



Explanatory note

On 6 December 2017, the Government introduced the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the Bill) into Parliament.¹ If passed by the Parliament, Schedule 2 of the Bill would establish a Commonwealth Deferred Prosecution Agreement (DPA) scheme. The Government seeks views on the draft DPA Code of Practice contained in this document (the draft Code), which is designed to provide detail on the practical operation of the provisions in schedule 2.

Under the proposed DPA scheme, the Commonwealth Director of Public Prosecutions (CDPP) would have the option to invite a corporation that is alleged to have engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions. To obtain a DPA, a corporation may be required to cooperate with law enforcement, provide evidence against culpable individuals, admit to agreed facts and agree to pay a financial penalty. Where a corporation fulfils its obligations under a DPA, it would not be prosecuted for the offences specified in the DPA.

The aim of an Australian DPA scheme is to enhance the ability of investigators and prosecutors to identify and address serious corporate crime by encouraging corporations to self-report misconduct and cooperate with law enforcement. In appropriate cases, DPAs would provide a more effective and efficient way of holding offending corporations to account without the cost and uncertainty of a criminal trial.

The DPA scheme provides a new mechanism for addressing serious corporate crime in Australia. The Government proposes to publish a Code of Practice to provide guidance on the intended operation of the scheme and ensure industry has a clear understanding of the entire DPA process, from the point of entering into DPA negotiations to fulfilling the terms of a DPA.

The Government seeks views on the draft Code, and in particular on whether the Code adequately describes the DPA process and provides sufficient information on matters of interest to industry. The draft Code has been developed by the Attorney-General's Department in consultation with key agencies across Government, and reflects views expressed by stakeholders in response to the Government's 2016 and 2017 public consultations on a Commonwealth DPA scheme.² Feedback received through this consultation process will inform the finalisation of the Code prior to publication. Publication of the finalised Code will coincide with the commencement of the scheme. Submissions to this consultation process should be sent to criminallaw@ag.gov.au by 5:00pm, 9 July 2018.

¹ A copy of the Bill and its Explanatory Memorandum can be accessed at:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=s1108.

² <https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx> ; <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>.



Australian Government
Attorney-General's Department

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Deferred Prosecution Agreement Scheme Code of Practice

CONSULTATION DRAFT

Deferred Prosecution Agreement Code of Practice

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1. Introduction

Background

- 1.1 This Deferred Prosecution Agreement (DPA) Code of Practice (the Code) provides guidelines on the operation and implementation of the Commonwealth DPA scheme, which is contained in Part 3 of the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act).
- 1.2 Under the DPA scheme, the Office of the Commonwealth Director of Public Prosecutions (CDPP) can invite a corporation that has engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions. If a corporation fulfils its obligations under the agreement (the DPA), it will not subsequently be prosecuted in relation to the offences specified in the DPA. A breach of the terms of a DPA may result in the CDPP commencing prosecution or renegotiating the terms of the DPA with the corporation.
- 1.3 DPAs are only available with respect to the specific set of serious corporate offences listed in section 17B of the DPP Act (see Appendix A). DPAs are not available to natural persons (for the purpose of this Code, the term ‘corporation’ refers to any entity that may enter into a DPA), and a culpable individual cannot be protected by a DPA even if that individual’s misconduct is associated with the misconduct of a corporation that has negotiated a DPA.
- 1.4 The DPA scheme provides incentives for corporations to self-report misconduct to law enforcement authorities. The scheme offers corporations greater certainty of outcome when compared to litigation, and an opportunity to avoid some of the costs associated with lengthy criminal investigations and trial processes. A corporation may also choose to seek a DPA to, for example:
 - a. assist the corporation to proactively identify and address wrongdoing within the corporation
 - b. support the directors’ compliance with their statutory and fiduciary duties to act in the best interests of the corporation, and
 - c. limit corporate criminal liability by proactively identifying misconduct and preventing further offending.
- 1.5 The scheme aims to enhance accountability for serious corporate crime under Australian law and support improved corporate culture. By encouraging corporations to self-report misconduct and cooperate with law enforcement, the scheme also provides a new tool to assist law enforcement agencies to detect, investigate and address serious corporate offending and related criminal behaviour. The terms of a DPA will be adapted to the case at hand, and a corporation participating in DPA negotiations will typically be expected to cooperate in any investigation and prosecution against culpable individuals.

