Trying Corporate Actors: Why NotProsecute?

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OUTLINE

1. The context
2. DPAs in Australia – the proposed scheme
3. The relationship between DPAs and the criminal process
   • the relative punitive effect of conviction when compared to DPAs;
   • whether DPAs displace or supplement the conventional criminal process;
   • the transparency of the processes;
   • the dependence of DPAs on how corporate criminal liability is ascribed.
4. Concluding remarks
The context

• The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

  • Why not litigate?

  • Why not prosecute?
PROPOSED AUSTRALIAN DPA SCHEME

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Part 1

- The CDPP may enter into a deferred prosecution agreement with a person other than an individual for an offence listed in s17B (various offences under Anti-Money Laundering and Counter-Terrorism Financing Act 2006; Corporations Act 2001; Criminal Code (theft, proceeds of crime offences, bribery of a foreign official etc))

- A DPA means criminal proceedings must not be instituted, as long as corporation meets certain specified conditions, such as paying financial penalty or compensation; co-operating with future prosecutions of individuals suspected of involvement in criminality

- Approving officer (former judicial officer of federal/State/Territory court) must review and approve/not approve:
  - must approve the DPA if satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate.
THE PUBLIC INTEREST

The CDPP will enter into DPA negotiations only if this is in the public interest. Public interest factors include whether:

- the corporation self-reported, and when and how
- there is a history of similar conduct
- the conduct is part of the corporation’s business practices or culture
- the corporation has taken steps to avoid a recurrence
- harm was caused, and the impact on markets and governments
- the corporation withheld material required for the effective investigation and prosecution of individuals
- the offending represents isolated actions by individuals
- the offending is recent
- the collateral consequences of conviction or any court-imposed penalty would be disproportionate

*Draft Code of Practice on DPAs*
RELATIONSHIP BETWEEN DPAS AND CRIMINAL LIABILITY

1. the relative effect of DPAs and conviction – punitive and transformative;
2. whether DPAs displace or supplement the conventional criminal process – for corporates and/or individuals;
3. the transparency of the process;
4. the dependence of DPAs on how corporate criminal liability is ascribed.
RELATIONSHIP BETWEEN DPAs AND CRIMINAL LIABILITY

- DPAs introduced to mitigate/remedy issues with criminal law, but still dependent on it

- Identification doctrine still exists – must be a robust possibility of criminal liability for legal and human actors for corporations to choose DPAs

- DPA also used to offset possible consequences of criminal conviction:
  - Debarment from certain contracts
CONCLUDING THOUGHTS

- Considerable change on the horizon (in many jurisdictions) in respect of corporate criminal liability
  - How consistent and coherent are these reforms?

- Why not prosecute corporate misconduct? Why defer prosecution?
  - Only when the public interest is responding to and preventing such criminality is served comparably by such negotiated justice

- DPAs both serve to supplement as well as dilute corporate criminal liability
- And won’t resolve the issues with how we ascribe liability to corporate actors for criminal behaviour
FURTHER REFERENCES

• Full paper available here
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