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Optimal investigation outcomes for self-reporting and cooperating corporations



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Table of contents

Introduction	2
Background	3
General principles	3
AFP Investigative Doctrine	4
International standards	4
Proceeds of Crime Act 2002 (Cth)	5
When a non-conviction based POCA resolution is likely to be the optimal investigation outcome against a corporation	6
Best practice cooperation	6
Public interest factors	7
Non-conviction based POCA resolution	9
Process and mechanics	9
Deed of Settlement and Minutes of Proposed Orders	10
Negotiations to be conducted in a timely manner	10
Transparency	10
Global resolutions	11

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Introduction

This Guideline explains and develops the principles associated with achieving an optimal investigation outcome for corporations that provide genuine, proactive and fulsome cooperation in an AFP investigation, including through self-reporting. This Guideline is primarily directed towards investigations involving allegations of foreign bribery and related offending, however, the principles involved may also be applied in other AFP investigations involving cooperating corporations.

In short, where a corporation has engaged in alleged criminal misconduct, but has:

1. genuinely cooperated¹ in an investigation, and
2. demonstrated that it would not be in the public interest² to refer the corporation for prosecution,

the investigation team in conjunction with the Commissioner of the AFP, in the Commissioner's capacity as a 'proceeds of crime authority', and subject to the Legal Services Directions, will likely determine that the optimal investigation outcome is a non-conviction based (civil) *Proceeds of Crime Act 2002* (Cth) resolution unless exceptional circumstances apply.

This Guideline should be read in conjunction with the AFP's [Corporate Cooperation Guidance \(PDF, 890KB\)](#).

¹ See discussion regarding best practice cooperation at paragraph 14 and following in this Guideline.

² See public interest factors identified at paragraph 19 and following in this Guideline.

Background

General principles

1. This Guideline recognises that:
 - a) incentivising companies to self-report, cooperate and remediate by offering alternative resolutions to investigations, other than a criminal prosecution, is consistent with the AFP's Investigation Doctrine, contemporary international standards and efficient and effective use of public resources
 - b) corporate crime, including foreign bribery, is often complex, difficult to detect and difficult to investigate when there is no cooperation on the part of the corporation/s involved
 - c) a corporation may choose to self-report suspected misconduct for many reasons, including to:
 - i. proactively identify and address wrongdoing within the corporation
 - ii. comply with directors' statutory and fiduciary duties to act in the best interests of the corporation
 - iii. limit corporate criminal liability
 - iv. maintain public reputation including reinforcing corporate citizenship and social licence
 - v. demonstrate a positive corporate culture including one which encourages "speaking up"
 - vi. demonstrate a cooperative intent with the AFP in investigating the conduct
 - vii. maximise the sentencing discount that will be available to the corporation in any relevant prosecution of the corporation, and/or
 - viii. be a good "corporate citizen"
 - d) self-reporting is a very significant first step in assisting law enforcement agencies to investigate, prosecute individuals responsible and remove the benefits derived from criminal offences in a timely manner
 - e) cooperation, which may include self-reporting, is a relevant public interest factor to take into account when determining what the optimal investigation outcome might be
 - f) prosecuting corporations that have genuinely cooperated in investigations, including through self-reporting, may deter other corporations from cooperating in the future
 - g) whether a company has taken adequate steps to remediate itself, address any harm caused by the offending and prevent further offending will also be relevant public interest factors
 - h) timely and appropriate resolution of matters under POCA can save significant investigative, prosecution, court and public resources
 - i) corporations who have committed offences should, in all cases, be required to relinquish any benefits derived from that conduct, and
 - j) it is important to publish information to assist corporations in understanding how non-trial resolutions may operate, and to provide confidence to the public that misconduct is being addressed.

AFP Investigative Doctrine

2. The *Public Governance, Performance and Accountability Act 2013* (Cth) requires the efficient, effective, economical and ethical use of Commonwealth resources. These concepts are reflected in the AFP's Investigation Doctrine which notes that persons responsible for investigations should ensure "that resources are efficiently and effectively utilised, and that for complex investigations, an integrated approach is adopted by the multiple teams involved in the investigation".
3. With that in mind, the AFP's Investigation Doctrine recognises that an "optimal" investigation outcome will balance the time and resources used on an investigation in proportion to the impact of the outcome (impact, cost and time balance). It provides that "[w]here possible, outcomes that prevent, disrupt or deter crime should be considered".
4. The Doctrine:
 - a) emphasises the importance of seeking optimal investigation outcomes
 - b) notes the need to ensure that investigations support the pursuit of the right outcomes, and
 - c) recognises that investigators should apply professional judgement and innovation in determining how to achieve the most suitable outcome.
5. In relation to prevention and disruption outcomes, the Doctrine notes that these may take many forms and should be lawfully appropriate to the circumstances.

