

Neville Tiffen & Associates
PO Box 7283
Brighton
Vic 3186
nevillet@ntcompliance.com

The Secretary
Attorney General's Department

Re: Attorney General's Department's Considerations of a Deferred Prosecution Agreement Scheme in Australia

I thank the Department for the opportunity to make a submission as it considers a Deferred Prosecution Agreement (DPA) scheme in Australia.

My background

Today, I am a specialist consultant on business integrity, corporate governance and compliance. I carry on business as the sole proprietor of Neville Tiffen & Associates. I commenced this practice after leaving the Rio Tinto Group in July 2013. In 2015, the Secretary-General of the Organisation for Economic Cooperation and Development (OECD) invited me to join his newly formed high level advisory group on integrity and anti-corruption. Also, in 2015, I became an independent member of the Victorian Department of Education and Training's Integrity Committee. I am a member of the advisory group of the World Economic Forum's project on Infrastructure and Urban Development: Building Foundations for Transparency and am a Fellow of the Governance Institute of Australia and a member of several professional associations.

I was employed by Rio Tinto for over 20 years. My last role was Global Head of Compliance which I held for over five years. During that time, I designed and implemented its Integrity and Compliance Program. My other roles at Rio Tinto included Regional General Counsel – USA and South America, Chief Counsel – Australia, and Corporate Secretary/Chief Counsel – Comalco.

For transparency, I record that I was retained by the Australian Federal Police (AFP) to participate in their internal workshops on foreign bribery.

The recommendations, comments and views expressed in this submission are my own and not the views of any organization with which I am currently, or have previously been, associated.

Background

I set out below my submissions in relation to each of the particular questions asked by the Department in its discussion paper issued in March 2016. In doing so, I refer the Department to my submission to the Senate Standing Committee on Economics inquiry into foreign bribery dated

August 2015 (Submission no. 16).¹ That submission was made in the context of foreign bribery but many of the points made there are applicable more broadly. In particular, that submission made the following points:

- *Australia's laws on foreign bribery should be updated.*
- *Australian regulators should give clear guidance as to what would constitute a "culture of compliance". In the UK and the US, regulators have given guidance. There is no reason this could not happen here. This would be a strong incentive to companies to adopt good practices.*
- *Australian regulators should adopt processes that would encourage organisations to self report incidents of foreign bribery.*
 - *This should include mitigation of penalties for cooperation, including disclosure of all relevant facts (even where those facts are included in reports commissioned by lawyers and possibly covered by legal privilege).*
 - *Australian regulators should consider leniency with reduced penalties for those that first report bribery incidents, similar to practices in antitrust cartel enforcement.*
 - *Australia should introduce deferred prosecution agreements in a similar manner to the recent UK practice.*
- *As a major deterrent, the Australian Government should introduce a system which debars organisations which have been guilty of integrity offences, including foreign bribery, from being able to bid for government work. They should also be prohibited from obtaining incentives, subsidies, grants, donations or loans from governments. The debarment prohibition should last for 10 years. It could be shortened only if the organisation enters into, and adheres to, some form of deferred prosecution agreement with regulators following complete cooperation or has self reported and fully cooperated with regulators.*
- *Australia should legislate for the protection of whistleblowers in the private sector; this should cover specifically foreign bribery. Related to this:*
 - *whistleblowing should be included in any guidance issued by regulators on effective compliance programs; and*
 - *an effective whistleblowing program should be part of considerations in determining deferred prosecution agreements and other negotiated settlements.*

My submission to the Senate Committee gives more detail in relation to the above matters in the context of foreign bribery. It also argued that those Australian companies that try hard to comply with the laws relating to foreign bribery should not be disadvantaged when compared to those Australian companies that do not. They should know the benefits that will accrue to them for doing so, namely a defence to prosecution or mitigation in penalties if they can show a culture of compliance and if they fully cooperate with regulators. It is time to level the playing field among

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Australian companies. I also noted that I believe that companies that have an ethical approach to business, whether it be in human rights, community support, worker safety, environment or anti-corruption, will have a competitive advantage overall and a sustainable operation over the long term.

