Submission of Working Group on Foreign Corrupt Practices, Business Law Section of the Law Council of Australia

Public Consultation Paper
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Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia

This submission has been prepared by the Foreign Corrupt Practices Working Group, part of the Business Law Section of the Law Council of Australia.

The Working Group strongly supports the implementation of a Commonwealth Deferred Prosecution Agreement (**DPA**) scheme in Australia. A submission to this effect was also made by the Working Group to the Senate Economics References Committee inquiry into Foreign Bribery in August 2015.

The Working Group responds as follows to the fourteen questions raised in the Consultation Paper. This submission has attempted to succinctly record the views of the Working Group. We are happy to elaborate on any of the views expressed.

Question 1: Would a DPA Scheme be a useful tool for Commonwealth Agencies?

Yes, in the area of corporate crime.

The Working Group considers that the arguments in favour of and against DPA's for serious corporate crime are fully and comprehensively summarised in the Consultation Paper. The Working Group considers that the listed advantages outweigh the disadvantages.

When criminal law enforcement outcomes in Australia in the area of corporate economic crime are compared with outcomes achieved in some other countries over the last decade, Australia self-evidently does not have a strong record. This is true in the narrow area of corruption of foreign public officials (see OECD Phase 3 Report of 2012 and the more recent OECD Follow-up to the Phase 3 Report & Recommendations of April 2015) but also in relation to the criminal enforcement of other forms of economic crime by corporations.

Success in the use of a broader array of regulatory enforcement tools so as to create a regulatory enforcement pyramid can be seen with the additional tools given to ASIC and to the ACCC over recent decades, for example civil penalty proceedings and the ability to conclude investigations and enforcement proceedings on the basis of enforceable undertakings. These additional tools have improved enforcement outcomes for those regulatory bodies in critical areas (for example, continuous disclosure and directors' duties, in the case of ASIC and anti-competitive conduct and consumer protection breaches, in the case of ACCC).

A DPA scheme offers opportunities to deal with corporate criminal activity that may avoid some of the cost, delay and uncertainty of traditional prosecutions.

It is important to note that it is not just the introduction of a DPA scheme itself that requires consideration in the creation of a more effective regulatory regime.

First, there would need to be a change in the enforcement mindset of the relevant regulators (in particular, AFP and CDPP) in approaching proactive enforcement outcomes, away from a closed "black box" mindset of traditional criminal law enforcement to a more open engagement with corporate entities being investigated. This mindset or relationship can best be compared to the relationship developed between the business community and the ACCC over a number of years. There also needs to be a greater awareness and understanding of corporate compliance practices across various industries. This is critical for the regulators understanding how business works. Indeed, the US Department of Justice has employed a specialist Compliance Counsel (with

broad private industry experience) to ensure the Department's understanding of compliance issues is comprehensive.

Second, it is critical that the design of a DPA scheme encourages self-reporting to achieve the identified benefits. This means parties who self-report must obtain a high degree of assurance that a DPA is a predictable outcome of self-reporting if the relevant investigative agency is not aware of the matter reported, has no investigation under way in respect of it and the self-reporting parties are willing to co-operate with the investigative agency. The Working Group would support a stronger statement of regulatory intent in that regard than that contained in the UK Code of Practice. What is necessary is a set of clear, transparent criteria so that companies know what is expected of them and when they will be entitled to seek to negotiate a DPA. The criteria should be set out in the enabling legislation, the AFP's Immunity/Leniency Policy, the AFP's Memorandum of Understanding with the CDPP and/or amendments to the Prosecution Policy of the Commonwealth administered by the CDPP.

Question 2: In relation to which offences should a Commonwealth DPA Scheme be available?

The Working Group considers a DPA Scheme should in principle be available for all kinds of corporate economic crime. The Working Group would support the specification of the relevant offences to which a DPA is available in a manner similar to the way civil penalty offences are specified in the Corporations Act and the way offences are specified in Part 2 of Schedule 17 of the UK Crimes and Courts Act.

The Working Group considers that there may be other forms of corporate crime to which DPA's could be applied (for example, corporate responsibility for environmental damage). However, a DPA scheme should be initially introduced for identified corporate crimes (bribery, money-laundering, fraud and cartels) with a subsequent review of effectiveness, say after 3 years, before expanding the regime.

Question 3: Should DPA's be available for companies only, or for both companies and individuals?

