



Australian Government  
Attorney-General's Department

MARCH 2017

## Improving enforcement options for serious corporate crime

*A proposed model for a Deferred Prosecution Agreement scheme in Australia*

PUBLIC CONSULTATION PAPER



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**Attorney-General's Department**

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## **A proposed model for a Deferred Prosecution Agreement scheme in Australia**

### **Public Consultation Paper**

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# 1. Introduction

Corporate crime is estimated to cost Australia more than \$8.5 billion per year.<sup>1</sup> Other estimates place it as accounting for approximately 40% of the total cost of crime in Australia.<sup>2</sup>

While Australia has a well-developed legal and regulatory framework for corporate misconduct, the opaque and sophisticated nature of corporate crime makes it difficult to detect. Often, corporate criminal activity is only identified because ‘whistleblowers’ come forward, or because the company self-reports.

The Australian Government is considering options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by companies.

A key focus of this consideration is a possible deferred prosecution agreement (DPA) scheme.

## **What is a deferred prosecution agreement?**

A DPA is a voluntary, negotiated settlement between a prosecutor and a defendant. DPAs are used in both the US and UK in relation to serious corporate offences.

Under a DPA scheme, where a company or company officer has engaged in serious corporate crime, prosecutors have the option to invite the company to negotiate an agreement to comply with a range of specified conditions. These conditions typically require the company to cooperate with any investigation, admit to agreed facts, pay a financial penalty, and implement a program to improve future compliance. A company will not be prosecuted in relation to the matters that were the subject of the DPA where the company fulfils its obligations under the agreement.

A breach of the terms of a DPA may result in the prosecuting agency commencing prosecution or renegotiating the terms of the DPA with the company.

In 2016, the Minister for Justice, the Hon Michael Keenan MP, released a public consultation paper (the 2016 consultation paper) seeking public comment on whether a DPA scheme should be introduced in Australia. The paper:

- outlined the Australian Government’s multi-faceted approach to combating corporate crime, including current challenges and enforcement options for addressing corporate offences
- provided an overview of arguments for and against a DPA scheme
- outlined existing DPA models in the United States and United Kingdom, and
- set out key issues for consideration regarding the scope and operation of an Australian DPA scheme.

Seventeen submissions were received from a broad range of stakeholders, including business groups, academics, law societies and non-government organisations (see Annex B). All but two

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<sup>1</sup> Bell P, Frain MF, & Lauchs M, ‘Investigating international bribery and the applicability of routine activity theory: a literary review’, *International Journal of Business and Commerce* (2013 vol 2(10) pp 79-94) at p 81.

<sup>2</sup> Sanyal R and Samanta S, ‘Emerald Article: Trends in international bribe-giving: do the anti-bribery laws matter?’ *Journal of International Trade Law and Policy* (2011 vol 10(2), pp 151-164), cited in Bell et al, above.

of the submissions endorsed, or conditionally endorsed, the proposal subject to further development of the details of the scheme.

The 2016 consultation paper and submissions can be accessed at <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>.

Since the release of the 2016 consultation paper, the Attorney-General's Department (the department) has continued to investigate options for a DPA scheme, in close consultation with the Australian Federal Police (AFP), the Office of the Commonwealth Director of Public Prosecutions (CDPP), and other federal agencies. This includes consideration of how such a scheme would interact with Australia's federal structure and constitutional arrangements.

Based on these discussions and the responses to the 2016 consultation paper, the Australian Government has determined that there is merit in further exploring whether and how a DPA scheme could be implemented in the Australian context.

## Purpose of this paper

The purpose of this paper is to:

- outline a proposed model for an Australian DPA scheme, drawing from feedback to the 2016 consultation paper, and
- seek comments on this proposed model.

## Consultation process

### Request for feedback and comments

The Australian Government invites comments on the proposed model for an Australian DPA scheme outlined in this paper.

Submissions will be made available on the Attorney-General's Department website unless you clearly indicate that you would like all or part of your submission to remain confidential.

### Closing date for submissions

Submissions should be sent to [criminal.law@ag.gov.au](mailto:criminal.law@ag.gov.au) no later than close of business on 1 May 2017. Any queries concerning this consultation process may also be directed to this email address.

Thank you for participating in this further consultation process.

# Background

## Aims of an Australian DPA scheme

The challenges associated with detecting, investigating and prosecuting corporate crimes are well-recognised, and are outlined in detail in the 2016 consultation paper. In particular, the paper noted the difficulties for investigators and prosecutors to establish corporate criminal liability, and the lack of incentives for companies to proactively report internal misconduct (even when committed by ‘rogue’ employees).

