



AFP
AUSTRALIAN FEDERAL POLICE

Corporate Cooperation Guidance

POLICING FOR A SAFER AUSTRALIA

This AFP Guidance has been prepared in consultation with the Attorney-General's Department, the Commonwealth Director of Public Prosecutions, and the Australian Securities and Investments Commission. It is intended to further an understanding of how the public interest factor of cooperation at the investigation stage might be assessed. It is not intended to, nor does it, create legally enforceable rights, expectations or liabilities.

| | |
|-------------------------|---|
| Report title | Corporate Cooperation Guidance |
| Originating area | Crime Command |
| Date produced | November 2021 |
| Cleared by | Coordinator Corporate Crime and Foreign Bribery |
| Endorsed by | Commander Crime |

Contents

| | |
|--|----|
| Introduction | 4 |
| Indicators of genuine and proactive cooperation | 5 |
| Self-reporting and approach to internal investigations..... | 6 |
| Independent investigation and verifying information provided by a corporation..... | 6 |
| Preserving and providing material..... | 7 |
| Dealing with witnesses and individuals | 11 |
| Approach to LPP..... | 12 |
| Cooperation in related investigations and proceedings | 13 |

Introduction

1. The level of cooperation provided by a corporation during an investigation will be one of the key public interest factors to be considered by the CDPP in making decisions with respect to corporate suspects under:
 - a. the Prosecution Policy of the Commonwealth (Prosecution Policy), and
 - b. the Best Practice Guideline: Self-reporting of foreign bribery and related offending by corporations.
2. A corporation's response to learning of possible offending can range from proactive, genuine, timely and practical cooperation in an investigation to that which might be considered obstructionist.
3. Where a corporation adopts a genuine and proactive approach in cooperating with investigating agencies upon learning of the possible offending, it is likely to tell in favour of the corporation being treated more leniently. Similarly, adopting an adversarial or obstructionist approach to the investigation is likely to tell in favour of prosecuting the corporation, subject to the Prosecution Policy.
4. It is important for corporations and their legal representatives to recognise that even proactive and fulsome cooperation does not guarantee any particular outcome. The nature and extent of the corporation's cooperation is one of many factors that the CDPP will take into consideration when making decisions with respect to corporate suspects following the investigation stage.
5. However, even if ultimately a decision is taken to charge the corporation, the degree to which it has cooperated with law enforcement agencies must be taken into consideration on sentence.¹ Undertakings to provide future cooperation (for example in relation to the prosecution of relevant individuals) must also be taken into account at sentencing and may result in a reduction to the sentence imposed.²
6. How a corporation responds when possible criminal conduct is identified may also be relevant in assessing its culture of compliance.³
7. This Guidance sets out some examples of what might constitute genuine cooperation, including steps that the Australian Federal Police (AFP) and other investigating agencies may ask corporations to take, are set out in this Guidance.⁴ These examples should not be taken to be prescriptive or exhaustive and each case will ultimately be assessed on its merits.
8. The AFP and other Commonwealth agencies take a similar view when assessing cooperation as their international counterparts. Accordingly, significant guidance as to what constitutes genuine cooperation in an investigation can be found not just in domestic sentencing

¹ *Crimes Act 1914* (Cth) s 16A(2)(h).

² *Crimes Act 1914* (Cth) s 16AC.

³ See, eg, *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69 at [2], [175]-[178].

⁴ Many of the examples listed are taken from the UK SFO's Operation Handbook, "Corporate Co-operation Guidance".

remarks,⁵ but also international sentencing remarks, published reasons relating to Deferred Prosecution Agreements and Non-Prosecution Agreements, and guidance issued by international authorities regarding corporate cooperation.

