



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

NEW ZEALAND: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 27 October 2006.

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EXECUTIVE SUMMARY

The Phase 2 Report on New Zealand by the Working Group on Bribery evaluates New Zealand's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall, the Working Group finds that New Zealand has engaged in significant efforts to implement the Convention including the establishment of nationality jurisdiction over the foreign bribery offence and recent efforts to improve awareness about the Convention, but that stronger efforts are necessary in several key areas. The Working Group finds that New Zealand should broaden the criteria for the criminal liability of legal persons for foreign bribery.

The Working Group finds that prosecution and conviction of companies that engage in bribery is unlikely because applicable case law sets very high barriers to any corporate criminal liability. It recommends that the laws be changed to make companies more accountable. The Working Group also recommends that New Zealand clarify and expand the role of the Serious Fraud Office in the investigation and prosecution of foreign bribery cases and that it allow for the sharing of information about suspected criminal offences between the tax and law enforcement authorities. New Zealand should also ensure that the foreign bribery offence does not require the interpretation of any foreign law for its application and clarify the scope of the facilitation payments exception so that it complies with the narrow exception in the OECD Convention. New Zealand does not yet have a conviction for foreign bribery, but it has some investigative activity underway.

The Report also highlights a number of positive aspects in New Zealand's fight against foreign bribery including New Zealand's current proposed legislation to facilitate seizure and confiscation of the proceeds of crime, including bribery, its efforts to make the extradition system easier to use by requesting states and its efforts to encourage whistleblowing in appropriate cases. The Working Group also welcomed New Zealand's adoption of tax legislation expressly prohibiting the deduction of bribes, but recommended that it apply to all foreign bribe payments, including bribes paid through intermediaries.

The Report, which reflects findings of experts from Australia and Korea, was adopted by the OECD Working Group along with recommendations. Within one year of the Working Group's approval of the Phase 2 Report, New Zealand will report to the Working Group on the steps that it will have taken or plans to take to implement the Working Group's recommendations, with a further report in writing within two years. The Report is based on the laws, regulations and other materials supplied by New Zealand, and information obtained by the evaluation team during its on-site visit to Wellington and Auckland. During the five-day on-site visit in May 2006, the evaluation team met with representatives of New Zealand government agencies, the private sector, civil society and the media. A list of these bodies is set out in an annex to the Report.

A. INTRODUCTION

1. This Phase 2 report evaluates New Zealand's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors New Zealand's compliance with the 1997 Revised Recommendation. It reflects the New Zealand authorities' written responses to the general and supplementary Phase 2 questionnaires (hereinafter, the "Responses" and the "Supp. Responses"), interviews with government experts, representatives of the business community, lawyers, accounting professionals, financial intermediaries and representatives of civil society encountered during the on-site visit in Wellington and Auckland from 22-26 May 2006 (see attached list of institutions encountered in Annex 1), and review of relevant legislation and independent analyses conducted by the Lead Examiners and the Secretariat.¹

1. On-Site Visit

2. The on-site visit and the entire Phase 2 process were characterised by the highest levels of cooperation from the New Zealand authorities. The written responses to the questionnaires were provided on a timely basis and were generally both thorough and responsive to the questions asked. During the on-site visit, officials, including senior officials, were available as needed to answer the examiners' questions, including questions that came up during the week. New Zealand's excellent cooperation with the Phase 2 review has continued during the post-on-site visit phase.

2. General Observations

a. *Economic background and international economic relations*

3. New Zealand has a population of 4.1 million of which approximately one quarter lives in Auckland. Its economy has grown significantly in recent years, with average growth of about 3.5% annually from 2001-2005. Exports, however, have declined slightly over this period. Deterioration in the current account and other factors caused the exchange rate to fall significantly in the first half of 2006. New Zealand's main trading partners are Australia, the United States, Japan, the European Union, China and Taiwan. It also has significant exports to other countries in Asia and these have risen significantly in recent years: the proportion of total exports by value to Asian countries, excluding Japan, rose from 12% in 1985 to 33% in the first half of 2005. The government and trade promotion agencies have recently focused considerable attention on China and a bilateral free trade agreement was being actively negotiated at the time of the on-site visit.

