



CDPP

Australia's Federal Prosecution Service



AFP

AUSTRALIAN FEDERAL POLICE

**AFP and CDPP
Best Practice Guidelines**

Self-reporting of foreign bribery and related offending by corporations

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Introduction

1. This Guideline explains the principles and process that the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (CDPP) will apply where a corporation self-reports conduct involving a suspected breach of Division 70 of the *Criminal Code* (Cth) ['Bribery of foreign public officials'] (**foreign bribery**) or a related offence.
2. This Guideline operates within the framework of the *Prosecution Policy of the Commonwealth* (**Prosecution Policy**). In particular, it aims to provide corporations and their advisers with information about how the 'public interest' test in paragraphs 2.8-2.11 of the Prosecution Policy may apply to the specific circumstances of a self-reporting corporation. It is not directed at culpable individuals, for whom the Prosecution Policy provides adequate guidance - refer for example to the decision to prosecute (Chapter 2), the decision to issue an undertaking under the DPP Act (Chapter 6) and charge negotiations (Chapter 6).
3. AFP and the CDPP will review the operation of this Guideline within two years or earlier in the event that a Deferred Prosecution Agreement Scheme commences.

Self-reporting by corporations

4. For the purpose of this Guideline, a reference to a **corporation** includes a reference to a **related body corporate** of the corporation (refer sections 57A and 50 of the *Corporations Act 2001* (Cth), respectively).
5. '**Self-report**' means a report by a corporation to the AFP¹ of suspected criminal conduct by the corporation *and/or* its officers *and/or* its employees *and/or* its agents at a time prior to the receipt of any referral or the commencement of an investigation by the AFP of the conduct which is the subject of the self-report by the corporation concerned. A corporation may self-report conduct by its officers *and/or* employees without admitting criminal responsibility on the part of the corporation.
6. '**Related offence**' means an offence potentially connected with the subject matter of Division 70 of the *Criminal Code*, e.g. money laundering offences under Division 400 of the *Criminal Code*, false document offences under the *Corporations Act 2001* (Cth) or Commonwealth/State/Territory false accounting offences.
7. This Guideline recognises that:
 - (a) Foreign bribery is, by its nature, a complex and covert crime;
 - (b) Self-reporting of foreign bribery is consistent with directors' ethical obligations and is in the public interest;
 - (c) Self-reporting is a very significant first step in assisting law enforcement agencies to investigate and prosecute offences of foreign bribery in a timely manner;
 - (d) Self-reporting is a relevant public interest factor for the CDPP to take into account when determining whether a corporation should be prosecuted for conduct which it has self-reported;
 - (e) Guilty pleas that lead to the timely and appropriate resolution of matters can save

¹ If a corporation self-reports foreign bribery or a related offence to another Commonwealth authority or a State/Territory authority, the AFP and the CDPP may elect to treat that report as a self-report to the AFP and apply these Guidelines in the same manner.

significant investigative, prosecution, court and community resources and are in the public interest; and

- (f) If a corporation self-reports offending for which it is subsequently prosecuted, the fact of that self-report and the nature and scope of the corporation's broader cooperation with law enforcement agencies (including any guilty plea) are mitigating factors that a court must take into account at sentencing.

8. A corporation may choose to self-report foreign bribery or related offending for many reasons, including to:

- (a) proactively identify and address wrongdoing within the corporation;
- (b) comply with directors' statutory and fiduciary duties to act in the best interests of the corporation;
- (c) limit corporate criminal liability;
- (d) minimise reputational damage;
- (e) demonstrate a cooperative intent with the AFP in investigating the conduct;
- (f) maximise the sentencing discount that will be available to the corporation in any relevant prosecution of the corporation; and
- (g) be a good "corporate citizen".

Cooperation with the AFP investigation

9. The AFP will undertake an independent investigation into any conduct that is the subject of a self-report. This will necessarily include making an independent assessment of the quality and veracity of any internal investigation and report by the corporation in respect of the conduct. In addition, the AFP may investigate any criminal profits associated with possible offending and, where appropriate, the Commissioner of the AFP or the CDPP may commence action under the *Proceeds of Crime Act 2002*.

10. The corporation will be expected to provide full and frank disclosure to the AFP about the relevant conduct and the corporation's role in it so as to assist the AFP with its investigation and the CDPP in any subsequent prosecution arising from the self-report. Amongst other things, the corporation will be expected to give full access to:

- (a) all documents relating to the matter, including reports from any investigation carried out by or for the corporation, including reports commissioned by the corporation's lawyers²; and
- (b) all potential witnesses³, including for the purpose of providing witness statements and (if necessary) giving evidence in court (see 'Undertakings to cooperate with law enforcement agencies', below).

