Submission to Australian Law Reform Commission (ALRC), *Corporate Criminal Responsibility, Discussion Paper 87* (DP 87) (November 2019)

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Purpose of submission

This submission focuses on the policy issues and the question raised in the ALRC, Proposals and Questions, Corporate Criminal Responsibility (DP 87) that relate to **9. Deferred Prosecution Agreements, namely Question E: Should a deferred prosecution agreement (DPA) scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or with modifications?**

Preliminary

The arguments for and against DPAs have been extensively debated in academic, regulatory and policy circles.[1] This includes by the author in a recent publication, V. Comino, " The GFC and Beyond – How Do We Deal with Corporate Misconduct" (2018) 1 *The Journal of Business Law* 15). In addition to setting out my general views on DPAs, that publication examined the well-recognised turn from criminal prosecution for serious corporate wrongdoing. In the aftermath of the GFC, regulators in jurisdictions, such as the US and more recently, the UK have been privileging the use of regulatory tools, such as DPAs to resolve the regulatory dilemmas associated with pursuing complex, costly and time consuming criminal cases (including satisfying the criminal burden of proof 'beyond a reasonable doubt') against high profile, well-resourced corporate violators. As far as Australia is concerned, it already had an established system of civil penalties,[2] though the Australian Securities and Investments Commission (ASIC) has, at least until recently, also relied on enforceable undertakings (EUs) to deal with corporate misconduct.[3]

This submission will proceed to highlight the main benefits and concerns regarding DPAs, thereby 'revisiting the introduction of a DPA scheme in Australia', as the ALRC also does in Chapter 9 of its Discussion Paper (DP 87, 192-197), as well as to make some specific comments on the model proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017.

Benefits of DPAs

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1 See, e.g., S. Bronitt, "Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements" in T. Tulich, R. Ananian-Welsh, S. Bronitt and S. Murray and (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017), Ch 12, 211-226; and consultation papers on the introduction of a DPA scheme in Australia in 2016 and 2017: see, e.g., Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Public Consultation Paper, March 2016).

2 The civil penalty regime contained in Pt 9.4B of the Corporations Act 2001 (Cth) came into force in 1993.

3 EUs are a form of administrative settlement that ASIC may accept as an alternative to *civil*, not criminal, action. They have been available to ASIC since 1998. However, in view of the strident criticisms made of EUs by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (2019), Vol 1 (*Hayne Royal Commission Final Report*), ASIC's future use of EUs looks likely to decline dramatically if early indications continue: see, e.g., *ASIC Enforcement Update: January to June 2019*, above n 249, 5. The Summary of enforcement outcomes shows that only one (1) EU was accepted in this period.

The most obvious benefit is expediency, providing as they can a complete resolution to the wrongdoing in question in a relatively short time frame and avoiding the cost, delay and uncertainty of a criminal trial. With budgetary pressures and pressures on regulators to get 'more bang for their buck', the cost advantages of DPAs draw inevitable support. These advantages include that they internalise the costs of remedying non-compliance and monitoring future compliance on the regulated, not the regulator. Another benefit is that DPAs offer regulatory agencies a pathway to recoup part, if not most, of their investigation and enforcement costs. As far as the victims of corporate crime are concerned, DPAs may offer assured outcomes and quicker access to compensation than bringing litigation themselves. These measures might also incentivise greater self-reporting of internal misconduct by corporations. The reasons advanced as to why DPAs might encourage greater self-reporting include, that they allow a company to avoid the stigma and other negative consequences that might flow from a criminal trial or conviction; provide greater certainty of outcome, which enables corporations to remain in business and maintain investor confidence; and provide the possibility of a reduced financial penalty because of cooperation.[4] It is also argued that by providing a greater incentive to self-report misconduct, DPAs may help to reduce the current difficulties faced in detecting and investigating serious corporate crime so as "to strengthen investigations and prosecutions and improve enforcement outcomes".[5]

Another benefit of DPAs, brought into sharp focus in the aftermath of the GFC, and summed up in the phrases "Too Big to Fail" and "Too Big to Jail", is that they avoid, or at least, minimise the risk of serious collateral damage to innocent third parties (e.g., employees and suppliers) and market confidence resulting from criminal action against large corporations precipitating corporate collapse.[6]

Most significantly, however, in terms of prevention of future wrongdoing, DPAs provide "an enforceable organisational mandate for governance reform and enhanced compliance programs within the corporation",[7] which relates to the critical issue of changing behaviour and the culture of a wrongdoing corporation. This brings us to one of the strongest arguments favouring DPAs – the potential to afford corporations the opportunity to 'mend their ways' and change the culture that caused the wrongdoing in the first place.

