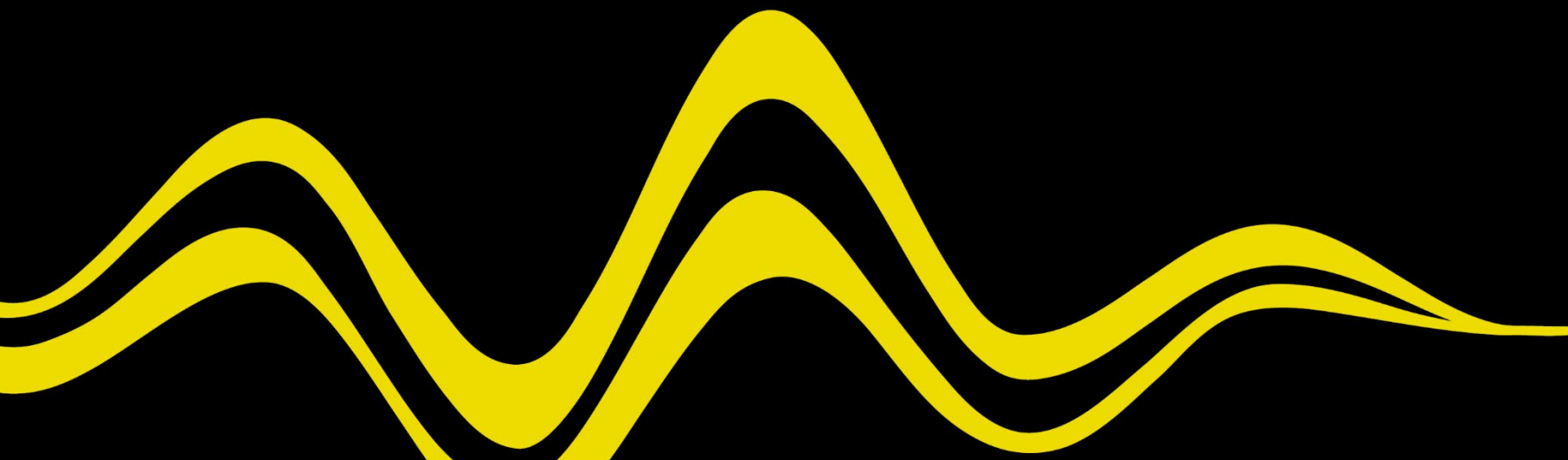


# Failure to Prevent Corrupt Activities Offence

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# Overview

- History and overview of the new offence
- Why has the new offence been introduced?
- The 'adequate procedures' defence
- Non-prosecutorial outcomes including the new Corporate Alternative Dispute Resolution Directive



## History of the new offence

- Shouldn't be confused with existing section 34 which is unchanged
- Judicial Matters Amendment Bill received Presidential assent on 3 April 2024.
- Amended the Prevention and Combating of Corrupt Activities Act, 2004 (“**PRECCA**”) by including the new section 34A offence.
- If a person associated with a ‘*member of the private sector or incorporated state-owned entity*’ bribes another person, intending to obtain or retain: (i) business; or (ii) an advantage for that member, the member itself commits an offence.
- However, no offence will be committed where that member had in place adequate procedures designed to prevent persons associated with it from engaging in such corrupt practices.



## Wording of the new offence

*“34A. Failure by members of private sector or incorporated state-owned entities to prevent corrupt activities*

*(1) Any **member of the private sector or incorporated state-owned entity** is guilty of an offence if a person associated with that member of the private sector or that incorporated state-owned entity gives or agrees, or offers to give any gratification prohibited in terms of Chapter 2 to another person, intending to obtain or retain-*

*(a) **business** for that member of the private sector or that incorporated state-owned entity; or*

*(b) **an advantage** in the conduct of business for that member of the private sector or that incorporated state-owned entity:*

*Provided that **no offence shall be committed** where that member of the private sector or that incorporated state-owned entity had in place **adequate procedures designed to prevent persons associated with that member of the private sector or that incorporated state-owned entity from giving, agreeing or offering to give any gratification prohibited in terms of Chapter 2.***

*(2) For the purposes of section 34A(1), a person is associated with a member of the private sector or an incorporated state-owned entity if, disregarding any gratification under consideration, that person **performs services for or on behalf of that member of the private sector or that incorporated state-owned entity, irrespective of the capacity in which such person performs services** for or on behalf of that member of the private sector or that incorporated state-owned entity”*



## Why has this new offence been introduced?

- Recommendation 8 of the Zondo Report recommendations.
- The recommendation called for the introduction of the new offence by way of an amendment of PRECCA.
- Alignment with global best practice - similar to the offence of failure to prevent bribery contained in section 7 of the United Kingdom Bribery Act.
- The purpose of the offence is, amongst others, to **proactively** encourage good corporate citizenship through procedures designed to prevent corruption from occurring in the first place.



## What are 'adequate procedures'?

- There is no offence where the member had in place 'adequate procedures' designed to prevent persons associated with it from giving, agreeing or offering to give any gratification prohibited in terms of Chapter 2 of PRECCA.
- The term '*adequate procedures*' is borrowed from the UK Bribery Act which contains a similar defence.
- UK Guidance – one of many useful benchmarks.
- Section 34A – no mandatory publication of guidance. However, existing **CIPC guidelines** on corporate compliance programmes should be read together with the UK Bribery Act Guidance.