The high-level aim of an Australian DPA scheme is to **enhance the accountability of Australian business for serious corporate crime** by increasing the range of tools available for investigators and prosecutors to deal with serious corporate crime. In appropriate cases, DPAs would provide a more effective and efficient way of holding offending companies to account without the cost and uncertainty of a criminal trial. This may increase the amount of corporate crime that agencies are able to detect and pursue, both directly through the use of DPAs and by freeing up resources to focus on the most serious forms of offending. For companies, the scheme could provide a way to avoid the damage to reputation and business interests that could be sustained as a result of litigation and/or a formal conviction. While DPAs would be made public, such reporting would show the steps the company was taking to cooperate and address the offending.

A DPA scheme would also serve the dual aims of **punishing companies for wrongdoing** and **creating an avenue for companies to provide redress to those affected**. The terms and conditions of DPAs would require the company to take specific action to address the harm caused by the offending by requiring the company to take steps such as providing compensation to victims, disgorging illicit profits and implementing improved compliance programs.

The proposed model is also designed to **support improved compliance and corporate culture**, both for companies that participate in the DPA scheme and more generally. As noted above, companies will usually need to agree to establish controls to prevent further offending as a condition of a DPA. DPAs will also be made public, which may provide a model for companies seeking to put procedures in place to prevent corporate crime by employees and agents.

Further, implementation of a DPA scheme will **contribute towards Australia meeting its international obligations** to combat corruption and related criminal conduct and **enable us to use DPAs in international settlements** in cases of offending by multinational companies. DPA schemes have been implemented in the US and UK, while the EU is considering implementing analogous reforms to allow companies to seek negotiated settlements for corruption offences. In 2016, investigations into corruption by Rolls-Royce resulted in it settling DPAs with the US and UK governments as well as a leniency agreement with the government of Brazil. Introduction of an Australian DPA scheme would enable us to build on international experience in our response to corporate crime and ensure that we can participate in similar multi-national DPAs and related agreements in the future.

The Australian Government notes concerns (including those outlined in submissions to the 2016 consultation paper) that DPAs could provide companies with a ‘free pass’ to commit serious corporate crime. However, the model proposed in this paper contains safeguards to ensure that DPAs are only used in appropriate circumstances, taking into account other available enforcement and prosecution options. Safeguards included in the proposed model include that **prosecutors could only offer a DPA where it is in the public interest to do so, and a final DPA could only be approved where its terms are found to be in the interests of justice**.

## Developments since previous consultation

The 2016 consultation paper outlined a number of steps the Australian Government has taken to strengthen its ability to prevent, detect and respond to corporate crime. These efforts have continued since the release of the 2016 consultation paper.

In 2014, the Government launched the AFP-hosted Fraud and Anti-Corruption Centre (the FAC Centre). The FAC Centre is a multi-agency initiative which strengthens law enforcement capability to respond to serious and complex fraud, foreign bribery and corruption. In 2016, the Government invested an **additional \$15 million** to expand the FAC Centre's foreign bribery investigative capability.

The Government constantly reviews relevant laws to ensure they remain strong and effective. In March 2016, **new false accounting laws** commenced which make it a criminal offence, punishable by significant penalties, to intentionally or recklessly falsify accounting documents. The Government is also exploring possible amendments to the offence of foreign bribery in s 70.2 of the *Criminal Code Act 1995* (Cth) to improve its effectiveness and remove possible impediments to a successful prosecution.

Work is also underway to enhance **whistleblower protections**. Treasury recently consulted on introducing new tax whistleblower protections and strengthening existing whistleblower protections in the corporate sector. This consultation complements the ongoing Parliamentary Committee inquiry into whistleblower protections in the corporate, public and not-for-profit sectors, which is due to report by 30 June 2017.

Australia is an active member of the OECD Working Group on Bribery, which monitors implementation and enforcement of the Convention. In March 2016, the Minister for Justice attended the **OECD Anti-Bribery Ministerial Meeting** in Paris and reaffirmed Australia's commitment to the Anti-Bribery Convention.<sup>3</sup>

The Senate Economics Committee is currently inquiring into Australia's arrangements in relation to foreign bribery. The terms of reference for this inquiry include an examination of the effectiveness of Commonwealth legislation governing foreign bribery and related offences. The submissions made to that Committee have assisted in preparing this consultation paper.

The Government released **Australia's first Open Government National Action Plan** in December 2016 (the Plan). The Plan was the culmination of joint efforts by Government and civil society (including non-government organisations, business, academia and community groups) to settle concrete initiatives to build confidence in Australian institutions and strengthen our democracy, including through our efforts to combat corporate crime.

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<sup>3</sup> Exploring new enforcement options for serious corporate crime, 17 March 2016  
<https://www.ministerjustice.gov.au/Mediareleases/Pages/2016/FirstQuarter/Exploring-new-enforcement-options-for-serious-corporate-crime.aspx>

The Government has committed to respond to the 2016 consultation paper and seek further public comment on a possible model for an Australian DPA scheme as part of the Plan. Other measures in the Plan relating to combating corporate crime include:

- ensuring that Australia’s protections against money laundering and terrorism financing are strong and that there are no unnecessary barriers to effective prosecution
- reviewing ASIC’s enforcement regime to assess the suitability of the existing regulatory tools available to it to perform its functions adequately, and
- ensuring that adequate, accurate and timely information is available on beneficial ownership of companies, to assist authorities address issues of tax evasion, money laundering and corruption.