Purpose of the Code

- 1.6 This Code is designed to enhance transparency, consistency and predictability in the negotiation and administration of DPAs, and to outline how Commonwealth agencies will work together to facilitate and support processes related to the negotiation and administration of DPAs.
- 1.7 This Code has been published by the Commonwealth Attorney-General's Department, with the agreement of the CDPP and a group of Commonwealth investigative and regulatory agencies (referred to in this document as 'the Commonwealth agencies') with operational responsibility for the offences included in the DPA scheme. These Commonwealth agencies are the:
- a. Australian Federal Police (AFP – including the Commissioner of the AFP as a Proceeds of Crime Authority)
 - b. Australian Securities and Investments Commission (ASIC)
 - c. Australian Transaction Reports and Analysis Centre (AUSTRAC), and
 - d. Australian Taxation Office (ATO).
- 1.8 The CDPP is responsible for negotiating, entering into and administering DPAs on behalf of the Commonwealth. In most circumstances, DPA negotiations will be conducted by a delegate of the Director. The CDPP will have regard to this Code when:
- a. considering whether to invite a corporation to enter into DPA negotiations
 - b. negotiating the terms of a DPA with a corporation
 - c. applying for approval of a DPA, and
 - d. overseeing the DPA after it has been approved by an approving officer, particularly in relation to variation, breach, termination and completion of the DPA.
- 1.9 In performing the CDPP's functions under the DPA scheme, the CDPP will consult with and be supported by relevant Commonwealth agencies. Collaboration between the CDPP and Commonwealth agencies is an important way of ensuring that the CDPP is aware of all relevant facts when determining whether to exercise functions and powers under the DPA scheme. Where appropriate, agencies may suggest terms for the CDPP to consider including in the DPA.
- 1.10 Employees of Commonwealth agencies will have reference to this Code when involved in a matter in which it may be appropriate to enter into a DPA. An employee of a Commonwealth agency should have particular regard to this Code when:
- a. determining whether to refer a corporation to the CDPP as a possible DPA candidate, and
 - b. assisting the CDPP in relation to the negotiation, entering into or administration of a DPA.

2. DPA negotiations

Entering into DPA negotiations

- 2.1 A corporation should direct a request to be considered as a candidate for DPA negotiations to the Commonwealth agency with operational responsibility for any of the offences that the corporation knows or suspects it has committed. In making such a request, the corporation should self-report its misconduct (if it has not already done so) and indicate its willingness to cooperate with Commonwealth agencies in any subsequent investigation. To encourage corporations to engage in open discussions with relevant Commonwealth agencies, the DPP Act restricts the admissibility of information provided by a corporation in any subsequent proceedings against that corporation (see paragraph 2.12).
- 2.2 Upon receiving a request from a corporation to be considered for a DPA, a Commonwealth agency will advise the CDPP that the request has been received and commence (or, where relevant, continue) an investigation into the misconduct. Consistent with section 17K of the DPP Act, the relevant agency will share information provided by the corporation and revealed through the agency's investigation/s with other relevant agencies and authorities (including the CDPP) to ensure the full extent of the corporation's offending, and of any related offending, is uncovered and considered.
- 2.3 The decision to invite a corporation to negotiate a DPA is a matter for the CDPP's discretion, and will be informed by consultation with relevant Commonwealth agencies. The CDPP may consider the corporation's candidature for DPA negotiations upon receiving notice of the request for DPA negotiations (which may be accompanied by supporting evidence), or may wait to receive further evidence (for example, from an agency's investigation) before considering the matter. An invitation to enter DPA negotiations does not guarantee that a DPA will be offered, and the CDPP may withdraw from DPA negotiations at any time.
- 2.4 The CDPP will only enter into DPA negotiations if it is satisfied that entering into DPA negotiations is in the public interest (see part 7 of this Code) and that there is a reasonable prospect of parties agreeing to a DPA. As such, in liaising with the CDPP on a possible DPA negotiation, Commonwealth agencies will generally make note of any matter that may assist the CDPP to determine whether the corporation would be a suitable candidate for DPA negotiations, including:
- a. whether the corporation has self-reported the suspected misconduct
 - b. the extent to which the corporation has demonstrated a willingness to cooperate with law enforcement agencies and processes
 - c. whether investigations into the alleged conduct are ongoing, and
 - d. any imminent or ongoing regulatory action or legal proceedings (for example, proceedings under the *Proceeds of Crime Act 2002*) that are related to matters that would be relevant to DPA negotiations.

- 2.5 The CDPP will always consider the views of relevant Commonwealth agencies when determining whether to offer a corporation DPA negotiations. Where appropriate, the CDPP may request that the corporation's suspected misconduct be subject to further investigation before deciding whether DPA negotiations should be commenced. The CDPP may request that this further investigation be conducted by a Commonwealth agency, the corporation themselves and/or by an independent auditor or monitor.
- 2.6 In most circumstances, it will be inappropriate to offer a corporation DPA negotiations where an ongoing or imminent regulatory action or legal proceeding (including proceedings under the *Proceeds of Crime Act 2002*) seeks, or would seek, to address the corporation's misconduct (either wholly, or in part). However, DPA negotiations may nonetheless be offered if the corporation is cooperating in these related matters and in any other relevant investigation to the extent that it is able to do so.
- 2.7 If a corporation is unsure whether to seek a DPA, the corporation may contact the CDPP or a relevant Commonwealth agency to seek further information on the DPA scheme and what would likely be required of the corporation to secure a DPA.
- 2.8 If the CDPP decides to invite a corporation to enter DPA negotiations, they will send the corporation a formal letter of offer to enter into DPA negotiations. This letter will specify how the negotiation will be conducted and relevant next steps. The letter may, amongst other things:
- a. identify the factors the CDPP will consider in determining whether to offer a DPA at the conclusion of negotiations
 - b. explain how negotiations will be conducted and the responsibilities of the parties during negotiations
 - c. outline how a DPA comes into force and ceases to be in force
 - d. identify the date by which the corporation must notify the CDPP in writing whether it accepts the invitation to enter into DPA negotiations according to the terms specified in the letter of offer
 - e. outline the process for withdrawing from DPA negotiations
 - f. advise how information obtained during DPA negotiations may be disclosed and used, and
 - g. advise that the CDPP may institute proceedings in relation to the matters contained in a DPA if a corporation materially contravenes that DPA.
- 2.9 If a corporation chooses to accept an offer to enter DPA negotiations, it must advise the CDPP of this decision by the date specified in the letter of offer. In accepting the invitation to enter DPA negotiations, the party agrees to comply with the conditions specified in the letter of offer. If these conditions are breached, the CDPP may decide to withdraw from DPA negotiations.

