Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales

Liz Campbell[*]

Abstract

Deferred prosecution agreements ('DPAs') are likely to be introduced in Australia to enable the settlement of criminal proceedings between the Commonwealth Director of Public Prosecutions and corporations. The hope is that DPAs will mitigate the risks and costs of criminal investigation and adjudication, and prove more effective in responding to corporate wrongdoing. This article analyses the DPA scheme in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, looking at its core purposes, animating principles, and placement in the wider legal scheme of corporate accountability. It reflects on the development and embedding of DPAs in the law of England and Wales, which exposes matters that need to be clarified and resolved if DPAs are adopted in Australia. It parses DPAs along three lines: cooperation, compliance, and compensation. These three factors make DPAs more likely to be offered and approved, as well as representing outcomes that DPAs seek to encourage. This article updates and extends existing critiques in Australia and beyond to provide new and concrete proposals for further reform of the proposed DPA scheme.

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[*] Professor & Francine V McNiff Chair of Criminal Jurisprudence, Faculty of Law, Monash University, Melbourne, Victoria, Australia.
Email: liz.campbell@monash.edu; ORCID iD: https://orcid.org/0000-0003-1328-1481.

I Introduction

Addressing corporate wrongdoing through criminal investigation and adjudication in the form of contested prosecution can be risky, costly, protracted, and ineffective, and therefore is an infrequently used tool of last resort for State agencies. Thus, the Australian Parliament proposes to augment the suite of mechanisms available to the Commonwealth Director of Public Prosecutions ('CDPP') by legislation to introduce deferred prosecution agreements ('DPAs').[1] DPAs enable the settling of criminal proceedings, through the agreeing of facts and the construction of terms combined with the imposition of certain conditions on the corporation.

This article centres on the core purpose of DPAs, their animating principles, and their placement in the wider legal and regulatory scheme of corporate accountability in Australia. It draws on comparative insights from England and Wales, due to the legislative similarities and policy transfer evident here. The proposed Australian DPA scheme has been nascent for a number of years, and this reasonably slow trajectory is to our analytical advantage insofar as there is more comparative jurisprudence and experience on which to draw. The article surveys the nine approved English and Welsh DPAs to ascertain matters that need to be resolved if (or perhaps when) DPAs are introduced in Australia. The article examines these DPAs along three principled lines — co-operation, compliance, and compensation — that make DPAs more likely to be offered and approved, and are what DPAs seek to encourage. This article updates and extends existing critiques in Australia and beyond,[2] to provide novel and concrete proposals for further reform of the proposed DPA scheme, as well as analysis relevant to its implementation.

After presenting a brief overview of the proposed DPA framework in Australia, as well as the English and Welsh counterpart, the article assesses the purpose behind their introduction and use in both jurisdictions. It then assesses the core principles of cooperation, compliance, and compensation, considering how these manifest in the approval and content of DPAs in England and Wales. In doing so, the article integrates a review of DPAs in the wider landscape of corporate accountability.

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1 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 2 ('CLACCC Bill 2019').

2 See Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt and Sarah Murray (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211; Liz Campbell, 'Trying Corporations: Why Not Prosecute?' (2019) 31(2) *Current Issues in Criminal Justice* 269; Colin King and Nicholas Lord, 'Deferred Prosecution Agreements in England and Wales: Castles Made of Sand?' [2020] (April) *Public Law* 307; Mark Lewis, 'Deterring Corporate Crime through the Use of Deferred Prosecution Agreements: An Analysis of the Proposed Australian Deferred Prosecution Agreement Regime' (2018) 42(2) *Criminal Law Journal* 76.

II Overview

DPAs are a form of negotiated settlement or 'non-trial resolution',[3] permitting prosecutors to enter into agreements with corporations to defer or suspend criminal proceedings, despite evidence and admissions of corporate wrongdoing. Originating in the United States ('US'), DPAs in various guises have been developed globally,[4] and have been mooted in Australia for the past few years.[5] Progress has been somewhat stilted. The Attorney-General's Department published a Consultation Paper on *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* in 2017.[6] This led to the publication of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) ('CLACCC Bill 2017') and a draft Code of Practice.[7] The CLACCC Bill 2017 was introduced and first read on 6 December 2017, but lapsed at the end of Parliament in July 2019. On 2 December 2019, the Australian Government tabled the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) ('CLACCC Bill 2019) in the Senate. In respect of DPAs, the CLACCC Bill 2019 does not differ greatly from the 2017 iteration. At the same time, the Australian Law Reform Commission ('ALRC') was conducting its inquiry into Australia's corporate criminal responsibility regime. The Discussion Paper included a chapter on DPAs, coming to a somewhat equivocal conclusion on their merits.[8] In its Final Report, the ALRC's focus in respect of DPAs was on recommendations for enhanced judicial oversight.[9] Furthermore, the Senate Legal and Constitutional Affairs Legislation Committee supports the introduction of DPAs.[10] At the time of publication, the 2019 Bill remains before the Australian Senate.

The CLACCC Bill 2019 sch 2 pt 1 inserts provisions into the *Director of Public Prosecutions Act 1983* (Cth) to permit the CDPP to enter into a DPA with a person other than an individual for certain financial and property offences, such as market misconduct and prohibited conduct relating to financial products/services under the *Corporations Act 2001* (Cth), offences under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), the *Autonomous Sanctions Act*

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3 Organisation for Economic Co-operation and Development ('OECD'), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019) 11.

4 See Corruption Watch, *Out of Court, Out of Mind – Do Deferred Prosecution Agreements and Corporate Settlements Deter Overseas Corruption*?; *Resolving Foreign Bribery Cases* (2016).

5 Campbell (n 2).

6 Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, March 2017) <https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx> ('*2017 Consultation Paper*').

7 Attorney-General's Department (Cth), 'Deferred Prosecution Agreement Code of Practice' (Consultation Draft, May 2018) <https://www.ag.gov.au/sites/default/files/2020-03/Deferred-prosecution-agreement-scheme-draft-code-of-practice.pdf> ('*Draft DPA Scheme Code of Practice*').

8 Australian Law Reform Commission ('ALRC'), *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) ch 9 ('*ALRC Corporate Criminal Responsibility Discussion Paper*').

9 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) 495–503 [11.10]–[11.36] ('*ALRC Corporate Criminal Responsibility Report*').

10 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (Committee Report, 17 March 2020) 24–5 [2.65]–[2.71].

2011 (Cth) and various property offences under the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') such as theft, proceeds of crime offences, and bribery of a foreign official.[11] A DPA means that criminal proceedings must not be instituted as long as the corporation meets certain specified conditions set out in the DPA,[12] such as paying a penalty or compensation; cooperating with prosecutions of relevant individuals; reviewing and improving compliance programmes; and appointing a monitor.[13] A DPA will include an agreed statement of facts; conditions to be fulfilled; any financial penalty; and the circumstances that would constitute a material contravention of the agreement.[14] An 'approving officer' (a former judicial officer of a federal/State/Territory court) must review the agreement, and must approve it if satisfied that its terms are 'in the interests of justice', and are 'fair, reasonable and proportionate'.[15] There is no requirement for the authorising officer to give reasons.[16] The ALRC recommends that this power of approval instead be conferred on a judge of the Federal Court of Australia,[17] citing concerns that the conferral of judicial power on an approving officer is unconstitutional and that there is no right for de novo review of any of their decisions.[18]

Both the US and the English and Welsh DPA schemes were cited in the Attorney-General's Department *2017 Consultation Paper*,[19] though the latter model is the more apposite comparator and prototype, due to the equivalent statutory framework, as well as the constitutional and cultural context.[20] In ascribing corporate criminal liability, England and Wales and Australia rely on the identification doctrine, whereby persons who control or manage the affairs of a company are deemed to embody the company itself.[21] Furthermore, the US may be distinguished due to the distinctive and expansive doctrine of *respondeat superior*, according to which the corporation is liable for acts of its employees and agents.[22] For that reason, the English and Welsh law and experience are drawn on here to flesh out the principles behind DPAs in theory and practice.

In England and Wales, a DPA is an agreement between a designated prosecutor (the Serious Fraud Office ('SFO') or the Crown Prosecution Service) and a corporate entity (not an individual) that could be prosecuted for an economic crime to suspend the indictment if the Crown Court approves the agreement.[23] The list of offences eligible for DPAs includes the common law offences of conspiracy to defraud, and cheating the public revenue, as well as offences under the *Theft Act*

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11 CLACCC Bill 2019 (n 1) sch 2 pt 1 s 7 (inserting 17B (Offences to which a DPA may relate) into the *Director of Public Prosecutions Act 1983* (Cth)). The Australian Government has considered the inclusion of other types of crime 'such as environmental crime, tax offences, cartel offences, and offences under workplace health and safety legislation': *2017 Consultation Paper* (n 6) 6.

12 CLACCC Bill 2019 (n 1) s 17A(2).

13 Ibid s 17C(2).

14 Ibid s 17C(1).

15 Ibid s 17D.

16 *ALRC Corporate Criminal Responsibility Report* (n 9) 501 [11.16].

17 Ibid 502 [11.35] and recommendation 20.

18 Ibid 502 [11.33].

19 *2017 Consultation Paper* (n 6) 6, 11, 14–15.

20 Campbell (n 2) 274.

21 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

22 *New York Central & Hudson River Railroad Co v United States*, 212 US 481 (1909).

23 *Crime and Courts Act 2013* (UK) sch 17 pt 1 s 1(1).

1968 (UK), *Proceeds of Crime Act 2002* (UK), *Companies Act 2006* (UK), *Fraud Act 2006* (UK) and *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (UK).[24] The Crown Court must be convinced that the DPA is 'in the interests of justice' and that its terms are 'fair, reasonable and proportionate'.[25] The DPA must contain a statement of facts relating to the alleged offence, which may include admissions by the corporate entity, and may impose a variety of requirements, such as payment of a financial penalty, compensation of victims, charitable or other donations, disgorgement of profits, implementing or altering a compliance programme, and cooperation in any investigation related to the alleged offence.[26]

Section 17H of the CLACCC Bill 2019 limits the use of information gathered in the process of negotiation of DPAs against that corporation. Documents (other than the agreement itself) indicating that the person entered into DPA negotiations, or which were created solely for the purpose of negotiating a DPA, are not admissible in civil or criminal proceedings against it. Such documents include records that the person entered into negotiations for the DPA, any record of such negotiations, and any draft of the DPA, including any draft statement of facts. Section 17H does not affect the admissibility in evidence of any information or document obtained as an indirect consequence of a disclosure of, or any information contained in, any document.[27] This provision does not apply if there has been a proven breach or provision of misleading information, or if the person gives evidence in another proceeding that is inconsistent with these documents. Also, it is important to ascertain the meaning of 'person' in this instance, as it does not include other human individuals, or other corporations. This is noteworthy, as in two agreed DPAs in England and Wales (Serco and G4S C&J), the corporation engaging in misconduct was a wholly owned subsidiary of a larger parent company, and the DPAs included undertakings by the parent companies. Such an approach does not treat the subsidiary as a separate legal entity,[28] as would be the case in Australia, but may in fact be more cognisant of 'the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary'.[29]

Documents created solely for the purpose of negotiating a DPA are not admissible in proceedings against the person in the agreement. Such a sole purpose test had been deployed in the common law regarding legal professional privilege until *Esso Australia Resources Ltd v Commissioner of Taxation*, where the High Court disputed the appearance of the test as a 'bright-line test, easily understood and capable of ready application'.[30] Gleeson CJ, Gaudron and Gummow JJ observed that rigid application of this test would mean that 'one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though,

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24 Ibid sch 17 pt 2 ss 15–17, 20, 23–25, 27.
25 Ibid sch 17 pt 2 ss 7(1), 8(1).
26 Ibid sch 17 pt 1 ss 5(1)–(3).
27 CLACCC Bill 2019 (n 1) s 17H(4).
28 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.
29 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577.
30 *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49, 72 [58] (Gleeson CJ, Gaudron and Gummow JJ) ('*Esso*').

without the legal purpose, the document would never have come into existence, will defeat the privilege'.[31] This suggests that a comparable alternative purpose would render the materials related to DPA negotiations admissible in Australia. Similarly, in England and Wales material created solely for the purpose of preparing the DPA or statement of facts on a prosecution for an offence consisting of the provision of inaccurate information is not admissible.[32] Material that shows a person entered into negotiations for a DPA is not admissible.[33] This includes any draft of the DPA or draft of a statement of facts intended to be included within the DPA, any statement indicating that they entered into such negotiations.[34] Apart from this,

> 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 [them], or against anyone else (so far as the rules of evidence permit).[35]

So, where information is obtained by the prosecutor during the DPA negotiation period, but where a DPA has not been concluded and the prosecutor chooses to pursue criminal proceedings against them, such information may be used.[36] Such proceedings are yet to occur in England and Wales. Moreover, unless criminal proceedings are pursued, or the DPA has been approved, the process and content of discussions will not be disclosed to the public.

