International Bar Association
Anti-Corruption Committee
Submission to
Australian Attorney General’s Department
Deferred Prosecution Agreement Scheme
Draft Code of Practice

9 July 2018
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Introduction</td>
<td>1</td>
</tr>
<tr>
<td>1.1 International Bar Association</td>
<td>1</td>
</tr>
<tr>
<td>1.2 IBA Anti-Corruption Committee</td>
<td>1</td>
</tr>
<tr>
<td>2 Executive Summary</td>
<td>2</td>
</tr>
<tr>
<td>2.1 Draft DPA Code of Practice</td>
<td>2</td>
</tr>
<tr>
<td>2.2 Certainty for Companies a Critical Feature</td>
<td>2</td>
</tr>
<tr>
<td>3 Detailed Review of Draft Code of Practice</td>
<td>2</td>
</tr>
<tr>
<td>3.1 Introduction and Purpose of the Code</td>
<td>2</td>
</tr>
<tr>
<td>3.2 DPA Negotiations</td>
<td>2</td>
</tr>
<tr>
<td>3.3 Terms and Features of the DPA</td>
<td>3</td>
</tr>
<tr>
<td>3.4 Approval of a DPA</td>
<td>3</td>
</tr>
<tr>
<td>3.5 Compliance and Breach of DPA Terms</td>
<td>3</td>
</tr>
<tr>
<td>3.6 Fulfillment of DPA Terms</td>
<td>3</td>
</tr>
<tr>
<td>3.7 Public Interest Factors</td>
<td>3</td>
</tr>
<tr>
<td>4 Other Matters</td>
<td>4</td>
</tr>
<tr>
<td>4.1 Conclusion</td>
<td>4</td>
</tr>
</tbody>
</table>
1 Introduction

1.1 International Bar Association

(a) The International Bar Association (IBA) is the global voice of the legal profession and includes over 80,000 of the world’s leading lawyers and 190 Bar Associations and Law Societies worldwide as its members.

(b) The IBA has had a longstanding interest in, and advocacy of, issues concerning transparency and probity in the public and private sectors and steps that countries around the world can take to combat foreign bribery and corruption and serious financial crime. Critical to this work is the manner by which governments encourage business to voluntarily report on suspected corporate or financial crime.

1.2 IBA Anti-Corruption Committee

(a) The IBA’s Anti-Corruption Committee (the Committee) draws its members from around the world made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants with legal qualifications. This membership gives the Committee a unique opportunity to comment upon important initiatives that affect anti-bribery and anti-corruption laws, policies and how they are implemented and enforced around the world and in particular countries.

(b) The Committee is pleased to take this opportunity to make a submission to the Australian Attorney General on the proposed Deferred Prosecution Agreement (DPA) Code of Conduct (Draft Code), reflecting how the proposed Commonwealth DPA scheme, set out in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 and to be included in the Director of Public Prosecutions Act 1983 (Cth) (the DPP Act), will operate in practice.

(c) The Committee has made a number of submissions to the Australian Government and to Senate Committees that are relevant to this submission. They include the following:

(i) Amended Submission to the Australian Senate Economics Reference Committee on Australia’s Foreign Bribery Laws dated 24 August 2015;

(ii) Submission to the Australian Attorney General’s Department on a proposed model for a Deferred Prosecution Agreement Scheme in Australia dated 26 April 2017;

(iii) Submission to the Australian Attorney General’s Department on Proposed Amendments to the Foreign Bribery Offences dated 26 April 2017;
2 Executive Summary

2.1 Draft DPA Code of Practice

(a) On the basis of the submission set out herein, the Committee supports the Draft Code.

(b) The Committee considers that the Draft Code sets out reasonable direction and guidance for business in how companies can voluntarily report potentially illegal conduct and to seek to negotiate a DPA with the Commonwealth Director of Public Prosecutions (CDPP).

2.2 Certainty for Companies a Critical Feature

(a) The Committee considers that it is critical to the success of the proposed DPA scheme that companies see and believe in the incentive to voluntarily disclose misconduct and illegal activity. Where there is a self-report by a company, there needs to be a clear identified reduction in penalty and a resolution process (the time taken to secure a DPA, noting each case may vary as to time and complexity, assuming proactive and full cooperation. The Draft Code is silent on the extent to which there is any discount on penalty, leaving it very much open and in the discretion of the prosecutor. This has the potential to be a distinct disincentive to companies if it is not apparent what real and meaningful discount on penalty will apply.