¹ The evaluating team was composed of four lead examiners from Australia (Robin Warner, Assistant Secretary, International Crime Branch, Attorney-General's Department; Wayne Barford, Acting Assistant Commissioner, Serious Non Compliance, Australian Tax Office; Ashleigh McDonald, Senior Legal Officer, International Crime Cooperation Branch, Attorney-General's Department; and Karen Twigg, Legal and Practice Management Branch, Commonwealth Director of Public Prosecutions Head Office), two lead examiners from Korea (Yoo-jin Choi, Deputy director, International Cooperation Division, Korea Independent Commission against Corruption; and Soonchul Kwon, Supreme Prosecutor's Office, Department of Planning & Coordination), and two members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs at the OECD Secretariat: David Gaukrodger, Principal Administrator – Senior Legal Expert, Coordinator Phase 2 Examination of New Zealand; and France Chain, Administrator – Legal Expert.

4. Traditionally, New Zealand's economy has been based on exporting primary commodities and importing manufactures. Dairy produce, meat and wool continue to account for 32.1% of exports, with forestry products contributing another 9.4%. Other significant exports include fish and seafood, fruit, and aluminium products. Agricultural products markets in many countries are subject to substantial levels of government protection, regulation and control, bringing New Zealand companies into regular contact with both foreign public officials and regulated markets.

5. In 2004, New Zealand's official development aid (ODA) as percentage of gross national income was 0.23%.² As its statistics office has recognised, it is the smallest donor of the members of the OECD Development Assistance Committee (DAC) in absolute terms and ranks 18th in terms of percentage of gross national income.³ However, it has a low percentage of tied aid (approximately 3%) and seeks to be a leader in this area. Its aid increased 8.2 % in real terms between 2003-2004. 75% of its aid is given bilaterally, and it is focused in particular in the Pacific Islands and Asia.

b. Political and legal system

6. New Zealand is a parliamentary democracy with a Westminster-style constitution consisting of key statutes, judicial decisions and constitutional conventions. Although it is a unitary state, it has a highly decentralised administrative structure. The whole state sector includes about 3 000 organisations, of which less than 40 fall within the legal Crown. The rest are mostly governed by a board or executive either appointed by a Minister or elected. These organisations are responsible for implementing their own specific policies with regard to procurement, conflicts of interest and similar matters. Ministers are able to express their expectations through means such as Ministerial letters of expectation directed to the managerial board, annual statements of intent agreed with the agency or an emphasis on ethics in accountability documentation.

7. New Zealand's legal system is similar to other common law legal systems in the Commonwealth. Judicial decisions have great importance in interpreting and determining applicable law and the decisions of higher courts on issues of law are generally binding on lower courts. Legal counsel and judges frequently refer to analogous case law from the UK and other Commonwealth jurisdictions; such case law is never binding precedent, but can be highly persuasive. In 2003, New Zealand abolished final appeals to the Judicial Committee of the Privy Council (PC) and created a new Supreme Court of New Zealand as a final court of appeal.

8. As in most other Commonwealth jurisdictions, treaties cannot be directly applicable or self-executing in the domestic legal order; they must be incorporated by means of a statute. However, New Zealand courts have increasingly referred to international treaties when they are interpreting a statute which implements a ratified treaty.⁴ In addition, New Zealand courts regularly apply a presumption that domestic legislation, insofar as its wording allows, should be read consistently with New Zealand's international obligations. But if the terms of the legislation are clear and unambiguous they must be given effect, even if the result breaches New Zealand's international obligations.