III Purpose

The introduction of DPAs is designed to enhance the range of measures available to the State in responding to corporate wrongdoing. It is also designed to move away from the orthodox binary choice in the criminal context between prosecution or no proceedings at all to something more nuanced and potentially more interventionist. DPAs are seen to enhance the prospect of at least some degree of corporate accountability, and may be more appealing to corporations and prosecutors alike in terms of predictability, cost, timing and outcome. Moreover, the terms of DPAs may increase the likelihood of effecting behavioural and cultural change within corporations,[37] though the US experience undermines claims about this potential impact.[38]

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31 Ibid 72 [58].

32 *Crime and Courts Act 2013* (UK) (n 23) sch 17 pt 13(4) and (6).

33 Ibid.

34 Ibid.

35 Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (February 2014) 9 [4.5] <https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf> ('*UK DPA Code of Practice*').

36 Ibid 9 [4.4].

37 See *2017 Consultation Paper* (n 6) 11; Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8(1) *Journal of Legal Analysis* 191, 200–3.

38 HSBC is a prime example of this, with multiple DPAs in the US, as well as settlements in Switzerland: Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014) 102. There is a growing list of repeat corporate offenders who have resolved more than one enforcement action under the *Foreign Corrupt Practices Act of 1977*, Pub L No 95-213, 91 Stat 1494: <https://fcpaprofessor.com/corporate-fcpa-repeat-offenders-4/>. Moreover, Parker and Nielsen found that in Australia 'some elements of compliance systems can translate into good management of compliance[,] [b]ut management commitment to compliance values, managerial

In Australia, DPAs would be located within the existing suite of regulatory mechanisms and potential public enforcement actions ranging from enforceable undertakings through to contested prosecution. The Attorney-General's Department has noted that:

> To ensure effective and efficient responses to serious corporate crime, investigators and prosecutors need a range of tools. … Negotiated settlements are used in some contexts for the regulation of companies, including [the Australian Securities and Investments Commission ('ASIC')] ASIC's use of enforceable undertakings. These are used as a supplementary tool in matters in which criminal proceedings are undertaken. Faced with an increasingly complex and serious threat environment, there may be scope to increase the options available to respond quickly and effectively to offending by companies, by allowing for negotiated settlements through a DPA scheme.[39]

Though ASIC's use of enforceable undertakings has been criticised, this is not necessarily fatal to DPAs.[40] In the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Commissioner Hayne found that enforceable undertakings had been negotiated and agreed to by ASIC on terms that the entity admitted no more than that ASIC had reasonably based 'concerns' about its conduct.[41] This would be guarded against in respect of DPAs by requiring detailed admissions by corporations.

In Australia, the timelines for investigation and prosecution of suspected corporate crime are remarkably protracted, and contested trials are not common. In terms of duration, some cases about overseas bribery, such as those involving Securency International Pty Ltd, a Reserve Bank of Australia subsidiary, took more than a decade,[42] with similar timeframes in respect of actions for financial misconduct.[43] While DPA investigations and processes are not necessarily much swifter,[44] the hope is to place some responsibility on the corporation with regard to

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oversight and planning, and organizational resources are just as important': see Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(1) *Administration & Society* 3, 3.

39 Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Public Consultation Paper, March 2016) <https://documents.pub/reader/full/deferred-prosecution-agreements-discussion-paper> 6–7.

40 See Campbell (n 2) 272.

41 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) vol 1, xix [2.2].

42 Commonwealth Director of Public Prosecutions, 'Case Report: Securency and Note Printing Australia Foreign Bribery Prosecutions Finalised' (Web Page, 2018) <https://www.cdpp.gov.au/case-reports/securency-and-note-printing-australia-foreign-bribery-prosecutions-finalised>.

43 For example, a financial advice company, Storm Financial, collapsed in 2009 after giving inappropriate advice to many investors. ASIC commenced civil penalty proceedings against the company's directors in 2010. The Federal Court found in favour of ASIC in *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 and the Full Federal Court dismissed an appeal in *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533. See also *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, cited in *ALRC Corporate Criminal Responsibility Report* (n 9) 112 [3.103].

44 In terms of English DPAs:

- Standard Bank self-reported its concerns to the United Kingdom ('UK') Serious Fraud Office ('SFO') and instructed an internal investigation with disclosure of those findings to the SFO in April 2013, with the DPA approved in 2015 (see *Standard Bank* (n 187));

internal investigation and information provision, to mitigate issues of resource and risk. As for frequency, the ALRC found that prosecutions against corporations in Australia are 'relatively rare', and 'often not pursued due to practical difficulties and perceived low prospects of success'; usually they are 'long, complex, and contested by well-resourced defendants'; and when pursued are deployed as a 'broader strategy to pursue the responsible individuals … and/or because a greater penalty is seen to be warranted' than would be available under other mechanisms.[45] In the 2018–19 financial year, less than 1% of defendants in cases finalised in Australian criminal courts were organisations.[46] Moreover, '[c]harges against organisations are frequently withdrawn by the prosecution', at around three times the rate for individuals.[47] 'Between 30 June 2009 and 30 June 2019, the CDPP commenced a total of 13 prosecutions against corporations for offences under the *Criminal Code*', seven of which 'resulted in convictions, each after a plea of guilty'.[48] Just one matter went to trial in that decade.[49] 'Between 30 June 2009 and 30 June 2019, the CDPP commenced a total of 567 prosecutions against corporations under statutes other than the *Criminal Code*', of which 423 resulted in a plea or guilty verdict.[50] Between 30 June 2015 and 30 June 2019, 'ASIC referred between 35 and 50 briefs of evidence to the CDPP annually'.[51] In this five-year period, 194 matters prosecuted by the CDPP on referral from ASIC were finalised.[52] A significant proportion of these were for offences under the *Corporations Act 2001* (Cth), so it is conceivable that some such referrals might lead to the opening of DPA negotiations.

It is intended that the introduction of DPAs will encourage corporate self-reporting, which could increase these numbers, although not all such reports will lead to prosecution, or to the negotiation of a DPA.[53] Serious corporate crime cases

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- Sarclad's in-house counsel disclosed findings of its internal investigations to the SFO in January 2013, with the DPA approved in July 2016 (see *Sarclad* (n 111));
- Rolls-Royce's investigation was announced December 2013 by SFO press release, with the DPA approved January 2017 (see *Rolls-Royce* (n 86));
- Tesco's investigation was announced in October 2014, with the DPA approved in April 2017 (see *Tesco* (n 102));
- the Serco investigation was opened by SFO in October 2013 with the DPA approved in July 2019 (see *Serco* (n 157));
- the SFO investigation of Güralp Systems Ltd ('GSL') began in December 2015, with the DPA approved in October 2019 (see *GSL* (n 84));
- the Airbus SE investigation opened in 2016 with the DPA approved in January 2020 (see *Airbus* (n 79)), and
- the SFO opened its investigation into G4S C&J in 2013, with the DPA approved in July 2020 (see *G4S C&J* (n 61)).

45 *ALRC Corporate Criminal Responsibility Discussion Paper* (n 8) 75 [3.56].

46 *ALRC Corporate Criminal Responsibility Report* (n 9) 97 [3.73].

47 Ibid 114 [3.106].

48 *ALRC Corporate Criminal Responsibility Discussion Paper* (n 8) 75 [3.57].

49 Ibid.

50 Ibid 78 [3.61].

51 Ibid 80 [3.67].

52 Ibid 81 [3.68].

53 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [10], [192]. In the UK, numerous self-reported matters are not prosecuted, such as in respect of ABB Ltd, a Swiss robotics/automation technology company. The SFO was investigating the activities of ABB Ltd's UK subsidiaries, their officers, employees and agents for suspected bribery and corruption. The investigation was announced on February 2017 following a self-report

may be dropped due to lack of evidence, the public interest, or national security concerns.[54] All of this, however, underlines how rare contested corporate prosecutions are, and how matters might be improved by adding to the CDPP's tools. Moreover, in a hard-headed sense, one could see DPAs as enabling similar outcomes to conviction and guilty pleas. While there may be none of the quintessential 'calling to account' as occurs in the course of a criminal trial and sentencing,[55] the corporation still needs to narrate its wrongdoings in an agreed statement of fact, it must address its wrongdoing in terms of compliance, and it is likely to pay a penalty, akin to post-conviction punishment. In contrast to prosecutions, which might culminate in acquittal, DPAs avoid this inherent risk by settling matters.

Furthermore, DPA negotiations between enforcement authorities and corporations enable what has been conceptualised as the 'bundling' of allegations as well as enforcement actions.[56] 'Allegation bundling' is where 'the terms of settlements often include a basket of allegations widely spread across time and geography'.[57] 'Enforcement bundling' involves 'a set of distinct enforcement authorities with overlapping jurisdiction'.[58] Bundling can mitigate issues regarding lack of evidence or weaknesses in cases. It enables 'comprehensive resolutions with organisations that engaged in major corruption schemes',[59] providing efficiencies on both sides: enforcement agencies can collaborate as well as merge charges of differing strengths, while companies may avoid the light being shone on all wrongdoing.

It is instructive to use this concept of bundling to interpret the DPA with G4S C&J.[60] Although G4S C&J engaged in inaccurate reporting of cost efficiencies across a six-year period, its criminal liability related to a period of approximately 12

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by representatives acting on behalf of ABB. It was related to an ongoing investigation into Unaoil (announced 19 July 2016). The SFO concluded in 2020 that the case did not meet the relevant test for prosecution as defined in the Code for Crown Prosecutors: Serious Fraud Office, 'SFO Closes Its Investigation into ABB Ltd', *Case Updates* (Web Page, 19 May 2020) <https://www.sfo.gov.uk/2020/05/19/sfo-closes-its-investigation-into-abb-ltd/>. Another example is ALCA Fasteners Ltd, which the SFO began investigating in December 2017 for suspected bribery and money laundering, prompted by a self-referral. The company owner pleaded guilty to bribery in 2019. The SFO stated subsequently that ACLA and its new directors cooperated fully with the investigation, and that no further action would be taken: Serious Fraud Office, 'ALCA Fasteners Ltd', *Case Information* (Web Page, 12 February 2021) <https://www.sfo.gov.uk/cases/alca-fasteners-ltd/>.

