A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia

Attorney-General’s Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council’s Constituent Bodies. The Law Council’s Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council’s six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.
Acknowledgement

The Law Council is grateful for the assistance of the Foreign Corrupt Practices Committee of the Business Law Section (FCPC), the National Criminal Law Committee and the Law Society of New South Wales in the preparation of this submission.
Executive Summary

1. The Law Council is grateful for the opportunity to comment on the Attorney-General’s Department’s March 2017 Consultation Paper on a proposed model for a Deferred Prosecution Agreement scheme in Australia (the Consultation Paper).

2. Under a Deferred Prosecution Agreement (DPA) scheme, where a company has engaged in a serious corporate crime, prosecutors would have the option to invite the company to negotiate an agreement to comply with a range of specified conditions. The terms of the DPA would likely require the company to cooperate with any investigation, pay a financial penalty, admit to agreed facts, and implement a program to improve future compliance. A company would not be prosecuted in relation to the matters outlined in the DPA where the company fulfils its obligations under the agreement.

3. The Law Council continues to hold the views expressed in the FCPC submission on the implementation of a DPA scheme in Australia made in response to the March 2016 public Consultation Paper (the Law Council’s earlier submission). The potential benefits that can be generated by a DPA scheme can be seen in the United Kingdom’s (UK) experience in using DPA’s over the last 12 months.

4. The Law Council supports the broad structure of a DPA scheme that is now proposed and described the Consultation Paper. This submission builds upon the Law Council’s earlier submission, providing additional observations and comments on the proposed scheme.

5. Key recommendations include:
   - A comprehensive program of education in relation to the finalised DPA scheme should be undertaken;
   - The Attorney-General’s Department should circulate a draft of the guidance on the operation of the DPA scheme for public consultation;
   - The Australian Government should further investigate means by which a Commonwealth DPA can also resolve breaches of state and territory laws;
   - The offences the subject of a DPA as identified in the Consultation Paper are a good starting point. The Law Council supports periodic review of appropriate offences that may be subject to a DPA;
   - The DPA scheme should initially only be available for companies and not individuals, although the Australian Government should return to examine this issue when the subsequent review of the operation of the system is undertaken;
   - The DPA scheme should provide potential applicants with sufficient information to determine whether a DPA is likely to be offered and some idea of likely terms;
   - A company should be able to explore the possibility of negotiating a DPA;
   - Sufficient credit should be given to companies for self-reporting;
   - The terms of a DPA should not contain a formal admission of criminal liability;
• Client legal privilege should not be eroded under a DPA scheme. Specifically, there should not be an expectation for client legal privilege to be waived in relation to matters pertaining to the process of a DPA;

• The DPA scheme should include a tolling of the limitation period in respect of any related civil proceedings that arise out of the offending conduct;

• The Government should consider, and if necessary address, whether the Commonwealth Director of Public Prosecutions (CDPP) and the (AFP) have the full range of skills and experience to engage in corporate negotiation and compromise;

• Approval of a DPA should be by way of an independent administrative panel. If this is not to be accepted, a retired judge, or a panel of judges, reviewing and approving the proposed DPAs would be an acceptable alternative. The review process should not be subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth);

• The DPA itself could also include a process for resolving disputes, including having an independent third party determine whether there has been a material breach, the independent panel who approved the agreement or a court;

• A material breach of a DPA should not be an offence. Any conduct amounting to a breach of a DPA could appropriately be taken into account in sentencing, should the company be convicted for the matters to which the DPA relates;

• A separate legislative provision prescribing what constitutes a material breach is unnecessary;

• Independent corporate monitors should be engaged in appropriate cases. Where a monitor is engaged, consideration needs to be given to the need for confidentiality of their reports and findings. These reports should be confidential and not publicly available, unless required in proceedings for a breach of the DPA; and

• Prosecution policy should be amended to allow for the use of subsection 9(6D) of the Director of Public Prosecutions Act 1983 (Cth) whereby the CDPP may provide an undertaking not to prosecute in situations where a company has fulfilled its obligations under a DPA.
6. In relation to the focus of the scheme, the Law Council agree that an Australian DPA scheme should prioritise reparation and remediation, to provide a vehicle for restitution to victims of crime, financial penalties and on the implementation of effective compliance programs. The Law Council would also include in this list the improvement of corporate governance and culture.

7. A DPA scheme should include the following twin attributes:
   
   • transparency of operation to potential applicants, law enforcement and the public; and
   
   • to the greatest extent possible, certainty and predictability in its operation. This will encourage would-be self-reporters to come forward, and provide a framework for those operating the scheme to ensure consistent and appropriate standards are applied.