International standards

6. International best practice and standards recognise that there is a need for law enforcement agencies:
 - a) to consider a range of treatment options, and
 - b) to incentivise companies to self-report misconduct and cooperate with law enforcement investigations.
7. In the foreign bribery context, that international best practice was recognised in the OECD's 2021 Recommendation. The 2021 Recommendation complements the OECD Anti-Bribery Convention by seeking to strengthen and support its implementation. Article XVII of the 2021 Recommendation recommended "that member countries consider using a variety of forms of resolutions when resolving criminal, administrative, and civil cases with both legal and natural persons, including non-trial resolutions".
8. Article XVIII sets out further recommendations to ensure that non-trial resolutions follow the principles of due process, transparency and accountability, including recommending that member countries:
 - a) "develop clear and transparent criteria regarding the use of non-trial resolutions including, where appropriate, voluntary self-disclosure of misconduct, cooperation with law enforcement authorities, and remediation measures" (art XVIII(ii))
 - b) "provide clear and publicly accessible information on the advantages that an alleged offender may obtain by entering into a non-trial resolution" (art XVIII(iii)), and
 - c) where appropriate, make public particular elements of any non-trial resolutions (art XVIII(iv)) including:

- i. the main facts and the natural and/or legal persons concerned
 - ii. the relevant considerations for resolving the case with a non-trial resolution
 - iii. the nature of sanctions imposed and the rationale for applying such sanctions, and
 - iv. remediation measures taken by the company, including the adoption or improvement of internal controls and anti-corruption compliance programmes.
9. Further, Article XV(ii) recommended that member countries consider incentivising and rewarding good corporate behaviour by taking into account mitigating factors in applying sanctions such as:
- a) fulsome, timely, and voluntary disclosures to law enforcement authorities of misconduct,
 - b) full cooperation with law enforcement authorities including the disclosure of all facts relevant to the wrongdoing at issue,
 - c) acceptance of responsibility, or
 - d) timely and appropriate remediation including the implementation or enhancement of an effective ethics and compliance programmes.

Proceeds of Crime Act 2002 (Cth)

10. The Commissioner is a proceeds of crime authority under POCA and is responsible for resolving proceeds of crime matters under POCA by litigated outcome, or otherwise. In practice, the Commissioner has delegated their powers and duties under POCA to the General Counsels Criminal Assets Litigation – South and North, who sit within the Criminal Assets Confiscation Taskforce (CACT).
11. Decisions in relation to the litigation of matters under POCA are taken independently of those responsible for the criminal investigation and in accordance with the Legal Services Directions.
12. There are a number of outcomes possible pursuant to POCA, some of which are based on a person being convicted of an offence.³ Other outcomes under POCA are non-conviction based, that is they represent a purely civil judgment being entered into against a civil defendant/respondent. For the purposes of this Guideline, the following non-conviction based resolutions are of particular relevance:
- a) Pecuniary Penalty Orders (see Part 2-4 of POCA)
 - b) Forfeiture Orders (see Part 2-2 of POCA), and
 - c) Unexplained Wealth Orders (see Part 2-6 of POCA).

³ Section 331 of POCA sets out the meaning of "convicted of an offence".

When a non-conviction based POCA resolution is likely to be the optimal investigation outcome against a corporation

13. Having regard to the General Principles outlined above, the Legal Services Directions, the AFP Investigations Doctrine, international standards and best practice, a non-conviction based POCA resolution can be considered an optimal investigation outcome against a corporation if:
- a) the Commissioner is satisfied there exists reasonable grounds to commence proceedings alleging criminal misconduct to the civil standard against the corporation,
 - b) the corporation has provided genuine best practice cooperation, and
 - c) the corporation has demonstrated it would be in the public interest to resolve the matter on a civil basis.

