

Deloitte Bribery and  
Corruption Survey 2015  
Australia & New Zealand  
Separate the wheat from the chaff





Bribery and corruption damages business and markets and has a deeply corrosive effect on countries where it's allowed to take root.

At the strategic level, there is a real need to articulate the harm caused by this activity – to answer and defeat the tired old clichés used by those who seek to justify it, and to make anti-corruption an essential and visible part of the brand of every democracy.

At the tactical level, we must map and count the problem, identify sectors most at risk, share intelligence, encourage whistle-blowing, and maximise enforcement effort on kleptocrats, enablers, facilitators, and top tier money-launderers.

I welcome the results of this insightful survey into the perceived incidence of bribery and corruption in Australia and New Zealand. It sits well alongside surveys conducted by global non-government organisations.

**David Green CB QC** Director, UK Serious Fraud Office (SFO)  
*The UK SFO is the principal agency with responsibility for enforcing the UK Bribery Act*

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# Introduction

In a first of its kind, Deloitte surveyed Australian and New Zealand organisations on offshore bribery and corruption risk in 2012.

We identified a range of themes around exposure, enforcement and accountability and highlighted the fact that Australian and New Zealand organisations were encountering bribery and corruption incidents and challenges which many were ill-equipped to identify, manage and, most importantly, prevent.

Late last year, we launched our second survey, and this new report provides an essential follow up on the significant risks presented by this complex issue.

We again focus on risks related to overseas investments and operations but, given recent high profile domestic corruption incidents in both Australia and New Zealand, we also look at risks from a domestic perspective.

## So what's the issue?

Bribery and corruption is much more than a one dimensional compliance issue. The damage an incident can cause to an organisation – via traditional and social media channels, to reputation, and even bottom line – is generally understood, although not always well managed.

But there is also a much more insidious issue to consider – bribery and corruption is a truly malevolent force that can deeply affect countries, communities and individuals where it has been allowed to take hold. This, if nothing else, should be a key driver for any responsible organisation wanting to create a commercial world in which doing the right thing and considering the greater good are central to the way they do business.

We have been investigating corruption and fraud for nearly 25 years, and have worked with many organisations across the industry spectrum to help them enhance the controls and processes needed to manage the risk of someone doing the wrong thing and, where needed, dealing with the repercussions. While we have seen many organisations take a robust approach to mitigating this risk, we have unfortunately not seen any tangible decrease in levels of corruption, or any major shifts in attitudes towards it, especially in jurisdictions where corruption has taken hold.

Many organisations we work with report similar accounts of the challenges they face in terms of managing corruption risk and turning compliance requirements into workable operational reality. We are often asked: *'So how much is enough, and how do I approach it?'*

The key is to separate the wheat from the chaff. Every organisation needs to understand where it will get most return on its investment and minimise waste on issues of low priority. And the first step in achieving this is to understand and assess the risks.

## Our survey

Bribery and corruption is a real and ongoing risk – and it demands action. We hope this report prompts wide ranging thinking on the broader issues, and managing the risks.

We look forward to hearing from you and learning what you think about the thoughts presented in this report. Please contact us at [B&C@deloitte.com.au](mailto:B&C@deloitte.com.au) with any comments or feedback.



**Frank O'Toole**  
Partner, Deloitte Forensic Australia



**Barry Jordan**  
Lead Partner, Deloitte Forensic New Zealand



Every business, every organisation, has an obligation to look at its operations through both professional and ethical lenses. Community expectations are rightly high, and we must see ourselves as guardians of the right behaviour. Superficial thinking and casual oversight must be rejected, otherwise we risk entering into transactions or relationships which, once the surface is scratched, may be judged unprofessional, unethical, and potentially criminal.

Organisations will be found out, and this could mean reputational damage, severe penalties and greater regulatory scrutiny. The risk of bribery and corruption is just as relevant for Deloitte as it is for our clients, and we have invested heavily in domestic and global regimes to create and sustain a workplace in which our people know, and choose, to do the right thing. A strong culture, vigilance and critical thinking go a long way, and are well worth the investment.

**Cindy Hook** CEO, Deloitte Australia

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Foreign bribery undermines the credibility of Australian businesses here and overseas, and where there are allegations that Australian companies or citizens are trying to pursue business opportunities through illegal activities, the AFP will investigate and prosecute.

Australia is a committed member of the OECD Anti-Bribery Convention. The AFP now works closely with our ten partner agencies in the Fraud and Anti-Corruption Centre, to enforce our anti-corruption laws.

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**Commander Linda Champion** Manager Fraud and Anti-Corruption, Crime Operations, Australian Federal Police (AFP)  
*The AFP is the principal Australian enforcement agency of Commonwealth foreign bribery offences*

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Deloitte's survey highlights that there are not insignificant levels of known instances of foreign bribery, and yet it appears that many companies are still not recognising this risk. A large percentage of respondents do not have adequate systems in place to identify foreign bribery risks, nor have they carried out foreign bribery and corruption risk assessments.

This is surprising given the success of Kiwi companies overseas, in jurisdictions identified by Transparency International as high risk, and where UK, US and NZ legislation all apply. We see the potential for an increase in foreign bribery cases given this profile and would encourage all companies trading in international markets to be proactive in taking steps to identify and respond to risks of foreign bribery in their organisations. Any potential offences identified should then be reported to the SFO.

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**Julie Read** Chief Executive and Director, New Zealand Serious Fraud Office  
*The New Zealand SFO is the country's principal enforcement agency of bribery and corruption offences*

## About this report

This report is the result of a survey conducted by Deloitte in Australia and New Zealand in November and December 2014.

Chief Financial Officers, Chief Risk Officers, other executives, board members, and employees responsible for risk management, and involved in the operational side of business activities, were asked to respond to a series of questions on:

- Challenges and risks in relation to both domestic and foreign bribery and corruption
- Organisational bribery and corruption compliance programmes and assessments
- Australian, New Zealand and international bribery legislation.

The survey was completed by 269 respondents, including those from ASX 200 and NZX 50 companies, Australian subsidiaries of foreign companies, public sector organisations and other listed and private companies. Unless otherwise stated, all percentages referred to relate to survey responses.

Deloitte makes no representation or warranty about the accuracy of the information or how closely the information gathered in the survey will resemble organisation's actual instances and experiences of bribery and corruption. Circumstances might have changed since the time this information was gathered, and this survey does not take such matters into account.

All responses are confidential, and only aggregate responses have been reported. We have compiled the information into a series of graphs and have drawn certain conclusions about domestic and foreign bribery and corruption based on a weighting that we have allocated to these responses. The graphs and our conclusions are based on the answers we received in the survey and the weightings given to those responses.

### Thanks and acknowledgement

We would like to extend our gratitude to the following for their support, and sharing their views and expertise:

- Commander Linda Champion, Manager Fraud and Anti-Corruption, Crime Operations, Australian Federal Police
- Phil O'Reilly, CEO, BusinessNZ
- Corporate Lawyers Association of New Zealand
- Catherine Beard, Executive Director, ExportNZ
- Martin Tolar CCP, GAICD, Managing Director, GRC Institute
- Julie Read, Chief Executive and Director, New Zealand Serious Fraud Office
- David Green CB QC, Director, UK Serious Fraud Office
- Mike Ahrens, Chief Executive, Transparency International Australia
- Suzanne Snively ONZM, Chair, Transparency International New Zealand.



# Domestic corruption

## Are we as clean as we think?



**Thought:** Are Australia and New Zealand deserving of their respective reputations? Almost one in four organisations having an incident is a significant level of corruption. Can your organisation afford to ignore this risk?

# Offshore exposure

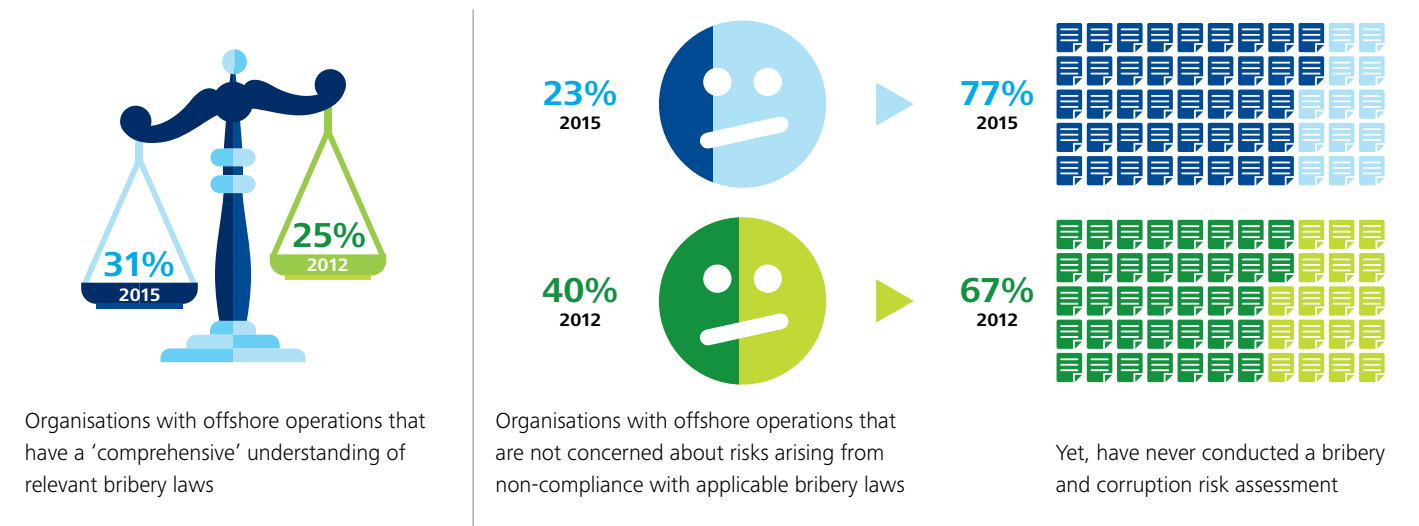
## Who's at risk?



**Question:** How clear is the line of sight in respect of offshore operations, and what is the understanding and level of management of the risk without a risk assessment? Are too many organisations relying on the assumption that the span of control will not be diluted, and related third parties will do the right thing?

# Foreign bribery laws

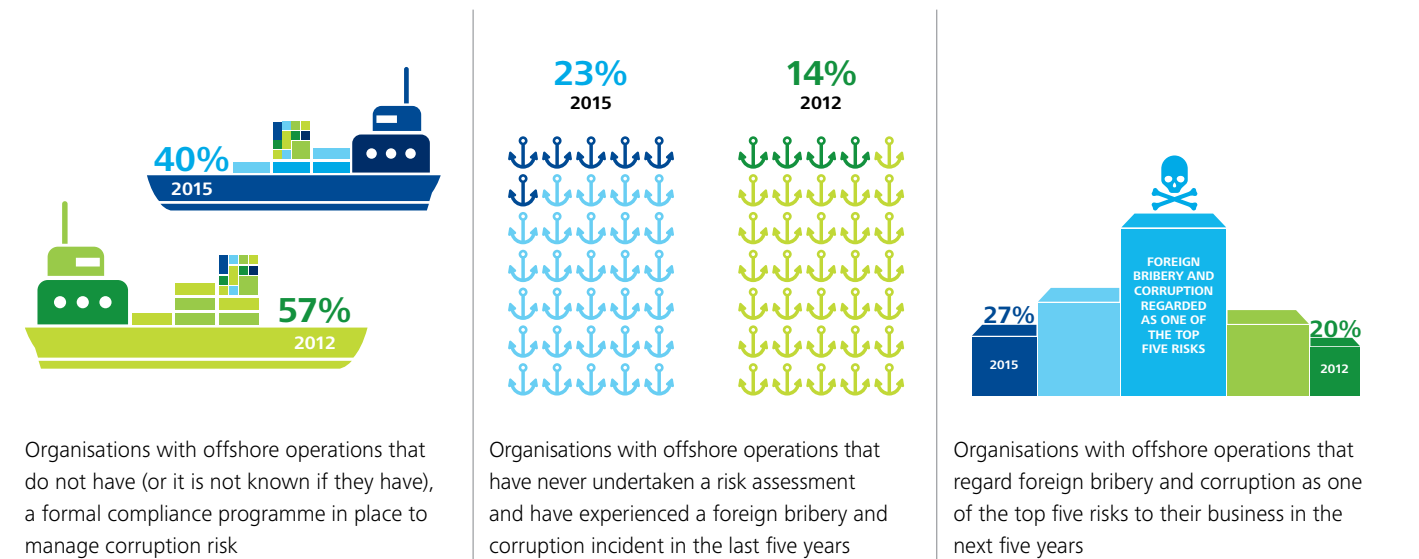
## Abiding or abetting?



**Thought:** While there are encouraging signs pointing to improvement in a comprehensive understanding from the 2012 results, Australian and New Zealand organisations still have a way to go. It's a fundamental governance imperative that executives and board members understand that the legislation exists, their organisation's obligations under it, and what their organisation is doing to manage those obligations.