In the context of DPAs, I believe that ethical companies should self report serious financial and other crime but to enable this to happen, the companies need to know the consequences of self reporting and cooperation, and the self reporting and cooperation should be recognised through clear policies and processes with definite benefits to the company.

This would be consistent with the OECD Working Group in relation to foreign bribery recommendations that Australia develop a clear framework for plea bargaining and self reporting. It stated that this framework should cover the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company.

In Australia the Commonwealth Director of Public Prosecutions (CDPP) may enter into an agreement with a defendant to provide immunity or which provides that the defendant pleads guilty to some charges or to lesser charges. The CDPP may agree to proceed with a charge summarily rather than by indictment; to not oppose a defence submission to the Court on the appropriate sentence range. The CDPP has issued the Commonwealth Prosecution Policy setting out the factors that must be considered when deciding whether to enter into one of these agreements. This gives very little certainty of any beneficial treatment to anybody self reporting.

It should be much clearer about what benefits will accrue for self reporting. This should include a strong outcome of reduced penalties. Of course, any benefit would be dependent on full cooperation with the regulators, including disclosure of all relevant facts, including transcripts of witness interviews in any internal investigation (even where those facts are included in reports commissioned by lawyers or the interviews conducted by the company's lawyers).

The introduction of DPAs will also level the playing field for Australian companies when compared to companies domiciled in the US or the UK.

I strongly support the introduction of DPAs in Australia.

Specific questions asked by the Department:

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

As indicated above, a DPA scheme would be a useful tool for Commonwealth agencies. It should, as also indicated above, be just one of the measures that the Commonwealth should introduce to enhance enforcement of our laws.

DPAs could increase respect for our legal system by producing enforcement results in a quicker, more cost effective and more beneficial manner. Many corporate crimes are difficult to prove. Foreign bribery is a classic example – to date, there has not been one reportable conviction. Encouragement to self report, including a sturdy DPA process, could change the legal landscape in that area. Similarly, the publication of DPAs (see below) will influence other companies in improving their compliance efforts. In the US, the publication of DPAs has certainly increased other companies' awareness of what is expected of them from a compliance viewpoint and, overall,

has increased their efforts to achieve this. The publication has disclosed the large monetary penalties combined with the requirement to improve the compliance program of the company involved.

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

In principle, there is no reason to limit the crimes to which a DPA could be applied. However, in practice, I would recommend that at its commencement DPAs be available for serious financial and economic crimes in a very broad sense, including foreign bribery, money laundering, competition law and fraud. Once the DPA scheme has been operating for a time, it should be reviewed to see if the range of crimes should be extended.

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

It is generally recognised that actions against individuals can be a more powerful deterrent to others. Of course, corporates act through individuals. However, it is not always easy to pursue individuals in relation to many corporate crimes.

DPAs should be available to individuals. There should be some encouragement for individuals to self report; for instance, if a company employee has been involved in foreign bribery with the connivance of more senior management and the individual self reports the activity, thus enabling some sort of enforcement against the other individuals and/or the company, that individual should know with some certainty that he will receive some favourable treatment, rather than just rely on the good offices of the prosecutor and the courts. This is very similar to the leniency granted to the first to report cartel behaviour. DPAs are available in the US for individuals but are rarely used, given the prevalence and acceptance of the plea bargaining processes.

(Please note that for the sake of simplicity, in this submission I will refer to companies, rather than individuals taking part in any DPA process.)

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

The courts should be involved in the DPA process, primarily to ensure public confidence. The courts will need to have an independent role but there will need to be sufficient certainty as to how that role will act in order to encourage self reporting and cooperation. There cannot be a process where the prosecutor and company have both exerted great efforts to agree a DPA but a judge overrides it on narrow technical grounds.