² See www.oecd.org/dataoecd/42/8/1860509.gif

³ See www.stats.govt.nz/products-and-services/nz-in-the-oecd/official-overseas-aid.htm

⁴ See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (Ct. App. 1994) (Minister should have considered treaty in exercising statutory discretion over deportation order).

c. Dependent territories and associated states

9. New Zealand directly administers its Antarctic territory, the Ross Dependency. New Zealand's criminal law applies and its courts have criminal jurisdiction over offences committed there. New Zealand's other dependency is Tokelau, which has minimal commercial activity; no significant commercial enterprises; no commercial banks; and no offshore company or trust centres. General multilateral treaties may be extended to Tokelau by New Zealand, but this is currently generally done only with the consent of the Government of Tokelau on a case-by-case basis. New Zealand's ratification of the OECD Convention in 2001 did not extend to Tokelau, but the instrument of ratification allows future extension of the Convention to Tokelau. No action has been taken with regard to such an extension to date.

10. The Cook Islands and Niue are self-governing states in free association with New Zealand, with constitutional capacity to undertake their own international relations.⁵ The Cook Islands and Niue have become parties to certain multilateral treaties, including the constituent treaties of various international organisations, under an "all states" adherence formula. New Zealand has not extended its treaties to the Cook Islands or Niue since the mid-1980s. New Zealand did not extend its ratification of the Convention to those jurisdictions and considers that adherence would be a question for the Governments of those associated states.

d. Implementation of the Convention and the Revised Recommendation

11. New Zealand signed the Convention on 17 December 1997 and deposited its instrument of ratification on 25 June 2001. The foreign bribery offence entered into force on 3 May 2001. Like all Working Group members, New Zealand has also agreed to the Revised Recommendation adopted by the OECD Council in 1997. The Phase 1 review of New Zealand took place in 2002.

e. Cases involving the bribery of foreign public officials

12. Certain allegations arising out of the Independent Inquiry Committee report into the UN Oil-for-Food Programme (IIC Report) are currently under investigation by the New Zealand law enforcement authorities. Other than Oil-for-Food related allegations, there have not been any publicly-disclosed foreign bribery allegations or investigations concerning New Zealand companies, citizens or residents. The treatment of the Oil-for-Food allegations, which raises concerns, is discussed further below in the section on investigations.

3. Overview of Corruption Trends and Recent Measures

13. New Zealand has signed but not ratified the United Nations Convention Against Corruption (UNCAC); legislative steps for ratification are underway. New Zealand officials have recently indicated that, with Cabinet approval, the Government will endorse the terms of the Asian Development Bank (ADB)/OECD Anti-Corruption Action Plan for Asia and the Pacific. New Zealand has also endorsed the Asia Pacific Economic Co-operation (APEC) Santiago Commitment to Fight Corruption and Ensure Transparency as well as APEC's Course of Action on Fighting Corruption and Ensuring Transparency. New Zealand has been a member since 1990 of the Financial Action Task Force (FATF).

⁵ See Repertory of Practice of United Nations Organs, Supp. No. 8 (1989-1994) (revised advance version), available at <http://www.un.org/law/repertory/art102.htm> (noting that the UN Secretariat recognised the full treaty-making capacity of the Cook Islands in 1992 and of Niue in 1994, following, inter alia, a 10 November 1988 Declaration by New Zealand that its future treaty actions would not extend to the Cook Islands or Niue unless done expressly on their behalf.).

14. New Zealand is generally considered to have a very low degree of domestic corruption. It ranked 2 out of 159 countries in Transparency International's Corruption Perception Index (CPI) in 2005, which measures perceptions of the extent of domestic corruption.⁶ New Zealand was not included as a country in the 2002 TI Bribe Payers Index (BPI), which focused specifically on foreign bribery. During the on-site visit, a wide variety of people cited the CPI ranking and some seemed to consider that it practically established that New Zealand companies and citizens would be culturally opposed to foreign bribery and would therefore not engage in it. The lead examiners recognise the existence and the importance of the generally low tolerance for domestic bribery in New Zealand and consider that it undoubtedly assists in the fight against foreign bribery. However, the lead examiners consider and the New Zealand authorities acknowledge that there is little doubt that some internationally-active New Zealand companies, including ones that can afford sophisticated legal and commercial advisors, may – like some companies elsewhere – risk engaging in illegal activity where the benefits appear to outweigh the costs. By expressing these general concerns, the examiners do not mean to suggest that New Zealand's generally excellent reputation for fighting corruption is unwarranted, but rather that there are no grounds for complacency with regard to the fight against foreign bribery.