Rationale and Aims of DPAs

However, this will only be the case *if* the overall rationale for them, which will provide guidance on both the design and enforcement strategy underlying them, is clearly understood. It should be founded on restorative/preventive (rather than retributive) justice, which Bronitt, drawing on the important regulatory work of Brent Fisse and John Braithwaite on

4 See Consultation Paper, above n 1, 9.

5 Ibid.

6 This risk is known as the "Arthur Anderson effect" (where prosecution of the US-based global accountancy firm for obstructing justice and destroying evidence in relation to the Enron matter resulted in its collapse in 2002).

7 S. Bronitt, "New Paradigms for Regulating Institutional Child Sexual Abuse: Lessons from Regulating Corporate Crime and White-collar Criminals" in Y. Smaal, A. Kaldelfos and M. Finnane (eds) *The Sexual Abuse of Children: Recognition and Redress* (Melbourne, 2016), 88. See also Consultation Paper, above n 1, 9.

corporate/organisational blameworthiness, [8] contends is the proper philosophy for DPAs. As Braithwaite has explained:

> What formal Western law lacks when it applies techniques such as deferred prosecution is a philosophy of why allowing *justice as repair and redemption* should be the mainline response even when doing so involves a breach of the principle of proportional punishment. A restorative justice philosophy allows us to accept that if a victim wishes to forgive in return for some other dimension of justice beyond proportional sanctioning after discussing the option with other stakeholders, this can be *just*.[9]

The author agrees with Bronitt that the lack of a clear statement of purpose in the current regulatory frameworks governing DPAs in both the US and the UK is a major flaw.[10] He argues that DPAs should not be viewed as instruments of punishment or 'quasi-punitive' measures, noting that the UK model, which requires that a DPA be approved only if the judge considers the terms and conditions proportionate to the degree of culpability and harm caused by the corporation, displays 'the twin core ideals central to the retributive philosophy of "just desserts"'.[11] Further, DPAs should not be confused with civil or pecuniary penalty schemes, but as diversionary tools of preventive justice. The author agrees and urges that the Australian DPA model should make it clear that the overarching principles governing the use of DPAs scheme should be focussed on preventive, restorative and restitutionary aims, where again the author agrees that "DPAs are likely to have greater legitimacy and regulatory impact" if conceived as vehicles of preventive, rather than punitive, justice.[12]

Admisssions in DPAs

Notwithstanding the preventive aims of DPAs, however, it is critical that under the Australian DPA model, they contain an admission by defendants that what they had done was wrong, in other words, that they committed an offence/offences. After all, at the heart of a DPA is the requirement to stop the wrongful conduct and prevent it happening again. This position is also consistent with the recommendation Commissioner Hayne made in the Hayne Banking Royal Commission regarding the future use of EUs, namely that 'ASIC should adopt a policy that it will generally not agree to an EU in respect of a civil penalty provision without the entity acknowledging that it has breached one or more specific legislative provisions'.[13] The Commissioner was concerned that in the EUs that ASIC had secured from financial services entities, they merely acknowledged ASIC had 'concerns' about their conduct and that there was no admission that they broke any particular law.[14] With those EUs also being 'heavily

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8 See in particular, B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993).

9 J. Braithwaite, "Cultures of Redemptive Finance" in J. O'Brien and G. Gilligan (eds) *Integrity, Risk and Accountability in Capital Markets – Regulating Culture* (Hart Publishing, 2013), 282 (emphasis added).

10 He highlights that neither the UK DPA scheme, nor its US counterpart, contain a statutory objects or purpose clause: see Bronitt, n 1, 222.

11 Ibid.

12 Ibid, 215.

13 *Hayne Royal Commission Final Report*, n 3, 442.

