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Submission to the Attorney-General's Department on Consideration of a Deferred Prosecutions Scheme

2 May 2016



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1 Introduction

The Australian Government is considering options to facilitate a more effective response to corporate crime through encouraging greater self-reporting by companies. A key focus of this consideration is a possible Australian deferred prosecution agreement (DPA) scheme. A DPA is a voluntary, negotiated settlement between a prosecutor and a defendant. They are used in both the US and UK in relation to serious corporate offences. The Attorney-General's Department has published an Issues Paper¹ on the pros and cons of introducing DPAs into the Australian legal system. Responses to the Issues Paper have been sought by 2 May 2016. This is the Australian Chamber's initial response to the broad question.

At present, the Australian Chamber is developing policies that address the issue of anti-corruption measures, inclusive of the sort of criminal conduct where DPAs are used i.e. fraud, bribery and money laundering as expressed in Schedule 17 to the *Crime and Courts Act 2013* (UK) (CC Act).

The Australian Chamber opposes corruption. We support endeavours to uncover and respond to corruption risks. An assessment of the nature, extent and impact of corruption in Australia is to be commended, noting that this is one of the matters that we have recommended in the context of the current Senate inquiry into the establishment of a National Integrity Commission.² The specific question of whether DPAs should be introduced is a matter that sits within the need for a holistic government strategy that looks at the highest areas of risk of corruption and then tailors remedies which target those areas. A national anti-corruption strategy should be formulated having regard to a targeted, risk-based approach once a better understanding of the extent of corruption risks has been undertaken.

This submission addresses the Australian Chamber's initial reaction to the discussion set out in the Issues Paper. Whilst we would prima facie be supportive of the introduction of DPAs a great deal would depend on their specific terms and the need for them to be supervised by the judiciary, as discussed below.

2 Are DPAs a useful tool for Commonwealth agencies?

The 2014 OECD *Report on Analysis of the Crime of Bribery of Foreign Public Officials*³ found that one in three cases came to the attention of authorities through self-reporting by defendant companies or individuals.⁴ Accordingly, legal measures to facilitate self-reporting are likely to facilitate the detection of bribery offences.

In further support of DPAs the Issues Paper indicates that a DPA scheme would not impose additional regulatory and compliance burdens on companies generally. Companies which have engaged in criminal conduct and look to settle through a DPA would likely incur a range of costs, including increased financial penalties as well as compliance and monitoring requirements but

¹ <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf>

² http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Establishment_of_a_National_Integrity_Commission/NIC/Submissions The Australian Chamber submission is number 17

³ http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-foreign-bribery-report_9789264226616-en#page1

⁴ Id at p 9

generally these would be more beneficial than having a criminal conviction recorded with all of the adverse consequences which flow when such a conviction is recorded.

The costs to the Commonwealth would ultimately depend on the design detail of any scheme. The Australian Chamber notes that the Issues Paper says that resourcing implications for Commonwealth agencies would be expected to be offset by the reduced costs in investigating and prosecuting complex corporate crime matters. But the Australian Chamber is concerned that no diminution in enforcement activities should occur because of the introduction of DPAs. Accordingly, there may be an additional cost to Government which will be able to be discerned when the design of the scheme is clearer.

3 Application

Whilst not a concluded view, the Australian Chamber at this stage prefers the British model over the model adopted in the United States of America (USA). This support is given because in the British model a DPA is subject to court supervision and therefore there is proper scrutiny, outside of the sole ambit of officials, about whether the terms of a DPA are fair, reasonable and proportionate. Further limiting the range of offences for which a DPA may be agreed to those offences which are in the British system will also more likely enable a co-operative legislative regime to be negotiated, noting that where State and Territory laws have been breached, a harmonised system of dealing with offenders would be preferred.

4 Individuals as well as Companies?

The Issues Paper raises the question of whether a DPA should be entered into with a commercial organisation as well as with an individual. This question needs further consideration depending on the detailed design of the scheme. At present, the British model is favoured because individuals are the primary agents of the illegitimate conduct should be prosecuted. As noted in the Issues Paper, formal convictions are a very effective deterrent for corporate crime, and the use of DPAs should not weaken this deterrence.

5 Judicial Involvement

As noted in section 3 of this submission, we prefer the model where judicial oversight of DPAs is mandated. This oversight better accords with the rule of law than a system where judicial scrutiny is absent. Judicial scrutiny takes from officials the application of the law. It gives necessary transparency to the administration of any scheme. Too much authority vested in prosecutors to determine which defendants are eligible for DPAs could be seen to undermine the rule of law. Similarly enabling prosecutors to use the threat of either not offering a DPA or dropping an existing DPA as leverage to pressure defendants to agree to conditions should not form part of an Australian system. Those practices risk undermining the public's confidence in the DPA system.

6 Predictability and Certainty

Predictability and certainty are, similarly to the avoidance of high levels of discretion being placed in the hands of officials, fundamental elements of the rule of law. We agree with the notion raised at page 17 of the Issues Paper that clear guidance would need to be provided on the factors a prosecutor would consider when deciding whether to invite a company to enter a DPA. These factors should be based on those used in the UK: whether there is a reasonable suspicion that the organisation has committed an offence, whether there is a reasonable prospect of a successful prosecution, and that it is in the public interest to enter into a DPA instead of a prosecution. Following initial testing of these matters in the courts, there should be a body of law which develops to ensure that DA terms are fair, reasonable and proportionate.

7 DPAs Made Public?

In the interests of promoting transparency, the Australian Chamber favours the British model. Under the British scheme once the court has approved the DPA the prosecutor must publish the DPA. At the same time, the prosecutor must also publish a declaration by the court that the DPA is likely to be in the interests of justice and that the proposed terms of the DPA are fair, reasonable and proportionate, considerations that must be palpably present. The Australian Chamber notes that in the Issues Paper the observation is made that if the terms of a DPA are not made public, this may erode public confidence that the misconduct is being appropriately addressed. We agree with the general proposition that transparency in the process will reinforce the basic tenets of the rule of law.

8 The Conduct of DPA negotiations

The Issues Paper raises a number of complex matters in this context. Any scheme would need to exclude the common law privilege against self-incrimination that entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person. As a means of assisting the process of disclosure (as is suggested in the Issues Paper), the conduct of the defendant during the negotiations and quality of their internal investigations could be taken into account in determining the terms of the DPA. In cases where a defendant has self-reported suspected wrongdoing, the defendant could also be expected to disclose reasonable material to establish the facts of the matter and evidence concerning the role of individuals who may have particular responsibility for the misconduct and who would then be those held culpable.

9 Breach of a DPA

Dependent on the severity of the breach, defendants could face a substantial fine and also face possible resumption of prosecution. Whether evidence from the negotiations may be used against the defendant during criminal or civil proceedings would also depend on the nature and extent of the breach. These are matters that should be the subject of judicial scrutiny so that the consistent application of what is fair, reasonable and proportionate is a central component of the system.

10 Conclusion

The answers to many of the questions raised in the Issues Paper would be dependent on the detailed design of the scheme. Accordingly, the Australian Chamber looks forward to further interaction with the Attorney-General's Department on this important issue, as well as on the more general question of anti-corruption measures.

11 About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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