

6 July 2018

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By email

## TRANSPARENCY INTERNATIONAL AUSTRALIA SUBMISSION TO ATTORNEY-GENERAL'S DEPARTMENT CONSULTATION INTO DEFERRED PROSECUTION AGREEMENT SCHEME

Transparency International Australia (TIA) is pleased to submit some brief comments to the consultation on the proposed model for a deferred prosecution agreement (DPA) scheme in Australia. This submission is a response to the draft DPA Code of Practice (the draft Code), Schedule 2 of the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017.

This submission from TIA can be read in conjunction to the two previous TIA submission to the Attorney-General's Department in 2017 and 2016, and the supporting letter to the OECD Secretary General, Angel Gurría of 11 March 2016 – 'Global Standards for Corporate Settlement in Foreign Bribery Cases'.

## TRANSPARENCY INTERNATIONAL AUSTRALIA

TI Australia (TIA) is part of a global coalition to fight corruption and promote transparency, integrity and accountability at all levels and across all sectors of society, including in government. TIA was launched in March 1995 to raise awareness of corruption in Australia and to initiate moves to combat it. TIA believes that corruption is one of the greatest challenges of the contemporary world. Corruption undermines good government, distorts public policy, leads to the misallocation of resources, harms private and public-sector development and particularly hurts the poor. It drives economic inequality and is a major barrier in poverty eradication. Tackling corruption is only possible with the cooperation of a wide range of stakeholders. We engage with the private sector, government and civil society to build coalitions against corruption. Coalitions against corruption will help shape a world in which government, politics, business, civil society and the daily lives of people are free of corruption.

TI Australia is the national chapter of [Transparency International \(TI\)](#), the global coalition against corruption, with a presence in over 100 countries. TIA fully supports TI's [Vision, Objectives and Guiding Principles](#) and [Mission and Strategy](#).

TI Australia, is registered with the Australian Charities and Not-for-Profits Commission (ACNC).



## TI AUSTRALIA POSITION

The TIA position is that the establishment of a Deferred Prosecution Agreement (DPA) scheme in Australia, will only be an effective tool in combating bribery and corruption if it is part of a package of reform measures, and not viewed as a 'get- out-of-jail free' card by offending corporates.

“Unless the use of settlements for foreign bribery can be seen to be delivering real deterrence and effective sanctions, public confidence across the world in the fight against corruption will be undermined.”<sup>1</sup>

The DPA scheme must be part of a package of reforms to:

1. Strengthen the present enforcement framework for the offence of bribery of foreign officials making it easier to for law enforcement agencies to prosecute foreign bribery and money laundering offences.
2. Ensure full implementation of the commitments under the OECD Convention, including full implementation of all OECD Working Group recommendations.
3. Ensure that where there is proof of bribery of a foreign official by an agent, employee or associate, the organisation itself will also be guilty of an offence unless it can be shown it has an adequate 'culture of compliance' and has not condoned such bribes, even implicitly.
4. Establish clear liability – in other words to provide that when an organisation is guilty of a bribery offence, its complicit directors will be liable where they approved what was happening or cannot show the organisation had an adequate culture of compliance.
5. Establish whistle-blower protection and reward in the private sector.
6. Establish a public beneficial ownership register.
7. Removal of facilitation payment defence – This defence to prosecution should be removed, and guidance given to companies to help them avoid making such payments.
8. Ensure that sufficient resources continue to be provided to enable the AFP to enforce the laws on bribery of foreign officials.

The following comments relate to specific sections of the DPA Code of Practice.

### **Background**

TIA holds a firm view that for a corporation to obtain a DPA, the corporation will (not may) be required to cooperate as outlined in the Code of Practice, including full disclosure of who did what and when.

It is our strong view that corporations should be required to make a formal admission of criminal liability.

The company's formal admission of criminal liability is absolutely essential to the success of the scheme. The omission of this mandatory requirement will undermine DPA's as an effective alternative to prosecution.

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<sup>1</sup> Letter to OECD Secretary General Angel Gurría, 11 March 2016, from Transparency International, Global Witness, Corruption Watch UK and UNCAC Coalition. Submitted to Attorney-General's Department, March 2016



The absence of the requirement of an admission of liability is the most significant weakness in the draft Code of Practice.

### **Entering into DPA negotiations**

TIA agrees that the CDPP is responsible for negotiating, entering into and administering the DPA, including matters of variation, breach, termination and completion of the DPA. The decision to invite a corporation to negotiate a DPA is, we agree, at the CDPP 's discretion, and does not guarantee that a DPA will be offered. We agree it is ultimately up to the CDPP to negotiate the terms of the DPA.

We agree that DPA negotiations must be in the public interest, and in the interest of justice.

In determining whether the corporation would be a suitable candidate for DPA negotiation, we firmly believe that this should include willingness to formally admit criminal liability.

Further, the letter of offer to enter into DPA negotiations needs to clearly state that the CDPP will (not may) institute proceedings in relation to matters contained in a DPA if the corporation materially contravenes the DPA.

