



Australian Government

Australian Law Reform Commission

DISCUSSION PAPER  
APPENDICES A-L

# CORPORATE CRIMINAL RESPONSIBILITY

Discussion Paper 87 (DP 87)  
November 2019







**Australian Government**

**Australian Law Reform Commission**

**DISCUSSION PAPER  
APPENDICES A-L**

# **CORPORATE C R I M I N A L RESPONSIBILITY**

You are invited to provide a submission  
or comment on this Discussion Paper

This Discussion Paper reflects the law as at 1 November 2019.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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# Appendix A

## Preliminary Consultations

### May–October 2019

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Dr Radha Ivory, University of Queensland	Brisbane
Allens	Melbourne
Professor Ian Ramsay, University of Melbourne	Melbourne
Ms Helen Bird, Swinburne University	Melbourne
Professor Liz Campbell, Monash University	Melbourne
Mr Dean Luxton, Barrister	Melbourne
Professor Jonathan Clough, Monash University	Melbourne
Integrity and Security Division, Attorney-General's Department (Cth)	Canberra
Dr Olivia Dixon, University of Sydney	Sydney
Mr Stephen Speirs	Sydney
The Hon Justice Wendy Abraham, Federal Court of Australia	Sydney
Mr Alan Cameron AO, NSW Law Reform Commission	Sydney
Office of the Commonwealth Director of Public Prosecutions (CDPP)	Sydney
The Hon Justice Hammerschlag, Supreme Court of NSW	Sydney
Associate Professor Juliette Overland, University of Sydney	Sydney
Australian Institute of Company Directors (AICD) – Directors Roundtable	Sydney
Australian Securities and Investments Commission (ASIC)	Sydney
Dr Simon Longstaff AO, The Ethics Centre	Sydney
Australian Federal Police (AFP)	Teleconference
Corrs Chambers Westgarth (Melbourne)	Brisbane

<b>Name</b>	<b>Location</b>
Department of the Treasury (Cth)	Canberra
Professor Jonathan Fisher QC, Visiting Professor in Practice, London School of Economics	London
Professor Jeremy Horder, London School of Economics	London
Ms Susannah Cogman and Mr Brian Spiro, Herbert Smith Freehills	London
Ms Lisa Osofsky and Mr John Carroll, Serious Fraud Office	London
Mr Mark Steward, Mr Daniel Thornton and Mr Vincent Coughlin QC, Financial Conduct Authority	London
Ms Alison Saunders, Linklaters	London
Lord Garnier QC, former UK Solicitor General	London
Sir Nicholas Green, Chair and Professor David Ormerod QC, Commissioner, UK Law Reform Commission	London
Professor Sarah Worthington, University of Cambridge	London
Mr Mukul Chawla QC and Ms Rebecca Norris, Bryan Cave Leighton Paisner	London
The Rt Hon Sir Brian Leveson	London
The Rt Hon Sir Charles Haddon-Cave	London
Judge Deborah Taylor	London
Sir Ross Cranston	London
Faculty Members, Law School and Business School, University of Queensland	Brisbane
Professor TT Arvind, University of York	Teleconference
Australian Tax Office (ATO)	Teleconference
Professor Dale Pinto, Curtin University	Perth
Professor Grantley Taylor, Curtin University	Perth
Julie Read, New Zealand Serious Fraud Office	Teleconference
Australian Financial Markets Association	Teleconference
Professor John Braithwaite and Professor Brent Fisse	Teleconference

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Name	Location
Associate Professor Sarah Jane Kelly, Professor Nicole Gillespie, Professor Matthew Hornsey, University of Queensland Business School	Brisbane
Professor Tina Søreide, NHH Norwegian School of Economics	Brisbane
Associate Professor David Chaikin, University of Sydney	Teleconference
Dr Erin O'Brien, Queensland University of Technology	Brisbane
Ms Nana Frishling, University of New South Wales	Teleconference
Mr Ben Power, Barrister	Brisbane
Dr Vicky Comino, University of Queensland	Brisbane
Lord Gold	London
Human Rights Law Centre	Teleconference
Transparency International Australia	Teleconference
Allens and Australian Institute of Company Directors (AICD)	Brisbane



## Appendix B

### Comments on Terms of Reference

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1. Not published
2. Professor L Campbell
3. Associate Professor J Overland
4. Not published
5. Not published
6. Australian Restructuring Insolvency & Turnaround Association (ARITA)
7. McCullough Robertson
8. Dr R Ivory
9. Business Council of Australia
10. Australian Institute of Company Directors (AICD)
11. Law Council of Australia
12. Allens
13. Australian Banking Association
14. Motor Trades Association of Australia



# Appendix C

## Primary Sources

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### Australian legislation

#### *Commonwealth*

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*Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth).

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*Australian Consumer Law (Competition and Consumer Act 2010* (Cth) sch 2).

*Australian Energy Market Act 2004* (Cth).

*Australian Securities and Investments Commission Act 2001* (Cth).

*Banking Act 1959* (Cth).

*Biosecurity Act 2015* (Cth).

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*Proceeds of Crime Act 1987 (Cth).*

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*Regulatory Powers (Standard Provisions) Act 2014 (Cth).*

*Superannuation Industry (Supervision) Act 1993 (Cth).*

*Taxation Administration Act 1953 (Cth).*

*Taxation Laws Amendment Act 1984 (Cth).*

*Telecommunications Act 1997 (Cth).*

*Therapeutic Goods Act 1989 (Cth).*

*Trade Practices Act 1974 (Cth) (repealed and replaced by the Competition and Consumer Act 2010 (Cth)).*

*Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018 (Cth).*

*Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth).*

*Work Health and Safety Act 2011 (Cth).*

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*Crimes (Sentencing Procedure) Act 1999* (NSW).  
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*Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205.

*Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [2016] FCAFC 186.

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- Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474.
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*Coroners and Justice Act 2009* (UK) c 25.

*Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19.

*Crime and Courts Act 2013* (UK) c 22.

*Crime and Disorder Act 1998* (UK) c 37.

*Crimes Act 1961* (NZ) No 43.

*Criminal Code* (Canada) RSC 1985, c C-46.

*Criminal Finances Act 2017* (UK) c 22.

*Health and Safety at Work etc Act 1974* (UK) c 37.

*Companies Act 1993* (NZ) No 105.

*Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre* (France) Loi n° 2017-339, 27 mars 2017.

*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* (France) Loi n° 2016-1691, 9 décembre 2016.

*Poor Relief Act 1601* (UK) 43 Eliz 1, c 2.

*Securities Exchange Act 1934* (US) Pub.L. 73–291.

*Speedy Trial Act 1975* (US) 18 USC.

*Insolvency Act 1986* (UK) c 45.

*Interpretation Act 1889* (Imp) 52 & 53 Vict, c 63.

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*Attorney-General's Reference (No 2 of 1999)* [2000] EWCA Crim 90.

*Boyd v Croydon Ry Co* (1938) 4 Bing N C 669.

*Canadian Dredge & Dock Co v R* [1985] 1 SCR 662.

*Commonwealth v Beneficial Finance Co*, 275 NE 2d 33 (Mass., 1971).

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*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

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*United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, 2225 UNTS 209 (entered into force 19 September 2003).

*United Nations Convention against Corruption*, New York, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

*United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, A/Res/45/158.

## Appendix D

### Reviewed legislation

---

1. *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth)
2. *Agricultural and Veterinary Chemicals Code Act 1994* (Cth)
3. *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
4. *Australian Securities and Investments Commission Act 2001* (Cth)
5. *Australian Consumer Law* (contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth))
6. *Banking Act 1959* (Cth)
7. *Competition and Consumer Act 2001* (Cth)
8. *Corporations Act 2001* (Cth)
9. *Criminal Code* (contained in Schedule of the *Criminal Code Act 1995* (Cth))
10. *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
11. *Excise Act 1901* (Cth)
12. *Export Control Act 1982* (Cth)
13. *Fair Work Act 2009* (Cth)
14. *Fisheries Management Act 1991* (Cth)
15. *Income Tax Assessment Act 1936* (Cth)
16. *Income Tax Assessment Act 1997* (Cth)
17. *National Consumer Credit Protection Act 2009* (Cth)
18. *Privacy Act 1988* (Cth)
19. *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth)
20. *Quarantine Act 1908* (Cth)
21. *Superannuation Industry (Supervision) Act 1993* (Cth)
22. *Taxation Administration Act 1953* (Cth)
23. *Telecommunications Act 1997* (Cth)
24. *Therapeutic Goods Act 1989* (Cth)
25. *Work Health and Safety Act 2011* (Cth)





# Appendix E

## Summary of attribution methods for corporate criminal liability under reviewed legislation

Legislation	Section (attribution model)	Application	Express disapplication of Part 2.5?	Method (criminal liability)	“on behalf of” a body corporate?	Fault elements covered	Bespoke negligence rule?	Actors covered under conduct limb	Actors covered under fault limb	Aggregation of conduct and fault?	Defences	Application of defence	Comments
<b>Criminal Code Act 1995</b>	Part 2.5	Criminal Code and default for Commonwealth Acts	No	Part 2.5	No	Intention, knowledge, recklessness	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	
<i>Trade Practices Act 1974</i>	84	TPA	N/A	TPA	Yes	State of mind	No	D, E, A and persons at direction	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	Reasonable mistake of fact; Reasonable precautions and due diligence		
<i>Agricultural and Veterinary Chemicals (Administration) Act 1992</i>	69EU	Offences against Part 7A, 7AA or 7AB	Yes (s 5A)	Combined TPA and Part 2.5 model	No	Intention, knowledge, recklessness	No	D, E, A	D, or high managerial agent	No	Due diligence (limited to HMA)	Fault element	Fault elements from Part 2.5 - board of directors, and high managerial agent
<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	Sch 1, 151	Agricultural and Veterinary Chemicals Code (Schedule)	Yes (s 8AA)	Combined TPA and Part 2.5 model	No	Intention, knowledge, recklessness	No	D, E, A	D, or high managerial agent	No	Due diligence (limited to HMA)	Fault element	Same as AVCAA
<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	231	Entire Act	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	Different methods for criminal and civil proceedings
<i>ASIC Act 2001</i>	12GH	Subdiv G of Div 2 of Part 2	Yes (s 12GH(6))	TPA Model	Yes	State of mind	No	D, E, A and persons at direction	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	No defence applicable	NA	
<b>Australian Consumer Law (contained in Schedule 2 of the Competition and Consumer Act 2010)</b>	139B CCA	ACL (when applied as a law of the Cth)	Yes (s 131G)	TPA Model	Yes	State of mind	No	D, E, A and persons at direction	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	Reasonable mistake of fact	Entire offence	