The National Action Plan can be accessed at <http://ogpau.pmc.gov.au/>.

## 2. Model for an Australian DPA scheme

This section sets out the details of a proposed model for an Australian DPA scheme. In developing this model, we considered the frameworks currently in use in the United States and United Kingdom and the responses to the 2016 consultation paper.

### 2.1 Preliminary

#### Summary

- DPAs would only be available to companies (individuals would not be able to seek a DPA).
- DPAs would only be available for a publicly available list of Commonwealth 'serious corporate crime' offences.

In the first instance, we propose that an Australian DPA scheme would apply only to companies (not to individuals).

We propose that an Australian DPA scheme would be focussed on reparation, remediation, financial penalties, and on the implementation of effective compliance programs. As such, while individuals may be incentivised to self-report if a DPA is available to them, a DPA scheme is more suited to the context of offending by corporations. Furthermore, information provided by companies during DPA negotiations could assist with the identification and prosecution of individuals for their role in relevant offences.

The UK scheme applies to specified economic crimes listed in Part 2 of Schedule 17 of the *Crime and Courts Act 2013* (UK) (Crime and Courts Act). An Australian DPA scheme should apply to a similar set of offences as those covered by the UK scheme. Accordingly, we propose that DPAs be made available to corporations in the context of the following crime types:

- fraud
- false accounting
- foreign bribery
- money laundering
- dealing with proceeds of crime
- forgery and related offences
- exportation and/or importation of prohibited or restricted goods
- specific offences under the Corporations Act, and
- any ancillary offence relating to an offence to which the DPA scheme explicitly applies.

We are also continuing to assess whether other crime types (such as environmental crime, tax offences, cartel offences and offences under workplace health and safety legislation) should be included in a DPA scheme.

We would also propose that the decision to limit the scheme to companies and to the aforementioned offences be re-assessed after two years as part of a broader review of the scheme.

## 2.2 Initiation of DPA negotiations

### Summary

- A decision on whether to enter into DPA negotiations would be at the discretion of prosecutors. However, the Government will make publicly available guidance on factors that prosecutors may consider in exercising this discretion.
- The DPA negotiation period would begin once a prosecutor extends a formal letter to the company offering to begin DPA negotiations.

Under an Australian DPA scheme, prosecutors engaged by the CDPP would be the only authorities with the capacity to officially invite a company to enter into DPA negotiations. The decision to invite a company to enter into negotiations for a DPA would be at the prosecutor's discretion.

The CDPP, in consultation with relevant investigative agencies, would be responsible for identifying cases that are suitable for consideration under the DPA scheme. Cases may be brought to the CDPP's attention for consideration under the scheme where a company self-reports misconduct and seeks to initiate DPA discussions, or where an enforcement body or regulator detects criminal behaviour and the company then offers full and genuine cooperation.

A successful DPA scheme will need to strike a balance between the priorities of prosecutors and companies during the pre-negotiation period. Prosecutors will need to be made aware of the nature and significance of the company's offending such that they can be satisfied that the misconduct can be appropriately addressed by a DPA. However, a company may be deterred from providing evidence of misconduct if it is unclear whether it is likely to be offered formal DPA negotiations.

As such, a successful DPA scheme will require clear and detailed guidance on when a prosecutor is likely to offer DPA negotiations. This information could be provided in the *Prosecution Policy of the Commonwealth*<sup>4</sup> (Prosecution Policy) and/or in other public documents produced by Government (see section 2.7).

These documents would outline in detail the types of public interest considerations that would guide the CDPP in deciding whether to initiate formal DPA negotiations. Where a company has self-reported misconduct and has genuinely cooperated with any investigation and pre-negotiation discussions, this would be given considerable weight in favour of the initiation of formal negotiations. Such cooperation may include providing the CDPP and any investigative agency with complete and accurate details about corporate and individual misconduct. Other considerations would include the likely success of negotiations, and the company's past conduct, role in the offending, cooperation with any ongoing investigations, and apparent willingness to cooperate once offending is brought to its notice.

If a prosecutor decides to exercise their discretion to enter DPA negotiations, they would be required to extend a formal letter of offer to the company to enter negotiations.

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<sup>4</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, <https://www.cdpp.gov.au/prosecution-process/prosecution-policy>

## 2.3 Negotiation

### Summary

- Prosecutors could conduct DPA negotiations as they see fit, but would be guided by the Prosecution Policy and relevant undertakings entered into by the company.
- The terms of a DPA would be determined by the parties. These will be adapted to suit the particular case but may include requirements to pay financial penalties and reasonable costs associated with administering the DPA and an agreement to implement corporate compliance programs.
- An outcome of the negotiations could be the CDPP declining to prosecute the company (a declination), either party abandoning negotiations, or the production of a final DPA for approval.