The court's role should be similar to that in the UK where it declares that in the interests of justice the DPA is fair, reasonable and proportionate. Guidance as to what constitutes "interests of justice" and "fair, reasonable and proportionate" must be set out broadly in any enabling legislation and more particularly what would entitle a court to reject the DPA. A court's decision to reject a DPA should be appealable by both the prosecutor and the company.

The above risk may be alleviated if Australia were to adopt a preliminary stage court involvement indicating whether the matter was an appropriate one for a DPA. The Department should consider if court involvement could also be available if the prosecutor were to claim lack of cooperation by the company and refuse to continue the DPA process, in circumstances where the company believes it has cooperated. This would give further encouragement to companies to take part in the process. It would mean that not all the negotiating strength lay with the prosecutor.

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

The US Department of Justice has issued guidance on what it expects companies to do in order to receive beneficial treatment. This guidance is a very good starting point for Australia. The guidance has three main limbs – voluntary self reporting; full cooperation with the regulators and remediation inside the company to ensure that the event is not repeated.

I submit that, if a company does all of the three elements, it should be entitled to a DPA along lines set out in clear guidance. As the US guidance indicates, the self reporting must be prior to any imminent threat of disclosure or government investigation and within a reasonably prompt time of becoming aware of the conduct.

I further submit that, even if a company does not self report, because it finds out about the conduct from the Australian Federal Police or other regulator or through media sources, but the company then fully cooperates and remediates, it should be entitled to a DPA – but perhaps with slightly less favourable beneficial treatment than a company which did self report. This avenue would only be available when the board and senior management were not aware of the conduct.

The cooperation aspect should include disclosing all relevant facts, including those contained in any legal advice or in any reports commissioned by the company's lawyers for the purpose of giving legal advice, including transcripts of witness interviews in any internal investigation. It would not require disclosure of the actual legal advice. The cooperation aspect should also include regular meetings between the company and its lawyers on the one hand and the prosecutor and the AFP on the other hand in relation to any ongoing internal investigation being conducted with the approval of the prosecutor and AFP. The progress meetings would be for the prosecutor and AFP to give directions on the investigation. This is similar to the process that exists in the US and which works well. It enables thorough investigation buy save on the use of the limited resources of law enforcement.

The remediation aspect should include the company adopting an effective integrity and compliance program and monitoring its implementation. Guidance as to what is regarded as an effective program should be given. If before the conduct, it is shown that the company had such a program in place and that in fact the employee(s) who committed the conduct was a "rogue", then the company should receive credit for this. Although many compliance professionals will argue that there rarely is a rogue employee and that often there are other factors surrounding the conduct that need improvement, a company that has clearly tried to have an effective compliance program should be recognised.

Please also see my comments in response to question 1 above and question 10 below in relation to compliance programs.

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

The DPA process should be confidential, including any preliminary court involvement, unless the company requests that it be made public. The DPA should be public, once it has been approved by the court. However, the DPA process and the DPA or parts of it might have to remain confidential if its disclosure would prejudice ongoing investigations or prosecutions.

Publication of the DPA will remove any suspicion that any favourable treatment has been given to any particular company behind closed doors.

As indicated above, publication of DPAs should act not only as a deterrent to others but also as an indicator as to what integrity and compliance efforts are expected of companies and thereby an incentive for companies to aim for that standard.

In the case of foreign bribery, the DPA should name the overseas country involved and the name and role of any government officials involved – OECD governments, including Australia, need to do more directly in relation to the countries where foreign bribery is occurring and not leave the fight just to companies. The only exception to naming the country and officials would be where the safety of individuals on the ground in those countries might be threatened.

A listed company might consider it necessary to disclose that it is in a DPA process and also the outcome. Also, some companies might need to consider any representations and warranties being given to banks and other third parties - many international banks and third parties are including clauses about anti-corruption and other crimes in contracts. Consideration should be given as to how this disclosure could be made without prejudicing the ongoing DPA process and any related investigation and also any other investigations or prosecutions in relation to the particular conduct.