54 For an assessment of the lawfulness of the SFO Director's decision to halt a criminal investigation into allegations of corruption against BAE Systems plc on national security public interest grounds following a threat from Saudi representatives, see *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 6; Andrew Roberts, 'Prosecution: Director of SFO — Lawfulness of Decision to Discontinue Prosecution' (2009) 1 *Criminal Law Review* 46; Michael Zander QC , 'When Caving in is Lawful' (2008) 158(7334) *New Law Journal*.

55 Anthony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: Judgment and Calling to Account* (Hart Publishing, 2006); King and Lord (n 2).

56 Branislav Hock, 'Policing Corporate Bribery: Negotiated Settlements and Bundling' (2020) *Policing and Society* 1 <https://doi.org/10.1080/10439463.2020.1808650>.

57 Ibid 1.

58 Ibid 1–2.

59 Ibid 2.

60 *Serious Fraud Office v G4S Care and Justice Services (UK) Ltd* (Deferred Prosecution Agreement, 17 July 2020) <https://www.judiciary.uk/judgments/sfo-v-g4s/> ('*G4S C&J DPA*').

months between 2011 and 2012.[61] Though such a choice regarding the charge might occur in relation to conventional prosecutions, the process of negotiation and interaction in DPAs renders this more likely. This is quintessential allegation bundling or, more sceptically, a downplaying of the gravity and extent of the harms.[62] Also notable is the conclusion of the Court that the conduct of G4S C&J appeared to be motivated by 'a desire to conceal unanticipated cost efficiencies', rather than overtly attempting to defraud the Ministry of Justice from the outset.[63] This is a remarkably benign view, given the nature and duration of the misreporting, and the favourable implications of so doing for the corporation.

As detailed below, DPAs can permit more intervention and ongoing oversight than would usually occur post-conviction, and so may be more cognisant of the complexity and reality of wrongdoing as well as reform efforts. While there is no evidence that DPAs, whether domestic or multi-jurisdictional, prevent future misconduct or crime,[64] they could be an improvement on no or failed prosecutions. A further aim of DPAs is to alter behaviour without destruction of the company, though the extent to which this 'corporate death penalty' is likely after conviction has been debunked in the US.[65] Practically speaking, the introduction of DPAs would align Australia with other jurisdictions.[66] This is preferable for large corporations with global footprints, who benefit from DPAs and may prefer consistency between jurisdictions. In addition, regulatory and law enforcement agencies benefit from the uniformity as well as the ability to negotiate terms in conjunction with overseas agencies in respect of corporations. There is, of course, a recurring and fair criticism that DPAs are offered to, and favour, bigger and more powerful companies,[67] while smaller companies are more likely to be prosecuted and so will not benefit from such efficiency gains.

IV Principles

DPAs have been described as representing a new form of justice, a hybrid model of legal responsibility whereby civil penalties and settlements, rather than criminal

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61 *Serious Fraud Office v G4S Care and Justice Services (UK) Ltd* (Southwark Crown Court, Davis J, 17 July 2020) [25] ('*G4S C&J*').

62 Steve Tombs and David Whyte, 'The Shifting Imaginaries of Corporate Crime' (2020) 1(1) *Journal of White Collar and Corporate Crime* 16.

63 *G4S C&J* (n 61) [20].

64 Campbell (n 2) 282.

65 The much-cited example is the collapse of accounting firm Arthur Andersen LLP in the US: Jonathan D Glater, 'Last Task at Andersen: Turning Out the Lights', *New York Times* (online, 30 August 2002) <https://www.nytimes.com/2002/08/30/business/last-task-at-andersen-turning-out-the-lights.html>; Susan E Squires, Cynthia J Smith, Lorna McDougall and William R Yeack, *Inside Arthur Andersen: Shifting Values, Unexpected Consequences* (Cisco Press, 2003). Markoff's research found that no publicly traded company failed because of a conviction between 2001 and 2010: Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) *University of Pennsylvania Journal of Business Law* 797, 797–8.

66 OECD (n 3).

67 See Brandon L Garrett, 'Declining Corporate Prosecutions' (2020) 57(1) *American Criminal Law Review* 109, 137.

processes, are the dominant regulatory norm.[68] This novel mode of justice prioritises negotiation and pragmatism in respect of corporations, against whom conventional criminal proceedings are often unfeasible or unsuccessful.[69]

The *Draft DPA Scheme Code of Practice* does not outline governing principles explicitly, though these, as well as DPAs' purposes, may be gleaned throughout:

> The aim of an Australian DPA scheme is to enhance the ability of investigators and prosecutors to identify and address serious corporate crime by encouraging corporations to self-report misconduct and cooperate with law enforcement. In appropriate cases, DPAs would provide a more effective and efficient way of holding offending corporations to account without the cost and uncertainty of a criminal trial.[70]

The lack of a principled basis and clear purpose for the negotiation and approval of DPAs in England and Wales has been criticised, leading to what is described as 'haphazard' practice.[71] Indeed, there are issues regarding the lack of a principled grounding in legislation, as well as how DPAs have been operationalised. That said, it appears more that practice is organic, evolving and rather too generous to corporations, than haphazard per se, since there is an inherent logic to it.

Despite the absence of articulated principles in the relevant legislation, this article suggests that DPAs seek to enable, and are predicated on, a number of core principles that include cooperation, compliance, and compensation. As indicated above in Part II, this is exemplified by ss 17A(2) and 17C(2) of the CLACCC Bill 2019, which provide that a DPA means that criminal proceedings must not be instituted, as long as the corporation complies with certain conditions, such as paying a penalty or compensation; cooperating with prosecutions of individuals; reviewing and improving compliance programmes. The core principles are relevant both in approving DPAs, as well as in the terms that are required to be agreed and adhered to.

Unlike in the context of sentencing,[72] there is no overt statutory basis for these underlying principles, though there are public interest factors that guide negotiations for a DPA and any subsequent approval of its terms.[73] As noted previously, under the proposed Australian DPA scheme the CDPP will enter into DPA negotiations only if they are in the public interest.[74] The approving officer must approve the agreement if satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate.[75] The corporation's level of cooperation with law enforcement constitutes a 'particularly influential public interest factor'.[76] Other public interest factors include:

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68 Bronitt (n 2) 211, 225.
69 Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave, 2017).
70 *Draft DPA Scheme Code of Practice* (n 7) 1 (explanatory note).
71 King and Lord (n 2) 308.
72 See *Crimes Act 1914* (Cth) s 16A.
73 See Campbell (n 2) 275–6.
74 *Draft DPA Scheme Code of Practice* (n 7) 4 [2.4].
75 Ibid 15 [4.8].
76 Ibid 20 [7.3].

- whether, when, and the extent to which the corporation self-reported;
- whether there is a history or culture of similar conduct or other legal breaches;
- whether the corporation has taken steps to avoid a recurrence;
- whether significant harm was caused to the integrity or confidence of markets or governments;
- whether the corporation withheld material required for the effective investigation and prosecution of individuals;
- the timing of the offending and whether the corporation in its current form essentially is a different entity from the offending one;
- whether the collateral consequences of any court-imposed penalty would be disproportionate; and
- whether conviction is likely to have significant and disproportionate effects on the public, employees, shareholders or members of a superannuation scheme.[77]

Returning to extant English and Welsh case law, as summarised in Table 1 at the end of this article, we will see that these principles of cooperation, compliance, and compensation are emerging as retrospective justification in an iterative fashion, rather than forming the basis for the initiation and approval of DPAs, strictly speaking. Their interpretation by both prosecutors and the courts has been liberal in assessment of corporate acts and timeframes, indicating that they are *post hoc* rationalisations rather than pre-animating motivations. In essence, the emerging body of DPAs in England and Wales is helping to clarify and crystallise the core principles, which is helpful for the ongoing legislative process in Australia.

A *Cooperation*

Under Australia's proposed DPA scheme, corporate cooperation (such as self-reporting of wrongdoing, disclosure of information, waiver of legal privilege, and making individuals available for interview) increases the likelihood of a DPA being offered, negotiated, and approved; cooperation is also required in the finalised DPA terms.[78] It can also lead to a discount of the total pecuniary penalty imposed.[79] As noted above, the corporation's level of cooperation with law enforcement is a 'particularly influential public interest factor' in determining the appropriateness of

[77] Ibid 19–20 [7.1].
[78] CLACCC Bill 2019 (n 1) s 17C(2)(a)(v).
[79] *Director of the Serious Fraud Office v Airbus SE* (Southwark Crown Court, Sharp P, 31 January 2020) [112] ('*Airbus*').

deferring prosecution.[80] Another public interest factor is whether, when, and the extent to which the corporation self-reported.[81]

Corporate cooperation is also among the public interest factors that favour deferred prosecution in England and Wales.[82] Cooperation usually refers to 'past and future' cooperation in the DPA process.[83] Once the DPA is finalised, cooperation becomes a continuing obligation.[84] Hence, in evaluating the public interest factors, courts will consider not only the terms required in the DPA for future cooperation, but also the corporation's past cooperation with the SFO. For example, in relation to both the Airbus and Rolls-Royce DPAs, the Court described their past cooperation as 'exemplary'[85] and 'extraordinary',[86] rather generously it must be said. What is relevant is the level and quality of the past cooperation, which includes any self-reporting by the corporation.[87] Airbus cooperated 'to the fullest extent possible' after a 'slow start':[88] though initially it was sluggish in coming forward, rigorous investigations followed, with continued steps taken to prevent wrongdoing, as well an internal review.[89] Notably, acceptance of the extraterritorial powers of the SFO under the *Bribery Act 2010* (UK) and thus its jurisdiction was included as evidence of Airbus's cooperation. Airbus is registered in the Netherlands, but it is considered a 'relevant commercial organisation' under s 7 of the *Bribery Act 2010* (UK) because part of its business is carried out in the United Kingdom ('UK').[90] Dame Victoria Sharp noted that accepting the SFO's jurisdiction 'was an unprecedented step for a Dutch and French domiciled company to take, in respect of the reporting of conduct which had taken place almost exclusively overseas'.[91] Indeed, one could speculate that Airbus's main reason for accepting jurisdiction might have been to increase its chances of getting a DPA.

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80 *Draft DPA Scheme Code of Practice* (n 7) 20 [7.3]. See also above nn 73–7 and accompanying text.

81 Ibid 21 [7.5]. Self-reporting is a central dimension of routine corporate compliance and disclosure. The reporting of suspected misconduct may generate criminal investigations or charges, but is often met with leniency.

82 *UK DPA Code of Practice* (n 35) 5 [2.8.2]; *Airbus* (n 79) [61].

83 *Serious Fraud Office v Standard Bank Plc* (Deferred Prosecution Agreement, 30 November 2015) [6(i)] <https://www.sfo.gov.uk/cases/standard-bank-plc/> ('*Standard Bank DPA*'); *Director of the Serious Fraud Office v Airbus SE* (Deferred Prosecution Agreement, 31 January 2020) [5(b)] <https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/> ('*Airbus DPA*').

84 See, eg, *Airbus* (n 79) [114]. See also *Serious Fraud Office v Güralp Systems Ltd* [2020] Lloyd's Rep FC 90, [31] (Davis J) ('*GSL*').

85 *Airbus* (n 79) [73], [87], [112].

