

NEW AUSTRALIAN GUIDELINES FOR SELF-REPORTING FOREIGN BRIBERY

07 February 2018 | Australia

Legal Briefings - By **Jacqueline Wootton**, **Tania Gray** and **Christine Wong**

The Commonwealth Department of Public Prosecutions (**CDPP**) and the Australian Federal Police (**AFP**) have issued a set of joint Guidelines dealing with self-reporting of foreign bribery and related offending by companies.

The Guidelines operate within the broader framework of the *Prosecution Policy of the Commonwealth* (**Prosecution Policy**). They provide specific guidance about how the 'public interest' test contained within the broader framework applies where a company self-reports conduct related to a suspected breach of the foreign bribery offences in Division 70 of the *Criminal Code 1995* (Cth) (or related offences like money laundering and false accounting).

The Guidelines have been supplemented from the exposure draft released in August 2016, and will be reviewed in 2 years or following the introduction of a Deferred Prosecution Agreement scheme (see our briefing on this proposal [here](#)).

The full Guidelines are available [here](#). Our summary of the key implications, and effect of a decision to self-report on any AFP investigation, and decisions on sentencing and prosecution are set out below.

WHAT ARE THE KEY IMPLICATIONS?

There is presently no obligation on companies to self-report suspected breaches of the foreign bribery offences under Australian law. The Guidelines clarify how the CDPP will consider a voluntary self-report by a company in deciding whether or not to prosecute (or how the Court may consider that in any sentencing).

Together with other potential reforms that have been the subject of our earlier updates (see [here](#) and [here](#)), the Guidelines are intended by authorities to encourage companies to consider self-reporting, and to facilitate enforcement of foreign bribery offences in Australia.

Companies becoming aware of potential foreign bribery issues should have regard to, and seek advice in relation to, the Guidelines in considering their response to these foreign bribery issues.

THE DECISION TO SELF REPORT

The Guidelines apply to a 'self-report' by a company to the AFP of suspected criminal conduct, prior to the AFP receiving a referral or commencing an investigation in respect of the relevant conduct. A company may self-report conduct by its officers and/or employees without admitting criminal responsibility on its part.

REASONS TO SELF REPORT

A decision to self-report triggers a range of consequences, including potential implications across jurisdictions and ongoing implications for the company and individuals. Although the Guidelines point to various reasons to self-report, such a decision should only be considered taking all those wider considerations into account.

The Guidelines note that self-reporting is a relevant public interest factor that the CDPP can take into account when determining whether or not a company should be prosecuted for conduct which it has self-reported. If a company self-reports conduct and is later prosecuted, the company's cooperation with the law enforcement process is a mitigating factor which a court must take into account during sentencing.

The Guidelines also identify a range of additional reasons why a company may choose to self-report:

- a. proactively identify and address wrongdoing within the company
- b. comply with directors' statutory and fiduciary duties to act in the best interests of the company
- 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 company in any relevant prosecution of the company

g. be a good 'corporate citizen'

WHAT HAPPENS AFTER A COMPANY SELF-REPORTS

AFP INVESTIGATION

The Guidelines suggest that the AFP will conduct a full investigation into any information and conduct arising out of a self-report. This involves an independent assessment of the quality and reliability of any internal investigation and report provided by the self-reporting company. This may involve a 2 stage process, with the AFP first undertaking an 'evaluation' through the Fraud & Anti-corruption Centre prior to proceeding to full 'investigation'.

Companies are expected to provide full and frank disclosure to the AFP about the relevant conduct and the company's role in its self-report. This includes:

- a. all relevant documents, including reports from any investigation carried out by the company or their legal representatives (excluding documents subject to a valid claim for privilege); and
- b. all potential witnesses, including for the purpose of providing witness statements and (if necessary) giving evidence in court. This is expressly subject to a company's legal powers to require co-operation by employees and / or agents and an individual's right not to incriminate themselves.

The AFP may also request that the company enter into an Investigation Cooperation Agreement that documents the AFP's expectations for cooperation.

While the AFP and CDPP will treat the self-reporting as confidential, some disclosure may occur in circumstances where the AFP works collaboratively with domestic and international law enforcement agencies. Companies will need to consider the cross-border implications of any self-report, and whether reporting to foreign authorities is necessary or appropriate, as part of their overall decision whether to make a self-report in Australia.

CDPP'S DECISION REGARDING PROSECUTION

In deciding whether or not to commence a prosecution, the Prosecution Policy requires the CDPP to consider whether:

- a. there are reasonable prospects of obtaining a conviction on the available admissible evidence; and
- b. a prosecution is in the public interest.

The Guidelines clarify that a company's decision to self-report (as well as the quality and timeliness of the self-report) is a significant factor when considering whether a prosecution is in the public interest. Other relevant factors include:

- the extent of the company's co-operation with any investigation of the AFP in relation to the conduct, and any prosecution commenced against others in relation to the conduct
- whether there is a history of similar misconduct
- whether there was an appropriate governance framework in place to mitigate the risk of bribery and the extent to which there was a culture of compliance with that framework
- the extent to which members of the board or other high managerial agents were involved
- whether steps have been taken to avoid recurrence and to redress any harm caused

SENTENCING

The Guidelines also outline how a self-report may affect a matter should authorities decide to prosecute and a company is willing to consider making an early guilty plea.

Self-reporting and co-operation with an AFP investigation are relevant to sentencing. Section 16A of the *Crimes Act 1914* (Cth) establishes factors which must be taken into account by a court during sentencing. These include the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences.

Significant discounts may be offered where that occurs. By way of example, in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876, the defendant received a 40% discount in recognition of their past cooperation, assistance, guilty plea, contribution and remorse, and an additional 10% discount for future cooperation.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**JACQUELINE
WOOTTON**
PARTNER, BRISBANE

+61 7 3258 6569 / +61 3 9288
1022
jacqueline.wootton@hsf.com



TANIA GRAY
PARTNER, SYDNEY

+61 2 9322 4733
Tania.Gray@hsf.com



**GRANT
MARJORIBANKS**
PARTNER, SYDNEY

+61 2 9225 5517
Grant.Marjoribanks@hsf.com



**ANNA
SUTHERLAND**
MANAGING PARTNER,
DISPUTES, AUSTRALIA

+61 2 9225 5280
Anna.Sutherland@hsf.com



**ELIZABETH
MACKNAY**
PARTNER, PERTH

+61 8 9211 7806
Elizabeth.Macknay@hsf.com



LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND
MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2021