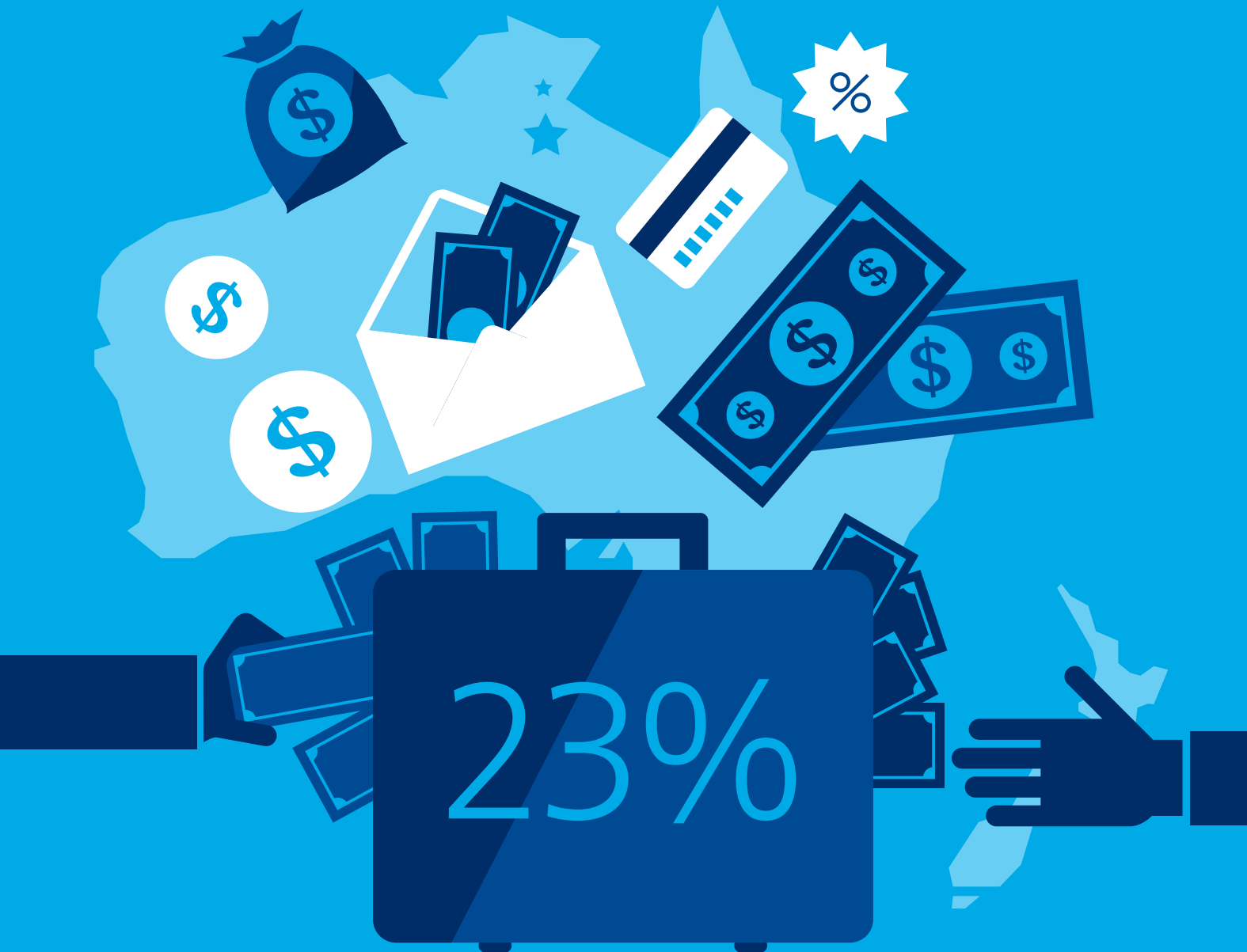
# Offshore risks

## Who's accountable?



**Question:** Despite a 17 percentage point fall from the 2012 results, the number of organisations that do not have (or it is not known if they have) a formal bribery and corruption compliance programme remains a concern. How do these organisations determine whether or not they are at risk, and whether a corruption event has occurred, is occurring, or is likely to occur?

23% of organisations have experienced one or more known instances of domestic corruption in the last five years



## Domestic corruption

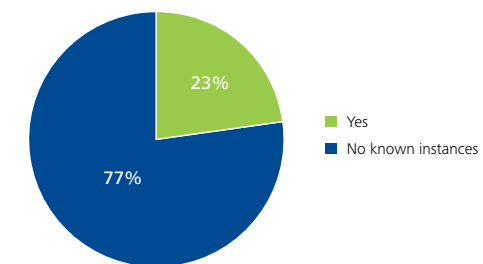
### Are we as clean as we think?

With recent high profile incidents in both Australia and New Zealand, and with both countries' ratings falling in the latest Transparency International Corruption Perception Index (TI CPI), albeit from very favourable positions, greater focus is being placed on organisations and individuals involved in domestic bribery and corruption incidents.

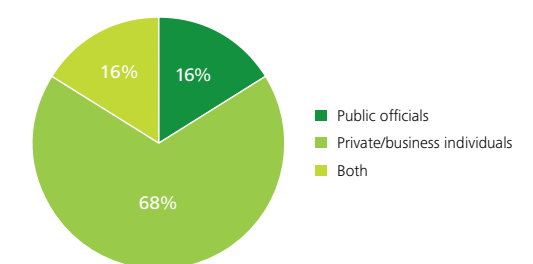
Home-grown bribery and corruption remains an issue, manifesting in, but not limited to, incidents involving the giving or receiving of secret commissions, 'kickbacks', 'under-the-table' payments, and favours.

All Australian and New Zealand (federal, state and territory) governments have bribery legislation that prohibits both bribery of domestic government officials, and in certain circumstances, bribery between private sector entities and individuals.

**Has your organisation experienced any known instances of domestic corruption in the last five years?**



**Have incidents of domestic corruption involved public officials, private/business individuals, or both?**



- 52% of incidents occurred in the last 12 months
- Of the respondents with more than 5,000 employees, 47% have experienced a domestic corruption incident in the last five years. This compares to 20% reported by respondents with less than 5,000 employees
- The top five types of incidents account for 69% instances and are:
  - Undisclosed conflict of interest (16%)
  - Supplier kickbacks (15%)
  - Personal favours (14%)
  - Inappropriate gifts/hospitality (13%)
  - Providing confidential organisational information to a third party (11%).

- 84% of incidents involved private/business individuals
- 73% of incidents were reported to either a regulator or to other stakeholders in the last two years, the most common being reports to law enforcement (49% of the instances reported)
- All industry sectors experienced reported incidents in the last five years, with the highest number reported in:
  - Energy/Resources
  - Government/Public sector
  - Financial services.

Domestic bribery and corruption is a real and growing issue, and these results show that a significant dimension of this involves private sector to private sector corruption, in addition to corruption involving public officials.

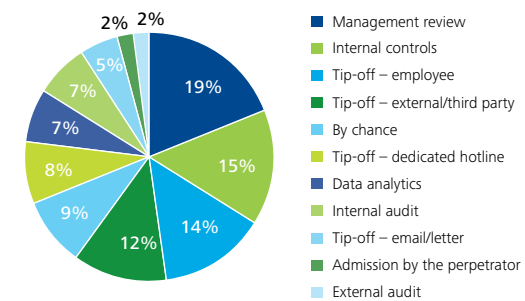


With more than 70 investigations commencing in the first year of the establishment of the South Australian Independent Commission Against Corruption in September 2013, and the other Australian anti-corruption state agencies as busy as ever, anyone who believes that domestic corruption is not a key issue is seriously mistaken. For many organisations, it will only be a matter of time before a corrupt offer or demand is made and someone gives in to a temptation and takes advantage of a control gap.

There is also a heightened risk of being found out, with more and more events being reported by whistleblowers. Whistleblower activity will only increase, particularly as more progress is made in terms of protection for those reporting incidents of corruption.

Frank O'Toole Partner, Deloitte Forensic Australia

### How were domestic corruption incidents discovered?



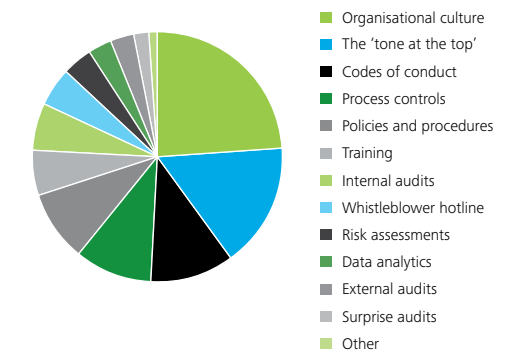
- The top three ways in which instances of domestic corruption were discovered:
  - Management review
  - Internal controls
  - Tip-offs from employees
- Organisations with more than 5,000 employees accounted for 26% of reported incidents, with tip-offs via a dedicated hotline the top discovery method
- For organisations with fewer than 5,000 employees management review was the top discovery method
- The various types of tip-offs collectively account for 40% of the ways in which instances were discovered.

That nearly half of incidents detected by some form of tip-off highlights the importance organisations should place on enabling tip-offs to be made, appropriately received, and actioned. In an emerging trend, hotlines have increasing potential in terms of incident detection (and deterrence), and were reported as the most effective method for discovering domestic corruption in organisations with more than 5,000 employees.

Some of the most effective bribery and corruption detection devices are employees, customers, suppliers and third parties with whom an organisation interacts. The key is to establish effective mechanisms that individuals have confidence in, and encourages those with information to make it known to management in the knowledge that they will not, as a result, be subjected to any detrimental action.

The top three factors selected to help prevent bribery and corruption incidents reinforces how critical it is to get the culture of an organisation right. The effectiveness of all other controls is weakened without the right culture to underpin them.

### What are the top three factors that can help prevent bribery or corruption incidents?



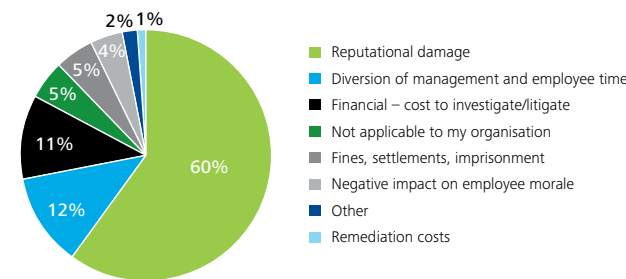
- The top three factors are:
  - Organisational culture
  - 'Tone from the top'
  - Codes of conduct
- Organisational culture was listed as a top three factor by 73% of respondents
- A surprise audit was the least reported factor, with only 5% of respondents listing it as a top three factor.



When it comes to bribery and corruption risk, actions management can employ to demonstrate a strong and clear tone from the top include (but are not limited to):

- Acting, and being seen to act, with integrity at all times
- Using and promoting internal and external communication channels and events to discuss the importance of ethical behaviour. For example, emails from the Chairman and/or Managing Director which are further reinforced by department/business unit leads
- Webinars, articles in newsletters, articles on intranet/internet, press releases, inclusion of a note in the organisation's financial statements
- Appointing and promoting the role of ethics officers throughout the organisation
- Developing and promoting corporate values statements, codes of conduct and related programmes that commit the organisation and its people to ethical business practices and zero tolerance for fraud, bribery and corruption
- Formal approval of the anti-bribery and corruption programme by the board and/or senior management
- Oversight of anti-bribery and corruption programmes at board level (or delegated to appropriate body i.e. Audit Committee) and/or senior management.

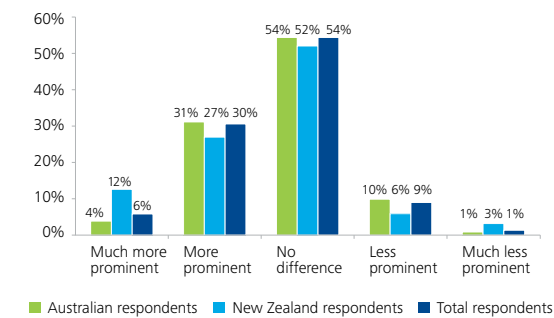
#### What is the key downside posed by domestic corruption to your organisation?



- 60% of respondents see reputational damage as the key downside
- The second and third factors were diversion of management and employee time (12%) and the financial cost to investigate and/or litigate (11%).

A corruption incident – domestic or foreign – can result in a wide range of negative consequences for both the organisation and individuals involved. It's clear from these results that reputational damage is regarded as the greatest downside, and fear. News, or even market rumours, of poor governance and/or corruption can have a significant impact, with reputational impacts including share price and market capitalisation pain, and loss of stakeholder confidence.

#### Compared to five years ago, is the risk of domestic corruption more or less on your organisation's radar?

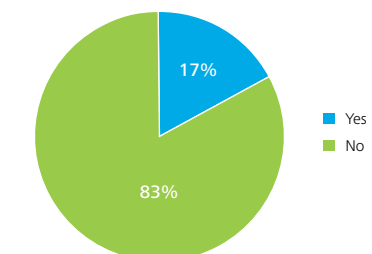


- The risk of domestic corruption is more prominent or much more prominent compared to five years ago for 35% of Australian respondents, and 39% of New Zealand respondents
- 64% of respondents do not see it as a more, or much more, prominent issue.

While domestic bribery and corruption risk is increasing in terms of the attention paid to it by some organisations, it still ranks outside the top five risks most organisations have identified.

Intuitively, these results make sense, because corruption events, and fraud more generally, are often seen as the work of individuals in isolation rather than a systematic problem. Other risks therefore seem more immediate and are placed higher on the priority list. It's also possible that activities involving the exchange of secret commissions, kick-backs or 'under-the-table' payments are categorised by certain organisations as fraud rather than bribery or corruption.

#### Is domestic corruption a top five risk for your organisation?



- 83% of respondents do not see domestic corruption as a top five risk.

