9 July 2018

Australian Government
Attorney-General's Department

By email: criminallaw@ag.gov.au

Dear Sir/Madam

Deferred Prosecution Agreement (DPA) Scheme – Code of Practice
Consultation Draft

Submission of Control Risks

We refer to the Consultation Draft Code of Practice (Draft Code) released by the Attorney-General’s Department (AGD).

We welcome the opportunity to make a written submission to the AGD in relation to the Draft Code. This submission follows our previous submissions to the:

- AGD on 1 May 2017 in relation to the proposed model of a DPA scheme in Australia
- AGD on 1 May 2017 in relation to the proposed amendments to the foreign bribery offence in the Criminal Code Act 1995 (Criminal Code)
- Department of Foreign Affairs and Trade on 27 February 2017, in relation to its foreign policy whitepaper
- Senate Economics Committee on 24 August 2015 in relation to the Committee’s foreign bribery inquiry.

Overall, we welcome the proposition of a DPA scheme in Australia and the introduction of a Code of Practice. We largely agree with the terms of the Draft Code, subject to our various comments set out below. In particular, we comment on whether the Draft Code provides a corporation with a 'greater certainty of outcome' and also the proposed publishing of notices relevant to a DPA.

We consider it worthy to reiterate at this juncture our view that, for a DPA to appear attractive to a corporation, there needs to be an otherwise very real risk of successful prosecution, involving greater penalties than would be available via a DPA. Importantly however, the attractiveness of a DPA will also depend on the extent to which a corporation will be able to achieve a greater certainty of outcome when compared to litigation and we consider the Draft Code to be a useful tool in achieving this.

Our credentials

Control Risks is an independent, specialist risk consultancy practice with a global network of 36 offices worldwide. We help organisations mitigate risk and succeed in complex and challenging environments. Our diverse suite of intelligence- and investigative-guided solutions assists companies and counsel in identifying, evaluating and minimizing integrity risk when facing and responding to regulatory, operational and strategic challenges around the world. We also currently perform the role of independent monitors in relation to regulatory matters in the US and are therefore able to draw on significant experience and expertise in this area.
The author, Mark Pulvirenti, leads Control Risks’ Compliance, Forensics and Intelligence practice for the Australia Pacific region. He is a Chartered Accountant, Certified Public Accountant, Certified Fraud Examiner and Insolvency Practitioner.

Based in Sydney, Mark directs Control Risks’ compliance consulting services, complex multi-jurisdictional investigations and diverse technology solutions. Prior to his return to Australia in 2014, Mark spent most of his 24 year career overseas in Hong Kong, the Cayman Islands and Thailand, including case management experience in 26 countries across Asia Pacific, Europe and the Americas.

He specialises in financial crime and dispute advisory and investigation matters with a particular bribery and corruption speciality, having led multi-national teams in a number of high profile global corruption investigations. In addition to leading European and Asian regional forensic components of one of the largest global Foreign Corrupt Practices Act (FCPA) investigations to date, Mark has been engaged in corruption, asset-tracing and fraud-related investigations from Europe to Asia and South America, and has also been accepted by the District Court in Hong Kong as an expert witness in money laundering investigations and prosecution cases.

Mark also works with clients in an advisory capacity to assess fraud and corruption risks and to ensure that internal controls, as part of wider fraud and corruption compliance programs, are robust and successfully mitigate risks and detect issues.

Our Comments

In making our comments, we have adopted a numbering format consistent with that set out in the Draft Code. All paragraph and section references below are references to the Draft Code unless otherwise stated.

In our view:

1 Introduction

- We agree that, while a DPA Scheme (together with currently-proposed amendments to the Criminal Code) will likely provide an incentive for corporations to self-report misconduct to, and generally cooperate with, law enforcement, corporations will want as much certainty of outcome as possible. While many issues will turn on the facts at hand, and acknowledging that absolute certainty is not possible, we consider that the Draft Code provides a roadmap to the greatest level of certainty that can be reasonably expected.

   Equally, while proposed amendments to the Criminal Code (by way of “adequate procedures”) seek to improve corporate culture, we see DPAs also contributing to that aim. The Draft Code sets out helpful considerations as to what a compliance program may look like and we make further comments in this regard below.

- We otherwise agree with the remaining content of this section.

2 DPA Negotiations

Entering into DPA Negotiations

- We agree that the restriction of admissibility of information provided by a corporation during the DPA negotiations phase will encourage corporations to engage in open discussions with relevant Commonwealth agencies.