Legislation	Section (attribution model)	Application	Express disapplication of Part 2.5?	Method (criminal liability)	“on behalf of” a body corporate?	Fault elements covered	Bespoke negligence rule?	Actors covered under conduct limb	Actors covered under fault limb	Aggregation of conduct and fault?	Defences	Application of defence	Comments
<b><i>Banking Act 1959</i></b>	69C	Entire Act and regulations made under the Act	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	17/6/99: Repealed s 69C(1) and (2) which otherwise would have reflected the TPA
<b><i>Competition and Consumer Act 2001</i></b>	84	Conduct: for the purposes of the Act and consumer data rules; State of mind: ss 45AF, 45AG, 56BN(1), 56CC(1); civil proceedings	Yes (s 6AA)	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A and persons at direction	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	No defence applicable	NA	
<b><i>Corporations Act 2001</i></b>	1308A	Entire Act except Chapter 7 (per s 769A)	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	No, unless second person is acting at direction of first	Part 2.5 regime	Part 2.5 regime	
<b><i>Corporations Act 2001 Chapter 7 - Financial Services and Markets</i></b>	769B	Chapter 7 and proceedings under Chapter 9 that relate to a provision of Chapter 7	Yes (s 769A)	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A; persons at direction of; persons in relation to	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	No defence applicable	NA	Includes conduct engaged in ‘in relation to’ a person; carves out RE & Res; includes a regulation making power in ss(9)
<b><i>Environment Protection and Biodiversity Conservation Act 1999</i></b>	498B	Entire Act	Yes (s 7)	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A and persons at direction	D, E, A and persons at the direction of	No	Reasonable precautions and due diligence	Conduct element	
<b><i>Excise Act 1901</i></b>	145A	an Excise prosecution’ (s 133)	Yes (s 6B(2))	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A and persons at direction of	D, E, A engaged in conduct within scope of authority		No defence applicable	NA	
<b><i>Export Control Act 1982</i></b>	4AA	Entire Act	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	

Legislation	Section (attribution model)	Application	Express disapplication of Part 2.5?	Method (criminal liability)	“on behalf of” a body corporate?	Fault elements covered	Bespoke negligence rule?	Actors covered under conduct limb	Actors covered under fault limb	Aggregation of conduct and fault?	Defences	Application of defence	Comments
<i>Fair Work Act 2009</i>	793	Entire Act and procedural rules	Yes (s 793(4))	TPA Model	Yes	State of mind; Inclusive definition	No	O, E, A and persons at direction of	O, E, A and persons at direction of	No, unless second person is acting at direction of first	No defence applicable	NA	
<i>Fisheries Management Act 1991</i>	164	Entire Act	Yes (s 164(10))	TPA Model	No	State of mind; Inclusive definition	No	D, E, A	D, E, A	No, unless second person is and E or A of first	Reasonable precautions and due diligence	Conduct element	No “within scope”
<i>Income Tax Assessment Act 1936</i>	7B	Entire Act	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	
<i>Income Tax Assessment Act 1997</i>	See s 1-3	Entire Act	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	
<i>National Consumer Credit Protection Act 2009</i>	324	Entire Act (other than the National Credit Code)	Yes (s 324(4))	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A; persons at direction of; persons in relation to	D, E, A and persons at the direction of	No	No defence applicable	NA	
<i>Privacy Act 1988</i>	99A	Entire Act and civil penalty orders under the <i>Regulatory Powers Act</i>	Yes (s 3A)	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A	D, E, A engaged in conduct within scope of authority	No	Reasonable precautions and due diligence	Conduct element	
<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	28	Entire Act	Yes (s 7)	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A and persons at direction of	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	No defence applicable	NA	
<i>Quarantine Act 1908</i>	86G	No longer in force	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	
<i>Superannuation Industry (Supervision) Act 1993</i>	338	Offence against the <i>SIS Act</i> , including by regulations or s 6 of the <i>Crimes Act 1914</i>	Yes (s 338(12))	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A	D, E, A engaged in conduct within scope of authority	No, unless second person is acting at direction of first	Reasonable precautions and due diligence	Conduct element	

Legislation	Section (attribution model)	Application	Express disapplication of Part 2.5?	Method (criminal liability)	“on behalf of” a body corporate?	Fault elements covered	Bespoke negligence rule?	Actors covered under conduct limb	Actors covered under fault limb	Aggregation of conduct and fault?	Defences	Application of defence	Comments
<i>Taxation Administration Act 1953</i>	8ZD	Prosecution for ‘a taxation offence’	Yes (s 8ZD(3))	TPA Model	Yes	Intention only		D, E, A and persons at direction of	E or A	No, unless second person is acting at direction of first	No defence applicable	NA	‘corporations’ not ‘bodies corporate’
<i>Telecommunications Act 1997</i>	575	Civil and criminal proceedings under the <i>TA</i> , <i>Spam Act</i> et al, or offences created by the <i>Crimes Act</i> or Pt 2.4 of the <i>Criminal Code</i> relating to the <i>TA</i>	Yes (s 11A)	TPA Model	Yes	State of mind; Inclusive definition	No	D, E, A	D, E, A engaged in conduct within scope of authority	No	Reasonable precautions and due diligence	Conduct element	
<i>Therapeutic Goods Act 1989</i>	55	Criminal offences and civil contraventions under the <i>TGA</i>	No	TPA; Part 2.5	Yes	State of mind; Inclusive definition	No	D, E, A	D, E, A engaged in conduct within scope of authority	No	Reasonable precautions and due diligence	Conduct element	
<i>Work Health and Safety Act 2011</i>	244	Entire Act	No	Part 2.5	Part 2.5 regime	Part 2.5 regime	Part 2.5 regime	O, E, A	Part 2.5 regime	Pt 2.5	Part 2.5 regime	Part 2.5 regime	

**Key:**

D, E, A

Director, employee or agent acting within the scope of his or her actual or apparent authority

O, E, A

Officer, employee or agent acting within the scope of his or her actual or apparent authority

persons at direction of

any other person at the direction or with the consent or agreement (whether express or implied)

D, or high managerial agent

director or an employee or agent with duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the body corporate

Appendix F

Summary of offences under reviewed legislation

Legislation	Total no of offences	Total no of offences ≥ 60 PU/1yr	Total no of offences < 60 PU/1 yr	Total of strict liability offences ≥ 60PU/1yr	% of offences that are strict liability and ≥ the specified 60PU/1yr equivalent threshold	Total no of absolute liability offences ≥ 10 PU
<i>Agricultural and Veterinary Chemicals (Administration) Act 1992</i>	28	18	10	0	0	0
<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	54	37	17	9	16.7	0
<i>Anti-Money Laundering and Counter- Terrorism Financing Act 2006</i>	43	34	9	0	0	0
<i>ASIC Act 2001</i>	90	55	35	19	21.1	0
Australian Consumer Law (contained in Schedule 2 of the <i>Competition and Consumer Act 2010</i> )	83	83	0	46	55.4	0
<i>Banking Act 1959</i>	73	39	34	8	11	0
<i>Competition and Consumer Act 2001</i>	50	26	24	5	10	0
<i>Corporations Act 2001</i>	840	585	255	3	0.4	0
<i>Criminal Code</i>	608	605	3	0	0	0
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	150	129	21	12	8	0
<i>Excise Act 1901</i>	70	53	17	19	27.1	0
<i>Export Control Act 1982</i>	28	18	10	0	0	0
<i>Fair Work Act 2009</i>	18	14	4	0	0	0
<i>Fisheries Management Act 1991</i>	54	49	5	14	25.9	0
<i>Income Tax Assessment Act 1936</i>	6	0	6	0	0	0
<i>Income Tax Assessment Act 1997</i>	7	0	7	0	0	0
<i>National Consumer Credit Protection Act 2009</i>	105	44	61	2	1.9	0
<i>Privacy Act 1988</i>	8	8	0	0	0	0
<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	99	93	6	45	45.5	0

Legislation	Total no of offences	Total no of offences $\geq$ 60 PU/1yr	Total no of offences < 60 PU/1 yr	Total of strict liability offences $\geq$ 60PU/1yr	% of offences that are strict liability and $\geq$ the specified 60PU/1yr equivalent threshold	Total no of absolute liability offences $\geq$ 10 PU
<i>Superannuation Industry (Supervision) Act 1993</i>	39	18	21	2	5.1	0
<i>Taxation Administration Act 1953</i>	66	37	29	3	4.5	2
<i>Telecommunications Act 1997</i>	55	40	15	0	0	0
<i>Therapeutic Goods Act 1989</i>	259	254	5	82	31.7	0
<i>Work Health and Safety Act 2011</i>	65	33	32	19	29.2	0
<b>Total no of offences:</b>	2898	2272	626			

Note that the data for the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009* and *ASIC Act 2001* is only current to February 2017.

**Appendix G**

**Availability of infringement notices and non-monetary penalties under reviewed legislation**

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Legislation	Total no of offences in statute	Allows infringement notices (or ‘penalty instead of prosecution’) for criminal offences?	Infringement notices available for civil penalties?	No of offences with non-monetary penalty available	Non-punitive orders available?	“on application” only?	Provisions covered by non-punitive orders	Adverse publicity order available?	Available on application of:	Provisions covered by adverse publicity order	Disqualification order available?	Available on application of:	Provisions covered by disqualification order	Company deregistration order available?	Other non-monetary penalty?	Available on application of:	Type of order and offences applicable to
<i>Agricultural and Veterinary Chemicals (Administration) Act 1992</i>	28	No	Yes (s 69EK)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	54	No	Yes (s 145DA)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	43	Yes (s 184)	Yes (s 184)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>ASIC Act 2001</i>	90	Yes (s 12GX)	Yes (s 12GX)	24	Yes (ss 12GLA)	Yes	ss 12CA to 12CC; 12DA to 12DN; or 12EA to 12ED	Yes (s 12GLB)	ASIC	ss 12GBB or 12GB	Yes (s 12GLD)	ASIC	Subdiv C or D (other than s 12DA)	No	Yes (s 12GM)	Court discretion	Other orders to compensate or prevent/reduce loss or damage (offences under Div 2 of Pt 2)
<b>Australian Consumer Law (contained in Schedule 2 of the Competition and Consumer Act 2010)</b>	83	No	Yes (CCA s 134A)	82	Yes (ss 246, 247, 248)	Yes	Ch 2, 3 or 4	Yes (s 247)	Regulator	Ch 4 offence	Yes (s 248)	Regulator	Pt 2-2, Pt 3-1, Div 2 of Pt 3-2, ss 106(1), (2), (3) or (5), 107(1), (2), 118(1), (2), (3), (5), 119(1), (2), 125(4), 127(1), (2), 128(2), (6), 131(1), 132(1), 136(1), (2), (3), 137(1), (2), Ch 4 offences	No	Yes (s 239)	Regulator	Order to redress etc. loss/damage suffered by non-party consumers
<i>Banking Act 1959</i>	73	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA



Legislation	Total no of offences in statute	Allows infringement notices (or 'penalty instead of prosecution') for criminal offences?	Infringement notices available for civil penalties?	No of offences with non-monetary penalty available	Non-punitive orders available?	"on application" only?	Provisions covered by non-punitive orders	Adverse publicity order available?	Available on application of:	Provisions covered by adverse publicity order	Disqualification order available?	Available on application of:	Provisions covered by disqualification order	Company deregistration order available?	Other non-monetary penalty?	Available on application of:	Type of order and offences applicable to
<i>Competition and Consumer Act 2001</i>	50	No	Yes (s 51ACD)	2	Yes (ss 86C, 86D)	Yes	Pt IV or IVB or ss 55B, 60C, 60K or 92 or ss 45AF or 45AG	Yes (s 86D)	Commission	ss 45AF or 45AG	Yes (s 86E)	Commission	Pt IV	No	No	NA	NA
<i>Corporations Act 2001</i>	840	Yes (ss 1317DAC, 1317DAN)	Yes (s 1317DAN)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Criminal Code</i>	608	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	150	Yes (s 497)	No	150	No	NA	NA	No	NA	NA	No	NA	NA	No	Yes (s 480A)	Minister only	Remediation order (all offences)
<i>Excise Act 1901</i>	70	Yes (s 129B)	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Export Control Act 1982</i>	28	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Fair Work Act 2009</i>	18	Yes (s 799)	Yes (s 558)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Fisheries Management Act 1991</i>	54	No	No	14	No	NA	NA	No	NA	NA	No	NA	NA	No	Yes (s 98)	Court discretion	Order that person not be on a boat in relevant area for particular (offence under s 95(1) (d),(e),(f), 105A, 105AA, 105AB, 105B, 105C, 105E, 105EA, 105F, 105FA, 105H, 105I; cancel fishing concession (all offences committed while doing something authorised by fishing concession))
<i>Income Tax Assessment Act 1936</i>	6	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Income Tax Assessment Act 1997</i>	7	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA



