

Saying No to Bribery and Corruption – A Guide for New Zealand Businesses

FOREWORD

Bribery and corruption cause serious social, economic, and political problems and New Zealand is committed to playing its part in the global fight against this damaging conduct.

This guide is intended to provide New Zealand businesses of all sizes with useful information on a range of topics related to anti-corruption compliance. This includes details of relevant domestic and foreign corruption laws; international anti-corruption agreements; and guiding principles on how to establish, implement, and maintain effective anti-corruption compliance procedures. It is part of a suite of resources published by the Ministry of Justice, which includes:

- Facilitation Payments and New Zealand's Anti-Bribery Laws
- How to create a fraud and corruption policy.

The Ministry produced this guide in consultation with the Serious Fraud Office (SFO) and other government agencies, with valuable input from experts in the private sector and civil society. We hope that it will be a useful guide for New Zealand businesses, individuals and others interested in keeping New Zealand corruption-free.

INTRODUCTION

Corruption is a global problem that damages businesses, markets, democratic institutions, and the social fabric of society. Widespread corruption undermines the rule of law and erodes justice, driving other domestic and transnational crimes such as trafficking in people, weapons and drugs.¹

Corruption is also bad for business. It distorts prices, reduces competitiveness, introduces uncertainty and risk into the market, and erodes fair and transparent business practices. When it involves the public sector, it can divert resources away from key priorities such as education, health, and infrastructure, which in turn impacts economic and social development.

Bribery and corruption in connection with international trade is now the focus of a number of international conventions, underlining the growing recognition that corruption is a substantial barrier for economic and social development. The past two decades have seen the development of the [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (OECD Anti-Bribery Convention), the [United Nations Convention Against Corruption](#) (UNCAC) and the Asia Pacific Economic Cooperation's (APEC) [Santiago Commitment to Fight Corruption and Ensure Transparency](#). New Zealand is a signatory to each of these and has also recently strengthened its domestic anti-corruption frameworks by passing the Organised Crime and Anti-corruption Legislation Bill (the Organised Crime Bill).

New Zealand has robust anti-corruption laws and the SFO is committed to proactively detecting, investigating and prosecuting both public and private sector corruption. However, the private sector also has an important role to play in solving this global problem.

New Zealand businesses trade on our hard-earned reputation as one of the least corrupt countries in the world. However, we cannot afford to become complacent and businesses should continually work to prevent and address this threat through a top-level commitment to a culture of zero tolerance.

Such commitment begins with the implementation of strong compliance systems. Effective internal controls, ethics, and compliance programmes, including a clearly articulated anti-corruption policy are

¹ Maryse Tremblay & Camille Karbassi, *Corruption and Human Trafficking 4*, Transparency International, Working Paper No. 3, 2011

essential to minimising or preventing the costs, legal consequences and reputational damage associated with corruption or the perception of corruption within your organisation.

The information in this guide reflects international best practice and applies equally to small, medium and large scale organisations. The corruption risks facing an organisation vary greatly depending on its size, type, legal structure, and location and sector of operation. Therefore, a key theme in this guide is that businesses must implement anti-corruption procedures that are proportionate to the risks they face.

New Zealand's business landscape is predominantly made up of small to medium-sized commercial organisations with domestic operations and limited resources. Anti-corruption compliance is equally important and beneficial for these types of businesses, and need not be cumbersome and expensive. Combating bribery and corruption should be a priority for any organisation that cares about its future.

While no compliance programme can completely remove the risk of corruption, following the principles set out in this guide will go a long way to helping your business implement effective and proportionate procedures to prevent, detect and appropriately respond to corruption.

DEFINITIONS AND EXAMPLES OF BRIBERY AND CORRUPTION

There is no legally binding definition of corruption in New Zealand. However, the SFO relies on Transparency International's definition of corruption as *"the abuse of entrusted power for private gain."* Corruption often involves bribery, which generally speaking, is the giving or receiving, whether directly or indirectly, of something of value to influence a transaction.

Bribery and corruption can take many forms including:

- Payment, receipt or solicitation of bribes or secret commissions (kickbacks)
- Manipulation of tendering or procurement processes
- Undisclosed conflicts of interest
- Wilful blindness in respect of the activities of agents overseas. This is particularly relevant to organisations with a presence in the U.K and U.S (see below section on 'overseas anti-corruption legislation')
- Failure to put in place adequate systems and controls to mitigate the risk of bribery (again, particularly relevant to organisations with a presence in the U.K and U.S)
- Extravagant corporate hospitality or gifts
- Undisclosed giving or receiving of gifts

Practical examples of bribery and corruption

- Offering a New Zealand customs officer a payment for approving the import of a product sold by your company.
- A company in New Zealand paying a public official in another country a sum of money to secure clearance to launch a product in that country.
- A foreign agent of New Zealand company bribes the procurement manager of a state owned manufacturing plant to secure an order for goods from the New Zealand company.

RELEVANT ANTI-CORRUPTION LEGISLATION

New Zealand businesses, particularly those operating abroad, need to be aware of the overlapping laws that may apply to their operations. In addition to New Zealand legislation, businesses should familiarise themselves with the laws of the local jurisdiction(s) in which they operate, and also any applicable 'long-arm' laws, principally those of the [United States Foreign Corrupt Practices Act 1977](#) (U.S FCPA) and the [United Kingdom Bribery Act 2010](#) (U.K Bribery Act).

