



# DEFERRED PROSECUTION AGREEMENTS COMING SOON: GOVERNMENT RELEASES PAPER ON AN AUSTRALIAN SCHEME

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Legal Briefings - By **Jacqui Wootton, Tania Gray** and **Priscilla Bourne**

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On 31 March 2017, the Australian Government released a public consultation paper on '[Improving enforcement options for serious corporate crime: a proposed model for a Deferred Prosecution Agreement scheme in Australia](#)' (**Consultation Paper**).

The Consultation Paper sets out the Government's proposed model for implementing a deferred prosecution agreement (**DPA**) scheme in Australia.

The proposed model is a step forward in developing a new enforcement mechanism for serious corporate crime in Australia, at a time when the Government is consulting on a number of measures to implement corporate crime reform. Among those measures is the Government's proposed amendments to Australia's foreign bribery offence provisions, which are set out in a [consultation paper recently released on 4 April 2017](#).

Responses to the Consultation Paper close on **Monday 1 May 2017**.

In this summary, we provide an overview of the proposed DPA model and our observations on what we can expect going forward.

## WHAT IS A DPA AND HOW ARE THEY USED?

A DPA is a voluntary, negotiated settlement between a prosecutor and (generally) a company, whereby prosecutors agree to defer prosecution if the company agrees to comply with a series of conditions usually including a financial penalty, admissions of agreed facts and programs to improve future compliance. In appropriate cases, a DPA provides a means of resolving offending by corporate entities for serious corporate crimes such as fraud, bribery and other economic crime.

The US and more recently the UK have DPA schemes for serious corporate crime, which have resulted in substantial settlements, including the recent DPAs entered into by Rolls Royce in both the US and UK, which involved payments of approximately US\$800 million to UK, US and Brazilian authorities.

## **HOW WILL A DPA SCHEME CHANGE THE LANDSCAPE FOR CORPORATE CRIME IN AUSTRALIA?**

Under the current legal framework in Australia, there are no tangible legal incentives for companies to proactively report any potential issues identified internally and a lack of certainty as to whether any meaningful benefit will flow from cooperation during a criminal investigation.

If a DPA scheme is introduced, it will provide greater certainty around those issues and may result in:

- the length of the criminal investigation and enforcement process being reduced;
- the cost and uncertainty of a criminal trial being avoided in appropriate cases; and
- an opportunity for companies to actively engage with investigators and prosecutors to manage potential reputational harm arising from criminal investigations and prosecutions.

## **WHAT IS THE PROPOSED MODEL FOR AN AUSTRALIAN DPA SCHEME?**

A decision on whether to introduce a DPA scheme in Australia has been under active consideration by the Attorney-General's Department since March 2016, when the proposal was floated in a [public discussion paper](#). Most responses to that discussion paper endorsed the introduction of DPAs while cautioning the need to apply learnings from the existing US and UK models.

The Attorney-General's Department has involved the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions (**CDPP**) and other federal agencies in its consideration of options for a DPA scheme and the Consultation Paper sets out how the Government considers a DPA scheme could be implemented in Australia.

The key features of the proposed DPA scheme are summarised below.

## **WHAT WILL DPAS APPLY TO?**

The proposed DPA scheme would only be available for companies (not individuals).

The scheme will also only apply to a publicly available list of Commonwealth 'serious corporate crime' offences, similar to the position in the UK, such as:

- fraud;
- false accounting;
- foreign bribery;
- money laundering;
- dealing with proceeds of crime;
- forgery and related offences;
- exportation and/or importation of prohibited or restricted goods; and
- specific offences under the Corporations Act (though no examples of what this might include have been given).

The Consultation Paper calls for submissions as to whether other crime types should also be included (such as environmental crime, tax offences, cartel offences, and workplace health and safety offences).

Issues that remain for consideration include what will occur if offences against state and territory laws are alleged and how a DPA scheme would interact with proceeds of crime legislation, particularly where a DPA requires disgorgement of profits (which may render potential action under proceeds of crime legislation unnecessary).

## **HOW WILL DPA NEGOTIATIONS BE INITIATED AND PROGRESS?**

Under the proposed scheme, the CDPP would be the only authority with the ability to invite companies to enter into negotiations for a DPA. Such a decision would be at the prosecutor's discretion. However, cases may be brought to the CDPP's attention where a company either self-reports or offers full cooperation to a regulator-initiated investigation.

The Government intends to make publicly available clear and detailed guidance on factors that prosecutors may consider in exercising this discretion. Relevant factors identified in the Consultation Paper include:

- whether a company has self-reported misconduct and genuinely cooperated with any investigation and pre-negotiation discussions;
- the likely success of negotiations;
- the company's past conduct and role in the offending;
- the company's cooperation with any ongoing investigations; and
- public interest considerations, including the seriousness of the conduct.

