IMPROVING ENFORCEMENT OPTIONS FOR SERIOUS CORPORATE CRIME:

A PROPOSED MODEL FOR A DEFERRED PROSECUTION AGREEMENT SCHEME

Public Consultation Paper

Submission

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1. This Submission

Thank you for the opportunity to make a submission on the Proposed Model.

The Proposed Model calls for further development in several main respects:

- the range of offences subject to DPAs (see section 2 below);
- the conditions of entry into DPA negotiations (see section 3 below);
- the terms of a DPA (see section 4 below); and
- the need to integrate the DPA scheme with reactive corporate fault (see section 5 below).

2. Range of offences subject to DPAs

The range of offences subject to DPAs under the Proposed Model is limited to those set out in the Discussion Paper at p 6. The Discussion Paper states (p 3) that: "We are also continuing to assess whether other crime types (such as environmental crime, tax offences, cartel offences and offences under workplace health and safety legislation) should be included in a DPA scheme."

It is difficult to understand why the DPA scheme should not apply to all serious offences under Commonwealth criminal law, including cartel offences under ss 44ZZRF and 44ZZRG of the Competition and Consumer Act 2010 (Cth).

The Discussion Paper states (p 3) that the DPA scheme has the following aims:

> "The high-level aim of an Australian DPA scheme is to **enhance the accountability of Australian business for serious corporate crime** by increasing the range of tools available for investigators and prosecutors to deal with serious corporate crime." ...
>
> "A DPA scheme would also serve the dual aims of **punishing companies for wrongdoing** and **creating an avenue for companies to provide redress to those affected**."

Those aims apply to cartel offences just as much as to the range of offences included under the Proposed Model.

It might possibly be contended that the CDPP and ACCC immunity schemes that apply to criminal and civil cartel prohibitions respectively make a DPA scheme unnecessary or undesirable in that context. Any such contention should be treated sceptically. The CDPP and ACCC immunity schemes are not entirely satisfactory[1] and do not obviate the need for additional incentives to report cartel offences. If the immunity schemes need to be harmonised with the proposed DPA scheme, the appropriate solution would be to harmonise the schemes rather than to exclude cartel offences from the DPA scheme.

3. Conditions of entry into DPA negotiations

Individual accountability

Part 2.2 of the Proposed Model does not provide a sufficient guarantee that the DPA scheme will recognise and uphold individual accountability for serious offences.

The Discussion Paper at p 7 states that:

> ".. a successful DPA scheme will require clear and detailed guidance on when a prosecutor is likely to offer DPA negotiations. This information could be provided in the Prosecution Policy of the Commonwealth4 (Prosecution Policy) and/or in other public documents produced by Government (see section 2.7).
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> These documents would outline in detail the types of public interest considerations that would guide the CDPP in deciding whether to initiate formal DPA negotiations. Where a company has self-reported misconduct and has genuinely cooperated with any investigation and pre-negotiation discussions, this would be given considerable weight in favour of the initiation of formal negotiations. Such cooperation may include providing the CDPP and any

[1] See C Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 Journal of Antitrust Enforcement 126; C Beaton-Wells & C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015).

> investigative agency with complete and accurate details about corporate and individual misconduct. Other considerations would include the likely success of negotiations, and the company's past conduct, role in the offending, cooperation with any ongoing investigations, and apparent willingness to cooperate once offending is brought to its notice."

The statement that "[s]uch cooperation may include providing the CDPP and any investigative agency with complete and accurate details about corporate and individual misconduct" is too indefinite and too lax. Complete and accurate details about the individuals concerned in the relevant offence and their conduct should be an essential precondition of entry by the CDPP into negotiation of a DPA *in all cases*.[2] Individual accountability is fundamental to social control. It should not be compromised by corporate settlements that conceal, mask or otherwise protect the individuals implicated in the commission of offences.[3]

Eligibility of corporate recidivists

Part 2.2 of the Proposed Model does not preclude a DPA where the alleged offender is a recidivist.[4]

A DPA is a major concession to a corporation that commits a serious offence. There is a strong case for limiting DPAs to offenders who have not been convicted of the same type of offence or a similar type of offence previously, or who have not previously had the benefit of a DPA in relation to the same type of offence or a similar type of offence.

4. Terms of a DPA

Part 2.3 of the Proposed Model canvasses the terms of a DPA but with respect is too loose.

The Discussion Paper (p 9) states that:

> "We anticipate that DPAs would draw on a wide range of terms and conditions as negotiated between parties. These terms might require a company to disgorge profits, report at regular intervals, implement or improve a compliance program, fund an independent monitor, and/or compensate victims.

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2 Corporate liability alone may be justified in the context of test cases but, by hypothesis, DPA cases are not test cases where a court is being asked to clarify a legal rule. Contrast C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 192.

3 See B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993); C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) section 6.6.

