



Law Council  
OF AUSTRALIA

Office of the President

12 July 2018

Anna Harmer  
First Assistance Secretary  
Security and Criminal Law Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

By email: [criminallaw@ag.gov.au](mailto:criminallaw@ag.gov.au)

Dear Ms Harmer

### Deferred prosecution agreement scheme code of practice

1. The Law Council of Australia welcomes the draft Code of Practice issued by the Attorney-General's Department and supports its adoption.
2. The Law Council is grateful for the assistance of its Foreign Corrupt Practices Committee of the Business Law Section and National Criminal Law Committee in the preparation of this submission.
3. The Law Council has strongly supported the adoption of a deferred prosecution agreement (**DPA**) scheme in Australia. In that regard, the success of the UK system since its introduction in 2014 is most recently illustrated by the Rolls Royce DPA (now the third use of a DPA in the UK) which illustrates the advantages from a regulatory enforcement perspective that can be achieved through the principled application of a DPA regime.<sup>1</sup>
4. Critically, regulatory implementation of a DPA scheme in Australia will need to give corporations the confidence to self-report in exchange for a meaningful reduction in penalty and resolution timeframe where there is genuine co-operation and remediation by the corporation. While the draft Code details what might be required of a co-operating corporation, it is silent as to the likely reduction in penalty that will be obtained. If corporations do not have sufficient certainty to conduct a cost benefit analysis at the outset, that will likely affect the level of participation in the scheme.
5. The Law Council believes that it will be important for all relevant regulators (the Commonwealth Department of Public Prosecutions, the Australian Federal Police, the Australian Securities and Investments Commission (**ASIC**), the Australian Transaction Reports and Analysis Centre and the Australian Taxation Office) to embrace the

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<sup>1</sup> For discussion see Ben Morgan, 'The future of Deferred Prosecution Agreements after Rolls-Royce' (Speech delivered at a seminar for General Counsel and Compliance Counsel for corporates and financial institutions, Norton Rose Fulbright LLP, 7 March 2017) <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/>.

relevant principles and approach and proactively engage in educational activities surrounding DPAs with the business community as part of the implementation of the scheme.

6. The Law Council supports the terms of the draft Code and notes its policy similarities to many aspects of the UK Code of Practice<sup>2</sup> and the US Attorneys Manual.<sup>3</sup> The Law Council has the following relatively minor comments:

- Remediation and monitoring (paragraph 3.3(a) and paragraphs 3.16 to 3.20). The Law Council suggests that imposition of these requirements will only be necessary if deficiencies actually exist and the Code should reflect that general principle. The Law Council prefers the approach reflected in paragraphs 7.11 to 7.21 of the UK Code of Practice.
- Further to the preceding point, the preamble to the second sentence of paragraph 3.3 might more appropriately read, 'There are a number of further terms that may be included in DPAs as appropriate'. Compare the preamble to proposed subsection 17C(2) and paragraph 129 of the Explanatory Memorandum.
- Admission of liability (paragraph 3.2(a)). The Law Council considers it important that there be clarity that a DPA not require admission to a contravention of law to encourage self-reporting and use of DPAs, having regard to the implications of a formal admission in terms of civil class actions, etc. (compare the impediments created by section 1317E of the *Corporations Act (2001)* Cth (**Corporations Act**) to civil penalty settlements with ASIC in the Corporations Act context). In the context of paragraph 3 of the draft Code, the Law Council would recommend an explicit statement similar to paragraph 6.3 of the UK Code of Practice.
- The Law Council queries the need to use the typology of 'serious' corporate crime in paragraphs 1.2, etc. of the draft Code to encourage engagement by corporations (noting however the similar references that are in the Explanatory Memorandum).
- Paragraph 7.4(c) appears to contain an assumption that a corporation can require individual officers and employees to make themselves available to be interviewed. That is a decision for the individual and cannot be compelled by the relevant corporation, even if the relevant individual remains an officer or employee.
- The Law Council also queries whether paragraph 7.4 should include an acknowledgment that to the extent that information has been obtained during the course of an investigation through an employee being required to answer questions by his or her employer, then the non-provision of such information does not demonstrate a lack of co-operation if other material obtained is made available. That is because the provision of such material may cause difficulty for

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<sup>2</sup> Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013*, [https://www.cps.gov.uk/sites/default/files/documents/publications/dpa\\_cop.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf).

<sup>3</sup> United States Department of Justice, *United States Attorneys' Manual* 9-28.000 *et seq* (Principles of Federal Prosecution of Business Organizations) <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

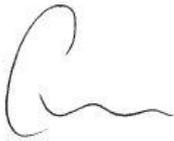
any prosecution of the relevant individual on the basis it would undermine his or her privilege against self-incrimination.

Thank you for the opportunity to provide these comments.

The Law Council would be pleased to elaborate on the above issues, if required.

Please contact Dr Natasha Molt, Acting Director of Policy, Policy Division (02 6246 3754 or at [Natasha.molt@lawcouncil.asn.au](mailto:Natasha.molt@lawcouncil.asn.au)), in the first instance should you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a stylized flourish at the end.

**Morry Bailes**  
**President**