

# ALLEN & OVERY

## Australian agencies responsible for the enforcement of foreign bribery laws release self-reporting guidelines



The Australian government agencies responsible for investigating and prosecuting foreign bribery have released joint best practice [guidelines](#) that indicate how they will approach self-reporting by companies voluntarily seeking to disclose suspected foreign bribery and related offences (the **Guidelines**).<sup>1</sup> The Guidelines, which are designed to operate within the existing framework of the [Prosecution Policy of the Commonwealth \(Prosecution Policy\)](#), provide greater clarity on the expectations of the Australian Federal Police (**AFP**) and the Commonwealth Director of Public Prosecutions (**CDPP**) in a range of areas, including when and to which agency a self-report should be made, the conduct of an internal investigation giving rise to a self-report, and any post-report cooperation required of the disclosing company. The new Guidelines should assist company management and external advisers in guiding boardrooms on the way forward in resolving the often complex challenges that arise when managing allegations of foreign bribery, at least in so far as those allegations have an Australian nexus.<sup>2</sup>

The Guidelines collect, in one document<sup>3</sup>, a variety of new guidance on the expectations of the AFP and the CDPP in regard to self-reporting. The Guidelines also answer several common questions that arise in foreign bribery investigations. This article categorises the information in the Guidelines into a number of questions, as follows:

1. What are the circumstances in which the Guidelines apply?
2. How will the quality of a self-report be assessed?

3. What level of cooperation is expected of a self-reporting company?
4. What are the potential benefits of self-reporting?
5. What if a company offers to plead guilty or a prosecution proceeds regardless?

This article concludes by considering some of the key takeaways from the publication of these Guidelines, including recent trends and likely future developments that may impact the operation of the Guidelines as they come into effect in Australia. This article also offers suggestions as to what companies should consider when deciding whether to self-disclose under the new Guidelines.

### *1. What are the circumstances in which the guidelines apply?*

The Guidelines explain the principles and process that the AFP and CDPP will apply in circumstances where a corporation self-reports a suspected breach of Division 70 of the *Criminal Code* (Cth), Australia's legislation prohibiting bribery of foreign public officials. The Guidelines also apply to a range of other corporate offences related to bribery of foreign public officials, including money laundering, false document offences and false accounting offences.<sup>4</sup>

There are some limitations, however, on the application of the Guidelines to a company's self-report. In order for the Guidelines to apply, the report must be received by the AFP

<sup>1</sup> Australian Federal Police & Commonwealth Director of Public Prosecutions Best Practice Guidelines, *Self-Reporting of Foreign Bribery and Related Offending by Corporations*, 8 December 2017. An exposure draft of the self-reporting guidelines had been released by the AFP and CDPP in August 2016.

<sup>2</sup> While the aim of the Guidelines is to clarify the principles that the AFP and CDPP "will apply" in the event of self-disclosure (Guidelines at 1), the Guidelines still allow for broad prosecutorial discretion and should be viewed as a starting point for prosecutorial decision-making rather than binding rules. Prosecutors have leeway to consider any "relevant factor" (Guidelines at 15(j)) when determining whether to prosecute, not limited to the specific considerations set out in the Guidelines or the Prosecution Policy. Further, the Guidelines emphasise that the outcome of the CDPP's balancing of "public interest" factors cannot be set out in advance, but will depend on the circumstances. In sum, how prosecutors will interpret the Guidelines – and how closely they adhere to them – will be a developing issue in Australia.

<sup>3</sup> By comparison to the collection of documents and speeches that deal with the expectations of UK authorities.

<sup>4</sup> In addition to suspected bribery of foreign public officials (Division 70 of the *Criminal Code* (Cth)), the Guidelines apply to related offences that are "potentially connected with the subject matter of Division 70", for example 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.

(Australia's principal investigative agency for foreign bribery) prior to the AFP commencing its own investigation or receiving a referral from another domestic or international agency.

Beyond those express limitations, the Guidelines leave open certain other questions regarding applicability that often arise in other jurisdictions. For instance:

- **Reports made to authorities other than the AFP.** The AFP and the CDPP have discretion to treat a report made to other Australian authorities (eg. a State or Territory authority) as if it were a report to the AFP. However, the Guidelines do not deal directly with self-reports to foreign enforcement bodies outside of Australia.<sup>5</sup> As a result, it can be assumed that a self-report needs to be made to an Australian authority in order to obtain the incentives available under these Guidelines. Reports to non-Australian regulators may well be insufficient to trigger the applicability of the Guidelines.
- **Companies already under investigation for other conduct.** It appears possible that a corporation already under investigation in respect of one course of conduct could still make a report in relation to another course of conduct and gain the benefit of the self-reporting incentives offered in the Guidelines. This is significant in light of the extensive debate surrounding the approach of the Serious Fraud Office (SFO) in the [Rolls Royce matter](#), where Rolls Royce was granted a deferred prosecution agreement and cooperation credit for information provided about corporate misconduct that went “far beyond” what the SFO knew and was investigating.

