BHP welcomes the opportunity to provide comment on the draft Deferred Prosecution Agreement Code of Practice (Draft Code).

BHP has previously made submissions relevant to the introduction of a Deferred Prosecution Agreement (DPA) scheme in Australia including in response to:

- the Senate Economic References Committee Inquiry into Foreign Bribery;
- the Attorney General's Department's Public Consultation Paper on 'Consideration of a Deferred Prosecution Agreements Scheme in Australia'; and
- the exposure draft of amendments to the foreign bribery offence in the Criminal Code Act 1995 (Cth) and introduction of a DPA scheme in Australia.

This submission supplements BHP’s previous submissions.

Introduction

Our operations

BHP is a leading global resources company, among the world’s top producers of major commodities, including iron ore, metallurgical coal and copper, and we have substantial interests in conventional and unconventional oil and gas and energy coal. Our workforce currently comprises approximately 60,000 employees and contractors, working in a number of countries around the world.

Our approach to compliance

A culture of compliance begins with a commitment to ethical conduct on the part of all employees. This is embodied in our Charter, introduced in 1999, and our Code of Business Conduct, introduced in 1997.¹

The Code of Business Conduct, which sets out the standards of behaviour and ethics that BHP expects from its employees and contractors, represents our commitment to meet or exceed applicable legal requirements. All BHP employees are expected to understand the Code of Business Conduct and apply it to their work every day.

We constantly seek out ways in which we can improve how we do our work. BHP’s approach to ethical conduct and regulatory compliance is no different. We review and test our compliance program to ensure best practice continually. Building on a strong framework established over time with a focus on continuous improvement, we have what we consider to be a world-class compliance program.

Anti-corruption compliance program

Our anti-corruption compliance program has evolved over time in response to external and internal developments and learnings. Our comments in response to the matters raised in the Draft Code are informed by these experiences.

¹ Our Charter and our Code are available on our website at http://www.bhpbilliton.com/aboutus/ourcompany/codeofbusconduct.
Response to the Draft Code

Introduction

BHP supports reforms in Australia that increase international consistency, help to align compliance standards regardless of a company’s home jurisdiction and ultimately assist in the fight against corporate crime, including by levelling the playing field and safeguarding the ability of ethical companies to compete. In this regard, BHP supports the Draft Code as a policy to provide further guidance to regulators and companies.

A number of matters in the Draft Code are in line with BHP’s Previous Submissions, including:

- types of offences for which DPA negotiations may be appropriate;\(^2\)
- guidance on the appropriateness of a particular matter for DPA negotiations;\(^3\)
- relevant considerations for the imposition of appropriate DPA terms;\(^4\)
- guidance in relation to compliance with and adjustments to a DPA;\(^5\)
- confidentiality, and the limited exceptions to maintaining documents as confidential;\(^6\)
- examples of the documents disclosed in the DPA negotiations that may be inadmissible in future proceedings;\(^7\)
- and
- public availability of DPAs.\(^8\)

BHP’s comments on the Draft Code address the following further matters.

Interviews with employees

The Draft Code appears to assume that companies can require witnesses to make themselves available for interviews.\(^9\) While companies like BHP may encourage employees to cooperate with both internal investigations and enforcement authorities, companies cannot compel their officers and employees to attend interviews. Therefore, this may be a challenging criteria against which to judge a corporation’s cooperation. Employment law considerations and other consequences may also be relevant in this context.

Quality of internal investigations should be a relevant factor in determining the terms of a DPA

As noted in previous submissions, BHP supports consideration of a company’s cooperation during negotiations with an investigating agency and the quality of a company’s internal investigations as two factors relevant to the terms of a DPA. Recognition of these factors is likely to encourage the quality of self-reporting, internal investigations and cooperation.\(^10\)

The Draft Code is currently silent as to how the quality of an internal investigation will influence the terms of the DPA. Clearer guidance on this may improve the quality of internal investigations, which is also likely to support the interests of relevant enforcement authorities.

Admission of liability

The Draft Code does not address admissions of liability. An admission of liability for conduct that has not been tried judicially may have collateral consequences for corporations and this could be a disincentive for companies to enter into a DPA.

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\(^2\) Draft Code, Appendix A.
\(^3\) Draft Code, paras 2.3 to 2.6 and 2.9 to 2.14.
\(^4\) Draft Code, paras 3.1 to 3.20.
\(^5\) Draft Code, paras 2.13 and 5.1 to 5.13.
\(^6\) Draft Code, para 2.11.
\(^7\) Draft Code, para 2.12.
\(^8\) Draft Code, paras 4.12 to 4.14.
\(^9\) Draft Code, para 7.4(c).
\(^10\) Previous Submission, p.5.
As one of the aims of the DPA regime is to reach appropriate and expeditious agreement between a company and enforcement authorities, not requiring an admission of liability may better serve this purpose.

**Factors in relation to fines**

As BHP's previous submissions noted, factors to be taken into account when imposing a fine, and the potential reduction to a fine for entering into a DPA and cooperating meaningfully in that process, are important considerations for a company considering entering into a DPA.

While the Draft Code identifies factors that may be taken into account in determining the amount of a fine, additional guidance could provide further incentive for a company considering a DPA. For example, it may be helpful for companies to understand how the quantum of a fine imposed under a DPA could be reduced in comparison to what a court might impose.\(^1\) It would also be helpful if the Draft Code identified the weighting of factors to be taken into account.

**Withdrawal from negotiations**

The Draft Code refers to the possibility that the Commonwealth Director of Public Prosecutions (CDPP) or the corporation may withdraw from DPA negotiations at any time before the approval of the DPA by the Approving Officer without giving reasons.\(^2\)

It would be helpful for the Draft Code to identify factors or circumstances that may lead to the CDPP's withdrawal from the negotiations. This could assist in providing greater certainty to companies considering entering DPA negotiations and transparently align the expectations of the parties.

**Basis of rejecting a DPA**

As noted in BHP's previous submissions, a lack of certainty in relation to an outcome arising from a DPA not being approved could reduce the effectiveness of a DPA scheme.\(^3\)

The Draft Code provides that a person appointed as an Approving Officer under the relevant legislation must approve the DPA terms if they are (1) in the interests of justice and (2) fair, reasonable and proportionate.\(^4\) Further guidance as to what factors may influence these determinations could be useful and would provide greater certainty for companies looking to cooperate and enter into DPA negotiations.

**Relevant enforcement authorities and regulators should be encouraged to embrace the principles**

As BHP has noted in previous submissions (and above), aligning global standards assists companies committed to doing the right thing.

In addition to providing an opportunity to align principles for Australian DPA negotiations to the global environment, there may be an opportunity to encourage adoption of the principles in the Draft Code by a number of Australian enforcement authorities and regulators (the CDPP, the Australian Federal Police, the Australian Securities and Investments Commission, the Australian Taxation Office and the Australian Transaction Reports and Analysis Centre).

This could enhance engagement between each of these authorities and corporations. The implementation of a new regime also creates an opportunity for educational activities involving both authorities and corporations regarding DPAs, which is likely to support the success of the new regime.

\(^{11}\) Draft Code, paras 3.5 to 3.15.
\(^{12}\) Draft Code, para 2.15.
\(^{13}\) Previous Submissions, p.4.
\(^{14}\) Proposed section 17D of the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth); Draft Code, para 4.8.