

Deferred prosecution agreements

A new weapon for Australia in its anti-fraud and corruption armoury?

The UK has recently enacted legislation underpinning a major policy shift in its fight against fraud and corruption. Hopes are raised that the adoption of deferred prosecution agreements into the UK legal framework will be a new means for authorities to combat serious economic crime. The UK Attorney General's office has already declared that they will be a new 'weapon in the prosecutor's armoury which will provide them with greater flexibility to pursue an alternative outcome in appropriate cases.'

Already operating in the United States, deferred prosecution agreements allow corporations involved in serious economic crime to avoid a criminal conviction by entering into an agreement with the authorities to defer prosecution. In return, corporations agree to commit to reform and restitution, which will often include the payment of financial penalties.

If adopted in Australia, deferred prosecution agreements would be a revolutionary tool for prosecutors addressing fraud and corruption issues. It had been thought that deferred prosecution agreements would not be appropriate within the Australian constitutional setting but a series of legislative amendments adopted in the UK could it seems be mirrored in Australia negating that concern.

Risks will remain for corporations once negotiations with prosecutors commence.

Deferred prosecution agreements in the US

Deferred prosecution agreements were viewed as an attractive alternative to criminal prosecution in the US from around 1999. This grew largely from the need to find a mechanism to bring corporates to account for criminal violations without inflicting harm on innocent victims. These victims included workers left unemployed as a result of a company being found guilty of an economic crime, as well as affected investors and markets.

They also appeal to corporations, as they provide a complete resolution to allegations of wrongdoing relatively quickly, without causing the company to suffer the potentially devastating consequences of criminal liability, such as loss of licensing or debarment. Adverse publicity is also usually avoided, which is often an overriding consideration for many.

However, the US model has also been widely criticised, particularly as most of the process is extra-judicial. Deferred prosecution agreements in the US largely bypass the formal legal system, raising a number of constitutional and public policy considerations. While, empirically, deferred prosecution agreements have seen high levels of compliance and enforcement, there are also fears that undue prosecutorial advantage is held throughout the process. Critics claim that the emphasis on co-operation and negotiation may mask disproportionate prosecutorial leverage. For example, all admissions made by companies during negotiations may be used in any later prosecution if an agreement is not reached. The prosecuting authority also has a unilateral right to withdraw from negotiations and pursue criminal proceedings using such information.

Notwithstanding the criticism, the number of corporations entering into deferred prosecution agreements in the US has rendered this tool one of the most effective economic crime enforcement processes in the world. The Assistant Attorney General of the US Department of Justice has commented that 'DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe'. Since 2000, it is estimated that monetary recovery in the US as a result of deferred prosecution agreements as well as non-prosecution agreements has totalled more than US\$37 billion in publicly disclosed agreements alone.



The adoption of deferred prosecution agreements in the UK

The introduction of deferred prosecution agreements in the UK has been hailed as a significant step forward in the fight against serious economic crime.

The UK model seeks to incorporate a far greater level of transparency, consistency and judicial involvement than its US counterpart. The Deferred prosecution agreements code of practice provides a clear, unambiguous directive for the negotiation of deferred prosecution agreements, as well as appropriate terms for the agreement. Terms of the agreement must be 'fair, reasonable and proportionate' and will usually include a financial penalty, requirements for future compliance and redress for victims wherever possible.

The UK judiciary will also be highly involved in the process, with judicial approval required of both a negotiation's progress and any final agreement reached. This arguably overcomes the major criticism of the US

model, which many see as operating outside the established legal system.

In the UK, a proposed dilution of the 'prospects of success' standards, required to commence negotiation of a deferred prosecution agreement, will also allow prosecutors to more effectively address corporate wrongdoing. Under this framework, the prosecutor only needs a 'reasonable suspicion' that an offence has been committed (and reasonable expectation that further investigation would provide more evidence), rather than a 'realistic prospect of conviction' as required to commence criminal proceedings. Therefore, a deferred prosecution agreement may be reached between corporations and prosecutors in circumstances where a criminal conviction may otherwise have been unlikely, lengthy or very costly to all parties.

