations may be more likely to cooperate with prosecutors in circumstances where they are afforded an ability to address an allegation of 'material contravention' by the CDPP, take steps to remediate any contravention and make submissions to a Court as to whether there has been compliance with the terms of a DPA before it is no longer in effect. Leaving decision-making with regards to whether a breach has occurred more firmly in the hands of the Court (as in the UK) may help to encourage corporations to engage with the DPA scheme.

**Conclusion**

- 32 We trust this submission will be of assistance to the Australian Law Reform Commission. If you would like to discuss this submission further please do not hesitate to contact us.

Yours sincerely



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