Anti-corruption Laws and Regulations

A Global Guide

Consulting Editor **Roberto Hernández-García**

Consulting editor
Roberto Hernández-García

Managing director
Sian O'Neill

Anti-corruption Law and Regulation, A Global Guide
is published by

Globe Law and Business Ltd
3 Mylor Close
Horsell
Woking
Surrey GU21 4DD
United Kingdom
Tel: +44 20 3745 4770
www.globelawandbusiness.com

Printed and bound by CPI Group (UK) Ltd, Croydon CR0 4YY

Anti-corruption Law and Regulation, A Global Guide

ISBN 9781787421172
EPUB ISBN 9781787421189
Adobe PDF ISBN 9781787421196
Mobi ISBN 9781787421202

Table of contents

Introduction ____ 7
Roberto Hernández-García
COMAD, SC

The International Chamber of Commerce: the business pioneer in the fight against corruption ____ 11
Viviane Schiavi
International Chamber of Commerce
Denis Simonneau
L'Oréal
François Vincke
Attorney, Member of the Brussels Bar

Anti-corruption and the legal profession ____ 21
Ashleigh Buckett
Lawyer
Rocío Paniagua
International Bar Association

The United Nations Convention Against Corruption (Merida Convention) and its effect in local law ____ 29
Lorena de la Barrera
Carlos Hernández
UNODC LPO Mexico

Argentina ____ 41
Roberto P Bauzá
Santiago Oliva Pinto
Rattagan Macchiavello Arocena

Australia ____ 61
Jocasta Giles
King & Wood Mallesons
Robert Wyld
Johnson Winter & Slattery

Bolivia ____ 81
Estefania Paz
Lindsay Sykes
Ferrere

Brazil ____ 91
Mariana Duprat Ruggeri
Camargo Corrêa Infra
Leopoldo Pagotto
Freitas Leite Advogados

Bulgaria ____ 103
Kamen Chanov
Vanya Evtimova
Dessislava Fessenko
Kinstellar

Canada ____ 113
Wendy Berman
Lara Jackson
Stephanie Voudouris
Cassels Brock & Blackwell LLP

Chile ____ 127
Juan Eduardo Figueroa
Sergio Huidobro Martínez
FIHS Abogados

China 141
Zhaopeng Yang
Haixiao Helen Zhang
Zhong Lun Law Firm

Czech Republic 155
Jitka Logesová
General Prosecutor's Office (Czech Republic)
Kristýna Del Maschio
Filip Široký
Kinstellar

France 165
Stéphane de Navacelle
Sandrine dos Santos
Julie Zorrilla
Navacelle

Germany 181
Volker D Popp
Compliance and AML Officer

Ghana 199
David Ofosu-Dorte
AB & David

Hong Kong 213
Ada SW Chan
Sophia SY Lam
Felix KH Ng
Haldanes

India 227
Ramesh K Vaidyanathan
Advaya Legal

Italy 239
Marco Dalla Vedova
Luca Pietrantuono
Dalla Vedova Associazione Professionale

Japan 261
Naoki Iguchi
Nagashima Ohno & Tsunematsu

Mexico 273
Roberto Hernández-García
Cynthia Irene Osio Sanchez
COMAD, SC

New Zealand 295
Gary Hughes
Akarana Chambers

Nigeria 311
Ayodele Adeyemo
Chukwuma Ezediaro
Babajide O Ogundipe
Sofunde, Osakwe, Ogundipe & Belgore

Panama 323
Darío Sandoval Shaik
Fabrega Molino

Peru 331
César Guzmán–Barrón
Lawyer in management of social conflicts, compliance and arbitration

Russia 347
Anastasia Kayukova
Roman Vedernikov
German Zakharov
ALRUD Law Firm

Singapore 355
Hamidul Haq
Istyana Ibrahim
Rajah & Tann

United Kingdom ____ **371**
Chris Hardjasa
Morgan J Miller
Paul Hastings LLP

United States ____ **391**
Hillary Levun
Perkins Coie LLP

The United States Foreign ____ **403**
Corrupt Practices Act
Josh Christensen
Timothy L Dickinson
Derek Turnbull
Paul Hastings LLP

