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the legal profession

**International Bar Association
Anti-Corruption Committee**

**Submission to the Australian Attorney General's
Department on a proposed model for a Deferred
Prosecution Agreement Scheme in Australia**

26 April 2017

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International Bar Association Anti-Corruption Committee

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1 Introduction

1.1 *International Bar Association*

- (a) The International Bar Association (**IBA**) is the global voice of the legal profession and includes over 80,000 of the world's leading lawyers and 190 Bar Associations and Law Societies worldwide as its members.
- (b) The IBA has had a longstanding interest in, and advocacy of, issues concerning transparency and probity in the public and private sectors and steps that countries around the world can take to combat foreign bribery and corruption and serious financial crime. Critical to this work is the manner by which governments and business respond to the prevalence of serious corporate crime and the ability of companies to voluntarily report suspected misconduct in an environment where a degree of certainty exists as to the possible outcome

1.2 *IBA Anti-Corruption Committee*

- (a) The IBA's Anti-Corruption Committee (the **Committee**) draws its members from around the world made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants with legal qualifications. This membership gives the Committee a unique opportunity to comment upon important initiatives that affect anti-bribery and anti-corruption laws, policies and how they are implemented and enforced around the world and in particular countries.
- (b) The Committee formed a working group in relation to the matters the subject of the March 2016 Public Consultation Paper, *Consideration of a Deferred Prosecution Agreements Scheme in Australia* and its views were set out in the Committee's submission dated 2 May 2016 (the **May 2016 Submission**) The Committee has reviewed the March 2017 Public Consultation Paper, *A proposed model for a Deferred Prosecution scheme in Australia* (the **2017 DPA Consultation Paper**).

2 Executive Summary

2.1 *A DPA Scheme in Australia*

- (a) For the reasons set out in the May 2016 Submission, the Committee supports the introduction of a Commonwealth DPA scheme.
- (b) The Committee made a number of recommendations set out in clause 2.2(b) of the May 2016 Submission.

- (c) The Committee supports the proposed model for a DPA scheme in Australia, as described in the 2017 DPA Consultation Paper, subject to the comments set out below.
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3 The Proposed DPA Scheme in Australia

3.1 Preliminary

- (a) The Committee supports the stated aims of an Australian DPA scheme as set out in the background notes to the 2017 DPA Consultation Paper.

- (b) In particular, the Committee believes that the introduction of a DPA scheme will not only enhance the accountability of Australian business in responding to serious corporate crime but will act as an incentive to support an improved level of compliance and corporate culture both for companies that participate in the DPA scheme and more generally. However, this incentive must be supported by enhanced funding and resourcing for the investigators (it is the Committee's opinion that the Australian Federal Police, **AFP** should be the investigator in conjunction with the Commonwealth Director of Public Prosecutions, **CDPP**, as the prosecuting authority) and a structure where one dedicated agency undertakes the investigation of serious corporate crime. For too long, there has remained the perception that the policing resources in Australia are too disparate, diffuse and have lacked real in-depth specialisation in corporate finances, structures and international business transactions. This problem of diffused agencies only adds to unnecessary duplication on costs and resources. What is needed is one dedicated agency, perhaps using the Serious Fraud Office model in the United Kingdom and New Zealand as a starting point. While much has been done to improve this over the last few years, the Committee believes this is a critical area to improve upon to ensure that in turn, the business community responds accordingly. It hardly needs to be said that the lower the perceived risk of detection, investigation and prosecution, the less incentive exists to voluntarily disclose conduct.

- (c) The Committee has noted that a DPA will be made available to companies in the context of the following crime types:

- (i) fraud;
- (ii) false accounting;
- (iii) foreign bribery;
- (iv) money laundering;
- (v) dealing with the proceeds of crime;
- (vi) forgery and related offences;
- (vii) exportation and/or importation of prohibited or restricted goods;
- (viii) specific offences under the *Corporations Act*; and
- (ix) any ancillary offence relating to and offence to which the DPA scheme specifically applies.

