

# DRAFT CODE OF PRACTICE PROVIDES INSIGHT INTO OPERATION OF AUSTRALIA'S PROPOSED DPA SCHEME

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Legal Briefings - By **Grant Marjoribanks, Tania Gray and Christine Wong**

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On 8 June 2018, the Attorney-General's Department released a draft Deferred Prosecution Agreement (**DPA**) Scheme Code of Practice for public consultation (the **draft Code**). A full copy of the draft Code appears [here](#).

The draft Code seeks to provide guidance on the practical operation of the DPA scheme that is part of proposed reforms under the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (Bill)* (see our separate briefings on the Bill [here](#) and its subsequent endorsement by the Senate Economics References Committee in March 2018 [here](#) and the Senate Legal and Constitutional Affairs Committee in April 2018 [here](#)).

The DPA scheme provides a mechanism for companies to reach agreement with the Commonwealth Director of Public Prosecutions (**CDPP**) for the deferral of prosecution in return for meeting certain conditions. It is intended to encourage companies to self-report misconduct, including by providing greater certainty of outcome. Key to the achievement of this objective is whether there will be sufficiently clear guidance for companies on how the proposed DPA scheme will operate in practice and the availability of a DPA to them.

The draft Code provides additional clarity, and builds on the CDPP and the Australian Federal Police's (**AFP**) earlier guidelines on self-reporting (see our briefing [here](#)).

## WHAT ARE THE IMPLICATIONS AND NEXT STEPS?

The draft Code is designed to enhance the transparency, consistency and predictability of the negotiation and administration of DPAs.

It is particularly instructive in clarifying the public interest factors that the CDPP may consider in deciding whether to offer DPA negotiations, particularly the nature and extent of the requirement to cooperate. These factors will have significant bearing on whether companies consider the benefits of a potential DPA provide sufficient incentive to self-report having regard to the outcomes that will arise from the self-report.

Public submissions on the draft Code have been sought by 9 July 2018.

## **WHO WILL THE CODE APPLY TO?**

The CDPP is required to have regard to the Code when considering whether to invite a company to enter into negotiations, negotiating the terms of a DPA, applying for approval of the DPA and overseeing the DPA post approval.

Employees of Commonwealth agencies involved in a matter where a DPA may be appropriate will also have reference to the Code, for example the AFP.

## **WHAT IS SIGNIFICANT ABOUT THE CODE?**

The draft Code confirms aspects of the DPA scheme provided for in the Bill.

However, it also provides further clarification and guidance on a number of key matters, including:

- 1. In most cases where the company is the subject of separate proceedings or imminent or ongoing regulatory action, the company will not be invited to participate in DPA negotiations**

An exception to this is where the company can demonstrate that it is cooperating in these matters, in which case DPA negotiations may be offered. The Code does not provide clarity on what level of cooperation in these separate matters might be required, nor whether the other regulatory agency would need to confirm its view as to the requisite level of cooperation.

- 2. The CDPP will collaborate closely with the relevant Commonwealth agency**

The CDPP will consider the views of the relevant Commonwealth agency in determining whether to offer DPA negotiations and will work with it to ensure that the CDPP has the relevant facts. The Commonwealth agency may also suggest DPA terms for the CDPP's consideration.

### **3. DPA negotiations will only be entered into if it is in the public interest and there is a reasonable prospect of the parties agreeing to a DPA**

The public interest factors listed in the draft Code (in addition to the Prosecution Policy of the Commonwealth) include:

- the extent of cooperation – this is key and is elaborated on below
- any self-reporting of misconduct (and its quality and timeliness)
- any history of similar misconduct
- whether the conduct is alleged to be part of business practices or culture, or represents isolated actions by individuals
- the level of harm caused to victims and any steps to redress harm
- the disclosure of material relating to the prosecution of individuals involved in the misconduct
- steps taken to avoid recurrence or a demonstrated commitment to such steps (e.g., disciplinary action against culpable individuals)
- any proactive compliance programs
- any steps taken by the company to mitigate the effects of its misconduct
- whether conviction or collateral consequences of a court imposed penalty are likely to be disproportionate

### **4. Self-reporting is not a pre-requisite, but the extent of cooperation throughout**

## **the DPA is a particularly influential public interest factor**

The Code expressly states that self-reporting is not a pre-requisite to establish the necessary level of co-operation for a DPA. However, practically, there may be limited circumstances where a company could become a candidate for DPA negotiations without self-reporting. This includes because the Code states that a company should self-report its misconduct if it makes a request to the relevant investigating agency to be considered as a candidate for DPA negotiations.

With or without a self-report, DPAs will only be offered if a company engages in full and frank discussions. The Code provides that a high degree of co-operation may be demonstrated by:

- involving Commonwealth agencies in internal investigations at an early stage
- waiving privilege, although the draft Code otherwise provides that waiver of legitimate claims of privilege is not required to demonstrate co-operation
- providing information and assistance in relation to culpable individuals or other companies, including the disclosure of documents and internal investigation reports
- identifying witnesses and ensuring that they are made available for interviews to Commonwealth agencies
- developing remedial actions, including compensation schemes for victims (where there are identifiable victims)

### **5. There are limits on the use of information disclosed by a company in DPA negotiations**

Although information will be shared amongst relevant Commonwealth agencies, those agencies are required to seek to ensure that information remains confidential, unless compelled by law or agreed to in the DPA negotiation.

Documents relating to negotiations / created solely for that purpose generally cannot be used against a company in proceedings outside of limited circumstances, such as a material contravention of the DPA or the provision of inaccurate, incomplete or misleading information.

## **6. In addition to the mandatory terms in the Bill, most DPAs will include a number of non-mandatory terms**

This includes terms requiring:

- the company not to engage in any further offending of the type in the DPA for the term of the DPA (this will always be included unless there are extraordinary circumstances).
- compensation for victims. The draft Code identifies this as an important function of the DPA scheme, with failure to pay any compensation ordinarily constituting a material contravention of the DPA. Where the victim is a foreign country, the DPA may require a payment to be made to the relevant foreign government.
- co-operation with any investigation or prosecution of other persons. No detail is provided in the Code on what the DPA terms relating to co-operation might require the company to do.
- the appointment of an independent monitor to determine improvements to compliance programs and monitor compliance with DPA terms. The company will incur the costs of this appointment, although the appointment is a matter for the CDPP. The draft Code provides a non-exhaustive list of the types of matters that the monitor may be appointed to assess and advise on, including: training and education programs; internal procedures for reporting conduct issues; mechanisms for identifying and compensating victims; compensation structures; due diligence procedures; and processes for identifying key strategic risk areas.
- the company to report on any further offending or suspected offending by itself or others during the term of the DPA.
- no statements to be made which publicly contradict or deny the agreed statement of facts.

## **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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