NEW ZEALAND LEGISLATION

Scope and Jurisdiction

New Zealand criminalises bribery and corruption in both the public and private sectors, challenging traditional conceptions that corruption is purely a public sector issue.

Importantly, all of New Zealand's bribery and corruption offences apply to individuals and legal persons. This means that an act of bribery or corruption committed by an employee, agent or other intermediary on behalf of an organisation may result in a prosecution against the individual in their personal capacity, as well as a prosecution against the organisation. This is important, as seeking accountability from individuals who perpetrate illegal or unethical acts is one of the most effective ways to tackle corporate wrongdoing.²

Further, all bribery and corruption offences apply both domestically *and* extraterritorially. This means that the SFO can prosecute New Zealand citizens, residents, and entities incorporated in New Zealand for acts of bribery and corruption that occur wholly outside of New Zealand, including when the bribe is paid through a foreign intermediary.

Private sector corruption – Secret Commissions Act 1910

The Secret Commissions Act contains bribery and corruption style offences relevant to the private sector (though also relevant to public sector employees and contractors). The key corruption offence criminalises the bribing of an agent (for example, someone who works on behalf of a principal). Generally speaking, it is an offence to corruptly give, agree, or offer to give, an agent a gift or other consideration so as to induce or reward an agent's actions with respect to their principal's (for example, client's or employer's) affairs or business.³

Other Secret Commissions Act offences include:⁴

- failure of an agent to disclose to their principal a financial interest in a contract
- provision of a false receipt to an agent with intent to deceive a principal
- receipt of a secret reward for advising someone to enter a contract.

The Organised Crime Bill increased the maximum penalties for all Secret Commissions Act offences to 7 years' imprisonment or an unlimited fine for individuals. Corporations are also liable to an unlimited fine.

Public Sector Corruption – Crimes Act 1961

Generally speaking, bribery under the Crimes Act occurs when a person corruptly gives, receives, accepts or obtains a bribe (whether directly or indirectly) for themselves or any other person, with intent to influence that person to act or refrain from acting in their official capacity. A bribe may involve money, gifts, or any other benefit. For example:

- **Money** – cash, vouchers, allowances
- **Payments of expenses** - school fees, medical bills
- **Favours** – offers of housing, employment
- **Preferential treatment** – discounts, rebates, refunds
- **Corporate hospitality** – gifts, entertainment, travel

(a) Domestic bribery and corruption

[Sections 100-105 of the Crimes Act](#) criminalise bribery and corruption of New Zealand judges, government ministers, members of Parliament, police officers and other public officials. It is also an offence to corruptly use official information or to trade in influence (for example, accept a bribe in return for using one's

²See 2015 memo from the U.S Department on Justice on '[Individual Accountability for Corporate Wrongdoing](#)'.

³Section 3 of the Secret Commissions Act 1910.

⁴Sections 5, 6 & 8 of the Secret Commissions Act 1910 respectively.

influence over an official). Penalties for individuals convicted of bribery and corruption of domestic public officials range from a maximum of seven to 14 years' imprisonment or an unlimited fine for individuals and corporations.

(b) Foreign bribery

Sections 105C and 105D of the Crimes Act criminalise bribery of foreign public officials in the course of an international business transaction (which includes the provision of international aid). The offence occurs where any person corruptly gives, offers, or agrees to give a bribe to a person with intent to influence an act or omission by the official (whether or not within the scope of the official's authority). Businesses must be wary that this offence captures bribes paid by New Zealand persons operating anywhere in the world, including the actions of intermediaries acting on behalf of a New Zealand business (*see section (iii) below on 'corporate liability for foreign bribery'*).

(i) Increased penalties

Acknowledging the seriousness of foreign bribery, the Organised Crime Bill amended the maximum penalties for this offence to a term of imprisonment not exceeding seven years *and/or* a fine not exceeding the greater of:

- a. \$5 million; or
- b. if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention.

The introduction of a commercial gain formula is a positive change intended to deter both individuals and businesses from making a commercial decision to pay bribes. Further, the new penalties will ensure that individuals convicted of foreign bribery may now incur substantial fines *in addition* to a term of imprisonment (previously a fine could only be imposed as an alternative to imprisonment).

(ii) Routine government actions or facilitation payments

New Zealand's foreign bribery offence does not apply to acts committed for the sole or primary purpose of ensuring or expediting the performance of a 'routine government action', provided the value of the benefit is 'small'.⁵ Such payments are more commonly referred to as 'facilitation' or 'grease' payments.

To fall within the exception, the payment must be for an act within the scope of the official's ordinary duties and must not involve a decision about awarding new business, continuing existing business, or the terms of new or existing business. The Organised Crime Bill narrowed the exception even further to ensure it will not cover instances where the payment provides either an undue material benefit or disadvantage, and introduces a new requirement for companies to record these payments in their accounts.⁶

Facilitation payments carry substantial risks, and as a matter of best practice, New Zealand businesses are encouraged to develop internal procedures and controls that prohibit their use. More detailed guidance on facilitation payments is available in a separate guide prepared by the Ministry of Justice – 'Facilitation Payments and New Zealand's Anti-Bribery Laws.'

