

DEFERRED PROSECUTION AGREEMENTS IN AUSTRALIA: MORE FUEL TO THE CLASS ACTIONS FIRE

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Legal Briefings - By **Harry Edwards, Tania Gray, Kate Meakin and Jacqueline Wootton**

Deferred prosecution agreements may be on their way and companies should be getting ready for this new way of enforcing corporate crime.

While the form of Australia's DPA regime and extent of oversight might still be debated, the Australian Law Reform Commission's final report on corporate criminal liability (which you can read about [here](#)), has clearly endorsed DPAs as a component of the enforcement landscape.

Drawing on insights from our Corporate Crime & Investigations and Class Actions teams, in this briefing we explore what DPAs mean for class action risks, and some issues companies need to manage in their response to emerging issues that may potentially end in a deferred prosecution outcome.



The introduction of a DPA process is no doubt a welcome addition to the prosecutor’s tool kit. Used well, it can promote efficiency and allow a corporate to accept wrongdoing with appropriate redress and remediation and continue to pursue its chosen business model. This is particularly the case in regulated industries or where government or state-entities are key customers of the corporate, where a criminal conviction could be fatal to that business model.

However, as part of any process of negotiating a DPA, corporates will need to take into account the increased class action risk from accepting the accompanying statement of facts and providing promoters of class actions with a clear advantage in preparing private claims. This will often be a finely balanced judgement, weighing up risks that are difficult to quantify. It may well need to be taken early in a process, based on imperfect information, and will involve, throughout, a need to show clear willingness to cooperate with the prosecutor.

Finally, in the course of any such litigation, care will need to be exercised in approaching the substantive defence of the claim. It will clearly be necessary to provide the court with context to the admitted facts, as well as updating them with any information which subsequently comes to light. But it will obviously be important to ensure that the conditions of the DPA are not disturbed by doing so.

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HARRY EDWARDS
PARTNER,
MELBOURNE
+61 3 9288 1821
Harry.Edwards@hsf.com



TANIA GRAY
PARTNER, SYDNEY
+61 2 9322 4733
Tania.Gray@hsf.com



KATE MEAKIN
PARTNER, LONDON
+44 20 7466 2169
Kate.meakin@hsf.com



**JACQUELINE
WOOTTON**
PARTNER, BRISBANE
+61 7 3258 6569
jacqueline.wootton@hsf.com

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