4 Consider eg WPJ Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 World Competition 5.

However, to promote consistency and certainty for both parties to a DPA, we suggest that DPAs would contain, at a minimum, the following mandatory elements:

- an agreed end date for the agreement, by which point all obligations under the agreement must be satisfied
- an agreed statement of facts outlining the particulars relating to each offence and details of any financial gain or loss, with supporting material
- the company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence (see section 2.7)
- the company's agreement to co-operate with any investigation relating to the matters outlined in the DPA
- provision for the termination of the DPA if the company engages in a material breach of the terms of the DPA (see section 2.5)
- an agreement to make a DPA publicly accessible after it has been approved by a retired judge (see section 2.4), and
- an agreement to publish the DPA and agreed statement of facts on the CDPP's website, unless exceptional circumstances exist (see section 2.4)."

Unstructured discretion

The terms of a DPA under the Proposed Model may impose a wide variety of obligations including an obligation to pay a fine, an obligation to compensate victims, or an obligation to implement or improve a compliance program.

The discretion conferred is not structured. This unstructured discretion is likely to produce inconsistency and arbitrary choice of some obligations rather than others. A better approach would be to specify a template of the obligations to be included in all DPAs unless there is a compelling justification for not including any of those specified obligations.

Individual accountability

There is no requirement that, as a condition of a DPA, the corporation take internal disciplinary action against the individuals implicated in the offence subject to deferred prosecution. An internal discipline order[5] should be a mandatory term of DPAs.

Redress facilitation

Part 2.3 does not discuss redress facilitation[6] as an alternative to redress.

Attempting to provide compensation to the victims of offences as part of public enforcement proceedings may not be feasible given the large number of victims and/or the likely complexity of assessing the amount of damages payable. However, it may be feasible to require the alleged offender to take certain steps to facilitate the provision of redress in separate civil proceedings for damages.

The settlement agreement between class action plaintiffs and Lufthansa and Swiss International Air Lines in the US in the wake of air cargo price fixing[7] is one of many instructive examples. The agreement sets out cooperation obligations, including an obligation to produce relevant documents and to make directors, officers and employees available to give evidence. These cooperation obligations are comprehensive and detailed. They provide a useful starting point for the drafting of redress facilitation obligations in a DPA.

Fines

The Proposed Model envisages the payment of fines but does not impose maxima or other limits on fines in DPAs.

This open-ended approach is remarkable and highly unsatisfactory. At the least, maxima should be specified together with other constraints on the use of fines (eg where compensation is possible and likely to be a sufficient deterrent).

If fines are imposed, they should be paid into consolidated revenue (contrast the Discussion Paper at p 16). Otherwise there is an unacceptable risk that fines will be allocated for pet projects of a prosecutor or a retired judge supervising a DPA.

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5 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 2006, 30.14, 30.15, 30.16, 30.25; C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) section 6.6.3.

6 B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 Southern California Law Review 1141, 1231–2.

7 In re Air Cargo Shipping Services Antitrust Litigation, 'Settlement Agreement between Air Cargo Plaintiffs and Defendants Deutsche Lufthansa AG, Lufthansa Cargo AG, and Swiss International Air Lines Ltd', Master File 06-MD-1775 (CBA)(VVP), 2006, US District Court, Eastern District of New York, www.aircargosettlement.com.

Admission of liability

It should be made clear that the admission of liability made in a DPA may be relied on in private proceedings by victims of an offence.

Compliance program?

A mandatory term of a DPA should be that an adequate compliance program is in place or will be put in place within a specified time.[8]

Finalising a draft DPA

The Discussion Paper (pp 9-10) does not make it clear that a prosecutor must be satisfied that the mandatory terms of a DPA are met and that other terms of the DPA are satisfactory.

5. Need to integrate the DPA scheme with reactive corporate fault

The Proposed Model does not address the substantive problems occasioned by the current rules governing corporate criminal liability under the Criminal Code and other Commonwealth legislation. One major problem is the unworkability of the definition of corporate fault under the Criminal Code.[9]

Due inquiry into the current rules governing corporate criminal liability under the Criminal Code and other Commonwealth legislation would require consideration of the concept of reactive corporate fault as an additional and alternative basis for the attribution of corporate criminal liability.[10]

DPAs are welcome as a means of reflecting the concept of reactive corporate fault.[11] However, DPAs apply only if there is a reasonable prospect that a corporation could be prosecuted successfully (Discussion Paper pp 9-10) on the basis of the current unsatisfactory rules on corporate fault. With respect, that approach is half-baked. The current fault rules should be revised to include the concept of reactive fault. The concept of reactive corporate fault could and should then be taken as the underlying foundation of

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8 See further B Fisse, 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015) ch 10.

9 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) section 7.4.

10 See B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 Southern California Law Review 1141, 1195-213; C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 251-253.

11 See S Bronitt, 'Regulatory bargaining in the shadows of preventive justice: Deferred prosecution agreements' in T Tulich, R Ananian-Welsh, S Bronitt and S Murray (eds), *Regulating Preventive Justice* (Routledge, 2017) ch 12.

DPAs.[12] The Proposed Model should then be integrated squarely with that concept of reactive corporate fault.

[12] See S Bronitt, 'Regulatory bargaining in the shadows of preventive justice: Deferred prosecution agreements' in T Tulich, R Ananian-Welsh, S Bronitt and S Murray (eds), *Regulating Preventive Justice* (Routledge, 2017) ch 12.