Where the Guidelines apply, their application will not be limited to Australian companies. Rather, the Guidelines are also relevant to multinational companies given the extraterritorial reach of Australia's foreign bribery regime.<sup>6</sup> This extraterritoriality is set to be expanded in [recently proposed amendments](#) to the foreign bribery regime, which would create a new strict liability corporate offence of failing to prevent foreign bribery by an “associate,”<sup>7</sup> including overseas associates, where the associate committed bribery for the profit or gain of the corporation (for more information on the proposed amendments, click [here](#)).<sup>8</sup>

As a result, a multinational with operations in jurisdictions including Australia will need to consider the Guidelines if it has formed suspicions of foreign bribery or related offences that might have provided a benefit to its Australian operations.

## *2. How will the quality of a self-report be assessed?*

Similar to its counterparts in other jurisdictions, the AFP has indicated that it will undertake an independent investigation of matters that are the subject of a voluntary self-report. The AFP has stated that this will include an independent assessment of the quality of any internal investigation and the veracity of the resulting report.

Like the AFP, the CDPP will also assess the quality and value of a self-report. The Guidelines state that the CDPP, in determining whether to proceed with prosecution, will have regard to the information the self-report delivers about the offending conduct and those involved, and it will also have regard to the level of assistance provided to Australian law enforcement agencies as a result.

The issue of the quality of a company's self-report is of critical importance for entities deciding on their approach to an investigation. There have been a number of high-profile examples in which internal investigations have been criticised or rejected by authorities.<sup>9</sup> The rejection of an internal investigation can dramatically expand resolution timeframes as government agencies conduct a parallel investigation into the internal investigation process in addition to the underlying allegations.

An assessment of the quality of a self-report will also raise issues as to scope. The Guidelines are unclear as to whether the AFP's investigation will include only matters covered by the self-report, or whether it will investigate other matters that the AFP regards as arising from the report.<sup>10</sup>

<sup>5</sup> The Guidelines at 5.

<sup>6</sup> Currently, the foreign bribery offence under Division 70 of the Criminal Code (Cth) applies under two circumstances: where the conduct constituting the offence occurred wholly or partly in Australia, or where the conduct occurred wholly outside of Australia, and was committed by an Australian citizen, resident or corporate entity: *Criminal Code Act 1995* (Cth) s 70.5.

<sup>7</sup> Including officers, employees, contractors, agents that operate overseas, subsidiary or controlled companies or persons performing services for or on behalf of the company.

<sup>8</sup> There is a defence that applies if the corporation had in place a system of internal controls and compliance in place to prevent the bribery from occurring: *Crime Legislation Amendment (Combating Corporate Crime) Bill 2017* (Cth) sch 1 pt 1 sub-div A, 2.

<sup>9</sup> For example, recent internal investigations in [England](#) and in [Germany](#).

<sup>10</sup> This is in contrast to guidance issued by the SFO in the UK, which expressly reserves that right: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/>.

### 3. What level of cooperation is expected of a self-reporting company?

Under the Guidelines, a self-reporting company is expected to cooperate with the AFP in any investigation into the conduct that forms the subject of the self-report. The AFP may ask the company to enter into an Investigation Cooperation Agreement (**ICA**) to document the AFP's expectations and provide a clear framework against which cooperation may be assessed. The ICA may cover the duration and termination of the agreement, legal liabilities, search warrants, management of legal professional privilege claims, interviews and statements, and communication and media strategy.<sup>11</sup>

In conducting its investigation, the AFP expects full access to all relevant documents and witnesses.<sup>12</sup> In relation to documents, the AFP specifically states that it expects access to reports prepared in relation to the conduct being investigated, including those commissioned by the corporation's lawyers.<sup>13</sup> However, the AFP also notes that this does not include documents subject to a valid claim of legal professional privilege.<sup>14</sup> This position stands in contrast to the approach taken by the UK's SFO, which has **indicated** that it will expect the waiver of legal professional privilege over commissioned reports as part of a corporate's cooperation with the SFO's investigation (an approach which has been the subject of **criticism** by lawyers in the UK).

