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Submission of the Synod of Victoria and Tasmania, Uniting Church in Australia to the Corporate Criminal Responsibility Discussion Paper

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The Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes the opportunity to provide a submission in response to the *Corporate Criminal Responsibility* Discussion Paper.

The Synod supports Proposals 1 -8, 11, 15-18, 20, 22, 23 of the Discussion Paper.

With regards to Proposals 9 and 10, the Synod is if the view that available sanctions against individuals must be capable of contributing to general deterrence of the owners, managers or employees of a company breaking the law. The body corporate itself does not make decisions. It is the people who make up the body corporate that make decisions and therefore, there is a need to hold individuals accountable for the decisions they make.

It has been recognised that where a company is fined, rather than the sanction applying to the individuals involved, it fails to act as a general deterrent to the illegal behaviour. Associate Professor Soltes gives an example:[1]

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

Also, it is necessary that individuals responsible for serious corporate crimes are held to account to maintain the public's faith in the fairness of the criminal justice system. As US Senator Elizabeth Warren said in the US Senate Banking Committee Hearing in March 2013, in relation to the Deferred Prosecution Agreement with HSBC for extensive money laundering including of Mexican drug cartel money:[2]

> *…. if you get caught with an ounce of cocaine, the chances are good you're going to go to jail... if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine, and you go home and sleep in your own bed at night. I think that's fundamentally wrong.*

With regards to Proposal 13 and 14, the Synod is concerned that at the suggestion that the sentence on a corporation takes into account the impact on third parties. Such a consideration

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[1] Eugene Soltes,'Why they do it', Public Affairs, USA, 2016, 325.
[2] Corruption Watch, 'Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements fail to deter overseas corruption', March 2016, 10
https://docs.wixstatic.com/ugd/54261c_423071d2a88f4af0be0a0309f6c51199.pdf

should only apply to the same extent as it does in relation to the case of individuals. For example, if a court takes into account the impact on third parties in the sentencing of an individual for theft or fraud, then the court should take a similar approach to the sentencing of a corporation. Otherwise, a perverse incentive is created where it paid to commit crimes behind the veil of incorporation, as the sanction that results will be reduced by the extent to which it impacts on third parties compared to the sentence that would be imposed on an individual.

Question C – Should the whistleblower protections contained in the *Corporations Act 2001 (Cth), Taxation Administration Act 1953 (Cth), Banking Act 1959 (Cth)* and *Insurance Act 1973 (Cth)* be amended to provide a compensation scheme for whistleblowers?
The Synod supports these Acts, including a compensation scheme for whistleblowers. Whistleblowers are often vital to the detection of serious criminal conduct by people working inside corporations. Many instances of serious corporate criminal activity would go undetected without whistleblowers. In addition, whistleblowers can often provide vital information to allow for the successful prosecution of a corporation or its managers and employees.

The Synod believes the law needs to provide three avenues for whistleblowers. In some circumstances, it may be possible for a whistleblower to remain in employment in their current role or in an alternative role with their existing employer. In such cases, protection for the whistleblower is needed.

In other cases, it may not be possible for the whistleblower to remain in their current employer, or they may not wish to do so. For example, they may have no faith in the management that authorised or permitted serious criminal conduct to take place. In such cases, compensation for harm suffered as a whistleblower and loss of income from becoming a whistleblower may be an appropriate avenue.

In some cases, it may not be possible for a whistleblower to remain in their existing employment and the pursuit of compensation may be seen as costly and time-consuming. In such cases, a reward might offer a vital option for the whistleblower, reducing the personal costs they will be exposed to (such as loss of employment and shunning by colleagues).

The US *False Claims Act* has been able to recover over US$44 billion since 1986 through lawsuits filed under the Act. In 2014 alone, recoveries from *qui tam* cases totalled nearly US$3 billion, with whistleblowers receiving US$435 million.