Best practice cooperation

14. The AFP's Corporate Cooperation Guidance sets out the standards against which the AFP will measure any cooperation.
15. If a corporation self-reports misconduct, or agrees to cooperate in an AFP investigation, it may be asked to enter into an Investigation Cooperation Agreement (or ICA) acknowledging the AFP's expectations as outlined in the Corporate Cooperation Guidance. The ICA may cover topics such as the duration and termination of the ICA, execution of search warrants (including search and seizure of electronic and hardcopy material), the timely and efficient management of Legal Professional Privilege (LPP) claims, interviews and statements, and communication and media.
16. As the Corporate Cooperation Guidance makes clear, once the AFP has determined that it will investigate possible misconduct, regardless of the level of cooperation from the corporation, the AFP is still required to undertake an independent investigation into any conduct that is the subject of a self-report.
17. Any such investigation will necessarily include making an independent assessment of the quality of the cooperation, the veracity of any self-report or self-disclosure and the reliability of any internal investigation conducted by the corporation or its representatives.
18. In making an assessment of the quality of the cooperation, the AFP will have particular regard to:
- a) whether the corporation has self-reported or self-disclosed the conduct, as well as the quality⁴ and timeliness of that report or disclosure (with the burden being on the corporation to demonstrate timeliness)
 - b) whether the corporation has proactively disclosed all facts and evidence available to it which may be relevant to the investigation(s), including:
 - i. the breadth and scope of the potential misconduct

⁴ In assessing the quality and value of a self-report, the AFP will have regard to the information it contains about the scope and detail of the offending in question and those involved in its design and implementation.

- ii. all persons (natural and legal) involved
- iii. the corporation's role in the misconduct, and
- iv. the benefits derived from, proceeds of crime, or instruments associated with, potential offending that have been derived by the corporation and others
- c) whether the corporation has responded to requests for information from law enforcement in a timely fashion and in a suitable format
- d) the corporation's approach to claims of LPP, including whether the corporation has voluntarily and in a timely manner waived LPP over relevant material, including internal investigation reports
- e) whether the corporation encouraged or required its directors, employees, agents and associates⁵ to participate in the investigation
- f) whether employees, officers, agents and associates of the corporation were prepared to cooperate in the investigation
- g) the extent to which the corporation has cooperated in relation to:
 - i. any parallel investigations conducted by foreign or domestic law enforcement agencies or regulators; and
 - ii. any prosecution or civil litigation commenced against other natural or legal persons in relation to the conduct,⁶ and
- h) the extent to which the corporation is prepared to provide future cooperation.

Public interest factors

19. In determining whether the optimal investigation outcome involves a non-conviction based POCA resolution only, in addition to matters relevant to cooperation, the AFP will have regard to the following public interest factors:
- a) the seriousness of the offending including:
 - i. 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 and at what level
 - ii. the duration and scope of the alleged offending
 - iii. the value and number of any bribes paid
 - iv. the value of any benefits derived
 - v. the harm caused by the alleged offending and the impact on any victims
 - b) the culture of integrity within the corporation, including:

⁵ See the definition of associate in s 70.1 of the *Criminal Code*.

⁶ See Corporate Cooperation Guidance for further detail.

- i. whether the corporation had adequate procedures in place to mitigate the risk of criminal conduct (including through specific anti-corruption policies and processes), and the extent to which there was a culture of compliance with that framework⁷
 - ii. detection methods applied by the corporation in relation to misconduct (eg, through the use of technology)
 - iii. risk assessment procedures
 - iv. the “tone from the top”, that is board and managerial-level dedication to the prevention of crime (particularly the category of crime under investigation) and other misconduct
 - v. the corporation’s policies and approach to the use and scrutiny of third parties, consultants, contractors and agents
 - vi. the corporation’s approach to mitigation of its criminal conduct, including risk-based due diligence
 - vii. the corporation’s implementation strategy for its prevention policies, including communication and training
 - viii. reporting obligations, responsibilities and protections, including whether information is provided to employees and other associates about reporting avenues and whether there are secure channels for anonymous reports by whistleblowers
 - ix. the corporation’s treatment of persons who report misconduct and/or want to cooperate in investigations
 - x. monitoring and review of compliance programs, including ensuring adequate resourcing
 - xi. whether the corporation has a history of misconduct, including any prior criminal, civil and regulatory enforcement action or prior warning by law enforcement or regulatory bodies
- c) whether the corporation has taken steps to remediate and avoid a recurrence of the alleged offending, for example, by dismissing culpable individuals and improving its culture of integrity particularly in the areas set out in paragraph b), above
- d) whether the corporation has taken steps to redress any harm caused by the offending, for example, by compensating victims or making contributions to relevant non-government organisations, public-private partnerships or civil society initiatives