- (d) The Committee has also noted that any expansion or broadening of the DPA scheme will be reassessed after two years. Any further crime types that might be included, such as environmental crime, tax offences, cartel offences and offences under work health and safety legislation and contraventions of sanctions or a sanctions permit should, in the Committee's opinion, be considered for inclusion. These offences invariably raise serious issues of public interest and often involve serious criminal offences with a detrimental impact upon society and those harmed by the conduct. Cartel offences already have a well-established framework for responding to voluntary disclosures and immunity and leniency policies that promote the early detection and reporting of cartel conduct¹. The Committee believes that all serious corporate offences, including tax and cartel offences, should be capable of being included in a DPA scheme.
- (e) In relation to the "*specific offences under the Corporations Act*" to be included as crime types to which a DPA will apply, these offences should be clearly identified.

3.2 *Initiation of DPA Negotiations*

- (a) The Committee has noted that a decision on whether to enter into a DPA negotiation would be at the discretion of the prosecutor (the office of the Commonwealth Director of Public Prosecutions, **CDPP**) and that the Government will publish guidance on factors which the prosecutors may consider in exercising the discretion.
- (b) The Committee considers that it will be critical for the success of the DPA scheme that such a guidance be published and made available to companies at the time of the commencement of the DPA scheme. The business community will look for a degree of certainty in terms of the conduct that a company must undertake in order to regard itself as eligible to at least request the commencement of DPA negotiations, even accepting that those negotiations would only be triggered at the discretion of the prosecutor.
- (c) As a guide, the Committee considers that the UK *Deferred Prosecution Agreements Code of Practice* published by the UK Serious Fraud Office and the Crown Prosecution Service should act as a useful starting point. The Committee believes it is desirable, in an increasingly global economic environment, for consistency in guidance as between the DPA scheme in the UK and one to be implemented in Australia. The framework in the UK should where possible, be adopted in Australia and be published as part of the existing Commonwealth *Prosecution Policy* or as a separate stand-alone document.

3.3 *Terms of a DPA and Disclosure of Material*

- (a) The Committee has noted the framework as to the conduct of the DPA negotiations including the likely mandatory terms that would be included in the DPA.
- (b) The Committee broadly supports the relevant proposed mandatory terms.

¹ *Immunity and Cooperation Policy for Cartel Conduct*, ACCC Sept 2014 to be read in conjunction with the *Memorandum of Understanding between the ACCC and the CDPP Regarding Serious Cartel Conduct*.

- (c) One term that is proposed as a mandatory term is “*the company’s formal admission of criminal liability*”. This was covered in section 11.3 (d) to (g) of the May 2016 Submission. Without repeating those matters, the Committee, while recognising that consequences may flow from such an admission, believes that an admission may be a necessary mandatory term of a DPA. While the public might expect nothing less than the company admitting its liability if it is to secure the benefit of a DPA, the great attraction to a business, often one operating across jurisdictions, is to avoid admissions or findings of criminal liability with their serious flow-on consequences. Other legal consequences will (or may) flow from such an admission (such as flow-on civil legal proceedings) and they will have to be considered by the company when it decides whether to voluntarily report potentially illegal conduct. The Committee believes there is merit having such an admission as a possible, but not a mandatory, term depending on the facts (which themselves should be agreed or admitted by the company), the conduct and the likely offences, and the parties negotiating whether a formal admission of liability is necessary.
- (d) The Committee has also noted that “*subject to specified exceptions*”, a prosecutor (or relevant investigative agency) would not be permitted to disclose or use material in any subsequent proceeding that was provided during a DPA negotiation period and “*and was created solely to facilitate, support or accord DPA negotiations*”.
- (e) The Committee believes that any exceptions should be clearly stated and limited to those occasions where it is necessary, either in the interests of justice or for the purposes of ongoing investigations, that there be such disclosure or use of material provided or exchanged between the parties during the DPA negotiations.

3.4 Approval

- (a) The Committee has noted the proposal that a “*retired judge*” will be the independent entity to review and approve a DPA, and that subject to the approval (or not) of the DPA, it then becomes binding (with no formal criminal indictment being filed or presented before a Court), or it would fall away and negotiations could continue or legal proceedings commence. The model is predicated on an administrative regime outside the purview of the court system.
- (b) In its original submission, the Committee considered that the UK model should be accepted. The Committee remains of the opinion that given the seriousness that the public will have for the integrity of the process (and its ultimate success), and to counter a popular perception that companies may use a DPA to “*buy their way out of the criminal justice system*”, the role and involvement of the Court is paramount. The role of the Court makes any questions of independence, competence, fairness and companies not “*buying their way out of the criminal justice system*” of less impact.
- (c) The Committee accepts that the role of a significantly experienced and well respected retired judge might look and be acceptable. The Committee believes the process should go further and if an administrative regime is to be established, then review rights need to be considered under the Administrative Judicial Review legislation. However, the Committee believes that it is in the interests of the success of the DPA scheme that further work be undertaken to examine whether it is possible to overcome the potential constitutional problems to permit a judicial officer, exercising judicial power, to “*sentence*” or otherwise “*determine*” the fines and penalties in a manner that does not offend the separate role and exercise of judicial power under The Constitution.