During DPA negotiations

2.10 During DPA negotiations, the CDPP, corporation and relevant Commonwealth agencies will work together to identify the extent of the corporation's misconduct and agree to a set of terms to include in the DPA. Although it will ultimately be up to the CDPP to negotiate the terms of the DPA, the involvement of relevant Commonwealth agencies will ensure that:

- a. the CDPP can verify information provided by a corporation with agencies who have investigated related matters
- b. the CDPP is aware of any related proceedings or investigations that have been, or will be, instigated by another Commonwealth agency, and
- c. the CDPP is aware of any interests other Commonwealth agencies might have in the terms of a DPA (for example, agencies might seek recovery of costs or the corporation's cooperation in other proceedings).

2.11 A corporation will only be offered a DPA if it engages in full and frank discussions with Commonwealth agencies and the CDPP during, and in the lead up to, DPA negotiations. The DPP Act limits how information divulged by the corporation during these discussions will be used. Section 17K of the DPP Act only permits the further disclosure of information obtained as a direct result of negotiating, entering into or administering a DPA in specified circumstances. Broadly speaking, this provision allows for the disclosure of information for law enforcement and judicial purposes, and for the purposes of assisting Commonwealth entities to exercise their powers, functions or duties. Although information provided by a corporation during DPA negotiations will be shared amongst relevant Commonwealth agencies, Commonwealth agencies will work to ensure this information remains confidential from the public unless:

- the disclosure of the information is compelled by law, or
- the disclosure is agreed to as part of the DPA negotiation. For example, the company may be required, as a condition of continuing DPA negotiations, to disclose information to an independent monitor (see paragraphs 3.16 – 3.20) and/or to victims of the misconduct (see paragraph 3.13).

2.12 Section 17H of the DPP Act further encourages corporations to engage in full and frank discussions with the CDPP during DPA negotiations by prohibiting particular documents from being used in evidence in legal proceedings against a corporation that is, or was, a party to DPA negotiations (including where these negotiations did not result in a DPA). Specifically, the provision applies to any document that indicates that a corporation entered into DPA negotiations (such as minutes of DPA negotiations), as well as any document that was created solely for the purpose of negotiating a DPA (such as draft DPAs, or relevant emails between prosecutors and the corporation). However, to protect against possible exploitation of the DPA process, these section 17H protections do not apply to the DPA itself, and do not apply if the corporation has:

- a. materially contravened the DPA

- b. provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with the DPA in circumstances where the corporation knew, or ought to have known that the information was inaccurate, misleading or incomplete, or
- c. given evidence in another legal proceeding that is inconsistent with the evidence that would otherwise not be admissible.

2.13 A corporation that provides misleading, inaccurate or incomplete information to the CDPP or to a Commonwealth agency during DPA negotiations may face significant repercussions.

- a. Under paragraph 17A(3)(b) of the DPP Act, a corporation may be prosecuted for the offences relating to the matters outlined in a DPA if, at any time, it is revealed that the corporation provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with the DPA and the corporation knew, or ought to have known, that the information was inaccurate, misleading or incomplete.
- b. Under division 137 of the Criminal Code, a corporation may be guilty of an offence if it provides information that is false or misleading to a Commonwealth entity as part of the DPA process.

2.14 A corporation should ensure it retains any materials that are or may be relevant to DPA negotiations, assessing compliance with a DPA or which may be relevant as evidence in criminal proceedings brought in relation to matters contained in a DPA (for example, following a material contravention of a DPA). Under section 17J of the DPP Act, a person may be guilty of an offence if the person intentionally prevents these materials from being used in negotiating or assessing compliance with a DPA, or in evidence in a relevant criminal proceeding.

Withdrawing from DPA negotiations

2.15 Either party (being the CDPP or the corporation) may withdraw from DPA negotiations at any time before a DPA has been approved by an approving officer. A party withdrawing from negotiations must provide the other party with written notice of their withdrawal, but is not required to give any reasons for withdrawing from negotiations. If either party withdraws from negotiations, the CDPP may decide to institute a prosecution for the alleged offending. However, if such a prosecution is instituted, documents that indicate that a corporation entered into negotiations for a DPA or that were created solely for the purpose of negotiating a DPA will not be admissible against the corporation (see para 2.12).

3. Terms and features of a DPA

Likely terms of a DPA

3.1 The terms of a DPA must clearly set out the measures with which the corporation must comply. The DPA must detail the entirety of the agreement between the parties in respect of the alleged offending.