(iii) Corporate liability for foreign bribery

Following amendments in the Organised Crime Bill, New Zealand's foreign bribery offence now specifies the circumstances under which a organisation can be held liable for acts of foreign bribery committed by an employee (which includes agents, directors, and officers of

⁵Section 105C(3) Crimes Act 1961.

⁶See [section DB 45 Income Tax Act 2007](#).

⁷See section 105C(2A) Crimes Act 1961.

that organisation).⁷ We reiterate that this definition is broad enough to capture the actions of foreign intermediaries, even where they take place entirely outside of New Zealand. Therefore, your business could find itself liable for the actions of those who work for, but are not directly employed by you.

The necessary elements for an organisation to be held liable for foreign bribery are set out below:

- the offence is committed by an employee of the organisation, and
- the employee was acting within the scope of their authority, and
- the offence was committed at least in part with the intent to benefit the organisation, and
- the organisation failed to take reasonable steps to prevent the offence.

No anti-corruption programme is capable of completely eliminating corrupt conduct. Further, there will always be a risk that a well-run business is afflicted by the one-off actions of a rogue employee. To address this, the new provision provides that organisations that take 'reasonable steps' to prevent foreign bribery by their employees will not be held liable under the Crimes Act.

Whether or not an organisation took 'reasonable steps' to prevent the offence is a question for the courts based on the individual circumstances of each case. However, the extent to which an organisation has effective anti-corruption compliance procedures in place to prevent bribery and corruption will be a relevant consideration. To that end, incorporating the '*guiding principles for effective anti-corruption compliance procedures*' discussed in this guide into your organisation's compliance programme, will go some way towards compliance with the new corporate liability provision (notwithstanding contextual elements).

The new corporate liability provision provides a presumption that an organisation did not take reasonable steps to prevent the offence. However, the moment a business produces evidence to rebut this presumption, the onus falls on the prosecution to prove beyond reasonable doubt that the organisation did not take reasonable steps to prevent the bribe from taking place. An organisation's liability is dependent on an employee engaging in conduct that amounts to foreign bribery, but it is irrelevant whether an individual has been convicted or even charged with this offence.

While the new corporate liability provision relates specifically to the offence of foreign bribery, the same broad principles could be applied to investigations and prosecutions against organisations for domestic bribery and corruption offences.

Overseas anti-corruption legislation

With growing awareness of the threat posed by corruption, more and more developing countries are adopting anti-corruption laws in line with those required under the UN and OECD Conventions. It is therefore imperative that New Zealand businesses operating abroad understand the local anti-corruption laws in any country in which they operate, and be aware that they may be more restrictive than our own. Additionally, businesses should familiarise themselves with the U.K Bribery Act and the U.S FCPA, both of which have extensive jurisdictional reach.

The FCPA can apply to anyone that does business, even indirectly, within the jurisdiction of the U.S. This includes routing emails, texts or phone calls through a U.S server, or sending a wire transfer through a U.S. banking system.⁸ Therefore, a New Zealand business or individual caught, for example, using the U.S banking system to make an illegal payment (such as a bribe) could face substantial civil and criminal penalties under the FCPA. The U.S is recognised as having the most effective enforcement regime in the world and regularly prosecutes commercial organisations for their activities outside of the U.S.

⁸See para 78dd-3(f)(5) of the U.S FCPA (defining "interstate commerce").

While the extensive jurisdiction of the FCPA has long been controversial, the U.K Bribery Act also has broad reach whereby businesses may be prosecuted for bribery if they carry on a business or part of a business in the U.K. This is the case regardless of where the bribe takes place and irrespective of where the company is formed or incorporated.⁹

If your business operates abroad, you should comply with the most restrictive law applicable, whether it is a local or foreign law. The Ministry of Justice also recommends you seek independent advice as to the operation of local laws, and the specific requirements of the FCPA and U.K Bribery Act (if relevant to your business operations).

INTERNATIONAL SETTING: GLOBAL ANTI-CORRUPTION INSTRUMENTS

Over the past 2 decades, Governments have made significant progress in addressing the risk posed by corruption through a commitment to implement and undergo review for compliance with the measures contained in various international anti-corruption instruments. Some of these are outlined below.

OECD Anti-Bribery Convention

New Zealand signed the OECD Anti-Bribery Convention in 1997 and ratified it in 2001. The Convention requires countries to criminalise the offence of foreign bribery (i.e. where an individual or business from New Zealand pays a bribe to a foreign public official in the conduct of international business).

As of 10 December 2015, there are 41 parties to the Convention (34 OECD member countries (including New Zealand) and seven non-OECD member countries (Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa). All of these parties are members of the OECD Working Group on Bribery which is responsible for monitoring the implementation of the Convention through a mutual evaluation process.

To date, the evaluation process has taken place in three phases focussing on implementation, effectiveness and enforcement respectively. All of New Zealand's previous reports are available online via the [OECD's website](#). New Zealand underwent its Phase 3 review in 2013 and the Working Group on Bribery identified a range of areas for improvement. Legislative amendments contained in the Organised Crime Bill responded in part to these recommendations, as does this guide which is intended raise awareness bribery and corruption generally.