We propose the following model for negotiating a DPA.

### DPA negotiations

The DPA negotiation period would begin when the prosecutor sends a formal letter of invitation to the company and end with the voluntary withdrawal of one or both parties from the process or the final approval of a DPA by a retired judge (see section 2.4).

The prosecutor would have the general discretion to conduct DPA negotiations as they see fit, subject to limitations imposed by law and relevant prosecutorial guidelines.

The fact that DPA negotiations are taking place would (subject to any overriding legal requirements) be confidential and details of these negotiations would only be shared with relevant investigative agencies. Subject to specified exceptions, a prosecutor (or relevant investigative agency) would not be permitted to disclose material or use it in subsequent legal proceedings where that material was provided during the DPA negotiation period and was created solely to facilitate, support, or record DPA negotiations (see section 2.7).

In addition to these confidentiality requirements, prosecutors would be required to ensure that, in the course of DPA negotiations:

- the prosecutor and company have obtained sufficient information from each other so each can play an informed part in the negotiation
- a full and accurate record of negotiations is prepared
- where appropriate, the prosecutor maintains copies of all documents provided by the company during the course of negotiations
- the proposed DPA fairly and accurately reflects the severity of the company's alleged offending, and
- the DPA details the entirety of the agreement between the parties in respect of the alleged offending.

The company would also be required to ensure that:

- it does not disclose information provided to the company by the prosecutor or an investigative agency
- the information it provides to the prosecutor during the course of negotiations is not misleading, inaccurate or incomplete

- it cooperates fully with any investigations that are conducted during the course of negotiations, and
- it maintains any records of information or other materials relevant to the matters to which a DPA relates unless the prosecutor provides that they may be disposed of or destroyed.

Before or during DPA negotiations, the prosecutor could decide that neither a prosecution nor a DPA is in the public interest (for example, where the prosecutor comes to believe that no offence has been committed). In such cases, the prosecutor may issue a declination (declining to prosecute on the basis of the information provided) and withdraw from DPA negotiations. Investigative agencies may continue to investigate evidence of misconduct, and a prosecution could subsequently be commenced if new information comes to light.

## Terms of a DPA

It is important that DPAs are flexible and adapted to suit the particular circumstances of the matters to which they relate. For this reason, we do not propose to exhaustively prescribe the types of terms that may be included in a DPA.

We anticipate that DPAs would draw on a wide range of terms and conditions as negotiated between parties. These terms might require a company to disgorge profits, report at regular intervals, implement or improve a compliance program, fund an independent monitor, and/or compensate victims.

However, to promote consistency and certainty for both parties to a DPA, we suggest that DPAs would contain, at a minimum, the following mandatory elements:

- an agreed end date for the agreement, by which point all obligations under the agreement must be satisfied
- an agreed statement of facts outlining the particulars relating to each offence and details of any financial gain or loss, with supporting material
- the company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence (see section 2.7)
- the company's agreement to co-operate with any investigation relating to the matters outlined in the DPA
- provision for the termination of the DPA if the company engages in a material breach of the terms of the DPA (see section 2.5)
- an agreement to make a DPA publicly accessible after it has been approved by a retired judge (see section 2.4), and
- an agreement to publish the DPA and agreed statement of facts on the CDPP's website, unless exceptional circumstances exist (see section 2.4).

## Finalising a draft DPA

We propose that the prosecutor must be satisfied of the following factors before finalising a draft DPA:

- there are reasonable grounds based on admissible evidence to believe that a relevant offence has been committed by the company
- there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, such that there would be a

reasonable prospect of securing conviction should prosecution be commenced in relation to the matters contained in the DPA

- the full extent of the company's offending has been identified throughout the course of negotiations, and
- the public interest would be served by the prosecutor entering into a DPA, including consideration of the public interest in pursuing a DPA compared to available prosecution options.

We propose that once the prosecutor is satisfied of these factors, the DPA would be submitted to the Director of the CDPP (or his or her delegate) for approval.

## 2.4 Approval

### Summary

- A prosecutor would be required to make a written application to a retired judge, seeking approval of the final terms of the DPA.
- The retired judge would consider whether the DPA is in the interests of justice and whether the terms are fair, reasonable, and proportionate.
- If the retired judge approves the DPA, it would take effect and be made publicly available on the CDPP's website. If the DPA is not approved, the parties would be able to negotiate further or terminate the negotiations.

### Proposed model

Once the Director of the CDPP (or his/her delegate) approves the terms of the DPA, the prosecutor would make a written application to a retired judge seeking final approval for the DPA.