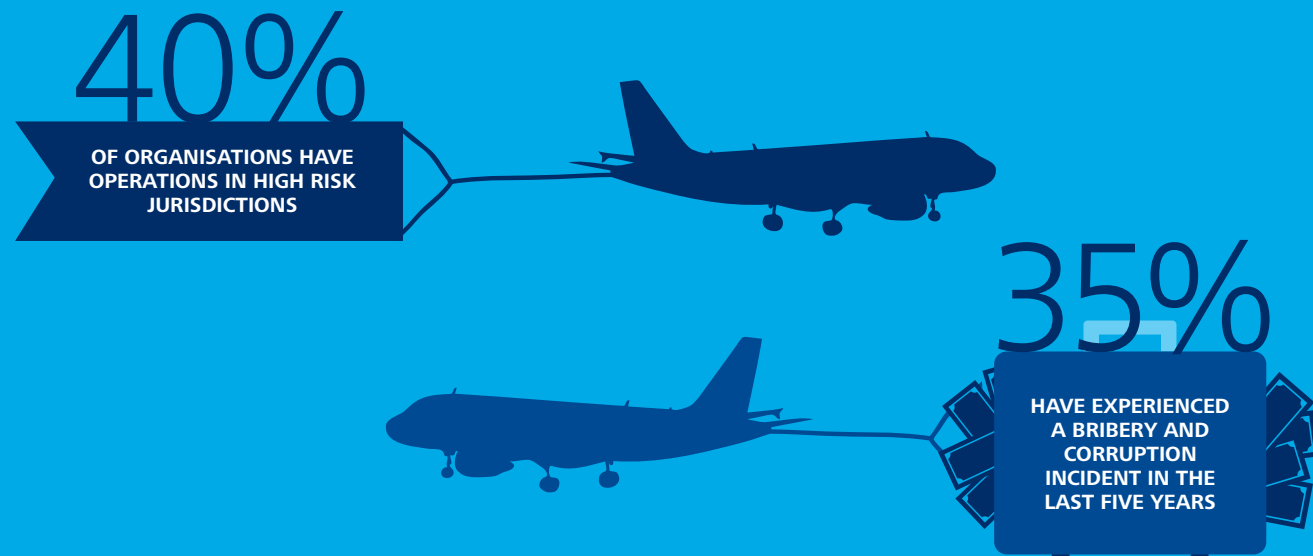


While our survey results show that private sector to private sector domestic corruption is a greater risk than corruption involving public officials, recent Australian public sector events highlight that Commonwealth and state government agencies are still exposed to significant risk. The Commonwealth Attorney-General's Department is playing an active role in combating corruption via domestic policy development, while anti-corruption agencies are increasingly prosecuting individuals for serious and systemic corruption events.

Government agencies are the custodians of information and processes that can be lucrative for people prepared to cut corners. Where this involves bribery, the compromised integrity of a public official undermines the rule of law and democracy, and paves the way for organised crime and even terrorism.



40% of organisations have operations in high risk jurisdictions, and of these 35% have experienced a bribery and corruption incident in the last five years



## Offshore exposure Who's at risk?

As Australian and New Zealand organisations explore offshore opportunities, they face the dual risk of operating in higher corruption risk jurisdictions and being captured by extra-territorial bribery laws that, historically, have been more rigorously enforced than our own foreign bribery laws.

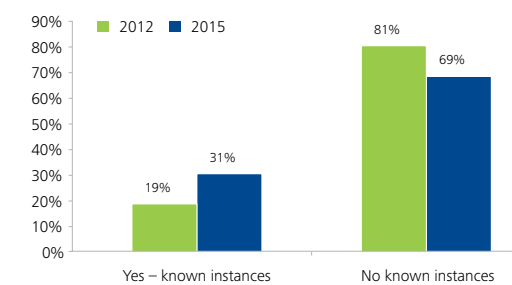
Often forgotten, however, is that irrespective of the extraterritorial reach of the laws of certain western countries, it's almost certain that any form of bribery and corruption committed in a foreign jurisdiction will be a breach of the local laws of that jurisdiction. The risk of organisations and individuals being prosecuted within the country that the activity has occurred is therefore very real.

Some of Australia's and New Zealand's biggest trading partners are considered higher risk countries<sup>1</sup>, and a number of these, particularly China, India and Indonesia, have begun to prioritise and increase their corruption enforcement efforts.

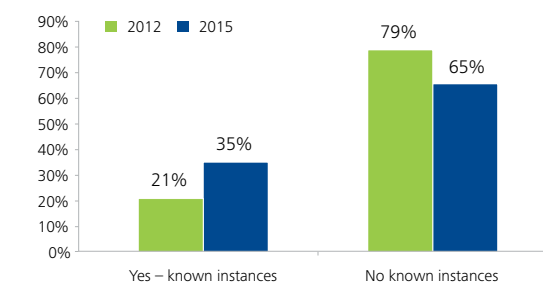
Corruption risk should not be a barrier to growth and new markets, but it does need to be properly managed. Organisations operating offshore need to fully understand the risks they face, and be confident that their processes and controls are satisfactory to mitigate the risk.

### Has your organisation experienced known instances of foreign bribery and corruption in the last five years?

All offshore operations (48% of 2015 respondents and 51% of 2012 respondents)



Offshore operations in high risk jurisdictions (40% of 2015 respondents and 34% of 2012 respondents)



- 48% of respondents reported having offshore operations, of which 31% have experienced a known bribery and corruption incident in the last five years
- 38% of these instances occurred in the last 12 months (compared to 54% in 2012).
- 40% of respondents reported having operations in high risk jurisdictions, of which 35% experienced a bribery and corruption incident in the last five years
- 37% of these instances occurred in the last 12 months (compared to 61% in 2012).

Australian and New Zealand organisations are clearly pursuing opportunities in developing countries. Almost half of the 2015 survey respondents have offshore operations, and 84% of these respondents have them in high risk jurisdictions.

<sup>1</sup>Transparency International 'Australia's top trading partners listed as posing serious corruption risk' <http://transparency.org.au/index.php/media-release/australias-top-trading-partners-listed-as-posing-serious-corruption-risk/>





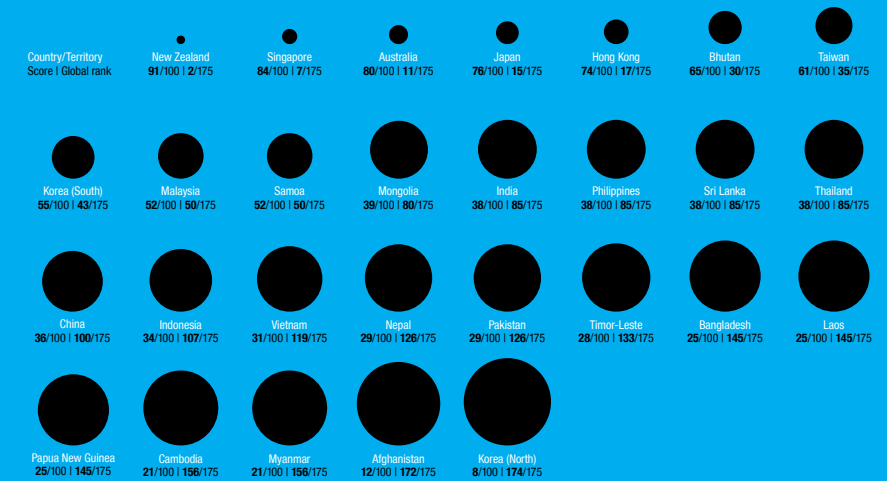
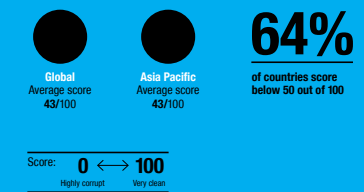
Corrupt behaviour is more prevalent than most people think. We assume that because we're Australians or New Zealanders that we behave in a right and proper way. Even a cursory read of media reports, however, reveals enough material to challenge this assumption.

The AFP has also said it's pursuing 14 active investigations. While this number may appear small, these are only the cases that have been detected and made their way to law enforcement. The real question is how many are not being referred, and how many don't we know about?

**Frank O'Toole** Partner, Deloitte Forensic Australia

# CORRUPTION PERCEPTIONS INDEX 2014

## Asia Pacific



### #cpi2014

The 2014 Corruption Perceptions Index measures the perceived levels of public sector corruption in 175 countries/territories around the world. To see the full results go to: [www.transparency.org/cpi](http://www.transparency.org/cpi)



[www.transparency.org.au](http://www.transparency.org.au)

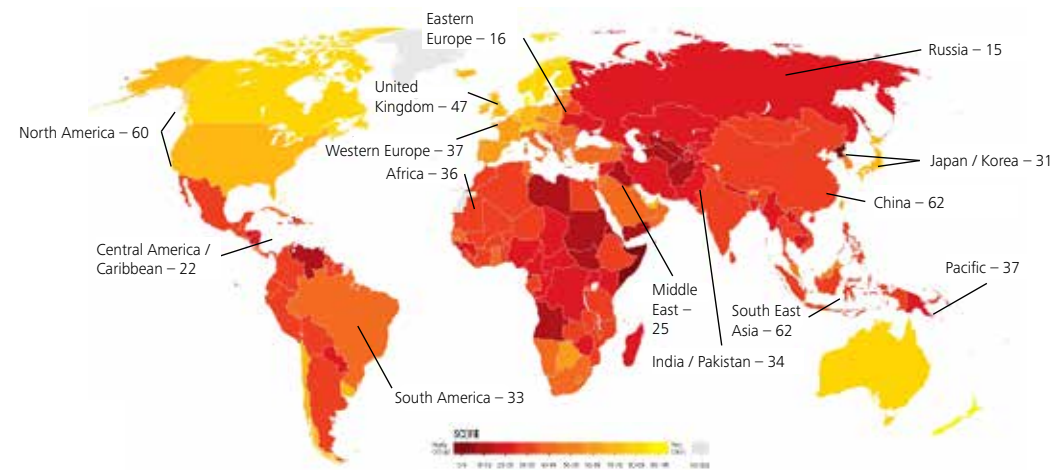


[www.transparency.org.nz](http://www.transparency.org.nz)

As the local Chapters of Transparency International, TI Australia and TI New Zealand act in an advocacy role and monitor developments in the enforcement of laws banning corruption in both the public and private sectors. Transparency International is a non-profit body and is non-partisan, in that its views are impartial. With a secretariat in Berlin, it now has almost 100 Chapters around the world ([www.transparency.org](http://www.transparency.org)). TI Australia and TI New Zealand each publish regular newsletters and e-updates, and welcome both corporate and individual members and supporters.



**Does your organisation have offshore operations in any of the following jurisdictions?**



Notes: 1. Survey responses have been overlaid on the TI CPI 2014 map.  
2. 129 respondents reported a total of 517 offshore operations in the jurisdictions above.

**2015 results**

- 84% of organisations with offshore operations reported having operations in high risk jurisdictions identified in the TI CPI map
- 65% of these have not experienced a known instance of corruption in the last five years, but 46% have never conducted a corruption risk assessment
- 19% of these do not discuss corruption risk at management or board level.

**2012 results**

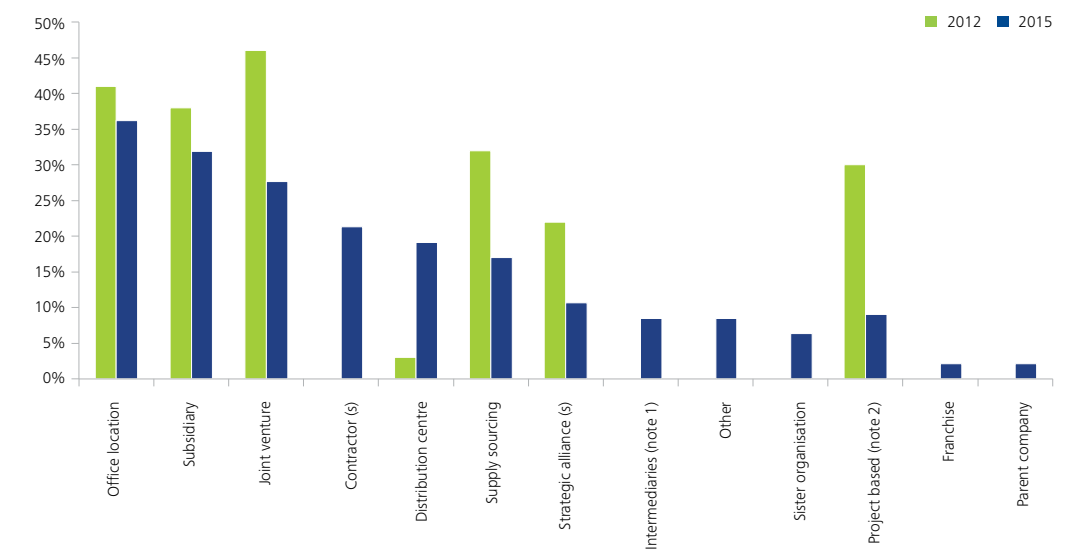
- 34% reported having operations in high risk jurisdictions identified in the TI CPI map at the time
- 79% of these had not experienced a known instance of corruption in the prior five years, but 48% had never conducted a corruption risk assessment.
- 21% of these reported that they did not discuss corruption risk at management or board level.