United Nations Convention Against Corruption

New Zealand signed UNCAC in 2003 and ratified it in November 2015. UNCAC is wider in scope than the OECD Ant-Bribery Convention and is the first global instrument to address corruption in both the public and private spheres. UNCAC requires countries to criminalise a broad range of corrupt conduct, including both domestic and foreign bribery and related offences such as obstruction of justice, embezzlement of public funds and money laundering.

UNCAC also obliges countries to adopt coordinated preventative measures such as transparent procurement processes, codes of conduct for public officials, enhanced access to public information, effective auditing and accounting standards for the private sector and active engagement with civil society.

Implementation of UNCAC is also monitored through a peer review mechanism. New Zealand will likely undergo its first review under the Convention in 2016.

APEC Code of Conduct

In 2004 Leaders of the Asia Pacific Economic Cooperation (APEC) endorsed the [Santiago Commitment to Fight Corruption and Ensure Transparency](#) and the [APEC Course of Action on Fighting Corruption and Ensuring Transparency](#).

⁹Section 7 of the U.K Bribery Act 2010.

New Zealand was a founding member of APEC which seeks to support sustainable growth and prosperity in the Asia Pacific Region.

Among other things, the Santiago Commitment and Course of Action require member states to ratify and implement UNCAC, assist member countries to prevent corruption and strengthen transparency in the public sector and across government, target private sector corruption by encouraging integrity in business and improving accounting standards, and work with civil society, NGOs, the private sector and international organisations to fight corruption and strengthen integrity in the Asia Pacific Region.

In 2014 the *APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET)* was established. The goal of ACT-NET is to act as an informal network for sharing information and exchanging best practices and techniques among anti-corruption and law enforcement authorities in the Asia-Pacific region. The first ACT-NET meeting was held in Beijing on 15 August 2014 where New Zealand was represented by the SFO.

GUIDING PRINCIPLES FOR EFFECTIVE ANTI-CORRUPTION COMPLIANCE PROCEDURES

Robust anti-corruption compliance procedures are essential for preventing, detecting and responding to corruption and ensuring your business is not held liable where employees, agents or other intermediaries do engage in corrupt conduct.

The following guiding principles are intended to encourage and assist New Zealand businesses to establish, implement, monitor, and improve their anti-corruption compliance procedures. These are not legally binding and may stand on their own or be incorporated as part of an organisation's wider compliance programme.

As outlined earlier, the foreign bribery offence in the Crimes Act now provides that businesses that take have taken 'reasonable steps' to prevent the offence will not be held liable. However, similar considerations will apply to all forms of corruption. Businesses are therefore encouraged to implement anti-corruption procedures of general application that apply broadly to all relevant anti-corruption laws.

Whether or not a business has taken reasonable steps to prevent corruption is a question for the courts based on the individual circumstances of each case. Therefore, a departure from the principles detailed in this guide will not necessarily indicate a failure to take reasonable steps. However, the guiding principles are intended to reflect international best practice and businesses are strongly encouraged to consider the extent to which each of the principles is relevant to its operations. You will need to assess this for your organisation.

(i) Proportionality

- **Effective anti-corruption compliance procedures must be proportionate to the individual risks faced by a business**

When it comes to any type of compliance, proportionality is essential. It is common-sense that a small or medium-sized enterprise with domestic operations will require different anti-corruption compliance procedures to that of a large multinational organisation operating in a jurisdiction with high levels of corruption. Proportionality is an overarching theme that features prominently throughout the seven other guiding principles.

To that end, each principle is flexible and should be adapted to suit your business's individual circumstances. This requires a risk-based approach under which the compliance procedures adopted are proportionate to the corruption risks facing your organisation. These will vary greatly depending on its size, type, legal structure, sector and location of operation.

The Ministry of Justice is aware that many New Zealand businesses are small, domestic operations and it is

not our intention that anti-corruption compliance be unduly burdensome or restrictive on such organisations, particularly those with limited resource. Instead, we hope to show that effective and proportionate compliance can be achieved through a pragmatic approach and will ultimately benefit your business.

(ii) Top level commitment to combating corruption

- Senior leaders within an organisation must be committed to combating corruption, including by actively promoting a culture of compliance.

Tone must be set at the top

While anti-corruption compliance is the responsibility of individuals at each level of an organisation, setting a ‘tone at the top’ is critical to fostering a culture in which there is zero tolerance for all forms of bribery and corruption.

There is a body of evidence that provides that ethical culture is a significant determining factor in the amount of misconduct that will take place in a business, as the strength of an ethics culture reveals the extent to which individuals at each level within the organisation are committed to doing what is right.¹⁰ Therefore, in assessing an organisation’s anti-corruption compliance procedures, consideration will be given to the commitment of senior leadership to promoting a ‘zero tolerance culture’ toward corruption.

