Dear Sir/Madam

Deferred Prosecution Agreements Scheme Code of Practice

The Attorney-General's Department has invited submissions on a draft Deferred Prosecution Agreement Scheme Code of Practice – Consultation Draft (Code Consultation Draft). The Code Consultation Draft has been drafted to reflect proposed amendments to the Director of Public Prosecutions Act 1983 (Cth) outlined in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (proposed legislation).

Clifford Chance welcomes the opportunity to comment on the Code Consultation Draft. Clifford Chance previously made submissions on the issue of deferred prosecution agreements (DPAs) during the consultation process initiated by the Federal Minister for Justice on 31 March 2017. A copy of that submission dated 1 May 2017 (First Submission) is at Annexure A to this submission.

Our comments below are based on the substantial experience of lawyers in our Regulatory Investigations, Enforcement and White-Collar team. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Clifford Chance

Clifford Chance is one of the world's pre-eminent law firms, with more than 3,300 lawyers across five continents led by a single integrated partnership. We are consistently highly ranked in Chambers Global Top 30.

Our firm has significant experience assisting clients in the United States and in the United Kingdom in relation to schemes equivalent to that outlined in the proposed legislation.
\textbf{Code Consultation Draft}

Our views and recommendations expressed below are confined to the Australian commercial and jurisprudential context. Further, the content of our submission is not intended to be exhaustive, nor does it constitute legal advice.

We reiterate that we welcome the introduction of a DPA scheme in Australia. The introduction of a code of practice will further strengthen the proposed scheme and provide much needed guidance to both Commonwealth agencies and Australian corporations to achieve the best outcome from this process. We do, however, consider that some amendments are required to the Code Consultation Draft to ensure clarity and consistency of approach is adopted for the proposed scheme to be best utilised.

\textbf{1. DPA NEGOTIATIONS}

\textbf{1.1. Initiating the negotiations process}

1.1.1. The Code Consultation Draft outlines (in Section 2) the initiating process for entering into DPA negotiations, including the provision of a letter from the Commonwealth Director of Public Prosecutions (CDPP) specifying "how the negotiation will be conducted and relevant next steps." The Code Consultation Draft suggests (at [2.9]) that a corporation "chooses to accept" an offer to enter DPA negotiations. However, there does not appear to be any scope to negotiate with the CDPP as to these matters. Given the bespoke nature of DPAs, in that there is likely no "one size fits all" approach, the corporation should be at liberty to confer with the CDPP with respect to the negotiations process.

\textbf{1.2. Offences covered by the Scheme}

1.2.1. We note the list of offences outlined in Appendix A of the Code Consultation Draft, which mirrors the list of offences to which a DPA may relate set out in section 17B of the proposed legislation. We are of the view that consideration should be given to broadening the offences covered, which we accept will necessarily involve amendments to the proposed legislation, and, in particular, consideration be given to potential contraventions which are appropriately suited to the DPA process.

\textbf{1.3. Protection of information}

1.3.1. Section 17K of the proposed legislation sets out the circumstances in which information obtained as a direct result of the negotiation, entry into, or administering, of a DPA may be disclosed. Of some concern is that the fairly broad ability to disclose such information to authorities of foreign countries for "law enforcement purposes" or
for "the protection of public health, or the life or safety of an individual or group of individuals" exposes the corporation to foreign civil or criminal proceedings and provides the relevant foreign authority with an advantage it otherwise would not have obtained but for the DPA process. In addition, the disclosure can apparently be made without notice to the corporation engaged in the DPA process and without an opportunity to be heard on the proposed disclosure, unless a court order is already in place prohibiting the disclosure (s 17K(3)(b)). This may discourage corporations from participating in DPA negotiations if it is not clear what use may be made of any information disclosed.