Legislation	Total no of offences in statute	Allows infringement notices (or 'penalty instead of prosecution') for criminal offences?	Infringement notices available for civil penalties?	No of offences with non-monetary penalty available	Non-punitive orders available?	"on application" only?	Provisions covered by non-punitive orders	Adverse publicity order available?	Available on application of:	Provisions covered by adverse publicity order	Disqualification order available?	Available on application of:	Provisions covered by disqualification order	Company deregistration order available?	Other non-monetary penalty?	Available on application of:	Type of order and offences applicable to
<i>National Consumer Credit Protection Act 2009</i>	105	Yes (s 288K)	Yes (s 288K)	105	No	NA	NA	Yes (s 182)	ASIC	All offences + civil penalty provisions	Yes (s 86)	ASIC	Where ASIC cancels licence or makes banning order, which is available inter alia upon contravention of the legislation)	No	Yes (s 180)	Plaintiff or ASIC	Order in relation to unlawful credit activities (includes offences under ss 29, 124A, 133CA)
<i>Privacy Act 1988</i>	8	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>	99	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Quarantine Act 1908</i>		No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Superannuation Industry (Supervision) Act 1993</i>	39	Yes (ss 34R, 223A)	Yes (s 223A)	39	No	NA	NA	No	NA	NA	Yes (s 126H)	Regulator	All offences	No	Yes (s 314)	Regulator	Disclosure/ advertisements (contravention of Pt 19)
<i>Taxation Administration Act 1953</i>	66	No	No	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Telecommunications Act 1997</i>	55	Yes (s 453A)	Yes (s 572E)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Therapeutic Goods Act 1989</i>	259	Yes (s 42YK)	Yes (s 42YK)	0	No	NA	NA	No	NA	NA	No	NA	NA	No	No	NA	NA
<i>Work Health and Safety Act 2011</i>	65	Possibly (s 243)	Possibly	65	No	NA	NA	Yes	Court discretion or by application of prosecutor	All offences	No	NA	NA	No	Yes (s 237 restoration orders, s 238 WHS project orders, s 241 training orders)	Court discretion	All offences



# Appendix H

## Finalised prosecutions referred to the CDP by ASIC

Legislation	Offence provisions	Description	Number of finalised prosecutions	Total no of finalised prosecutions
ASIC Act	63-67	Hindering an ASIC Investigation	14	14
Corporations Act	1041A&B	Market misconduct	4	160
	1041G	Dishonest conduct in financial services	6	
	1043A	Insider trading	18	
	1307	Falsification of company books	16	
	1308(2) & (4)	False or misleading statements to ASIC	30	
	1309	Providing false information about company	15	
	184	Directors duties	49	
	205G	Director failing to advise of notifiable interest	1	
	206A	Managing a company whilst disqualified	11	
	592	Fraud prior to appointment of administrator	1	
	631	Takeover offer less favourable than announcement	2	
	671B	Failure to advise on substantial holding	1	
	674	Continuous disclosure breach	1	
	911A	Unlicensed AFSL conduct	3	
	989B	Failure by AFSL holder to provide annual profit/loss statement	2	
NCCP Act	160D(2)	False or misleading information in credit activity	10	14
	225(3)	False or misleading documents provided to ASIC	1	
	29(2)	Unlicensed credit conduct	1	
	82	Conduct contrary to a credit banning order	2	
Criminal Code	135.1	Fraud on a Commonwealth entity	1	4
	400.4	Money laundering	1	
	477.1	Unauthorised access to computer	2	
Crimes Act 1914	20A	Failure to comply with a sentencing order	1	1
AML&CTFA	142	Structured threshold transactions	1	1
				194



Appendix I

Individual liability for corporate offences under reviewed legislation

Legislation	Section	Application	Relevant actors	Class of individuals liable	Type of fault	Whose fault? §	Type of liability	Attribution elements	Conduct on behalf of the individual	Defences	Reverse onus in relation to fault	Limit on imprisonment	Notes
<i>Agricultural and Veterinary Chemicals (Administration) Act 1992</i> (Cth)	69EJR	Any civil penalty provision under the Act	Body corporate	Executive officer *	Knowledge	Defendant	Primary liability for separate offence	Failure to prevent model	No	None	No	No	Reasonable steps set out in s 69EJS.
	69EU(3)	Crim offences under Pts 7A, 7AA, 7AB	Agent or employee of the person	Individual †	‘Intentionally, knowingly or recklessly’ or ‘expressly, tacitly or impliedly authorised or permitted the relevant conduct’	Relevant actor	Direct liability for same offence	Deemed liability (AVCAA method)	No	Due diligence	Legal burden	Yes	
<i>Agricultural and Veterinary Chemicals Code Act 1994</i> (Cth)	Sch 1, 151(3)-(5)	Any offence under the Code	Agent or employee of the person	Individual †	‘Intentionally, knowingly or recklessly’ or ‘expressly, tacitly or impliedly authorised or permitted the relevant conduct’	Relevant actor	Direct liability for same offence	Deemed liability (AVCAA method)	No	Due diligence		Yes	
<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> (Cth)	233	Any crim or civil proceedings under the Act	Agent or employee of the person	Person other than a corporation	State of mind ¶	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	Reasonable precautions <i>and</i> due diligence		Yes	
<i>ASIC Act 2001</i> (Cth)	12GH(3)	Proceedings under Subdiv G of the Act, in relation to Subdiv D (ss 12DA to 12DN)	Agent or employee of the person, or any other person acting at the direction/ consent/ agreement of the agent or employee	Person other than a body corporate	State of mind ∆	Relevant actor	Direct liability for same offence	Deemed liability (ACL method)	Yes	‘Reasonable mistake’ or ‘reasonable reliance on information supplied by another person’ or the contravention was due to something beyond the defendant’s control <i>and</i> def. took reasonable precautions and exercised due diligence		No	
		Proceedings under Subdiv G of the Act, in relation to ss 12GBA and 12GBB								Def acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused	Evidentiary burden	No	

Legislation	Section	Application	Relevant actors	Class of individuals liable	Type of fault	Whose fault? §	Type of liability	Attribution elements	Conduct on behalf of the individual	Defences	Reverse onus in relation to fault	Limit on imprisonment	Notes
<i>Australian Consumer Law (Competition and Consumer Act 2010</i> (Cth) Sch 2)	139C of the CCA	ACL	Agent or employee of the person, or any other person acting at the direction/ consent/ agreement of the agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (ACL method)	No	The contravention was due to something beyond the defendant's control and def. took reasonable precautions and exercised due diligence (s 208)	Legal burden	Yes	
<i>Banking Act 1959</i> (Cth)	69C	Any proceedings under the Act or Regulations	Agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	No	Reasonable precautions <i>and</i> due diligence	Legal burden	Yes	
<i>Competition and Consumer Act 2010</i> (Cth)	84(3)-(4A)	An offence against section 44ZZRF or 44ZZRG, or conduct to which section 44ZZRJ or 44ZZRK or Part IVA, IVB, V or VC applies	Agent or employee of the person, or any other person acting at the direction/ consent/ agreement of the agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	Acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused	Evidentiary burden	Yes	
<i>Corporations Act 2001</i> (Cth)	769B(5)	Chapter 7 offences under the Act (Financial services and markets)	Agent or employee of the person, or any other person acting at the direction/ consent/ agreement of the agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (ACL method)	No	None	Evidentiary burden	No	
	588G(2)	Insolvent trading (civil penalty)	Company	Director (as at the time when the company incurs the debt)	It's complicated	-	Primary liability for separate offence	(a) a person is aware that there are grounds for suspecting the company is trading while insolvent; or (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.	No	None	?	No	
	588G(3)	Insolvent trading (criminal offence)			Dishonesty	Defendant	Primary liability for separate offence	(a) a company incurs a debt; and (aa) the person is a director at that time; and (b) the company is insolvent or becomes insolvent by incurring the debt; and (c) the person suspected the company was or would become insolvent; and (d) the person's failure to prevent the company incurring the debt was dishonest.	No	Mistake of fact defence available in relation to elements (aa) person is a director at that time; and (b) the company is insolvent at that time or becomes insolvent by incurring the debt	No	No	Element (3)(a) is absolute liability; (3)(aa) and (b) are strict liability.

Legislation	Section	Application	Relevant actors	Class of individuals liable	Type of fault	Whose fault? §	Type of liability	Attribution elements	Conduct on behalf of the individual	Defences	Reverse onus in relation to fault	Limit on imprisonment	Notes
<b><i>Environment Protection and Biodiversity Conservation Act 1999</i></b> (Cth)	498B(3)	Any conduct for the purposes of this Act	Agent or employee of the person, or someone acting at direction/ consent/ agreement of an agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (ACL method)	No	Reasonable precautions <i>and</i> due diligence	Legal burden	No	Reasonable precautions set out in s 498B(5)
	494	Civil penalty provisions of Pt 3; or s 142; or s 390SA	Body corporate	Executive officer *	Knowledge, recklessness or negligence	Defendant	Primary liability for separate offence	Failure to prevent model	No	None	No	Yes	Reasonable steps set out in s 496
	495(1)	Criminal offences: s 489; or s 490; or s 491			Knowledge, recklessness or negligence	Defendant	Primary liability for separate offence	Failure to prevent model	No	None	No	No	Reasonable steps set out in s 496
	495(2)	Criminal offences: ss 15A, 15C, 17B, 18A, 20A, 22A, 24A, 24E, 27A, 27C, 142A, 390SB			Recklessness	Defendant	Primary liability for separate offence	Failure to prevent model	No	None	No	No	Reasonable steps set out in s 496
<b><i>Excise Act 1901</i></b> (Cth)	145A(4)	Any conduct for the purposes of this Act	Agent or employee of the person, or any other person acting at the direction/ consent/ agreement of the agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (ACL method)	Yes	None	Evidentiary burden	No	
<i>Export Control Act 1982</i> (Cth)	-												No relevant provision identified
<i>Fair Work Act 2009</i> (Cth)	-												No relevant provision identified
<b><i>Fisheries Management Act 1991</i></b> (Cth)	164	Prosecution of any offence against this Act	Agent or employee of the person	Person other than a body corporate	State of mind <sup>◊</sup>	Relevant actor	Direct liability for same offence	Any conduct engaged in by agent or employee	No	Reasonable precautions <i>and</i> due diligence	Legal burden	Yes	Reasonable precautions and due diligence set out in 164(4A)