3.2 At the conclusion of DPA negotiations, a DPA will only be approved if the terms of the DPA are fair, reasonable and proportionate and entering into the DPA is in the interests of justice. The range of terms that are fair, reasonable and proportionate will vary according to the particular facts at hand. However, all DPAs must contain the mandatory terms and features listed at section 17C(1) of the DPP Act. These terms and features include:

- a. a statement of facts that gives particulars relating to the conduct that is relevant to each offence to which the DPA relates
- b. an end date by which all obligations under the agreement must be satisfied
- c. requirements to be fulfilled by the corporation under the DPA
- d. a specified financial penalty, unless exceptional circumstances apply (see paragraphs 3.5 – 3.7 of this Code)
- e. circumstances which constitute a material contravention of the DPA, and
- f. a term allowing for the Director to bring proceedings on indictment in the event of a material contravention of the DPA, without the corporation having been examined or committed for trial (see paragraphs 5.8 – 5.13 of this Code).

3.3 Unless extraordinary circumstances exist, a DPA will always include a term requiring the corporation not to engage in any further offending of the type specified in the DPA during the term of the DPA. There are a number of further terms which will be included in most DPAs:

- a. a term requiring the corporation to review and, if necessary, make improvements to its compliance program
- b. where victims can be identified, a term requiring a corporation to compensate victims or take other remedial action (see paragraphs 3.11 – 3.13)
- c. a term requiring, at the corporation's expense, the appointment of an independent monitor (see paragraphs 3.16 – 3.20 of this Code) to determine necessary improvements to corporate compliance programs and to monitor compliance with DPA terms
- d. a term requiring a corporation to relinquish any criminal benefits of the misconduct
- e. a term requiring the corporation to cooperate with any investigation or prosecution relating to the matters outlined in the DPA, including in relation to other persons

- f. a term requiring the corporation to provide any further information, document, or thing that comes to the corporation's attention during the term of the DPA and suggests, or may suggest, further offending is occurring or has occurred (regardless of whether that possible criminality relates to the corporation or to another person), and
- g. a term requiring a corporation to agree not to publicly contradict or deny the agreed statement of facts.

3.4 The terms of a DPA may also provide a mechanism to resolve disputes about minor breaches of the DPA. For example, a DPA might provide that minor breaches will be resolved through an application to the approving officer to vary the DPA, or to require payment of interest on particular amounts not paid by a due date specified in a DPA.

Financial penalty

3.5 The financial penalty imposed by a DPA must be of a severity that is appropriate having regard to all circumstances relating to the DPA. Section 17C(3) of the DPP Act requires the CDPP to have regard to the following factors when determining an appropriate financial penalty:

- a. the extent to which the corporation has cooperated with Commonwealth agencies during DPA negotiations (a high level of cooperation may justify a lower financial penalty)
- b. the severity of the penalty that may be imposed by a court if the corporation was convicted of each offence specified in the DPA, and
- c. the inclusion of other terms in the DPA that require payments to be made by the corporation (if other terms of the DPA require the corporation to make significant payments, a lower financial penalty may be appropriate).

3.6 In determining an appropriate financial penalty, the CDPP will consider factors relevant to the case at hand. These factors may include

- a. the nature and circumstances of the misconduct
- b. the circumstances of the corporation
- c. any other relevant offending (including any pattern of offending)
- d. any other ongoing legal proceedings and other fines, penalties or other sanctions that have been imposed on the corporation with respect to the misconduct
- e. the personal circumstances of any victim of the misconduct
- f. any injury, loss or damage resulting from the misconduct
- g. the degree to which the corporation has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence, or in any other manner

- h. the degree to which the corporation has cooperated with law enforcement agencies in the investigation of the offence or of other offences
- i. the need to ensure that the corporation is adequately punished for the offence, and
- j. any other factor that might be considered by a Court in determining an appropriate sentence for the relevant misconduct (as outlined in section 16A of the *Crimes Act 1914*).

3.7 Section 17C(4) of the DPP Act provides that a DPA does not need to include a financial penalty if the Director of the CDPP is satisfied that exceptional circumstances apply. If a corporation considers that such exceptional circumstances apply, it may make submissions to the CDPP to this effect during DPA negotiations.

Removal of criminal benefits

3.8 A DPA will generally require a corporation to relinquish criminal benefits associated with its misconduct. This may include proceeds, profits or assets acquired as a result of the suspected criminal offending.

3.9 A DPA will usually require the surrender of criminal benefits in one of two ways:

- a. by requiring the corporation to agree to consent (under section 316 of the *Proceeds of Crime Act 2002*) to certain actions under the *Proceeds of Crime Act 2002* (such as the making of a pecuniary penalty order under Part 2-4 of the *Proceeds of Crime Act 2002*) obliging the corporation to make payments to the Commonwealth of amounts based on the benefits that the corporation has derived from the misconduct, or
- b. in any other way agreed to by the parties.

3.10 The CDPP (and, where appropriate, other Commonwealth agencies) will work with the corporation to negotiate an appropriate mechanism for facilitating the relinquishment of criminal benefits through a DPA.

Compensating victims

3.11 An important function of the DPA scheme is to provide a mechanism by which victims of misconduct can be compensated. Where there are identifiable victims who have suffered loss as a result of the corporation's misconduct, it will generally be appropriate for the DPA to require the corporation to pay a quantified level of compensation to these victims.

3.12 In some instances, the victim of the misconduct may be a foreign country. For example, instances involving the bribery of foreign public officials (foreign bribery) may result in corporations obtaining proceeds to which the foreign country is entitled. In such circumstances, it may be appropriate for a DPA to require the corporation to make a payment to the government of the relevant foreign country.