8. The Law Council notes that an effective DPA scheme will require clear guidance to ensure companies are aware of their rights and obligations. While examples of these types of guidelines can be found in the United States Attorney’s Manual, the Securities and Exchange Commission (SEC) Enforcement Manual, and the DPA Code of Practice in the UK, guidelines should be developed to meet the specific requirements of the Australian criminal law environment.

9. The guidance should cover the following:
   
   • the nature of cooperation that the CDPP expects from a company to qualify for an invitation to negotiate a DPA;
   
   • the factors that the CDPP will take into account in determining whether to offer a DPA, drawing upon existing regimes operating in the US with the DOJ and the UK with the Serious Fraud Office (SFO);
   
   • whether the existence or non-existence of an Investigation Cooperation Agreement as a material factor;
   
   • the extent to which a company will be expected to waive or not waive client legal privilege during the DPA negotiations; and
   
   • as in the US (reflected in the “Yates Memorandum”), the conduct of all relevant individuals, however senior or junior, must be disclosed.

10. The Law Council recommends that an exposure draft of the guidance is made available for public consultation as soon as possible and before the proposed DPA scheme is enacted so it can be considered by interested participants.

11. Further, a comprehensive program of education explaining substantial changes with any introduction of new whistleblower protections and a DPA scheme will be necessary to ensure these measures are successful.

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1 Office of the Deputy Attorney General, Individual Accountability for Corporate Wrongdoing, (9 September 2015).
Interaction with other legislative schemes

12. The Law Council encourages the Australian Government to further investigate means by which a Commonwealth DPA can also resolve breaches of state and territory laws.

13. There is a high degree of overlap between Commonwealth, State and Territory laws in many of the areas where it is proposed that a DPA be an available remedy. For example, price-fixing in the financial markets could equally be prosecuted under the market manipulation provisions of the Corporations Act 2001 (Cth) and under the cartel provisions of the Competition and Consumer Act 2010 (Cth) and many of the offences on the DPA offences list may have counterparts in State Crimes Acts. It is highly desirable that the DPA mechanism be seen by corporations as a solution to all breaches of Australia law associated with the conduct in question.

Recommendation:

• The Australian Government should further investigate means by which a Commonwealth DPA can also resolve breaches of State and Territory laws.

Offences the subject of a DPA

14. The Law Council has noted that for the initial term of the model DPA scheme, it will apply to a limited number of identified economic crime offences, to be thereafter reviewed. The Law Council agrees that the identified offences are a good starting point. The Law Council notes that there is a need for flexibility regarding DPAs when the scheme is first established with the possibility of extending it to other offences over time. In addition, any offences under the Corporations Act 2001 (Cth) that will be covered by the proposed DPA scheme should be clearly identified. While periodic review should occur, the uptake of DPAs may be slow initially, and there may not be a sufficient body of precedents established in the first two years on which to base a decision on the future conduct of the scheme. In the Law Council’s view, it is likely to take several years before such a body of precedents is established, and all implementation issues are effectively worked through.
Recommendation:

- The offences the subject of a DPA as identified in the Consultation Paper are a good starting point. The Law Council supports periodic review of appropriate offences that may be subject to a DPA.

DPA and individual liability

15. Differing views are held within the Law Council as to whether a DPA should be available for an individual. The Law Council’s prior submission noted that there were divergent views on this question, and this continues to be the case. The Law Council’s National Criminal Law Committee has noted the general desirability for a consistent criminal law framework. The Law Society of New South Wales expressed the view that the DPA scheme should only apply to companies and not to individuals. The Law Council suggests this be an issue that should be returned to when the subsequent review of the operation of the system is undertaken.

Recommendation:

- The DPA scheme should initially only be available for companies and not individuals, although the Australian Government should return to examine this issue when the subsequent review of the operation of the system is undertaken.

Negotiation of a DPA

16. The proposed DPA scheme would provide that only CDPP prosecutors will be able to officially invite a company to enter into DPA negotiations. The invitation would be at the CDPP’s discretion.

17. In the Law Council’s view, there are several issues which require elaboration including:

- When the CDPP’s discretion will be exercised;
- How will the CDPP’s discretion be exercised;
- What is the company’s exposure during the pre-invitation and negotiation stage and how is this managed; and
- The level of cooperation required.

Timing of offer to negotiate a DPA

18. It is not clear at what point in time an assessment of the appropriateness of an invitation to negotiate a DPA is made.

