

FRAUD & WHITE COLLAR CRIME

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HOW COOPERATION IN AUSTRALIAN CORPORATE CRIME INVESTIGATIONS MAY LEAD TO GREATER LENIENCY

By Dennis Miralis

When a corporation is being investigated for corporate crime, the Commonwealth Director of Public Prosecutions (CDPP) will consider the level of cooperation provided. If the company *genuinely and proactively* cooperates with investigating agencies, there is an increased likelihood that they will be treated more leniently. This article explores the key considerations outlined in the AFP's Corporate Cooperation Guidance.

What is genuine and proactive cooperation?

Genuine and proactive cooperation means assisting investigating agencies in a way that goes above and beyond compliance with legal obligations. Examples include:

- Advising relevant agencies as soon as practicable after potential offending is discovered.
- Providing full and frank disclosure about the relevant conduct and the corporation's role.
- Advising investigating agencies of relevant information and evidence without waiting for it to be formally requested.
- Identifying suspected wrong-doing and criminal conduct together with the individuals responsible, regardless of their seniority or position in the corporation.
- Identifying and preserving available evidentiary material including evidence located overseas.
- Providing evidentiary material to investigating agencies promptly and in an evidentially sound format.
- Identifying and making available relevant witnesses.
- Encouraging employees, officers, agents and associates to cooperate in the investigation.
- Giving evidence in any related proceedings.
- Waiving Legal Professional Privilege over relevant materials to expedite the investigation.
- Cooperation in parallel investigations into conduct related to the underlying offending.

It is important to recognise that even the most proactive and genuine cooperation does not guarantee any particular outcome.

Self-reporting and internal investigations

Self-reporting possible offending is a significant first step in adopting a genuine and proactive approach to cooperation. In some circumstances, a corporation may wish to undertake its own internal investigation before self-reporting suspected misconduct.

In such instances, the corporation should ensure that it does not prejudice potential investigations by law enforcement agencies, for example by tainting a potential witness's recollection of events. Corporations should self-report as soon as there is a reasonable basis to suspect offending. Early and timely engagement with investigating agencies will be seen as a positive indication of providing genuine and proactive cooperation.

Preserving and providing evidence

Genuine and proactive cooperation involves identifying, preserving and providing available evidentiary material (both in digital and hard copy format), including evidence held overseas, to investigating agencies.

A corporation that provides evidence proactively, without waiting for a formal request from investigating agencies, will be assessed as demonstrating a high degree of cooperation. It is also important to ensure that evidentiary integrity is preserved, for example by providing emails and digital evidence in native format.

Materials should be provided in a useful, structured way, for example by ensuring that key materials are sorted by individual or specific issue. The organisation should also provide a thorough document to the investigating agency that sets out the methodology used to identify, review and collect data and evidence.



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Key takeaways

If a corporation is being investigated for misconduct, their level of cooperation with investigating agencies will be considered by prosecutorial authorities.

Genuine and proactive cooperation may result in the corporation being treated more leniently, however this is not guaranteed.



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