86 *Serious Fraud Office v Rolls-Royce Plc* [2017] Lloyd's Rep FC 249, [121] ('*Rolls-Royce*').

87 *Airbus* (n 79) [68].

88 Ibid [69].

89 Ibid [70]–[73].

90 Ibid [21].

91 Ibid [72].

1 *Self-Reporting*

While DPAs seek to incentivise self-reporting,[92] such reporting is not a prerequisite for a corporation to be regarded as cooperative,[93] as was made clear in *Rolls-Royce* and *Airbus*. In *Rolls-Royce*, the SFO's investigation was triggered initially by a whistleblower's online posts, whereas the catalyst for reporting in *Airbus* was an audit by a government body: UK Export Finance. *Airbus* suggests that while self-reporting is a crucial factor, what matters more is the thoroughness of the reporting, not necessarily the order of or motivation for reporting.

> It would be wrong to look at the issue of self-reporting purely from the perspective of the first report of wrongdoing, however. Even if the prosecuting authorities became aware of the relevant conduct by the actions of a third party, if subsequent self-reporting or co-operation overall, is of a high quality and brings significant wrongdoing to light that would not otherwise have come to the attention of the authorities, this will be a significant factor in favour of a DPA: see *Rolls Royce* para 22 of the final judgment and *Sarclad* at paras 37 to 38 of the preliminary judgment. To that extent, there is no necessary bright line between self-reporting and co-operation.[94]

It is of note that an Airbus subsidiary, GPT Special Project Management Ltd ('GPT'), was investigated separately by the SFO, outside the DPA settlement. Thus, this subsidiary is not caught by the cooperation requirements of the agreed DPA. The SFO announced the GPT investigation in August 2012. On 30 July 2020 it brought charges against GPT and three individuals in connection with the conduct of GPT's business in the Kingdom of Saudi Arabia.[95] GPT is alleged to have paid at least £14 million in bribes to secure a £2 billion military contract with the Saudi Arabian Government.[96] It does not appear that this was regarded as relevant to the DPA with Airbus.

2 *Timing and Level of Cooperation*

The *G4S C&J DPA* reinforced the centrality, yet flexibility, of the concept of cooperation. In 2013, the UK Ministry of Justice notified the SFO of its concerns that G4S C&J had raised invoices for the electronic monitoring of offenders when no monitoring was taking place, and then raised a further concern that G4S C&J had

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92 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [10], [192].

93 *Draft DPA Scheme Code of Practice* (n 7) 21 [7.5]. The SFO's guidance on corporate self-reporting was revised in October 2012: 'Corporate Self-Reporting', *Serious Fraud Office* (Web Page, October 2012) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/>.

94 Ibid [68].

95 Serious Fraud Office, 'GPT Special Project Management Ltd', *Case Information* (Web Page, 30 July 2020) <https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd/>; Serious Fraud Office, 'SFO Charges GPT and Three Individuals following Corruption Investigation' (News Release, 30 July 2020) <https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd/>.

96 GPT had just one contract with the UK Ministry of Defence. The company reported that its contract with the Ministry was due to end and that it had no intention to renew or seek other business: see 'GPT Special Project Management Ltd: Annual Report and Financial Statements', *Compliance Week* (online, 31 December 2018).

not complied with its financial reporting obligations.[97] Early in 2014, G4S C&J self-reported to the SFO that it had discovered material indicating that it had failed to provide accurate financial reports to the Ministry of Justice.[98] Though G4S C&J cooperated from the outset, the level of cooperation increased significantly in October 2019, by providing access to all interviews conducted by its solicitors and accountants, responding voluntarily to SFO investigative requests and providing digital and hardcopy material to the SFO or notifying the SFO of when and how data had been destroyed.[99]

The Court noted that G4S C&J's 'less than full cooperation with the SFO investigation until a relatively late stage point[ed] to the public interest being properly served by prosecution of G4S C&J'.[100] Having said that, the Court then was prepared to look at the 'overall level of co-operation' and concluded that the 'initial reluctance to cooperate fully can be dealt with when considering the discount on any financial penalty'.[101] This is another variation from the initial interpretation of cooperation.

3 *Cooperation regarding Individuals*

DPAs co-exist alongside conventional actions against individuals, and indeed are hoped to improve the likelihood of successful prosecutions, given that the corporation itself 'will ordinarily be the main repository of material relevant to the prosecution of individuals'.[102] Cooperation regarding individuals is a public interest factor against corporate prosecution in the Code of Practice issued under the *Crime and Courts Act 2013* (UK),[103] so it is incentivised, though not a mandatory condition of/for DPA negotiations. Similarly the 2018 Australian Draft Code provides that 'a corporation participating in DPA negotiations will typically be expected to cooperate in any investigation and prosecution against culpable individuals'.[104] Sensibly, calls have been made for this to be mandatory.[105] Moreover, one of public interest factors in the Draft Code is 'whether a corporation has withheld material that is required for the effective investigation and … prosecution of individuals involved in the offending conduct'.[106] Again, such withholding should weigh heavily against deferring prosecution, if not preclude it altogether.

The optimum balance between pursuit of corporate and human actors is not settled. Garrett's research in the US indicates that DPAs and non-prosecution

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97 *G4S C&J* (n 61) [4].
98 Ibid.
99 Ibid [23].
100 Ibid [26].
101 Ibid [27].
102 *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep FC 283, [73] (Leveson P) ('*Tesco*').
103 *UK DPA Code of Practice* (n 35) 5 [2.8.2].
104 *Draft DPA Scheme Code of Practice* (n 7) 2 [1.5].
105 Brent Fisse, Submission to Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (1 May 2017) 4 <https://www.brentfisse.com/images/FisseSubmissiononDPA1May2017.pdf>; Campbell (n 2) 284.
106 *Draft DPA Scheme Code of Practice* (n 7) 19 [7.1].

agreements are not accompanied by prosecutions of individuals typically,[107] and that when employees *have* been charged, 'most were not higher-up officers of the companies, but rather middle managers of one kind or another and also some quite low-level individuals'.[108] It is instructive to look to England and Wales to ascertain whether this trend is replicated there, and if so, how best to address this. As Table 1 shows, of the nine DPAs secured by the SFO to date, individuals alleged to be involved in the corporate wrongdoing have been prosecuted in four instances (Sarclad, Tesco, GSL, and Serco). In every case, the individuals implicated were acquitted.[109]

The Managing Director of Sarclad (Michael Sorby), Head of Sales (Adrian Leek) and Project Manager (David Justice) were charged with conspiring with agents to agree to bribes regarding 27 overseas contracts.[110] All had left the company by the time the DPA was approved.[111] All were acquitted on 16 July 2019. There is little other information available in relation to the prosecutions, though the jury at Southwark Crown Court obviously was not convinced by the SFO case. In relation to Tesco, Carl Rogberg (Financial Director); John Scouler (Commercial Director of Food); and Christopher Bush (Managing Director) were charged on 9 September 2016 with false accounting under s 17 of the *Theft Act 1968* (UK) and fraud under s 4(1) of the *Fraud Act 2006* (UK).[112] On 26 November 2018, Sir John Royce held at first instance that there was no case to answer in relation to Bush and Scouler, and Rogberg's trial was severed due to his ill-health.[113] On 5 December 2018, the Court of Appeal upheld the trial decision, noting that while the jury had heard from 30 witnesses with over 3,000 pages of evidence, there was no independent accountancy expert evidence that the accused had contributed to the illegitimate accounting and underlying fraud.[114] This meant that the prosecution could not differentiate between differing streams of improperly recognised income, nor could it prove the extent of any alleged fraud or the underlying breaches of accountancy practice.[115] Moreover, the SFO had failed to provide sufficient evidence such that

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107 Garrett (n 67).

108 Brandon L Garrett, 'The Corporate Criminal as Scapegoat' (2015) 101(7) *Virginia Law Review* 1789, 1802.

109 The trial of *R v Woods and Marshall* (Serco's Finance Director and Operations Director of Field Services) commenced on 31 March 2021 before Southwark Crown Court, but the case was withdrawn in late April 2021 by the Serious Fraud Office: Serious Fraud Office, 'Serco', *Case Information* (Web Page, 2021) <https://www.sfo.gov.uk/cases/serco/>.

110 Serious Fraud Office, 'Three Individuals Acquitted as SFO Confirms DPA with Sarclad' (News Release, 16 July 2019) <https://www.sfo.gov.uk/2019/07/16/three-individuals-acquitted-as-sfo-confirms-dpa-with-sarclad/>.

111 *Serious Fraud Office v Sarclad Ltd* [2016] Lloyd's Rep FC 509, [6] (Leveson P) ('*Sarclad*').

112 Jane Croft and Jonathan Eley, 'Tesco Fraud Trial Collapse Puts Deferred Prosecution Deals in the Dock: Store Chain Criticised for "Throwing Executives under the Bus" Over Accounting Scandal', *Financial Times* (online, 24 January 2019) <https://www.ft.com/content/b6c2b688-1f29-11e9-b126-46fc3ad87c65>; Serious Fraud Office, 'Tesco PLC', *Case Information* (Web Page, 23 September 2020) <https://www.sfo.gov.uk/cases/tesco-plc/>.

113 *R v Bush* [2019] EWCA 29 (Crim) [3]–[4] ('*Bush*'); 'I Should Never Have Been Charged — Former Tesco Director', *BBC News* (online, 23 January 2019) <https://www.bbc.com/news/business-46970604>; 'Former Tesco Director Carl Rogberg Cleared of Fraud over 2014 Scandal', *Reuters* (online, 23 January 2019) <https://www.reuters.com/article/britain-tesco-fraud/-former-tesco-director-carl-rogberg-cleared-of-fraud-over-2014-scandal-idUSL8N1ZM5K7>.

114 *Bush* (n 113) [4], [26], [59], [61], [125].

115 Ibid [125].

any reasonable jury properly directed could be sure that Bush knew that income had been improperly recognised. This meant there was no case to answer on either count.[116] So the heart of the matter was the insufficiency of evidence. Furthermore, all three applied unsuccessfully to Leveson P to have their details redacted from the *Tesco* DPA judgment, due to their acquittals.[117] The basis for redaction was that the DPA 'related only to the potential criminal liability of Tesco and did not address whether liability of any sort attached to Tesco Plc or any employee, agent'.[118]

Regarding GSL, founder Cansun Güralp, head of sales Natalie Pearce, and Finance Director Andrew Bell were charged in 2018 with conspiracy to make corrupt payments contrary to s 1(1) of the *Criminal Law Act 1977* (UK).[119] The SFO alleged that Güralp and Pearce conspired to bribe a South Korean public official to help secure contracts for GSL between 2002 and 2015.[17] In the final judgment approving the DPA, Davis J stated that Güralp and the official signed an agreement, according to which the official would provide support and advice to GSL in the Korean market and would recommend GSL products to buyers; and that GSL made payments of approximately US$1 million to the official.[120] All were acquitted in December 2019.[121] This outcome is cause for concern when viewed through the lens of the DPA. In the GSL final judgment, the Court found that '[t]he criminal conduct was planned by senior officers and employees of the company and it continued over many years.'[122] These findings are hard to reconcile with the outcome of the individual cases, given the inability of the SFO to persuade juries of the criminal culpability of the individuals involved.