There are mixed views within the Working Group as to whether DPA's should be available for individuals as well as companies. The "*no body to kick, no soul to damn*" features associated with corporate culpability means that a DPA can be a particularly efficient and cost effective outcome where the guiding mind and will of a company demonstrates a desire to reform and repair internal processes.

From a public policy perspective there is no strong basis to distinguish corporate and individual liability in relation to the possible availability of a DPA. Criminal sanctions against corporations should place corporations in the same position, or as close as possible, as individuals. Where an individual demonstrates remorse and a desire to reform that should provide a basis to support the availability of DPA's for individuals under the criminal law.[1]

The Working Group notes the prevailing view in the United States, reflected in the "*Yates Memorandum*" to the effect that cooperation credit requires a company to disclose the conduct of all relevant individuals.

The Working Group notes the issue posed in the Consultation Paper concerning the risk that insiders may be discouraged from seeking a corporate DPA if that may expose them to personal liability. There will always be a risk of this, although in many corporate environments there will be sufficient governance checks and balances so that the directing mind and will of the company (through the Board of Directors or the chair of a risk audit committee) will act in corporate rather than insider interests.

The Working Group notes that these types of changes may require more substantive legislative changes to existing sentencing principles under Commonwealth laws[2].

[1] In this context, the Working Group also notes the views of Judge Emmet Sullivan of the US District Court in *United States v Saena Corporation; United States v Intelligent Decisions Inc* (Case 1: 14-cr-00066-EGS, Judgment dated 21 October 2014) where the Court found that the US Congress did not create the US DPA scheme just for companies; rather, it should be applied equally to companies and individuals.

[2] Section 16AA *Crimes Act 1914* (Cth) will need to be looked at in this context.

Question 4: To what extent should the courts be involved in an Australian DPA Scheme?

DPA's should be subject to the approval of a Court based on considerations of fairness, reasonableness and proportionality.

There needs to be a public assurance that large companies are not using DPA's to buy their way out of trouble- a key potential disadvantage of a DPA scheme. There is a serious question as to whether the US experience with DPA's has gone too far in this direction in recent years leading to a loss in public confidence. Judicial oversight will assist in providing that confidence. The criteria set out in Section 8(1) of Schedule 17 of the UK Crimes and Courts Act is a useful judicial standard to apply.

The Working Group notes the reference in the Consultation Paper to issues of constitutional and separation of powers posed by the introduction of a DPA scheme. Clearly a DPA scheme cannot be structured as the rubber stamping of a pre agreed criminal penalty in the sense criticised by the High Court of Australia.[3] The Working Group suggests that it should be able to structure a DPA scheme to navigate these issues- for example by providing the relevant indictment is suspended so that the Court is not required to itself impose a criminal penalty.

A party agreeing to a DPA should not be subjected to the possible jeopardy of a Court substituting its own penalty to that agreed in the DPA. The role of the Court should be binary to accept the negotiated DPA or to reject the DPA (where, for example, the Court does not consider the DPA to be in the interests of justice) and require the parties to continue with the prosecution.

Members of the Working Group vigorously debated the question of the degree of Court intrusion into the penalties contained in a DPA. The majority considered encouragement of self-reporting would be enhanced if the scheme allows a fixed proposed penalty to be reviewed by the Court.

The Working Group does not support the two step preliminary hearing regime provided for in the UK Crimes and Courts Act. Confirmation of a DPA once agreed at a single Court hearing should adequately address the relevant policy concerns.

Question 5: What measures could enhance certainty for companies invited to enter into a DPA?

As stated above, the Working Group believes this is one of the critical issues in developing an effective DPA Scheme. Without clear, transparent guidelines or criteria which permit or entitle a company to seek to negotiate a DPA, the outcome will be dependent upon the shifting criteria or discretion of individual prosecutors, which would not only be unhelpful, but counter-productive to encouraging companies to voluntarily report potentially criminal conduct.

The Working Group believes that the guidelines surrounding the operation of a DPA scheme should contain a prosecutorial direction that a DPA should be an expected outcome where:

- The company has promptly self-reported the conduct to the relevant investigative or prosecutorial body (the AFP or the CDPP).
- The self-reported conduct is not the subject of any investigation or prosecution by the relevant body at the time it is reported.
- The company has promptly investigated any concerns of potential wrongdoing upon red-flags being raised internally and reports its findings to the relevant body.
- The company has volunteered access to its records and to its employees for interviews to occur (subject to each individual having the right to independent legal advice and to decide whether or not to submit to any interview, formal or otherwise). However, the company should not be obliged to provide privileged information to a prosecutor to prove its co-operation.