About the authors ____ **417**

New Zealand

Gary Hughes
Akarana Chambers

1. Country overview regarding corruption matters

New Zealand has a welcome and well-earned reputation for being a relative beacon of low corruption. For many years, the country has sat comfortably high in international estimations, usually listed among the very best-performing nations in the annual Transparency International *Corruption Perceptions Index*[1] and similar global surveys.

This is due to generally high prevailing standards of governance, strong public institutions and courts, rigid application of the rule of law, good freedom of the press and official information disclosure regimes, as well as historically low cultural tolerance of corrupt practices.

However, no country is immune from bribery issues, particularly in the modern globalised era. Increased foreign travel, trade, inward investment and immigration demographics are changing New Zealand, and especially its largest city, Auckland. These remote islands are now a highly multicultural and diverse Asia-Pacific nation.

Possibly as a result of the historical absence of entrenched corruption that can be sadly commonplace in other nations, many New Zealanders have developed a sense of complacency. There remains a perception that because bribery is rare, it is close to non-existent, even where growing evidence suggests otherwise. This collective complacency can manifest itself in a lack of urgency to reform key legislative and regulatory measures, which therefore risk becoming outdated. It also leads to less pressure being exerted upon corporations to adopt and enforce stringent compliance measures. In this area, other developed nations, such as the United Kingdom and the United States, have moved current best practice forward through more detailed compliance and enforcement measures, such as the UK Bribery Act 2010.

New Zealand's enforcement agencies and media are not necessarily complacent. They continue to investigate, strongly call out and prosecute corruption matters. Public sentiment and the courts will condemn those rare instances of outright bribery. However, more could be done in key legal and corporate compliance aspects to ensure vigilance against standards gradually slipping, or against softer forms of corruption gaining a foothold in society.

1 Ranked number one in the 2017 edition (released January 2018), marginally ahead of Denmark. Survey available at www.transparency.org.nz/corruption-perceptions-index/.

2. Applicable international anti-corruption treaties and their effect in the fight against corruption

New Zealand is a signatory country to three main international conventions in this area:

- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) (1998, ratified by New Zealand in 2001);
- the United Nations (UN) Convention against Transnational Organized Crime (2000, ratified in 2002);
- the United Nations Convention Against Corruption (UNCAC) (2003, ratified following inexplicable delay in 2015).

New Zealand also participates in regional-level initiatives, such as the Asia-Pacific Economic Cooperation (APEC) Santiago Commitment to Fight Corruption and Ensure Transparency (2004), and via its role in the Asia/Pacific Group on Money Laundering, a financial crime and anti-money laundering intergovernmental forum. The Trans-Pacific Partnership free trade area agreement, currently under re-negotiation following the withdrawal of the US, also has a chapter dealing with transparency matters.

Perhaps the most influential of these international arrangements has been the OECD Convention. Like other signatories, New Zealand is subject to periodic peer review by the OECD; it received a timely international rebuke with the publication of the OECD's Phase 3 Report (2013)[2] on New Zealand's patchy levels of compliance with the convention. This helped spur belated local legislative efforts in response to strengthen a number of elements of New Zealand's domestic anti-corruption frameworks by enacting the Organised Crime and Anti-Corruption legislation reforms in 2015.

Those 2015 reforms comprised a relatively modest package of legislative changes aimed at redressing issues identified by the OECD report. It included measures making technical and definitional amendments to criminal laws, finally ratifying the UNCAC into domestic law and updating provisions to deal with related criminal scourges, such as human trafficking, passport fraud and cross-border identity-related offences.