The provision of financial reward for whistleblowing has allowed the US to expose major cases of illegal activity against the US Government. Fraud has been detected at 50 times the rate before the amendments to the *False Claims Act* were made in 1986.[3]

US laws that reward whistleblowers have both safeguards against making false claims and thresholds of action before a reward will apply. The fact that a reward will only be provided when the US Government recovers funds is a safeguard against people making false claims. The whistleblower will only get a reward if a court finds that the corporation in question has broken the law and is required to make a financial payment to the government. If the court finds the whistleblower's claims are false, then no reward follows.

In terms of thresholds, under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* the Securities Exchange Commission will only provide a reward where the information leads to an enforcement action yielding monetary sanctions of over US$1 million. This helps ensure that information brought to regulatory authorities is more likely to be of a serious nature pre-sorts whistleblower cases for the law enforcement or regulatory agency in question.

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[3] Kim Sawyer, "Rewarding whistleblowers for risk brings results", *The Australian Financial Review,* 23 December 2008.

Against the idea of setting thresholds needs to be weighed the desire to address serious criminal activity in the private sector even where the sums of money involved may not be large, for example, a labour hire business involved in human trafficking or forced labour.

Other jurisdictions have also provided rewards for whistleblowers that expose tax evasion and tax avoidance. Such rewards have can a significant benefit in the recovery of funds from these criminal activities. The US IRS reported between 2007 and 2015, information received from whistleblowers assisted the IRS in collecting over US$3 billion in tax revenue, and the IRS awarded US$403 million to whistleblowers.[4]

A high profile case is that of former banker Bradley Birkenfeld who was paid a US$104 million reward for his role in exposing the role Swiss bank UBS had played in US citizens engaging in tax evasion. According to the IRS, Birkenfeld had "provided information on taxpayer behaviour that the IRS had been unable to detect, provided exceptional cooperation, identified connections between parties to transactions, and the information led to substantial changes in UBS business practices and commitment to future compliance." They went on to say "While the IRS was aware of tax compliance issues related to secret bank accounts in Switzerland and elsewhere, the information provided by the whistleblower formed the basis for unprecedented actions against UBS." His information directly resulted in UBS having to pay a US$780 million fine to the US Government and over 35,000 taxpayers voluntarily repatriated their illegal offshore accounts. His disclosure also indirectly lead to revised tax treaty negotiations between the US and Swiss governments, and to UBS subsequently releasing the names of over 4,900 US taxpayers with offshore accounts, who were then investigated.[5]

In the US specialist lawyers can assist whistleblowers to prepare their information for the IRS, assisting the tax authority with the initial processing of the information. An example is the Tax Whistleblower Law Firm.[6] Such an approach can have benefits in reducing the investigative resources the tax authority needs to commit to the preliminary investigation of a case.

Under the Stop International Tax Evasion Program by the Canadian Revenue Agency, whistleblowers can be rewarded between 5% and 15% of federal tax collected for information leading to tax recoveries exceeding $100,000.[7] In their 2014-2015 annual report to Parliament, the Canadian Revenue Authority reported that:[8]

> *As of March 31, 2015, the program had received 1,920 calls. The Agency identified 522 as coming from potential informants. Of those, 201 followed up with written submissions, and 110 cases are actively under review.*

In the UK, media reports suggest that offering a reward for exposing tax evasion is assisting Her Majesty's Revenue and Customs in collecting more tax, paying out £605,000 to informants in the 2014-2015 financial year.[9]

Germany also provides rewards for whistleblowing on tax evasion.[10]

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4 http://static1.squarespace.com/static/54b02e1de4b075f5535088d5/t/56bb98914c2f856b13c08a5c/1455134865917/WB_Annual_Report_FY_15_Final+Ready+for+Commissioner+Feb+8.pdf, p. 4.

5 Lowtax Library Newswire, "IRS Pays UBS Whistleblower USD104 m', 14 September 2012.

6 http://twlfusa.com/

7 http://www.cra-arc.gc.ca/gncy/cmplnc/otip-pdife/menu-eng.html

8 http://www.cra-arc.gc.ca/gncy/nnnl/2014-2015/ar-2014-15-eng.pdf, p. 50.