[3] *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 253 CLR 58:[2014] HCA 2; approved in *Commonwealth of Australia & Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] HCA 46 at [33] to [37] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.

- Any employees or agents who may have been involved in wrongdoing have been or will be appropriately disciplined by the company in consultation with the regulatory body. Where a company forms the opinion that any of its employees or agents have engaged in criminal conduct, the company remains at liberty in its discretion to terminate the employment of that individual (or agent) subject to the legal advice the company may receive on that matter.

- The company has strengthened compliance measures (appropriate to the industry in which the company operates) to ensure future wrongdoing is avoided or if it occurs, it is promptly detected before the company enters into any offending conduct.

The ultimate decision to offer a DPA should remain a prosecutorial discretion having regard to clearly established criteria. The list of considerations set out in Section E (page 17) of the Consultation Paper are appropriate. The decision to accept a DPA should remain at the election of the company being investigated without any adverse inference being drawn against the company if it elects not to accept a DPA.

Question 6: Should a DPA be made public? If so, are there any circumstances where a DPA should not be published, or its publications postponed?

There should be a strong presumption and expectation that a DPA be made public.

Public confidence in the administration of a DPA scheme requires that the enforcement outcome reflected by a DPA is available for public scrutiny.

The Working Group is conscious that there is a risk that allegations of corporate economic crime can be politicised – examples of politicisation in the foreign bribery space can be seen with the suppression issues surrounding the Securency prosecutions in Australia, the BAE investigation in the UK and the Giffen prosecution in the US.

Only in exceptional circumstances should a DPA be suppressed or its announcement be delayed, and then only as a result of a court order. There is nothing special about DPA's that should result in different legal principles in relation to the law relating to the imposition of suppression orders generally.

Question 7: How should DPA negotiations be structured?

The Working Group does not consider that any great formality needs to be prescribed as to how DPA negotiations are structured. The CDPP should be involved in all DPA negotiations.

That being said Section 3 of the UK code of practice provides a helpful guide as to the policy underpinnings for the conduct of DPA negotiations. The Working Group would not however support the rigidity of the process outlined in that section, in the interests of flexibility being available to achieve satisfactory enforcement outcomes.

Beyond a statement of general principles, every example of a DPA negotiation is likely to have unique features and that should be recognised in the relevant guidelines.

The DPA guidelines should make it clear that the resolution of a DPA negotiation should be undertaken as expeditiously as is reasonable in the circumstances. The interests of justice will always support such a principle applying, although the needs of every case will be different. The specification of fixed timeframes to resolve a DPA is likely to be counter-productive.

Question 8: What factors should be considered in agreeing a proposed settlement?

The factors listed in section 9-28.300 et seq of the DOJ manual, sections 6.22 and 6.23 of the SEC manual and section 2 of the UK code of practice are a good starting point for the factors that should be specified in relevant guidelines.

Question 9: Should material disclosed during negotiations be available for criminal and/or civil proceedings?

The Working Group considers that a DPA negotiation should sit outside the normal investigative process and to the extent material is provided as part of a DPA negotiation it should only generally be available for subsequent criminal and/or civil proceedings if separately obtained through normal methods of compulsion. Negotiations about entering into a DPA should be confidential and without prejudice

The Working Group considers that the following positions should apply to any Commonwealth DPA scheme:

- all negotiations between a company and the prosecutor relating to a DPA should be and remain confidential, not to be disclosed to any third party;

- if a DPA is concluded, material and information supplied by the company and (documents, records, statements of facts and/or admissions) held by the prosecutor may be used by the prosecutor against the company (and any other person only on a derivative basis and not as constituting any admission by that other person) in any subsequent criminal or civil proceeding against the company, in the event of a breach or termination of the DPA (other than by compliance with its terms and its expiry);

- if a DPA is not concluded and negotiations for a DPA cease (for whatever reason), all material and information held by the prosecutor supplied to it on a voluntary basis or otherwise by the company for the purposes of negotiating a DPA may not be used by the prosecutor against the company (or any other person) and all materials so provided to the prosecutor on a voluntary basis must be either destroyed or returned to the company;

- all material and information held by the prosecutor supplied to it on a voluntary basis or otherwise by the company for the purposes of negotiating a DPA should not be accessible from regulatory agencies or the CDPP by class action litigants or others bringing civil proceedings against the company (or any other person); and

- these conditions and the permitted use of any information or documents provided by a company seeking to negotiate a DPA should be clearly set out in the supporting legislation to ensure enforceable rights for the return of such material exist.