The retired judge would examine this written application and the terms of the DPA and determine whether these terms are in the interests of justice and are fair, reasonable and proportionate. In making this determination, the retired judge would not be permitted to revisit matters of fact, but may have regard to the agreed statement of facts and the terms and conditions of the DPA, including compensation granted to third parties, the seriousness of the offending conduct and the level of cooperation demonstrated by the company.

If the retired judge determines that the DPA terms are in the interests of justice and are fair, reasonable, and proportionate, they would be required to make a written declaration including a statement of reasons for reaching this decision. Once the declaration is issued, the DPA would come into effect. At this point, both the declaration and the DPA will be published on the CDPP's website unless there are exceptional circumstances (for example, where publication would prejudice court proceedings).

If the retired judge determines that the DPA terms are not in the interests of justice, or are not fair, reasonable, and proportionate, the parties could continue to negotiate a DPA or terminate negotiations.

It has alternatively been proposed that the Director of the CDPP be given the sole discretion to approve the terms of a DPA. The approval of the Director is currently required to give undertakings of immunity from prosecution. This framework could provide greater certainty to

the parties as the CDPP would both offer and approve the DPA's terms. We welcome any comments on this alternative procedure.

Some submissions to the 2016 consultation paper preferred a UK-style model, where courts are responsible for approving DPAs. However, taking into account constitutional considerations in the Australian context, particularly the separation of judicial power, we do not propose a model involving judicial approval of DPAs.

## 2.5 Oversight and response to DPA breaches

### Summary

- If appropriate, independent monitors would be appointed at the company's expense to ensure that the company adheres to the terms of the DPA. The monitor would report to the CDPP.
- The CDPP may attempt to address breaches of DPAs by providing the company with an opportunity to address the breach and/or renegotiate the terms of the DPA.
- If this does not resolve the breach, the CDPP may seek to resolve the matter by referring the breach to a third party. We seek views on whether this third party should be the Director of the CDPP (or his/her delegate), a retired judge, or a court.
- If the third party determines that the DPA has been materially breached, the CDPP may prosecute the company for the matters included in the DPA.

It will be essential to ensure that the parties abide by the terms of the DPA, and that breaches are appropriately addressed. We seek views on the appropriate model to ensure appropriate oversight and address any breaches of a DPA.

### Independent monitors and oversight

A DPA would typically include commitments by the company to reform its corporate culture to avoid re-offending. To ensure such commitments are met, it will be important that there is appropriate external monitoring.

A separate matter is the oversight of ongoing conditions contained in the DPA, including requirements to report or provide information about compliance with the DPA terms on a periodic basis, or requirements to make payments under the DPA over a period of time.

In contrast to UK and US agencies that administer DPAs, the CDPP does not currently have the regulatory, oversight or investigatory capacity to consistently and proactively monitor DPA compliance.

Accordingly, we propose to ensure that independent monitors can be appointed to oversee compliance with DPAs. Independent monitors could be drawn from auditing and/or consulting firms, or could be individuals with relevant expertise. The appointment of independent monitors may also assist a company to identify and implement internal changes that will protect against future misconduct.

The independent monitor could report to the CDPP on the company's progress in fulfilling relevant terms of the DPA, including any concerns about non-compliance with the DPA.

The appointment of an independent monitor would not be required in all DPAs, but would be expected to be included in the terms of a DPA in cases where the company is obligated to institute organisational or cultural change. The costs associated with appointing and maintaining an independent monitor would be borne by the company.

## Procedure in response to breach of DPA

As the responses to the 2016 consultation paper indicate, the response to possible breaches of a DPA should be adapted to the seriousness of the breach.

As such, we propose that upon identifying a breach of a DPA, three responses would be available to the CDPP:

1. The CDPP could provide the company with an opportunity to address the breach. This may be appropriate in situations where a company has not intended to breach the DPA or in the context of minor breaches.
2. The CDPP could provide the company with an opportunity to address the breach *and* seek to renegotiate the terms of the DPA. This may be appropriate in situations where the company cannot fulfil its obligations under the DPA for reasons beyond its control, or where the CDPP considers that the company requires additional instructions on how to fulfil these obligations. Variations to a DPA would be published to safeguard the transparency of the DPA process.
3. The CDPP could refer the matter to a third party to determine whether there has been a 'material breach' of the DPA. This process is outlined in further detail below.

## Procedure in response to a material breach of DPA

We suggest that legislation would provide a non-exhaustive list of what may constitute 'material breach', including where:

- the breach is so significant that it is in the public interest to terminate the DPA and commence prosecution
- the company has committed further criminal offences
- the breach is such that the integrity of the DPA scheme could be significantly compromised if prosecution is not available as a consequence of the breach
- it has not been possible for parties to agree to a response to an otherwise minor breach
- there has been a pattern or sequence of minor breaches which, when assessed cumulatively, suggest that the company is not making sufficient efforts to meet its obligations under the DPA scheme, and
- the company does not otherwise appear to be committed to its obligations under the DPA.