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 AFP will consider relevant policies issued by Australian authorities, such as the Guidance on adequate procedures to prevent the commission of foreign bribery, and international best practice principles over the period of the offending, including those issued by OECD Working Group on Bribery member countries, and the International Standards Organisation (ISO). The AFP will make a pragmatic assessment. It recognises that corporations often operate across jurisdictions and there is a strong public interest in consistency and predictability of approach.

- e) whether the corporation has self-reported or disclosed related offending in another jurisdiction and complied with any penalties/orders imposed by that jurisdiction; and the nature of those penalties/orders
- f) whether the collateral consequences of any court-imposed penalty are likely to be disproportionate to the gravamen of the alleged offending by the corporation⁸
- g) whether the corporation continues to derive a benefit from the conduct, and
- h) any other relevant factor.

Non-conviction based POCA resolution

Process and mechanics

20. If the AFP's investigation team forms the view that the optimal investigation outcome is likely to be a (civil) non-conviction based POCA resolution, it will refer the matter to the CACT, for review and consideration by the Criminal Assets Litigation team. Prior to forming a view about the optimal investigation outcome, the AFP investigation team may ask the corporation to provide information addressing any public interest factors relevant to its decision.
21. If the Commissioner and/or the Commissioner's delegate agree with the investigation team that the optimal outcome against the corporation would be a non-conviction based POCA resolution, the AFP will invite the corporation to enter into "without prejudice" negotiations.
22. During any "without prejudice" negotiations it is expected that:
 - a) the CACT and the Criminal Assets Litigation team would be supported by the AFP's investigation team
 - b) the AFP would outline the alleged offending that would form the basis of any non-conviction based POCA resolution
 - c) the corporation would have an opportunity to respond to the allegations
 - d) the corporation would provide information and evidence regarding the value of:
 - i. any benefit derived from the alleged offending
 - ii. any instruments of crime associated with the offending, and/or
 - iii. any unexplained wealth
 - e) the AFP would assess and test any valuation evidence presented to it by the corporation
 - f) the corporation would provide any further material reasonably requested by the AFP to assist its assessment of the valuation evidence
 - g) the corporation would provide any further material it considered to be relevant to public interest, and

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).

- h) formal offers may be exchanged and negotiated between the parties.
- 23. To the extent possible, the above steps will be achieved as efficiently as possible including through face to face without prejudice meetings.
- 24. The ultimate goal of the without prejudice negotiations would be to try to reach agreement on both a Deed of Settlement and formal Consent Orders to be made by a Court pursuant to POCA.

Deed of Settlement and Minutes of Proposed Orders

- 25. If the proposed terms of a resolution can be agreed between the corporation and the Commissioner, a formal Deed of Settlement would be entered into between the parties.
- 26. That Deed of Settlement would include Minutes of Proposed Consent Orders under POCA to be filed with a Court with relevant jurisdiction.
- 27. The resolution between the Commissioner and the corporation would only be finalised once a Court had made any final orders. Pursuant to POCA, Courts retain discretion in relation to any such orders.
- 28. Terms that may be included in a Deed of Settlement include:
 - a) The payment of costs associated with the investigation, negotiations and any court processes
 - b) Ongoing cooperation by the corporation in respect of any parallel prosecutions or investigations against relevant individuals
 - c) Warranties that information provided by the corporation is not misleading and/or is true and correct, and/or
 - d) A payment being made to a relevant prevention organisation or civil society entity.

Negotiations to be conducted in a timely manner

- 29. In order to be considered as an optimal investigation outcome, without prejudice negotiations in respect of a non-conviction based POCA resolution will need to be conducted and concluded in a timely manner.
- 30. Should the AFP form the view that the corporation was not genuinely seeking to resolve the matter then it may terminate the negotiations and consider whether another investigation outcome would be preferable.
- 31. The AFP will aim to conclude negotiations within 12 months from the date on which it has invited the corporation to enter into without prejudice negotiations.