Q7: How should DPA negotiations be structured?

The CDPP should have principal carriage of the negotiations from the government side.

There should be clear conditions set out indicating what a company needs to meet to be entitled to enter into DPA negotiations. If those conditions are met, the company should have the right to seek a DPA. This will encourage companies to self report.

Disagreement between the prosecutor and the company as to whether those conditions are met could be a matter for preliminary consideration by a court.

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

There should be guidance as clear as possible as to the factors that will be considered in the negotiations to agree a DPA. My responses to the particular questions contain several factors that should be considered.

In the US, there has been guidance given in addition to the normal considerations that a prosecutor would take into account. The Department should look at that guidance and also at the first DPA approved in the UK where the judge, in effect, gave guidance as to what a court should take into account.

One of the major factors that should be considered is the extent of cooperation from the company. There should be full cooperation, including disclosure of all relevant facts and transcripts of witness interviews in any internal investigation (even where those facts are included in reports commissioned by lawyers or the interviews are conducted by the company's lawyers).

Another factor that might influence the DPA would be how the company's self reporting and/or cooperation has assisted in the investigation and prosecution of any individuals involved in the conduct.

The terms of the DPA would be influenced by how much effort a company had previously put into establishing a culture of integrity and compliance. A DPA should provide that a company will

adopt measures to ensure such a culture of integrity and compliance exists in the company going forward or that the company has improved, or is willing to improve, its compliance efforts. (See my response to question 10 on this aspect.)

Where senior management or directors of the company have been involved or where misconduct is widespread in the company, in addition to the implementation of an effective integrity and compliance program, the company should be required to have an independent monitor appointed. (see my response to question 13 on this aspect.)

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

Documents and information provided by a company during the DPA process should be available for use in any further criminal or civil proceedings, even if a DPA is not concluded. To require a prosecutor or the police to go back to the start and issue warrants etc to obtain such information would be a ludicrous position. However, in order to ensure even-handedness in the DPA process, some preliminary role for the court should be considered so that a company in deciding to self report and/or cooperate can be confident that the DPA process will be properly followed by the prosecutor.

On a related note, it should be clear that documents and information provided to the prosecutor might be provided to overseas regulators when Australian regulators have existing arrangements to do so.

Q10: *What facts and terms should DPAs contain?*

The Department's discussion paper reflects several matters that should be covered by the DPA. The US and UK have listed such factors. Australia should follow suit.

It has been a failing of Australian regulators that they have given no guidance on what constitutes a corporate culture of compliance.

- The UK regulators have put out guidance on what they would look at in determining "adequate procedures" under the UK Bribery Act. The US regulators have also issued guidance as to what they look for under the Federal Sentencing Guidelines. In many ways, they are similar to the UK's "adequate procedures" guidance. *Such guidance is itself an incentive for companies to be proactive in implementing an effective compliance program and an incentive for the directors to take a serious interest in it.*
- In Australia, the regulators have provided no such guidance to companies. The Criminal Code's reference to a "culture of compliance" is similar to the "adequate procedures" concept in the UK and to the ethical decision making concept under the US Federal Sentencing Guidelines. The Australian regulators should provide guidance as to what they would expect from a company in order to rely on this defence.
- A good starting point for Australian regulators would be the new international standard on compliance management systems (ISO 19600). This is based on the Australasian standard that has existed for several years. Some Federal Court competition law decisions have required companies to adopt processes based on the standard. There are also Australian standards on risk management and whistleblowing. In late 2016, it is expected that there will be an international standard (ISO/CD 37001) on anti-bribery management systems.

It should not be difficult for Australian regulators to issue guidance. As stated, this in itself will be an incentive for organisations to move to adopting leading practice. Such guidance should be reflected in the terms of any DPA in requiring a company to implement an effective integrity and compliance program.

A DPA should also provide that the company will indemnify the prosecutor and policy for any costs they have incurred in the matter.