We are considering three possible options for the third party to determine whether there has been a material breach. We seek views on which option most effectively meets the goals of establishing a fair and transparent process for resolving questions of material breach and ensuring those decisions are made in an efficient manner.

The first option is for possible material breaches of a DPA to be considered by the retired judge involved in approving the DPA. The second option is for a court to consider whether there has been a material breach of the terms of the DPA. The third option is for the Director of the CDPP to determine this issue.

Granting the Director of the CDPP the power to determine whether a 'material breach' has occurred would accord with the the CDPP's traditional function of determining whether there is

sufficient evidence of offending to commence a prosecution. A company may be uncomfortable with the Director deciding a breach.

If the third party determines that there has been a material breach, then the CDPP would have the discretion to terminate the DPA and prosecution may be initiated on the matters to which the DPA relates. All information disclosed during the course of DPA negotiations could be used in evidence in any criminal or civil proceedings that are commenced after a material breach is identified (see section 2.7). If it is determined that the breach is not material, the DPA would continue to operate and the prosecution would not be able to commence.

We are considering whether it is necessary to establish a new offence for breaching a DPA. Depending on the model adopted, it may be sufficient for the company's conduct in materially breaching the DPA to be dealt with during sentencing should the company be convicted for the matters to which the DPA relates.

## 2.6 Conclusion of DPA

### Summary

DPA's would be concluded by either of the following:

- a material breach of a DPA (see section 2.5), or
- fulfilment of the terms of the DPA and the subsequent undertaking by the CDPP not to prosecute the company in relation to the matters that were the subject of the DPA.

Under the proposed model, a DPA would be concluded in one of two ways.

If the company is found to have committed a 'material breach' of the DPA, the CDPP would then be able to terminate the DPA and prosecution may be commenced. Further information on this process is at section 2.5.

Alternatively, if the company fulfils the terms of the DPA, the CDPP could give the company an undertaking pursuant to s 9(6D) of the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act):

*(6D) The Director may, if the Director considers it appropriate to do so, give to a person an undertaking that the person will not be prosecuted (whether on indictment or summarily):*

*(a) for a specified offence against a law of the Commonwealth; or*

*(b) in respect of specified acts or omissions that constitute, or may constitute, an offence against a law of the Commonwealth.*

Under s 9(6E), where an undertaking is given under s 9(6D), criminal proceedings against the company will not be instituted in a federal court or in a court of a state or territory in respect of the offences, acts or omissions specified in the statement of facts.

Currently, the Prosecution Policy contemplates the use of s 9(6D) only in situations where the CDPP gives an accomplice an undertaking to secure that person's testimony for the prosecution of another person/entity. We propose that the Prosecution Policy be amended to allow for the use of s 9(6D) in situations where a company has fulfilled its obligations under a DPA.

If the CDPP gives an undertaking not to prosecute at the conclusion of the DPA, the information disclosed during negotiations (with the exception of the DPA, including the statement of facts,

which will have been published online) would remain confidential and would only be shared with relevant law enforcement agencies unless otherwise required by law.

It has alternatively been proposed that, instead of finalising a DPA using an undertaking under the DPP Act, Australia may wish to adopt the UK model, in which a charge is filed with a court after a DPA is approved and is finalised through a notice of discontinuance if the terms of the DPA are fulfilled (ss 13(2), schedule 17 of the Crime and Courts Act). This may bring greater clarity to parties as to the charges that will be prosecuted if the terms of the DPA are materially breached. It may also assist prosecutors to commence prosecution swiftly if such a breach occurs. We welcome any comments on this alternative procedure.

Regardless of the approach adopted, we note that prosecutors would retain the ability to commence prosecution for a relevant offence after the conclusion of the DPA if it is discovered that the company provided inaccurate, misleading or incomplete information during the course of the negotiations in circumstances where the company knew or ought to have known that the information was inaccurate, misleading or incomplete.

## 2.7 Other issues

### Use of information

Subject to the exceptions outlined below, material disclosed by the company during DPA negotiations would not be disclosed (other than to relevant enforcement and investigative agencies) or used in subsequent criminal or civil proceedings where this information was created solely to facilitate, support, or record DPA negotiations. This approach is drawn from the UK scheme (see s 13, schedule 17, Crime and Courts Act). Examples of the kinds of information that would be protected would include minutes of negotiations, draft DPAs and reference documents created for DPA negotiations.

This information would only be used in subsequent criminal proceedings in the following circumstances:

- in a prosecution for an offence of providing false or misleading information under part 7.4 of the Criminal Code
- where a prosecution is commenced because a company provides inaccurate, misleading or incomplete information during the course of the negotiations in circumstances where the company knew or ought to have known that the information was inaccurate, misleading or incomplete
- where a court determines that the company has materially breached the DPA and the CDDP commences prosecution, or
- where the company makes a statement inconsistent with the material in a prosecution for some other offence.