- We note that the Commonwealth Director of Public Prosecutions (CDPP) will only enter into DPA negotiations with a corporation where it is deemed to be in the public interest to do so. We consider the list of matters/factors that the CDPP will consider when
determining whether negotiating with a corporation will be in the public interest (set out in sub-paragraphs 2.4(a) to (d) and in more detail in section 7) will, in our view, provide corporations with clarity. In this regard, we consider “leniency” for wrongdoers to be a privilege for government to offer rather than a fundamental right of the accused.

- We consider paragraph 2.7 to be particularly helpful to corporations. The willingness of the CDPP and/or relevant Commonwealth agencies to be open and available to corporations for initial discussions will, in our view, do much to facilitate successful DPAs.

**During DPA Negotiations**

- We consider it both reasonable and appropriate to:
  - offer a DPA only in circumstances in which a corporation enters into full and frank discussions; and
  - limit protections and create consequences for a corporation that is found to have provided inaccurate, misleading or incomplete information.

- We otherwise agree with the remaining content of this section.

**3 Terms and features of a DPA**

**Financial Penalty**

- We agree that the financial penalty imposed by a DPA must be of an appropriate severity in light of the circumstances relating to the DPA.

**Compensating victims**

- We agree that a DPA should facilitate a corporation identifying and compensating victims of its offending.

**Independent monitors**

- Paragraph 3.16 provides that an independent external monitor will be appointed “in many cases”. Yet paragraph 5.1, provides that an independent monitor will be appointed “in most cases”.

Aside from the inconsistent wording between these two paragraphs, the Draft Code does not provide any guidance to corporations as to what factors will be considered by the CDPP when determining whether or not to require the appointment of a monitor.

Given the potentially-significant cost and burden that such an appointment would involve for a corporation, we consider that it would be useful for corporations to have a better understanding of the circumstances that would give rise to the appointment of a monitor. Alternatively, it would be beneficial to understand if it is the CDPP’s intention to appoint a monitor as a general rule, in the absence of extenuating circumstances.

- We consider the list of matters set out at paragraph 3.19 to be particularly helpful to corporations in understanding what the CDPP might consider “adequate procedures” to look like.

- We otherwise agree with the remaining content of this section.
4 Approval of DPA

Applying to the approving officer for final approval

- Paragraph 4.7 sets out what will be included in the CDPP’s submission to an approving officer. We wonder whether further information/clarification as to the application process itself might be helpful. For instance, will a submission simply be made ‘on the papers’ or will there be some type of hearing or meeting at which the CDPP and/or the corporation will have an opportunity to attend and be heard?

Publishing the DPA and associated documents

- Paragraph 4.12 provides that a DPA will “generally” be published on the CDPP’s website. We consider it essential to the success of a DPA scheme for there to be utmost transparency. While paragraph 4.13 provides a small but helpful list of situations in which the Director may not publish a DPA “in the interests of justice”, we wonder whether paragraph 4.12 could be rephrased to align more closely with subsection 17D(7) of the DPP Act (as defined), which provides that, in the absence of any relevant interests of justice, a DPA “must” be published.1 We consider it appropriate for there to be a greater onus on publishing than not.

- We otherwise agree with the remaining content of this section.

5 Compliance and breach of DPA terms

Preliminary

- Our comments above reflect our position regarding the appointment of monitors and the need for consistency between wording in paragraphs 5.1 and 3.16.

Prosecuting a corporation on the basis of a ‘material contravention’ of the DPA

- Paragraph 5.12 provides that a notice will “usually” be published on the CDPP’s website if a DPA ceases to be in force. Again, in the interests of transparency, we wonder whether clarification might be given here as to the types of circumstances in which such a notice may not be published? Further, we would welcome language to emphasise that notice will be published in the absence of any relevant interests of justice that would prevent publishing.

- We otherwise agree with the remaining content of this section.

6 Fulfilment of DPA terms

- We agree with the content of this section.

7 Public Interest factors

- We note from paragraph 7.5 that self-reporting is not a pre-requisite to proving a corporation’s co-operation but that it is a strong public interest factor in favour of a DPA. We consider this appropriate.

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1 Similarly, when a DPA is varied, section 17F(6) of the DPP Act provides that (in the absence of any relevant interests of justice) the DPA, as varied, “must” be published.
Similarly, we note from paragraph 7.6 that a corporation will not be expected to waive legitimate claims of legal professional privilege to prove co-operation however waiving privilege may demonstrate a high degree of co-operation. We consider this appropriate.

- We otherwise agree with the remaining content of this section.

Should you have any queries in relation to any of the above, please do not hesitate to contact me via email at mark.pulvirenti@controlrisks.com or by telephone on 0414 236919.

Yours faithfully

Mark Pulvirenti
Partner