Airbus also makes reference to actions against individuals, and the possible implications of naming them:

> There are ongoing investigations in respect of a number of individual suspects in this jurisdiction and abroad. It is appropriate to protect the rights of the suspects to a fair trial. In addition some of the individuals involved in the relevant conduct are based in jurisdictions where there are human rights concerns, and the death penalty exists for corruption. Further, the intermediary companies used by Airbus were often made up of a few individuals. Naming the companies would therefore be tantamount to naming those individuals.[123]

The trial of *R v Woods and Marshall* (Serco's Finance Director and Operations Director of Field Services) commenced on 31 March 2021 before Southwark Crown Court. By the end of April 2021, however, the case against the defendants had been withdrawn, due to problems identified with the Crown's disclosure of evidence to the defendants.[124]

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116 Ibid [68].
117 Croft and Eley (n 112).
118 Ibid.
119 Serious Fraud Office, 'Three Individuals Acquitted as SFO confirms DPA with Güralp Systems Ltd' (News Release, 20 December 2019) <https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/>.
120 *GSL* (n 84) [13]–[14].
121 Serious Fraud Office (n 119).
122 *GSL* (n 84) [25].
123 *Airbus* (n 79) [13].
124 Serious Fraud Office (n 109).

The SFO has been subject to criticism for its inability to hold individuals accountable,[125] despite the 'cooperation' of companies pursuant to the terms of the relevant DPA. The crux of the matter seems to be a paucity of adequate evidence against the individuals involved, which would satisfy the standard of proof in a criminal trial before a jury. Against this are issues of procedural, as well as substantive, fairness for the individuals involved, who may be implicated and impugned by their naming in a DPA before trial. None of this is cause for optimism regarding the prosecution of individuals for corporate crimes in Australia, if DPAs are sought to improve the current state of affairs of senior management accountability for wrongdoing. The provision of information by corporations regarding individuals should be a prerequisite, and fuller elaboration in the Draft Code providing guidance for prosecutors is needed.

4 *Cooperation as a Term of Deferred Prosecution Agreements*

A DPA's terms may require a corporation to cooperate in any investigation or prosecution relating to a matter specified in the DPA.[126] Similarly, cooperation is a standard term of approved DPAs in England and Wales.[127] Generally, this requires:

- retention of material gathered by the corporation through its internal investigation and in the course of cooperating with the SFO's investigation leading to the DPA;
- cooperation 'fully and honestly'[128] with the SFO in regard to its pre-investigations, investigations and prosecutions for the duration of the DPA;
- cooperation 'fully and honestly' upon request of the SFO with any other domestic or foreign law enforcement or regulatory authority or agency in any investigation or prosecution of any officer, director, employee, agent, consultant or third party connected to the indictment and Statement of Facts;
- disclosure of all information and material that is not protected by a valid claim of legal professional privilege or any other law against disclosure; and
- using reasonable endeavours to make any officer, director, employee, agent, consultant or third party available for interview by the SFO.

The issue of legal professional privilege has been fraught for the SFO's investigations and has consequences for DPAs particularly. In ascertaining the interests of justice, and before approving any DPA, 'the court must examine the company's conduct and the extent to which it co-operated with the SFO' including 'whether the company was willing to waive any privilege attaching to documents

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125 Transparency International UK, 'Lack of Individual Prosecutions in Rolls Royce Bribery — Justice Not Served' (Press Release, 22 February 2019) <https://www.transparency.org.uk/lack-individual-prosecutions-rolls-royce-bribery-case-justice-not-served>; Tom Hickey, 'Deferred Prosecution Agreements 5 Years On — the Americanisation of UK Corporate Crime Enforcement', *White & Case* (Web Page, 10 May 2019) <https://www.whitecase.com/publications/alert/deferred-prosecution-agreements-5-years-americanisation-uk-corporate-crime>.

126 CLACCC Bill 2019 (n 1) s 17C(2)(a)(v).

127 *Sarclad* (n 111) [19]; *Tesco* (n 102) [72].

128 *Airbus DPA* (n 83) [12].

produced during internal investigations'.[129] Therefore, waiver of legal professional privilege forms a central component of what the SFO considers full cooperation in order for a company to be eligible for a DPA.[130] Even a limited waiver will be looked on favourably.[131] Similarly, the Australian Draft Code of Practice states, in assessing whether it is in the public interest to agree a DPA, '[c]orporations will not be expected to waive legitimate claims of legal professional privilege in order to demonstrate co-operation, but waiving privilege may demonstrate a high degree of co-operation'.[132]

Beyond legal professional privilege, the *GSL DPA* required the company's Compliance Officer to 'co-operate generally' with the SFO.[133] This seems like a shift in approach, in respect of imposing a duty on an individual, rather than the corporation per se. That said, it is unlikely that this term creates any civil or criminal liability for the compliance officer. Refusal by them to comply with a request of the SFO, which was regarded as unreasonable, would not breach the DPA. Thus, the consequence and enforcement of this term are dubious. On the other hand, the *Airbus DPA* of 2020 included a further term in directly imposing an obligation on the corporation's board of directors to report any suspected serious or complex fraud.[134] Breach of this term would constitute a breach of the DPA.

Overall, demonstration of cooperation enables beneficial outcomes, for both the corporation as well as enforcement agencies. A company can demonstrate its integrity and future 'adhere[nce] to the highest standards required of those engaged in corporate activity' by 'self-reporting to the authorities, co-operation with an investigation, a willingness to learn the lessons'.[135]

5 *Cooperation of Regulatory and Law Enforcement Agencies*

Another dimension to the meaning of cooperation is between investigation authorities. Nothing in the DPA schemes precludes simultaneous criminal investigation or actions overseas, and currently there is 'no consistent international approach to the question of whether a [DPA] in one jurisdiction will operate as a bar to a prosecution in another'.[136] On the one hand, the SFO views a DPA as engaging the principle against double jeopardy at an international level — for example, a DPA in the US concerning certain conduct would preclude a prosecution in respect of the

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129 *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2019] 1 WLR 791, 836–7 [117].

130 In the US context, see Lisa Kern Griffin, 'Compelled Co-operation and the new Corporate Criminal Procedure' (2007) 82(2) *New York University Law Review* 311; Cindy A Schipani, 'The Future of the Attorney-Client Privilege in Corporate Criminal Investigations' (2009) 34(3) *Delaware Journal of Corporate Law* 921.

131 *Director of the Serious Fraud Office v Airline Services Ltd* [2021] Lloyd's Rep FC 42, [72] ('*SFO v Airline Services Ltd*').

132 *Draft DPA Scheme Code of Practice* (n 7) 21 [7.6].

133 *Serious Fraud Office v Güralp Systems Ltd* (Deferred Prosecution Agreement, 22 October 2019) [22] ('*GSL DPA*').

134 *Airbus DPA* (n 83) [16].

135 *Tesco* (n 102) [117].

136 Katherine Hardcastle and Karl Laird, 'International Double Jeopardy and Deferred Prosecution Agreements' [2018] (12) *Criminal Law Review* 946, 960. See also OECD (n 3) 166–173.

same facts in the UK. However, on the other hand, the US and France seem to see the jurisdiction of their courts as unconstrained by proceedings elsewhere.[137]

That aside, many of the companies that have settled DPAs in England and Wales have been pursued simultaneously in other jurisdictions. Standard Bank was charged by the US Securities and Exchange Commission for 'failing to disclose certain payments in connection with debt issued by the Government of Tanzania in 2013', and settled the charges for US$4.2 million.[138] The *Rolls-Royce* case led to a coordinated global resolution on the relevant conduct between the SFO and the US Department of Justice ('DOJ'), and between the US DOJ and Brazil's Ministério Público Federal ('MPF'). The investigations were conducted in parallel, and a DPA was reached with the US DOJ and a Leniency Agreement with the MPF. Because of the overlap with the US investigation, the US DOJ credited the amount paid to the MPF against the fine in the US. Similarly, Airbus entered into a DPA with the US DOJ. Airbus was charged with conspiracy to violate the anti-bribery provision of the *Foreign Corrupt Practices Act of 1977*[139] and conspiracy to violate the *Arms Export Control Act of 1976*[140] and its implementing regulations, *International Traffic in Arms Regulations*. Airbus paid a total of US$582.4 million to settle the bribery and conspiracy charges. Airbus also reached a Convention Judiciaire d'Intérêt Public ('CJIP' or Judicial Public Interest Agreement: the French equivalent to the DPA) with the French Parquet National Financier. The prospect of such cooperation and 'multi-jurisdictional alignment' being enabled is part of the appeal of DPAs in Australia.[141]

B *Compliance*

As with cooperation, the principle of compliance operates prospectively and retrospectively as a factor in favour of deferring prosecution, as well as a term of DPAs. The relevant public interest factors for deciding whether a DPA is appropriate include whether there is a history or culture of similar conduct or other breaches of the law and whether the corporation has already taken steps to avoid a recurrence.[142] The presence and relative merits of a compliance programme are relevant to assessing whether a DPA and/or its terms are in the public interest.[143] Among terms ordinarily included in DPAs will be a requirement that the corporation review and, if necessary, improve its compliance programme, and the appointment of an independent monitor 'to determine necessary improvements to corporate

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137 Liz Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?' in Nicholas Lord, Éva Inzelt, Wim Huisman and Rita Faria (eds) *European White-Collar Crime: Exploring the Nature of European Realities* (Bristol University Press, forthcoming 2021) 359, 364.

138 US Securities and Exchange Commission, 'Standard Bank to Pay $4.2 Million to Settle SEC Charges' (Press Release, 2015-268, 30 November 2015) <https://www.sec.gov/news/pressrelease/2015-268.html>.

139 *Foreign Corrupt Practices Act of 1977*, Pub L No 95-213, 91 Stat 1494.

140 *Arms Export Control Act of 1976*, Pub L No 94–329, 90 Stat 729.

141 *ALRC Corporate Criminal Responsibility Discussion Paper* (n 8) 195 [9.57].

142 *Draft DPA Scheme Code of Practice* (n 7) 19 [7.1].

143 Ibid.

compliance programs and to monitor compliance with DPA terms' at the corporation's expense.[144]

A number of English and Welsh DPAs highlight how this has been rolled out in practice. In some instances, an external auditor was commissioned: the commissioned auditor named in the *Standard Bank DPA* was Price Waterhouse Coopers LLP.[145] Standard Bank was required to undertake a review that included the implementation of its existing internal controls, policies, and procedures on compliance with the *Bribery Act 2010* (UK) and other anti-corruption laws.[146] In the Tesco DPA, Deloitte was directed to 'review and report on two aspects of Tesco's Global Finance Transformation Programme'.[147] In other cases, internal officers or appointments were approved or maintained. Sarclad's Chief Compliance Officer was required to prepare and submit a report on Sarclad's anti-bribery and corruption policies and their implementation within 12 months of the DPA coming into effect, and then each year of the DPA.[148] Lord Gold (then head of litigation at Herbert Smith Freehills, London) was retained by Rolls-Royce in January 2013 to conduct an independent review of anti-bribery and corruption compliance, and had produced two interim reports.[149] It was a condition of the finalised DPA that he produce a third interim report, an implementation plan, and a final report.[150]

The ability of the SFO to oversee compliance is questionable. For example, a compliance monitor was not imposed on Serco or GSL, despite ongoing compliance remediation being required. The *Serco DPA* was accompanied by an undertaking by Serco Group (the parent company of Serco Geografix Ltd, which was a dormant company) to strengthen and improve its group-wide ethics and compliance program, and to report annually on its group-wide assurance programme.[151] Similarly, the *GSL DPA* required annual reports on its corporate compliance programme and implementation to be submitted to the SFO, including measurements of the effectiveness of training, though no SFO or third-party monitor approval was required.[152] If it were concluded that the training was ineffective there is no mechanism in the DPA to compel an improvement, nor would the ineffectiveness amount to a breach of the DPA. Further, GSL was required to report any past, present or future conduct that would fall within the ambit of the SFO as soon as it becomes known to any director of the company.[153]

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144 Ibid 8 [3.3].
145 *Standard Bank DPA* (n 83) [28]–[30].
146 Ibid.
147 *Tesco* (n 102) [97].
148 *Serious Fraud Office v Sarclad Ltd* (Deferred Prosecution Agreement, 6 July 2016) [20] <https://www.sfo.gov.uk/download/sarclad-ltd-and-sfo-deferred-prosecution-agreement/>.
149 Rolls-Royce, 'Rolls-Royce Completes Agreements with Investigating Authorities' (Press Release, 17 January 2017) <https://www.rolls-royce.com/media/press-releases/2017/17-01-2017-statement.aspx>.
150 *Serious Fraud Office v Rolls-Royce PLC* (Deferred Prosecution Agreement, 17 January 2017) [27] <https://www.sfo.gov.uk/download/deferred-prosecution-agreement-sfo-v-rolls-royce-plc/>.
151 *Serious Fraud Office v Serco Geografix Ltd* (Deferred Prosecution Agreement, 2 July 2019) [29] <https://www.sfo.gov.uk/download/deferred-prosecution-agreement-serco-geografix-ltd-sfo/> ('*Serco DPA*').
152 *GSL DPA* (n 133) [19].
153 Ibid [20].