3. The concept of 'corruption' in New Zealand

An understanding of what amounts to 'corruption' can vary widely among people and firms in New Zealand, reflecting a spectrum of conduct from the ethically ambiguous (eg, conflicts of interest) to more overt levels of dishonesty (eg, kickbacks or secret commissions).

New Zealand has no single agreed or legally binding definition of 'corruption', but the main enforcement agency, the Serious Fraud Office (SFO), is content in practice to apply a broad definition. As such, the SFO may turn to wide notions, such

2 See www.oecd.org/newzealand/new-zealand-not-immune-from-foreign-bribery.htm.

as Transparency International's view that corruption entails "the abuse of entrusted power for private gain",[3] or that of the Asian Development Bank, which refers to:

> *behaviour on the part of officials in the public or private sector in which they improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing the position in which they are placed*.[4]

Bribery is a particularly pernicious subset of corrupt practices, being taken to mean the giving or receiving, whether directly or indirectly, of something of value to influence a transaction. New Zealand's core statute in this area, the Crimes Act 1961,[5] ascribes a fairly mechanical definition of 'bribe' as meaning "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect".[6] However, in the context of the relevant series of offences laid out in that statute, this neutral definition works in tandem with an additional element of 'corrupt' conduct.

The New Zealand courts have recently had opportunity to examine the statutory meaning and extent of the term 'bribery'. This was in the important case of *Borlase and Noone v R*,[7] which explored where the line should be drawn between lavish but legitimate corporate hospitality and those gifts that would amount to corrupt consideration in return for the award of contracts. As the Court of Appeal explained:[8]

> *It is the word "corruptly" which introduces the specific element of impropriety. Corruption is established by evidence of the payment of a financial benefit knowing that its receipt is fundamentally inconsistent with the public official's duties. It does not require proof of dishonesty but of a conscious recognition by both the payer and recipient that the benefits are being provided in connection with the official's duties.*

This has been New Zealand's highest profile corruption case in recent times. The Crown prosecuted both the recipient of a series of extended and lavish gifts, cash payments, and hospitality who was a senior manager at an Auckland Council-owned public transport infrastructure provider, and the bribe-payer, who ran a roading engineering and construction company, Projenz.

The trial, which was conducted over seven weeks with almost 40 witnesses, exposed a contest over conduct that was argued by the defendants to be acceptable commercial conduct in order to develop business relationships, whereas the Crown alleged that it amounted to long-term and detailed corruption of a person integral to a department that was awarding significant public roading contracts.

The two men each faced charges under section 105 of the Crimes Act for bribery and corruption of a public official. This spanned a seven-year period from 2006 to 2013, during which Projenz routinely paid monthly 'consulting services' invoices issued by the public servant, Mr Noone. The High Court (New Zealand's first instance trial court) concluded that these were a sham and that in substance no consulting services had been provided.

---

3 See www.transparency.org.nz/anti-corruption/.
4 See www.sfo.govt.nz/what-fraud-is-and-what-we-do.
5 Available at www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html?src=qs.
6 See Part 6 of the Crimes Act 1961, definition of "crimes affecting the administration of law and justice" in section 99.
7 *R v SJ Borlase and MJ Noon*e [2016] NZHC 2970 at first instance (High Court), and [2017] NZCA 514 (Court of Appeal).
8 *Borlase and Noone v R* [2017] NZCA 514 (14 November 2017) at [19].

Earlier case authority confirmed that since the wide scope of section 105 carried a risk of criminalising activity involving unexceptional token gifts or other benefits, there should be allowed a *de minimis* exception for truly minor gifts or what the Crown referred to as "the usual courtesies of life". However, the extravagant benefits provided by Projenz went well beyond the scope of that exception. The Court closely analysed detailed particulars and circumstances of the gifts and payments, and for the most part rejected, various receipts and invoices for lunches, dinners, gifts of wine and whisky, international travel and conferences, iPads, iPhones and holidays for Mr Noone's family members, and payment of personal telephone bills, hotel rooms and taxi travel. These, the court held, went beyond "standard industry business expenses".