3.13 It is envisaged that, in some circumstances, it may be appropriate for the CDPP to require a corporation to disclose information to victims as a condition of continuing DPA negotiations, in order to best reflect the victims' interests in the terms of the DPA. In other cases, where confidentiality concerns prevail, a DPA may include a mechanism to identify and compensate victims after the DPA has been finalised and approved. Where victims cannot be identified, donations to charities which support the victims of the offending may be appropriate.

3.14 A DPA does not remove any individual's legal rights to bring a civil action against a corporation that is party to the DPA. Failure to pay compensation due to victims under a DPA will ordinarily constitute a material contravention of the DPA. Where this is the case, the CDPP will ordinarily request that a court make reparation orders in favour of victims at the sentencing stage of any subsequent prosecution.

Recovery of costs

3.15 A DPA may require a corporation to pay some or all of the costs incurred by Commonwealth entities in investigating matters contained in the DPA, or in negotiating, administering or approving the DPA. Whether costs will be sought will depend on the circumstances of the case at hand. Circumstances within which a term recovering costs may be required include (but are not limited to) cases where a DPA is negotiated with the assistance of an investigation by an agency that operates on a cost-recovery basis (such as ASIC), or where the negotiation of a DPA has significant resource implications for an agency.

Independent monitors

3.16 In many cases, the CDPP will require a corporation to agree to the appointment of an independent external monitor to carry out particular functions specified in the DPA. It may also be appropriate to appoint an independent monitor before a DPA is approved, as part of DPA negotiations. Where this occurs, the scope of the monitor's role will be outlined in a written agreement.

3.17 The corporation will be required to meet all costs associated with the engagement of an independent monitor, regardless of whether the monitorship begins before or after a DPA has been approved. If DPA negotiations fail, or a DPA ceases to be in force due to a material contravention, a corporation will still be required to make any outstanding payments due to the independent monitor.

3.18 Monitoring mandates will be adapted to the facts and circumstances of each case including the nature and size of the corporation. The monitor's role (whether specified in the DPA or elsewhere) will be clear, and parties will usually agree on a method of reviewing the monitor's arrangements.

3.19 An independent monitor may be appointed to assess the effectiveness of a corporation's existing compliance program, make suggestions for how a corporation can develop an effective (or more effective) compliance program and/or to monitor a corporation's compliance with DPA terms. Matters a monitor may be appointed to assess and advise on include, but are not limited to the corporation's:

- a. code of conduct

- b. relevant training and education programmes
- c. internal procedures for reporting conduct issues which enable issues to be reported in a safe and confidential manner
- d. processes for identifying key strategic risk areas
- e. mechanisms for identifying and compensating victims (for example, through a customer remediation program)
- f. safeguards to approve the appointment of representatives and payment of commissions
- g. gifts and hospitality policy
- h. procedures for ensuring due diligence in relation to potential projects, acquisitions, business partners, agents, representatives, distributors, sub-contractors and suppliers
- i. procurement procedures
- j. contract terms with business partners, subcontractors, distributors, and suppliers including express contractual obligations and remedies in relation to misconduct
- k. internal management and audit processes
- l. compliance programmes and policies in all of its subsidiaries, operating businesses, and joint ventures in which it has management control
- m. processes which ensure its use of reasonable endeavours to guarantee that the joint ventures in which it does not have management control, together with key subcontractors and representatives, are familiar with and are required to abide by the corporation's compliance programmes and policies to the extent possible
- n. programmes and procedures compatible with anti-money laundering and counter-terrorism financing legislation, rules and regulations
- o. policies regarding charitable and political donations
- p. terms related to external controls, e.g. procedures for selection of appropriate charities
- q. policies relating to internal investigative resources, employee disciplinary procedures, and compliance screening of prospective employees
- r. policies relating to the extent to which senior management takes responsibility for implementing relevant practices and procedures
- s. mechanisms for review of the effectiveness of relevant policies and procedures across business and jurisdictions in which the corporation operates, and
- t. compensation structures that remove incentives for unethical behaviour.

3.20 Where the appointment of a monitor is proposed to be a term of a DPA, the monitor will generally be selected and provisionally appointed and the terms of the monitorship will be agreed to before the DPA is approved. In deciding whether to appoint a candidate to an independent monitor role, the CDPP will have regard to the views of any relevant Commonwealth agencies, the experience and knowledge of the candidate and any conflicts of interest that may arise as a result of the appointment. A corporation may suggest possible candidates for the monitorship role, but ultimately the appointment of the monitor is a matter for the CDPP.

4. Approval of DPA

Approval of the Director

- 4.1 If officers of the CDPP and a corporation agree to a draft DPA, the DPA will be submitted to the Director of the CDPP for consideration. CDPP officers will consider any views expressed by Commonwealth agencies on the corporation's suitability for a DPA before submitting a draft DPA to the Director.
- 4.2 The Director must be satisfied that there are reasonable grounds to believe that the offences specified in the DPA have been committed, and that entering into the DPA is in the public interest. In determining whether these factors are satisfied, the Director may consider the public interest considerations (outlined at Part 7 of this Code).
- 4.3 If the Director is not satisfied of the factors outlined above, the CDPP and corporation may choose to continue DPA negotiations with a view to submitting an amended DPA for approval, or may voluntarily withdraw from the negotiations.