4. Outline of the Report

15. The balance of this report is structured as follows. Part B focuses on the prevention and detection of foreign bribery and discusses ways to enhance their effectiveness. Part C deals with the investigation and prosecution of foreign bribery and related offences, and includes sections reviewing the foreign bribery offence and the liability of legal persons. Part D sets forth the recommendations of the Working Group and the issues that it has identified for follow-up. A list of the principal acronyms and abbreviations used in the report is included in Annex 2. The principal legislative and other legal provisions are reproduced in Annex 3.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

a. Government initiatives to raise awareness

16. The New Zealand government has adopted a “whole of government approach” both to combating bribery and corruption, and to educating the public and relevant government bodies in order to improve awareness of the foreign bribery offence in the Crimes Act 1961. Under this approach, there is no central coordinating body in charge of developing legislation and organising awareness raising activities for stakeholders within and outside public institutions, although the Ministry of Justice is the lead policy agency for criminal law issues (see below).

⁶ The CPI provides data on perception of the “extent of corruption” within countries. It focuses on domestic corruption and is in fact a “poll of polls”; a composite index aggregating the results of 18 carefully selected international surveys and experts scorecards from 12 different institutions (CPI 2004). The source data used to create the composite index reflect the perceptions of non-resident experts, non-resident business leaders from developing countries and resident business leaders evaluating their own country. The questions used by the sources relate the “extent of corruption” to the frequency of bribe payments and/or overall size of bribes in the public and political sectors; and provide a ranking of countries.

17. Notwithstanding this “whole of government approach”, an Inter-Agency Working Group (IAWG) was established in November 2005 to coordinate New Zealand’s responses in view of the Phase 2 evaluation. The IAWG is chaired by the Ministry of Justice and includes public agencies such as the Ministry of Economic Development, the Ministry of Foreign Affairs and Trade, the Department of Labour, the Inland Revenue Department, the Treasury, New Zealand Police, the Serious Fraud Office, Customs, the Crown Law Office, the State Services Commission, the Securities Commission, the Commerce Commission, and the Office of the Auditor General. The IAWG may also consult with New Zealand Agency for International Development, New Zealand Trade and Enterprise and non governmental organisations. Representatives of the Ministry of Justice explained that, as of June 2006, the IAWG is not a commission and functions purely on an ad hoc basis. It does not have any role in developing a coordinated approach to awareness raising or enforcement of the foreign bribery offence. These representatives did not however exclude the possibility that the IAWG could take on such a role in the future, and indicated that its status would be re-examined following the Phase 2 evaluation of New Zealand.

(i) *Within the government and public agencies*

18. With respect to awareness raising within government and public sector agencies, few initiatives have been carried out overall in New Zealand. However, the Ministry of Justice has been recently active in disseminating information to stakeholders both within the administration and in the private sector. In December 2005, the Ministry launched its “Bribery and Corruption” website which covers the work of various government agencies in this area, the different international legal instruments to which New Zealand is party. It also describes procedures for making complaints and protection available for whistleblowers.⁷ In March 2006, the Ministry of Justice also published a pamphlet on “Saying no to bribery and corruption”, which provides information on the Convention, New Zealand’s key legislation, what companies can do to recognise bribery and corruption, measures to combat bribery and corruption, what to do when bribery and corruption is suspected and who to contact.⁸ This pamphlet was notably distributed to key government agencies (these would notably include agencies involved in the IAWG). Discussions with other government agencies during the on-site visit revealed that only limited or no efforts directed at training or awareness raising have been carried out, notably for civil servants or staff of public institutions involved with New Zealand companies operating abroad. Following the on-site visit, the New Zealand authorities informed the examining team that the State Services Commissioner, who is responsible for setting minimum standards of integrity and conduct within the public sector, plans to publish a code of conduct by mid-2007, including a general awareness raising duty for public sector agencies. According to New Zealand, this would notably entail a duty on public sector agencies with off-shore responsibilities to ensure that their staff are aware of issues relating to the bribery of foreign public officials.

