# Submission Regarding Deferred Prosecution Agreements in Australia

## I. Introduction

The Rule of Law Institute of Australia thanks the Attorney-General's Department for the opportunity to make a submission regarding the public consultation paper on Deferred Prosecution Agreements (DPAs) in Australia.

The Institute is an independent, non-partisan, not-for-profit body formed to promote and uphold the rule of law in Australia.

The Patron of the Institute is The Honourable James Spigelman AC QC, and the Governing Committee includes Richard McHugh SC, Professor Geoffrey de Q. Walker, David Lowy AM, Nicholas Cowdery AM QC, Professor Martin Krygier, and Hugh Morgan AC.

The objectives of the Institute include promoting good governance in Australia by the rule of law, and encouraging transparency and accountability in State and Federal government.

## II. Executive Summary

The Institute considers that a DPA scheme may undermine respect for corporate criminal laws, and the rule of law in general, and recommends against introducing such a scheme in Australia.

In the event that such a scheme is introduced in Australia, the Institute considers that certain key protections must be included.

## III. Clarity of, and respect for, laws

The Institute understands the difficulties facing the agencies tasked with uncovering and prosecuting corporate crime. Proper enforcement of laws is an important part of maintaining and supporting the rule of law.

However, from a rule of law perspective, the most important way of tackling corporate crime is to have laws that are accessible and understood, and respected. It is not clear how a DPA scheme would improve the clarity of, or respect for, laws governing corporate crime.

In fact, the Institute considers that a DPA scheme would have a negative impact on respect for corporate criminal laws. Such a scheme could seriously undermine the fairness and integrity of the criminal justice system, creating different incentives and different calculations for those accused of different crimes, and dividing criminal justice

between those accused of white collar offences – already cynically known as the 'good kind of crime' – and those accused of other offences.

This risks perpetuating socioeconomic divisions in the criminal justice system, and also of undermining the denunciatory power of designating certain behaviour as 'criminal'. If corporate crimes are just as criminal as other crimes, then they should be treated as such.

## IV. Protections in a DPA Scheme

If a DPA scheme were to be introduced into Australia, the Institute considers that certain protections must be included, the most important of which is that the financial penalties included in a DPA ought to be capped at an amount not exceeding the costs of the investigation into the misconduct.

Other protections ought to include:

A. The Institute supports the UK approach to defining which offences may allow a DPA, by creating a publicly available list.

   The discretion granted to prosecutors in the United States risks undermining the fair and equal treatment that is required under the rule of law.

B. Courts ought not to be involved in any decision about whether or not to offer a DPA, whether or not to extend a DPA, or what conditions to include in a DPA.

   These matters are emphatically the province of the executive government, as represented by the prosecutor, and it is not fitting for a court to engage in second-guessing those decisions. Court decisions about whether a DPA ought to be offered or extended or not, and on what terms, amount to judicial usurpation of prosecutorial discretion, and undermines the separation of federal judicial power mandated by Chapter III of the Constitution. Any fairness concerns at this stage of the process are more appropriately dealt with by the legislature or the executive government, providing clear, public guidance on how these questions will be approached.

C. Courts ought to be the forum in which it is decided whether a DPA has been breached or not. This process ought to mirror the process adopted for enforceable undertakings in s 93AA of the Australian Securities and Investments Commission Act 2001 (Cth). This process provides suitable safeguards for a finding that a DPA has been breached, and avoids an accumulation of power in the hands of the prosecutor like the situation in the United States, where the executive government is often positioned as the sole, non-reviewable determiner of whether a breach of a DPA has occurred.

D. This focus on judicial involvement only in occasions of alleged breaches of DPAs finds a balance between protecting the integrity and independence of federal judicial power, and ensuring the fairness and suitability of DPAs.

E. Any DPA scheme ought to contain mechanisms for tempering this exercise of power, and directing its use according to clear, public guidelines.

These guidelines ought to deal with two issues:

i) in what circumstances will DPAs be offered, and

ii) what terms and conditions may be included in a DPA.

F. Clarity around these two issues is necessary to prevent a DPA scheme becoming an arbitrary exercise of prosecutorial discretion.

G. DPAs ought to be made public. This transparency should have two effects

First, it should protect public confidence in the operation of the DPA scheme. When people can see what misconduct has been admitted, and how the penalties of the DPA are structured to make amends for that conduct, and prevent further misconduct, confidence in the scheme will be protected.

Secondly, it should prevent increased confusion in the corporate regulatory environment. Publication of DPAs will provide both companies and other prosecutors with an understanding of what appropriate penalties are in particular situations. Although this understanding may be achieved amongst prosecutors in other ways, it is important to maintain the information symmetry between the federal government on the one hand and companies on the other. The same principles behind sentencing databases applies to publication of DPAs – similar circumstances should give rise to similar penalties.

H. Material disclosed during negotiations ought to be available for criminal and/or civil proceedings afterwards.

Protecting information disclosed during negotiations may otherwise perversely incentivise companies to dump material on prosecutors, and avoid both a DPA and further proceedings.

I. DPAs ought to contain sufficient particularity about what prosecutions are being deferred pending compliance with the agreement. Is it all proceedings arising out of a factual scenario? Is it particular charges for particular actions or omissions?

J. Similarly, DPAs ought not evolve into mechanisms by which the federal government becomes involved in enforcing corporate social responsibility, or disseminating best practice corporate governance from the inside, unless such aims are appropriate in the circumstances.

K. Any monitoring mechanisms included in a DPA ought only to extend as far as necessary, and should not become a cloak under which the federal government may seek to influence corporate behaviour in general.

L. The relationship between FOI legislation and any information gathered by a monitor under a DPA must be clarified. Will information gathered by a monitor be subject to FOI requests? This could seriously undermine corporate confidentiality practices, and strict guidelines for monitors must be drawn up.

M. Guidelines should be included for treatment of information gathered by monitors. Will information gathered by a monitor under a DPA be able to be used in other circumstances? That is, will a monitor in effect be an ongoing government investigator into the company's affairs, or will their role be strictly limited?

N. It will be important to ensure that a monitor not only has the necessary expertise, but is also seen to be an effective and independent monitor, neither in the pocket of the company, nor of the government.

Having companies select and pay for monitors may undermine public confidence in ongoing monitoring mechanisms. However, on the other hand, too close an identification of a monitor with the federal government may undermine the effective functioning of a relationship between the monitor and the company.

## V. Conclusion

The Rule of Law Institute of Australia thanks the Attorney-General's Department for the opportunity to make a submission regarding the public consultation paper on Deferred Prosecution Agreements (DPAs) in Australia.

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