As part of this process, the AFP may ask the corporation to enter into an Investigation Cooperation Agreement (ICA). The purpose of an ICA is to document the AFP's expectations of the corporation in assisting the AFP with its investigation and provide a clear framework against which a corporation's cooperation may be assessed. The ICA may cover topics such as the duration and termination of the ICA, legal liabilities, execution of search warrants

² Excluding documents subject to a valid claim of legal professional privilege – see further paragraph 11.

³ subject to a corporation's legal powers to require cooperation by employees and/or agents, and an individual's right not to incriminate themselves

(including search and seizure of electronic and hardcopy material) and the management of Legal Professional Privilege (LPP) claims, interviews and statements, the matters referred to in paragraph 10(a) and (b), and communication and media strategy. The ICA will help to inform AFP and the CDPP's assessment of the quality and extent of the corporation's assistance for the purpose of any subsequent sentencing proceedings should the matter proceed to prosecution. (see 'Sentencing' below).

Legal professional privilege

11. This Guideline does not affect a corporation's entitlement to exercise legal professional privilege in respect of material to which the privilege applies.

Confidentiality

12. If practicable, the AFP and CDPP will treat the self-disclosure as confidential. However, the AFP works collaboratively with domestic and international regulatory and law enforcement agencies in investigating allegations of foreign bribery. Information disclosed during a self-disclosure may, in some circumstances, be shared with other agencies. Provided the information can be shared without compromising another investigation,⁴ AFP and the CDPP will give the corporation notice of any proposed on-disclosure of information or material provided by the corporation in a self-report to third parties (including other Commonwealth authorities or authorities in other jurisdictions) and will work with the corporation to manage such on-disclosure.

Prosecution policy

13. In deciding whether or not to commence a prosecution the Prosecution Policy requires the CDPP to consider whether there are reasonable prospects of obtaining a conviction on the available admissible evidence and whether a prosecution is in the public interest.⁵
14. The CDPP recognises that prosecuting a corporation that self-reports foreign bribery or related offending may not be in the public interest even if the CDPP is of the view that there are reasonable prospects of obtaining a conviction on the available admissible evidence.

Public interest factors

15. In addition to the public interest factors set out in paragraph 2.10 of the Prosecution Policy, the CDPP will have regard to such of the following factors as are relevant and applicable in determining whether a prosecution of a self-reporting corporation is in the public interest:
 - (a) The fact the corporation has self-reported the conduct, as well as the quality⁶ and timeliness of that self-report (with the burden being on the corporation to demonstrate timeliness);
 - (b) The extent to which the corporation is willing to, and does, cooperate with any investigation of the conduct by the AFP and any subsequent prosecution commenced by the CDPP against others in relation to the conduct;

⁴ For example, the company's self-report may lead to an investigation into a director or other office holder by another agency, and it may be possible that giving the corporation notice that information would be disclosed to the other agency would tip off the other suspect or otherwise compromise the other investigation.

⁵ Refer chapter 2 of the Prosecution Policy

⁶ In assessing the quality and value of a self-report, the CDPP will have regard to the knowledge it delivers about the offending in question and those involved in its design and implementation; and the assistance provided to Australian law enforcement agencies as a result.

- (c) Whether the corporation and/or related bodies corporate have a history of similar misconduct, including any prior criminal, civil and regulatory enforcement action or prior warning by law enforcement or regulatory bodies;
 - (d) Whether the corporation had an appropriate governance framework in place to mitigate the risk of bribery (including specific anti-corruption policies and processes), and the extent to which there was a culture of compliance with that framework⁷;
 - (e) Whether the alleged offending involved, or was expressly, tacitly or impliedly authorised or permitted by, any members of the board and/or other high managerial agents of the corporation, and if so, how many;
 - (f) Whether the corporation has taken steps to avoid a recurrence of the alleged offending, for example, by dismissing culpable individuals and improving governance processes;
 - (g) If the corporation has taken steps to redress any harm caused by the offending, for example, by compensating victims, the fact of that action;
 - (h) Whether the corporation has self-reported related offending in another jurisdiction and complied with any penalties/orders imposed by that jurisdiction; and the nature of those penalties/orders;
 - (i) Whether the collateral consequences of any court-imposed penalty are likely to be disproportionate to the gravamen of the alleged offending by the corporation⁸; and
 - (j) Any other relevant factor.
16. It is not possible to set out in advance all the public interest factors that may apply, nor the outcome of the CDPP's weighing of the public interest test, which will necessarily depend on all the circumstances of a matter. However, the fact that a corporation has made a self-report will be a significant factor that is taken into account, consistent with the objectives of this Guideline.