The [OECD’s 2014 Foreign Bribery Report](#) showed that in the majority of cases, corporate management or even the CEO was both aware of and endorsed the bribery. This is at odds with suggestions that most bribery is conducted by “rogue employees” and illustrates the need for companies to ensure that anti-corruption compliance procedures are implemented from the top down.¹¹

To achieve this, it is essential that there is strong, direct, and visible support from top-level management with respect to an organisation’s controls or measures for preventing, detecting and responding to corruption. Compliance procedures that appear impressive on their face are meaningless if it not fully endorsed and implemented by senior management. This remains true irrespective of whether the lack of support is a result of ignorance, complacency, turning a blind eye, or actively encouraging misconduct in the course of business.

A consistent and comprehensive approach from those in charge will send a clear message that the organisation takes its corruption prevention procedures very seriously, and encourage staff and customers to do the same.

Involvement of senior leadership in anti-corruption compliance

The extent to which senior leaders are involved in corruption prevention will vary depending on an organisation’s individual circumstances (again, including size, type, legal structure and operating principles). For example, in a small business, senior managers may need to be directly involved in the development and implementation of anti-corruption controls. However, in larger organisations, ultimate responsibility for anti-corruption compliance procedures will likely sit with the board (though senior management should still develop, implement, and monitor these procedures).

However, regardless of the organisation’s make-up, those in charge should show commitment to the development, implementation, and maintenance of robust anti-corruption compliance procedures including:

¹⁰Ethics Resource Centre, 2009 National Business Ethics Survey: [National Business Ethics Survey of the U.S. Workforce](#), 2013.

¹¹OECD (2014), OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing. The Report endeavours to measure and describe transnational corruption based on data from the 427 foreign bribery cases concluded between 1999 & 2014.

- promoting a culture of compliance among employees, including communicating the importance of compliance
- ensuring that sufficient resources are committed to anti-corruption compliance, including training
- endorsing and communicating the organisation's anti-corruption policies both internally and externally
- raising awareness of and encouraging use of reporting procedures for suspected instances of corruption
- ensuring that those that do report in good faith, can do so confidentially, without fear of reprisal or discrimination
- providing active oversight of corruption risk assessment, reporting, and investigation
- Providing feedback to a governing body (if there is one) on suspected breaches and general compliance within the organisation.

(iii) Clearly articulated anti-corruption policies

- *Every organisation shall have a clearly articulated policy that sets out its internal procedures for combating bribery and corruption*

A compliance policy is critical to communicating a business's approach to combating bribery and corruption and thus developing a culture that does not tolerate such conduct. Similar to other compliance procedures, a corruption prevention policy may stand on its own or form part of an organisation's wider compliance policies such as the code of conduct or procurement procedures.

Regardless of the approach taken, the most important thing is that there is a clear anti-corruption policy that can be effectively implemented across each of an organisation's functions. It is therefore important that the policy applies to all individuals and entities over which the organisation exercises control. This includes employees, directors, officers, agents, subsidiaries, contractors, consultants and third party providers.

The body or number of persons responsible for monitoring compliance with an anti-corruption policy will differ between organisations. However, oversight of an anti-corruption compliance policy must be the responsibility of one or more senior officers, with a sufficient level of resources, authority and independence from management of the organisation.

While an organisation's corruption prevention policy will vary depending on its size, structure or market, generally speaking, an effective statement that reflects leadership commitment will include the following elements:

- A pledge of zero-tolerance to all forms of bribery and corruption
- A commitment to operate in line with a code of ethics
- Definitions of bribery and corruption
- Consequences for those that breach the policy
- Reference to the procedures the organisation has in place to prevent, detect, and respond to bribery (for example, reporting mechanisms, protections for whistle-blowers, investigations process)
- Roles and responsibilities of persons at each level of the organisation with respect to the policy.

To assist organisations in developing and improving their policies, the Ministry of Justice has prepared a guide to creating a fraud and corruption policy (see link on this website). As with this guidance, the framework is flexible and intended to be adapted by organisations depending on their individual circumstances and the particular risks they face.

Further policies targeting bribery and corruption

Depending on the size, nature, and risks facing an organisation, there are a range of other policies it may have in place to combat corruption. In assessing an organisation's overall compliance, consideration will be given to its business structure and operations, to determine whether it has appropriate policies in place to address the risks it faces. These may include policies on:

- Protected disclosures
- Probity
- Financial controls
- Conflict of interest
- Delegations
- Disciplinary process
- Risk management policy
- Political contributions
- Charitable donations and sponsorships
- Facilitation payments (expanded on in a separate guide)
- Personal gain through employment (i.e. customer travel, gifts, hospitality, entertainment and expenses)

What constitutes reasonable gifts, hospitality and expenditure is often a grey area, both in New Zealand and internationally. Therefore in developing these policies, businesses are encouraged to be very specific in defining what is and is not acceptable, and to have clear systems in place for reporting and recording gifts and hospitality that employees both receive and provide.

Again, to be effective each of these policies must apply to, and be communicated to individuals at each level of the organisation.

(iv) Risk assessment

- *All organisations should assess and address the specific risks they face*

All anti-corruption compliance procedures should be proportionate to the particular risks facing an organisation. It follows that a solid risk assessment is at the heart of an effective anti-corruption compliance programme.