Under the code of practice, a prosecutor may only invite a corporation to negotiate a deferred prosecution agreement if they are satisfied that the public interest will be served in doing so. If a company self-reports, this will

be taken into consideration, weighing against a decision to prosecute. The prosecutor does, however, hold the ultimate discretion as to whether to negotiate and whether to offer the company involved a deferred prosecution agreement at the conclusion of those negotiations.

Therefore, as well as providing options for companies to redress internal compliance measures, potentially reducing financial penalties and providing a means to avoid criminal liability, deferred prosecution agreements also provide UK prosecutors with the necessary means to investigate serious economic crimes and provide restitution to victims.

Fighting fraud and corruption in Australia

The global economic downturn has resulted in a growing widespread acceptance of unethical business practices across the world, according to the twelfth Ernst and Young Global Fraud Survey. Although Australia retains a high compliance rate and low

instances of corruption, a number of its largest trading partners, particularly in Asia-Pacific, rank poorly in corruption comparators. Commentators have pointed out that this makes it likely that many Australian corporations will at some point be exposed to foreign corruption and bribery.

In the financial services industry in Australia, a report on fraud, bribery and corruption by KPMG Australia surveying the 2010-2012 period concluded that A\$322.2 million was lost to fraud, accounting for 86 per cent of the total value of reported fraud loss. The report found that the total value of fraud loss of A\$372.7 million in the period of 2010–2012 has more than tripled since a similar 1997 survey. Out of the 281 respondents to the survey, 43 per cent of respondent firms reported fraud, with a total of 194,454 individual incidents. Further, there were 20 incidents of fraud where over A\$1 million was lost, up from 11 of these incidents during the 2008–2010 period.

Australia has already been criticised by the lack of anti-corruption proceedings under the OECD Anti-Bribery Convention, enacted in 1999. This dearth of enforcement more probably signifies inadequate strategies for prosecution and a lack of incentives for voluntary reporting than it does the absence of fraudulent or corrupt practices among Australian and foreign companies.

Against this backdrop, it is clear that new strategies to address corporate wrongdoing, fraud and corruption would assist Australian authorities and enforcement bodies in their endeavours. A new weapon in the arsenal may be necessary to step up the fight against serious economic crime. The introduction of deferred prosecution agreements into the Australian legal framework would be an effective mechanism to achieve these goals.

The US example has shown that deferred prosecution agreements have the capacity to both encourage and enforce behavioural change amongst corporations, while allowing internal redress in sufficient training and compliance. Negotiated agreements, as opposed to complex investigations and criminal proceedings, are more efficient, less costly and result in a more assured outcome for all parties in many cases. Financial penalties payable under a deferred prosecution agreement also allow both an accrual of government revenue as well as redress for wrongdoing and, in some cases, compensation for victims.

There remains a risk for corporations in entering into deferred prosecution agreement negotiations. There is no assurance that once negotiations are commenced an agreement will be formulated and prosecution deferred. As seen in the US and UK, evidence raised and admissions made by companies throughout negotiations can be used in any later prosecution if an agreement is unable to be reached. The prosecutor may also choose to withdraw unilaterally from negotiations and pursue criminal proceedings based on such information. It is likely that any Australian adoption of deferred prosecution agreements would include similar processes.

Nevertheless, history has also shown that corporations are incentivised by the prospect of entering into a deferred prosecution agreement and avoiding criminal prosecution. This is especially so given the reduction in legal uncertainty and costs, negative publicity and the ability to avoid criminal liability and associated consequences. In the US, companies are increasingly more likely to self-report, thereby improving enforcement rates and outcomes for serious economic crimes.

In Australia, adopting the improvements made to the deferred prosecution agreement framework by the UK legislature (by incorporating a judicial function and oversight) would make deferred prosecution agreements an effective option for authorities here in pursuit of corporate wrongdoers. The potential for alternative and individually negotiated outcomes, as well as heightened levels of voluntary reporting and compliance as provided by deferred prosecution agreements cannot be overlooked. In addressing mounting concerns over fraud and corruption in Australia by both foreign and domestic companies, deferred prosecution agreements would be a welcome additional option for authorities and in many cases, result in a more constructive outcome for corporations.

Reference

UK Sentencing Council, Guideline for sentencing corporate offenders convicted of fraud, bribery and money laundering offences.

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