In contrast, a monitor was appointed for both Airbus and G4S C&J. Airbus was required to continue to implement and review its compliance improvements, and external compliance review was carried out by the Agence Française Anticorruption (the French Anti-Corruption body), Pricewaterhouse Coopers and Ernst & Young (as statutory auditors). Furthermore, the Agence Française Anticorruption was appointed to act as monitor of Airbus's compliance for the duration of the CJIP).[154] Thus, the SFO did not recommend the appointment of an external monitor as part of the DPA in this case.[155] G4S C&J and the G4S Group entered into significant compliance remediation commitments, which included the appointment of an independent monitor to review and report on such commitments.[156] This represents an evolution of the DPA scheme, with stronger emphasis on post-DPA oversight and assurance of compliance, as a way of ensuring remediation.

The impact on the parent company's compliance is also noteworthy. As noted, the *Serco DPA* was the first occasion in which undertakings were made by a parent company in relation to a DPA entered into by one of its subsidiaries. This was described as 'an important development in the use of DPAs'.[157] Approving the DPA for G4S, Davis J emphasised that, as was the case with the *Serco DPA*, the entity engaging in misconduct (G4S C&J) is a wholly owned subsidiary of a larger parent company (G4S Group).[158] Unlike in Serco, G4S Group continues to trade, and therefore the remedial steps it undertook were considered by the Court to be 'all the more important'.[159] The steps already taken and to be done in terms of compliance and as part of the overall 'process of corporate renewal' were regarded as 'very significant'.[160] Moreover, they were described as steps which 'only can be enforced under the aegis of a DPA. Prosecution and conviction of G4S C&J could not sensibly achieve this objective. The public interest in the remedial steps is very high.'[161]

Davis J approved the appointment of an external monitor:

> an independent person will be appointed as Reviewer of the corporate renewal being undertaken by G4S. By December 2020 the Reviewer will provide a report to the SFO identifying any additional steps which G4S should take to ensure that their internal controls, policies and procedures meet defined criteria intended to prevent any fraudulent or corrupt practices.[162]

All of these features mean that:

> The intensity of the external scrutiny as set out in the DPA is greater than in any previous DPA. This is necessary and appropriate given the exposure of both G4S C&J and the parent company to government contracts. Equally, it is an important factor in providing reassurance to the SFO, to relevant government departments and to the wider public that both companies have

154 *Airbus DPA* (n 83) [28]–[30].
155 *Airbus* (n 79) [80]–[81].
156 *G4S C&J DPA* (n 60) [31]–[42].
157 *Serious Fraud Office v Serco Geografix Ltd* [2019] Lloyd's Rep FC 518, [42] ('*Serco*').
158 *G4S C&J* (n 61) [28], [43].
159 Ibid [28].
160 Ibid.
161 Ibid.
162 Ibid.

> proper controls in place to ensure the integrity of their accounting and governance processes.[163]

Despite their appointment in Airbus and G4S C&J, corporate monitors are not a compulsory or even primary aspect of DPAs in England and Wales, and indeed the Code states that the use of monitors should be 'approached with care'.[164] Further, '[t]he appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.'[165] The SFO *Operational Guidance and Information* on evaluating a compliance programme, published in early-2020, states:

> If a DPA includes terms about the organisation's compliance programme, the prosecutor will need to be able to assess the expected reforms while the DPA is in force, to determine whether the organisation is complying with the terms of the DPA. The DPA should set out the means by which the organisation will satisfy the prosecutor. This is likely to include a monitor being appointed at the organisation's expense.[166]

While used infrequently in DPAs so far, monitors have been involved in previous cases prosecuted by the SFO, such as that concerning Oxford University Press,[167] Balfour Beatty,[168] and Innospec.[169] In the US between 2010 and 2014, monitors were used in an average of 1-in-3 DPAs/NPAs.[170] However, the situation there changed with the Trump Administration Justice Department's more pragmatic approach to addressing corporate wrongdoing.[171] The process for selecting a monitor was articulated in the 2018 Benczkowski Memorandum, which emphasised the need to balance the costs and benefits of imposing a monitorship and to limit the scope of monitorships 'to avoid unnecessary burdens to the business's operations'.[172] The approach of the Biden Administration in this context remains to be seen.

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163 Ibid [43].

164 *UK DPA Code of Practice* (n 35) 13 [7.11].

165 Ibid.

166 Serious Fraud Office, 'Evaluating a Compliance Programme', *Operational Guidance and Information* (Web Page, January 2020) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/evaluating-a-compliance-programme/>.

167 Serious Fraud Office, 'Oxford Publishing Ltd To Pay Almost £1.9 million as Settlement After Admitting Unlawful Conduct in its East African Operations' (News Release, 3 July 2012) <https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/>.

168 Jessica Naima Djilani, 'The British Importation of American Corporate Compliance' (2010) 76(1) *Brooklyn Law Review* 303, 324; OECD Directorate for Financial and Enterprise Affairs, *United Kingdom: Phase 2bis. Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (October 2008) 24–5 [89]–[92].

169 *R v Innospec Ltd* [2010] EW Misc 7 (EWCC).

170 Arlen (n 37) 201, table 1; Vikramaditya Khanna and Timothy L Dickinson, 'The Corporate Monitor: The New Corporate Czar?' (2007) 105(8) *Michigan Law Review* 1713.

171 United States Department of Justice, Office of the Attorney General, 'Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference Washington, DC', *Justice News* (24 April 2017) <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

172 Memorandum from Assistant Attorney General Brian A Benczkowski to US Department of Justice, All Criminal Division Personnel, 'Subject: Selection of Monitors in Criminal Division Matters' (11 October 2018) 2 <https://www.justice.gov/opa/speech/file/1100531/download>.

In Australia, the monitoring of enforceable undertakings in the civil sphere is commonplace,[173] and so provides a useful prototype for DPAs. That said, Parker's research found that 'compliance program audits focus more on reviewing (and recommending improvements to) the systems elements of the compliance program, rather than its compliance performance'.[174] Moreover, the Australian Competition and Consumer Commission suggested that 'independent reviews are more effective than those conducted by internal staff'.[175] This underlines the significance of external, independent monitors. One can conceive of the strategic appointment of a 'monitor' by a corporation once an internal investigation has been started, as it appears from the English experience that if there is a monitor or auditor in place already, it is unlikely to be replaced. Furthermore, these auditors are not beyond reproach themselves, with various examples of questionable auditing practices.[176]

All of these matters should be reflected on in respect of the appointment of corporate monitors in Australia. The CLACCC Bill 2019 does not provide a legislative basis on which the authorities may impose monitors, though the 2018 Draft Code of Practice outlines the matters on which a monitor may be appointed to assess and advise.[177] Moreover the Draft Code provides that where the appointment of a monitor is proposed to be a term of a DPA, selection and provisional appointment generally will be agreed to before the DPA is approved.[178] While a corporation may suggest monitorship, ultimately appointment is a matter for the CDPP, having regard to views of any relevant Commonwealth agencies, the experience and knowledge of the candidate and any conflicts of interest that may arise as a result of the appointment.[179]

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173 Marina Nehme, 'Enforceable Undertakings' Practices across Australian Regulators: Lessons Learned' (2020) 21(1) *Journal of Corporate Law Studies* 283, 308–17.

174 Christine Parker, 'Regulator-Required Corporate Compliance Program Audits' (2003) 25(3) *Law and Policy* 221, 224.

175 Australian Competition and Consumer Commission, *Small Business Guide to Trade Practices Compliance Programs* (April 2006) 9 <https://www.accc.gov.au/media-release/small-business-guide-to-trade-practices-compliance-programs> (note that this publication has been retired).

176 Hannah Wootton, 'Deloitte Case Could Curb Audit Class Action Trend', *Financial Review* (online, 15 October 2019) <https://www.afr.com/companies/professional-services/court-ruling-could-limit-trend-of-audit-class-actions-20191014-p530fi>; Hannah Wootton, 'Court says EY Must Cop Losses from Allegedly Flawed Audit' (online, 16 October 2019) <https://www.afr.com/companies/professional-services/court-says-ey-must-cop-losses-from-allegedly-flawed-audit-20191014-p530ik>; Eli Moskowitz, 'Large Auditing Firms Probed for Role in £230m Investment Scandal', *Organized Crime and Corruption Reporting Project* (online, 26 June 2020) <https://www.occrp.org/en/daily/12646-large-auditing-firms-probed-for-role-in-230m-investment-scandal>; Financial Reporting Council ('FRC'), 'FRC Launches Investigations into Three Audit Firms over the Audits of London Capital & Finance Plc' (Press Release, 24 June 2020) <https://www.frc.org.uk/news/june-2020/frc-launches-investigations-into-three-audit-firms>.

177 *Draft DPA Scheme Code of Practice* (n 7) 11–12 [3.19].

178 Ibid 13 [3.20].

179 Ibid.

C *Compensation*

According to the 2018 Draft Code, a term that will be included in most DPAs is a requirement that the corporation compensate victims or take other remedial action,[180] noting that a foreign country may be the victim of the misconduct.[181] This echoes the English and Welsh scheme, which provides that the content of a DPA may include a requirement to compensate victims of the alleged offence,[182] and to donate money to a charity or other third party.[183] Moreover, the Crown Prosecution Service, the National Crime Agency and the SFO have agreed 'general principles' to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases.[184] Again, English decisions summarised in Table 1 are telling and warrant further reflection with respect to the adoption of DPAs in Australia. While this experience is of course context- and fact-specific and therefore not generalisable or binding, it demonstrates clearly that compensation is not a common term in English DPAs, notwithstanding its presence in the SFO Operational Guidance and Information,[185] its rhetorical weight,[186] and the wide-ranging impact of many of these crimes.

Only one English DPA has required the payment of compensation: Standard Bank were required to pay compensation for the benefit of the Government of the United Republic of Tanzania (US$6,000,000 plus interest of US$1,046,196.58).[187] A variety of reasons lie behind compensation's absence in other DPAs. Sarclad's DPA did not include a compensation order on the basis that:

- The majority of implicated contracts were made with 'entities based in a country in Asia' and there was no request for mutual legal assistance nor an established mechanism for payments of compensation orders to the authorities;
- The amounts of the bribe payment and any rise in the contract price to accommodate it were not always confirmed in the evidence; and

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180 Ibid 8 [3.3].