The Working Group strongly believes that there is a real incentive for a company to volunteer its internal records and information in return for the ability to negotiate a DPA. However, there should also be an obligation on the prosecutor to negotiate on the premise that a DPA will be achieved. If for any reason, the negotiations cease, the prosecutor should not be placed in an advantageous position of having obtained the company's records voluntarily and then be able to use them against the company in a criminal prosecution. That is not, in the Working Group's opinion, a proper use of the prosecutor's position in the criminal justice system.

Question 10: What facts and terms should DPA's contain?

In general a DPA should contain the matters listed in section H (page 20) of the Consultation paper.

A DPA should contain an agreed statement of facts in sufficient detail to allow appropriately informed judicial review as outlined above.

As noted by the Victorian Court of Appeal in *ASIC v Ingleby* [2013] VSCA 49 judicial review of a civil penalty settlement requires sufficient material to be provided to allow the Court to assess the appropriateness of the civil penalty proposed (see paragraphs 31 and 69). This position is acceptable in the civil penalty regime where the courts can take a more proactive approach in determining liability and imposing penalties on a company (and individuals).

The requirement of section 5(1) of Schedule 17 of the UK Crimes and Courts Act is a useful reference point as it provides for the fact that admissions may be included in an agreed statement of facts. However, the real issue is whether, under Australia's criminal law, an admission is necessary to underpin the court's imposition of a criminal sentence, exercising judicial power.

The Working Group does not believe that a DPA need contain a formal admission of criminal liability.

Question 11: How should funds raised through DPA's be used?

Payments in the nature of financial penalties should be paid to general revenue in the same way as penalties imposed in connection with findings of criminal liability. Penalties as a matter of policy should not be retained by investigating or prosecuting agencies as that would create a conflict of interest.

Beyond this general provision there should be no restrictions on a DPA making provisions for the creation of a compensation fund or for a company making a charitable or other contribution to a public or private body that advances an area that touches on the conduct the subject of the DPA. DPA's should facilitate flexibility in advancing settlement's that have broad public benefit.

The Working Group considers that Section 5(3) of the UK Crimes and Courts Act is a useful specification of potential DPA requirements.

Question 12: What should be the consequences of breach of a DPA?

Loss of the deferral of the prosecution.

As noted above the Working Group does not consider it necessary that there be an admission of criminality (see the comments above).

In that regard the Working Group considers Section 9 of Schedule 17 of the UK Crimes and Courts Act is a useful model of regulation.

The ultimate consequences of the loss of deferral of the prosecution would fall for determination by the Court through criminal proceedings.

Question 13: Should an Australian DPA Scheme make use of independent monitors or other non-judicial supervisory mechanisms?

In many situations monitors or other supervisory mechanisms will be an appropriate means to obtain assurance that the company will comply with its DPA obligations and further reform its behaviour as part of participating in the DPA scheme.

The effectiveness of monitors and other supervisory mechanisms can be seen in the US experience with DPA's. See also the use of a monitor in the UK Standard Bank PLC DPA.

In the field of enforceable undertakings administered by ASIC and ACCC, professional advisory firms are frequently used as independent auditors or monitors to ensure that those undertakings are implemented and complied with. The Working Group believes that certain nominated and experienced practitioners familiar with domestic fraud and foreign bribery, anti-corruption and compliance issues in a professional advisory firm could be engaged to supervise and monitor compliance with DPA obligations. The US tradition is not to appoint "firms" as monitors, but to appoint an experienced individual who is accountable to the company, the regulatory body and the Court. It is critical that the appointment of a monitor be subject to negotiation between the regulatory body and the company and the monitor's obligations should be clearly set out in any DPA (particularly as to the monitor's scope of duties and reporting obligations).

Question 14: Do you have any other comments in relation to a potential Commonwealth Scheme?

As noted in its submission to the Senate Economic References Committee, the Working Group also supports a substantive review of private whistleblowing legislation to support the proactive enforcement of corporate economic crime.

The Working Group also notes the value of data likely to be generated by companies entering into DPA negotiations, including through access to internal records, employee interviews, and identification of internal mechanisms by which wrongdoing has come to light (eg whistleblowers).The public availability of grouped-up anonymised data on factors such as these could assist risk analysis within corporations, enforcement agency strategy, and on-going review of the content of guidelines surrounding the operation of a DPA scheme. The resource implications associated with the creation of summary data within a prosecutorial agency could be addressed by allocation of a component of the funds raised through DPA's.