Transparency

- 32. Courts are the final arbiters of non-conviction based POCA outcomes. That is, a Court with relevant jurisdiction is given the discretion to make orders by consent and cannot be compelled to do so. The appropriateness of such orders will be a factor in the Court exercising its discretion to make any proposed consent orders. Unless a court was persuaded that it was necessary to make non-publication orders, any court orders giving effect to a resolution under

this Guideline would be publicly available subject to the processes of the Court. Consistent with international standards, best practice and the AFP's obligations under the Legal Services Directions, the AFP's starting position is that where appropriate, non-trial resolutions should be made public.

33. To further promote transparency, enhance public trust, and ensure accountability in the resolution of corporate misconduct, the AFP would also issue a public statement following any non-conviction based POCA resolution with a corporation.
34. To the extent possible, any such public statement would specify:
 - a) The orders made by the Court;
 - b) The cooperation provided by the corporation; and
 - c) Any other public interest factors that were taken into account.

Global resolutions

35. Some cases involving self-reporting and/or cooperating corporations can result in parallel investigations being conducted in multiple jurisdictions. For example, a corporation may self-report potential misconduct in more than one country. In those situations, the AFP will work closely with its international partners⁹ throughout the investigation, including for the purpose of de-conflicting in relation to legal and natural person suspects. It should be noted, however, that related corporate entities (eg, subsidiaries) may be liable for the same underlying conduct.
36. If the corporation is genuinely cooperating, the AFP will also seek to work with its international and domestic partners to try and achieve a global resolution with the corporation, as appropriate. Some additional non-trial resolution options may be available in those circumstances. In circumstances where the corporation agrees to enter into a non-trial resolution in a foreign jurisdiction there are mechanisms in place that allow for relinquished benefits to be provided to Australia. For example, s 296(1)(gb) of POCA allows for money (other than a penalty) to be paid into the Confiscated Asset Account by a person under, or in connection with, a foreign deferred prosecution agreement.
37. Non-trial resolution options vary in every country. Accordingly, the appropriate format of a non-trial resolution in the context of a global resolution will need to be determined on a case-by-case basis.

⁹ For example, the AFP is a member of the International Foreign Bribery Taskforce alongside the United States' Federal Bureau of Investigation, the United Kingdom Serious Fraud Office, the United Kingdom's National Crime Agency, the Royal Canadian Mounted Police, New Zealand Police and the New Zealand Serious Fraud Office.

Definitions / Short forms

Term	Definition
2021 Recommendation	OECD 2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions
AFP	Australian Federal Police
CACT	Criminal Assets Confiscation Taskforce
Commissioner	Commissioner of the AFP and their delegate/s.
Corporation	Includes a reference to a related body corporate of the corporation (see sections 57A and 50 of the <i>Corporations Act 2001</i> (Cth)).
Crimes Act	<i>Crimes Act 1914</i> (Cth)
Deed of Settlement	A formal agreement entered into between the Commissioner of the AFP and the corporation resolving the POCA matters pertaining to the conduct under investigation.
Doctrine	AFP Investigation Doctrine
ICA	Investigation Cooperation Agreement
Legal Services Directions	<i>Legal Services Directions 2025</i> (Cth)
OECD	Organisation for Economic Cooperation and Development
OECD Anti-Bribery Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Anti-Bribery Convention
Non-Trial Resolution or NTR	Any agreement between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits of the allegations either before or after indictment with sanctions and/or confiscation, irrespective of whether it is a conviction (e.g. plea deals) or a non-conviction mechanism (e.g. non-prosecution or deferred prosecution agreements). Non-trial resolutions refer to a wide range of mechanisms available to resolve cases involving foreign bribery or related economic offences without a full trial on the merits. These resolutions can also be used in administrative or civil proceedings as part of the enforcement of the foreign bribery laws in the Parties to the Convention, in particular with legal persons. See: Organisation for Economic Co-operation and Development Governance .
POCA	<i>Proceeds of Crime Act 2002</i> (Cth)
Self-report	A report by a corporation to the AFP 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. If a corporation self-reports to another Commonwealth authority, Commonwealth Office Holder, or a State/Territory authority, the AFP may elect to treat that report as a self-report to the AFP.