9 http://www.theguardian.com/politics/2015/jun/15/uk-tax-authorities-hmrc-record-informants

10 Jason Fekete, "Whistleblowers will get cash rewards for helping nab tax cheats", *Montreal Gazette,* http://www.montrealgazette.com, 21 March 2013.

Question D – Should whistleblower protections contained in the *Corporations Act 2001 (Cth), Taxation Administration Act 1953 (Cth), Banking Act 1959 (Cth)* and *Insurance Act 1973 (Cth)* be amended to apply extraterritorially?

The Synod supports that the laws in question be amended to ensure that whistleblowers are able to be protected and compensated (or, ideally, rewarded) if they are located overseas, but the corporate entity is subject to one of the Acts. The protection and compensation should also apply to whistleblowers who report illegal activity that has been conducted by the corporate entity overseas.

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

The Synod cautiously supports the introduction of such a Deferred Prosecution Agreement (DPA) scheme as proposed by the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019,* provided that it is designed to ensure individuals or corporations are held to account for serious criminal activity while encouraging greater detection of such criminal activity. The Synod also sees DPA's as part of a suite of measures needed to deter, detect and prosecute corporate criminal behaviour. Additional measures needed include whistleblower protection, compensation and reward in the private sector, a public beneficial ownership register and making it easier to for law enforcement agencies to prosecute money laundering offences.

As pointed out by Norma Z Paige Professor of Law, Jennifer Arlen, a DPA scheme can help deter corporate misconduct only if properly structured and situated in an effective enforcement regime governing individual and corporate liability.[11] She argues that improperly designed DPA statutes can undermine deterrence if they operate primarily to reduce the sanctions imposed on companies for corporate crime.[12]

We agree that the DPA scheme should only apply to corporations and not individuals. We agree that a DPA should only be available where a corporation admits to agreed facts detailing their misconduct, pays a financial penalty to the Commonwealth and is required to disgorge profits and benefits obtained through the conduct. Further, the corporation receiving the DPA should be required to fully cooperate with law enforcement in any investigation towards prosecuting the individuals responsible for serious corporate crime. The cooperation should include the waiving of legal privilege over any material from internal investigations conducted by the corporation prior to self-disclosure.[13]

Data from the US shows that in *Foreign Corrupt Practices Act* (FCPA) DPAs appear to have led to an increase in the number of individuals subsequently subjected to prosecution. From 2004-2014 there were 42 prosecutions of individuals involved in corporate FCPA cases[14], while the in

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[11] Jennifer Arlen, 'The Potential Promise and Perils of introducing Deferred Prosecution Agreements outside of the US', New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 19-30, July 2019, 2.

[12] Jennifer Arlen, 'The Potential Promise and Perils of introducing Deferred Prosecution Agreements outside of the US', New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 19-30, July 2019, 2.

[13] S. Hawley, C. King and N. Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution in England and Wales', in T. Soreide and A. Makinwa (eds.), *Negotiated Settlements in Bribery Cases: A Principled Approach,* Edward Elgar, 2020, 11.

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

preceding decade 1993 – 2003 there were only seven prosecutions of individuals and in the period 1982 – 1992 there were 21 prosecutions of individuals.[15]

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

UK DPAs have failed to lead to a single successful prosecution of individuals who have organised or paid bribes. In July 2019, Michael Sorby, Adrian Leek and David Justice were acquitted of conspiracy to corrupt and conspiracy to bribe.[16] The jury found the three men not guilty of conspiring with various agents to agree to bribes in relation to 27 separate overseas contracts for Sarclad Ltd.[17] Sarclad Ltd had entered into a DPA with the UK Serious Fraud Office in July 2016. Sarclad Ltd had accepted the charges of corruption and failure to prevent bribery in relation to the systematic use of bribes to secure contracts for the company between June 2004 and June 2012.[18] The UK Serious Fraud Office announced the DPA with Sarclad had been concluded with the corporation fulfilling the requirements of the DPA.[19]