Where the same conduct could be prosecuted by other OECD countries, it would be reasonable for Australian regulators to work with their overseas colleagues and to come to an overall resolution in relation to the particular conduct. There should be some recognition in the DPA that Australia has worked with those countries and arrived at an overall resolution in regard to agreement of facts and penalty. (See my comments in relation to question 9.) The same might have to occur where the conduct could be prosecuted under Australian state laws.

The duration of a DPA should be stated. If debarment from government contracts or benefits is introduced that might affect the duration of the DPA. Debarment periods vary around the world – the World Bank can debar companies for up to 10 years, the EU generally is five. The DPA should extend for the length of any debarment. However, a company should be able to apply to shorten the period of the debarment, and thereby the DPA, if it can show that it has implemented an effective integrity and compliance program and operated it for at least two years.

If a monitor is appointed to the company, the DPA should continue until the monitor can report that the company has introduced an effective integrity and compliance program and operated it for at least two years.

If it is agreed that any penalties are to be paid over time, then clearly the DPA should continue until the payments are completed.

Otherwise, the DPA should continue for three years – a reasonable “good behaviour” period.

Q11: *How should funds raised through DPAs be used?*

Penalties that can be imposed in Australia are low when compared to the US and the UK. Enforcement agencies in Australia are dependent on funds from the government’s budget each year. Often, they do not know what the level of funding will be in the very next year – thus making it very hard to plan for future work.

Generally, funds raised through the DPA process should, nevertheless, be paid to consolidated revenue but with an understanding that those funds would largely be available for law enforcement.

However, where there are provisions for victim restitution, then funds should be specifically set aside for that, perhaps through the Australian Financial Security Authority. In the case of foreign bribery, particularly where there is a penalty based on profit or turnover, some funds should be paid to the foreign country where the bribery has occurred, but only where that foreign country has extended satisfactory mutual legal assistance in relation to the particular matter.

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

I encourage the Department to examine ways of introducing into the DPA process a concept similar to “agreed” or “liquidated” damages in a contract. If there is a material breach of a DPA, the further penalty would have already been agreed; the company would also agree that it would not oppose any submission by the prosecutor to the court requesting the further penalty be imposed and most likely would need to enter a guilty plea to the charge.

If the material breach is that the company did not disclose pertinent facts which would have indicated that the conduct was more serious or more widespread or involved other individuals, the above paragraph would still apply but with the right for the prosecutor to seek additional penalties on top of the agreed amount – in respect of which the company would have the right to make a submission.

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

The ability to appoint a monitor would enhance enforcement of our laws and add to the integrity and compliance spectrum in Australia. The use of monitors overseas has generally been good. There have been issues with costs to companies. However, the monitor can very often assist a company to improve its integrity and compliance efforts and more generally its culture.

Reports of monitors should be made public so that the whole corporate sector can benefit.

In many instances, I would argue for just one person to be appointed a monitor rather than having a team of monitors. This person would need to be experienced in the compliance field. Should the monitor report that there are issues with the company implementing an effective program, then it should be possible to require that the monitor be given additional resources.

A monitor should be considered where the company did not have any compliance program, where its program has clearly failed or has been inadequate or where the company has not endeavoured in any real sense to have a culture of integrity and compliance.

Conclusion

I believe that ethical companies should self report serious financial and other crime. To encourage this to happen, the companies need to know with a large degree of certainty the consequences of self reporting and cooperation, and that its self reporting and cooperation would be recognised through clear policies and processes with definite benefits to the company, whilst at the same time providing a deterrent to others in regard to that sort of conduct.

The introduction of DPAs would be a very valuable addition to enforcement of our laws. Publication of DPAs would assist in improving the integrity and compliance efforts of Australian companies generally. I strongly support the introduction of a DPA scheme in Australia.

Should the Department require any further information or any clarification, please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'N. Tiffen', with a small dot at the end.

Neville Tiffen
Principal
Neville Tiffen & Associates