- (d) The Committee believes that while a Court can determine sentences, and exercise judicial power, rather than “approve” a proposed DPA², the Committee believes that the strength of the system in the UK is the clear role that the Court plays in the system, acting as an independent public safeguard to any perception, rightly or wrongly held, that the process of giving effect to a DPA involves less rigor and is more favourable to a company than public scrutiny by a court of law during a criminal trial³. While the Committee believes that consistency and a transparent process to secure a DPA are critical to the success of a system designed to encourage business to voluntarily disclose corporate misconduct and illegal conduct, the determination to approve a DPA must be and must be seen to be independent and well-respected by the participants and society.
- (e) The Committee argues strongly against the alternative proposal that the Director of the CDPP be given the sole discretion to approve the terms of a DPA. The process needs to be transparent. There is a very real public need for an independent party to approve a DPA, rather than for one party to the negotiation being given the power both to offer to negotiate a DPA and the power to accept or reject the terms of the negotiated DPA. Indeed, to permit the Director to be the final arbiter makes a mockery of any negotiation process. There is no analogy between the proposed DPA scheme and an undertaking of immunity from prosecution.

3.5 Oversight and Response to DPA breaches

- (a) The Committee has noted and agrees with the fact that there should be independent oversight in relation to how a company complies with the terms of the DPA.
- (b) The Committee has also noted that independent monitors could be drawn from the auditing and/or consulting firms or could be individuals who have relevant expertise. The role of monitors is not a feature of the Australian legal landscape. Traditionally, authorities have simply used the traditional civil or criminal system to seek sanctions on individuals and companies. Ongoing future oversight is not a common element to any penalty regime. Monitors are widely used in the US. The Department of Justice (**DOJ**) has published criteria concerning the selection and independence of monitors⁴ and the role of the DOJ in how disputes might be resolved between a monitor and the company being monitored⁵.
- (c) The Committee draws upon the experience of its members, particularly from Europe and the United States where invariably senior members of the legal community, either from private

² The issues surrounding the High Court of Australia’s rulings in *R v Barbaro* are canvassed in sections 3.1(c) to (e) of the May 2016 Submission.

³ All three of the current UK approved DPAs have been reviewed and approved by one of the UK’s most senior judges, Sir Brian Leveson, President of the Queen’s Bench Division.

⁴ The Mumford Memorandum published 7 March 2008 entitled *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*.

⁵ The Grindler Memorandum dated 25 May 2010 entitled *Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*.

law firms experienced in the relevant types of serious commercial crime and/or from the independent Bars, are appointed monitors. There are certain key issues that will need to be addressed in the appointment of a monitor, including:

- (i) the monitor's mandate and scope of work;
 - (ii) a clear reporting framework to the company and to the nominated oversight agency;
 - (iii) educating the monitor on the company's business and how requests for information and documents, meetings, site visits and other procedural tasks can be managed.
- (d) In the Committee's experience, monitors drawn from the legal community have invariably, where necessary, drawn upon specialist expertise and advice from those experienced in auditing, consulting, or any particular field of industry which is relevant to a company's business.
- (e) The Committee believes that the appointment of any independent monitor should be drawn from a panel of approved monitors, with relevant legal experience in complex commercial business structures and the types of financial crimes that apply to a DPA scheme, or more generally subject to the peculiar needs of a particular case. There should be a cooling off period before any lawyer, forensic accountant or former prosecutor can be appointed as a monitor to avoid potential conflict of interest issues.
- (f) In addition, the Committee believes consideration should be given to the extent to which and to which entity, or authority, an independent monitor might provide ongoing or final reports in terms of the monitor's supervision over the company's compliance with the DPA. The Committee believes that the most appropriate entity to which such reports should be given would be the CDPP or the AFP. This would mean that the CDPP and/or the AFP would have to be tasked with staff equipped to act as the oversight authority. If not the CDPP and/or the AFP, then another agency, perhaps the Australian Securities and Investments Commission, with its greater understanding of the corporate world (and greater history, for example, in the oversight of, for example, liquidators and administrators), needs to undertake this work. Whichever agency undertakes this oversight work, guidelines should be published to business and advisors have a clear and transparent framework under which to operate.
- (g) The Committee also believes that consideration should be given to making a monitor's final report at the conclusion of the DPA public in order to enhance the transparency of the process and to hold those subject to a DPA accountable for their conduct⁶.