On 20 December 2019, the UK Serious Fraud Office reported that Cansun Güralp, Andrew Bell and Natalie Pearce were acquitted of conspiracy to make corrupt payments in relation to a South Korean official between 2002 and 2015.[20] The lack of a conviction of the accused individuals is despite that the UK Serious Fraud Office had a DPA with Güralp Systems Ltd, which had been agreed in October. In the DPA, Güralp Systems Ltd had accepted charges of conspiracy to make corrupt payments and a failure to prevent bribery by employees in relation to the payments made between 2002 and 2015.[21]

Thus, there is reason to be cautious about the introduction of a DPA scheme, and it should be subject to review in five years' time to assess its effectiveness.

A past academic review of the use of DPAs in the US has concluded that DPAs have at times been ineffective in deterring future criminal behaviour by the same corporation, finding that some of them obscure who was personally responsible for the company's misconduct and failing to achieve meaningful structural or ethical reform within the company.

For instance, Pfizer Inc, the huge pharmaceutical company, entered into a DPA in 2002 due to one of its subsidiaries paying large bribes to a managed care company to give preferred status to one of its drugs. Pfizer was required to implement a compliance mechanism that would uncover illegal marketing activities and bring them to the attention of its board. Two years later, the company was again facing prosecution for similar illegal marketing activities that had

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

[16] UK Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Sarclad', Media Release, 16 July 2019.

[17] UK Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Sarclad', Media Release, 16 July 2019.

[18] UK Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Sarclad', Media Release, 16 July 2019.

[19] UK Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Sarclad', Media Release, 16 July 2019.

[20] UK Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Güralp Systems Ltd', Media Release, 20 December 2019.

[21] UK Serious Fraud Office, 'Three individuals acquitted as SFO confirms DPA with Güralp Systems Ltd', Media Release, 20 December 2019.

continued at the same subsidiary. Pfizer then entered into a second DPA but by 2007 further criminal marketing activities by another subsidiary led to yet another DPA. In all these instances, not one person was prosecuted.[22]

Despite three DPAs, in 2009 Pfizer, the parent company, was found to have engaged in the same illegal marketing activities and was permitted to enter a fourth DPA, was required to pay US$2.3 billion in penalties, the largest criminal fine ever imposed up until then. However, it was most likely a small fraction of the profits derived from its long-term criminal activity. Again, no individuals were charged.[23]

In 2008 the Aibel Group Limited pleaded guilty to violating the US *Foreign Corrupt Practices Act* anti-bribery provisions and "admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct."[24] The US Department of Justice media release stated: "This is the third time since July 2004 that entities affiliated with the Aibel Group have pleaded guilty to violating the FCPA."[25]

Similarly, in 2012 Marubeni Corp resolved a US$54.6 million FCPA enforcement action through a DPA concerning alleged improper conduct in Nigeria. In 2014, the company resolved another FCPA enforcement action – a US$88 million action concerning alleged improper conduct in Indonesia.[26]

The US Government Accountability Office raised concerns in 2010 that the US Department of Justice had been unable to assess the impact of its DPA scheme:[27]

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

There have also been concerns about DPAs in the UK not being adequately used to prosecute the individuals behind the serious criminal conduct. The DPA granted to Standard Bank was in relation to its failure to prevent its Tanzanian subsidiary, Stanbic Tanzania, and its top executives from paying bribes to senior government officials to secure the Tanzanian Government's mandate to raise US$600 million of sovereign debt financing in the form of a bond.[28] The alleged bribes consisted of a US$6 million fee paid by Stanbic to a local agent,

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

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

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

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

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

[27] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 513, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf

[28] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 3.

