



AUSTRALIAN TAXATION OFFICE

Improving enforcement options for serious corporate crime:  
Consideration of a Deferred Prosecution Agreements scheme  
in Australia

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Public Consultation Paper by the Attorney-  
General's Department

ATO SUBMISSION

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## Introduction

1. The Australian Taxation Office (ATO) welcomes the opportunity to contribute to this public consultation by the Attorney-General's Department (AGD) into consideration of a Deferred Prosecution Agreements (DPA) scheme in Australia. This submission addresses a number of the questions from the Public Consultation Paper ("Consultation Paper") as below. Note that not all questions have been addressed for a variety of reasons: some questions are of limited direct relevance to the role of the ATO, others focus more on policy issues which are a matter for government and/or The Treasury, some questions are of limited direct relevance to the role of the ATO and lastly for some questions the ATO did not have anything further to add to the discussion in the Consultation Paper.

## The role of the ATO in combatting serious corporate crime

2. Serious corporate crime is always profit driven. The ATO is the key agency in removing the profit from crime. The ATO was the lead agency for Project Wickenby, the multi-agency taskforce aimed at protecting Australia's financial and regulatory systems by preventing people from promoting or participating in the abusive use of secrecy jurisdictions. In addition to over \$985 million recouped from compliance action, Project Wickenby has resulted in 46 convictions for serious tax crime to date. The Serious Financial Crime Taskforce, of which the ATO is a member, is continuing the work of Project Wickenby and focussing more broadly on serious financial crime. The ATO also works closely with partner law enforcement agencies through targeted and co-ordinated actions, and on a number of other taskforces aimed at serious corporate crime activities such as phoenix, trust abuse and superannuation fraud.
3. The ATO is included in the Commonwealth's strategic, capability-led approach to serious and organised crime as an agency with shared responsibility for addressing its impact on Australia. Serious corporate crime, depending upon the suspected actions, can fall under the banner of serious and organised crime. The Commissioner of Taxation is a member of the Australian Crime Commission Board and of the Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA). The ATO is a member of the Serious and Organised Crime Coordination Committee, as well as the Joint Management Group and Joint Operation Groups. The ATO is a key member in a number of cross-agency taskforces targeted at serious corporate crime.
4. The ATO has dedicated teams of criminal investigators, prosecutors, auditors, legal and technical advisors and intelligence analysts focussed on financial crime.

## ATO responses to the Consultation Paper Questions

### Q1) Would a DPA scheme be a useful tool for Commonwealth agencies?

5. Yes. The ATO considers that DPAs are likely to be a valuable tool in combatting serious corporate crime. If DPAs were to be made available for tax crime purposes, their scope in a tax crime context would likely emerge over the longer term, rather than it being a sanction that the ATO would seek to use immediately. The ATO sees potential for DPAs in relation to corporations that have facilitated or been a party to tax crime, and where ethical officers of these corporations come forward to disclose misconduct by the corporation and willingly offer their co-operation to the ATO.

## Q2) In relation to which offences should a Commonwealth DPA scheme be available?

6. The Consultation Paper notes that “serious corporate crime” includes fraud, and the ATO considers that tax offences should come within this definition and therefore be available for a Commonwealth DPA scheme. This would be consistent with the DPA schemes in the United States and United Kingdom:
  - In the United States, DPAs apply to a wide spectrum of federal crimes. Rather than articulate an exhaustive list of criminal offences for which DPAs may be used, the US Department of Justice instead narrowly defines conduct which is not eligible for a DPA. Department of Justice policy prohibits the use of DPAs in matters involving:
    - national security,
    - foreign affairs,
    - individuals with two or more felony convictions,
    - cases that would usually be referred to a State prosecution,
    - where public officials have violated the public trust.
  - In the UK, DPAs may be used for a range of common law offences including conspiracy to defraud, and many statutory offences including money laundering, bribery, fraud, theft, and offences under company law. Ancillary offences of aiding and abetting, or attempting or conspiring to commit any of these offences are also included.
7. The ATO submits that a Commonwealth DPA scheme should be broad enough to encompass all relevant offences (including ancillary offences) under the banner of “serious corporate crime”, which would include tax offences.

## Q3) Should DPAs be available for companies only, or for both companies and individuals?

8. For both companies and individuals. As noted in the Consultation Paper:

“In order to encourage self-reporting by individuals, it may be beneficial to allow DPAs for an individual, provided they are not the chief architect of the relevant misconduct.”
9. By excluding individuals from a DPA scheme, this may reduce its appeal to officers of companies who would otherwise be willing to come forward.
10. A DPA scheme should also allow for multiple entities within a group to jointly enter into a DPA – for example foreign-headquartered entities along with Australian subsidiaries.

## Q5) What measures could enhance certainty for companies invited to enter a DPA?

11. These measures will largely be a matter for the prosecuting authority (likely the Commonwealth Director of Public Prosecutions) however the measures may need to cover any potential impact on tax assessments for the companies and individuals subject to a DPA. It would be premature to analyse this issue in detail at this time given the potential scope of the DPA scheme is still to be decided.

Q6) Should a DPA be made public? If so, are there any circumstances where a DPA should not be published, or its publication postponed?

12. This is a policy matter. However the ATO notes that if the final position is that DPAs should be made public, the strict tax secrecy provisions in the *Taxation Administration Act 1953* could require amendment to allow for such a disclosure to occur.

Q9) Should material disclosed during negotiations be available for criminal and/or civil proceedings?

13. As the Consultation Paper notes, there are compelling reasons for information disclosed during negotiations on a DPA to be made available for criminal and/or civil proceedings. However if the final position is that material disclosed during negotiations should not be available for criminal and/or civil proceedings, section 166 of the *Income Tax Assessment Act 1936* would have to be taken into account in any DPA scheme. Under section 166, the Commissioner of Taxation is under a duty to make an assessment of tax using information available to him from income tax returns and/or other sources. These 'other sources' would likely include information provided during DPA negotiations unless they are protected by a privilege or other statutory protection. As noted by the Full Federal Court in *Denlay v Commissioner of Taxation [2011] FCAFC 63*, the obligation in section 166 is not limited in any way and would require express statutory provision in order to be read narrowly.