We agree with the proposal that if a corporation provides misleading, inaccurate or incomplete information to the CDPP or to a Commonwealth agency during DPA negotiations they will face significant repercussions. Further, should either party withdraw from negotiations we agree the CDPP may institute prosecution for the alleged offence. We note, entering into a DPA does not prevent prosecution of an individual.

It should be made clear that a DPA offered to a company that knew of the serious criminal activity and choose not to disclose it, and is offered a DPA for subsequent cooperation after law enforcement detected the crime, will be less generous than a DPA where the company alerted law enforcement to the criminal activity.

### **Approval**

We support the proposal that the 'approving officer' be a former judicial officer and has the knowledge or experience necessary to properly exercise the power of an approving officer.

We agree a DPA will only be approved if the terms of the DPA are fair, reasonable and proportionate, and in the interests of justice.

### **Terms and features of a DPA**

TIA broadly agrees with the proposed terms of a DPA. Further, we agree with the broad range of offences outlined in Appendix A. In due course, other types of crime (tax offences, environmental crimes, cartel offences and human rights crimes and illegal workplace health and safety activities) be considered for inclusion. TIA supports the review of the DPA scheme after two years.

It is our view that the financial penalty imposed by a DPA must be of an appropriate severity. This will be important to ensure confidence in the scheme and to act as an important deterrent of corporate crime.



In determining a financial penalty, we suggest consideration be given to including any injury, loss or damage to people, communities and the natural environment resulting from the misconduct.

Further, regarding compensating victims, this be broadened to include identifiable victims, including communities, noting that impact could be foreign country or specific community.

It needs to be made clear that a DPA will require a corporation to relinquish criminal benefits associated with its misconduct.

The Code of Practice does not provide any guidance on whether corporate cooperation will result in a reduced fine, and under what circumstances.

Information provided by the company during a DPA negotiation should not be subject to exemption from subsequent use in a future prosecution, if the material is then subsequently obtained by another way by a law enforcement agency or prosecutor. To ensure credibility, DPA negotiations need to be protected from being misused as a mechanism by which company personnel deliberately introduce information into the negotiations for the purpose of having evidence of the criminal activity exempted from any future prosecution.

### **Independent monitors**

TIA agrees that an independent external monitor be appointed for specific functions as outlined in the terms of the DPA. Their expenses would be met by the company but their duties and responsibilities must patently be to the CDPP. It is our view that the corporation should not recommend or suggest possible candidates for the monitoring role. The potential for a conflict of interest exists. For example, a firm or individual that provides other professional services to the corporation.

The matters a monitor may be appointed to assess and advise on are reasonably comprehensive. We suggest adding:

- Policies and procedures to prevent and detect bribery and corruption
- Policies and procedures to foster a culture of responsible business conduct
- Whistle-blower protection policy and procedures
- Business and human rights policy and procedures

TIA welcomes the reference to due diligence and suggests including reference to the OECD Due Diligence Guidance for Responsible Business Conduct<sup>2</sup>.

### **Publishing the DPA and associated documents**

TIA holds a view that all approved DPA be published on the CDPP website, unless likely to prejudice the administration of justice. We believe it should also be a required term of the DPA that the company also publishes on their website,

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<sup>2</sup> <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>



makes it known at the AGM, reports in the annual report, and in the case of ASX listed entities, formally advises the ASX Corporate Governance Council.

Public disclosure is vital to address the perception that DPA's are a 'back room deal' that do not hold the company to account.

### **Compliance and Breach of DPA Terms**

TIA suggests the Code of Practice makes it crystal clear that an independent monitor will be appointed by the CDPP, at the expense of the corporation, and employed by the CSPP to monitor compliance. The CDPP will determine if a 'material contravention' has occurred and commence prosecution.

Varying the terms of the DPA to address a breach or potential breach must only be done in exceptional circumstances, and at the discretion of the CDPP. Current wording in the Code of Practice – (5.5) "a corporation cannot fulfil its obligations under a DPA for reasons beyond its control" could too easily be used to justify non-compliance.

### **Public Interest Factors**

TIA supports the listed public interest factors. We suggest the level of harm caused directly or indirectly to victims, and adverse impacts (g.) be broadened to include communities and the natural environment.

We suggest removing (q.) "a conviction is likely to have significant and disproportionate effects on the public, employees, shareholders...". Corporations and their Directors must accept that is the impact of corporate crime.

TIA supports adopting the UK model, in which a charge is lodged with a court after a DPA is approved, and is finalised through a notice of discontinuance if the terms of the DPA are fulfilled. This will strengthen the integrity of the DPA system, will have a deterrent effect, and can assist prosecutors to commence prosecution more swiftly and efficiently if a material breach occurs.

## **CONCLUSION**

In summary, it is TIA view that the establishment of a Deferred Prosecution Agreement (DPA) scheme in Australia, will only be an effective tool in combating bribery and corruption if it is part of a package of reform measures, and not viewed as a 'get- out-of-jail free' card by offending corporates.

The company's formal admission of criminal liability is absolutely essential to the success of the scheme. The omission of this mandatory requirement from the Code of Practice will, in our view, undermine DPA's as an effective alternative to prosecution.



DPA – Code of Practice

We thank the Attorney-General's Department for the opportunity to participate and would be happy to elaborate on any aspects raised in this submission.

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