The proportion of organisations that have never conducted a corruption risk assessment remains a concern. More encouraging however, is that of the 59% of 2015 survey respondents with offshore operations in high risk jurisdictions that have conducted a risk assessment, 67% of these were undertaken in the past year. Of real concern is that 19% of organisations operating in high risk jurisdictions do not discuss corruption risk at management or board level. This likely leaves directors and executives exposed should a significant bribery or corruption event occur.

Corporate Australia has a responsibility to do the right thing, and if bribes are paid in an effort to further their business opportunities, the company, directors and even employees may face criminal prosecution. Additionally the company and shareholders face the reputational damage and financial liability that comes with it. Directors in particular need to take a genuine responsibility in maintaining corporate oversight with their compliance programmes for overseas activities, ensuring they are ethical and aligned to expectations of the company. With the AFP being a member of the International Foreign Bribery Taskforce, we work diligently with our international partners to focus on foreign bribery investigations, information and intelligence sharing. Companies operating unlawfully through foreign entities, including subsidiary companies, may also be subject to prosecution by any of the International Foreign Bribery Taskforce partner agencies.

**Commander Linda Champion** Manager Fraud and Anti-Corruption, Crime Operations, AFP

**Types of offshore business activities of organisations that have experienced known bribery and corruption incidents in the last five years**



Note 1: For example, sales agents, consultants, distributors  
Note 2: World Bank, Asian Development Bank, Australian Agency for International Development and turnkey projects.  
Note 3: 23 of the 40 organisations that have experienced a known instance(s) of bribery and corruption in the last five years reported having multiple types of offshore operations. The graph represents the type of offshore operation as a percentage of the total known instances.

Of the organisations that reported having experienced bribery and corruption incidents in the last five years, office locations, subsidiaries and joint ventures are the most common type of business relationships. While this is consistent with the 2012 results, the 2015 results report a wider range of business operations by organisations that have experienced a known instance(s) of bribery and corruption in the last five years.

Largely consistent with the 2012 results, business activities that involve third parties (whether suppliers, joint venture or alliance partners), or operations that may enjoy a degree of autonomy such as subsidiaries, carry a greater risk of being the source of bribery or corruption events.

Oversight activities, such as consistent policies and procedures, training and awareness, audit and risk management, are critical in providing reasonable assurance that those managing offshore operations are complying with the organisation's ethics and business conduct requirements and are accountable for ethical business practices.

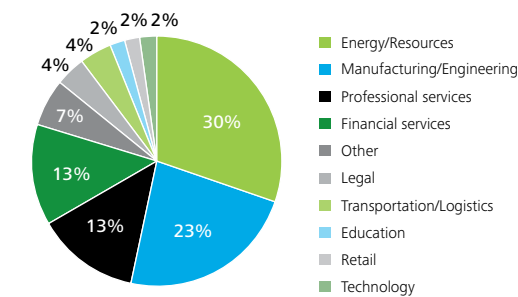


With a number of US enforcement actions recently brought against acquiring companies, successor liability is a very real and serious risk that can have wide-ranging and detrimental impacts. The value, timing and successful completion of a transaction can be impacted by any known or suspected bribery law violations. Other immediate risks include investor legal proceedings, loss of investor confidence, reputational damage and loss of market access and revenue.

Corruption risk arises with transactions, including joint ventures, because inaccuracies in the books and records, control and process weaknesses, or any corrupt activities of the target can become the responsibility of the acquirer. It's vital that adequate corruption due diligence is undertaken, and any corruption 'red flags' identified during the process are appropriately mitigated.

**Steve Shirliff** Partner, Corporate Finance – Transactions, Deloitte Australia

**Organisations that have experienced known instances of foreign bribery and corruption in the last five years – by industry**



- The top industries are:
  - Energy and resources
  - Manufacturing and engineering
  - Professional services
  - Financial services
- These account for 79% of known foreign bribery and corruption incidents
- In 2012 the top industries were:
  - Energy and resources
  - Manufacturing and engineering
  - Financial services.



Making excuses for paying a bribe or engaging in corrupt activity is easy. Doing the right thing isn't so easy. It's vital before entering into situations that may give rise to difficulties to fully understand what alternatives exist to enable you to do the right thing. Paying a bribe is not the answer.

**Barry Jordan** Lead Partner, Deloitte Forensic New Zealand

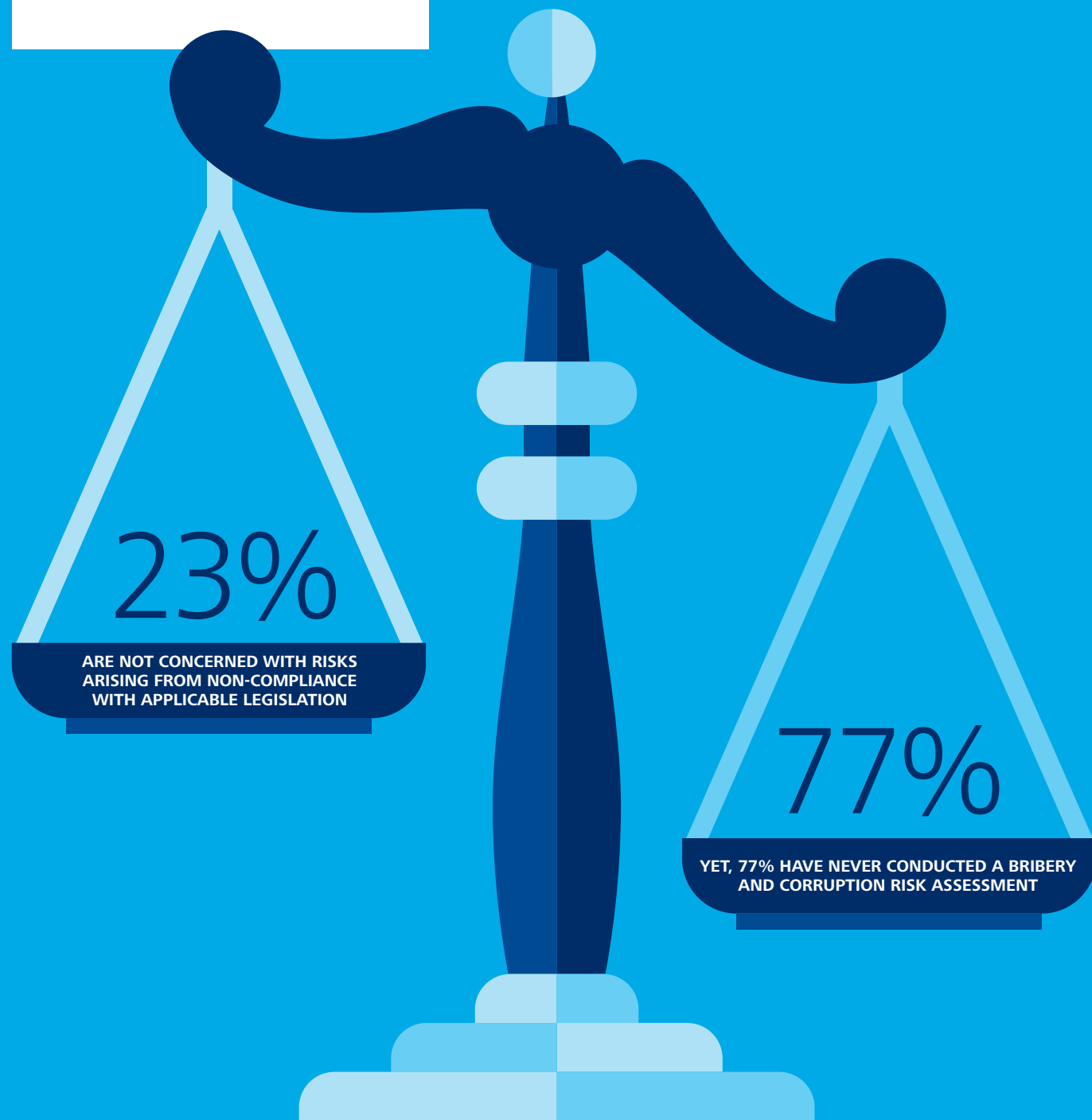
**So, what are the alternatives when you say 'no'?**

Some options include (but are not limited to):

- Consult with legal advisors
- Escalate the matters internally and/or with the third party
- Engage with domestic and/or local government enforcement agencies as appropriate
- Clear communication and endorsement of the organisation's code of conduct by the executive/management
- Abandon the opportunity/customer
- Chose an alternative third party.



Of organisations with offshore operations, 23% said they are not concerned with risks arising from non-compliance with applicable legislation, yet 77% have never conducted a bribery and corruption risk assessment



## Foreign bribery laws Abiding or abetting?

It would be naive to assume that the enforcement of bribery legislation won't continue to increase. Regulators and enforcement agencies across the globe are building momentum. And the US, of course, is as active as ever.

An organised crime and anti-corruption bill recently introduced into the New Zealand Parliament will, if enacted in its current form, increase penalties for private sector corruption. Submissions have also been made to remove existing facilitation payment loopholes, which will see the NZ legislation have a greater alignment with the UK Bribery Act.

Australia's Commonwealth Attorney-General's Department continues to review the country's bribery and corruption laws, including a focus on the removal of the facilitation payments defence from current legislation to maintain consistency with international legislation and treaties. While submissions are still being assessed, considering the impact of the UK Bribery Act 2010 and growing international pressure to prohibit facilitation payments, it's possible the defence will be removed from the legislation in the future.

One previously missing element that is getting some real traction is that of global cooperation. Police and regulators are cooperating and sharing information more than ever before, and this will no doubt continue and become the norm. Enhanced detection and more effective and efficient brief building will result, along with an increase in investigations and prosecutions.

### Facilitation payments: What are they?

Facilitation payments, also referred to as 'grease' payments, are minor payments for the purposes of expediting or securing the performance of a 'routine government action'. According to the Australian Criminal Code, examples include actions such as the granting or processing of permits, licenses and visas.

For some organisations, making facilitation payments in relation to offshore operations has been seen as a necessary cultural evil, and the price of doing business in offshore locations where corrupt behaviour is considered the norm. This justification is fast losing credence in the international regulatory and corporate landscape, and is reasoned to suggest a lack of commitment to ethical business dealings.



We are seeing an increase in coordination between law enforcement agencies in different Asian jurisdictions in the fight against cross-border corruption. The Corrupt Practices Investigation Bureau and prosecutors in Singapore have a good working relationship with their counterparts in Malaysia, Hong Kong and Indonesia, and are constantly networking and building new links with other jurisdictions. Through the forging of such strong ties, the sharing of information and mutual assistance can only be further enhanced in a world where anti-corruption legislation is becoming increasingly extra-territorial in nature.

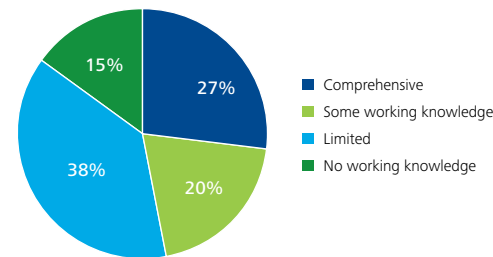
**Tim Philipps** Deloitte Global Managing Director for Forensic and Data Analytics

**Domestic**

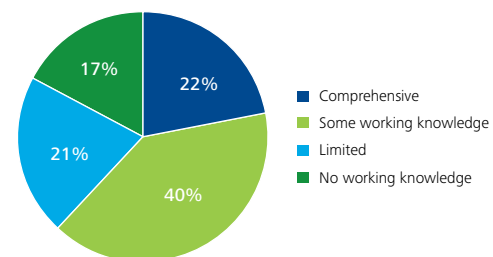
Which statement best reflects your organisation's knowledge of the Australian Criminal Code Act 1995 (Cth) with regard to prohibiting foreign bribery and corruption (Australian organisations with offshore operations)?

**Australia**

2015 survey results



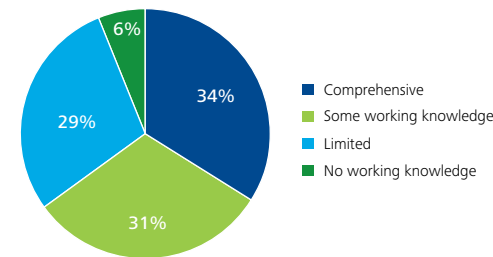
2012 survey results



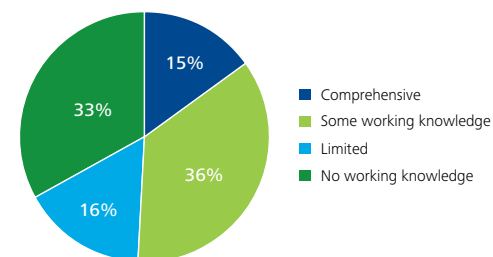
Which statement best reflects your organisation's knowledge of the New Zealand Crimes Act 1961 and the Secret Commissions Act 1910 with regard to prohibiting foreign bribery and corruption (New Zealand organisations with offshore operations)?

**New Zealand**

2015 survey results



2012 survey results



While there is currently a defence in Australian and New Zealand foreign bribery laws regarding facilitation payments, and an exception under the US Foreign Corrupt Practices Act, an organisation that allows facilitation payments in respect of foreign public officials will be at odds with its domestic policy, as there is no concept of a 'facilitation payment' in Australian or New Zealand anti-bribery domestic law.