19. The Law Council understands that, in the normal course, an agency conducts an investigation and then an initial assessment is made by the agency as to whether the conduct is potentially criminal and a brief is prepared and sent to the CDPP for its consideration. The CDPP conducts its own assessment and determines whether there
are sufficient grounds for commencing criminal proceedings and whether those criminal proceedings have a reasonable prospect of success.

20. This process provides an important check and balance on the conduct of investigative agencies and applies the CDPP’s expert skills and knowledge of criminal prosecutions. Importantly, the CDPP is substantially removed from the investigative process, and can evaluate the evidence with fresh eyes. It is not clear from the Consultation Paper whether an assessment will be made by the CDPP, based on a brief of evidence, prior to an offer to negotiate a DPA being made.

21. In the period leading up to the initiation of a DPA negotiation there is little detail on how a decision to offer to negotiate a DPA will be determined. The Law Council considers that greater clarity is needed around the operational processes for evaluation and decision making in offering to negotiate a DPA.

22. The Law Council notes that it is suggested that clear and detailed guidance will be given on when a prosecutor is likely to offer a DPA negotiation and that information could be provided in the prosecution policy of the CDPP or other guidelines.

23. The Law Council considers that it is important to the success of a DPA scheme to provide potential applicants with sufficient information to determine whether a DPA is likely to be offered and some idea of likely terms. This will enable these potential applicants to determine whether it would be better to pursue leniency or discounts under existing cooperation agreements. A lack of predictability in the criteria for a DPA is likely to hinder their adoption.

**Exposure for the company leading up to agreement**

24. In the pre-negotiation stage, and up until the approval of the DPA, there is a risk of exposure to the company if it discloses information seeking to initiate DPA discussions, but that DPA does not eventuate. This is a disincentive to self-reporting and entering a DPA.

25. To minimise these disincentives, in the US, a company can explore the possibility of negotiating a DPA by approaching the Department of Justice (DOJ) or SEC and provide information on a hypothetical basis (initially through their lawyers) before the government fully commits to a DPA. This is to avoid any admission in the event that the DPA does not eventuate or cannot be agreed on. We suggest that a similar procedure be considered in the operation of the Australian scheme.

**Credit given for self-reporting**

26. If one of the aims of a DPA scheme is to encourage greater self-reporting, there needs to be sufficient credit given to self-reporting in the DPA assessment process. Companies should be provided with a strong indication that self-reporting, together with full cooperation, will generally result in a DPA. Otherwise the benefits of self-reporting with the possibility of using a DPA are diminished.

**Formal admissions**

27. The Law Council does not support the proposal that the terms of a DPA must contain a formal admission of criminal liability.
28. Class actions have become a fixture of the Australian commercial environment. If an admission of liability was a required term of the DPA that would potentially undermine the attractiveness for a corporation in seeking to negotiate a DPA as it could effectively underwrite civil class actions in relation to the conduct the subject of the DPA.

29. This should, for example, be contrasted with the US Foreign Corrupt Practices Act of 1977\(^2\) regime where breach of that legislation creates no civil cause of action and therefore an admission is not an impediment to agreed settlements using a DPA.

30. The difficulties associated with requiring an admission of a breach of law and its impact on class actions can also be seen where there is an agreed breach of civil penalty proceedings under Part 9.4B of the Corporations Act 2001 (Cth) (the requirement to admit a breach of law under those provisions is a significant disincentive for corporations in seeking agreed civil penalty settlements).

31. In many situations there may be other adverse consequences arising from a formal admission that may discourage a company from engaging in a DPA settlement, for example contracting issues, ability to engage in tenders or the ability to operate in other jurisdictions.

32. For these reasons, an admission of breach of law should depend on the circumstances and should not be a formal or mandatory requirement for the terms of a DPA. Alternatively, consideration could also be given to making any admission made for the purposes of the DPA inadmissible in any subsequent civil or criminal proceedings. Consideration could also be given to drawing on alternative mechanisms such as that used by the Australian Securities and Investments Commission (ASIC) in enforceable undertakings (whereby a company does not make a formal admission but acknowledges ASIC has a concern about a transaction and in recognition of that concern, enters into an enforceable undertaking).

**Client legal privilege**

33. Legal professional or client legal privilege (CLP) is a right for a client of a lawyer not to have their communications associated with legal advice or impending litigation disclosed without their consent. The benefit is for the client, not the lawyer. The Law Council regards CLP as a fundamental civil right and a pillar of the Australian legal system. It ensures full and frank discussions between legal advisers and their clients, which promotes the administration of justice and encourages compliance with the law.