Legislation	Section	Application	Relevant actors	Class of individuals liable	Type of fault	Whose fault? §	Type of liability	Attribution elements	Conduct on behalf of the individual	Defences	Reverse onus in relation to fault	Limit on imprisonment	Notes
<b>Hazardous Waste Act 1989</b> (Cth)	40B(1)	ss 39, 40, 40A, 40AA	Body corporate	Executive officer *	Knowledge, recklessness or negligence	Defendant	Primary liability for separate offence	Failure to prevent model	No	None	No	No	Reasonable steps set out in s 40B(4) // Negligence defined in 40B(2)
	40B(2)				Knowledge or recklessness	Defendant	Primary liability for separate offence	Failure to prevent model plus additional element that contravention injures/ damages or is likely to injure/ damage human beings or the environment	No	None	No	No	Reasonable steps set out in s 40B(4)
<b>Income Tax Assessment Act 1936</b> (Cth)	Pt 6, Div 9, ss 222AOB-222AQD	Repealed (failure to remit withheld taxation instalments)											
<b>National Consumer Credit Protection Act 2009</b> (Cth)	325	Any proceedings under the Act, other than the National Credit Code	Agent or employee of the person, or any other person acting at the direction/ consent/ agreement of the agent or employee	Person other than a body corporate	State of mind <sup>Δ</sup>	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	None	Evidentiary burden	No	
<b>Privacy Act 1988</b> (Cth)	99A	Any offence against this Act, or a civil penalty under the Regulatory Powers Act in relation to this Act	Agent or employee	Person other than a body corporate	State of mind <sup>¶</sup>	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	Reasonable precautions <i>and</i> due diligence	Legal burden	Yes	
<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> (Cth)	-												No relevant provision identified
<i>Quarantine Act 1908</i> (Cth)	-	[No longer in force]											No relevant provision identified
<b>Superannuation Industry (Supervision) Act 1993</b> (Cth)	338(4)-(6)	Proceedings for any offence under this Act	Servant or agent	Individual <sup>†</sup>	State of mind <sup>¶</sup>	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	Reasonable precautions <i>and</i> due diligence	Legal burden	Yes	
<b>Taxation Administration Act 1953</b> (Cth)	8Y	Any taxation offence	Corporation	Executive officer <sup>‡</sup>	None	-	Direct liability for same offence	Any act or omission by a corporation that constitutes a taxation offence	No	(a) did not aid, abet, counsel or procure; and (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission	Legal burden	No	



Legislation	Section	Application	Relevant actors	Class of individuals liable	Type of fault	Whose fault? §	Type of liability	Attribution elements	Conduct on behalf of the individual	Defences	Reverse onus in relation to fault	Limit on imprisonment	Notes
<i>Telecommunications Act 1997</i> (Cth)	576	Any offence under the Act, except for an offence relating to s 42, inc. by s 6 of the <i>Crimes Act</i> or Pt 2.4 of the <i>Criminal Code</i>	Agent or employee	Person other than a corporation	State of mind ¶	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	Reasonable precautions <i>and</i> due diligence	Legal burden	Yes	
<i>Therapeutic Goods Act 1989</i> (Cth)	54B, 54BA	An offence under s 54BA, or a civil penalty provision	Body corporate	Executive officer *	Knowledge	Defendant	Primary liability for separate offence	Failure to prevent model	No	None	No	No	Reasonable steps set out in s 54C
	55(3)-(6)	Proceedings under the Act, civil or criminal	Agent or employee	Person other than a body corporate	State of mind ¶	Relevant actor	Direct liability for same offence	Deemed liability (CCA method)	Yes	Reasonable precautions <i>and</i> due diligence	Legal burden	Yes	
<i>Work Health and Safety Act 2011</i> (Cth)	-												No relevant provision identified

<b><i>Class of individuals liable</i></b>
* The term ‘executive officer’ defined in the Act to mean ‘a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body’.
† Not defined in the Act.
‡ The term ‘executive officer’ not used in the Act, but the same definition provided as for “Executive officer” in other Acts marked by *.

<b><i>Fault</i></b>
§ Whether the provision requires an element of fault on the part of the individual to be held liable, as opposed to a requirement of fault on the part of the person who engaged directly in the conduct.
¶ Where the relevant actor who engaged in the conduct was acting within the scope of their actual or apparent authority, and had the required state of mind, that state of mind is attributed to the defendant.
Δ Where the employee or agent acting within their actual or apparent authority, or other person acting at the direction or with the consent or agreement of an agent or employee acting within their actual or apparent authority, had the required state of mind, that state of mind is attributed to the defendant.
◇ Where the employee or agent who engaged in the conduct had the required state of mind, that state of mind is attributed to the defendant.

<b><i>Attribution elements</i></b>
Deemed liability (ACL method): (a) employee or agent acting within scope of actual or apparent authority; or (b) any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent.
Deemed liability (CCA method): Any conduct by the relevant actor, acting within the scope of their actual or apparent authority.
Failure to prevent model: (a) individual fault element as specified; and (b) defendant was in a position to influence the conduct of the body in relation to the contravention; and (c) failed to take all reasonable steps to prevent the contravention.
Deemed liability (AVCAA method): Agent or employee (a) acted within actual or apparent scope of employment or authority; and (b) had ‘duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the individual’; and (c) the agent/employee acted ‘intentionally, knowingly or recklessly’ or ‘expressly, tacitly or impliedly authorised or permitted the relevant conduct to be engaged in’.



**Appendix J Crown Prosecution Service  
and Serious Fraud Office (UK), *Deferred  
Prosecution Agreements Code of Practice:  
Crimes and Courts Act 2013 (2014)***

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## Deferred Prosecution Agreements Code of Practice

Crime and Courts Act 2013

# Deferred Prosecution Agreements Code of Practice

*Crime and Courts Act 2013*



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## Introduction

This Deferred Prosecution Agreement Code of Practice ("DPA Code") is issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013 ("the Act").

Prosecutors should have regard to this DPA Code when:

- i. Negotiating Deferred Prosecution Agreements ("DPAs") with an organisation ("P") whom the prosecutor is considering prosecuting for an offence specified in the Act;
- ii. Applying to the court for the approval of a DPA;  
and
- iii. Overseeing DPAs after their approval by the court, in particular in relation to variation, breach, termination and completion.

## 1. Whether a Deferred Prosecution Agreement is a possible disposal of alleged criminal conduct

- 1.1. A DPA is a discretionary tool created by the Act to provide a way of responding to alleged criminal conduct. The prosecutor may invite P to enter into negotiations to agree a DPA as an alternative to prosecution.
- 1.2. In order to enter a DPA the prosecutor is to apply the following two stage test. Prosecutors must be satisfied and record that:
  - 1.6 If a DPA is considered appropriate by the relevant Director, having determined that either limb of the evidential stage is met, and that the public interest is best served by entering into a DPA, the prosecutor will (where the court approves the DPA) prefer an indictment. The indictment will however then immediately be suspended pending the satisfactory performance, or otherwise, of the DPA.

### EVIDENTIAL STAGE

- i. Either:
  - a) the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied or, if this is not met, that
  - b) there is at least a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.
- 1.7 In cases where neither limb of the evidential stage can be met by the conclusion of any DPA negotiations and it is not considered appropriate to continue the criminal investigation, the prosecutor should consider whether a Civil Recovery Order is appropriate. Attention is drawn to the Attorney General's guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002, issued 5 November 2009.

And

### PUBLIC INTEREST STAGE

- ii. The public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA with P in accordance with the criteria set out below.
- 1.4 The Prosecutor should first consider whether the test in paragraph 1.2 i a) is met. If it is not met consideration may be given to the test under paragraph 1.2 i b).
- 1.5 For the purposes of 1.2 i b) a reasonable time period will depend on all the facts and circumstances of the case, including its size, type and complexity.



## 2. Factors that the prosecutor may take into account when deciding whether to enter into a DPA

### NEGOTIATIONS

- 2.1 An invitation to negotiate a DPA is a matter for the prosecutor's discretion. P has no right to be invited to negotiate a DPA. The SFO and the CPS are first and foremost prosecutors and it will only be in specific circumstances deemed by their Directors to be appropriate that they will decide to offer a DPA instead of pursuing the full prosecution of the alleged conduct. In many cases, criminal prosecution will continue to be the appropriate course of action. An invitation to enter DPA discussions is not a guarantee that a DPA will be offered at the conclusion of the discussions.
- 2.2 Where the prosecutor is satisfied that:
  - i. either the evidential stage of the Full Code Test in the Code for Crown Prosecutors is met, or there is a reasonable suspicion based upon some admissible evidence that P has committed an offence;
  - ii. the full extent of the alleged offending has been identified;
 and
  - iii. the public interest would likely be met by a DPA,
 then the prosecutor may initiate DPA negotiations with any P who is being investigated with a view to prosecution in connection with an offence specified in the Act.
- 2.3 When considering whether a DPA may be appropriate the prosecutor will have regard to existing Codes of Practice and Guidance, in particular:
  - i. The Code for Crown Prosecutors;
  - ii. The Joint Prosecution Guidance on Corporate Prosecutions ("the Corporate Prosecution Guidance");
  - iii. Bribery Act 2010: Joint Prosecution Guidance ("the Bribery Act Guidance");
  - iv. The DPA Code.
- 2.4 Where either limb of the evidential stage is passed, the prosecutor must consider whether or not a prosecution is in the public interest. The more serious the offence, the more likely it is that prosecution will be required in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade. The impact of the offending in other countries, and not just the consequences in the UK, should be taken into account.
- 2.5 Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence, which includes the culpability of P and the harm to the victim. A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution.
- 2.6 In applying the public interest factors when considering whether to charge, seek to enter a DPA or take no further criminal action the prosecutor undertakes a balancing exercise of the factors that tend to support prosecution and those that do not. This is an exercise of discretion. Which factors are considered relevant and what weight is given to each are matters for the individual prosecutor. It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Decisions will be made on an individual case by case basis.

## 2. Factors that the prosecutor may take into account when deciding whether to enter into a DPA

- 2.7 Prosecutors should have regard when considering the public interest stage to the UK's commitment to abide by the OECD Convention on "Combating Bribery of Foreign Public Officials in International Business Transactions" in particular Article 5. Investigation and prosecution of the bribery of a foreign public official should not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.
- 2.8 The prosecutor should have regard to the public interest factors set out in the Code for Crown Prosecutors. In addition the following non-exhaustive factors will be of relevance in deciding whether a prosecution is appropriate or not in order to satisfy the public interest:
- 2.8.1 Additional public interest factors in favour of prosecution
- i. A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against P and/or its directors/partners and/or majority shareholders). Failing to prosecute in circumstances where there have been repeated or serious breaches of the law may not be a proportionate response and may not provide adequate deterrent effects.
  - ii. The conduct alleged is part of the established business practices of P.
  - iii. The offence was committed at a time when P had no or an ineffective corporate compliance programme and it has not been able to demonstrate a significant improvement in its compliance programme since then.
  - iv. P has been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct.
  - v. Failure to notify the wrongdoing within reasonable time of the offending conduct<sup>1</sup> coming to light.
  - vi. Reporting the wrongdoing but failing to verify it, or reporting it knowing or believing it to be inaccurate, misleading or incomplete.
  - vii. Significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments.
- 2.8.2 Additional public interest factors against prosecution
- i. Co-operation: Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents.
  - ii. A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against P and/or its directors/partners and/or majority shareholders; The prosecutor should contact relevant regulatory departments (including where applicable those overseas) to ascertain whether there are existing investigations in relation to P and/or its directors/partners and/or majority shareholders;