14 *Hayne Royal Commission Final Report*, 271.

negotiated',[15] he concluded that the danger was that entities regarded EUs as just a 'cost of doing business', or 'the cost of placating the regulator'.[16]

Concerns regarding DPAs

While there is a 'public interest' in avoiding corporate collapses which inflict serious harm, DPAs nevertheless raise important questions related to the Rule of Law, especially "equality before the law". Corporate offenders, if large and powerful enough, will be eligible for a DPA – it raises concerns that they can always 'buy their way out of trouble', receiving a corporate version of the 'Get Out of Jail Free Card'.[17] Furthermore, from an ethical perspective, Bronitt explains how commentators have been concerned about the erosion of the moral force of the law by legitimating state-sanctioned corporate 'payoffs' or 'legal bribes' to avoid prosecution and how expediency puts undue pressure on enforcement staff to settle matters rather than proceed to lengthy and expensive trials.[18] This pressure may be especially acute during times of growing public sector austerity by this dependence upon billion dollar DPA-generated revenue streams.[19] With diminishing moral authority associated with this bargaining process, there is also a risk that corporations themselves may come to regard DPAs and the payments made under them in transactional terms as just another 'cost of doing business', so that their deterrence impact is reduced.

Another serious criticism is that DPAs in the US (and, it seems, also the UK)[20] have become a substitute for individual accountability for corporate and financial crime.

The lack of transparency in DPA processes and the lack of judicial or independent oversight in the use of DPAs (and NPAs) in the US has been the subject of significant concern.[21] In contrast, in the UK, an important difference with the US is that UK DPAs are conducted with ongoing judicial oversight. Judges are involved in the negotiation stage, 'preliminary' hearing and in approval of the final agreement.[22] By having judicial involvement in the process, which requires a determination that the prosecutor's decision to enter into a DPA is in the "interests of justice" and that its terms are "fair, reasonable and proportionate",[23] it has been argued that the UK legislation has sought to address the "legitimacy deficits" associated with the use of

15 *Hayne Royal Commission Final Report*, 288.

16 *Hayne Royal Commission Final Report*, 442.

17 See, e.g., D. Uhlmann, "Deferred Prosecution Agreements and Non-Prosecution Agreements and the erosion of Corporate Criminal Liability" (2013) 72 *Maryland Law Review* 1295-344.

18 See S. Bronitt, "Policing Corruption and Corporations in Australia: Towards a New National Agenda" (2013) 37 *Criminal Law Journal* 283, 288.

19 In the US, e.g., DPAs have led to monetary penalties totalling over $US42.5 billion from 2000 to July 2014: see Consultation Paper, n 1, 11.

20 In the five DPAs entered into in the UK, no individual has been convicted.

21 See, e.g., B. Garrett, *Too Big to Jail – How Prosecutors Compromise with Corporations* (Harvard University Press, 2014), 2.

22 *Crime and Courts Act 2013* (UK), sch 17, para 7-8.

23 *Crime and Courts Act*, sch 17, paras 7(1) and 8(1). If the DPA is approved by a court, it will publish a declaration to that effect, as well as the DPA.

DPAs in the US.[24] The prosecutor must then publish the DPA, the declaration of the court and the court's reasons, unless the court orders postponement of publication to avoid prejudicing proceedings.[25]

Under the proposed Australian DPA model, the agreements require the approval of an authorised person (a retired judge), but they are not to be filed with a court. This seems odd and in the interests of transparency, *should* be filed with a court. Furthermore, while the retired judge must ensure that the terms of the DPA meet the UK standard of 'fair, reasonable and proportionate', the author shares some of Bronitt's concerns that the full range of public interests relevant to the DPA may not be evident in negotiations between the two parties, especially in regard to dealing with the harms caused to third parties, such as consumer, employee or shareholder groups, professional bodies and industry regulators. As such, the author agrees that the retired judge should be given the power to call and hear submissions from any 'interested' parties.[26]

As far as oversight of DPAs are concerned, the role of independent monitors cannot be overstated. Ideally, the legislation should provide for monitors to be appointed in all cases,[27] with Bronitt going further in requiring that the monitor should be funded and supervised by an arm's length independent agency, such as the Office of the Public Interest Monitor, funded by a levy included in all DPAs.[28]

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24 See Bronitt, n 1.That said, however, it has been argued that the UK system also suffers from certain weaknesses when compared with the US, including the lack of admission of guilt, a failure to use a DPA as a leverage to fully disclose misconduct, weak standards for reporting on compliance and weak breach requirements: see in Corruption Watch UK, "Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements Fail To Deter Overseas Corruption" (March 2016),15, 22-24.

25 *Crime and Courts Act*, sch 17, para 8.

26 See Bronitt, n 1, 221.

27 See also S. Bronitt, Submission to the Attorney-General's Department (Cth*), Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, 2017), 4.

28 Ibid.