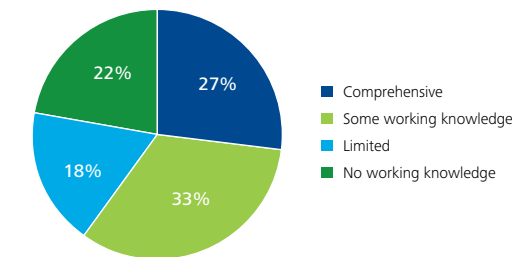
This will likely result in an increased risk that stakeholders misinterpret organisation policies, fail to understand the organisation's position, and an inconsistent control approach is followed. A policy that permits facilitation payments risks setting a lenient tone in respect of wider unethical practices. We know that some law enforcement agencies view facilitation payments as clues to potentially wider systemic corruption issues.

**Foreign**

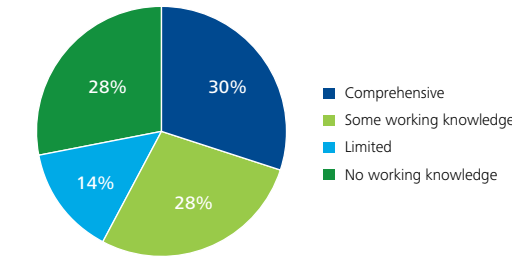
Which statement best reflects your organisation's knowledge of the US Foreign Corrupt Practices Act (organisations with US operations)?

**US**

2015 survey results



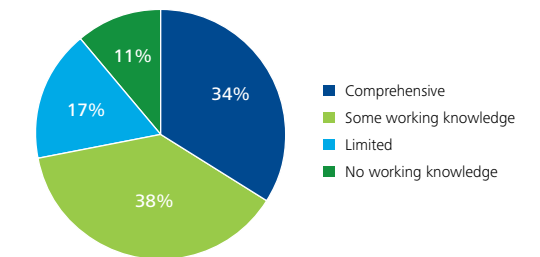
2012 survey results



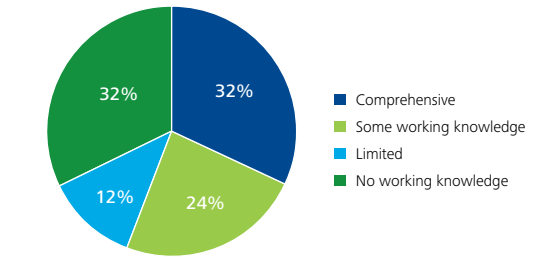
Which statement best reflects your organisation's knowledge of the UK Bribery Act 2010 (organisations with UK operations)?

**UK**

2015 survey results



2012 survey results



**Ignoring the obligation to act ethically: What is the impact?**

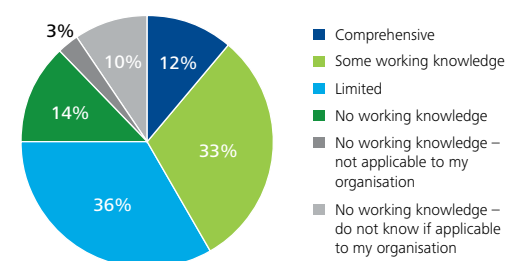
According to a report prepared by the World Economic forum in association with the International Chamber of Commerce, the United Nations Global Compact and Transparency International:

- 'The cost of corruption is estimated to equal more than 5% of global GDP (US\$2.6 trillion), with over US\$1 trillion paid in bribes each year
- Corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries
- Moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20% tax on foreign business.'

<http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>



Which statement best reflects your organisation's knowledge of other bribery laws of the countries in which you operate (organisations with offshore operations)?

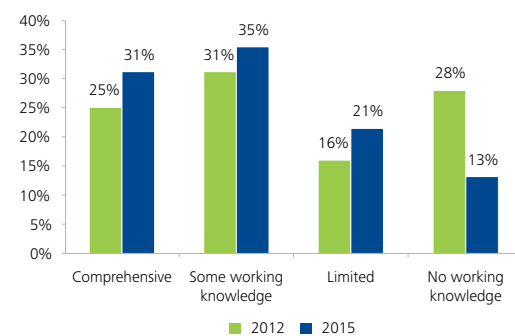


- 31% (up from 25% in 2012) of organisations with offshore operations said they have a comprehensive understanding of the relevant laws (both domestic and foreign).

While the increase in comprehensive knowledge is encouraging, a worrying lack of awareness of bribery laws, both domestic and foreign, remains. Compliance with relevant bribery laws, and maintaining a sufficient understanding of regulatory requirements, continues to be a real and ongoing challenge for organisations.

Of course it's not realistic to expect all employees to have a comprehensive knowledge of applicable laws, but it's critical that, at a minimum, there is a general awareness of their existence and a basic working knowledge. The key is to ensure all employees are regularly reminded to be vigilant, to always critically think through the things they do, and to ask when they are not sure.

Both domestic and foreign knowledge



- 34% of respondents with offshore operations either have limited or no working knowledge of applicable domestic and/or foreign bribery laws, down 10 percentage points from 2012.

### US FCPA and UK Bribery Act 2010

A number of Australian and New Zealand organisations operating in the UK or the US (or captured by virtue of the nature of their operations) are also subject to the US FCPA and the UK Bribery Act 2010, in addition to their domestic legislation. As well as increasing their understanding of the law, Australian and New Zealand organisations should ensure that they take proactive steps to recognise and mitigate the risk of cross-border enforcement, particularly as Australian and New Zealand organisations continue to be investigated under the US FCPA and UK Bribery Act 2010.

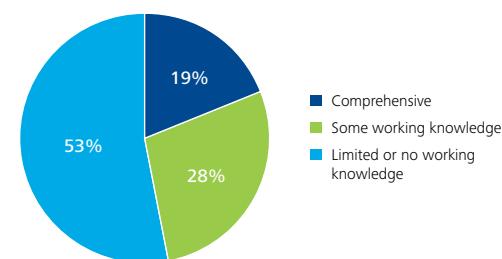
A widespread and mistaken belief that commercial bribery can't be, or isn't, prosecuted under the FCPA has been contradicted by comments from the Securities and Exchange Commission (SEC) and recent enforcement actions. Both demonstrate the SEC's plan to prosecute companies who have paid commercial bribes for violations of the FCPA books and records provisions. It is therefore vital that organisations ensure they have adequate controls in place to manage this expanded risk.

The table below summarises the key provisions of the UK Bribery Act 2010. While the Section 7 corporate offence is broad, there is a defence available for organisations charged under this section, in that if the organisation is able to demonstrate that it had 'adequate procedures' in place to prevent associated persons committing such conduct, it may be afforded a defence.

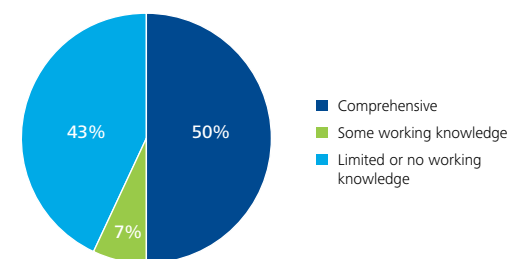
<b>Section 1</b>	Bribing another person	Offering, promising or giving a bribe in the UK or abroad, in the public or private sector.	Must be intention to induce a person to act improperly in the performance of their duties.
<b>Section 2</b>	Receiving a bribe	Requesting, agreeing to receive or accepting of a bribe in the UK or abroad, in the public or private sector.	What is 'improper' is judged by the standards of a 'reasonable person in the United Kingdom'.
<b>Section 6</b>	Bribery of foreign public officials	Bribery of a foreign public official in order to obtain or retain business or otherwise gain a business advantage.	Payment or benefit must influence a foreign public official in the performance of their duties. No requirement to show improper conduct.
<b>Section 7</b>	Failure to prevent bribery	Failure by a commercial organisation to prevent a bribe being paid on behalf of the organisation by those who perform services for or on behalf of the organisation.	It will be an affirmative defence if a commercial organisation has 'adequate procedures' in place.

**Executive/board member knowledge of applicable domestic and foreign bribery laws (where organisations have offshore operations)**

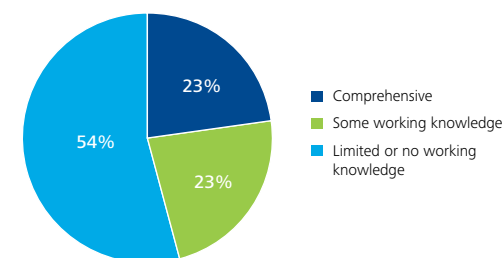
**Domestic**



**Foreign – UK**



**Foreign – US**



- Of those:
  - 19% have a comprehensive understanding of the applicable domestic (Australian or New Zealand) bribery laws (20% in 2012)
  - 23% with operations in the US had a comprehensive understanding of the FCPA, down 18 percentage points from the 41% reported in 2012. Of concern are the 12% who responded that they didn't know if the FCPA was applicable to their organisation
  - 50% with operations in the UK had a comprehensive understanding of the UK Bribery Act 2010, an increase of 10% points from the 40% reported in 2012.

- 44% of executive and board member respondents were from organisations with offshore operations

As with broader employee groups, it isn't realistic to expect all senior executives and board members to have comprehensive knowledge of complex legislation, including that touching on foreign bribery and corruption. It is, however, necessary for them to have at least some working knowledge. It's interesting to note that awareness of the UK law is markedly higher than that of the US, Australian, and New Zealand law. It may be that the education efforts of the UK authorities have had, and/or are having, greater success.

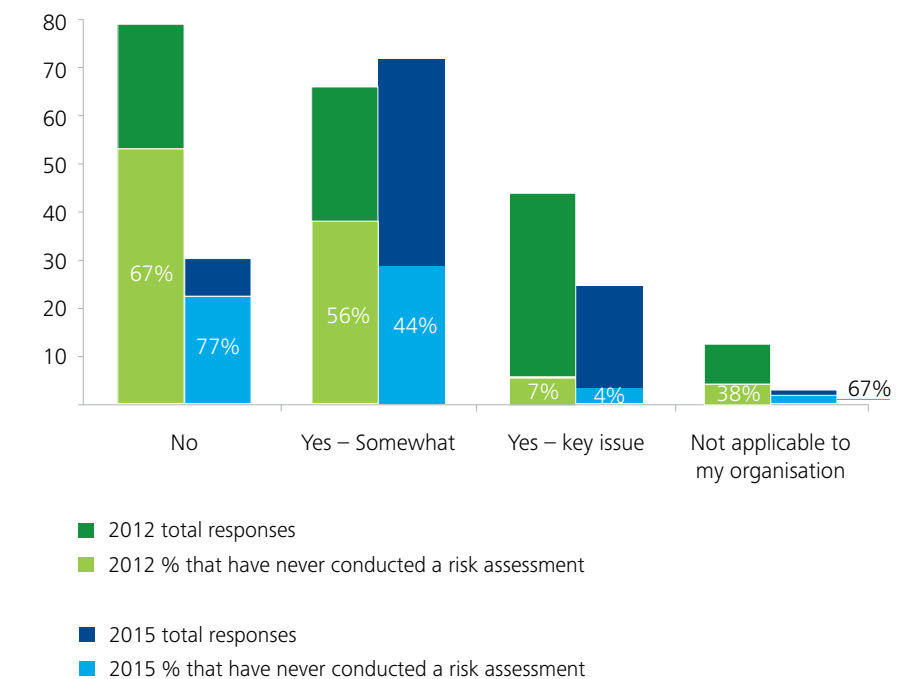
When comparing the 2015 and 2012 results, it appears that executives and directors that had some knowledge or understanding of the various international bribery laws also had improved upon this understanding. It's disappointing however, that for those who exhibited a lack of awareness in 2012, this has either stayed the same or deteriorated further.

It will be interesting to see what impact the soon to be completed International Organization for Standardization (ISO) standard on anti-bribery will have on these results in the future.