Method used is discretionary

A business has complete discretion as to how it conducts its risk assessment (e.g. methodology employed, how risks are categorised and prioritised, the level of risk deemed acceptable). It will be important that the assessment is tailored to the organisation's individual circumstances in a manner that enables it to identify and prioritise the risks that its anti-corruption compliance procedures seek to mitigate and control.

Risk assessment must be proportionate

An effective risk assessment should also dedicate a level of time and resource proportionate to the risk posed by the the relevant markets, customers, and transactions. For example, a multi-million dollar contract with a foreign government in a high risk jurisdiction will demand far greater inquiry than moderate travel, hospitality, and entertainment expenses. Disproportionate time spent scrutinising low relative to high risk areas may be indicative of weak compliance procedures, and count against an organisation for failing prevent bribery in a high risk area (should a criminal act occur).

Conversely, when assessing a business with an extensive compliance programme that has been implemented in good faith, due consideration will be given to the fact that a breach in a low risk area occurred because greater resource was focussed on areas of high risk.

Overview of commonly encountered risks

While the risks faced by an organisation are fact specific, consideration should be given to the level of risk presented by:

Location: consider whether the country or region has high levels of perceived corruption, poor anti-corruption laws or low transparency in the public and private sectors.¹² Various bribery indexes may be used for this purpose.¹³

Sector: Some industry sectors are inherently higher risk than others. These include the extractive and large-scale infrastructure sector.¹⁴

Size and structure of organisation: For example, a small organisation centred in one location will likely face lower corruption risks than a large organisation that operates across several locations.

Nature, scale and complexity of business operations: Similarly, an organisation which runs a small supply operation in one location is likely to manage its corruption risks with ease relative to a multinational organisation running extractive projects across several locations.

Business associates: Certain relationships involve higher risks than others. Businesses must assess the level of risk posed by relationships with all associates (i.e. customers, suppliers, intermediaries). For example, use of intermediaries or agents in transactions involving foreign public officials or politically exposed persons will likely pose a high risk, particularly where commissions are involved.

Transactions: Certain transactions will also carry inherently higher risks, such as those involving political contributions, public procurement, charitable donations, permits and approvals issued by officials.

An assessment of the above risk factors is not meant to be a burdensome exercise, nor is it an infallible way of accurately assessing risk. Nonetheless, the results of a risk assessment should enable an organisation to identify actual and potential risks and determine how these can be mitigated through anti-corruption control. The results should also identify whether existing procedures are adequate or require improvement.

Where controls are deemed insufficient in relation to an existing or proposed transaction or relationship, the organisation must consider whether this needs to be postponed or cancelled in order to manage the risks.

Periodic Review

As a business evolves, its risk profile will change. It is therefore important that a corruption risk assessment is reviewed periodically and whenever the organisation undergoes substantial change in structure or operations, such as acquiring a new subsidiary. To that end, risk assessments must be adequately resourced and accurately documented.

(v) Awareness raising and training

- *Organisations must periodically communicate anti-corruption policies and procedures both internally and externally.*

Compliance policies and procedures are meaningless unless the persons to whom they apply are both aware of, and understand their content. Therefore, the extent to which an organisation has communicated its anti-corruption policies and procedures to individuals at each level of the organisation, including through staff training, is central to determining whether an organisation has effective anti-corruption procedures in place.

¹²It is a widely held perception that bribery is a problem that occurs primarily in developing countries. However, of the 427 cases examined on the OECD's Foreign Bribery Report, almost one in two cases of foreign bribery occurred in countries with high to very high levels of human developments. This data suggests that while the country in which a business operates is one factor that may be taken into account, risk assessments should focus on the wider context of each transaction.

¹³See, for example, [Transparency International's Corruption Perceptions Index](#).

¹⁴The OECD Foreign Bribery Report showed that almost two thirds of foreign bribery cases occurred in four sectors (extractive (19%), construction and transportation (15% each) information and communication (10%), p. 22.

Communication from senior leadership

The manner in which a business communicates its anti-corruption policies will vary considerably depending on things like size and the intended audience. For example, internal communications should come from senior management and outline the various policies and procedures that the organisation has in place to prevent corruption, and the consequences for those that breach these. Regular communications of this nature will help deter illegal acts and embed a corruption-free culture.

Simple ways to communicate a policy include through newsletters, intranet publications, email alerts, and staff training (discussed further below). At a minimum, an organisation's anti-corruption policy should be disseminated to and readily accessible by staff at all times (for example, through its intranet).

Internal communications are also essential for drawing attention to the mechanisms in place for staff to confidentially report suspected instances of bribery and corruption. This is discussed further under the guiding principle (vii) on 'reporting and investigation.'

External communication of an organisation's anti-corruption policy can also be an effective deterrent, reducing the likelihood that demands for bribes will be made. This should include communications to those acting on behalf of your organisation, such as foreign agents or intermediaries. Communication may involve external publication of bribery prevention policies or be as simple as a clear public statement of the organisation's anti-corruption stance. Depending on the risks facing the organisation, this may be targeted at a particular audience or the public at large.

Anti-corruption training

Staff training is essential to reinforcing your business's anti-corruption stance, including expectations and procedures around reporting. While the extent of the training needs to be proportionate to the risks faced, even low-level training is likely to have a positive impact on your business's ethical culture.