Applying to the approving officer for final approval

- 4.4 If the Director is satisfied of the matters outlined in subsection 17D(2) of the DPP Act, the DPA will be provided to an approving officer (appointed to the role under section 17G of the DPP Act) for final approval.
- 4.5 In appointing a person to the role of approving officer, the Minister must be satisfied that the person:
- a. is a former judicial officer of a federal court or a court of a State or Territory, and
 - b. has the knowledge or experience necessary to properly exercise the power of an approving officer.
- 4.6 These requirements ensure that approving officers are appropriately qualified and able to draw on expertise in adjudicating matters impartially when considering a DPA.
- 4.7 The CDPP's submission to an approving officer will include:
- a. the draft DPA
 - b. the Director's written determination that, in his or her opinion, the factors in section 17D(2) of the DPP Act have been satisfied, and
 - c. any other information or documentation that the parties agree to share with the approving officer.

- 4.8 An approving officer must assume that the information set out in the DPA is true and correct for the purposes of assessing whether to approve the DPA. The approving officer must approve the DPA if they are satisfied that:
- a. the terms of the DPA are in the interests of justice, and
 - b. the terms of the DPA are fair, reasonable and proportionate.
- 4.9 If the approving officer approves the DPA, the DPA enters into force on the day after the approving officer provides written notice to both parties advising that the DPA is approved.
- 4.10 If the approving officer does not approve the DPA, the parties may continue to negotiate the DPA or may withdraw from the DPA process.
- 4.11 Parties should make all reasonable efforts to ensure that all communications with an approving officer in respect of a DPA, including where a DPA is not approved, are kept confidential between the parties.

Publishing the DPA and associated documents

- 4.12 If the approving officer approves the DPA, the DPA will generally be published on the CDPP's website within 10 business days of the day notice of approval is given.
- 4.13 If the Director considers it appropriate to do so in the interests of justice, the Director may decide not to publish the DPA, or to publish a redacted version of the DPA. Examples where the Director may make such a decision include where publication may:
- a. prejudice current or future investigations, prosecutions or other legal proceedings (including proceedings under the *Proceeds of Crime Act 2002*)
 - b. pose a threat to public safety, or
 - c. be contrary to an order of a court.
- 4.14 Any determination not to publish a DPA will be made by the Director in consultation with relevant Commonwealth agencies. If the Director decides not to publish a DPA, the CDPP will inform the corporation of this decision in writing. The Director always maintains the discretion to publish the DPA at a later time.

5. Compliance and Breach of DPA Terms

Preliminary

5.1 Where appropriate, the arrangements for monitoring compliance with a DPA will be contained in the DPA's terms. As outlined in paragraphs 3.16 – 3.20 of this Code, in most instances an independent monitor will be appointed at the expense of the corporation to monitor compliance.

5.2 Where the CDPP believes that the corporation is in breach of a term of a DPA the CDPP may:

- a. provide the corporation with an opportunity to rectify the breach
- b. negotiate with the corporation to vary the DPA, or
- c. determine that a 'material contravention' has occurred and commence a prosecution in relation to the matters contained within a DPA.

5.3 The CDPP will generally attempt to resolve any suspected non-material contraventions of a DPA with the corporation, provided that they do not form a pattern or sequence of contraventions that, considered collectively, are significant. Actions that may be taken by the CDPP upon the discovery of a contravention of a DPA are outlined in further detail below.

Providing the corporation with an opportunity to rectify the breach

5.4 It may be appropriate for a corporation to be given an opportunity to rectify a breach of a minor or mechanical term of the DPA (for example, where the breach occurs unintentionally or due to factors outside the corporation's control). The DPA may include mechanisms for addressing such breaches.

Varying the terms of the DPA

5.5 The CDPP and/or the corporation can apply to vary the terms of the DPA to address a breach or potential breach. This may be appropriate where a corporation cannot fulfil its obligations under a DPA for reasons beyond its control, or where additional terms are required to clarify a corporation's obligations under the DPA.

5.6 All variations to the DPA's terms must be approved in the same way that the original DPA was approved (by the Director of the CDPP, and then by an approving officer). A variation to a DPA takes effect immediately after the day that an approving officer provides notice of the approval of the variation.

5.7 Once a variation is approved, the CDPP will publish the DPA as varied on the CDPP's website, subject to the conditions outlined in paragraphs 4.13 – 4.14 of this Code.

Prosecuting a corporation on the basis of a ‘material contravention’ of the DPA

- 5.8 As noted in paragraph 3.2 of this Code, all DPAs will allow for the CDPP to commence prosecution for the offences relating to the matters outlined in a DPA on indictment without the corporation having been committed or examined for trial if the CDPP determines that a material contravention of the DPA has occurred.
- 5.9 Each DPA will specify the types of circumstances that will constitute a ‘material contravention’ of that DPA. ‘Material contraventions’ will include (but not be limited to):
- a. the contravention of any term in the DPA that is specified as a significant term, or
 - b. a pattern or sequence of contraventions of a term of a DPA that, considered collectively, are significant.
- 5.10 Furthermore, the CDPP will generally consider that a material contravention has occurred if the breach is so significant that it is in the public interest to terminate the DPA and commence prosecution, or if the breach is such that the integrity of the DPA scheme could be significantly compromised if prosecution was not available as an option.
- 5.11 The DPA ceases to be in force on the day that the corporation receives notice that criminal proceedings have been initiated in relation to the matters contained in a DPA. From this point, a corporation is not obliged to comply with the DPA’s terms. However, if a court subsequently makes a declaration (in any form) that there was no material contravention, the DPA comes back into force at that point and parties are again obliged to comply with the DPA’s terms.
- 5.12 If a DPA ceases to be in force due to a material contravention, a notice to this effect will usually be published on the CDPP’s website.
- 5.13 Where a DPA ceases to be in force as a result of material contravention, the corporation cannot claim back payments made pursuant to the DPA’s terms. However, any action taken by the corporation pursuant to a DPA may be considered by a court in determining an appropriate sentence for the criminal offending (see section 16A(2)(fb) of the *Crimes Act 1914* (Cth)).