**Martin Tolar** CCP, GAICD, Managing Director, GRC Institute

**Is your organisation concerned with risks arising from non-compliance with either domestic or foreign bribery laws (organisations with offshore operations)?**

# respondents

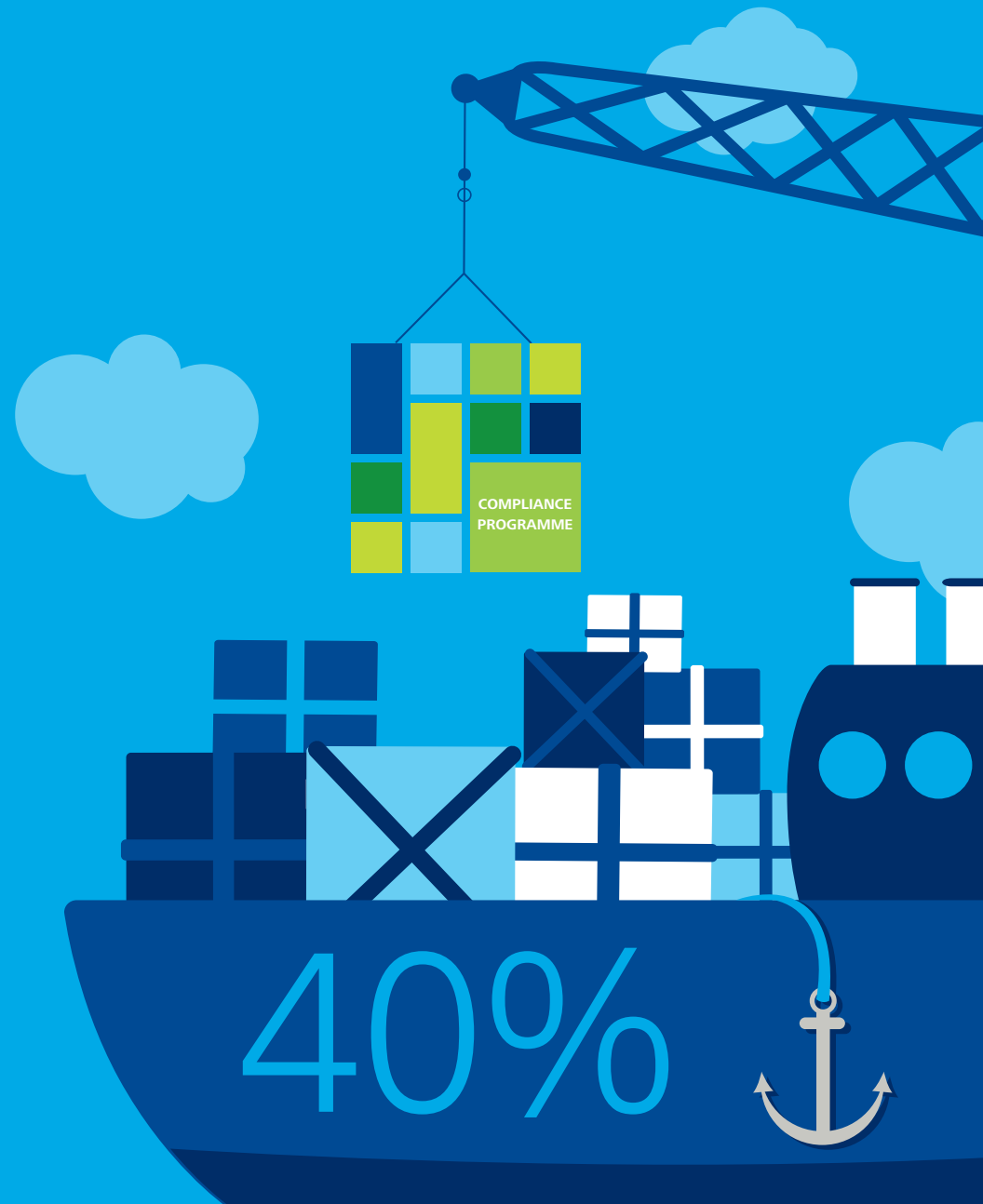


- 23% of organisations with offshore operations said they are not concerned with risks arising from non-compliance with applicable laws
- Yet 77% of these organisations have never conducted a bribery and corruption assessment.

Similar to 2012 survey responses, a large proportion (77% in 2015) of respondents with offshore operations, and who are not concerned with risks arising from non-compliance with either domestic or foreign bribery laws, have not completed a risk assessment. The question again is, how can these organisations be comfortable that they have the knowledge to make informed decisions about whether or not they are at risk? Is it simply a case of 'see no evil, hear no evil'?



40% of organisations with offshore operations do not have (or it's not known if they have), a formal compliance programme in place to manage corruption risk



## Offshore risks Who's accountable?

Prevention is one thing, and appropriate effort on this front is definitely required. But no system will ever be perfect, so organisations must be diligent in detecting misconduct. Being smart in utilising the massive data sets an organisation holds, creating a culture and workplace environment in which people feel secure in speaking up, and having proper audit, detection and investigation mechanisms in place is essential in identifying those transactions and events that don't meet conduct expectations.

Ultimately, responsibility for any breaches of bribery laws will fall squarely at the door of executives and the board, unless they can clearly demonstrate to stakeholders and regulators that misconduct such as bribery and corruption is not tolerated, and all reasonable efforts have been made to prevent such activity. Being able to demonstrate that an incident is a rogue event, and not part of a wider systemic problem, is vital for any organisation facing allegations of corrupt activity.

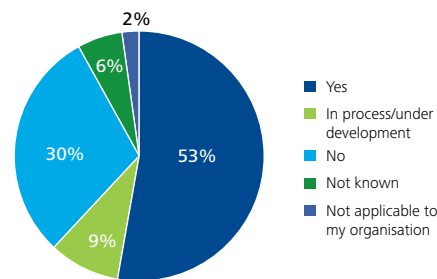


A question we commonly hear from clients is: 'Who within our organisation should have day-to-day operational responsibility for ensuring the effectiveness of the anti-bribery and corruption compliance programme, and where should they sit in the business? Is this a role for legal, compliance or risk?'

The simple answer is there is no one size fits all. What's important is that responsibility is delegated to specific senior individuals who have the right resources and appropriate authority to ensure the effective operation of the programme. Further, they must have clear and effective channels to report up the chain, autonomy, **the ability to report bad news without fear of repercussions**, the ability to provide guidance and urgent advice to employees on compliance, and sufficient and appropriate knowledge of the subject matter.

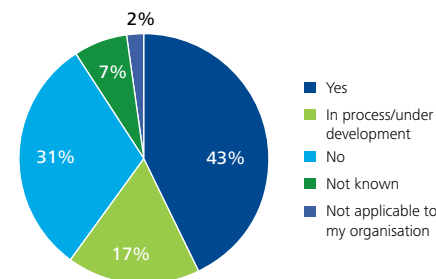
**Rachel Besley** General Counsel, Deloitte Australia

**Does your organisation have a formal foreign bribery and corruption policy in place (organisations with offshore operations)?**



- 38% of organisations responded that they didn't know, it wasn't applicable, or they didn't have a formal policy in place to manage corruption risk.

**Does your organisation have a formal foreign bribery and corruption compliance programme in place (organisations with offshore operations)?**



- A similar figure, 40%, responded in the same way when it came to having a compliance programme in place to manage corruption risk.



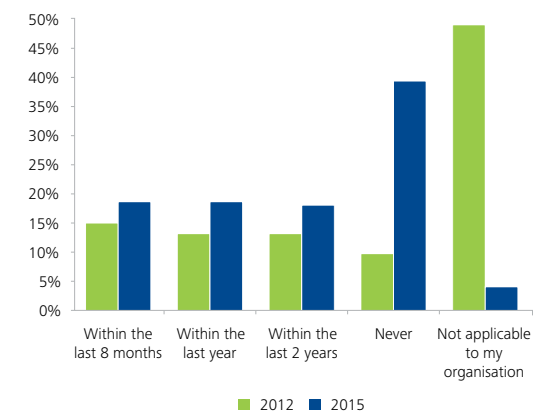
The value of an anti-bribery and corruption programme is not limited to being an essential tool to prevent and manage corruption risk. We've also seen its value as a defence in relation to potential enforcement actions, mitigating penalties, and minimising the consequent damage to reputation through negative publicity.

A high level of compliance with better practice would be one factor a regulator would take into account when responding to allegations or suspicions of corrupt activity. Other factors include the effective implementation and ongoing monitoring and improvement of the organisation's anti-bribery and corruption programme.

Organisations need to regularly assess whether their programme would hold up to external scrutiny. In particular, is it based on a sufficiently thorough and well-designed risk assessment, is it proportionate and adequate, and are all the key risk areas covered?

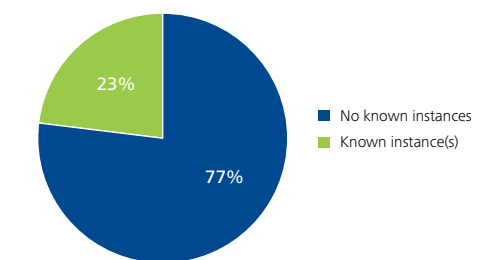
**Chris Noble** Lead Partner, Deloitte Forensic Australia

**How recently has your organisation conducted a formal foreign bribery and corruption risk assessment (organisations with offshore operations)?**



- 45% of organisations with offshore operations have never conducted a formal foreign bribery and corruption risk assessment, or said it wasn't applicable to their organisation. This is a decrease from the 59% reported in 2012.

**Known instances of bribery and corruption (organisations with offshore operations that have not conducted a formal foreign bribery and corruption risk assessment)**



- 23% of respondents whose organisation has never undertaken a risk assessment have experienced a foreign bribery and corruption incident in the last five years.

The 2015 results show a significant drop, from 49% in 2012 to 5%, in the number of organisations with offshore operations that don't believe a risk assessment applies to their organisation. At the same time, there has been an almost commensurate rise in the number that have not undertaken a risk assessment. This raises the question of whether organisations with offshore operations now realise that risk assessments are applicable, but haven't yet got around to undertaking them.



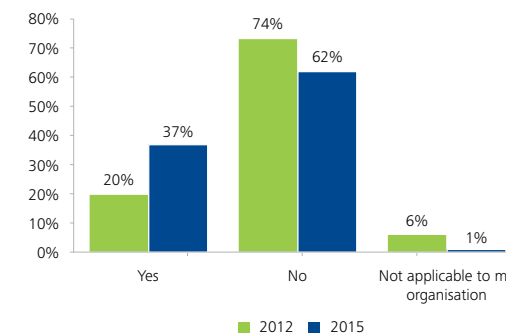


An honest, detailed and regular assessment of the risks inherent in a business is critical to an organisation's ability to develop a programme that is fit for purpose. Without knowing the risks, how can an organisation ever be confident that what has been developed to mitigate and detect those risks will be effective in the face of a real incident?

Equally, a robust foreign bribery and corruption risk assessment and accompanying programme doesn't need to be overly burdensome. We are starting to see organisations taking a more holistic approach to financial crime management, weaving foreign bribery and corruption into their broader financial crime risk assessments. Such an approach enables a more realistic and multi-dimensional view of risk exposures, and to design procedures and controls that are multi-purpose and situational. This is helping to both cut red tape for employees on the ground and integrate the management of bribery and corruption risk far more seamlessly into the business environment.

**Lisa Dobbin** Partner, Deloitte Forensic Australia

**In the next five years, do you regard foreign bribery and corruption as one of the top five risks to your business (organisations with offshore operations)?**



- 63% of respondents with offshore operations said they either don't regard foreign bribery and corruption as a top five risk, or the issue is not applicable to their organisation. This is a decrease of 17 percentage points from the 80% reported in 2012
- 37% see bribery and corruption as a top five risk.

That many organisations with offshore operations don't regard foreign bribery and corruption as a top five future risk is a concern. Although the risk is increasing in perceived importance, there are still too many organisations not giving bribery and corruption the attention it deserves.

We are seeing an increase in local enforcement actions for breaches of foreign bribery laws and greater cooperation internationally between law enforcement agencies. There is an increasing and very real risk that Australian and New Zealand organisations will find themselves caught up in bribery and corruption enforcement actions in the coming years.

While New Zealand rates well as a low corruption country, we cannot be complacent. Bribery and corruption is a serious business risk with numerous negative flow-on effects. New Zealand businesses are increasingly trading in international markets where the problem is much more prevalent, and it's vital that this risk is managed by way of adequate and proportional anti-bribery and corruption programmes, including effective systems and policies.

**Phil O'Reilly** CEO, BusinessNZ and  
**Catherine Beard** Executive Director, ExportNZ

# Thoughts from the front line

## Paying a bribe – Excuses, excuses, excuses



It is generally acknowledged that the key ingredients of bribery and corruption (and fraud), are:

- Opportunity
- Motivation and
- Rationalisation.

These three elements motivate the briber's wrongdoing and each is, more or less, secret. The ability to rationalise enables people to justify and provide false legitimacy to their wrongful actions. Such rationalisation is commonly used to 'shift the blame' in any direction other than on him or herself.

When an executive doing business abroad is confronted with demands for a bribe, they can make at least five excuses or justifications for complying with the request:

### *'It's just an extra cost of doing business.'*

The executive may tell themselves that, 'Paying a bribe has become so prevalent here there is no point in refusing to recognise the situation or in resisting it. The customer is still getting the best price and our agent will guide us on the appropriate amount, who to pay and how to do it discreetly so as not to offend. It is a just a matter of being realistic.'

### *'In this culture bribe payments have always been the way business is done. Everyone does it.'*

'After all we are strangers here and we need to respect their culture.' This excuse is commonly used to justify wrongdoing or breaches of corporate codes. It is particularly prevalent when executives are dealing with a powerful figure in an emerging market.

### *'I have, after all, a duty to our shareholders.'*

'We would be failing our duty to act in the best interests of the company if we do not compete—and we can't compete in that market without paying under the counter. Moreover we know that the boss will support us, despite company policy.' Such rationalisations may have a long company history or even be used as a joint excuse with others in the negotiating team.

### *'To lose the tender or the opportunity will cost me my bonus.'*

Personal incentives and rewards will often run counter to compliance with company policy. There are very few bonus programmes which take into account the need not to bid or to walk away when bribes are being demanded. To refuse to pay and conform to the company policy, though moral, may not stand up against the need to maximise one's earnings.

### *'We will never get caught.'*

This is the supposedly 'killer' argument for those in remote locations, especially those with the express or implied support of senior officers. They do not feel exposed. However, this is a less powerful factor nowadays, whether people justify their actions alone or in combination with the rationalisations of others.

Whether such justifications are invoked in the executive's mind or openly with their peer group, cloaked by a veil of secrecy, they will only be vaguely acknowledged.

This means that it must become common practice to recognise and frequently consider bribery as a possible breach of a company's Code of Conduct. This can be done using role plays and other training techniques designed to provide strong moral guidance and to focus on the personal responsibility of each executive. Giving constant reminders of how an executive can readily rationalise his or her behaviour and providing effective ways to resist and counteract bribes should be an essential part of all corporate compliance programmes.