34. While full cooperation is to be expected, one issue of contention in the US is whether documents which would normally be privileged, such as internal investigations, are required to be produced as part of the company’s obligation to cooperate. This is a particularly sensitive issue if the government is requiring waiver of privilege prior to an agreement being finalised.

35. CLP should not be eroded as a result of the implementation of any effective DPA scheme.

36. In this context, there is a possibility for waiver of privilege to be considered at different stages, including for example: (a) the transaction in question; (b) the interview of witnesses or investigation phase; and (c) seeking advice from a legal practitioner regarding the DPA process (for example, whether a breach has occurred). The Law

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Council considers that waiver of privilege as part of the DPA process might be expected over the transaction in question and conceivably aspects of the investigation phase. However, privilege should not be expected to be waived altogether over for example advice about the process.

Limitation periods

37. The framework for negotiations and the mandatory elements to be contained in a DPA could, in the Law Council's view, contain a tolling of the limitation period in respect of any related civil proceedings which arise out of the offending conduct. As most common law and statutory causes of action, including civil penalty proceedings, have limitation periods, any negotiations for a DPA, which might be quite lengthy, or a DPA itself should not place a regulator, or any person who has suffered losses as a result of the offending conduct, in a disadvantageous position. The tolling could occur for the period until negotiations are terminated, or if an agreement is reached, when that DPA is approved and made public.

Expertise in handling DPA negotiations

38. The Law Council has a concern that the CDPP and Australian Federal Police (AFP) may not currently have available to them the full range of skills and experience necessary to engage in the process of corporate negotiation and compromise that would be a feature of a properly functioning DPA scheme. While ASIC may have greater experience in this type of corporate negotiation, the Law Council would anticipate that the CDPP and AFP would be the key regulatory bodies for a DPA scheme.

39. The Law Council encourages the Australian Government to consider this issue and, if necessary, ensure appropriate skills and experience are recruited as part of the introduction of a DPA scheme. The Law Council understands that a process of this nature was adopted in relation to the SFO when the UK DPA scheme was introduced. In addition, in the US, the Department of Justice in 2016 engaged an experienced Compliance Expert, Ms Hui Chen, to assist the DOJ in assessing the culture of compliance in large business organisations, which is not a traditional area where, in the Law Council’s experience, the AFP or the CDPP have focused resources. In turn, earlier in 2017, the DOJ published a Guidance on the Compliance Issues that US prosecutors take into account in determining how to respond to a voluntary disclosure of potentially illegal conduct.

Recommendations:

- The DPA scheme to provide potential applicants with sufficient information to determine whether a DPA is likely to be offered and some idea of likely terms;
- A company should be able to explore the possibility of negotiating a DPA;
- Sufficient credit should be given to companies for self-reporting;
- The terms of a DPA should not contain a formal admission of criminal liability;
Approval of a DPA

40. The Law Council’s earlier submission noted that DPA’s should be subject to the approval of a court based on considerations of fairness, reasonableness and proportionality. However, the Law Council has reconsidered this issue on the basis of constitutional and separation of powers posed by the introduction of a DPA scheme (as noted in the March 2016 public Consultation Paper).

41. The Law Council now prefers an approach by which a prosecutor would be required to make a written application to an independent administrative panel (consisting of, for example, three members), seeking approval of the final terms of the DPA. The panel would consider whether the DPA is in the interests of justice and whether the terms are fair, reasonable and proportionate. If the panel approves the DPA, it would take effect and be made publicly available on the CDPP’s website. If the DPA is not approved, the parties would be able to negotiate further or terminate the negotiations. Panel members should be legally trained and have experience in commercial crime and understand the commercial environment.

42. An independent panel should be empowered to make the parties to the DPA comply with its terms. This model is preferred over a retired judge model because an independent panel can be empowered to make the parties to the DPA comply with its terms.

43. To the extent that other kinds of decisions or procedures may be brought into the process (e.g. proceedings of crime; enforceable undertakings; breach of dealings licenses; civil penalties and criminal prosecutions), the Law Council believes the framework for a DPA must make it clear that during the negotiation stage, the company and the CDPP should consider all applicable Federal and/or State offences that might arise (from the relevant conduct). Once the scope of a DPA is agreed upon, the company should not thereafter be subject to any other form of criminal, civil or civil penalty proceedings by a Commonwealth, State or Territory agency based upon the conduct the subject of the DPA.

44. If the establishment of an independent panel is not accepted, a retired judge, or a panel of judges, reviewing and approving the proposed DPAs would be an acceptable alternative. In order to achieve predictability, that same retired judge, or panel of judges,

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4 Attorney-General’s Department, Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia (March 2016).
should be used consistently, and, subject to privacy considerations, their approvals be publicly available.