1.3.2. The Code Consultation Draft includes some safeguards in relation to keeping the information confidential from the public but makes plain that the information will be shared amongst relevant Commonwealth agencies. The exception to this is where the disclosure is compelled by law or is permitted by the terms of the DPA. The words "compelled by law" in the Code Consultation Draft and the words "for the purposes of proceedings before, or in accordance with an order of, the court, tribunal, authority or person" at item 4 in the table at s 17K(3) of the proposed legislation leave open the possibility of compelling disclosure to a third party via subpoena or application for public access to government information. If this is the case, we consider that it should be expressly stated in the Code Consultation Draft. Further, the relevant corporation should be notified of any proposed disclosure and afforded the opportunity to be heard prior to disclosure being made.

1.3.3. Further, s 17H of the proposed legislation only renders inadmissible "documents (other than the DPA itself) that indicate the person entered into negotiations for a DPA" (s 17H(1)(a)) or any documents "created solely for the purpose of negotiating a DPA" (s 17H(1)(b)). While the Code Consultation Draft is clear that purposes of excluding the DPA from s 17H include to prevent exploitation of the DPA process, this still leaves open the possibility that a third party may subpoena or otherwise apply to access to the information disclosed during the DPA negotiations as these are exceptions technically "compelled by law." While the documents may be inadmissible in evidence, they may provide an unfair advantage to a prospective litigant by revealing the existence of other documents or information. Further, the Code Consultation Draft does not explain how the terms of a draft DPA itself may be protected from disclosure if that draft DPA is not ultimately approved by the CDPP. Whilst a draft DPA could be considered to fall within the carve-out contained in s

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1 Possibly for use in determining whether to bring civil proceedings against the corporation (notwithstanding the protections in place with respect of evidentiary admissibility contained in s 17H of the proposed legislation, as to which see para 1.3.3).
17H(1)(b) of the proposed legislation, for the avoidance of doubt, we consider that the Code Consultation Draft ought to expressly state that a draft DPA would be included in this category.

1.3.4. In light of the above matters, we consider that the Code Consultation Draft should clarify:

1.3.4.1. that documentary disclosures made during the DPA negotiations process (including, for the avoidance of doubt) documents created or brought into existence for that purpose) are made on a "without prejudice basis" as between the corporation and the CDPP; and

1.3.4.2. the steps (if any) the CDPP will take to ensure adequate protection of information disclosed by a corporation which may provide an unfair advantage to third parties (including draft DPAs and any documents referred to in DPAs (whether draft or final)).

2. TERMS AND FEATURES OF A DPA

2.1. Terms and admissions

2.1.1. Section 17C(1) of the proposed legislation and Section 3 of the Code Consultation Draft outline the intended content of a DPA. This includes a statement of facts relating to each offence to which the DPA relates. We welcome the deviation from the previous proposal that the relevant corporation should be required to make formal admissions of criminal liability for specified offences. In this regard, we consider that the Code Consultation Draft should expressly make clear that a corporation is not required to make any formal admissions of guilt, as is the case in the United Kingdom and the United States and we refer to the comments made in our First Submission on this topic.

2.2. Costs

2.2.1. The Code Consultation Draft is silent as to the method of calculation of any costs that a corporation would be required to pay as a result of participating in DPA negotiations and ultimately agreeing a DPA. Corporations incur significant legal costs in investigating matters to ensure the appropriate action is taken and a large portion of

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2 This is especially important in circumstances where the corporation is not initially represented by solicitors and/or where it may not be clear that documents or information are privileged. In the absence of clarification on this issue, corporations may be discouraged from disclosing documents during the process that were not "created solely for the purpose of negotiating a DPA".
these costs will likely be incurred before self-reporting to authorities has taken place. We consider that any costs incurred by the Commonwealth to be paid by the corporation ought to be reasonable and that a schedule be provided at or around the conclusion of the negotiations process, in order for adequate negotiation to take place. Absent agreement between the parties, provision ought to be made in the Code Consultation Draft for an independent officer to be appointed, if necessary, to determine the reasonableness of any costs incurred.

