Please direct all responses/queries to:
Michael Abbott
t: +61 8 9348 5806
e: michael.abbott@woodside.com.au

Our reference: 1400356664

Woodside Petroleum Ltd.
ACN 004 898 962
Woodside Plaza
240 St Georges Terrace
Perth WA 6000
Australia
T: +61 8 9348 4000
F: +61 8 9214 2777

www.woodside.com.au

4 May 2017

Criminal Law Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
By email: criminal.law@ag.gov.au

Dear Sir/Madam

PUBLIC CONSULTATION PAPER – A PROPOSED MODEL FOR A DEFERRED PROSECUTION AGREEMENT SCHEME IN AUSTRALIA

I refer to Government's Public Consultation Paper dated 31 March 2017 (Paper), inviting comments on its proposed model for an Australian Deferred Prosecution Agreement (DPA) scheme. Woodside Petroleum Ltd (Woodside) is pleased to have the opportunity to make this submission in response to the Paper.

Woodside welcomes the steps which Government has taken in recent years to strengthen its ability to tackle serious corporate crime. Woodside supports as a matter of principle steps which enable Government to enforce criminal laws more effectively, including through the introduction of an Australian DPA scheme. In Woodside's view, DPAs are a tool which in appropriate cases enable prosecutors to achieve an effective balance between, on the one hand, the public interest in prosecuting serious corporate crime and providing a disincentive to companies to offend (for example, through the imposition of financial penalties), and on the other hand encouraging companies to cooperate with authorities and to implement and maintain effective compliance programs to avoid future improper conduct.

In broad terms, Woodside supports Government's proposed model for an Australian DPA scheme set out in its Paper. Woodside considers that there is strong merit in a DPA scheme in which:

- a prosecutor can invite a company (but a company is not entitled as of right) to negotiate a DPA;
- the fact that DPA negotiations are taking place is to be kept confidential (subject to any overriding legal requirements), with details only to be shared with relevant investigative agencies;
- subject to specified exceptions, a prosecutor is not permitted to disclose material or use it in subsequent legal proceedings where that material was provided to the prosecutor during the DPA negotiation period and was created solely to facilitate, support or record DPA negotiations; and (again subject to specified exceptions, such as in relation to legal advisors) the company would not be permitted to disclose information provided to the company by a prosecutor or an investigative agency;
- it is open to a prosecutor, before or during DPA negotiations, to decide that neither a prosecution nor a DPA is in the public interest (such as where the prosecutor comes to believe that no offence has been committed). Woodside also supports the prosecutor having the discretion to issue a declination, declining to prosecute on the basis of the information provided to it;
- the terms of a DPA can be adapted to suit the particular circumstances of the matters to which they relate, albeit containing certain mandatory elements. Woodside considers that the mandatory elements could include an agreed end date for the agreement, by which time all obligations under the agreement must be satisfied; an agreed statement of facts; agreement by the company to cooperate with any investigation concerning the matters outlined in the DPA; provision for termination of the DPA in the event of material breach of its terms by the company; agreement to make the DPA publicly accessible once it has been approved; and

agreement to publish the DPA and the agreed statement of facts on the prosecutor's website unless exceptional circumstances exist;

- a prosecutor and a company are at liberty to agree, in the terms of a DPA:
    - the imposition on the company of an appropriate financial penalty which is fair, reasonable and proportionate in respect of the conduct which is the subject of the DPA, and payment by the company of reasonable costs incurred by the prosecutor in negotiating the DPA;
    - elements which are aimed at addressing the risk of future offending conduct (such as requiring the company to take steps to address identified deficiencies in its compliance program);
- material breach of a DPA by a company can lead to the termination of the DPA (and resumption of the underlying prosecution) or the renegotiation of the DPA's terms; and
- following the end date of the DPA, the prosecution against the company is withdrawn.

Woodside makes the following additional comments in relation to Government's proposed DPA scheme:

1. **Published guidance** - Woodside strongly supports Government's proposal to publish guidance in relation to when a prosecutor is likely to offer DPA negotiations (including the factors to which it will have regard) and on the operation and processes of the DPA scheme itself. In Woodside's view, published guidance is likely to enhance public confidence in the scheme by reducing uncertainty as to the circumstances in which a DPA may be considered, and the processes through which it would be negotiated and approved. Woodside considers that the Deferred Prosecution Agreements Code of Practice, published by the United Kingdom's Serious Fraud Office and Crown Prosecution Service, provides a good example of the kind of clear guidance which Government should publish in this area.