Indicators of genuine and proactive cooperation

9. Genuine and proactive cooperation means providing assistance to investigating agencies that goes **above and beyond** compliance with legal obligations. It includes:
 - a. advising relevant agencies as soon as practicable after potential offending is discovered, including regulatory agencies in relation to civil contraventions
 - b. providing full and frank disclosure to investigating agencies about the relevant conduct and the corporation's role
 - c. advising investigating agencies of relevant information and evidence without waiting for it to be formally requested
 - d. identifying suspected wrong-doing and criminal conduct together with the individuals responsible, regardless of their seniority or position in the corporation
 - e. identifying and preserving available evidentiary material including evidence located overseas
 - f. providing evidentiary material to investigating agencies promptly and in an evidentially sound format
 - g. identifying and making available relevant witnesses
 - h. encouraging employees, officers, agents and associates to cooperate in the investigation
 - i. supporting employees, officers, agents and associates to provide witness statements and give evidence
 - j. giving evidence (via relevant persons associated with the corporation) in any related proceedings
 - k. taking a cooperative and practical approach to assisting any ancillary investigation or resolving any action taken against the corporation that is related to the corporation's misconduct, including under the *Proceeds of Crime Act 2002* (POC Act) or other proceeds of crime proceedings
 - l. taking a cooperative and practical approach to any legal professional privilege (LPP) claims
 - m. excluding possible suspects (such as senior officer holders) from any decision making in relation to the investigation, and
 - n. providing investigating agencies with copies of internal investigation reports prepared by or on behalf of the corporation (including by its legal representatives).

⁵ See, eg, *R v Note Printing Australia Ltd & Anor* [2012] VSC 302; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876; *CDPP v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

10. Genuine cooperation is **inconsistent** with:
- a. protecting specific individuals or unjustifiably blaming others
 - b. putting subjects on notice and creating a danger of tampering with evidence or testimony
 - c. silence about selected issues
 - d. misuse of LPP claims, and
 - e. tactical delays or information overloads.

Self-reporting and approach to internal investigations

11. Self-reporting possible offending is a significant first step in adopting a genuine and proactive approach to cooperation.
12. In some circumstances a corporation may wish to undertake its own internal investigation before self-reporting suspected misconduct. A corporation may seek to do this in order to obtain more information about possible offending that has occurred and/or mitigate the risk of ongoing or future offending.
13. While conducting an internal investigation is not necessarily incompatible with genuine and proactive cooperation, law enforcement agencies will view early and timely engagement with investigating agencies as soon as there is a reasonable basis to suspect offending as a positive indication of cooperation.
14. Consistent with a proactive approach to cooperation, a corporation that wishes to continue its internal investigation after notifying investigating agencies of possible offending should make agencies aware of its intended course of action.
15. A corporation should ensure that any steps taken as part of an internal investigation will not undermine or prejudice independent investigation by law enforcement agencies. To avoid potential prejudice to a law enforcement investigation, a corporation should undertake early and ongoing engagement with investigating agencies during the course of its internal investigation.
16. Corporations that engage in proactive cooperation with investigating agencies would be expected to share details of the results of their internal investigation where suspected offending has been identified.

Independent investigation and verifying information provided by a corporation

17. Even in cases involving the highest level of cooperation from a corporation, investigating agencies will still need to undertake an independent investigation into the relevant conduct. This will necessarily involve making an independent assessment of the quality and veracity of any internal investigation undertaken by the corporation.
18. In conducting an independent investigation, agencies will investigate credible allegations and follow reasonable lines of inquiry. This is consistent with usual practice in that investigating agencies would be expected to compile a detailed brief of evidence in order to

inform the CDDP of matters relevant to the Prosecution Policy, as well as ensuring the scope of any offending is able to be identified.

19. This independent investigation may involve the use of the powers available to investigating agencies. Use of powers by an investigating agency should not be taken as demonstrating a lack of cooperation by the corporation.
20. Should additional material and evidence be identified as a result of any independent investigation this will be used in assessing the level of cooperation provided by the corporation.
21. A cooperating corporation should not expect to be kept abreast of the investigation being undertaken by a relevant agency. Investigating agencies will need to follow the evidence obtained where it leads. Not all of that evidence, nor the scope of the investigation, will be known to a cooperating corporation.