6. Fulfilment of DPA terms

- 6.1 A DPA concludes, and ceases to be in force on the date specified in the DPA. Failure by a corporation to satisfy its obligations under the DPA by this point may constitute a material contravention of the DPA, such that the CDPP may commence prosecution for the matters contained in the DPA. Alternatively, the corporation may be required to renegotiate the end date of the DPA with the CDPP to avoid prosecution.
- 6.2 If the corporation has satisfied its obligations under the DPA by the end date specified in the DPA, the CDPP will provide the corporation with a letter indicating that the terms of the DPA have been met and that the DPA has concluded. The CDPP will also publish a notice of the conclusion of the DPA on the CDPP's website. If the corporation and the CDPP agree, a report detailing the corporation's compliance with DPA terms may also be published on the CDPP's website after the DPA has concluded.
- 6.3 Where the DPA has been concluded in this manner, the CDPP will not be able to prosecute the corporation for the offences specified in the DPA, unless it is revealed that the corporation:
- a. materially contravened the DPA, or
 - b. provided misleading or incomplete information to the CDPP in circumstances where the corporation knew, or ought to have known, that the information was inaccurate, misleading or incomplete.

7. Public Interest factors

7.1 Paragraphs 2.4, 4.2 and 5.10 of this Code refer to decisions made as part of the DPA process ‘in the public interest’. The types of public interest factors that will be relevant in any given matter will depend on the facts at hand, and will vary from case to case. An indicative list of the types of factors that may be relevant to determining whether a particular action or decision is in the ‘public interest’ can be found at paragraphs 2.9 to 2.14 of the [Prosecution Policy of the Commonwealth](#). Other factors that may be relevant in certain cases include, but are not limited to:

- a. whether the corporation has self-reported the misconduct, and the quality and timeliness of that self-report
- b. whether there is a history of repeated or serious breaches of the law, and/or a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the corporation and/or its directors/partners and/or majority shareholders
- c. whether the conduct alleged is part of the business practices or culture of the corporation
- d. whether the corporation has already taken steps to avoid a recurrence of the misconduct (including where the corporation has taken such steps before becoming aware of the offending) or has demonstrated a genuine commitment to taking such steps (for example, by dismissing culpable individuals and committing to improve governance processes)
- e. whether the corporation has been previously subject to warning, sanctions, regulatory action or criminal charges in relation to misconduct (and in particular, misconduct that is similar to the misconduct described in the DPA) and has nonetheless failed to take adequate action to prevent future unlawful conduct, or has continued to engage in the conduct
- f. whether the corporation reported the wrongdoing but failed to verify it, or reported it knowing or believing it to be inaccurate, misleading or incomplete
- g. whether there was a significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments
- h. whether a corporation has withheld material that is required for the effective investigation and, where appropriate, prosecution of individuals involved in the offending conduct
- i. whether the misconduct to which the DPA relates has been subject to extensive investigation by a Commonwealth agency and the extent to which the corporation has cooperated during that investigation and any subsequent prosecution of culpable individuals
- j. the existence of a proactive corporate compliance programme both at the time of offending and at the time of reporting but which failed to be effective in this instance

- k. whether the corporation has self-reported the same or related offending in another jurisdiction and complied with any penalties/orders imposed by that jurisdiction, and the nature of those penalties/orders
- l. whether the offending represents isolated actions by individuals
- m. whether the offending is recent and the corporation in its current form is effectively a different entity from that which committed the offences (for example if the corporation has been taken over by another organisation, it no longer operates in the relevant industry or market and/or its management team has completely changed)
- n. whether the corporation has taken steps to redress any harm caused by the offending
- o. whether the collateral consequences of any court-imposed penalty are likely to be disproportionate to the seriousness of the alleged offending by the corporation
- p. disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending, and
- q. a conviction is likely to have significant and disproportionate effects on the public, the corporation's employees, shareholders or members of a superannuation scheme managed or facilitated by the corporation.

7.2 Regardless of the factors outlined above, to the extent that a DPA relates to foreign bribery the CDPP must not be influenced by considerations of the national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved in the matter. This is required under Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which Australia is a party.

7.3 The corporation's level of cooperation with law enforcement throughout the DPA process will constitute a particularly influential public interest factor. Considerable weight may be given to a genuinely proactive approach adopted by the corporation's management team when the offending is brought to their notice, involving reporting the corporation's offending otherwise unknown to the CDPP within a reasonable time of the offending coming to light and taking remedial actions.