Technology means that training is no longer restricted to a classroom, and may include web-based seminars or modules, or a combination of both. Regardless of the method chosen, training should typically cover the organisation's anti-corruption policies and procedures, provide advice on applicable laws, and include real life scenarios to enable individuals to practically address the risks faced by the organisation.

The [free online anti-corruption training module](#) produced by Transparency International New Zealand and BusinessNZ, in partnership with the Serious Fraud Office in 2014 is a comprehensive training tool that businesses are encouraged to use.

While training may take place as part of the induction process for new employees, it should still be tailored to the specific risks faced by a particular business unit. For example, the type of training provided to accounting and audit staff will be different to that addressed at a sales or contracts team. Similarly (though again, depending on the size, structure etc.) training for senior managers will be pitched at a different level to that targeting entry-level staff. Finally, depending on the level of risk, it may be appropriate to require agents, officers, and intermediaries to undergo training.

As with other procedures, to be effective, training must be periodic and well documented to ensure it can be monitored and evaluated on a regular basis.

Regardless of who the training targets, or the format it takes, the most important thing is that it enables individuals at all levels to understand and implement an organisation's anti-corruption compliance procedures.

(vi) Due Diligence

- *Organisations must undertake appropriate due diligence on third parties*

There is compelling evidence that third parties are frequently used to conceal bribe payments, particularly in offshore transactions.¹⁵ This includes agents and other intermediaries, consultants, representatives, distributors, contractors, suppliers and joint venture partners, whether individuals or companies. Due diligence is also vital when considering potential targets of mergers and acquisitions.¹⁶

This highlights the need for risk-based due diligence procedures in both the hiring and continued monitoring of third parties, to check the level of risk associated with them. It also demonstrates the importance of ensuring third parties are aware of your organisation's anti-corruption compliance procedures, and in appropriate circumstances, making it a contractual requirement that the third party comply with your organisation's compliance programme.¹⁷

Purpose of due diligence on third parties

Due diligence is an important part of good corporate governance and as such, due diligence with respect to corruption prevention will often form part of an organisation's wider due diligence model. Its purpose is twofold:

- It enables an organisation to further evaluate the nature of corruption risks identified during an organisation's risk assessment.
- It also acts as an additional, targeted means of detecting and mitigating risk.

Proper due diligence will enable an organisation to determine whether to postpone, cancel or alter a particular transaction, contract or relationship with a third party.

Due diligence procedures must be proportionate

As with all other corruption prevention procedures, due diligence must be proportionate, and will vary greatly depending on the risks identified with a particular relationship or transaction. For example, a third party that is itself providing products or services to an organisation will pose a much lower risk than an individual who is securing contracts on an organisation's behalf in a location or market with a high risk of bribery. What is important is that your organisation applies and documents consistent due diligence procedures across locations, markets and transactions with similar risk levels.

That said, the following are general factors that are always useful to consider where third parties are concerned and should be included in the wider risk assessment discussed in guiding principle (iii) above.

- Is the third party a legitimate business entity? This can be evidenced by registration documents, annual reports, taxation number, public listing etc.
- Does the third party have the necessary qualifications, resource and expertise for the particular transaction?
- Is there a clear reason to include the third party in the transaction? A contract with a third party should be explicit as to the service the third party is providing. An organisation should also consider whether the agent's fees/commission align with the standard rate for that service in that region.
- What is the third party's business reputation? In particular, does it have a reputation for, or has it

¹⁵The OECD's 2014 Foreign Bribery Report found that intermediaries were used in 75% of foreign bribery cases completed between 1999 and 2014 (p.9).

¹⁶The Foreign Bribery Report also found that 28% of self-reported cases became aware of the foreign bribery through merger and acquisitions due diligence procedures p.9.

¹⁷This is in line with the OECD's [Good Practice Guidance on Internal Controls, Ethics, and Compliance](#).

ever been investigated, prosecuted, or sanctioned for dishonesty offences, including bribery and corruption?

- Does the business have a relationship with any public officials or other politically exposed persons (for example, persons linked directly or indirectly to a public official) that might increase the chances of bribery?
- The above two bullets should also be considered in relation to the organisation's shareholders, beneficial owners and senior management.
- Does the third party have an effective anti-corruption compliance programme?

Where a particular relationship is deemed low risk, an organisation may decide that very little is needed in the way of due diligence. However, higher risk situations may require direct or indirect enquiries into the third party. This could include:

- making enquiries within the relevant sector about the third party's reputation
- a questionnaire sent directly to the third party.
- Requesting and conducting a review of the anti-bribery policy applicable to the third party
- Appointing an external party to conduct due diligence

Any red flags or adverse information discovered during this initial enquiry may result in the need for further due diligence (see below for further information on red flags).

(vii) Reporting and Investigation

- *Employees and third parties must be able to confidentially report suspected corruption without fear of retaliatory action. All reported violations shall be investigated by an appropriate individual or unit.*

Reporting suspected corruption

Corruption is particularly difficult to detect as it is by its very nature a covert and multifaceted crime, often involving offshore transactions, layers of intermediaries and complicated commercial structures.