Preserving and providing material

22. Genuine and proactive cooperation involves identifying, preserving and providing available evidentiary material, including evidence held overseas, to investigating agencies. A corporation that provides evidentiary material proactively, without waiting for a formal request from investigating agencies, would be assessed as demonstrating a high degree of cooperation.
23. When preserving and providing evidentiary material to investigating agencies, general good practices by a cooperating corporation include:
 - a. preserving both digital and hard copy material using a method that prevents the risk of document destruction or damage
 - b. as and when digital material is obtained, ensuring digital and evidentiary integrity is preserved (for example, by providing emails and digital evidence in native format)
 - c. taking a proactive, rather than reactive, approach to the disclosure of relevant material
 - d. obtaining and providing material promptly when requested
 - e. responding to requests by investigating agencies and meeting agreed timelines
 - f. providing a list of relevant document custodians and the locations (whether digital or physical) of the documents
 - g. providing material in a useful, structured way, for example through:
 - i. providing compilations of selected documents (including hard copy records, digital communications, records showing money flows)
 - ii. ensuring particularly relevant materials are sorted, for example, by individual or specific issue
 - iii. ensuring that where documents are being exchanged across date and time zones, that sequence of events can be identified
 - iv. providing a package of relevant material gathered during an internal investigation, and

- v. providing basic background information about the corporation and its associates, including organograms; lists, job titles, roles and responsibilities, decision-making and reporting structures, and contact and personal information of relevant persons; and what categories of data exist (e.g. emails, audio, chats)
 - h. providing material on a rolling basis in an agreed manner
 - i. informing investigating agencies without delay of suspicions of, and reasons for, data loss, deletion or destruction
 - j. identifying relevant material that is in the possession of third parties, noting investigating agencies may ask the corporation to facilitate the production of third-party material
 - k. providing relevant material that is held abroad where it is in the possession or under the control of the corporation
 - l. assisting in identifying material that might reasonably be considered capable of assisting any accused or potential accused or undermining the case for the prosecution, and
 - m. providing a document to the investigating agency that sets out the methodology used by the company to identify, review and collect data and evidence.
24. When providing a document to the investigating agency that sets out the methodology used by the company to identify, review and collect data and evidence, such a document would be expected to outline or include:
- a. all search and review methodologies applied to datasets both pre and post collection, including keywords, date restrictions and predictive models
 - b. whether deleted files have been recovered or restored, how they have been restored and whether they were included within the identified search methods
 - c. the location of data collections and applicable time zones
 - d. the time zones in which the collected data was processed and whether a uniform time setting was used either for processing or export
 - e. whether relevant backup tapes or drives have been identified, preserved, restored and reviewed
 - f. locations in which hard copy material was collected and whether all hard copy material has in fact been collected, searched and reviewed
 - g. the methodology used to process the data, both digital and hardcopy
 - h. the steps taken by the company to preserve all relevant material
 - i. a list of all of the devices issued to the key individuals or persons of interest
 - j. schedules of all hard copy and electronic material collected as part of the company's internal investigation
 - k. all software and database systems reviewed for relevant records
 - l. any data that could not be collected and explanations as to why, and

m. any manual review processes used to identify data and evidence.

25. In relation to digital evidence, good practices include:

- a. providing digital material:
 - i. in the format requested by the investigating agency
 - ii. in a format ready for ingestion by, and viewing on, the agency's document review platform, and
 - iii. in a manner that maximises its evidentiary value in the future.
- b. creating and maintaining an audit trail of the acquisition and handling of digital material and devices, and identifying an appropriate individual (or individuals) to provide a witness statement covering the methodology used by the company to identify, review and collect data and evidence, continuity and the provenance of the evidence
- c. being alert to ageing technology or bespoke systems, and preserving the means of reading digital files over the life of the investigation, any prosecution and subsequent appeals
- d. alerting the investigating agency to relevant digital material that the corporation cannot access (for example, relevant private email accounts, messaging apps or social media that have come to light in an internal investigation)
- e. preserving and providing passwords, recovery keys, decryption keys and the like in respect of digital devices, and
- f. where requested, facilitating access by the investigating agency to primary sources of digital evidence.

26. An agency may ask a corporation to provide schedules of relevant documents that it is producing and details of search terms, "seed sets" or other search methodologies applied to extract the documents.