⁶ The release of monitor reports has caused different results in some US cases. In the HSBC money laundering and sanctions case, U.S. District Judge John Gleeson ruled that the court and the public had a right to know whether HSBC was living up to its agreement to improve internal controls and merited a deferral of prosecution by the government. In contrast, on 3 April 2017, another US Federal Court Judge ruled that the release of reports by an independent monitor who oversaw compliance reforms at Siemens following the 2008 foreign bribery settlement would cause the German engineering company competitive harm. Nevertheless, the issue should be one for the courts to determine and for the benchmark of publicity to prevail unless there were exceptional reasons to the contrary.

- (h) The Committee supports the proposition that any breach, material or otherwise, of a DPA should itself be an offence. This will strengthen the transparency and integrity of the system and reinforce the message that compliance with the DPA is essential. However, a minor or inadvertent breach should not entitle the prosecutor to terminate a DPA without notice. The Committee believes that for non-material breaches, a notice regime should be implemented, requiring notice of default in writing by a prosecutor and a reasonable period for the company to remedy the default.

3.6 Conclusion of DPA

- (a) The Committee has noted the proposal for the CDPP to give an undertaking pursuant to the *Director of Public Prosecutions Act 1983* (Cth), upon the fulfilment of the terms of the DPA, that the company will not be prosecuted for any specified offence in relation to any specified conduct the subject of a DPA.
- (b) The Committee agrees that the Commonwealth Prosecution Policy should reflect how and in what circumstances such an undertaking will be given.

3.7 Other Issues

- (a) The Committee has noted how material disclosed by a company during the DPA negotiation process may or may not be disclosed. In the Committee's opinion, these conditions, and any exceptions to the general rule of non-disclosure should be clearly set out in the legislation creating the DPA scheme.
- (b) The Committee believes that it is critical that the DPA scheme be, in effect, a "one stop shop" for the company and the prosecutor to deal with all issues arising from the relevant conduct. For example, where profit disgorgement arises under the DPA as a requirement for the company to deliver up the fruits of the crime, that disgorgement should be regarded as precluding any further applications under the *Proceeds of Crime Act 2002* (Cth) or any corresponding State asset confiscation laws. Coordination between the Commonwealth and States and Territories in connection with any other laws that might have been contravened by the conduct in question is essential to the viability of the DPA scheme.
- (c) The Committee supports the proposed use of DPA funds once payments by way of fines, penalties, profit disgorgement or compensation payments to victims have been made by the company.
- (d) The Committee encourages the Commonwealth Government to not simply absorb all monies from a DPA into consolidated revenue, but to apply a reasonable amount back towards the financial resources available to the investigative and prosecutorial agencies in Australia to target complex corporate crime. It is the Committee's experience that significant skills will need to be developed within the AFP and CDPP if these agencies, rather than a dedicated stand-alone agency, are responsible for administering a DPA process. For example, the Serious Fraud Office in the UK employed a significant number of external, commercial lawyers to bolster its ability and knowledge base on international finance and commerce arrangements. The traditional process which has as its framework the triangular points of "offending conduct, guilty plea with a conviction and everything else goes to mitigation on sentence" will not, in the Committee's opinion, work in the environment of a complex DPA negotiation, which might involve cross-border issues, several investigative agencies and

conduct in various jurisdictions. To upskill its compliance base, the US DOJ retained a very experienced external compliance counsel as its formal Compliance Expert to consider the extent of a company's compliance initiatives in assessing liability issues in investigations. This might then start to manage the perennial problem of these agencies suffering constant budget cuts and other financial constraints which have a real impact of their ability to undertake their work. In turn, this stretched funding and its impact on the likelihood of an investigation, impacts within business when assessing whether or not to report conduct which, ultimately, may never otherwise come to light.