THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BusLaw: PWlb1300306

1 May 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: Natasha.molt@lawcouncil.asn.au

Jonathan

Dear Mr Smithers,

Deferred Prosecution Agreement Scheme Consultation Paper

Thank you for your memorandum dated 3 April 2017 requesting input into the Minister for Justice's Consultation Paper on *Improving Enforcement Options for Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* ("Consultation Paper"). The Law Society's Business Law Committee and Litigation Law and Practice Committee contributed to this submission.

1. Introduction

Some of the developments since the initial consultation paper in 2016 ("the 2016 consultation paper") are outlined at page 4 of the Consultation Paper. The Consultation Paper also outlines further measures to combat corporate crime which are under consideration. While progress in these areas is important and is to be commended, it is equally important that any Deferred Prosecution Agreement ("DPA") scheme in Australia is complementary to these initiatives and is implemented in a harmonious and integrated manner. It will also be necessary to review existing co-operation, leniency and immunity policies for law enforcement agencies to ensure these are complementary.

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.

Clear and detailed guidance is required to inform businesses, their advisors and regulators on the approach to be taken in respect of DPAs. In our view, it is critical to set out the criteria for accessing the scheme, what is required of a candidate for a DPA and the operational steps in each stage of the scheme. As this guidance is crucial for the understanding and operation of the DPA scheme, we suggest that the Attorney-General's office circulate for public consultation an exposure draft of the guidance on the operation of the scheme for comment.

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2.1. Preliminary

The Law Society agrees with the proposal on page 6 of the Consultation Paper that the DPA scheme should only apply to companies and not to individuals. We noted in our submission to the 2016 consultation paper that the Law Society's position is that individuals who commit serious crimes should be prosecuted, as a deterrent to others.

In relation to the focus of the scheme, we 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. We would also include in this list the improvement of corporate governance and culture.

A DPA scheme should include the following twin attributes:

1. transparency of operation to potential applicants, law enforcement and the public; and

2. 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.

We suggest that to achieve these outcomes, there needs to be formalised requirements for the use of DPAs, designed for the Australian DPA scheme. While examples of these types of guidelines can be found in the United States ("US") 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.

We consider that in terms of the scope of offences to which the Australian DPA scheme would apply, the list of crime types at page 6 of the Consultation Paper is an appropriate starting point ("DPA offences list").

Many of the offences on the DPA offences list may have counterparts in State Crimes Acts. There may need to be a memorandum of understanding, or the possibility of a joint DPA, with the relevant State authority to prevent exposure at the State level for the same conduct. Additionally, a DPA may need to include immunity for parallel federal offences currently outside the DPA offences list. For example, price-fixing in the financial markets could equally be prosecuted under the market manipulation provisions of the *Corporations Act 2001* and under the cartel provisions of the *Competition and Consumer Act 2010*. If market manipulation is included in the DPA offences list, but cartel conduct is not, then there is an exposure gap.

We note the proposal to limit the scheme to companies and to the offences listed in section 2.1 will be reassessed after two years, as part of the broader review of the scheme. 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 our view, it is likely to take several years before such a body of precedents is established, and all implementation issues are effectively worked through.

2.2. Initiation of DPA negotiations

The Consultation Paper states that prosecutors engaged by the Commonwealth Director of Public Prosecutions ("CDPP") will be the only authority who has the capacity to officially invite a company to enter into DPA negotiations. The invitation would be at the CDPP's discretion.

In the Law Society's view, there are several issues which require elaboration including:

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

Timing of offer to negotiate a DPA

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

As we understand it, 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.

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 is made.

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. We consider that greater clarity is needed around the operational processes for evaluation and decision making in offering to negotiate a DPA.

We note 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 Commonwealth or other guidelines.

We consider 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

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.

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

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.

Co-operation

We note that the Consultation Paper states that companies will be required to provide the CDPP and any investigative agency with complete and accurate details about corporate and individual misconduct.

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. We suggest that privileged documents should not be required to be produced prior to any agreement being executed.

Another issue which has arisen in the US is the extent to which a company must provide information about its employees or officers involved in any suspect conduct. The Yates memorandum[1] sets out what is expected of corporations cooperating with the DOJ in respect of information concerning individual employees or officers, in order for the company to fulfil its obligations to cooperate. It may be advisable for similar guidance to be provided in any Australian DPA scheme.

We note that there may be merit in not requiring a corporation to formally admit criminal liability. Requiring such an admission is likely to dissuade corporations from negotiating a DPA.

2.3. Negotiation

The framework for negotiations and the mandatory elements to be contained in a DPA listed on page 9 of the Consultation Paper, if a DPA is agreed, could, in our view, contain a tolling of the limitation period in respect of any related civil

[1] Office of the Deputy Attorney General, *Individual Accountability for Corporate Wrongdoing*, (9 September 2015) U.S. Department of Justice < https://www.justice.gov/archives/dag/file/769036/download>.

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.

2.4. Approval

The Law Society would prefer for DPA's to be approved by a Court. However, we understand that the view of the Attorney-General is that this is not feasible given legal and constitutional restraints. In those circumstances, the Law Society's view is that a retired judge, or a panel of retired judges, reviewing and approving the proposed DPAs would be an acceptable alternative. We suggest that, in order to achieve predictability, that the same retired judges, or panel of judges, be used consistently, and their approvals be publicly available.

2.5. Oversight and response to DPA breaches

Independent monitors and oversight

Most DPAs are likely to contain commitments by the company to undertake certain actions and to reform its corporate culture to avoid reoffending. We agree 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.

We agree that it is necessary to engage an independent corporate monitor in appropriate cases. Where a monitor is engaged, consideration needs to be given to the need for confidentiality of their reports and findings. We submit that these reports should be confidential and not publicly available, unless required in proceedings for a breach of the DPA.

Procedure in response to a material breach of DPA

We note that the Consultation Paper suggests that legislation provide a non-exhaustive list of what may constitute a material breach. In our 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 include a process for resolving disputes, including having an independent third party determine whether there has been a material breach or to have the matter referred to the retired judge who approved the agreement.

The Law Society has been unable to reach a final view on whether a new offence should be created for material breach of a DPA. We consider that the provision for such an offence may be an efficient mechanism in cases of a breach. However we also note that the establishment of such an offence may, in itself, constitute a disincentive for a company to enter into a DPA. An 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.

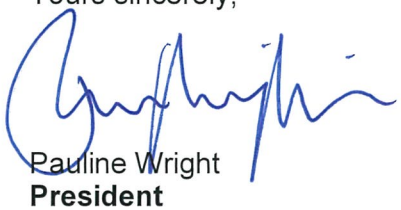
Conclusion of the DPA

We agree with the proposal that the prosecution policy should be amended to allow for the use of section 9(6D) in situations where a company has fulfilled its obligations under a DPA.

Conclusion

The Law Society appreciates the opportunity to provide input into a submission in response to the Consultation Paper. Please do not hesitate to contact Liza Booth, Principal Policy Lawyer on 02 99260202 or liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Pauline Wright
President