(ii) *Within the private sector*

19. Representatives of government agencies recognise that there is a corruption risk facing New Zealand companies involved in sensitive geographical markets or industries. The view was generally expressed that it was essentially the role of companies to make themselves aware of these risks and put in place internal controls to ensure compliance with the New Zealand legislation on foreign bribery. However, New Zealand authorities acknowledged that better efforts could have been made by public institutions to fulfil the government’s responsibility to disseminate information on the foreign bribery offence.

⁷ See the Ministry of Justice website on Bribery and Corruption at www.justice.govt.nz/bribery-corruption/index.html.

⁸ The pamphlet is available on the Ministry of Justice website at www.justice.govt.nz/bribery-corruption/chapter-13.html.

20. Indeed, overall, few awareness raising activities have been targeted at the private sector. Among government agencies, the Ministry of Justice has been the most proactive in disseminating information on the foreign bribery offence, through its website, as well as distribution of its brochure on “Saying no to bribery and corruption” (see above) to approximately 20 000 New Zealand companies, with a special aim at the top 100 New Zealand corporations with operations abroad. The Ministry of Justice has also published articles in several magazines aimed at the business community on the foreign bribery legislation and its implications for companies doing business abroad. These materials (brochure, magazine articles) are too succinct to provide sufficient information on sensitive issues such as bribery through intermediaries, or third party beneficiaries; nor do they provide guidance on small facilitation payments – an exception under the New Zealand foreign bribery legislation – and how those may be defined. Following the on-site visit, the Ministry of Justice indicated that it was planning to provide more detailed information on the foreign bribery offence, notably through its website, and also following the implementation of proposed legislative amendments implementing UNCAC.

21. Other government bodies, such as the Ministry of Economic Development, or the Ministry of Foreign Affairs and Trade, which may have regular contacts with New Zealand businesses operating abroad did not report having carried out awareness raising activities for the private sector (see section 3(b) below for further discussion on the role of foreign diplomatic representations). The New Zealand National Contact Point, in charge of overseeing implementation of the OECD Guidelines on Multinational Enterprises – which include a chapter on corruption – has not raised the issue with the business community, trade unions and/or non governmental organisations. New Zealand Trade and Enterprise (NZTE), New Zealand’s economic development agency which, inter alia, provides advice and assistance to New Zealand companies operating in overseas markets, indicated that the issue of corruption had not been addressed in terms of providing advice or warning companies in a systematic fashion. The examining team was especially concerned about the country reports prepared by NZTE, including on countries notably prone to corruption, and which serve as an information tool for exporters. While these reports address certain risks such as judicial transparency, safety or the financial health of local companies, they do not mention potential problems of corruption nor how these problems should be dealt with if encountered. Following the on-site visit, NZTE informed the examining team that it has already taken several steps to improve awareness with respect to foreign bribery issues, notably through information on its website, development of training and testing modules for staff, and inclusion of a reference to foreign bribery issues in its country reports.

22. While, generally, few efforts have been made to raise awareness in the private sector about the foreign bribery offence, stronger awareness-raising efforts have been made respect to the non tax deductibility of bribes. This non deductibility was fairly recently introduced in New Zealand’s tax regime by the Taxation Act 2002, and Inland Revenue appears to have been active in informing stakeholders of the changes to the law (see section 4 below on the Tax Administration).

b. Private sector initiatives to raise awareness

(i) Corporations

23. Several New Zealand companies interviewed during the on-site visit seemed inclined to believe that New Zealand business is rarely confronted with corruption situations. This belief appears to be notably based on the high ranking of New Zealand, as a country, on the Transparency International’s CPI 2005. However, as some other corporations acknowledged, the activities of New Zealand companies overseas are based in a number of countries which do not rank as highly on that same index. Representatives of these corporations suggested that New Zealand companies are often not very large and not sufficiently strong financially to “play the corruption game”, and even reported practical examples where their companies had to withdraw when confronted with solicitations.