The bribery and corruption charges related to the provision of benefits totalling around NZ$1.2 million over seven years by way of:

- payment by Projenz of Mr Noone's monthly invoices said to be for consulting services provided. These were found to be a 'sham' and the payments corrupt;
- the provision of benefits to Mr Noone, such as travel, accommodation, tablets, phones and meals at fancy restaurants. The Crown said these went beyond the "usual courtesies of life" and were corrupt. The defendants countered that these were either normal incidences of marketing and relationship-building with Mr Noone (and within a "culture of collaboration"[9] that was being encouraged at the Council and Auckland Transport), or otherwise provided in connection with the consultancy services. Some of these elements, such as lunches and travel to attend industry conferences, were found to be acceptable; most, however, were not.

The court noted that "happily for New Zealand's international reputation, there is a relative dearth of case law under these provisions". Despite the ordinary meaning usually given to the words 'bribery' and 'corruption', the Crimes Act gives different and less pejorative meanings, with the legislative offence framed in broad terms. In particular, the Court confirmed that this offence does not require:

- any dishonesty on the part of the official receiving the benefit or the person providing it;
- any improper action to be carried out on the part of the official concerned; or
- proof that the person providing the benefit intended to influence the official to carry out an improper act.

Even if there were no evidence of actual involvement by Mr Noone in favourably awarding council contracts to Projenz, the extensive nature of the benefits provided meant it could be inferred that they were only provided to grow and maintain influence with the public official in his role inside the department. Ultimately, both defendants were convicted and given long custodial sentences (as discussed further at 4 below).

9 High Court [2016] NZHC 2970, at [50].

4. Applicable regulations (administrative and criminal) and the authorities in charge of regulating, enforcing against and punishing corruption

4.1 Introduction

There are two main statutory elements to New Zealand's anti-bribery law:

- the series of provisions in the Crimes Act (as mentioned at 3 above), which focus purely on public sector corruption; and
- the Secret Commissions Act 1910,[10] which is now a very elderly piece of legislation but can apply across both the public and private sectors.

There is no general or overarching offence of bribery, but rather a set of specifically defined offences. Further, no detailed compliance programmes or anti-bribery measures are required by statute of business enterprises, these matters typically being left as a matter of commercial and governance choice.

In addition, there are further government regulatory or 'soft law' measures short of statutory powers, which influence the overall make-up of the anti-corruption regime.

While these bribery and corruption offences have a form of extraterritorial application in place, it is more limited than the extensive long-arm reach of the US and UK regimes under, respectively, the Foreign Corrupt Practices Act 1976 and the Bribery Act 2010. New Zealand law can apply to individuals and companies, regardless of whether the factual events and conduct took place locally/domestically or wholly abroad, but the enforcement agencies can only prosecute New Zealand citizens, residents and companies incorporated in New Zealand. Jurisdictional matters have very rarely been tested, but would appear not necessarily to apply to foreign citizens or corporations who merely have assets in or pass transactions through New Zealand.

4.2 Private sector corruption: the Secret Commissions Act 1910

The Secret Commissions Act 1910 (the 1910 Act) contains several bribery and corruption-style offences, couched in the language of principal and agent relationships and undisclosed benefits. Although it is the main private sector anti-corruption law, the 1910 Act is written in archaic and complex drafting style reflective of the time, and has not been the preferred vehicle for prosecutions in the past.

For many years, the prescribed financial penalties applied under the 1910 Act were almost comically low, as the statute had not been updated. Reforms under the 2015 package of changes (see 2 above) corrected this situation by finally increasing maximum penalties for all offences under the 1910 Act to seven years' imprisonment or a potentially unlimited fine both for individuals and for corporations (particularly as the latter cannot be jailed). Nevertheless, the substantive law provisions of the 1910 Act remain in need of major redrafting or replacement by a brand new modern statute.