45. If an independent panel scheme or a retired judge approach is to be implemented, the Law Council has reservations about the process being subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977(Cth) for a number of reasons:

- Principally, it may undermine the certainty of process that will be important to encourage companies to enter into a DPA settlement, as it opens up the possibility of a third party seeking to have a decision reviewed (e.g. a person who has suffered loss as a result of the conduct might argue they have standing as an aggrieved person);

- The review process is a check on the CDPP discretionary decision as to whether to prosecute or enter into the DPA. The CDPP's decision is itself not reviewable, so it would appear inconsistent to provide a right of review on the check on the discretion; and

- The company would not have much of a practical safeguard if the panel rejects a proposed DPA – in that case the Law Council anticipates that the company would seek to renegotiate the terms, rather than seek public review of the decision or terminate the DPA negotiations.

Recommendation:

- Approval of a DPA should be by way of an independent administrative panel. If this is not to be accepted, a retired judge, or a panel of judges, reviewing and approving the proposed DPAs would be an acceptable alternative. The review process should not be subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977(Cth).

Consequences of breach of a DPA

46. The Consultation Paper suggests that legislation provide a non-exhaustive list of what may constitute a material breach. In the Law Council’s view, a separate legislative provision prescribing what constitutes a material breach is not necessary. What constitutes a material breach could be included as part of each DPA negotiation process. The DPA itself could also include a process for resolving disputes, including having an independent third party determine whether there has been a material breach, the independent panel who approved the agreement or a court. The latter would be subject to the Australian Government seeking legal advice from the Solicitor-General regarding constitutional validity. Determination of whether or not a breach has occurred should not give rise to the same constitutional issues as may arise in connection with the initial review and approval of a DPA. However, any further constitutional issues that might arise with such an approach should be addressed.

47. The Law Council does not support the proposition that a material breach of a DPA should itself be an offence. This is on the basis that there would be unintended consequences arising from the creation of such an offence. The establishment of such an offence may, in itself, constitute a disincentive for a company to enter into a DPA. The conclusion of a DPA as a result of a material breach is a severe enough outcome. An
appropriate alternative would be that any conduct amounting to a breach of a DPA could appropriately be taken into account in sentencing, should the company be convicted for the matters to which the DPA relates.

48. The DPA scheme should make it clear that if the CDPP determines that there has been a material breach, it is for the prosecutor to notify the company in writing and if the breach is not remedied and the dispute resolved, then the prosecutor can proceed by way of charge.⁵

**Recommendation:**

- The DPA itself could also include a process for resolving disputes, including having an independent third party determine whether there has been a material breach, the independent panel who approved the agreement or a court;

- A material breach of a DPA should not be an offence. Any conduct amounting to a breach of a DPA could appropriately be taken into account in sentencing, should the company be convicted for the matters to which the DPA relates; and

- A separate legislative provision prescribing what constitutes a material breach is unnecessary.

**Independent monitors**

49. Most DPAs are likely to contain commitments by the company to undertake certain actions and to reform its corporate culture to avoid reoffending. The Law Council agrees that the CDPP is not equipped to provide regulatory oversight and does not have the investigative capacity to monitor the changes often mandated by a DPA.

50. The Law Council agrees that it is necessary to engage an independent corporate monitor in appropriate cases. Where a monitor is engaged, consideration needs to be given to how a monitor is supervised, the need for confidentiality of their reports and findings and how and in what manner any reports are to be published. These reports should be confidential and not publicly available, unless required in proceedings for a breach of the DPA.

**Recommendation:**

- Independent corporate monitors should be engaged in appropriate cases. Where a monitor is engaged, consideration needs to be given to how a monitor is supervised, the need for confidentiality of their reports and findings and how and in what manner any reports are to be published. These reports should be confidential and not publicly available, unless required in proceedings for a breach of the DPA.

⁵ The Law Council notes that there is a need for flexibility regarding DPAs when the scheme is first established with the possibility of extending it to other offences over time.
Conclusion of a DPA

51. The Law Council agrees with the proposal in the Consultation Paper that prosecution policy should be amended to allow for the use of subsection 9(6D) of the *Director of Public Prosecutions Act 1983* (Cth) whereby the CDPP may provide an undertaking not to prosecute in situations where a company has fulfilled its obligations under a DPA.

**Recommendation:**

- Prosecution policy should be amended to allow for the use of subsection 9(6D) of the *Director of Public Prosecutions Act 1983* (Cth) whereby the CDPP may provide an undertaking not to prosecute in situations where a company has fulfilled its obligations under a DPA.