24. Large New Zealand corporations have taken a number of initiatives to raise awareness of their staff to the criminalisation of foreign bribery, notably through internal controls such as inclusion of prohibitions of bribe payments in memoranda, codes of ethics and other corporate social responsibility policies. Most codes also include a comprehensive whistleblowing regime, with availability of anonymous hotlines and/or compliance officers, as well as a separate internal or external audit division, or fraud department, and regular report of these bodies to the board.

25. These ethical rules are generally extended to subsidiaries and agents, and may also be part of a formal binding contract with agents. However, careful consideration of agents and extension of ethical rules to them is not always part of company policy: for example, one large New Zealand corporation in the process of setting up major offices in a sensitive country reported that it did not have a formal policy in relation to the appointment of agents overseas.

26. Overall, the large corporations interviewed at the on-site visit appeared well aware of the foreign bribery legislation in place in New Zealand. Representatives of the legal profession providing counsel to corporations or acting as corporate defence lawyers expressed a more nuanced opinion: in their view, there is little awareness of the foreign bribery offence among New Zealand companies in general, but a very high awareness among those New Zealand companies operating overseas. They also expressed some doubts concerning awareness of the issue by Small and Medium-size Enterprises (SMEs), especially where those are at the beginning of the process of establishing business overseas.

(ii) *Business organisations*

27. Business New Zealand, the leading national organisation representing the interests of New Zealand's business and employing sectors, did not report undertaking awareness raising or training on foreign bribery. Nor has any initiative been taken to target SMEs in this respect. Representatives at the on-site visit indicated that, with a staff of five, Business New Zealand focuses on more pressing matters such as employment relations or tax issues. They did stress, however, that, if it were approached to provide assistance on the issue, Business New Zealand would strongly encourage corporations to have internal rules on the issue made clear to all staff.

(iii) *Civil society and trade unions*

28. New Zealand has had a small but active chapter of Transparency International, which follows corruption issues both in New Zealand and in the Pacific region, but few other non governmental organisations (NGOs) appear to take an interest in foreign bribery issues. New Zealand has an active and free press, which regularly reports on corruption-related issues and engages in investigative reporting. It is somewhat difficult to judge the degree of press interest in specific foreign bribery issues. The Oil-for-Food allegations concerning New Zealand companies were reported as was the initial MFAT response. However, there was little follow up reporting or questioning about the limited scope of the inquiry into the allegations (See below the section on the Oil-for-Food allegations). Neither the Convention nor New Zealand's implementation appear to have generated any specific academic writing to date, but the professors interviewed at the on-site visit were well aware of the Convention and its requirements. Trade union representatives were aware of the Convention, but indicated that they are unaware of any allegations of foreign bribery. Referring to Response 3.2, they expressed disappointment with regard to the government's lack of efforts to promote the OECD Guidelines for Multinational Enterprises, which include bribery-related provisions.

Commentary:

The lead examiners welcome the recent efforts of the Ministry of Justice and IAWG to improve awareness of the foreign bribery offence, notably through development of the Ministry of Justice website and publication of a brochure. However, they consider that significant additional efforts are still required, and encourage the authorities to consider maintaining and or formalising the IAWG as an oversight and coordinating body for effective implementation of the foreign bribery offence in New Zealand, including awareness raising activities for the public and private sector.