The key corruption offence under the 1910 Act criminalises the bribing of an

10 Available at www.legislation.govt.nz/act/public/1910/0040/latest/DLM177643.html?src=qs.

agent (broadly speaking, someone who works on behalf of a principal). A number of differently defined offences exist under the 1910 Act but, generally speaking, they include actions of corruptly giving, agreeing, offering or accepting/receiving in an agency role any gift or other consideration that is designed to induce or reward an agent's actions relating to the commercial affairs or business of his or her principal.[11]

If a gift or other consideration has been disclosed or has the consent of the principal or relevant party, it is generally not secret and so is often outside the definitions of the offence discussed above. Other offences include:[12]

- failure by an agent to disclose to his or her principal a pecuniary or financial interest in a contract;
- giving a false receipt or invoice to an agent with intent to deceive the principal, or for the agent to do so to his or her principal;
- receipt of a secret reward, inducement, gift or consideration for giving advice to enter a contract with a third party.

4.3 Public sector corruption: the Crimes Act 1961

As foreshadowed in the discussion of the Crimes Act 1961 (the 1961 Act) at 3 above, bribery occurs when a person corruptly gives, receives, accepts or obtains a bribe (which may be done directly or indirectly) for himself or herself or for any other person, with intent to influence the relevant official or person so that he or she acts or refrains from acting in a particular way in his or her official capacity. The main two elements of intent or evaluative nature of the conduct are highlighted by the expressions 'corruptly' and 'with intent to influence'.

A bribe may involve money, valuable consideration, office, employment, a gift, favour, voucher, discount or practically any other tangible benefit in cash or in kind.

The list of office-bearers or public roles to which the offence under the Crimes Act applies is found in sections 100–105 of the 1961 Act and covers New Zealand judges, government ministers, Members of Parliament, police or law enforcement officers and other public officials.

It is also an offence (under sections 105A and 105B of the 1961 Act) to use official information corruptly or to trade in influence or to disclose personal information about an identifiable individual corruptly.

A range of penalties exists for individuals convicted of bribery and corruption of domestic public office-holders, ranging from a maximum of 7–14 years' imprisonment or an unlimited fine.

Most of the provisions of the 1961 Act cannot be subject to a prosecution without leave of the Attorney-General, which serves to curtail significantly any scope for private prosecution and leaves the decision whether to apply for leave in the hands of public enforcement agencies. The same restraint is also to be found under the 1910 Act with regard to private sector cases.

Another set of 1961 Act provisions, sections 105C–105E, criminalise the bribery of foreign public officials in the course of an international business transaction or

11 Sections 3 and 4 of the 1910 Act.
12 See generally *ibid*, sections 5–10.

international aid or trade. These parts of the law were those to which the Phase 3 Review of the OECD Working Group (see 2 above) was directed and to which some criticisms were made. Giving, offering, or agreeing to give a bribe with intent to influence a foreign public official is the cornerstone of these offences, which apply whether or not the bribe is for an act or omission within the scope of the official's authority, and extend to bribes made through third parties or intermediaries.

Acknowledging the seriousness of foreign bribery, the organised crime reform package of 2015 amended the maximum penalties to a term of imprisonment not exceeding seven years and/or a fine not exceeding the greater of:

- NZ$5 million; or,
- 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, as it better ties the penalty with the gain or profit from the offence, utilising a legal formulation common in other regulatory areas, such as antitrust/competition law penalty cases. The new penalties also mean that individuals convicted of foreign bribery may now incur a fine in addition to a term of imprisonment (not simply as an alternative). These were an important part of New Zealand's response to the Phase 3 Review by the OECD Working Group, to ensure strong monetary penalties would operate as a firm deterrent to any complacency about corporate bribery.