In relation to witnesses, the Guidelines note that while the AFP expects access to individuals relevant to the conduct at issue, this expectation is subject to the corporation's powers to require cooperation and an individual's right against self-incrimination.<sup>15</sup> The Guidelines do not expressly require that it expects access to witness statements obtained as part of a company's internal investigation, as has been **suggested** by the UK SFO.

### 4. What are the potential benefits of self-reporting?

The Guidelines identify multiple reasons why a corporation may choose to self-report.

The key benefit is the potential to avoid prosecution. As part of its decision as to whether or not to commence a prosecution, it has long been CDPP policy – as set out in the Prosecution Policy – that it must assess whether it is in the “public interest” to prosecute. One of the stated goals of the Guidelines is to provide corporations and their advisers with information about how that “public interest” test may apply to the specific circumstances of a self-reporting corporation. More specifically, the Guidelines state that:<sup>16</sup>

*“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”.*

The Guidelines also set out a number of other considerations that will be taken into account in assessing the “public interest” in bringing a prosecution.<sup>17</sup> For example:

- The extent of cooperation by the corporation with the AFP investigation into the conduct and in any subsequent CDPP prosecution against others in relation to the conduct.
- The existence of an appropriate governance framework to mitigate the risk of bribery and the extent to which there was a culture of compliance with that framework<sup>18</sup>, as well as any steps taken to avoid a recurrence of the alleged offending.<sup>19</sup>
- The steps the corporation has taken to avoid a recurrence of the alleged offence, for example, by dismissing culpable individuals and improving governance processes.
- The involvement of any members of the board or other senior managers of the corporation in the alleged offence, whether by express, tacit or implied authorisation.

11 The Guidelines at 10.

12 *Ibid.*

13 *Ibid* at 10a.

14 *Ibid.*

15 *Ibid* at 10(b).

16 *Ibid* at 14.

17 Many of these factors will be familiar to those experienced in dealing with authorities responsible for enforcing foreign bribery laws in other jurisdictions around the world. See, for example, Section 9-28.300 of the United States Attorney's Manual.

18 In assessing what is an appropriate framework, the CDPP will be guided by international best practice and policies issued by Australian authorities, the International Standards Organisation, the United States Department of Justice, the United Kingdom's Ministry of Justice and related entities.

19 Such as dismissal of culpable individuals and improvements in governance processes will also be considered.

- The possibility of the “*collateral consequences*” of any court-imposed penalty being disproportionate to the alleged offence, including in regard to the impact on “innocent bystanders” such as employees, creditors and shareholders of the corporation.
- The existence of self-reports by the corporation in other jurisdictions and any penalties or orders imposed by that jurisdiction.

If the CDPP finds that it is not in the public interest to prosecute a self-reporting corporation for misconduct disclosed in a self-report, but the corporation is asked to assist in the investigation or prosecution of others in relation to that misconduct, the CDPP may issue a written undertaking that evidence given by the corporation as a witness will not be admissible (directly or derivatively) against the corporation in any civil or criminal proceedings.<sup>20</sup> However, it is worth noting that this only applies to proceedings in Australia.

The Guidelines also state that the AFP and CDPP will treat any self-disclosure as confidential, although they note that information may be disclosed to other agencies (including overseas regulatory and law enforcement agencies). Nonetheless, the Guidelines state that the AFP/CDPP will give notice of any proposed on-disclosure of information and will work with the corporation to manage any disclosure, provided that such notice and cooperation does not compromise another investigation.

Another benefit provided under the Guidelines is that a corporation can self-report without admitting criminal responsibility.<sup>21</sup> This option potentially encourages a more proactive approach to the discovery of suspicious circumstances, as it permits a corporation to report its suspicions without accepting that an offence has been committed.

## 5. *What if a company offers to plead guilty or a prosecution proceeds regardless?*

Where a corporation self-reports but a prosecution nonetheless proceeds, the Guidelines provide a mechanism for pleading guilty at an early stage and minimising the potential cost of fines and protracted proceedings. “Fast track” prosecutions allow the Court to skip any committal process that may otherwise apply.<sup>22</sup>

If a corporation self-reports and offers to plead guilty to an appropriate criminal charge<sup>23</sup>, the AFP/CDPP and the corporation will attempt to agree on a statement of facts that identifies for a sentencing court the corporation’s conduct in respect of the charge. The statement of facts will not be admissible as evidence of the truth of its contents in any other criminal or civil proceeding<sup>24</sup>, including, for instance, in related criminal proceedings against an employee or in civil proceedings brought by a company shareholder.