Enterprise Growth Market Advisors (EGMA) Ltd, paid out of international investors' money raised by Standard Bank for the Tanzanian Government.[29] EGMA, according to the agreed facts, provided no real services in return for its US$6 million fee. Its chairman at the time, Harry Kitilya, was Commissioner of the Tanzania Revenue Authority, which was responsible for advising the government on financing needs.[30] A key factor behind Standard's eligibility for a DPA was the fact it self-reported the alleged misconduct within days of being alerted by Stanbic Tanzania employees and cooperated with the UK Serious Fraud Office.

The Statement of Facts in the DPA identified, either by name or role, key players in the alleged criminal conduct.[31] However, no single individual in the UK was held to account either by Standard Bank or the UK Serious Fraud Office (SFO) for their failure to prevent the alleged bribery. It was noted by UK Corruption Watch that there was a high level of control and approval by UK individuals for the transaction. These individuals were able to operate at senior levels within the financial industry after the DPA was agreed.[32] The team at the Standard Bank PLC in the UK drew up the collaboration agreement with the local agent, supposedly because the local Tanzanian team did not have the capacity or knowledge to do so. The team appears to have deliberately avoided giving any detail about the role of the agent to the compliance team within Standard Bank UK, to the Mandate Approval Committee.[33] Staff in Standard Bank UK also helped draft the Mandate and Fee letters for the transaction. The Mandate letter was specifically drafted to avoid any mention of a partner or third party, while the Fee letter specified that the Government of Tanzania would pay Standard Bank, Stanbic and a 'local partner' a fee of 2.4% without naming who the local partner was.[34]

In the view of UK Corruption Watch:[35]

> *This particular DPA appears to set a precedent that UK employees can approve and draw up agency agreements on behalf of foreign subsidiaries, conduct no due diligence on those agreements, conceal the use of agents from a compliance function and institutional investors, and face no individual penalty. It is questionable whether such a precedent will act as a genuine deterrent to individuals not to engage in high-risk behaviour with regards to foreign bribery. It also suggests that the Bribery Act in practice may be significantly weaker in its application than the US Foreign Corrupt Practices Act. Under the FCPA, reckless disregard and wilful blindness, are enough to establish liability for knowledge of an offence.*

A former senior bank official in Tanzania alleged that officials in London were "well aware" what was going on but "suppressed key facts" to help it secure the SFO deal.[36] Shose Sinare, the former head of investment banking at Stanbic Bank, claimed the bank secured the DPA by "suppressing key facts." She claimed the Standard Bank misrepresented the fact it was not aware of local third party involvement in the deal insisting it was well aware before signing the deal and that a draft collaboration document had been circulated to the entire deal team including senior officials in London.

On 30 November 2018, the UK Serious Fraud Office announced the DPA with Standard Bank had reached its conclusion, with the bank having fully complied with all the requirements of the

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[29] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 3.
[30] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 3.
[31] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 4.
[32] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 1.
[33] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 5.
[34] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 5.
[35] Corruption Watch, 'The UK's First Deferred Prosecution Agreement', December 2015, 5.
[36] David Connett, 'Tanzanians slam SFO's plea bargain on Africa corruption case', *The Independent,* 15 March 2016, http://www.independent.co.uk/news/business/news/serious-fraud-office-tanzanians-slam-sfo-s-plea-bargain-on-africa-corruption-case-a6931146.html

DPA.[37] There were no prosecutions of any of the individuals involved in the bribery in the UK. There have been prosecutions of individuals in Tanzania, including the official who received the bribe and the former head of Investment Banking at Stanbic.[38]

The Director of the Commonwealth Director of Public Prosecutions should conduct DPA negotiations as they see fit within the guidance provided by the Prosecution Policy. However, the prosecutors should be required to take into account those who were impacted by the criminal activity of the company and/or its employees in negotiating the restitution and penalty in the DPA. UK Corruption Watch has pointed out that the DPA with Rolls Royce made specific mention of concerns about the impact on innocent employees of the company and shareholders, but made no mention of the victims of Rolls Royce's criminal activity.[39] Further, it appears the Rolls Royce DPA did not accept any input from prosecuting authorities in the countries where the bribes were paid, and it would appear no real assessment of the harm from Rolls Royce's criminal activity was assessed.[40] The Synod opposes consideration of factors such as the impact for the defence industry, which was a consideration in a lower penalty in the Rolls Royce DPA.[41]