27. In relation to hardcopy material, good practices include:

- a. maintaining an audit trail of the acquisition and handling of hard copy and physical material, and
- b. identifying an individual(or individuals) to provide a witness statement covering the methodology used by the company to identify, review and collect hardcopy material, continuity and the provenance of the evidence.

28. In relation to relevant financial records, good practices include:

- a. providing records that show relevant money flows
- b. providing relevant organisational financial documents in a structured way, including bank records, invoices, money transfers, contracts, accounting records and other similar documents
- c. alerting the investigating agency to relevant financial material that the corporation cannot access - for example, bank accounts into which monies flowed from the corporation or its associates

- d. explaining any internal accounting procedures
- e. making available, and encouraging, accountants and/or other relevant personnel (internal and/or external) available to produce and speak to financial records
- f. creating and maintaining an audit trail of the acquisition and handling of financial material, and identifying an individual to produce the exhibits and cover continuity
- g. making available any forensic accounting reports prepared by or on behalf of the corporation
- h. ensuring that all relevant financial material can be accessed and read, for example by identifying any accounting software used and providing access to financial records stored in proprietary or cloud based systems
- i. providing financial information and assistance relevant to:
 - i. the calculation of a financial penalty,
 - ii. the fulsome calculation of the total benefits derived as a result of the relevant conduct, and
 - iii. information relevant to the corporation's ability to pay (if relevant)⁶, including
 - 1. sufficient primary material to allow investigating agencies to verify any calculations undertaken by the corporation
 - 2. methodologies used to make any calculations or valuations of assets
 - 3. evidence of the reinvestment of benefits of the misconduct including primary evidence of the sale and valuation of relevant assets, and
- j. providing access to relevant accounting experts or financial analysts engaged by the corporation.

29. A cooperating corporation may also provide relevant contextual information, including:

- a. providing industry knowledge, context and common practices
- b. identifying potential defences that are particular to the market or industry at issue
- c. providing information on other actors in the relevant market
- d. explaining any contract or business procurement processes
- e. in the context of foreign bribery investigations, identifying relevant foreign public officials
- f. notifying the investigating agency of any other government authorities (domestic or foreign, law enforcement or regulatory) by whom the corporation has been contacted or to whom it has reported
- g. relevant corporate policies designed to ensure compliance with laws, any relevant risk analysis or due diligence, audit reports and training records

⁶ See, eg, *The Queen v Note Printing Australia Limited & Anor* [2012] VSC 302 at [71]

- h. providing other information and material that may be relevant to an assessment of the corporate culture within the corporation or the part of the corporation in which the relevant activities take place, and
- i. as requested, providing information and material relevant to the remediation of the corporation.

Dealing with witnesses and individuals

- 30. Obtaining the accounts of relevant witnesses is critical in any investigation. A genuinely cooperating corporation will take steps to ensure that investigating agencies have the best chance of obtaining relevant evidence from individuals.
- 31. A genuinely cooperating corporation will also ensure that action taken by that corporation, including in relation to conducting its own internal investigation, does not prejudice current or future investigation by law enforcement agencies.
- 32. When dealing with witnesses and individuals, corporations may:
 - a. consult in a timely way with the investigating agency before interviewing potential witnesses or suspects, taking personnel or HR actions (such as termination of a contract), or taking any other steps that could reasonably be expected to alert witnesses or suspects to the existence of an investigation into alleged misconduct
 - b. identify potential witnesses, including third parties
 - c. allow investigating agencies a reasonable opportunity to take the “first account” from potential witnesses
 - d. refrain from tainting a potential witness's recollection (for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen)
 - e. make employees and (where possible) agents available for interviews with investigating agencies, including arranging for them to return to Australia if necessary
 - f. provide the last-known contact details of ex-employees, officers, agents and associates if requested
 - g. as appropriate, encourage employees, officers, agents and associates to cooperate in the investigation
 - h. assure employees, officers, agents and associates that they will not be subject to any reprisals should they cooperate in the investigation, and
 - i. waiving any contractual terms relating to confidentiality or non-disclosure of information insofar as it pertains to the matters under investigation.
- 33. It is recognised that some cooperating corporations may pay for independent legal representation for employees, officers, agents and associates. However, care should be taken to ensure that any advice provided is free from conflicts of interest between the corporation and individual. Persistent advice from lawyers paid for by the corporation that people identified as **witnesses** should not cooperate in an investigation or provide a witness statement may reflect on:

- a. how genuinely the corporation is taken to be cooperating, and
- b. the culture of compliance within the corporation.