## What are 'adequate procedures'? Contd.

- The UK Guidance refers to 6 Principles which should inform the procedures to prevent bribery:
  1. **Proportionate Procedures**
  2. **Risk Assessment**
  3. **Top-Level Commitment**
  4. **Due Diligence**
  5. **Communication (including training)**
  6. **Monitoring and Review**



# Proportionate procedures

- “Procedures” = Both prevention policies and procedures to implement.
- No one size fits all - proportionality between the procedures and the corruption risks that the organisation faces.
- Relevant factors may include:
  - Size of the organization
  - Nature of the industry
  - Jurisdiction where the organisation operates
  - Use of third parties
  - Organisation structure – e.g. decentralized with minimal supervision/oversight





# Risk assessment

- Organisations must assess the nature and extent of their exposure to potential external and internal risks of corruption on its behalf by persons associated with it.
- Risk assessments must be **periodic, informed and documented**
- Critical to give effect to the principle of proportionality
- Characteristics of good risk assessments:
  - Independent, but overseen by top-level management
  - Appropriately resourced
  - Sufficient scope to identify internal and external risk sources
  - Accurate and appropriate documentation of the risk assessment and its conclusions



# Top-Level Commitment

- Top-level management or owners must demonstrate commitment to preventing corruption by persons associated with the organisation.
- Those at the top are best placed to foster a culture of integrity.
- What is required? – (1) Communication of the organization's anti-corruption stance; and (2) appropriate degree of involvement in development corruption prevention procedures.
- Examples of involvement:
  - Selection/appointment of senior management team to lead anti-corruption efforts
  - Assurance of risk assessment
  - General oversight of breaches
  - Engagement with external bodies to explain/communicate the organization's policies



## Monitoring and review

- Must monitor environment and policies/procedures to ensure continue to be aligned to risks
- General periodic reviews, and specific review triggered by events e.g. new market entry
- Independent external verification/assurance e.g. ISO37001 (anti-bribery management systems)



# Due diligence

- Must perform due diligence on persons/entities who will perform services for or on behalf of the organisation. This also includes employees.
- Risk-based approach
- Both a form of risk assessment and risk mitigation. Findings may inform implementation of specific controls e.g. contractual controls, on-going monitoring etc.
- Level of perceived risk will determine procedures. For example:
  - Discreet/desktop due diligence for lower risk engagements
  - Direct engagements and info gathering for higher risk engagements



## Communication (including training)

- Policies and procedures must be **sufficiently embedded**
- Communicated to relevant persons, accessible, proper training on the contents.
- Risk based approach – general training for all, targeted further training for high risk areas
- Training on whistle-blower / speak up policies and mechanisms.
- Training must be **effective, continuous and regularly monitored and evaluated**



## The benefit of non-prosecutorial outcomes

- The US and UK have used deferred prosecution agreements successfully for years to reach non-prosecutorial resolutions with companies charged with corruption offences.
- **Benefit =**
  - Company avoids prosecution (which can have disproportionate negative outcomes for innocent parties)
  - Company disgorges profits and pays a penalty – which is often significant
  - Avoid cost and time associated with a lengthy trial
  - Does not prevent the prosecution of implicated individuals
- What about South Africa?



## The Corporate Alternative Dispute Resolution Directive (contd.)

- South Africa does not have a DPA regime, but the NPA has relied on existing mechanisms to reach similar settlements, two high profile examples to date
- The NPA has now published its **Corporate Alternative Dispute Resolution Directive** which provides guidance on when such outcomes may be available
- Mechanism to divert criminal cases at **pre-trial** stage. Only available to companies and by invitation only (no right to rely on the mechanism). Following invitation, company may make representations as to whether a Corporate ADR should be considered
- Summary of the Corporate ADR must be published on the NPA website
- The Directive references **4 Principles (i) legality and rationality; (ii) public interest; (iii) guided discretion; (iv) transparency.**



## The Corporate Alternative Dispute Resolution Directive (contd.)

- **Factors which will increase likelihood of non-prosecutorial outcome being available:**
  1. Voluntary disclosure (self reporting)
  2. Full cooperation (but this does **not** require waiver of legal privilege)
  3. Willingness to implement and **effective compliance programme** and internal controls
  4. No pervasive wrongdoing in the company
  5. Would a conviction result in significant adverse collateral effects on innocent parties?

*“The existence and effectiveness of a compliance programme which prevents and detects misconduct and guides the company in complying with laws, regulations and rules will weigh in favour of a Corporate ADR”*





## Key takeaways

- Following the introduction of the new offence it is essential to assess risks, and review and update existing corporate compliance policies and procedures.
- The broad definition of associated persons will require ensuring the existence of controls to cover not only employees but also third party service providers.
- Introduction of the new offence comes at a time of expanding powers of the US and UK regulators who will likely continue to cooperate with the investigation and prosecution of offenders in South Africa. Increased spotlight may = increased compliance risk.





THANK YOU

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