181 Ibid 10 [3.12].

182 *Crime and Courts Act 2013* (UK) (n 23) sch 17 pt 1 s 5(3)(b).

183 Ibid sch 17 pt 1 s 5(3)(c).

184 Serious Fraud Office (UK), 'General Principles to Compensate Overseas Victims (including affected States) in Bribery, Corruption and Economic Crime Cases' (December 2017) <https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/>.

185 See, eg, Serious Fraud Office, 'Compensation Principles to Victims outside the UK', *Information for Victims, Witnesses and Whistleblowers* (Web Page, 2021) <https://www.sfo.gov.uk/publications/information-victims-witnesses-whistleblowers/compensation-principles-to-victims-outside-the-uk/>.

186 *2017 Consultation Paper* (n 6) 3; Evidence to Senate Legal and Constitutional Affairs Legislation Committee, *Committee Hansard* (12 February 2020) 6 (Mr Christopher Brown, Senior Policy Lawyer, Law Council of Australia); United Kingdom, *Parliamentary Debates*, House of Lords, Crime and Courts Bill, 13 November 2012, vol 740, col 1492 (The Minister of State, Ministry of Justice (Lord McNally).

187 *Serious Fraud Office v Standard Bank Plc (now ICBC Standard Bank Plc)* [2016] Lloyd's Rep FC 102, [13] ('*Standard Bank*').

- The SFO could not demonstrate whether and in what sum Sarclad agents actually paid bribes to 'named or unknown individuals'.[188]

Likewise, the SFO did not apply for a compensation order against Tesco. The negotiation of the DPA proceeded on the basis that the SFO did not intend to suggest that a compensation should be included as a term. The final judgment stated that it would not be easy to assess compensation and that only two of the relevant institutional investors approached by the SFO were willing to assist the investigation.[189] The SFO also did not apply for a compensation order against Rolls-Royce, as it could not identify a quantifiable loss arising from any of the criminal conduct.[190] The final judgment stated:

> There is no direct evidence of contracts where there was a rise in the contract price to accommodate a bribe … nor evidence that any of the products or services which Rolls-Royce sold to customers were defective or unwanted. In any event, any of the victims of the criminal conduct covered by the proposed DPA is in a position to pursue a claim for compensation.[191]

There was no compensation order as part of the DPA with Serco Geografix Ltd, on the basis that £12.8 million compensation had already been paid by Serco to the UK Ministry of Justice as part of a £70 million civil settlement in 2013.[192] The *GSL DPA* did not include a financial penalty or compensation order, but there is no explanation as to why in the final judgment. While this is not the first time that a compensation order has not been made, it is the first where the reasons for this have not been given, and contradicts the statement in *Rolls-Royce* that this should occur.[193] The SFO did not apply for a compensation order against Airbus, on the basis that the SFO could not easily identify a quantifiable loss resulting from the relevant criminal conduct; there was no evidence that any of the products or services sold by Airbus were defective or unwanted, meaning a legal claim for the value of an adequate replacement was not justified.[194] Furthermore, it was observed that the DPA does not prevent any victims from claiming compensation.[195] In *Director of the Serious Fraud Office v Airline Services Ltd*, compensation was not ordered because the SFO had not been able to identify a quantifiable loss to a particular party as a result of the criminal conduct.[196] The Court noted the SFO's view that any person affected could seek compensatory damages via civil litigation, which is unlikely given that Airline Services Ltd is effectively dormant, remaining only as a shell to enable the SFO investigation and conclusion of the DPA.[197]

The abdication of duty with respect to ascertaining the appropriate level of compensation is curious. Difficulties in calculating the requisite amount for penalties

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188 *Serious Fraud Office v XYZ Ltd* [2016] Lloyd's Rep FC 517, [41].
189 *Tesco* (n 102) [75].
190 *Rolls-Royce* (n 86) [83]–[84].
191 Ibid [84].
192 Serious Fraud Office, 'SFO Completes DPA with Serco Geografix Ltd' (News Release, 4 July 2019) <https://www.sfo.gov.uk/2019/07/04/sfo-completes-dpa-with-serco-geografix-ltd/>.
193 *Rolls-Royce* (n 86) [83].
194 *Airbus* (n 79) [96].
195 Ibid.
196 *SFO v Airline Services Ltd* (n 131) [77].
197 Ibid [46].

do not preclude their estimation, and a comparable approach should be adopted here. Paradoxically, or at least unfortunately, the more complex the crime, the less precise and less likely the determination of compensation will be, and it seems the less likely it is to be mooted and approved. In addition, this foisting of responsibility onto victims, as in *Rolls-Royce* and *Airbus*, is striking. To suggest that any of the victims of the criminal conduct covered by the proposed DPA is in a position to pursue a claim for compensation presumes: knowledge of victimisation; ability, capacity and resources to take action; as well as proof of standing.[198] It exemplifies a shift from the conception of DPAs as part of public law and enforcement and the purpose of the criminal law as vindicating the rights of the polity against the offender.[199]

DPAs co-exist alongside class actions taken in respect of corporate wrongdoing, and indeed such actions have been pursued in two instances in England and Wales. Nevertheless, these should never supplant the compensation dimensions and potential of DPAs. In terms of the Tesco DPA, other actions for wrongdoing were pursued. A shareholder class action against Tesco was brought in the Financial List of the High Court (Business and Property Courts) pursuant to s 90A (and its accompanying schedule, sch 10A) of the *Financial Services and Markets Act 2000* (UK), relating to Tesco's profit overstatement.[200] Moreover, the UK Financial Conduct Authority used its powers to force Tesco to pay compensation to institutional investors. Claimants who accepted an offer of compensation under this scheme were precluded from participating in the class action.[201] Likewise, there was a shareholder claim against Serco Geografix Ltd: a group of shareholders sued seeking compensation for the fall in share price following the fraud and false accounting revelations over electronic tagging in 2013.[202]

Similarly, Australia has class action regimes in both the Federal Court and the state supreme courts, and so DPAs if introduced would fit together with these. In the Federal Court, applicants can bring class action proceedings (a 'representative proceeding') under pt IVA of *Federal Court of Australia Act 1976* (Cth), introduced in 1992. To bring a claim under pt IVA: there must be seven or more persons with claims against the same person;[203] the claims must be 'in respect of, or arise out of, the same, similar or related circumstances';[204] and claims must give rise to at least one substantial common issue of law or fact.[205] Class actions have been pursued in

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198 Alan Doig, 'Non-Conviction Financial Sanctions, Corporate Anti-Bribery Reparation and their Potential Role in Delivering Effective Anti-Corruption Pay-Back: The Emerging UK Context' in Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018).

199 Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217.

200 'Tesco Shareholder Action — Case Update', *Stewarts* (Web Page, 4 June 2019) <https://www.stewartslaw.com/news/tesco-shareholder-action-case-update/>.

201 Herbert Smith Freehills, 'Current and Recent Shareholder Claims', *Litigation Notes* (Blog Post, 9 December 2019).

202 *Allianz Global Investors GmbH v Serco Group PLC* (Case No FL-2019-000006, Business and Property Court, England and Wales High Court).

203 *Federal Court of Australia Act 1976* (Cth) s 33C(1)(a).

204 Ibid s 33C(1)(b).

205 Ibid s 33C(1)(c).

respect of bribery,[206] financial misconduct,[207] and breach of the *Corporations Act 2001* (Cth).[208] Again, while we can see class actions as 'vindicating the public interest' and supplementing public enforcement,[209] this cannot be in replacement of the public action.

Despite the rhetoric, practice indicates that compensation is not a true principle of DPAs. Compensation is a potentially inventive, radical and distinctive dimension, by virtue of its ordering in a settlement taken on behalf of the public through criminal proceedings. For the compensation component to DPAs to be meaningful, reliance cannot be placed on class actions to supplement or replace it. It is useful here to draw on the insights of Fisse, who observed that

> deterrence of cartel conduct and the redress of such conduct typically have been pursued in separate proceedings: public enforcement proceedings (deterrence) and civil remedial proceedings (redress). A prevalent assumption is that compensation for losses from cartel conduct is best pursued in civil remedial proceedings given the typically large number of victims, complexity of assessing the amount of damages payable and limitations on the public enforcement purse.[210]

Instead, Fisse suggests 'the possibility of redress facilitation orders designed to facilitate compensation for loss caused by cartel and other unlawful conduct and at

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[206] For instance, a claim against CIMIC Group (formerly known as Leighton Holdings) related to allegations about corrupt payments made by a subsidiary of CIMIC in order to secure work in Iraq. This was settled in 2020: Maurice Blackburn Lawyers, *CIMIC Class Action* (Web Page) <https://www.mauriceblackburn.com.au/class-actions/past-class-actions/cimic/>. A class action against the Australian Wheat Board followed the *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme* (Parliamentary Paper Nos 395–399, 2006) and an investigation by ASIC. This was settled for $39.5 million in 2010: Maurice Blackburn Lawyers, AWB *Class Action* (Web Page) <https://www.mauriceblackburn.com.au/class-actions/past-class-actions/awb-class-action/>.

[207] In 2019 a shareholder class action commenced against Westpac Banking Corp relating to disclosure around monitoring of financial crime and Australian Transaction Reports and Analysis Centre ('AUSTRAC') proceedings: 'Westpac Shareholder Class Action', *Phi Finney McDonald* (Web Page, 25 November 2019) <https://phifinneymcdonald.com/projects/westpac-shareholder-class-action/>). Also in 2019, a shareholder class action commenced against Commonwealth Bank for alleged breach of continuous disclosure obligations and misleading or deceptive conduct regarding AUSTRAC anti-money laundering and counter-terrorism financing requirements: 'CBA Class Action', *Phi Finney McDonald* (Web Page, 18 March 2019) <https://phifinneymcdonald.com/projects/cba-class-action/>.

[208] A class action against Myer for failure to disclose material information to the market resulted in the first superior court judgment in an Australian shareholder class action: *TPT Patrol Pty Ltd (as trustee for Amies Superannuation Fund) v Myer Holdings Ltd* (2019) 140 ACSR 38. A consolidated class action against BHP seeks recovery of investor losses caused by BHP's violations of the *Corporations Act 2001* (Cth) in relation to the collapse of the Fundão Dam in Brazil: see, eg, 'BHP Class Action', *Phi Finney McDonald* (Web Page, 18 March 2019) <https://phifinneymcdonald.com/projects/bhp-class-action/>; *Impiombato v BHP Group Ltd (No 2)* [2020] FCA 1720. For an overview of class actions in Australia, see Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017): <http://globalclassactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf>

[209] Michael J Duffy, 'Australian Private Securities Class Actions and Public Interest – Assessing the 'Private Attorney-General' by reference to the Rationales of Public Enforcement' (2017) 32(2) *Australian Journal of Corporate Law* 162, 162, 165–6.

[210] Brent Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (2018) 37(1) *University of Queensland Law Journal* 85, 85–6.

the same time to enhance deterrence'.[211] If DPAs are to be introduced in Australia there must be a foregrounding of compensation, and, I suggest, a statutory requirement that compensation be considered and explicit reasons given if not a term in the DPA.