According to the Guidelines, during the sentencing process the AFP may provide a “letter of assistance” outlining the nature and value of the corporation’s assistance to the AFP relating to evidence beyond the scope of the corporation’s own misconduct.<sup>25</sup> The Guidelines also state that the CDPP’s submissions on sentencing will only go as far as an overview of the relevant facts known to the prosecution, such as the fact that the corporation self-reported, the extent of its cooperation with the AFP’s investigation and the stage at which the plea of guilty was entered. Otherwise any mitigating submissions are up to the corporation to make, such as any submissions regarding steps taken to prevent future misconduct.

<sup>20</sup> The Guidelines at 18. Notably, such an undertaking does not prevent confiscation actions under the *Proceeds of Crime Act 2002*.

<sup>21</sup> *Ibid* at 5.

<sup>22</sup> *Ibid* at 28 and 29.

<sup>23</sup> An early guilty plea proposal by a corporation may only be accepted if the charge bears a reasonable relationship to the nature of the corporation’s criminal conduct, provides an adequate basis for an appropriate sentence in all the circumstances of the case, and there is evidence to support the charge.

<sup>24</sup> The Guidelines at 27(f).

<sup>25</sup> The AFP will use the ICA to assess the quality and extent of the corporation’s assistance for the purpose of sentencing proceedings.

## 6. Key takeaways and observations

The scale and breadth of the Guidelines make their publication a landmark development in improving cooperation between corporations considering disclosure of potential bribery of foreign officials and the Australian government agencies determined to combat that bribery. At a minimum, the Guidelines should increase awareness about where to go to make a voluntary report and whether any benefits to self-reporting exist, both essential pieces of information to provide in encouraging more voluntary reporting. The Guidelines will also be important if the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* is passed into law to set up an Australian scheme for Deferred Prosecution Agreements.<sup>26</sup>

Other key takeaways for companies considering whether to make a voluntary disclosure are as follows:

– **Focus on the quality of internal investigations:** The Guidelines state that both the AFP and CDPP can be expected to assess the quality of any internal investigation conducted by a corporation in response to suspicions of foreign bribery or related misconduct. Further, the quality of any internal investigation and resulting self-report will contribute to the CDPP's assessment of whether a prosecution of a corporation will be in the “public interest”. In consultation with appropriately experienced external advisers, corporations should consider their processes and procedures around the conduct of internal investigations and whether the investigation record that is created would likely stand up to external scrutiny by a government authority.

– **Assess the adequacy of your existing anti-bribery and corruption compliance framework:** The Guidelines state that a factor to be taken into account in determining whether prosecution of a self-reporting corporation is in the “public interest” will be whether the corporation has an appropriate governance framework in place to mitigate the risk of bribery and the extent to which there is a culture of compliance at the company. The Guidelines further state that this assessment will be guided by international best practice principles, including any relevant standards and policies issued by the United States Department of Justice<sup>27</sup> and the UK Ministry of Justice.<sup>28</sup>

Companies should consider now, in cooperation with external advisers experienced in dealing with U.S. and/or UK authorities and familiar with the compliance program standards published in those jurisdictions, whether they have in place an appropriate, risk-based compliance program designed to prevent and detect potential violations of law.

– **Part of a broader push to combat foreign bribery and corruption:** The Guidelines were published in close proximity to the release of the most recent [OECD Report on Australia's implementation of the OECD Anti-Bribery Convention](#)<sup>29</sup>, which recognised that Australia has stepped up its enforcement of foreign bribery. The OECD Report recommended further law reform and other measures to boost enforcement, including to address the risk of money laundering in the real-estate sector, ensure that authorities are adequately resourced in order to be able to enforce offences, proactively pursue criminal charges against companies for foreign bribery, and enhance whistle-blower protections in the private sector.<sup>30</sup>

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<sup>26</sup> Ibid at 3.

<sup>27</sup> For example, the February 2017 [Evaluation of Corporate Compliance Programs](#) document, [Chapter 5](#) of the Resource Guide to the U.S. Foreign Corrupt Practices Act, [Section 9-28.900](#) of the United States Attorney's Manual, and the recently announced [FCPA Corporate Enforcement Policy](#).

<sup>28</sup> For example, the [Bribery Act 2010 Guidance](#).

<sup>29</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

<sup>30</sup> The OECD press release summarising the findings of the report can be found [here](#).