<sup>1</sup> For what is reasonable see paragraph 2.9 below

## 2. Factors that the prosecutor may take into account when deciding whether to enter into a DPA

- iii. The existence of a proactive corporate compliance programme<sup>2</sup> both at the time of offending and at the time of reporting but which failed to be effective in this instance;
  - iv. The offending represents isolated actions by individuals, for example by a rogue director;
  - v. The offending is not recent and P in its current form is effectively a different entity from that which committed the offences – for example it has been taken over by another organisation, it no longer operates in the relevant industry or market, P's management team has completely changed, disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending;
  - vi. A conviction is likely to have disproportionate consequences for P, under domestic law, the law of another jurisdiction including but not limited to that of the European Union, always bearing in mind the seriousness of the offence and any other relevant public interest factors;<sup>3</sup>
  - vii. A conviction is likely to have collateral effects on the public, P's employees and shareholders or P's and/or institutional pension holders.
- 2.9 With respect to the "Additional public interest factors against prosecution", at paragraph 2.8.2 i. above:
- 2.9.1 The prosecutor in giving weight to P's self-report will consider the totality of information that P provides to the prosecutor. It must be remembered that when P self-reports it will have been incriminated by the actions of individuals. It will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted. P must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution.
- 2.9.2 The prosecutor will also consider how early P self-reports, the extent that P involves the prosecutor in the early stages of an investigation (for example, in order to discuss work plans, timetabling, or to provide the opportunity to the prosecutor to give direction and where appropriate commence an early criminal investigation where it can use statutory powers in particular against individuals).
- 2.9.3 The prosecutor will consider whether any actions taken by P by not self-reporting earlier may have prejudiced the investigation into P or the individuals that incriminate P. In particular the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded. Internal investigations which lead to such adverse consequences may militate against the use of DPAs.
- 2.10 The Bribery Act Guidance provides factors tending in favour of or against prosecution in respect of each offence under the Bribery Act 2010. In doing so it refers to the Code for Crown Prosecutors, the Corporate Prosecution Guidance and unique considerations appropriate to the particular bribery offence being considered. A prosecutor in considering the public interest under the Code for Crown Prosecutors in respect of a bribery offence must therefore also consider the current Bribery Act Guidance offered in respect of the particular offence under consideration.

<sup>2</sup> The prosecutor may choose to bring in external resource to assist in the assessment of P's compliance culture and programme for example as described in any self-report.

<sup>3</sup> Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been convicted of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is mandatorily excluded from participation in public contracts within the EU. Discretionary exclusion may follow in respect of a conviction for a criminal offence.

### 3. Process for invitation to enter into negotiations

- 3.1 If the prosecutor decides to offer P the opportunity to enter into DPA negotiations, it will do so by way of a formal letter of invitation outlining the basis on which any negotiations will proceed.
- 3.2 That letter will constitute the beginning of the DPA negotiation period, which period will end on either the withdrawal of one or both parties from the process, or the approval/refusal by the court of a DPA at a final hearing. Neither party will be obliged to give reasons for withdrawal from negotiations. However in the event of withdrawal from negotiations by the prosecutor it will ordinarily be appropriate to provide P with the gist of the reasons for doing so. In some instances this may not be possible without prejudicing the investigation.
- 3.3 All parties should keep in mind that DPAs are entirely voluntary agreements. The prosecutor is under no obligation to invite P to negotiate a DPA and P is under no obligation to accept that invitation should it be made. The terms of a DPA are similarly voluntary, and neither party is obliged to agree any particular term therein. The Act does not, and this DPA Code cannot, alter the law on legal professional privilege.
- 3.4 DPA negotiations must be transparent. The prosecutor must:
  - i. Ensure that a full and accurate record of negotiations is prepared and retained. It is essential that a full written record is kept of every key action and event in the discussion process, including details of every offer or concession made by each party, and the reasons for every decision taken by the prosecutor. Meetings between the parties should be minuted and the minutes agreed and signed;
  - ii. Ensure that the prosecution and P have obtained sufficient information from each other so each can play an informed part in the negotiations;
  - iii. Ensure that documentation and any other material relevant to the matters the prosecutor is considering prosecuting is retained by P for any future prosecution;
  - iv. Ensure that the proposed DPA placed before the court fully and fairly reflects P's alleged offending; and
  - v. The prosecutor must not agree additional matters with P which are not recorded in the DPA and not made known to the court.

#### THE LETTER OF INVITATION

- 3.5 In order to initiate the DPA negotiations, the prosecutor will first send P a letter containing:
  - i. Confirmation of the prosecutor's decision to offer P the opportunity to enter into DPA negotiations;
  - ii. A request for confirmation of whether P wishes to enter into negotiations in accordance with the Act and this DPA Code; and
  - iii. A timeframe within which P must notify the prosecutor whether it accepts the invitation to enter into DPA negotiations.

#### UNDERTAKINGS

- 3.6 Where P agrees to engage in DPA negotiations, the prosecutor should send P a letter setting out the way in which the discussions will be conducted. This letter should make undertakings in respect of:
  - i. the confidentiality of the fact that DPA negotiations are taking place;
  - ii. the confidentiality of information provided by the prosecutor and P in the course of the DPA negotiations.

### 3. Process for invitation to enter into negotiations

- 3.7 In doing so the undertaking will make clear:
- i. the use which may be made by the prosecutor of information provided by P pursuant to paragraph 13 of Schedule 17 to the Act;
  - ii. that the law in relation to the disclosure of unused material may require the prosecutor to provide information received during the course of DPA negotiations to a defendant in criminal proceedings; and
  - iii. that the information may be disclosed as permitted by law.
- 3.8 The letter should also include:
- i. a statement of the prosecutor's responsibility for disclosure of material pursuant to this DPA Code;
  - ii. a warning that the provision by P of inaccurate, misleading or incomplete information where P knew or ought to have known that the information was inaccurate, misleading or incomplete may lead to a prosecution of P:
    - a. for an offence consisting of the provision of such inaccurate, misleading or incomplete information, and/or
    - b. for an offence or offences which are the subject of an agreed DPA; and
  - iii. the practical means by which the discussions will be conducted including appropriate time limits.
- 3.9 The prosecutor will require P to provide an undertaking:
- i. that information provided by the prosecutor in the course of DPA negotiations will be treated as confidential and will not be disclosed to any other party, other than for the purposes of the DPA negotiations or as required by law; and
  - ii. all documentation or other material relevant to the matters the prosecutor is considering prosecuting is retained until P is released from the obligation to do so by the prosecutor.
- 3.10 In exceptional circumstances and where permitted by law the prosecutor may agree in writing to different terms regarding the confidentiality of information. Ordinarily the decision to vary confidentiality terms will be dealt with on a case by case basis at the point that the disclosure is considered. In deciding whether to make such an exceptional variation, for example in relation to a disclosure of information to third parties, the prosecutor will take into account that statutory and common law safeguards already exist in respect of disclosure of information to third parties.
- 3.11 Until the issues of confidentiality, use of and retention of information have been agreed to the satisfaction of both parties, and the agreement reflected in signed undertakings, the prosecutor must not continue with the substantive DPA negotiations.

#### 4. Subsequent use of information obtained by a prosecutor during the DPA negotiation period

- 4.1 The use to which information obtained by a prosecutor during the DPA negotiation period may subsequently be put is dealt with at paragraph 13 of Schedule 17 to the Act. The use of any particular item is therefore governed by that legislation.
- 4.2 It is recognised that there is a balance to be struck between encouraging all parties to be able to negotiate freely, and the risk that P may seek knowingly (or when it should have known) to induce the prosecutor to enter into a DPA on an inaccurate, misleading or incomplete basis.
- 4.3 If P provides inaccurate, misleading or incomplete information where P knew or ought to have known that the information was inaccurate, misleading or incomplete, the prosecutor may instigate fresh proceedings against P for the same alleged offence in accordance with paragraph 11 of Schedule 17 to the Act notwithstanding any DPA that may have been approved.
- 4.4 There are two contexts within which information obtained by the prosecutor during the DPA negotiation period may subsequently be used.
  - i. Where a DPA is approved by the court under paragraph 8 of Schedule 17 to the Act the legislation provides (at paragraph 13 (1) and (2) of Schedule 17) that the statement of facts contained in the DPA may be used in subsequent criminal proceedings as an admission in accordance with section 10 of the Criminal Justice Act 1967.
  - ii. Where a DPA has not been concluded and the prosecutor chooses to pursue criminal proceedings against P, the material described in paragraph 13(6) of Schedule 17 to the Act may only be used in the limited circumstances described in paragraphs 13 (4) and (5) of Schedule 17 to the Act.
- 4.5 Apart from the material described at paragraph 13(6) of Schedule 17 to the Act, there is no limitation on the use to which other information obtained by a prosecutor during the DPA negotiation period may subsequently be put during criminal proceedings brought against P, or against anyone else (so far as the rules of evidence permit).
- 4.6 By way of non-exhaustive example, if the DPA negotiations fail the following types of document provided to a prosecutor in those negotiations would be available to be used by the prosecutor subject to the rules of evidence in a subsequent prosecution of P:
  - i. pre-existing contemporary key documentation such as contracts, accountancy records including payments of any kind, any records evidencing the transfer of money, emails or other communications etc. provided to the prosecutor by P;
  - ii. any internal or independent investigation report carried out by P and disclosed to the prosecutor prior to the DPA negotiation period commencing;
  - iii. any interview note or witness statement obtained from an employee of P and disclosed to the prosecutor prior to the DPA negotiation period commencing;
  - iv. any document obtained by the prosecutor at any time obtained from any source other than P; and
  - v. any information obtained by the prosecutor as a result of enquiries made as a result of information provided by P at any time.

## 5. Unused Material and Disclosure

- 5.1. Negotiations to enter into a DPA will necessarily take place prior to the institution of proceedings and the statutory disclosure rules will therefore not be engaged at this early stage.
- 5.2. P should have sufficient information to play an informed part in the negotiations. The purpose of disclosure here is to ensure that negotiations are fair and that P is not misled as to the strength of the prosecution case. The prosecutor must always be alive to the potential need to disclose material in the interests of justice and fairness in the particular circumstances of any case. For instance, disclosure ought to be made of information that might undermine the factual basis of conclusions drawn by P from material disclosed by P. A statement of the prosecutor's duty of disclosure will be included in the terms and conditions letter provided to P at the outset of the negotiations.
- 5.3. Consideration should be given to reasonable and specific requests for disclosure by P. Where the need for such disclosure is not apparent to the prosecutor, any disclosure may depend on what P chooses to reveal to the prosecutor about its case in order to justify the request.
- 5.4. The investigator's duty to pursue reasonable lines of inquiry in accordance with the CPIA 1996 Code of Practice is not affected by the introduction of DPAs or the application of this Code. What is reasonable in each case will depend upon the particular circumstances.
- 5.5. Before the final DPA hearing the prosecutor must obtain from the investigator enquiring into the alleged offence or offences information that will enable the prosecutor to make a written declaration to the court, as required by Criminal Procedure Rule 12.2 (3) (b), namely that:
  - i. the investigator enquiring into the offence or alleged offences has certified that no information has been supplied which the investigator knows to be inaccurate, misleading or incomplete; and
  - ii. the prosecutor has complied with the prosecution obligation to disclose material to the defendant.
- 5.6. To satisfy (ii) above, the prosecutor should request that the investigator provide written certification to the prosecutor that any material retained by the investigator which may satisfy the test for prosecution disclosure as outlined in this DPA Code has been drawn to the attention of the prosecutor.
- 5.7. Where a DPA is approved by the court and a bill of indictment is preferred upon entering into a DPA, the CPIA will apply. However, the immediate suspension of the indictment will have the effect of immediately suspending with it the disclosure obligations imposed. The statutory disclosure obligations and standard directions providing time limits for compliance will only apply if the suspension is lifted in the event of termination of the DPA and the prosecution of P.
- 5.8. The disclosure duty of the prosecutor as outlined in this DPA Code is a continuing one and the prosecutor must disclose to P any material that comes to light after the DPA has been agreed which satisfies the test for disclosure above.