V Conclusion

This article has returned to the ongoing debate around DPAs, which, despite bipartisan support, have not yet been introduced in Australia. The evolving experience in England and Wales continues to be instructive and raises issues for consideration and resolution here. King and Lord express unease with respect to the pragmatic stance of the SFO about the cost- and time-savings in DPAs: 'surely the SFO did not mean to imply that the bigger the company under investigation, and the more complex the case, the more they would be open to settlement'.[212] But indeed this is the precise state of affairs in many jurisdictions, however unpalatable or fatalistic it may seem. Realpolitik, as well as extant codes of practice, mean that the larger the company, the more important or sensitive its role, and the greater the potential for 'collateral' damage, so the less likely it is that it will be pursued in an adjudicated criminal sense. To be frank, in some instances DPAs might be as good as it gets. Adopting a comparably hard-nosed response to this set of circumstances, key changes to the CLACCC Bill 2019 are needed.

If DPAs are to fulfil their far-reaching preventive and remedial potential, rather than comprising a mere pragmatic alternative to adjudication, then more circumscribed rules are needed. Though this will limit discretion inevitably, experience in England and Wales does not give cause for optimism in terms of what is agreed between prosecutors and corporations otherwise. First, tighter definitions must be provided regarding the meaning and form of cooperation. The initiation of DPA negotiation should be predicated on self-reporting and, if not, the reasons for this must be interrogated by both prosecutors and the approving officer. Further, the highest degree of cooperation subsequently is a prerequisite for approval of a DPA. Acting in an unobstructive manner should not constitute cooperation; the corporation needs to be active, engaged, and helpful. In particular, the strategic use of legal professional privilege must be probed and limited. Linked to this, meaningful cooperation regarding individuals must be provided, though ultimately the public interest might not lie in their prosecution. Second, in terms of compliance, external monitors should be considered for all DPAs, be that from a State agency (as in *Airbus*) or an auditor (as in *G4S*). Again, reasons must be given if deemed not to be appropriate. Without such ability to oversee and scrutinise, the value and weight of the terms of DPAs, as well as adherence to them, is questionable. Third, compensation must be contemplated, and explicit reasons given if not required by the DPA. Finally, the presumption should be that a company would not benefit from more than one DPA in a given jurisdiction. Though the Draft Code does refer to previous behaviour as a public interest factor, repeat offenders are not precluded

[211] Ibid 86.
[212] King and Lord (n 2) 315, citing *Rolls-Royce* (n 86) [58].

from settlement agreements.[213] Furthermore, these measures need to be articulated and embedded statutorily, not addressed in a non-binding way in a code of practice.

The ALRC estimates that if introduced, there is likely to be just one DPA agreed per year in Australia.[214] This is in line with federal prosecution rates, as well as with the English and Welsh experience. While such limited use might suggest that concerns about the framework and likely terms are overstated, instead the potential nature and level of the misconduct involved as well as the status of many of the companies mean that such adjustments are imperative. Otherwise DPAs will go no way to alleviating the accountability deficit for corporate crime.

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[213] As noted earlier, HSBC is an example of this: Garrett (n 38) 102. Moreover, prior to its DPA, an FCA investigation in 2011 revealed Standard Bank's failure to implement anti-money laundering and anti-corruption procedures successfully: Financial Conduct Authority, 'Standard Bank PLC Fined £7.6m for Failures in its Anti-Money Laundering Controls' (Press Release, 23 January 2014) <https://www.fca.org.uk/news/press-releases/standard-bank-plc-fined-£76m-failures-its-anti-money-laundering-controls>. Indeed, investors are pursuing class actions against HSBC and Standard Chartered due to apparent failures to address money laundering: Helen Cahill and Adam Luck, 'HSBC and Standard Chartered to Face Class Action over FinCEN Files Claims', *RiskScreen* (online, 1 October 2020) <https://www.riskscreen.com/kyc360/news/hsbc-and-standard-chartered-to-face-class-action-over-fincen-files-claims/>.

[214] *ALRC Corporate Criminal Responsibility Report* (n 9) 503 [11.36].

Table 1: Deferred Prosecution Agreements Obtained by the Serious Fraud Office (England and Wales)[215]

Date	***Corporate entity***	***Nature of case***	***Offence(s)***	***Benefit/ advantage***	***Cooperation***	***Terms of DPA***	***Compliance terms***	***Compen-sation***	***Individual prosecutions***
November 2015	Standard Bank Plc ('Standard Bank')	Failure to prevent bribery by Stanbic Bank Tanzania (a bank in Standard Bank's division) of Enterprise Growth Market Advisors in Tanzania, to influence members of the Tanzanian Government	Failure of a commercial organisation to prevent bribery (*Bribery Act 2010* (UK) s 7)	Gained favour of US$600m proposal to be carried out on behalf of the Tanzanian Government. This generated US$8.4m transaction fees, shared by Stanbic Tanzania & Standard Bank	Self-reported	US$6m plus interest US$1,046,196.58compensation; US$8.4m disgorgement of profit; US$16.8m financial penalty; £330,000 SFO costs payment	Auditor-commissioned review	US$6m	No

[215] For an earlier and narrower iteration of such a table, see Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds) *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018) 239 (Table 13.2); and King and Lord (n 2) 322 (Table 1).
Note: 'SFO' = Serious Fraud Office (UK); 'MoJ' = Ministry of Justice (UK).

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July 2016	Sarclad Ltd ('Sarclad')	Company's employees & agents involved in systematic offer &/or payment of bribes to secure contracts in foreign jurisdictions	Conspiracy to corrupt & conspiracy to bribe (*Criminal Law Act 1977* (UK) s 1); failure of a commercial organisation to prevent bribery (*Bribery Act 2010* (UK) s 7)	£6,553,085 total gross profit from implicated contracts	Self-reported	£6,201,085 disgorgement of gross profits; £352,000 financial penalty. SFO agreed not to seek costs	Review by Internal Chief Compliance Officer	No	Yes; three directors & managers acquitted of conspiring to bribe in 2019
January 2017	Rolls-Royce plc	Company & associated persons used a network of agents to bribe officials in at least seven countries over three decades	Six offences of conspiracy to corrupt (*Criminal Law Act 1977* (UK) s 1); five offences of failure of a commercial organisation to prevent bribery (*Bribery Act 2010* (UK) s 7); one offence of false accounting (*Theft Act 1968* (UK) s 17)	£258,170,000 profit gained	Original report by whistleblower; then cooperated	£258,170,000 disgorgement of profit; £239,082,645 financial penalty, £12,960,754 SFO costs payment	Review by head of litigation at Herbert Smith Freehills (continuation of internal process started in 2013)	No	No

April 2017	Tesco Stores Ltd ('Tesco')	Accounting irregularities: Tesco overstated its profits by over £326m between February & September 2014; dishonestly falsified results for six months	Commission of an offence of false accounting (*Theft Act 1968* (UK) s 17)	By falsely inflating annual commercial income, the Tesco Board was presented with a series of 'legacy' years that formed the basis of inaccurate analysis of expected performance	Tesco issued trading update regarding overstatement of profit; then cooperated with SFO	£129m financial penalty, £3m investigation costs; £85m & related costs of the Financial Conduct Authority compensation scheme	External auditor Deloitte directed to 'review and report on two aspects of Tesco's Global Finance Transformation Programme'	No	Yes; three directors charged with false accounting & fraud; held no case to answer in 2018
July 2019	Serco Geografix Ltd ('Serco')	Scheme to dishonestly mislead MoJ as to true extent of profits made 2010–2013 by Serco Geografix Ltd's parent company, Serco Ltd, from its contract for the provision of electronic monitoring services	Three offences of fraud & two offences of false accounting (*Fraud Act 2006* (UK) s 2)	Profit gained equated to £12.8m; preventing MoJ from limiting parent company future profits; from recovering any of parent company's previous profits; from	Self-reported; cooperated	£19.2m financial penalty; £3.7m investigative costs payment; £12.8m compensation to MoJ as part of a separate £70m civil settlement in 2013	Undertaking by Serco Group (parent company) to improve group-wide ethics & compliance program	No	Yes; two directors charged with false accounting & fraud; case withdrawn by SFO in April 2021

				seeking more favourable terms during renegotiations of contracts; threatening the parent company's contract revenues					
December 2019	Güralp Systems Ltd ('GSL')	Scheme of corrupt payments to South Korean public official 2002–2015, made as inducement or reward for exploiting his position to influence the award of government contracts to GSL	Conspiracy to make corrupt payments (*Criminal Law Act 1977* (UK) s 1); failure of a commercial organisation to prevent bribery by employees (*Bribery Act 2010* (UK) s 7)	GSL's revenue from the Republic of Korea grew from £20,146 in 2003 to £1,453,618 in 2015; the total gross profit calculated on the best evidence available amounted to £2,069,861	Self-reported; cooperated	£2,068,861 disgorgement of gross profits	Annual reports on its corporate compliance programme	No	Yes, three charged with conspiracy to make corrupt payments; all acquitted in 2019

January 2020	Airbus SE (‘Airbus)	Failing to prevent persons associated with Airbus from bribing others concerned with the purchase of aircraft by customers across multiple jurisdictions (including Malaysia, Sri Lanka, Taiwan, Indonesia, Ghana)	Five counts of failure of commercial organisation to prevent bribery (*Bribery Act 2010* (UK) s 7)	Bribery intended to increase sales for Airbus; €585,939,740 total gross profit	Self-reported; cooperated, accepted SFO jurisdiction	€585,939,740 disgorgement of profits; €398,034,571 financial penalty; €6,989,401 costs	Internal review of compliance programme; external compliance review by Agence Française Anticorruption, & statutory auditors Price Waterhouse Coopers & Ernst &Young. Agence Française Anticorruption to monitor Airbus compliance throughout Convention Judiciaire D’intérêt Public (French DPA equivalent)	No	Ongoing investigations overseas

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July 2020	G4S Care & Justice Services (UK) Ltd	Fraudulent conduct regarding MoJ contracts for electronic monitoring services. Financial models submitted to MoJ concealed true cost of expenditure on field equipment, communications & vehicles. Costs reported to Home Office & Ministry were substantially higher than costs in company's management accounts. Total variance 2005–2012 was over £70 million	Three counts of fraud (*Fraud Act 2006* (UK) s 1)	Profit unlawfully obtained by the fraud was £21,396,265	Self-reported by parent company; cooperation increased from 2019	£38,513,277 financial penalty payment to SFO; £5,952,711 SFO reasonable costs payment. £21,396.265 compensation to MoJ; £22,115,505 paid under settlement deed in March 2014 credited against this amount (ie no additional compensation); £21,396,265 disgorgement of profits – 2014 payment also credited against this amount (ie no additional disgorgement)	Compliance remediation commitments, including appointment of independent monitor to review & report on G4S C&J & parent company	No	No

October 2020	Airlines Services Ltd ('ASL')	Three occasions of bribing an agent to secure contracts for ASL from Deutsche Lufthansa AG between 2011 & 2013	Three offences of failing to prevent foreign bribery (*Bribery Act 2010* (UK) s 7)	Secured valuable contracts for ASL to refit commercial airlines for Lufthansa & one of its subsidiaries	Self-report to the SFO after an internal investigation commenced in 2015	£990,971.45 disgorgement of profits; £1,238,714.3 payment of financial penalty; £750,000 payment of SFO costs	All material from internal & SFO investigations to be retained in UK for DPA term; ASL to cooperate fully & honestly with foreign enforcement agencies; disclosure of all non-privileged material to SFO; use of best efforts to make officer, directors, employees, agents & consultants of ASL available for interview; prompt reporting of any new evidence to SFO	No	No