A DPA should seek to provide reparations from the corporation to the victims of the criminal activity. As an example from another jurisdiction, in the settlement between BAE Systems and the UK Serious Fraud Office involved BAE Systems agreeing to "make an ex gratia payment for the benefit of the people of Tanzania in a manner to be agreed between the SFO and [BAE]. The amount of the payment shall be £30 million less any financial orders imposed by the court."[42] As a result, the government of Tanzania, BAE Systems, and the UK Department for International Development signed a joint memorandum of understanding enabling the payment of £29.5 million (plus accrued interest) by BAE Systems for educational projects in Tanzania.[43]

The Synod supports the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* allowing for the prosecution of a party who materially contravenes a DPA, or who provided inaccurate, misleading or incomplete information to law enforcement agencies in connection with a DPA or a DPA negotiation.

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

The Synod agrees that a prosecution should be permitted after a DPA has expired if it is found that the party to the DPA provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with the agreement and the party knew, or ought to have known that the information was inaccurate, misleading or incomplete.

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[37] UK Serious Fraud Office, 'UK's first Deferred Prosecution Agreement, between the SFO and Standard Bank, successfully ends', Media Release, 30 November 2018.
[38] S. Hawley, C. King and N. Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution in England and Wales', in T. Soreide and A. Makinwa (eds.), *Negotiated Settlements in Bribery Cases: A Principled Approach,* Edward Elgar, 2020, 9.
[39] Corruption Watch UK, 'Failure of Nerve: The SFO's Settlement with Rolls-Royce'.
[40] Corruption Watch UK, 'Failure of Nerve: The SFO's Settlement with Rolls-Royce'.
[41] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 14.
[42] Samuel Hickey, 'Bridging the gap between SFO and DOJ practice in remediating the victims of foreign bribery', 2019 OECD Global Anti-Corruption & Integrity Forum, 20-21 March 2019, 10.
[43] Samuel Hickey, 'Bridging the gap between SFO and DOJ practice in remediating the victims of foreign bribery', 2019 OECD Global Anti-Corruption & Integrity Forum, 20-21 March 2019, 10.

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

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

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

As allowed for in subsection 17C(2), the Synod believes that law enforcement agencies should be able to recover costs related to the investigation of the company and its employees and of the negotiations of the DPA through the terms of the DPA as is the case in the UK.[44]

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

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

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

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

The Synod also supports subsection 17H(5) so that in proceedings taken as a result of a contravention of the DPA the CDPP would not be required to prove the existence of the facts in the statement of facts and neither party would be able to adduce evidence to contradict or qualify an agreed fact unless the court gives leave.

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

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

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

- an authority of a Commonwealth entity for the purposes of assisting the entity to exercise its powers, or perform its functions or duties;
- an authority of a Commonwealth entity or an authority of a State or territory or a foreign country for law enforcement purposes, or for the protection of public health, or the life or safety of an individual or groups of individuals; and

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

- a court or tribunal or person that has the power to require the answering of questions or the production of documents for the purposes of proceedings before, or in accordance, with an order of, the court, tribunal, authority or person.

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

The Synod supports the amendments to the *A New Tax System (Goods and Services Tax) Act 1999* and the *Income Tax Assessment Act 1997* to prevent costs incurred by a corporation as a result of a DPA (such as fines, reparation payments, payments of the costs of the CDPP for negotiating the DPA) cannot be claimed as tax deductions.

The Synod supports item 16 to prevent potentially disruptive actions by a corporation to the ability of the CDPP to decide to offer a DPA or not, an approving officer's decision to approve or not approve a DPA or a variation to a DPA, and the CDPP's decision that there has been a material contravention of the DPA.