The fact negotiations are occurring would be confidential and material disclosed by the company during negotiations could not be later disclosed or used in subsequent proceedings where the material was created solely to facilitate, support or record negotiations. This approach is drawn from the UK scheme.

Otherwise, the prosecutor would have general discretion to conduct the negotiations as they see fit (subject to limitations imposed by law and prosecutorial guidelines).

### ***WHAT WILL A DPA COVER?***

The Government proposes that DPAs should contain the following mandatory terms (among others):

- an agreed statement of facts outlining the particulars relating to each offence;
- potentially, the company's formal admission of criminal liability for specified offences. Further consideration is being given to this;
- the company's agreement to cooperate with any ongoing investigation;
- provision for the termination of the DPA if the company materially breaches the terms; and
- an agreement to make the DPA publicly accessible following approval.

The Government notes that other suitable terms may include requirements to disgorge profits, report at regular intervals, implement or improve compliance programs, fund an independent external monitor or compensate victims.

## ***HOW WILL DPAS BE FINALISED?***

Once a DPA has been agreed, it is proposed that a retired judge would, upon application by the prosecutor, consider whether the DPA is in the interests of justice and whether the terms are fair, reasonable and proportionate. If the retired judge approves the DPA, they would be required to make a written declaration (including a statement of reasons for reaching that decision). The DPA would then take effect. All DPAs would be published in full on the CDPP's website, except in exceptional circumstances. The CDPP would also publish details on how the company has complied with the terms and conditions, as well as details of any breach, variation or termination.

## ***WHAT HAPPENS AFTER THE DPA IS APPROVED?***

The proposed DPA model includes an avenue to appoint independent external monitors (from auditing/consulting firms, or individuals with relevant expertise) at the company's expense to monitor compliance with a DPA and report to the CDPP. This would only be necessary where the agreed terms of the DPA oblige the company to instigate organisational or cultural change to avoid re-offending.

If there is a breach of a DPA, the proposed model contemplates a range of responses from providing an opportunity to address the breach, to termination and prosecution in the event of a material breach.

Absent a breach, the DPA would be concluded by fulfilment of its terms, followed by an agreement by the CDPP not to prosecute the company.

# **WHAT DO WE EXPECT TO SEE IF THE PROPOSED DPA SCHEME GOES AHEAD?**

## ***ENFORCEMENT FOCUS ON COOPERATION***

We have seen from the operation of the UK scheme that the more serious the offence, the more likely it is that the public interest will demand a prosecution and the less likely it is that a DPA will be in the interests of justice. Similar considerations will be a factor in the prosecutors' decision-making here in Australia under the proposed scheme.

Nonetheless, with the [most recent DPA concluded in the UK](#), the Court gave considerable weight to the company's 'extraordinary cooperation' (even absent a self-report), and the 'real and significant' steps taken to improve compliance procedures in deciding to approve the DPA.

Should the proposed DPA model be implemented in Australia, we are likely to see a focus on cooperation and self-reporting from investigating authorities and the CDPP, with the 'carrot' being an increased prospect that the CDPP will enter DPA negotiations.

The Consultation Paper contemplates that detailed guidance will be issued outlining when a prosecutor is likely to offer DPA negotiations. The quality and clarity of this guidance in setting out when a company may be invited to enter into DPA negotiations, and the range of outcomes that they may expect, will be of particular importance.

### **INCREASED SPOTLIGHT ON COMPLIANCE**

The introduction of a DPA scheme in Australia is also likely to increase the spotlight on corporate compliance programs. Unfortunately, there is still limited guidance for Australian companies on what regulatory authorities in this jurisdiction expect of companies.

The [consultation paper recently released regarding the proposed reforms to Australia's foreign bribery offence](#) indicates that the Government is proposing to introduce a new corporate offence of failing to prevent foreign bribery. It contemplates that guidelines will be issued by the Government on the steps companies can take to help prevent its employees, agents and contractors from engaging in bribery. This will further increase the attention of regulators on the internal controls and compliance culture within Australian organisations. For more information on how we can help our clients in corporate crime investigations and compliance, see [here](#).

## **INTERACTION WITH ONGOING INVESTIGATIONS**

A key area requiring further consideration by the Government is how the introduction of a DPA scheme in Australia would interact with any ongoing investigations or prosecutions into individuals. This is not addressed in the Consultation Paper.

Notably, the way in which new policies and schemes interact with existing investigations has been a key area of focus in the US following the publication of the 'Yates Memo'. The Yates Memo provided guidance to attorneys within the US Department of Justice (**DOJ**) on individual misconduct in corporate investigations, but also signalled substantial policy changes for the DOJ's approach to investigations.

If a DPA scheme is introduced in Australia, clarification on its application to existing investigations would be important.

For further information, see our recent updates and predictions for 2017 developments in the anti-corruption space [here](#), [here](#) and [here](#).



# KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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