06 May 2016

Australian Government
Attorney-General's Department

Email: criminal.law@ag.gov.au

Dear Sir/ Madam

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

CPA Australia represents the diverse interests of more than 155,000 members in 118 countries. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders. We make this submission on behalf of our members and in the broader public interest.

CPA Australia has had a long term interest in this area of law reform having made a submission to the Senate Economics References Committee inquiry into foreign bribery and responded to a specific request from your Department to comment on a draft offence of false accounting.

CPA Australia commends the Attorney-General's Department for undertaking this consultation on a matter of national and global importance. Combatting serious corporate crime requires firm responses in domestic laws and international cooperation, as well as exchange of information between agencies. Developments along the lines canvassed in the Public Consultation Paper, along with recently announced improvements to funding, will go a considerable way towards addressing concerns around Australia's inaction and slow response to implementation of the OECD Anti-Bribery Convention.

Our submission favours development along the lines of the more targeted United Kingdom approach rather than the wide ranging scheme of limited exclusions adopted in the United States. As such, we urge development of the scheme within the framework of Part 2.5 (Corporate criminal responsibility) of the Criminal Code Act 1995 (Cth.), noting though the breadth of application achieved in section 12.1 of the Criminal Code Act whereby "this Code applies to bodies corporate in the same way as it applies to individuals" creating the need for careful and targeted drafting.

Any legislation through which a Deferred Prosecution Agreement (DPA) scheme is promulgated should narrow its application to defined areas, such as bribery and money laundering. These defined areas may, by legislative amendment or delegated agency powers, be augmented if significant need arises. Additionally, this incremental approach safeguards against creating uncertainty and disharmony with the extensive penalty provisions of the Corporation Act 2001, which have both civil (Part 9.4B) and criminal (refer Schedule 3) consequences.

Our response to the consultation questions follows below.

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

Yes, but only in areas and circumstances of demonstrated need.

The misconduct and abuse sought to be combatted should be identified first, rather than a blanket extension to agencies whose armoury of investigatory and enforcement powers is, in our opinion, already adequate. The prompt availing of such powers to the appropriate agency may avoid the sub-optimal occurrence of resorting to civil penalties ancillary to the main wrongdoing and applied arguable to individuals less directly engaged or complicit. We allude here to the inaction around criminal proceeds recommended in the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (Cole Inquiry of 2005) and the eventual negotiation by ASIC of civil penalties and disqualifications (*ASIC v Lindberg* [2012] VSC 332 and *ASIC v Ingleby* [2012] VSC 339).

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

Aside from our introductory observations, and those immediately above, we make no further specific comment around the range of offences other than to caution against application outside of economic crimes. Further, noting the existence of both Commonwealth and State powers in criminal matters, we believe the development of DPAs is possibly worthy of consideration by COAG.

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

The development of a DPA scheme should in no way undermine the means of criminal attribution achieved through the physical element and fault elements respectively contained in sections 12.2 and 12.3 of Part 12.5 of the Criminal Code Act 1995. The fundamental concept of *mens rea* would point to DPAs being available only to companies. Nevertheless, we believe there is a need to be able to protect those individuals who work within a governance environment of tacit approval of wrongdoing. There is potentially a perverse incentive for companies to seek out an individual 'scapegoat' to whom blame can be shifted.

Q4: To what extent should courts be involved in an Australian DPA scheme?

CPA Australia is of the view that a degree of court involvement has distinct merit and is to be preferred over the United States approach where the prosecuting agency takes a dominant role. Transparency of process and the required degree of deterrence support this more formalised approach. We acknowledge the Constitutional impediments identified in the Consultation Paper and hope that they do not prove insurmountable. One avenue of comparison perhaps worthy of consideration is the Court approval and review powers provided within Part 5.1 (Arrangements and Reconstruction) of the Corporations Act 2001.

Q5: What measures could enhance certainty for companies invited to enter into a DPA?

CPA Australia supports development of the type and content of a guidance document outlined in Part E of the Consultation Paper. It is important that paramountcy be given to public interest considerations and that the prosecuting authority retains discretion over negotiations. This said, the development of any procedure needs to be based on encouraging companies to come forward. In this regard, it is important that a predictable basis of preliminary hearing be developed.

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

Generally, suppression would be unwise in an environment where corporate and financial market law encourages, through mechanisms such as continuous disclosure, the promotion and efficient announcement of matters that impact on investor and market assessments. Non- or postponed publication should be restricted to such circumstances as the potential jeopardising of current enforcement litigation, threat to national security and the placing of an individual at physical risk.

Q7: How should DPA negotiations be structured?

CPA Australia agrees with the broad thrust of negotiation arrangements outlined in Part G of the Consultation Paper. At preliminary stages of negotiation, a degree of privacy is important so as to encourage possibly offending companies to come forward. The corresponding promoting of internal investigation is also likely to minimise harm and draw the wrongdoing to an earlier cessation.

Q8: What factors should be considered in agreeing a proposed settlement?

CPA Australia has no specific comment here.

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

CPA Australia has no specific comment here.

Q10: What facts and terms should DPAs contain?

Page 20 of the Consultation Paper provides a worthwhile list of terms which might be included in a DPA, against which we make a limited number of comments. The payment of penalties would need to be set with reference to the scheme and scale of penalty units currently set by the Crimes Act 1914. The reference to disgorgement of profits is sound, however the payment of compensation to victims seems uncertain – how is this to be determined in a non-judicial setting? A further matter which might warrant coverage is addressing any stay of civil proceedings by allegedly aggrieved parties.

Q11: How should funds raised through DPAs be used?

On its face, CPA Australia sees no merit in departing from where and how criminal penalties are currently applied under existing laws. Being applied to the operating needs of the concerned agency raises wider issues of how oversight and enforcement regulation should be funded across a range of agencies.

Q12: What should be the consequences of a breach of a DPA?

Serious breach should trigger resumption of prosecution and there should be no barring of evidence obtained in negotiations being used against the defendant in any criminal or civil proceedings.

Q13: Should an Australian DPA scheme make use of independent monitors or other non-judicial supervisory mechanisms?

Yes. Given that the law is seeking not only to deter and punish, but also to effect behavioural change and improvement in governance, a degree of 'post-settlement' scrutiny would be advantageous. Likewise, monitoring of this nature would guard against recidivism and departure from agreed outcomes.

Q14: Do you have any other comments in relation to a potential Commonwealth DPA scheme?

We have no further comment.

If you have any questions regarding this submission, please do not hesitate to contact our Policy Adviser ESG Dr John Purcell FCPA on [INFORMATION REDACTED] or at [INFORMATION REDACTED].

Yours faithfully

Stuart Dignam
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