These protections would not extend to material that was created solely for a purpose other than to facilitate, support, or record DPA negotiations. For example, these protections would not apply to books and records regularly maintained by the company. However, sharing such information may demonstrate that the company has been cooperative and is therefore an appropriate candidate for a DPA.

Where a DPA has been approved, the statement of facts would also be treated as an admission of the facts contained within it. This could be similar to ss 13(2), schedule 17 of the UK Crime

and Courts Act, which provides that the statement of facts contained in the DPA is to be treated as an admission by the company under the *Criminal Justice Act 1967* (UK). We are also considering whether the DPA would require the company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence.

The following examples provide further illustration of the permissible uses of information at various stages of the DPA process.

#### **Example one – Information obtained before DPA negotiation period**

A company provides information to a prosecutor before an offer to enter into DPA negotiations is made. This information may be used by the prosecutor in subsequent criminal proceedings but the provision of this information demonstrates a level of cooperation that increases the company's chances that it will be invited to engage in DPA negotiations.

#### **Example two – Information obtained during negotiation period if DPA not approved**

A prosecutor takes minutes during DPA negotiations and the company provides the prosecution with extensive primary documentation of relevance to the facts in issue.

When applying to a retired judge for approval of the DPA, the prosecutor outlines that the company has demonstrated a high level of cooperation during DPA negotiations. This increases the chance that a retired judge will make a declaration that the DPA is in interests of justice and its terms are fair, reasonable and proportionate.

If the DPA is not approved, or one or more parties decide to leave the DPA negotiations, the primary documentation may be used in subsequent criminal proceedings but the prosecutor would be precluded from using or disclosing the minutes taken during DPA negotiations.

#### **Example three – Information obtained during negotiation period if DPA materially breached**

If the DPA in example two above is approved by a retired judge, but a court/retired judge/Director of the CDPP later determines that the company has materially breached the terms of the DPA and the DPA is therefore terminated, the prosecutor may use the minutes of the meeting, the primary documentation and the DPA statement of facts in subsequent criminal proceedings against the company.

## **Publication of DPAs**

Deferred Prosecution Agreements should be published in full, except in exceptional circumstances (for example, where full publication would prejudice court proceedings). At the end of the DPA process, the CDPP would publish details on how the company has complied with the DPA's terms and conditions. The CDPP would also be required to publish details of any breach, variation or termination of the agreement.

## **Guidance**

An effective DPA scheme will require clear, public guidance outlining its operation.

We propose to ensure appropriate guidance on the operation of the scheme is made available to companies to provide greater certainty on DPA processes. Guidance materials for prosecutors on the DPA process would also be made publicly available. These materials would include considerations that prosecutors would take into account when initiating, negotiating and seeking approval of a DPA.

As noted above, approved DPAs would be made public. Companies could draw on these records as an additional source of guidance on the DPA scheme.

These materials would provide assurance to companies and members of the public as to the transparency and consistency of the scheme.

## **Interaction with other legislative schemes**

Some submissions to the 2016 consultation paper noted that there may be instances in which a prosecutor pursues a DPA against a company which has breached state and territory laws in addition to committing Commonwealth offences. We are currently considering how this can best be handled.

We are also continuing to assess how a DPA scheme would interact with proceeds of crime legislation. Where a DPA requires disgorgement of profits, potential action under proceeds of crime legislation could be rendered unnecessary. We are considering how these two schemes should interact.

## **Use of DPA funds**

DPAs are likely to include conditions that a company make payments—for example, to disgorge profits associated with their misconduct or to provide restitution to victims. A DPA could also require the company to pay reasonable costs associated with establishing and monitoring the DPA.

The company would generally make these payments directly, as part of the obligations it assumes in exchange for the DPA.