2. **Agreed facts and liability** - Woodside notes that under Government's proposed model, DPAs will be required to include (amongst other things) both a statement of agreed facts and a formal admission by the company of criminal liability for specified offences. While Woodside supports a DPA model requiring a company and prosecutor to agree key facts (and in which those agreed facts could be taken as facts admitted by the company), it is concerned that a mandatory requirement for a company to admit criminal liability for alleged offences based on those facts may act as a disincentive for companies to accept an invitation to seek resolution of a prosecution through a DPA as opposed to defending a matter to trial and potentially appeals. Woodside also notes that a requirement for admission of criminal liability goes beyond the UK's DPA scheme, and considers that international consistency between DPA models regardless of a company's home jurisdiction will ultimately help to support compliance standards. Woodside suggests that the benefits of a DPA scheme are more likely to be achieved by a model in which a prosecutor and company are not prevented from negotiating admissions of criminal liability within the terms a DPA if they so wish, but at the same time are not compelled to do so.

3. **Approval of DPAs** - Woodside notes that under Government's proposed model, a prosecutor would be required to obtain the approval of a retired judge for the final terms of a DPA, and that the retired judge would consider whether the DPA is in the interests of justice and whether the terms are fair, reasonable and proportionate. In Woodside's view, an Australian DPA scheme would be strengthened by a need to seek approval from a currently sitting judge as opposed to a retired judge. Woodside encourages Government to consider ways in which any limitations posed by Australia's constitutional framework can be managed to achieve involvement in the DPA scheme by sitting members of the judiciary. Woodside considers that formal judicial oversight over DPAs is the best way of ensuring that DPAs and their terms are consistently fair, reasonable and proportionate and that this would maximise public confidence in their use in appropriate circumstances as an effective enforcement tool for serious corporate crimes.

4. **Independent monitors** - Woodside supports a model in which DPAs can in appropriate circumstances require the appointment of independent monitors, at the cost of the company, to oversee compliance with the terms of the DPA. Woodside endorses Government's proposal that the appointment of an independent monitor should not be required in all DPAs. Woodside agrees that the appointment of an independent monitor may be appropriate where the company is required to institute significant organisational or cultural change.

5. **Breaches of DPAs** – In the event of a breach of a DPA by a company, Woodside considers that (as suggested in the Paper) an appropriate response would be:
    a. first, for a prosecutor to provide the company with an opportunity to address the breach. If the breach was unintentional or minor in nature, then Woodside agrees that this may be appropriate response;
    b. secondly, in the case of repeated breaches of a minor nature and/or where the breach has arisen due to circumstances beyond the company's control, for the prosecutor to provide the company with the opportunity to address the breach and an opportunity to renegotiate the terms of the DPA; and
    c. thirdly, where it appears that the company has engaged in a material breach of the DPA, the prosecutor would be entitled to refer the matter to a Court to determine whether there has been a material breach of the DPA (with the company afforded the opportunity to make submissions to the Court regarding the matter) and in the event of a finding of material breach, to terminate the DPA and initiate prosecution on the matters to which it relates.

    Woodside supports Government's proposal that legislation would provide a non-exhaustive list of what circumstances may constitute 'material breach' of a DPA. Woodside considers that the circumstances set out at page 12 of the Paper could reasonably be included in the non-exhaustive list.

    Woodside considers that confidence in the DPA scheme would be optimised by judicial review and determination in the event of material breach. Woodside also considers that rather than introduce a new offence of breaching a DPA, a company's conduct in breaching a DPA may be more appropriately dealt with during sentencing if the company is later convicted of the substantive offences to which the DPA relates.

6. **Range of serious corporate offences covered** – Woodside supports Government's proposal that a DPA scheme should, at least initially (and similarly to the UK DPA scheme), apply to a limited set of serious corporate crime offences including fraud, false accounting, foreign bribery, money laundering, dealing with the proceeds of crime, forgery and related offences, exportation and/or importation of prohibited or restricted goods, and offences ancillary to these.

7. **Review of the scheme** – Woodside agrees that an Australian DPA scheme should be subject to review after an initial period of operation, to assess the effectiveness of the scheme in meeting Government's aims, as well as potential expansion of the scheme to a broader range of offences and/or to individuals. Woodside suggests that an appropriate initial period may be two or three years or such longer period as is needed for Government to assess whether the initial parameters for the scheme are supporting its effective use.

Thank you once again for the opportunity to make this submission.

Yours faithfully

Michael Abbott
Senior Vice President, Corporate & Legal
General Counsel