Transparency International Australia (TIA)
Consideration of a Deferred Prosecution Agreements scheme in Australia

Submission to the Public Consultation Paper of March 2016

TIA is pleased to provide a response to the Consultation Paper. We are encouraged by the positive initiative reflected in the statement of the Minister and by the valuable discussion paper.

TIA does not here propose to provide responses to all the questions posed in the Consultation Paper. However, in lieu, we attach a copy of a relevant letter to the OECD Secretary General, Angel Gurria of 11 March 2016 "Global Standards for Corporate Settlements in Foreign Bribery Cases" sent by Transparency International in conjunction with Corporate Watch UK and the UNCAC Coalition in relation to DPAs. Apart from the factors listed below the 14 conditions listed in the letter spell out the key principles which we recommend for your consideration in relation to DPA's.

Otherwise we concur in the basic thrust of the discussion paper that the UK model-which only recently has successfully passed the test of its first court approved settlement- is a suitable model for us to follow. The prism for our comments, naturally enough, is on its application and focus upon significant bribery and corruption issues, particularly foreign bribery.

In that context, however, we consider any DPA Scheme will only be successful in practice here and constitute a useful tool for commonwealth agencies if by the time of, or preceding its introduction:

1) The Government strengthens the present enforcement framework for the offence of bribery of foreign officials along the lines of Section 7 of the UK Bribery Act.

2) The AFP is able to show more teeth in advance by showing its determination to prosecute a significant number or all of the 22 companies that remained on its investigating list at the time of the Paris Ministerial meeting of the OECD.

In other words, unless companies and their advisors consider that the alternative to entering into a DPA agreement is the realistic prospect of a prosecution being commenced on the issues they uncover or suspect, the scheme will be a dead letter – it will not be a useful tool for commonwealth agencies.

It ought to be part of a package of reforms, not considered in isolation and not resorted to as an 'easy option'.

TIA policy emphasises that the Australian Government should address, without delay, the weaknesses in our laws and efforts to ensure Australia joins countries like the United Kingdom, United States and Canada as leaders in combatting bribery; and should fully implement its commitments under the OECD Convention, including full implementation of all OECD Working Group recommendations.

In particular, the Australian Government should fully enact the following law reforms to the foreign bribery sections of the Criminal Code.

1. Clarification is needed that on proof of bribery of a foreign official by an agent, employee or associate, the organisation itself will also be guilty of an offence unless it can be shown it has an adequate 'culture of compliance' and has not condoned such bribes, even implicitly.

2. Also it is important that amendments set clearer liability –in other words to provide that when an organisation is guilty of a bribery offence, its complicit directors will be liable where they

approved what was happening or cannot show the organisation had an adequate culture of compliance; and should extend this responsibility to actions of the company's subsidiaries and intermediaries.

3. Removal of facilitation payment defence – This defence to prosecution should be removed, and guidance given to companies to help them avoid making such payments.

4. Ensure that sufficient resources are provided to enable the AFP to enforce the laws on bribery of foreign officials.

   We are very pleased to see the recent increase of funding to the AFP.

   In order to improve active enforcement action the government should in our view institute a formal review of the enforcement resourcing by Australian regulators, particularly to ensure the appropriate mix of skillsets for investigating allegations, including qualified lawyers and forensic accountants, on a day-to-day basis and throughout the duration of each case in which their exists sufficient evidence to investigate.

5. Quite apart from a DPA scheme, Australian regulation and regulators can do more to actively encourage self-reporting. For instance, the government could:

   (a) establish a leniency program that enables those who first report bribery to regulators to receive reduction in penalties, provided they fully cooperate, and proactively remediate their deficient processes and procedures that led to the bribery;

   (b) give detailed guidance to companies on what constitutes an adequate compliance system in relation to combating bribery and corruption and establishing a healthy corporate culture of compliance.

6. All organisations seeking government contracts or inclusion in government programs should be required to set out their anti-bribery compliance programs, Award of contracts made contingent on a high level of implementation. Debarment of companies from seeking government contracts where convicted of integrity offences, including bribery of overseas officials, should be provided for in Australian legislation and regulations, with very limited exceptions for public interest (as Canadian and US approaches) and for self-reported breaches.

7. Removal of suppression orders from prosecutions – The Australian Government should issue strong guidelines, and where necessary legislate, to ensure that court proceedings in foreign bribery cases remain public, except in extreme and genuine national security circumstances. In particular, it should be made clear that suppression orders are not justified by simple international 'embarrassment' of Australia or of the foreign country or officials involved, or the possibility of threats of the disruption of trade.

Having regard to the view we take as to the necessity of inclusion of a DPA scheme only within such a package of reform measures and to the views already expressed by Transparency International as to desirable conditions to any such scheme, we do not propose to address at this stage the other matters identified in the discussion paper.