**Michael Ahrens** Chief Executive, TI Australia



www.transparency.org.au

Article originally published in the December 2014 edition of the TI Australia newsletter.

# What's a reputation worth?

According to Deloitte's 2014 Global Survey on Reputation Risk<sup>2</sup>, a reputation risk that is not properly managed can quickly escalate into a major strategic crisis.

### Reputation risk is driven by a wide range of other business risks that must all be actively managed.

Topping the list are risks related to ethics and integrity, such as fraud, bribery, and corruption. Third-party relationships are another rapidly emerging risk area, with companies increasingly being held accountable for the actions of their suppliers and vendors.



There seems to be a disconnect between risk and reality, with a perception among Australian and New Zealand organisations that bribery and corruption is not a key risk. However, many of them operate in higher risk countries or may be exposed to the US FCPA and the UK Bribery Act.

A more comprehensive understanding of applicable legislation and a thorough risk assessment is needed to bridge the gap between perceived risks and reality. Together with a robust anti-corruption compliance programme that cultivates an ethical culture, this will increase an organisation's risk capacity and give them a competitive advantage.

**Sophie McMurray** Head of Compliance and Anti-Corruption Officer, Deloitte Australia

<sup>2</sup>www.deloitte.com/reputationrisksurvey

A company's reputation is affected by its business decisions and performance across a wide range of areas:

**Financial performance.** Shareholders, lenders, and many other stakeholders consider financial performance when assessing a firm's reputation.

**Quality.** An organisation's willingness to adhere to quality standards goes a long way to enhancing its reputation. Product defects and recalls have an adverse impact.

**Innovation.** Firms that differentiate themselves from their competitors through innovative processes and unique/niche products tend to have strong name recognition and high reputation value.

**Ethics and integrity.** Firms with strong ethical policies are more trustworthy in the eyes of stakeholders.

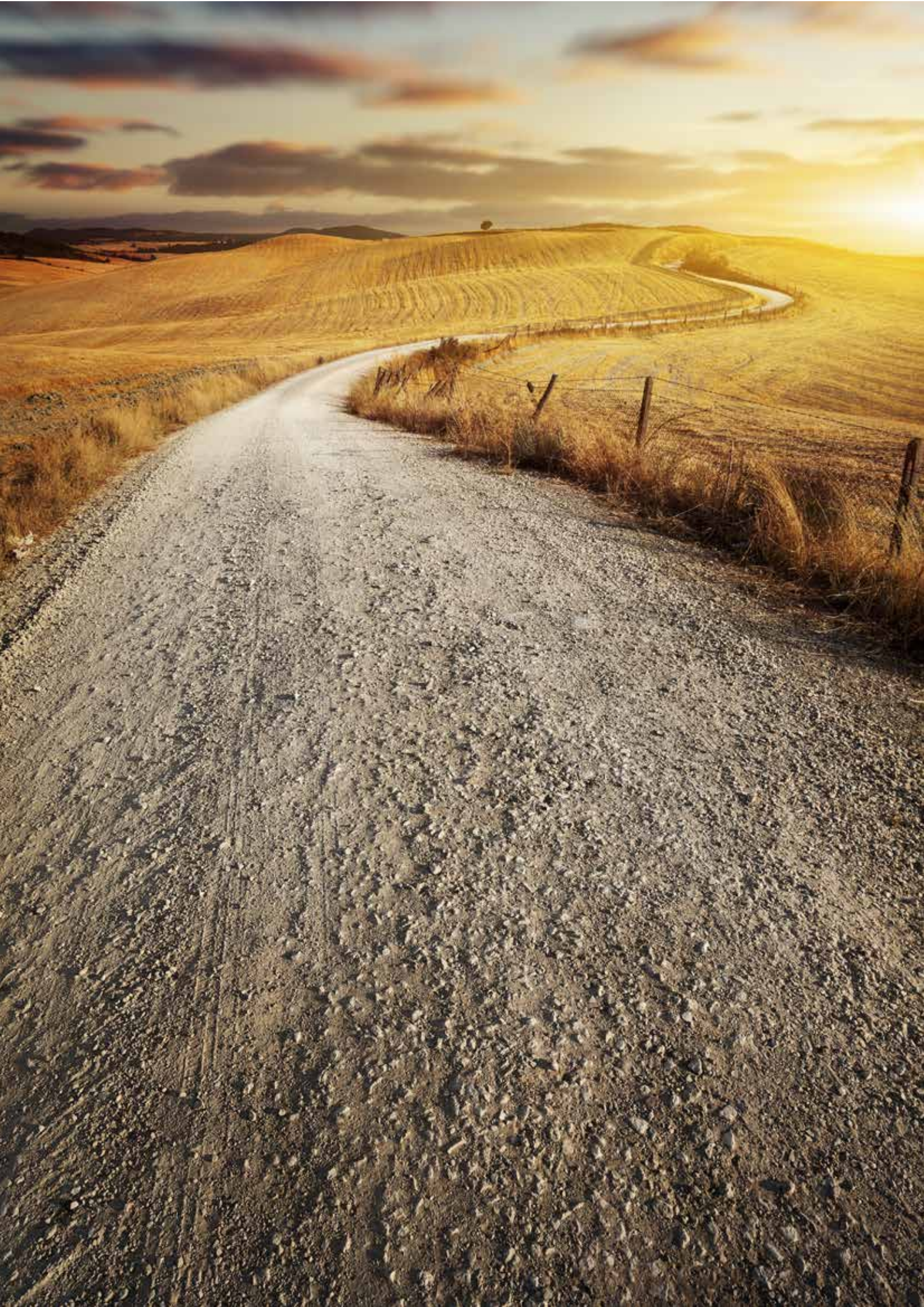
**Crisis response.** Stakeholders keep a close eye on how a company responds to difficult situations. Any action during a crisis can ultimately affect the company's reputation.

**Safety.** Strong safety policies affirm that safety and risk management are top strategic priorities for the company, building trust, and value creation.

**Corporate social responsibility.** Actively promoting sound environmental management and social responsibility programmes helps create a reputation 'safety net' that reduces risk.

**Security.** Strong infrastructure to defend against physical and cyber security threats helps avoid security breaches that could damage a company's reputation.





# Ethics and integrity: Have you realised the benefits?

For countries that like to win at everything they do, Australia and New Zealand had some disappointing news late in 2014, with both dropping one ranking in Transparency International's Corruption Perceptions Index (TI CPI) rankings of the least corrupt public sectors – New Zealand is now #2 and Australia is #11.

***This drop is a wake-up call for your organisation!***

**Australia and New Zealand are in a unique group of countries of the top 5% as they both:**

- Have the knowledge to demonstrate the benefits of ethical, transparent, and corruption-free practices, where integrity systems operate as antidotes to corruption
- Observe international anti-corruption conventions
- Have public, community, NGO and private institutions that are working towards maintaining good governance and transparency, and key elements of strong integrity systems (although lack of resources make them vulnerable)
- Are involved in supporting programmes available for the anti-corruption and transparency work in the Pacific and wider region.

## TI CPI

TI CPI compiles data collected by internationally accredited expert assessments and opinion surveys to rank countries 'by international perceptions of levels of corruption of their public sectors'.

According to the 2013 New Zealand National Integrity Systems Assessment (NISA), (see [www.transparency.org.nz/nis](http://www.transparency.org.nz/nis)), all of New Zealand's sectors (including the business sector) generally scored well for integrity. Australia's 2010 NISA found a similar result. ***The trouble is, these results are fragile because, as the Deloitte survey has found, many Australian and New Zealand organisations fail to take corruption seriously.***

**Yet, there are seven potential benefits to your business because of both Australia's and New Zealand's international reputation for strong integrity systems:**

- 1) Reputation and brand are powerful galvanisers, drawing global interest in products and services, increasing activity, revenue and the size of the tax base
- 2) Absence of corruption means a lower cost of doing business every day of the year
- 3) It can result in a lower cost of capital
- 4) It supports easier market access
- 5) Responsible entities achieve a higher rate of return on investment
- 6) Staff prefer to work for ethical organisations
- 7) Ethical organisations achieve greater customer value.

**Question:** *Has your organisation realised the benefits of these seven key areas, and are they reflected in enhanced competitiveness, profitability and productivity?*

You can realise these benefits, led by good governance, and increase your returns at the same time.

**Suzanne Snively** ONZM – Chair,  
Transparency International New Zealand



[www.transparency.org.nz](http://www.transparency.org.nz)



# Managing corruption risk

## Governance & oversight

- An effective oversight structure is in place and high level personnel are knowledgeable of the compliance programme and set the tone from the top
- Staff with sufficient seniority, independence, and resources, ensure compliance with all laws, regularly monitor and report results, and ensure that remuneration is sufficient to deter corrupt behaviour.

## Risk assessments

- A suitably detailed and honest preliminary assessment is undertaken and forms a reasonable base for the development of an anti-bribery and corruption (ABC) plan and programme
- Periodic assessment is undertaken thereafter.

## Policies & planning

- A clearly articulated and visible corporate policy is in place that prohibits bribery and corruption and promotes compliance with bribery laws, and is aligned with other related organisation policies
- Policies are accessible and applicable to all employees, contractors, agents, suppliers and other stakeholders as appropriate.

## Communications & training

- The ABC policy is:
  - Clearly communicated and emphasises that non-compliance will be taken seriously
  - Distributed and available through multiple channels
- Regular communications from senior management highlight risks and the importance of organisation-wide compliance
- Tailored communications are made for those with approval authority and third party interactions
- Annual certified ABC training is required for all employees
- Tailored training is required for higher risk employees and third parties
- Annual certification of understanding of ABC policies is required for employees, relevant third parties and joint venture partners.

## Internal controls

- Effective internal controls for prevention and detection of corruption with focus on key areas as appropriate, including (but not limited to):
  - Third parties
  - Government transactions
  - Gifts, hospitality, entertainment and expenses
  - Customer travel
  - Political and charitable donations and sponsorships
  - Facilitation payments
  - Solicitation and extortion payments.

## Monitoring

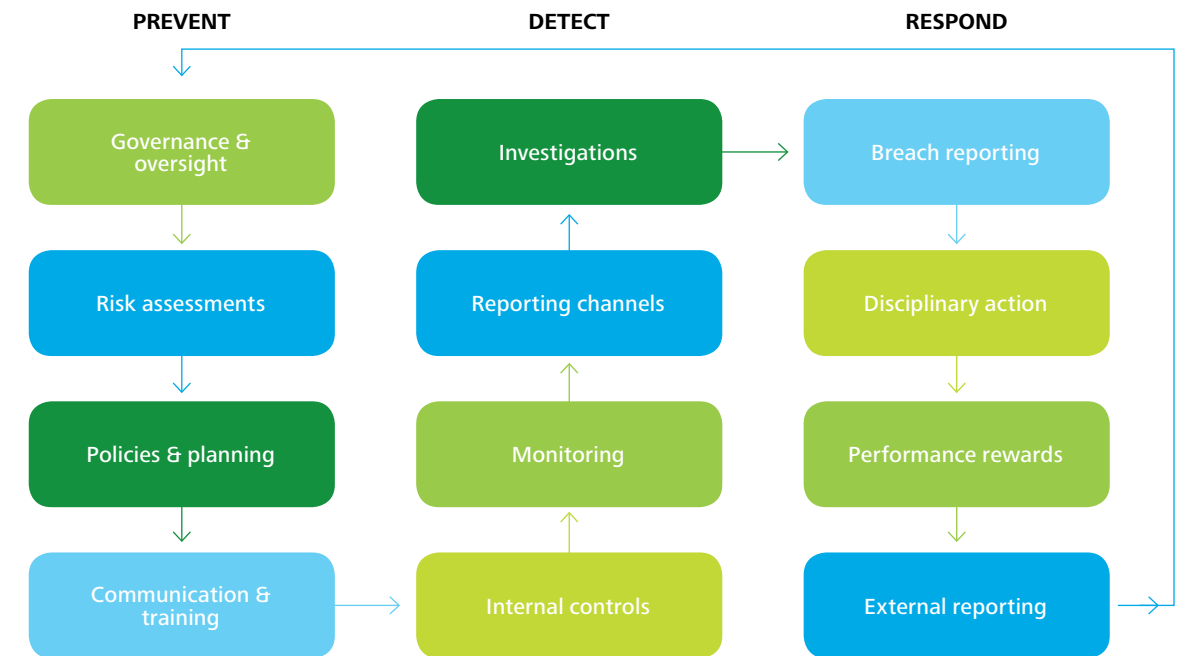
- Due diligence processes including risk-based due diligence of third parties
- Corruption risks incorporated into annual internal audit plan
- Periodic random audits of third parties
- Legal and compliance audits of contracts, training certifications, due diligence etc.
- Periodic review and enhancement as appropriate of the programme.

## Reporting channels

- Accessible channels implemented (e.g. whistleblower hotline, website/email, direct reporting lines to management) that encourage and allow employees, business partners, and other third parties to raise concerns and report violations in confidence and without fear of retribution
- Promotion of reporting channels to employees and third parties.

## Investigations

- A centrally-led independent team and external experts involved where appropriate
- Findings reported to management and improvements made to the programme accordingly.



## Breach reporting

- Effective measures to respond appropriately to reported violations. These should be efficient, reliable and have adequate resources to investigate allegations and violations
- An escalation process/protocols in place and operating effectively
- Whistleblower protection policy and independent investigation processes should be in place
- An incident register should be maintained and appropriately managed
- Necessary modifications to the programme following a violation.