2.3. **Independent Monitors**

2.3.1. Paragraph 3.16 of the Code Consultation Draft provides that, in many cases, independent external monitors are to be appointed, and their scope of work be agreed, as part of the DPA negotiations process. We consider it necessary that further guidance be provided as to how a monitor is to be appointed and how the scope of a monitor's role is to be defined and agreed. It is necessary to outline that a reasonable budget ought to be agreed as between the parties, so as not to place an unreasonable burden on the corporation in order to comply with the terms of the DPA.

3. **APPROVAL OF DPA**

3.1. **Choice of approving officer**

3.1.1. The Code Consultation Draft confirms (at [4.5]) the position set out in s 17G of the proposed legislation that the Minister alone appoints the approving officer for any DPA. We refer to our First Submission and reiterate our suggestion that any appointment of an approving officer be done in consultation with the corporation the subject of the proposed DPA. Adopting such a policy (to be encapsulated in the final DPA scheme code of practice without the need to amend the proposed legislation) leads to greater independence and public confidence in the process. As suggested in our First Submission, this can be achieved by each party nominating three proposed approving officers of the required knowledge or experience level, with the parties agreeing which individual to recommend to the Minister for consideration, thereby allowing the process contemplated in the proposed legislation to be undertaken. Failing agreement, the corporation and the CDPP could each submit their proposed approving offices to the Minister whose determination would be final.

3.2. **Publication of DPA**

3.2.1. It is of utmost importance that compliance with Australian law is enforced and would-be offenders made aware of the consequences of non-compliance. To this end, we understand the reasoning behind the publication of a DPA and associated documents.
However, any such publication will very likely generate further public (and media) interest, which may have wider repercussions such as collateral civil proceedings commenced by the corporation's shareholders. This will likely be a key consideration in a corporation's decision whether or not to enter into a DPA. Further to [4.12]-[4.14] of the Code Consultation Draft, where a DPA is proposed to be published on the CDPP's website, prior notice ought to be given to the corporation and the CDPP should hear from the corporation as to legitimate arguments against its publication, either in full or with redaction.

3.2.2. Much of the concern regarding the publication of the DPAs relates to the use by third parties of information and materials exchanged during the negotiation process, which we have addressed above. More certainty surrounding these issues (to be encapsulated in the final CDPP DPA scheme code of practice) will allow corporations to best prepare for these events.

4. COMPLIANCE AND BREACH OF DPA TERMS

4.1. Breaches

4.1.1. Further to [5.2] of the Code Consultation Draft, we consider that a corporation should always be given an opportunity to rectify a breach of a minor or mechanical term of the DPA. The consequences of the CDPP's determination of a breach are significant and minor breaches would result in disproportionate repercussions in circumstances where a corporation may be in a position to easily rectify the breach.

4.1.2. As set out at [5.8]-[5.13] of the Code Consultation Draft, a "material contravention" of a DPA (such materiality to apparently be determined at the CDPP's discretion) allows the CDPP to commence a prosecution. There is no mention of a notice period afforded to the corporation prior to the commencement of the prosecution, nor is the corporation afforded any opportunity to be heard on the materiality of the contravention or to confer with the CDPP prior to the filing of an indictment. We consider this would result in potentially wasted costs for both the CDPP and the corporation, in that a negotiated position could potentially be reached prior to commencement of criminal proceedings.

5. FULFILMENT OF DPA TERMS

5.1. Conclusion of a DPA

5.1.1. We refer to and repeat the matters canvassed in our First Submission on this topic, namely that the CDPP should use its best endeavours to ensure that any letter as to the conclusion of the DPA (as envisaged by [6.2] of the Code Consultation Draft) would
encompass an equivalent undertaking to be given by the States and Territories of Australia, to give sufficient comfort to the corporation.

We thank you for the opportunity to comment on the Code Consultation Draft. If you wish to discuss our submission, please contact any of the individuals listed below.

Yours faithfully

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