7.4 A corporation can demonstrate a high degree of co-operation by, for example:

- a. engaging in internal investigation shortly after becoming aware of the offending conduct and involving Commonwealth agencies in these internal investigations at an early stage
- b. providing investigators with relevant evidence which may be used against culpable individuals, other bodies corporate and/or the corporation itself if a DPA is negotiated and then prosecution is commenced on the basis of a material contravention of that DPA
- c. identifying relevant witnesses, disclosing accounts and relevant documents, making witnesses available for interview when requested, and providing a full report in respect of any internal investigation

- d. adopting a proactive approach to identifying victims and developing mechanisms for compensating victims or taking other remedial action,
- e. providing evidence or assistance in related legal proceedings (including proceedings under the Proceeds of Crime Act 2002), regulatory action and investigations against the corporation or against relevant individual officers, employees or agents (particularly where the information provided by a corporation would considerably expedite an investigation or prosecution), and
- f. engaging openly and constructively with the CDPP and relevant Commonwealth agencies in the lead up to, and throughout, DPA negotiations.

7.5 Self-reporting is not a prerequisite to prove the necessary level of co-operation, but is a strong public interest factor in favour of a DPA, particularly where self-reporting takes place shortly after the offence occurs.

7.6 Corporations will not be expected to waive legitimate claims of legal professional privilege in order to demonstrate co-operation, but waiving privilege may demonstrate a high degree of co-operation.

7.7 A corporation will be permitted to provide, and the CDPP will have regard to, any reasons why it would be in the public interest to enter into DPA negotiations or a DPA.

Appendix A – Offences to which a DPA may relate under section 17B of the DPP Act

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

- 35H – *Unauthorised access to verification information – offence*
- 35J – *Obtaining access to verification information by false pretences – offence*
- 35K – *Unauthorised use or disclosure of verification information – offence*
- 53 – *Reports about movements of physical currency into or out of Australia*
- 55 – *Reports about receipts of physical currency from outside Australia*
- 59 – *Reports about movements of bearer negotiable instruments into or out of Australia*
- 74 – *Unregistered persons must not provide certain remittance services*
- 123 – *Offence of tipping off*
- 136 – *False or misleading information*
- 137 – *Producing false or misleading documents*
- 138 – *False documents*
- 139 – *Providing a designated service using a false customer name or customer anonymity*
- 140 – *Receiving a designated service using a false customer name or customer anonymity*
- 141 – *Customer commonly known by 2 or more different names – disclosure to reporting entity*
- 142 – *Conducting transactions so as to avoid reporting requirements relating to threshold transactions*
- 143 – *Conducting transfers so as to avoid reporting requirements relating to cross-border movements of physical currency*
- 162 – *External audits – compliance*

Autonomous Sanctions Act 2011

- 16 – *Contravening a sanction law – offence*
- 17 – *False or misleading information given in connection with a sanction law – offence*

Charter of the United Nations Act 1945

- 20 – *Dealing with freezable assets – offence*
- 21 – *Giving an asset False or misleading information given in connection with a sanction law – offence*
- 27 – *Contravening a UN sanction enforcement law – offence*
- 28 – *False or misleading information given in connection with a UN sanction enforcement law – offence*

Corporations Act 2001

- 1041A – *Market manipulation*
- 1041B – *False trading and market rigging—creating a false or misleading appearance of active trading etc.*
- 1041C – *False trading and market rigging—artificially maintaining etc. trading price*

- 1041D – *Dissemination of information about illegal transactions*
- 1041E – *False or misleading statements*
- 1041F – *Inducing persons to deal*
- 1041G – *Dishonest conduct*
- 1043A – *Prohibited conduct by person in possession of inside information*
- 1307 – *Falsification of books*

Criminal Code Act 1995

- 70.2 – *Bribing a foreign public official*
- 131.1 – *Theft*
- 134.1 – *Obtaining property by deception*
- 134.2 – *Obtaining a financial advantage by deception*
- 135.1 – *General dishonesty*
- 135.4 – *Conspiracy to defraud*
- 141.1 – *Bribery of a Commonwealth public official*
- 142.1 – *Corrupting benefits given to, or received by, a Commonwealth public official*
- 144.1 – *Forgery*
- 145.1 – *Using forged document*
- 145.2 – *Possession of forged document*
- 145.3 – *Possession, making or adaptation of devices etc. for making forgeries*
- 145.4 – *Falsification of documents etc.*
- 145.5 – *Giving information derived from false or misleading documents*
- 400.3 – *Dealing in proceeds of crime etc.—money or property worth \$1,000,000 or more*
- 400.4 – *Dealing in proceeds of crime etc.—money or property worth \$100,000 or more*
- 400.5 – *Dealing in proceeds of crime etc.—money or property worth \$50,000 or more*
- 400.6 – *Dealing in proceeds of crime etc.—money or property worth \$10,000 or more*
- 400.7 – *Dealing in proceeds of crime etc.—money or property worth \$1,000 or more*
- 400.8(1) – *Dealing in proceeds of crime etc.—money or property of any value*
- 400.9 – *Dealing with property reasonably suspected of being proceeds of crime etc.*
- 480.4 – *Dishonestly obtaining or dealing in personal financial information*
- 480.5 – *Possession or control of thing with intent to dishonestly obtain or deal in personal financial information*
- 480.6 – *Importation of thing with intent to dishonestly obtain or deal in personal financial information*
- 490.1 – *Intentional false dealing with accounting documents*
- 490.2 – *Reckless false dealing with accounting documents*