Indemnity from prosecution

17. If, in applying the Prosecution Policy, the CDPP decides that it is not in the public interest to prosecute a self-reporting corporation for misconduct disclosed by the self-report, but it is proposed that the corporation will assist (e.g. by making available documents or witnesses) in the investigation/prosecution of others in relation to the misconduct, the Director may issue a written undertaking pursuant to section 9 of the *Director of Public Prosecutions Act 1983* (Cth) (**DPP Act**) (refer paragraphs 6.1 – 6.7 of the Prosecution Policy).
18. An undertaking issued by the Director will be to the effect that evidence given by the corporation as a witness is not admissible, whether directly or derivatively, against the corporation in any civil or criminal proceedings (see sections 9(6) and 9(6B) of the DPP Act⁹); or that the corporation will not be prosecuted for specified Commonwealth offences or specified

⁷ For example, can the misconduct be properly characterised as the isolated actions of a “rogue” individual or individuals acting contrary to an otherwise robust anti-corruption framework and culture? In assessing what is an “appropriate governance framework” the CDPP will be guided by international best practice principles over the period of the offending, including any relevant policies issued by Australian authorities, the International Standards Organisation (ISO), the United States’ Department of Justice, the United Kingdom’s Ministry of Justice and/or other relevant entities. The CDPP will make a pragmatic assessment. The CDPP recognises that corporations often operate across jurisdictions and there is a strong public interest in consistency and predictability of approach.

⁸ For example, what will be the impact on “innocent bystanders” such as employees, creditors and shareholders of the corporation (e.g. if the corporation is forced into liquidation after prosecution)?

⁹ Unless the proceedings relate to allegations that the evidence given by the corporation was false.

acts or omissions (section 9(6D) of the DPP Act), as appropriate.¹⁰

19. An indemnity from prosecution does not prevent a proceeds of crime authority from taking confiscation action under the *Proceeds of Crime Act 2002*.

Procedure for dealing with a corporation's early offer to plead guilty

20. There are significant benefits for both the corporation and the community when a corporation that is implicated in foreign bribery decides to plead guilty to an appropriate criminal charge at an early stage of the investigation or prosecution process.
21. A corporation that is considering this option should notify the AFP/CDPP that it is willing to enter into plea negotiations. If the matter is in the investigative phase, the corporation should approach the AFP in the first instance. If the matter is in the prosecution phase, the corporation should approach the CDPP in the first instance.
22. The corporation should be advised that:
- (a) all communications by the AFP with the self-reporting corporation will take place on a non-binding and without prejudice basis for the purpose of seeking to identify a potential guilty plea proposal that the AFP would be willing to refer to the CDPP for advice and assessment;
 - (b) views expressed by individual AFP officers do not bind the AFP itself;
 - (c) views expressed by the AFP do not bind the CDPP, which will independently assess any guilty plea proposal in accordance with the Prosecution Policy;
 - (d) unless and until the details of any proposed guilty plea are fully agreed by both the AFP and the CDPP neither agency is committed to any particular position or course of action;
 - (e) AFP will not make any representations or offer any concessions to the corporation in relation to sentencing submissions or sentencing outcomes; and
 - (f) ultimately, a court will determine the sentence that is imposed on the corporation, having regard to all the relevant circumstances (see '**Sentencing**', below).

Assessing the appropriateness of a guilty plea proposal

23. As with any charge negotiation, a pre-brief offer by a self-reporting corporation to plead guilty may only be accepted by the CDPP if it meets the criteria in paragraph 6.17 of the Prosecution Policy, namely:
- (a) the charge(s) to be proceeded with bear(s) a reasonable relationship to the nature of the criminal conduct of the corporation;
 - (b) the charge(s) provide(s) an adequate basis for an appropriate sentence in all the circumstances of the case; and
 - (c) there is evidence to support the charge(s).
24. When making this decision the CDPP must take into account all the circumstances of the case and any other relevant considerations (refer paragraph 6.18 of the Prosecution Policy), the CDPP [Victims of Crime Policy](#) and the views of the AFP.

¹⁰ For further information see ss. 9(6), (6B) and 9(6D) of the DPP Act

Statement of facts

25. If the corporation offers to plead guilty to a particular charge and the CDPP has assessed that offer as meeting the criteria set down in the Prosecution Policy, the AFP/CDPP and the corporation will attempt to agree upon a statement of facts which plainly identifies for a sentencing court the corporation's conduct in respect of that charge.
26. The CDPP will work closely with the AFP to draft the statement of facts. However, because the statement of facts is a formal court document the final decision about its content rests with the CDPP. For this reason any discussions between AFP and the corporation (or its legal representative) that occur in the absence of the CDPP will be conducted on the basis that they are subject to CDPP approval.
27. The statement of facts:
 - (a) should clearly and comprehensively set out the key facts of the alleged offending, including in sufficient detail to satisfy every element of each offence;
 - (b) must reasonably reflect the corporation's alleged criminality and the available evidence, otherwise the proposed guilty plea will not be accepted;
 - (c) should incorporate all the facts related to the offending upon which the corporation will be sentenced, including any alleged aggravating or known mitigating factors for which there is the requisite evidentiary basis;
 - i. If the corporation takes issue with a particular assertion by the prosecution which is material to the sentencing process (but which does not involve the corporation denying the existence of an element of the offence) the matter can proceed to a trial of that issue, also known as a contested facts hearing.
 - ii. If an asserted fact/issue is to be contested, that fact/issue should be clearly identified as a contested fact/issue. At the same time, the relevant evidence should be clearly identified and an agreement reached between the CDPP and the corporation's legal representative as to how the evidence will be put before the Court. Failing such agreement being reached, the Court will determine how this evidence will be put before the Court.
 - (d) only has evidentiary value after, and to the extent that, it is admitted or "adopted" by the corporation; and
 - (e) essentially binds the CDPP/AFP as well as the corporation;
 - (f) applies only to the prosecution to which this Guideline applies and is not admissible as evidence of the truth of its contents in any other criminal or civil proceedings.