Other key amendments made in 2015 included a number of matters of clarification or updating:

- the offence of foreign bribery no longer contains a dual criminality requirement. This ensures that New Zealand can effectively prosecute foreign bribery under the 1961 Act, regardless of whether it was an offence in the country in which the conduct actually took place;
- the definitions of 'business', 'employee' and 'routine government action' were also updated to ensure that the offence of foreign bribery applies to activities in the provision of international aid and other corporate activities, and to constrain trading businesses abroad in the scope for allowing the pre-existing 'facilitation payments' exception;
- new offences were created to address gaps in the pre-existing anti-corruption framework, for example, so that it is now a specific offence to accept a bribe in return for 'trading in influence' over an official;
- accounting obligations of companies who might be drawn into foreign bribery were clarified, in particular by changing rules under the Companies Act 1993 to ensure record-keeping of any small facilitation payments in a consistent manner. Additionally, the Income Tax Act 2007 now ensures that no bribes can be made tax deductible; and
- additional measures were enacted allowing New Zealand to provide seamless cross-border assistance in corruption investigations and prosecutions by approved overseas agencies, using existing processes under the Mutual Assistance in Criminal Matters Act 1992.

4.4 Facilitation or routine payments in foreign trade

One particularly contentious issue that New Zealand policymakers had to grapple with in 2015 concerned facilitation payments, ie, payments intended to be routine minor payments to speed up an action or process to which the payer is already entitled, such as a standard import process. The historic facilitation payments exception acted as a defence to charges under the 1961 Act but was open to misinterpretation and possibly abuse. The scope of the exception has now been significantly cut back and its definitions firmly clarified, though many commentators (including the writer) feel that it would have been preferable to abolish this confusing and questionable defence altogether. As was colourfully put by a Member of Parliament who criticised the continued existence of such a defence, it serves merely:

> *... to legalise facilitation or 'grease' payments made to foreign public officials to facilitate such activities as the granting of permits or licenses, the provision of utility services, and the loading or unloading of cargo. These 'grease' payments are bribes, no matter their size, and help maintain a culture in some overseas jurisdictions where low-level corruption is permitted and accepted as normal practice when working in some overseas jurisdictions. Internationally, New Zealand is seen as a leader in public sector ethics and transparency. The outlawing of the controversial and unethical practice of facilitation payments will help uphold this international perception.*[13]

However, legitimate competing concerns were raised about potentially putting New Zealand export business at a disadvantage when many other competing trading nations continue to permit some form of routine payments. A facilitation payments exception therefore remains available at law, albeit in very restricted terms.

4.5 Prosecuting bodies and related agencies

Bribery and corruption offences may be investigated and prosecuted by either the New Zealand Police or New Zealand's SFO, a specialist white collar crime unit created to enforce against offences involving matters of high value, complex or otherwise prioritised fraud and corruption cases.[14] By a memorandum of understanding between the two agencies, the SFO will take the lead in investigating any case of corruption or bribery, unless the scale of the matter is very modest.

The SFO has shown itself sufficiently motivated and resourced to make corruption issues a priority, with a team of forensic accountants and a panel of independent external prosecutors, leaving it able to take on challenging cases publicly and aggressively, if necessary.

The SFO frequently also uses additional related charges under the 1961 Act where they may equally fit the circumstances of a corruption or deception matter. For example:

- under section 240, concerning obtaining a benefit or causing a loss by deception (which can expressly apply to sports match-fixing issues);

13 Supplementary Order Paper to Parliament, Green Party, during the passage of the Organised Crime and Anti-Corruption Amendment Bill 2015.

14 https://sfo.govt.nz.

- under section 243, concerning money laundering offences;
- under section 249, concerning the accessing of a computer system for a dishonest purpose; and
- under sections 257–260, concerning the forging of documents and false accounting offences.

Other public agencies, such as the Office of the Auditor-General (which audits and investigates the financial affairs of government departments and entities), the State Services Commission and the Office of the Ombudsman, also have a role to play in handling complaints or probing into matters of public sector corruption, misfeasance or conflicts of interest.

This is an extract from the chapter 'New Zealand' by Gary Hughes in Anti-corruption Laws and Regulations, A Global Guide, *published by Globe Law and Business*.