Approach to LPP

34. Legal Professional Privilege (LPP) or client legal privilege is a fundamental right of all persons under Australian law.⁷ It provides “an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications”.⁸
35. There may be benefits for both a corporation and the investigating agency if a corporation chooses to waive LPP over relevant material. For example, waiving LPP over internal communications that disclose first accounts, records of internal interviews and investigation reports, is likely to lead to a more timely resolution of the investigation.
36. An assessment of a corporation’s level of cooperation will ultimately turn on whether all relevant facts have been disclosed in a timely manner and in a suitable form for use by investigating agencies. A decision to waive LPP would likely indicate a high degree of cooperation from a corporation.
37. However, it is no reflection on the level of cooperation if a corporation makes *genuine* claims of LPP over sources of information relevant to an investigation, as long as all relevant facts are ultimately disclosed.
38. Where LPP is claimed, the existence of a valid privilege claim must be properly established by the corporation. Where appropriate the investigating agency may seek to challenge the claim made.
39. The approach that a corporation takes to making and resolving claims of LPP may be relevant to an assessment of its cooperation. For example, a proactive and cooperative approach may involve the corporation:
 - a. agreeing to enter into a formal agreement regarding the treatment of LPP material at an early stage of the investigation
 - b. promptly providing a sufficiently detailed schedule of documents withheld on the basis of privilege, including the basis for asserting privilege
 - c. obtaining independent verification of LPP claims
 - d. agreeing to the appointment of an independent LPP expert to resolve any disputed claims to LPP, and
 - e. agreeing to the use of digital tools to:
 - i. exclude material not the subject of LPP claims from any data set, and
 - ii. facilitate a timely resolution of any outstanding LPP claims.

⁷ See, eg, *Baker v Campbell* (1983) 153 CLR 52; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646. However, the expectations listed under ‘Approach to LPP’ are not intended to apply to situations where LPP has been abrogated by statute.

⁸ *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646 at [12].

40. Conversely, a corporation is unlikely to be viewed as genuinely cooperating in the investigation if it:
- a. is not forthright in resolving claims of LPP
 - b. makes “blanket” claims of LPP over large data and document sets
 - c. structures its internal investigations in a way that facilitates improper claims of LPP over relevant material, or
 - d. claims LPP over material that advances a crime or fraud.⁹

This will particularly be the case if as a consequence the investigation is delayed and/or the investigating agency’s ability to identify relevant facts is hindered.

Cooperation in related investigations and proceedings

41. In some cases there may be parallel investigation by investigating or other regulatory agencies into conduct that is related to the underlying criminal offending and which may lead to separate proceedings being brought against a corporation or individuals.
42. For example, the AFP-led Criminal Assets Confiscation Taskforce may also investigate any benefits derived from possible offending and the Commissioner of the AFP in his capacity as a proceeds of crime authority may elect to commence action under the POC Act against a corporation or individuals. Similarly, ASIC may investigate possible breaches of corporations law and choose to commence regulatory proceedings, such as civil penalty proceedings, civil proceedings or administrative hearings, against a corporation or individuals.
43. In some cases, the underlying criminal offending may also be the subject of parallel investigation by foreign law enforcement agencies.
44. Cooperation in related investigations and proceedings is one of the key factors to be taken into account when assessing a corporation’s level of cooperation under this guidance.

⁹ See, eg: *R v Cox and Railton* (1884) 14 QBD 153 at [165]; *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141 at [145] and *Attorney-General (NT) v Kearney* (1958) 158 CLR 500 at page 511.