The Synod supports Item 17 that amends subsection 16A(2) of the *Crimes Act* so that a court must consider the fact the corporation entered into a DPA and can impose a sentence that reflects the extent to which, if at all, the corporation maliciously exploited the DPA process to avoid prosecution.

The Government should make it clear that a DPA offered to a company that knew of the serious criminal activity and choose not to disclose it and is offered a DPA for subsequent cooperation after law enforcement detected the crime would be less generous than a DPA where the company alerted law enforcement to the criminal activity. The Synod shares the concern of Corruption Watch UK that the DPA negotiated with Rolls-Royce will encourage companies to conceal the criminal activity until it is detected by law enforcement and only then offer cooperation.[45] This is of particular concern when none of the individuals involved in the bribery are then prosecuted, as was the case with Rolls-Royce.[46]

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

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

Question J. Should there be an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor-defeating disposition provisions?

The Synod supports the introduction of an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor-defeating disposition provisions.

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

[46] UK Serious Fraud Office, 'SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals', Media Release, 22 February 2019.

The benefits of this approach would be to deter those that seek to profit from the promotion and facilitation of illegal phoenix activity. This, in turn, should make organising illegal phoenix activity more risky and difficult and thus reduce the prevalence of illegal phoenix activity.

The 'Phoenixing Activity Recommendations on Detection, Disruption and Enforcement' report from the University of Melbourne suggested that penalties connected to the current promotor laws could be amended to act as better deterrence. It was suggested that "empowering the court to be able to impose conditions on professional licences where advisors have engaged in misconduct and making advisors directly liable for improper advice in addition to being liable as accessories."[47]

Question K. Are there any other legitimate amendments that should be made to combat illegal phoenix activity?

Additional measures that should be implemented to address illegal phoenixing include:

- The implementation of a public register of beneficial owners of companies and trusts. Community legal centres have reported cases of phoenixing entities holding assets in trusts to avoid disclosure of the ultimate beneficial owners.
- Introduction of an offence to act as a 'front' director for a company and not disclose whom they are acting for. As a 'front' director will usually not be involved in any underlying criminal activity themselves, making it an offence to act as a 'front' director where there is concealment of whom they are acting for should act as a significant disincentive for the 'front' director; and
- Introduction of a national licensing regime for labour hire companies in high-risk industries (such as agriculture, horticulture and security) where phoenixing is common, to force disclosure of the ultimate beneficial owners of the labour hire companies and ensure people highly unsuitable top run such a business are unable to. The Synod notes that the Commonwealth Government is currently consulting on the implementation of a labour hire registration scheme.

Question L. Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

The Synod supports the expansion of due diligence obligations of Australian corporations in relation to serious extraterritorial offences. However, there is a need to carefully select what possible criminal activity a corporation should be expected to conduct due diligence for. The Synod had extensive experience with the development and implementation of the *Illegal Logging Prohibition Act* which requires companies to conduct a meaningful risk assessment and due diligence to ensure timber they are importing or processing comes from a legal source. Just ensuring that this happens on a limited task has required substantial resources from the Commonwealth Government in making companies aware of their obligations and seeking compliance.

If there are too many areas where corporations are expected to conduct due diligence, then it can be expected that many corporations will conduct a superficial due diligence process. It would be better to limit the due diligence requirement to the most serious criminal offences, at least initially. Any due diligence process should also be backed up by government resources to make the corporations aware of their obligations, assist them with compliance and apply

[47] Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017, 108.

sanctions for reckless or wilful non-compliance, as is the case with the *Illegal Logging Prohibition Act.*

Requiring corporations to conduct due diligence on a vast array of areas without adequate government oversight is likely to allow corporations that willfully engage in criminal activity to easily conceal such activities, defeating one of the aims of a due diligence process. That aim is to make it harder for a corporation to engage or profit from criminal activity undetected wilfully.

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