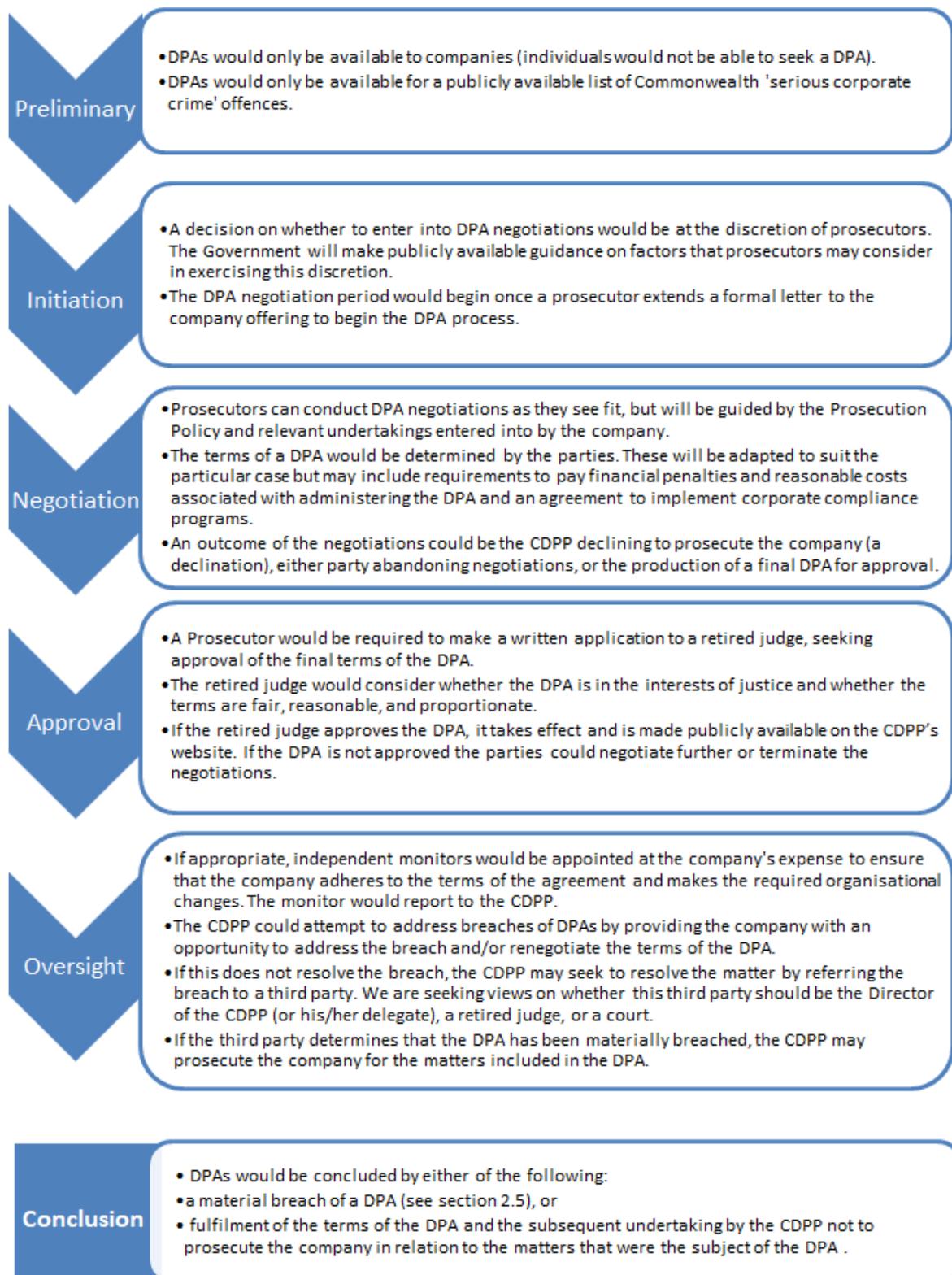
If a DPA includes payment of a fine to the Government, the DPA would specify the form the fine will take, noting that this may affect how the funds are absorbed (for example, whether it will be paid into the consolidated revenue fund or used for a specific purpose).

We propose that a company should not be able to retrieve funds allocated in accordance with a DPA if the agreement is subsequently terminated.

## **Review of the scheme**

We propose that an Australian DPA scheme be subject to review by Government after two years of operation. This review should assess the effectiveness of the scheme in meeting the aims outlined in section 1 of this paper. The review would also scope out possible improvements to the scheme, and would consider whether the scheme should apply to a broader range of offences and/or to individuals.

# Annex A: Summary of proposed DPA model



# Annex B: Summary of submissions to 2016 consultation paper

The 2016 consultation paper sought views on whether a DPA scheme should be introduced in Australia, taking into account the core purposes of the scheme to encourage corporate self-reporting while providing adequate penalties for corporate misconduct. The paper listed 14 specific questions for submissions to address.

The Government received a total of 17 submissions from the following individuals and organisations:

- Australian Chamber of Commerce and Industry
- Australian Securities and Investments Commission
- Australian Tax Office
- BHP Billiton
- CPA Australia
- International Bar Association
- King & Wood Mallesons
- KordaMentha Forensic
- Law Council of Australia (Business Law Section) – Working Group on Foreign Corrupt Practices
- Law Society of New South Wales
- Nemesis Project
- Neville Tiffen & Associates
- Norton Rose Fulbright
- Professor Simon Bronitt
- Rule of Law Institute of Australia
- Transparency International Australia
- Uniting Church

The submissions are available on the Attorney-General's Department website at <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>.

The majority of the submissions expressed support, or conditional support for the scheme. The proposed model in section 2 reflects the key preferences expressed in the submissions where possible (taking into account Australia's federal system and constitutional arrangements), and explains any significant departures.