3 Detailed Review of Draft Code of Practice

3.1 Introduction and Purpose of the Code

(a) The Committee supports the introduction of the Draft Code.

(b) However, in the Committee’s experience, the DPA scheme underlying the Draft Code will only be a success where there is a clear and transparent identification of the benefits that a company may secure in negotiating a DPA. If the overall discount factors are too general, leaving a discretion “at large” with the prosecutor, the scheme runs the risk of being unattractive to Australian companies. It is the uncertainty of result that in the Committee’s opinion, needs to be front of mind in how the DPA scheme is implemented.

3.2 DPA Negotiations

(a) The Committee has noted the negotiation process and considers it to be reasonable and acceptable.

(b) The Committee has noted the protections referred to in clauses 2.11 and 2.12 of the Draft Code in terms of the limits upon which access may be obtained, by third parties, to DPA-related documents or communications.
3.3 **Terms and Features of the DPA**

(a) The Committee supports the two-tier threshold test outlined in clause 3.1 of the Draft Code. However, the Committee is concerned that if an admission of a contravention is necessary (see clause 3.2(a) of the Draft Code), the flow on effects in other potential litigation that admission may have, might act as a disincentive to a company agreeing to self-report and to seek to negotiate a DPA.

(b) The Committee supports the importance of compensation to victims of offences covered by the DPA scheme. It therefore supports the importance of a company providing compensation to victims, either individuals, groups of individuals or a relevant foreign country.

(c) The Committee has no objection to the appointment of a monitor (contemplated under clause 3.20 of the Draft Code) being a matter for the CDPP. However, the Committee believes that only those persons experienced in cross-border compliance, financial crime and the review of cultural and ethical issues in business should be appointed as monitors. Appointees can be legally trained or qualified individuals or experienced forensic accountants familiar with Australian and offshore foreign bribery and commercial crime laws and practices. There should be a sound underlying reason to appoint a monitor to address systemic issues and the Committee favours the approach in paragraphs 7.11 to 7.21 of the United Kingdom DPA Code of Practice.

3.4 **Approval of a DPA**

(a) The Committee has noted and supports the approval process before the approving officer (a retired judicial officer with experience to undertake the work of reviewing a proposed DPA).

3.5 **Compliance and Breach of DPA Terms**

(a) The Committee has noted and supports the Draft Code in terms of the circumstances where there has been a contravention of a DPA and the consequences which flow that contravention.

3.6 **Fulfilment of DPA Terms**

(a) The Committee has noted and supports the Draft Code in terms of the consequences of a fulfilled DPA.

3.7 **Public Interest Factors**

(a) The Committee makes the following comments in relation to the public interest factors.

(i) It supports consistency between the Draft Code and the Commonwealth Prosecution Policy.

(ii) Any investigation of foreign bribery or the prosecution of companies or individuals should not, as noted in clause 7.2 of the Draft Code, be influenced by national economic interests, the potential effect on relations with another State or the identity of persons involved in the conduct.

(iii) In clause 7.3, the Draft Code discusses the level of cooperation expected by the CDPP of a company. The Committee is concerned with the criteria in clause 7.4(c)
which refers to the company “making witnesses available for interview when requested”. This appears to be inconsistent with an individual’s fundamental right, if not to silence, then to decline (on independent legal advice) to give evidence or to otherwise potentially incriminate himself. The most a company can do is to say that it has no objection to individuals being interviewed. It is a right of any individual to agree or not to agree to an interview with a criminal investigation agency and any decision made to decline an interview by an individual should not be held against the company, or indeed the individual.

(iv) The Committee has the same concern about the implicit requirement in clause 7.4(c) of the Draft Code on a company being expected to hand over a “full report in respect of any internal investigation” which might include statements by an individual that, particularly without independent legal advice, the individual felt compelled to give as the company told the individual “it must cooperate in the internal investigation to determine what happened”. The Committee considers the Draft Code should make it clear how such individual admissions will be treated in so far as the company and the individual is concerned.

4 Other Matters

4.1 Conclusion

(a) The Committee has supported the introduction of the proposed Commonwealth DPA scheme. The Draft Code provides, together with the Prosecution Policy of the Commonwealth, a helpful guide for Australian companies in how to negotiate a DPA and the expectations of the CDPP.

(b) The Committee reiterates it support, subject to what is said in this submission, to the publication of the Draft Code.