**6. Statement of facts**

- 6.1. The application must include a statement of facts which must:
  - i. give particulars relating to each alleged offence;
  - ii. include details where possible of any financial gain or loss, with reference to key documents that must be attached.
- 6.2. The parties should resolve any factual issues necessary to allow the court to agree terms of the DPA on a clear, fair and accurate basis. The court does not have the power to adjudicate upon factual differences in DPA proceedings.
- 6.3. There is no requirement for formal admissions of guilt in respect of the offences charged by the indictment though it will be necessary for P to admit the contents and meaning of key documents referred to in the statement of facts.
- 6.4. In the event that P is prosecuted for the alleged offence addressed by a court approved DPA, the statement of facts would be admissible against P in accordance with section 10 of the Criminal Justice Act 1967 in any subsequent criminal proceedings.



## 7. Terms

- 7.1. A DPA may include a broad range of terms, some of which are detailed in a non-exhaustive list in paragraph 5(3) of Schedule 17 to the Act.
- 7.2. The prosecutor and P are required to agree the terms of a DPA<sup>4</sup> which are fair, reasonable and proportionate. What terms are fair, reasonable and proportionate, including the length of the DPA, will be determined on a case by case basis. The terms may consist of a combination of requirements and it will normally be fair, reasonable and proportionate for there to be a financial penalty. It is particularly desirable that measures should be included that achieve redress for victims, such as payment of compensation. Paragraph 5 of Schedule 17 to the Act suggests that a possible term of a DPA is the recovery of the reasonable costs of the prosecutor in relation to the alleged offence or the DPA. The prosecutor should ordinarily seek to recover these costs, including the costs of the investigation where they have been incurred by the prosecutor.
- 7.3. The basis of the DPA and its terms will be explained in an agreed written application to the court.
- 7.4. The terms must set out clearly the measures with which P must comply. Clarity is important so P understands what is required. Further, in the event of breach of a term drafting ambiguity will complicate breach proceedings.
- 7.5. The terms must be proportionate to the offence and tailored to the specific facts of the case.
- 7.6. The DPA must specify the end date.
- 7.7. The following will normally be requirements of the DPA:
  - i. that the DPA relates only to the offences particularised in the counts of the draft indictment;<sup>5</sup>
  - ii. a warranty provided by both P and with P's consent, its legal advisers<sup>6</sup> that the information provided to the prosecutor throughout the DPA negotiations and upon which the DPA is based does not knowingly, contain inaccurate, misleading or incomplete information relevant to the conduct P has disclosed to the prosecutor.
  - iii. a requirement on P to notify the prosecutor and to provide where requested any documentation or other material that it becomes aware of whilst the DPA is in force which P knows or suspects would have been relevant to the offences particularised in the draft indictment.
- 7.8. The following will normally be terms of a DPA:
  - i. A financial order;
  - ii. The payment of the reasonable costs of the prosecutor;
  - iii. Co-operation with an investigation related to the alleged offence(s)<sup>7</sup>.

<sup>4</sup> The length of a DPA will need to be sufficient to be capable of permitting compliance with other terms such as financial penalties paid in instalments, monitoring and co-operation with the investigations and trials into individuals.

<sup>5</sup> Prosecutors should not agree to a term that would prevent P from being prosecuted for conduct not included in the indictment even where the conduct has been disclosed during the course of DPA negotiations but not charged.

<sup>6</sup> The SRA Code of Conduct sets out in Chapter 5 the duties of a solicitor when conducting litigation or acting as an advocate.

There are obligations on a solicitor:

a. Not to attempt to deceive or knowingly or recklessly mislead the court [O5.1],

b. Not to be complicit in any other person deceiving or misleading the court [O5.2], and

c. Where relevant to inform their client of circumstances in which their duties to the court outweigh their obligations to their client [O5.4].

<sup>7</sup> For example in respect of individuals. The obligation would include the provision of material to be used in evidence and for the purposes of disclosure.

## 7. Terms

- 7.9. The suggested financial terms may include but are not confined to: compensating victims; payment of a financial penalty; payment of the prosecutor's costs; donations to charities which support the victims of the offending; disgorgement of profits. There is no requirement to include all or any of these terms all of which are a matter of negotiation with P and subject to judicial oversight. The following should be noted:
- i. A late payment may constitute a breach of the DPA leading to breach and termination. It may however be appropriate to make provision for short delays pursuant to paragraph 5 (5) of Schedule 17 to the Act requiring the payment of interest on any payment(s) not paid by the date agreed and specify the rate that applies<sup>8</sup>.
  - ii. Where payment of a donation, compensation, financial penalty and/or costs is an agreed term of the DPA, the starting point should be that monies are ordered to be paid within seven days of the final hearing and this should be a standard term unless not fair, reasonable or proportionate.
  - iii. Where a financial penalty is to be imposed, the figure agreed must approximate to what would have been imposed had P pleaded guilty (see section 8 ).
  - iv. There should be a transparent and consistent approach to the setting of a financial penalty that is analogous to the sentencing framework for setting fines so the parties and the court will know before they enter into the process what the appropriate starting point is.
  - v. Financial penalties and disgorgements of profits will be paid to the prosecutor and then passed to the Consolidated Fund. Charitable donations and compensation will be paid by P directly or through an intermediary agreed by the parties and approved by the court as part of the DPA. P will provide confirmation and supporting evidence to the prosecutor of this as required.
- 7.10 Other terms that may be agreed might include:
- i. prohibiting P from engaging in certain activities.
  - ii. financial reporting obligations.
  - iii. putting in place a robust compliance and/or monitoring programme.
  - iv. co-operation with sector wide investigations.

**MONITORS**

- 7.11 An important consideration for entering into a DPA is whether P already has a genuinely proactive and effective corporate compliance programme. The use of monitors should therefore be approached with care. The appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.
- 7.12 A monitor's primary responsibility is to assess and monitor P's internal controls, advise of necessary compliance improvements that will reduce the risk of future recurrence of the conduct subject to the DPA and report specified misconduct to the prosecutor.
- 7.13 Where the terms require a monitor to be appointed it is the responsibility of P to pay all the costs of the selection, appointment, remuneration of the monitor, and reasonable costs of the prosecutor associated with the monitorship during the monitoring period. In assessing whether a term of monitoring may satisfy the statutory

<sup>8</sup>The rate should ordinarily be not less than the rate of interest payable on post judgment debts at the date when the DPA is approved

## 7. Terms

test the prosecutor should give consideration to the costs of such a term as these may be relevant.

- 7.14 P shall afford to the monitor complete access to all relevant aspects of its business during the course of the monitoring period as requested by the monitor. Any legal professional privilege that may exist in respect of investigating compliance issues that arise during the monitorship is unaffected by the Act, this DPA Code or a DPA.
- 7.15 As part of the DPA negotiations P should provide the prosecutor and the court with details of three potential monitors, including relevant qualifications, specialist knowledge and experience; any associations the monitor has or has had with P and/or associated companies and/or person(s) or any named companies or person(s) that feature in the DPA to avoid any conflict of interest; and an estimate of costs of the monitorship.
- 7.16 P should indicate their preferred monitor with reasons for the preference.
- 7.17 The prosecutor should ordinarily accept P's preferred monitor. However where the prosecutor considers there to be a conflict of interest or that the monitor is inappropriate, or does not have the requisite experience and authority, they may reject the proposed appointment. Similarly the court may register its dissatisfaction with the selection by not approving the proposed term.
- 7.18 Where monitorship is proposed to be a term of a DPA, before the DPA is approved the monitor will be selected, provisionally appointed, the terms of the monitorship agreed by the parties to the DPA, a detailed work plan for the first year (to include the method of review and frequency of reporting to the prosecutor) and an outline work plan for the remainder of the monitoring period agreed with the monitor including provisions

or limits as to costs. The monitor's report should include a breakdown of his proposed costs, and on what matters costs are incurred.

- 7.19 Terms of the DPA should include the length of time the monitors should be appointed. Provision should however be made in the DPA that if the monitor is satisfied that P's policies are functioning properly such that there is no need for further monitoring, the monitor may inform the prosecutor who will, subject to being satisfied through discussion with the monitor that the monitor's views are reasonable, agree to the termination or suspension of the monitor's appointment. Conversely the DPA should provide that, if the monitor and the prosecutor agree that P has not, or it appears will not by the end of the monitoring period have successfully satisfied its obligations with respect to the monitor's mandate, the term of the monitorship will be extended provided that no extension exceeds the length of the DPA.
- 7.20 Monitors' reports and associated correspondence shall be designated confidential with disclosure restricted to the prosecutor, P and the court, save as otherwise permitted by law.
- 7.21 No two monitoring programmes will be the same, given the varying facts and circumstances of each case including the nature and size of P. Terms included in the monitor's agreement may include, but are not limited to, ensuring that P has in place<sup>9</sup>:
- i. a code of conduct;
  - ii. an appropriate training and education programme;
  - iii. internal procedures for reporting conduct issues which enable officers and employees to report issues in a safe and confidential manner;

<sup>9</sup> These policies and procedures are not intended to provide an indication of what can amount to adequate procedures under s. 7 Bribery Act 2010.

## 7. Terms

- iv. processes for identifying key strategic risk areas;
  - v. reasonable safeguards to approve the appointment of representatives and payment of commissions;
  - vi. a gifts and hospitality policy;
  - vii. reasonable procedures for undertaking due diligence on potential projects, acquisitions, business partners, agents, representatives, distributors, sub-contractors and suppliers;
  - viii. procurement procedures which minimise the opportunity of misconduct;
  - ix. contract terms between P and its business partners, subcontractors, distributors, and suppliers include express contractual obligations and remedies in relation to misconduct;
  - x. internal management and audit processes which include reasonable controls against misconduct where appropriate;
  - xi. policies and processes in all of its subsidiaries and operating businesses, and joint ventures in which it has management control, and that P uses reasonable endeavours to ensure that the joint ventures in which it does not have management control, together with key subcontractors and representatives, are familiar with and are required to abide by its code of conduct to the extent possible;.
  - xii. procedures compatible with money laundering regulations;
  - xiii. policies regarding charitable and political donations;
  - xiv. terms related to external controls, e.g. procedures for selection of appropriate charities;
  - xv. policies relating to internal investigative resources, employee disciplinary procedures; and compliance screening of prospective employees;
  - xvi. policies relating to the extent to which senior management takes responsibility for implementing relevant practices and procedures;
  - xvii. mechanisms for review of the effectiveness of relevant policies and procedures across business and jurisdictions in which P operates;
  - xviii. compensation structures that remove incentives for unethical behaviour.
- 7.22 In designing a monitoring programme regard should be had to contemporary external guidance on compliance programmes<sup>10</sup>.