It is therefore imperative that an organisation's compliance programme include procedures that both enable and encourage individuals within and outside an organisation to report suspected instances of bribery or corruption. As with other procedures, an organisation may choose to have a policy that is dedicated to reporting corruption, or combine this into the reporting procedures for other areas of misconduct (for example, fraud, health and safety, malpractice).

Any reporting procedures should contain clear mechanisms for whistleblowing/protected disclosures and provide information on where individuals can go to seek advice on what to do when confronted with a potentially corrupt situation. It is critical that reporting can take place on a confidential basis, without fear of retaliatory action.

Mechanisms for reporting may include internal notification forms, a dedicated email or phone line, and contact details for the unit in charge of investigations or the ombudsman. Further information on New Zealand's whistle-blower protection systems can be found on the [Ombudsman](#) and [State Services Commission](#) websites.

External Reporting

The organisation's corruption prevention policies should detail a clear reporting chain and responsibility that leads to law enforcement authorities where an investigation results in credible suspicion that bribery or corruption may have occurred. For consistency and ongoing management of the relationship, reporting of incidents to external law enforcement authorities should be coordinated through a single point within each organisation.

Internal Investigations

Commercial organisations must have a suitably appointed person or team that is required to investigate any suspected corruption, whether reported or detected. The investigations process should detail key processes for escalation from initial assessment to full detailed investigations, including governance and oversight reporting (e.g. reporting to the CFO, Audit and Risk Committees, and where public money is involved, the Auditor-General). All investigations should be effectively documented, including any disciplinary action taken, and reporting to external authorities.

The unit or person in charge of investigations must have a sufficient level of investigative skill and objectivity needed to establish the facts. Further, they must be independent from the unit or person that is the subject of the investigation, and be empowered to require co-operation from employees at all stages of investigation into suspected corruption.

The investigations process should also comment on procedures the organisation will follow to recover losses from fraudulent or corrupt activity, whether civil or criminal recovery.

(viii) Monitoring and review

- *Effective anti-corruption compliance procedures must adapt to accommodate changes to the business and the environment in which it operates.*

A common theme throughout the above guiding principles is that the corruption risks faced by commercial organisations are not static and will inevitably change over time. Therefore robust anti-corruption compliance procedures must be flexible and evolve as an organisation's business and the environment in which it operates changes. For example, changes in the nature of its customer base, commercial structure, or the relevant laws or standards under which it operates.

In assessing an organisation's overall compliance, it will be important to look to whether it regularly monitors and reviews its anti-corruption compliance procedures and makes adjustments as required. Even where bribery occurs, an organisation may receive positive recognition for demonstrating continuous monitoring and improvements of its anti-corruption controls.

There are a range of mechanisms an organisation can employ to monitor the effectiveness of its corruption prevention procedures. For example, staff surveys and feedback from training can provide valuable insights into the strength of an organisation's compliance culture and be useful in detecting and identifying areas for improvement. Organisations should also examine the system set up to prevent and detect corruption, such as financial controls. Internal audits can also be used to examine whether these are effective in practice. Depending on a commercial organisation's nature, size, scale of operations etc, it may consider targeted audits of its anti-corruption compliance procedures.

An effective review function will also require those responsible for anti-corruption compliance within an organisation to report periodically to either its governing body or senior management on how effectively the programme is being implemented in practice, including the results of any audit. While the frequency will change depending on the nature of the organisation, it is recommended that this take place at least annually.

RED FLAGS FOR BRIBERY AND CORRUPTION

Some common warning signs that your business has been exposed to corrupt activity include:

- Abnormally high profit margins
- Business arrangements that serve no apparent commercial purpose
- Payments to countries with high perceived levels of corruption
- Pressure exerted for advance or urgent payments
- Reimbursement requests for undefined costs relating to goods or services
- Unusually high and unjustified commission payments
- Apparent 'special treatment'
- Inadequate record keeping
- Significant changes in employee behaviour

A more comprehensive list of bribery and corruption red flags can be found in the free online [Anti-Corruption Guide](#) produced by BusinessNZ, in partnership with Deloitte and Chapman Tripp in 2014.¹⁸

While even the most robust due diligence procedures will not eliminate risk of corruption, effective due diligence of third parties will go a long way to mitigating this risk, and ensuring that your organisation is not held liable where a third party engages in corrupt conduct.

FURTHER GUIDANCE AND INTERNATIONAL BEST PRACTICE

Several resources provide comprehensive information on anti-corruption policies and procedures and a variety of practical tools for businesses:

- [Anti-Corruption Guide produced by BusinessNZ, in partnership with Deloitte and Chapman Tripp](#)
- [Free online anti-corruption training module](#)
- [OECD Good Practice Guidance on Internal Controls, Ethics and Compliance](#)
- [OECD Guidelines for Multi National Enterprises](#)
- [The Business Anti-Corruption Portal](#)
- [Asia-Pacific Economic Cooperation—*Anti-Corruption Code of Conduct for Business*](#)
- [Transparency International—*Business Principles for Countering Bribery*](#)
- [World Bank—*Integrity Compliance Guidelines*](#)
- [OECD Bribery and corruption awareness handbook for tax examiners and tax auditors](#)

¹⁸*Bribery and Corruption Risks and Strategies for New Zealand Businesses Operating Overseas (2014).*