"Fast track" prosecutions

28. A corporation that wishes to plead guilty to criminal charges at the earliest opportunity and "fast track" resolution of the matter can do so. In this way, the corporation can maximise the sentencing discount that will be available to it from pleading guilty (see further 'Court' below).
29. In relevant jurisdictions, a corporation may consent to the Director bringing a direct indictment against the corporation which will allow the court to bypass any committal processes that may otherwise apply.

Undertakings to cooperate with law enforcement agencies

30. Plea negotiations will usually involve a discussion with the self-reporting corporation about its willingness to sign a formal undertaking under section 16AC of the Crimes Act to cooperate with law enforcement agencies in relation to future prosecutions and/or confiscation proceedings. It is the responsibility of the CDPP case officer to draft the relevant undertaking.
31. Where publication of the section 16AC undertaking could jeopardise the safety of the suspect or the integrity of an ongoing investigation, the CDPP will tender the undertaking to the Court by means of a sealed envelope or other confidential process.

Letter of assistance

32. As part of the sentencing process, AFP may provide a 'letter of assistance' to be tendered by the prosecution at court which outlines the nature and value of the corporation's assistance to the AFP where that assistance relates to evidence or information beyond the scope of the corporation's own offending.
33. Where publication of the letter of assistance could jeopardise the safety of the suspect or the integrity of an ongoing investigation, the letter will be tendered to the Court in a sealed envelope or by another confidential process.

Sentencing

34. It is the role of the court, not the prosecution, to determine the sentence that is imposed on the defendant and the extent of the discount that is given in recognition of the corporation's early guilty plea, remorse, assistance provided to law enforcement agencies and other factors (as appropriate). This discount may be very significant having regard to the facts, the relevant State or Territory sentencing legislation and case law (if applicable).
35. The *Crimes Act 1914* sets out a non-exhaustive list of factors that a court must take into account when sentencing an offender for a Commonwealth offence, to the extent that those factors are relevant and known to the court (section 16A(2)). These include: if the person has pleaded guilty to the charge in respect of the offence - that fact (paragraph (g)); the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences (paragraph (h)); and the degree to which the person has shown contrition for the offence (paragraph (f)). These factors may overlap to the extent that an offender's guilty plea and cooperation will usually be taken to indicate a level of contrition.
36. As part of this process, the CDPP will make submissions to the court on sentence which will include an overview of relevant facts known to the prosecution, such as the fact that the corporation self-reported the offending, the extent of its cooperation with the AFP's investigation and stage at which the plea of guilty was entered.
37. The corporation will make its own submissions in mitigation, which may include reference to any steps taken by the corporation to mitigate against the risk of re-offending; any penalties or punishments imposed on the corporation in other jurisdictions for related offending; and/or any other relevant factors.

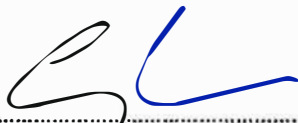
Proceeds of Crime

38. A proceeds of crime authority may also choose to take separate legal action under the *Proceeds of Crime Act 2002* (Cth) (PoCA) in relation to a self-reporting corporation. Any decision to take action under the PoCA will be taken independent of a decision on whether to commence a

criminal prosecution.

39. A corporation that cooperates in resolving any action taken against it under the PoCA (e.g., by consenting to the imposition of a pecuniary penalty order or the forfeiture of property) may have that cooperation taken into account by the court when sentencing the corporation for the relevant criminal offences (section 320 PoCA). Where appropriate, the PoCA proceedings may proceed concurrently with the criminal proceedings. In many cases they are dealt with prior to the sentencing hearing.
40. In no circumstances will the Commissioner of the AFP agree to settle confiscation proceedings on terms which preclude the AFP from commencing a criminal investigation, continuing an existing criminal investigation, arresting or charging a person, or referring a brief of evidence to the Director of Public Prosecutions.

Dated: 8 ~~November~~ ^{December} 2017



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