<sup>10</sup> At the time of publishing guidance can be found in the Ministry of Justice Bribery Act 2010: Guidance to help commercial organisations prevent bribery, the OECD Good Practice Guide on Internal Controls, Ethics and Compliance, the BS 10500 Anti-Bribery System Standard, the US Sentencing Commission's Federal Sentencing Guidelines Manual, in particular its guidance on effective compliance and ethics programmes, and the guidance on corporate compliance programmes in the US Department of Justice's Principles of Federal Prosecution of Business.

## 8. Financial Penalty

- 8.1. The prosecutor represents the public interest, and should assist with the identification of appropriate terms by drawing the judge's attention where possible and relevant to the following information:
  - i. any victim statement or other information available to the prosecutor as to the impact of the alleged offence on the victim;
  - ii. any statutory provisions relevant to the offender and the offences under consideration;
  - iii. any relevant Sentencing Council Guidelines and guideline cases; and
  - iv. the aggravating and mitigating factors of the alleged offence under consideration.
- 8.2. Such information where available and relevant should form part of the agreed written application to be provided to the court at the final hearing.
- 8.3. Any financial penalty is to be broadly comparable to a fine that the court would have imposed upon P following a guilty plea.<sup>11</sup> This is intended to enable the parties and courts to have regard to relevant pre-existing sentencing principles and guidelines in order to determine the appropriate level for a financial penalty in an individual case. This should include consideration of P's means and where compensation is appropriate, this should be given priority over a penalty.
- 8.4. The extent of the discretion available when considering a financial penalty is broad. The discount for a guilty plea is applied by the sentencing court after it has taken into account all relevant considerations, including any assistance given by P. The level of the discount to reflect P's assistance would depend on the circumstances and the level of assistance given, and the parties should be guided by sentencing practice, statute and pre-existing case law on this matter. A financial penalty must provide for a discount equivalent to that which would be afforded by an early guilty plea. Current guidelines provide for a one third discount for a plea at the earliest opportunity.
- 8.5. To be considered as voluntary and therefore mitigating, co-operation should be over and above mere compliance with any coercive<sup>12</sup> measures.

<sup>11</sup> Schedule 17, Paragraph 5 (4).

<sup>12</sup> Such as notices under s.2 (1) Criminal Justice Act 1987 issued by the Serious Fraud Office

## 9. Preliminary hearing(s)

- 9.1. The Criminal Procedure Rules make provision for the contents of the application<sup>13</sup>.
- 9.2. The prosecutor should contact a court designated to approve DPAs in order to request a listing and in doing so provide a realistic time estimate for a preliminary hearing.
- 9.3. The draft proposed application and any supporting documents must be submitted on a confidential basis to the court before the preliminary hearing.
- 9.4. The application must explain why the agreement is in the interests of justice and fair, reasonable and proportionate. In so explaining the prosecutor must address issues such as concurrent jurisdiction, on-going and/or subsequent ancillary proceedings, any conduct outwith the scope of the DPA which P has disclosed to the prosecutor but which does not form part of the draft indictment on account of the test at paragraph 1.2 above not having been satisfied.
- 9.5. Consideration should be given at the preliminary hearing to additional relevant issues such as timing of subsequent hearings.
- 9.6. The appropriate manner and timing of a preliminary hearing will vary on a case by case basis, and the court may adjourn a preliminary hearing if it requires more information about the facts or terms of a proposed DPA before it can make the full declaration under paragraph 7(1) of Schedule 17 to the Act.

## 10. Application for Approval

- 10.1. The Criminal Procedure Rules make provision for the contents of the application for final approval<sup>14</sup>. They further provide that an application for final approval should be sought as soon as practicable once the court has made a declaration under paragraph 7(1) of Schedule 17 to the Act and the parties have settled the terms of the DPA.
- 10.2. The basis of the DPA and its terms will be explained in an agreed written application accompanied by the proposed final terms of the DPA, agreed case statement with any supporting documents and the prosecutor's confirmation of which evidential test has been met. These documents must be submitted to the court on a confidential basis before the application for approval.
- 10.3. Issues germane to whether the DPA is in the interests of justice and its terms being fair, reasonable and proportionate such as concurrent jurisdiction, on-going and/or subsequent ancillary proceedings, must also be addressed by the prosecutor in the application for approval.
- 10.4. The application for approval of the DPA may be in private. This is likely to be almost always necessary as the prosecutor and P will be uncertain as to whether the court will grant a declaration under paragraph 8 (1). For the parties to make an application in open court which was refused might lead to the uncertainties and destabilisation that private preliminary hearings are designed to avoid.
- 10.5. The court may adjourn an application for approval if it requires more information about the facts or terms of a proposed DPA before it can make the declaration under paragraph 8(1) of Schedule 17 to the Act.

<sup>13,14</sup> Crim PR 12

## 11. Declaration in Open Court

- 11.1. If a DPA is approved, the court must make a declaration to that effect along with reasons in an open hearing<sup>15</sup>.
- 11.2. Once the declaration has been made in open court the prosecutor will, unless prevented from doing so by an enactment or by an order from the Court, publish on its website:
  - i. the DPA;
  - ii. the declaration of the court pursuant to paragraph 8 (1) of Schedule 17 to the Act with the reasons for making such a declaration;
  - iii. the declaration of the court pursuant to paragraph 7 (1) of Schedule 17 to the Act with the reasons for making such a declaration; and
  - iv. if appropriate, any initial refusal to make such a declaration with reasons for declining.
- 11.3. Immediate publication may be prevented by any enactment or order that postponement is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings. P's offence and the sanctions provided for in the DPA will be made public as soon as it is safe to do so.

<sup>15</sup> See paragraph 154.4 in respect of listing

## 12. Breach of a DPA

- 12.1. Paragraph 9 of Schedule 17 to the Act deals with the situation where P is, or is believed by the prosecutor to be, in breach of a term of a DPA that has been approved at a final hearing.

### ALLEGING AND PROVING BREACH OF A DPA

- 12.2. If, prior to the expiry of the DPA, it is believed that P is in breach of it, where possible the prosecutor should ask P to rectify the alleged breach immediately. In cases of minor breaches, it may be possible for a solution to be reached efficiently in this way, without the need for either an application under paragraph 9 of Schedule 17 to the Act or a variation of the DPA under paragraph 10 of Schedule 17 to the Act. The prosecutor will nevertheless still be required to publish details of the breach pursuant to paragraph 9 (8) of Schedule 17 to the Act. The prosecutor should also notify the court of any such developments.
- 12.3. If the prosecutor is unable to secure a satisfactory outcome in this way, it may apply to the court seeking a finding that P is in breach of the term as alleged, and explaining the remedy it seeks as a result. The question of whether or not there has been a breach of a term is to be judged on the balance of probabilities. The successful party may seek its costs of an application under paragraph 9 of Schedule 17<sup>16</sup>.

- 12.4. If the court finds that P is in breach of a term of the DPA it may invite the parties to agree a suitable proposed remedy. If agreement can be reached, that proposed remedy must then be presented to the court by way of an application in accordance with paragraph 10 of Schedule 17 to the Act. The court will approve the variation only if that variation is in the interests of justice and the terms of the DPA as varied are fair, reasonable and proportionate. It is anticipated that this mechanism should generally be used to rectify relatively minor breaches of a DPA where the parties have been unable to agree a remedy without the involvement of the court.

### TERMINATION FOLLOWING BREACH OF A DPA

- 12.5. Where the alleged breach is more material or the parties are unable to agree a suitable remedy or the court does not approve a proposed remedy, the court may order that the DPA be terminated. If the court makes such an order the DPA shall cease to take effect from that point onwards, and the prosecutor may apply to have the suspension of the indictment covered by the DPA lifted in accordance with paragraph 2 of Schedule 17 to the Act.
- 12.6. Where a DPA has been terminated in this way, P is not entitled to the return of any monies paid under the DPA prior to its termination, or to any other relief for detriment arising from its compliance with the DPA up to that point (for example the costs of a monitoring programme). The prosecutor may seek from P the costs of an application under paragraph 9 of schedule 17 to the Act<sup>17</sup>.

<sup>16</sup> <sup>17</sup> Crim PR 76.1 (c)



## 12. Breach of a DPA

**POST TERMINATION PROCESS**

- 12.7. Should the DPA be terminated it will be usual for the prosecutor to apply for the suspension of the indictment to be lifted and P to be prosecuted. The application to lift the suspension need not be made at the time that the DPA is terminated.
- 12.8. The lifting of the suspension would reinstitute criminal proceedings. Given the manner in which the earlier investigation was concluded and/or the passage of time since the DPA was concluded the prosecutor may not be in a position to commence criminal proceedings immediately. Further investigation and preparation may be needed in order for the prosecutor to be trial ready.
- 12.9. Before re-opening proceedings, the prosecutor must be satisfied that the Full Code Test under the Code for Crown Prosecutors is met in relation to each charge. The court will have been informed at the final hearing if the original charge was pursuant to the second limb of the evidential stage at paragraph 1.2 i b) above, in which case the prosecutor will now need to be satisfied that the more stringent evidential stage of the Full Code Test is met. Furthermore the public interest position will need reassessing in light of the breach.
- 12.10. If the prosecutor requires time before being in a position to re-open proceedings the court should be informed of the prosecutor's proposed course of action and then kept informed of progress.

## 13. Variation of a DPA

- 13.1. Paragraph 10 of Schedule 17 to the Act deals with the situation where it becomes necessary to vary the terms of a DPA that has been approved.
- 13.2. There are two possible situations in which variation may be necessary.
- i. The first is where a breach has occurred in respect of which the prosecutor has applied under paragraph 9 of Schedule 17, and the court has invited the parties to agree a solution to that breach, which the court then has to consider whether to approve.
  - ii. The second situation is where a breach has not yet occurred, but, absent the variation, is likely to. A variation in this category will only be approved by the court if it arises from circumstances that were not, and could not have been, foreseen by the prosecutor or P at the time that the DPA was agreed<sup>18</sup>. What circumstances a court considers to be adequate in these types of cases will have to be decided on a case by case basis. Variation of a DPA is not a mechanism that exists for mere convenience or efficiency. A DPA is a serious sanction for criminal conduct and will have been approved by the court on that basis. In the vast majority of cases the terms of a DPA that are approved at a final hearing should be strictly complied with in their entirety, failing which P risks prosecution.
- 13.3. In both situations, it is the prosecutor that must apply to the court to seek a declaration that a variation is acceptable. P does not have a right to apply to the court for a variation; it may only ask the prosecutor for a variation.
- 13.4. If a variation is approved, the court must give its declaration to that effect in an open hearing. Costs of an application under paragraph 10 of Schedule 17 to the Act may be sought<sup>19</sup>.

<sup>18</sup> Paragraph 10(1)(b) of Schedule 17 to the Act

<sup>19</sup> Crim PR 76.1 (c)

## 14. Discontinuance

- 14.1. On expiry of the DPA, the prosecutor should give notice to the court that it does not want proceedings to continue, in accordance with paragraph 11(1) of Schedule 17 to the Act.
- 14.2. Where considered necessary, consultation with the investigator and any monitor should take place prior to discontinuance.
- 14.3. Discontinuance notices should be sent to the court as soon as practicable after the decision to discontinue, and copies should be sent to P and the investigator.
- 14.4. The notice should state:
  - i. The effective date of discontinuance;
  - ii. The offences to be discontinued;
  - iii. Confirmation that the DPA has expired.
- 14.5. A DPA will ordinarily expire on the date specified in the agreement. However, this will not always be the case, and prosecutors should be aware of the various circumstances under paragraph 11 of Schedule 17 to the Act in which a DPA is to be treated as having or not having expired.
- 14.6. No notice of discontinuance is needed where the court terminates the DPA: see paragraph 11(5)(b) of Schedule 17 to the Act.
- 14.7. In contrast to discontinuance under the section 23A of the Prosecutions of Offences Act 1985, once proceedings are discontinued under paragraph 11(1), fresh proceedings against P for the same offence may not be instituted unless the conditions specified in paragraph 11(3) of Schedule 17 to the Act (provision of inaccurate, misleading or incomplete information by P) are satisfied.