## Disciplinary action

- Appropriate disciplinary procedures in place to address violations, including the failure to prevent criminal conduct at all levels of the organisation, and report known or suspected violations
- Disciplinary procedures to be applied reliably and promptly, and commensurate with the violation.

## Performance rewards

- Remuneration levels and structure are appropriate/commensurate to mitigate corruption risk
- Non-compliance with internal controls and incidents considered when awarding bonuses and pay.

## External reporting

- Systems and protocols should be in place to effectively identify whether and how external reporting is required, including:
  - Clear disclosure procedures
  - Key decision points regarding reporting to authorities
  - Key decision points regarding informing and consulting external advisers upon discovery of an issue.

My organisation is still maturing in terms of managing the risk of bribery and corruption. We are, however, transitioning from a culture of mere compliance (with policies and procedures) to one of actively considering this risk in all our business interactions.

Anti-bribery & Corruption Compliance Manager of an Australian listed company



# Key anti-bribery and corruption trends

Despite some serious concerns being raised by the OECD about Australia's failure to tackle and prosecute corrupt behaviour<sup>3</sup>, a number of anti-bribery and corruption trends are driving greater compliance and creating increased accountability in Australian and New Zealand organisations when it comes to corrupt behaviour:



1 Reinforcing the need for law reform, putting pressure on regulatory authorities to increase domestic and international cooperation and leverage cross-border enforcement action.

2 Facilitation payments may be a defence to an allegation of foreign bribery and corruption in Australia and New Zealand, but with the impact of the UK Bribery Act and growing international pressure to prohibit facilitation payments, it's possible that the defence will be removed. Other relevant law reform includes new whistleblower protections intended to facilitate disclosure and the investigation of wrongdoing and maladministration in the public sector.

3 A visible increase in coordination between law enforcement agencies in different jurisdictions in the fight against cross-border corruption.

4 As Australian and New Zealand companies explore offshore opportunities, they are often exposed to the dual risk of operating in higher risk jurisdictions and the extra-territorial application of laws that historically have been more rigorously enforced than Australian and New Zealand foreign bribery laws.

5 An investigation can trigger continuous disclosure obligations for listed companies if the investigation would have 'a material effect on the price or the value of the company's securities'<sup>4</sup>. A failure to adequately disclose allegations relating to corrupt activity may otherwise expose companies to shareholder class actions, which are also generally increasing in Australia and New Zealand.

6 Increasing awareness, and domestic and international cooperation and cross-border enforcement action is resulting in more companies requiring their business partners in Australia and New Zealand, third parties, sub-contractors and vendors to include anti-corruption contractual obligations.

7 Anti-corruption trends in Australia and New Zealand are making anti-corruption compliance programmes a ticket to play. Robust programmes are becoming a competitive advantage, providing organisations with the capacity to operate in higher risk jurisdictions.

8 Australian and New Zealand organisations are also conducting third party due diligence to mitigate the risk of non-compliance, and verifying their anti-corruption programme for contractual purposes and to harness the reward for effective compliance.

9 Ethical and socially responsible investment is also growing in Australia and New Zealand. While investment criteria vary among funds, socially responsible investment funds may yield more competitive returns, and attract more investment funds – a trend set to continue with superannuation funds also considering companies' conduct relating to bribery and corruption.

10 Benchmarking also continues to raise awareness about the importance of fighting bribery and corruption, reinforcing compliance with anti-bribery and corruption obligations world-wide.

<sup>3</sup>OECD, Phase 3 Report <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf>

<sup>4</sup>ASX listing rules 3.1

# Summary of foreign bribery legislation

## Australia

### Treaties

Australia has signed and ratified the following international treaties in relation to anti-bribery and corruption:

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
2. United Nations Convention against Corruption
3. United Nations Convention against Transnational Organised Crime.

### Legislation

Under the above conventions, Australia has committed to managing and criminalising bribery and corruption under the following legislation:

#### 1. Division 70 of the Criminal Code Act 1995 (Cth) (the 'Criminal Code')

**Purpose:** To make bribery of foreign/commonwealth public officials unlawful, where:

- i. The inducement is offered or provided with the intention to influence the official in their exercise of official duties
- ii. The benefit obtained is not legitimately due.

**Applies to:** All conduct constituting the offence, where it occurs wholly or partly in Australia. Where the conduct occurs wholly outside of Australia the Criminal Code applies, if at the time of the alleged offence, the person was:

- i. An Australian citizen
- ii. A residents of Australia
- iii. A body corporate incorporated by or under a law of the Commonwealth or of a State or territory.

**Enforcement:** The AFP has primary responsibility for the enforcement of Division 70 of the Criminal Code.

#### Penalties:

- i. Individuals – Maximum penalty of 10 years imprisonment and/or a fine of 10,000 penalty units (AU\$1,700,000)
- ii. Body corporate/company:
  - If the value of the benefit obtained can be determined, the maximum penalty is the greater of 100,000 penalty units (AU\$17,000,000) and three times the value of the benefit obtained
  - If the value of the benefit obtained cannot be determined, the maximum penalty is the greater of 100,000 penalty units (AU\$17,000,000) and ten per cent of the annual turnover of the body corporate.

#### 2. Mutual Assistance in Criminal Matters Act 1987

**Purpose:** Provides a mechanism to obtain evidence from overseas jurisdictions in an evidentiary format legally able to be admitted in an Australian court of law.

## New Zealand

### Treaties

New Zealand has signed and ratified the following international treaties in relation to anti-bribery and corruption:

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
2. United Nations Convention against Transnational Organised Crime.

In addition, New Zealand has signed the United Nations Convention against Corruption and is currently taking steps to ratify the agreement.

### Legislation

Under the above conventions, New Zealand has committed to managing and criminalising bribery and corruption under the following legislation:

#### 1. Part 6 of the Crimes Act 1961 (The 'Crimes Act')

**Purpose:** Part 6 of the Crimes Act contains criminal bribery offences in relation to the corruption of the Judiciary, Ministers of the Crown, Members of Parliament, law enforcement officers, public officials and the corrupt use of official information.

**Applies to:** All offences committed by the following, in or outside New Zealand:

- i. New Zealand citizens
- ii. Persons ordinarily resident in New Zealand
- iii. Body corporates incorporated in New Zealand
- iv. Corporations solely incorporated in New Zealand who commit this offence outside New Zealand.

**Enforcement:** The New Zealand SFO and Police are responsible for the enforcement of the Crimes Act.

#### Penalties:

- i. A maximum of seven years imprisonment for Members of Parliament, law enforcement officers and officials who corruptly accept, obtain, agrees or offers to accept or attempts to obtain any bribe
- ii. A maximum of seven years imprisonment to any individual who corruptly gives, offers or agrees to give a bribe with intent to influence
- iii. A maximum of 14 years imprisonment for Judicial Officers, Ministers of the Crown or a member of the Executive Council who corruptly accept, obtain, agrees or offers to accept or attempts to obtain any bribe.

#### 2. Secret Commissions Act 1910 (The 'Secret Commissions Act')

**Purpose:** The Secret Commissions Act covers bribery and corruption offences applicable to the private sector.

**Applies to:** The Act provides that 'Every person is guilty of an offence who aids, abets, counsels, or procures, or is in any way directly or indirectly knowingly concerned in or privy to the commission of any offence against this Act, or the commission outside New Zealand of any act in relation to the affairs or business of a principal residing or carrying on business in New Zealand which if committed in New Zealand would be an offence against this Act.'

#### Penalties:

- i. Individuals – A maximum fine of NZ\$1,000 and two years imprisonment
- ii. Corporations – A maximum fine of NZ\$2,000.



## United States

### Treaties

The US has signed and ratified the following international treaties in relation to anti-bribery and corruption:

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
2. United Nations Convention against Corruption
3. United Nations Convention against Transnational Organised Crime.

### Legislation

Under the above conventions, the US has committed to managing and criminalising bribery and corruption under the following legislation:

#### 1. Foreign Corrupt Practices Act 1977 (FCPA)

**Purpose:** To make bribery of foreign government officials unlawful, where the bribe is for the purpose of obtaining or retaining business.

#### Applies to:

- i. All US citizens
- ii. Certain foreign issuers of securities
- iii. Foreign firms and individuals 'who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.'

#### Enforcement:

- i. The United States Department of Justice – Responsible for the civil and criminal enforcement of the Act with respect to domestic concerns and foreign companies and nationals
- ii. The United States Securities and Exchange Commission (SEC) – Responsible for civil enforcement of the Act with regards to issuers.

#### Penalties:

- i. Criminal:
  - Corporations and other business entities – A fine of up to US\$2,000,000 per violation
  - Officers, directors, stockholders, employees and agents – A fine of up to US\$100,000 per violation and imprisonment for up to five years
  - These fines may be higher under the Alternative Fines Act.
- ii. Civil:
  - Any firm and officer, director, employee or agent of a firm, or stockholder acting on behalf of the firm are subject to a fine of up to US\$16,000 per violation
  - A court may also impose an additional fine not exceeding the greater of the gross monetary gain arising from the offence or a specified dollar limitation
  - The specified dollar limitation ranges from US\$7,500 to US\$150,000 for an individual and \$75,000 to \$725,000 for a company.
- iii. Other actions: For violations of the FCPA, a person or firm may also be:
  - A corporation fined up to US\$25,000,000 for violation of the Books and Records and Internal Control provisions
  - An individual fined up to US\$5,000,000 in addition to up to 20 years imprisonment for violation of the Books and Records and Internal Control provisions
  - Prohibited from doing business with the United States Federal government
  - Ruled ineligible to receive export licences
  - Be suspended or barred from the securities business
  - Be suspended or barred from certain agency programmes.

#### 2. Dodd-Frank Wall Street Reform and Consumer Protection Act (the 'Dodd-Frank Act')

**Purpose:** Part of the Dodd-Frank Act modifies and increases the powers of the SEC. Further, it requires that the SEC provide whistleblowers with 10% to 30% of the sanction enforced by the SEC on the basis that:

- i. Original documentation was provided by the whistleblower
- ii. The sanction imposed by the SEC is greater than US\$1,000,000.

## United Kingdom

### Treaties

The UK has signed and ratified the following international treaties in relation to anti-bribery and corruption:

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
2. United Nations Convention against Corruption
3. United Nations Convention against Transnational Organised Crime.

### Legislation

Under the above conventions, the UK has committed to managing and criminalising bribery and corruption under the following legislation:

#### 1. Bribery Act 2010 ('Bribery Act')

Became law in the UK on 8 April 2010 and came into force on 1 July 2011.

**Purpose:** The Bribery Act replaces the UK's previous anti-bribery legislation and makes provision about offences relating to bribery. The Bribery Act contains four separate offences:

- i. Two general offences, being active bribery (the offering, pledging or providing of a bribe) and passive bribery (the requesting, consenting to accept or accepting of a bribe)
- ii. A specific offence in relation to the bribery of foreign public officials in order to obtain or retain business or a business advantage
- iii. A corporate offence relating to the failure of organisations to prevent bribery by an 'associated' person.

**Applies to:** All UK citizens, residents, companies and partnerships established under UK law as well as non-UK companies if they do business in the UK. The Bribery Act is extra-territorial, which means that the relevant person or company can be prosecuted for the crimes even if they were committed overseas.

**Enforcement:** The UK Serious Fraud Office is responsible for enforcing provisions in respect of overseas corruption.

**Penalties:** Up to ten years imprisonment and an unlimited fine.

**Note:** The Bribery Act gives a broad definition of an associated person as a person who performs services for or on behalf of a commercial organisation.

#### Notes:

- 1 The tables above set out the anti-bribery and corruption legislative provisions applicable in the regions listed above on a Federal level.
- 2 Each Australian state has its own anti-bribery and corruption laws in place. Section 109 of the Constitution of Australia stipulates that in the event of an inconsistency between Commonwealth and State laws, Commonwealth laws prevail over those of a State to the extent of any inconsistency.
- 3 With regards to the US, this summary has focused on the FCPA. US domestic bribery law is set out in the US Code (USC), 18 USC Section 201 enacted in 1962.
- 4 Penalty units – Breaches of statute law in Australia are usually prescribed in terms of penalty units which are defined in section 4AA of the Crimes Act 1914 (Cth). Section 4AA defines a 'penalty unit' as \$170.
- 5 This summary has been prepared by resources from the Deloitte Forensic practice. Deloitte Forensic staff are not lawyers and our summary should not be relied upon as legal advice.

# Contacts

## Australia

### New South Wales



**Frank O'Toole**  
*Partner, Forensic*  
+61 2 9322 7328  
frotoole@deloitte.com.au

### Western Australia



**Martin Langridge**  
*Partner, Forensic*  
+61 8 9365 7130  
mlangridge@deloitte.com.au

### Queensland



**Chris Noble**  
*Lead Partner, Forensic*  
+61 7 3308 7065  
cnoble@deloitte.com.au

### Victoria



**Ivan Zasarsky**  
*Partner, Forensic*  
+61 3 9671 7252  
ivanzasarsky@deloitte.com.au

## New Zealand

### Wellington



**Barry Jordan**  
*Lead Partner, Forensic*  
+64 4 470 3760  
bjordan@deloitte.co.nz

### Auckland



**Jason Weir**  
*Partner, Forensic*  
+64 9 303 0966  
jasweir@deloitte.co.nz



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