## 15. Applications in Private

- 15.1. Where an application in private is contemplated all parties should consider whether the hearing can be heard in public as a starting point and if not, whether as much as possible of the hearing can be heard in public.
- 15.2. An application for a private hearing might be made for example where it is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings.
- 15.3. The court will not identify the parties to a private application.
- 15.4. Where the application to approve the DPA is in private it would be normally appropriate for reasons of transparency and open justice for the parties to request the court to delay the making of a declaration approving a DPA in open court so that a listing might be publicised in the normal manner.
- 15.5. All communications with the court in respect of a DPA will be confidential and the use of secure email should be the preferred means to maintain confidentiality.

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**16. Publishing decisions and postponement**

- 16.1. Transparency remains a key aspect of the success and proper operation of DPAs, and accordingly Schedule 17 of the Act requires in prescribed circumstances the prosecutor to publish on its website orders made by the court or decisions made by the prosecutor.
- 16.2. All requirements to publish under this section are subject to any enactment or order of the court under paragraph 12 of Schedule 17 to the Act preventing such publication from being made.
- 16.3. There is no requirement to publish a conclusion reached by a prosecutor alone that no breach has in fact occurred so that no application to the court has been made.

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# Appendix K

## Part 2.5 of the *Criminal Code*

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### Part 2.5—Corporate criminal responsibility

#### Division 12

##### 12.1 General principles

- (1) **This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.**
- (2) **A body corporate may be found guilty of any offence, including one punishable by imprisonment.**

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

##### 12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

##### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally,

- knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

***board of directors*** means the body (by whatever name called) exercising the executive authority of the body corporate.

***corporate culture*** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

## 12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

- (a) negligence is a fault element in relation to a physical element of an offence; and
- (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

## 12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
- (b) the body corporate proves that it exercised due diligence to prevent the conduct.

- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

## **12.6 Intervening conduct or event**

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.



Appendix L

United Kingdom DPA case studies

	Standard Bank plc	Sarclad Ltd	Rolls-Royce plc	Tesco plc	Serco Geografix Ltd
Offences	Failure to prevent bribery (by a subsidiary – USD6m) [no allegation of knowing participation in an offence of bribery was alleged]	Corruption (pre-2010 Act) and failure to prevent bribery (post-2010 Act)	Agreements to make corrupt payments Concealment or obfuscation of the use of intermediaries in its defence business in India Failing to prevent bribery	False accounting	Fraud (defrauded Ministry of Justice) False accounting
Interests of justice factors	<ul style="list-style-type: none"><li>• no evidence anyone within SB knew the payment was intended to constitute a bribe</li><li>• immediate self-report</li><li>• detailed internal investigation sanctioned by SFO; Statement of Facts substantially reliant on facts voluntarily disclosed</li><li>• cooperation in identifying witnesses, disclosing accounts and documents; making witnesses available</li><li>• no history of similar conduct; has been subject to regulatory enforcement by the FCA in respect of anti-money laundering procedures</li><li>• SB in its current form is effectively a different entity from that which committed the offence</li></ul>	<ul style="list-style-type: none"><li>• conduct was grave, involving a course of systematic conduct of 8 years; generated £6.5m of gross profits and caused detriment to competitors; part of Sarclad’s established business conduct</li><li>• majority of bribes instigated by agents; no evidence of agents being pressured by Sarclad into giving bribes; unsophisticated system – conduct there for all to see</li><li>• self-report; further matters brought to light by internal investigation; adopted genuinely proactive approach to the wrongdoing it uncovered; no suggestion the conduct would have otherwise been discovered but for the self-report</li><li>• new compliance program had been in place from 2011 that led to the discovery of the issues</li><li>• no evidence that parent company knew of the criminality nor that it knowingly made a profit from that criminality</li><li>• Sarclad in its current form is a different entity; two senior employees dismissed; relationships with suspect agents terminated; bids for suspect contracts withdrawn; none of Sarclad’s current employees or directors face criminal charges</li><li>• prosecution and conviction likely to have disproportionate non-penal legal consequences; it would be debarred from participating in public contract procedures in the UK and throughout the EU; it would risk becoming insolvent, harming the interests of workers, suppliers and the wider community.</li></ul>	<ul style="list-style-type: none"><li>• no self-report; SFO became aware of concerns on internet postings and sought information from RR; RR subsequently commenced an investigation which led to a report on the findings; continued internal investigation led to much more extensive findings than had been uncovered by SFO; ‘extraordinary cooperation by RR’ aggravating factors included bribery of foreign public officials, commercial bribery and false accounting; offences were multi-jurisdictional, numerous and spread across defence aerospace, civil aerospace and energy businesses, will cause substantial harm to integrity/confidence of markets; spanned 1989-2013; substantial funds made available to fund bribe payments; careful planning; earned over £250m of gross profit; involved very senior employees</li><li>• similar conduct in the energy business has been the subject of a recent DPA with the DOJ (USD169,917,710) and leniency agreement with Brazilian authorities (USD25,579,645)</li><li>• quasi-Monitor appointed in 2013; ethics and compliance procedures have been improved; specific attention paid to potential risks; suspension or reduction in number of intermediaries; disciplinary proceedings against 38 employees – 11 resigned and 6 were dismissed; cultural change has occurred/ no current member of Board involved</li><li>• impact of conviction would impact RR’s ability to trade in the world – 15% of its order book subject to public procurement rules with mandatory debarment; very negative share price impact; repercussions to third-party interests including adverse effect on UK defence industry, consequential financial effects on supply chain, impairment of competition in highly concentrated market, group-wide redundancies/restructuring and potential weakening of financial covenant for pensions</li><li>• DPA would avoid significant expenditure of time and money inherent in any prosecution (investigation has already cost £13m)</li><li>• DPA will likely incentivise the exposure and self-reporting of wrong doing by organisations in a similar position</li><li>• RR no longer the company it once was; new Board and executive team</li></ul>	<ul style="list-style-type: none"><li>• substantial harm caused to integrity of the market; senior management played a leading role in organised and planned misconduct; culture placed accounting and finance functions under pressure to deliver budget through illegitimate means; senior managers who were aware of unlawful conduct failed to alert internal audit or the boards</li><li>• unreserved and enduring cooperation from the day overstatement reported to the new CEO; 4 senior managers dismissed</li><li>• significant change to leadership – both management and board</li><li>• wide-ranging and comprehensive remediation measures</li><li>• no previous criminal or regulatory sanctions for similar conduct</li><li>• disproportionate consequences of conviction, including adverse effects to the UK supermarket and food industry with impairment of competition and consequential impact on supply chain; real impact on share price; loss of employment and potential weakening of Pension Scheme</li><li>• Wholly owned subsidiary of FTSE 100 company; conviction could have real impact on persons who have no connection at all with accounting practices of the company</li><li>• Efficient use of public resources in pursuing a prosecution need to be considered</li><li>• DPA will encourage and incentivise self-reporting by similar entities</li></ul>	<ul style="list-style-type: none"><li>• substantial fraud over many months reflecting ingrained business practices</li><li>• prompt and detailed reporting and substantial cooperation</li><li>• no history of similar conduct</li><li>• complete change of senior management</li><li>• debarment after criminal conviction not determinative (matter for government after sufficient remedial action) – court should not be involved in quasi-political decisions about whether companies should be debarred from public procurement</li><li>• conviction would be of a dormant entity</li></ul>

	Standard Bank plc	Sarclad Ltd	Rolls-Royce plc	Tesco plc	Serco Geografix Ltd
<b>Terms of DPA</b>	<ul style="list-style-type: none"> <li>• payment of compensation of USD6m</li> <li>• disgorgement of profit on the transaction USD8.4m</li> <li>• payment of financial penalty USD16.8m [assessed as 300% of total fee reduced by one third to represent the earliest admission of liability]</li> <li>• past and future cooperation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment</li> <li>• commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the <i>Bribery Act 2010</i> and other applicable anti-corruption laws</li> <li>• payment of costs incurred by SFO [£330,000]</li> <li>• no tax reduction to be sought in respect of any of the financial penalties</li> </ul>	<ul style="list-style-type: none"> <li>• £6,201,085 disgorgement of profits</li> <li>• £352,000 financial penalty [having regard to the amount Sarclad is able to pay without avoiding insolvency even though significantly lower than the sentencing guidelines would suggest — being £8.2m after 50% discount for full cooperation and savings of time and costs of trial]</li> <li>• full cooperation with SFO and provide a report addressing all third-party intermediary transactions and the completion and effectiveness of all its existing anti-bribery and corruption controls, every 12 months for the duration of the DPA</li> <li>• no tax reduction to be sought in relation to any of the financial penalties</li> </ul>	<ul style="list-style-type: none"> <li>• past and future cooperation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment</li> <li>• disgorgement of profit of £258,170,000</li> <li>• financial penalty of £239,082,645 (after a discount of 50% for extraordinary cooperation and savings of time and costs of trial)</li> <li>• payment of SFO's costs £12,960,754</li> <li>• at its own expense, completing a compliance program following the recommendations of the reviews commissioned by RR from Lord Gold of the approach to anti-bribery and corruption compliance [cost of £15m]</li> <li>• no tax reduction to be sought in respect of any of the financial penalties</li> </ul>	<ul style="list-style-type: none"> <li>• co-operation with the SFO, other law enforcement and regulatory authorities and agencies in all matters relating to the conduct arising out of the circumstances of the draft indictment and statement of facts</li> <li>• financial penalty of £128,992,500 (after 50% discount for cooperation and savings of time and costs of trial)</li> <li>• payment of costs of SFO (£3m)</li> <li>• at its own expense, commissioning external auditors acting for Tesco Stores to review and report on 2 aspects of Tesco's Global Financial Transformation Programme and implement any recommendation</li> <li>• no tax reduction to be sought in respect of any of the financial penalties</li> <li>• no protection from prosecution or regulatory action in relation to conduct that has not been disclosed prior to the date on which the DPA comes into force</li> </ul>	<ul style="list-style-type: none"> <li>• continuing co-operation with SFO and other investigative agencies</li> <li>• financial penalty of £19.2m (after 50% discount for cooperation and savings of time and costs of trial)</li> <li>• (credited for earlier payment of £20m to Ministry of Justice which fully offset the compensation (£12.8m) it would otherwise have been obliged to pay and represents disgorgement of profit)</li> <li>• payment of SFO's reasonable costs (£3,723,678)</li> <li>• improvements to ethics and compliance policies and procedures</li> </ul>
<b>Follow on against individuals</b>	No	3 directors charged but acquitted at trial	No – SFO announced in February 2019 that following further investigation and a detailed review of the evidence and an assessment of the public interest, there will be no prosecution of individuals associated with the company	3 senior managers charged; 1 fell ill; judge ruled no case to answer against other 2 – upheld on appeal by CA	
<b>Duration</b>	3 years	3 years	3 years	3 years	3 years