With respect to government agencies and other public institutions, the lead examiners recommend that the New Zealand authorities increase efforts to raise the level of general awareness of the foreign bribery offence, notably among staff of agencies involved with New Zealand companies operating overseas. These agencies and institutions should be made fully aware of all important aspects of the foreign bribery offence under New Zealand law, including its extraterritorial application, so as to be able to detect and report instances of foreign bribery they may come across in the course of their work, and to provide advice and assistance to New Zealand companies. In this respect, the lead examiners welcome initiatives such as the planned publication of a code of conduct by the State Services Commissioner, which would require awareness raising about foreign bribery among relevant staff, and encourage its prompt adoption.

With respect to awareness raising in the private sector, the lead examiners recommend that the New Zealand authorities conduct or provide support for seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, including in particular SMEs active in foreign markets, and encourage business organisations to do likewise. In particular, given the important role played by New Zealand Trade and Enterprise in promoting foreign trade and advising New Zealand companies active in foreign markets, it should take appropriate measures to improve its capacity to provide advice and assistance to those companies concerning the prevention of foreign bribery. In this respect, the lead examiners welcome the steps announced by NZTE following the on-site visit, and urge NZTE to implement and expand these measures actively. The lead examiners further encourage the New Zealand authorities to provide more complete information about the foreign bribery offence to the private sector, in particular concerning the definition of a bribe; the distinction between bribery and facilitation payments; and the broad scope of extraterritorial jurisdiction over the offence.

2. General Sources for Detecting and Reporting Foreign Bribery Offences

a. Reporting crimes

29. Information is provided in clear terms on the Ministry of Justice website on how to make a complaint in respect of suspicions of bribe payments by New Zealand individuals or companies to a foreign public official: any suspicion of a person or business being involved in bribery should be reported to either the New Zealand Police (NZP or “the Police”) or the Serious Fraud Office (SFO). All international complaints should be made through contact with the NZP or SFO, or the local New Zealand Embassy or High Commission.

30. For their part, the NZP and the SFO indicate that they have the possibility of proactively undertaking inquiries, but that cases concerning economic and financial crime generally originate from complaints or referral of cases. The SFO notably indicates on its website that complaints relating to serious and complex fraud notably come from government departments, liquidators, receivers, statutory managers, professional associations and the general public (see Part C section 1(b)(i) on commencement of proceedings).

31. In addition, New Zealand companies interviewed during the on-site visit indicated that, should they be confronted with a solicitation for bribe payments or with the behaviour of a less scrupulous competitor obtaining business through bribery of a foreign public official, they would seriously consider reporting these matters to law enforcement authorities or diplomatic missions. However, according to the NZP and the SFO, there have been no instances where companies have made complaints or provided information to the attention of authorities.

b. Whistleblower protection

32. The New Zealand authorities explain that the Protected Disclosures Act 2000 (PDA) establishes legal protection for the disclosure in good faith of what is believed to be serious wrongdoing within an organisation, where the disclosure is for the purpose of investigating that wrongdoing. Serious wrongdoing notably includes “an act, omission, or course of conduct that constitutes an offence”.⁹ However, protection is afforded to whistleblowers on condition that disclosures are first made in accordance with the internal procedures in place in the organisation.¹⁰ If the employee making the disclosure believes that the internal persons to whom the disclosure must be made may be involved in the serious wrongdoing, or if the company or organisation does not have internal procedures to receive protected disclosures, or further if there has been no action on the matter to which the disclosure relates, the disclosure may be made directly to an “appropriate authority”, which include a number of key government agencies (such as the Ombudsman, Controller and Auditor General), as well as, most notably, the NZP and SFO.¹¹

33. Under the PDA, whistleblowers are assured confidentiality,¹² immunity from civil and criminal proceedings,¹³ as well as protection provided for under labour laws. The PDA provides whistleblower protection to employees in both the private and public sector.¹⁴ Since the Act came into force in 2001 the Office of the Ombudsman has received 72 complaints and enquiries, most of which related to minor matters able to be resolved by other processes, such as mediation or the Employment Tribunal/Court. Three complaints have been referred to the Police and the SFO and another three were investigated by the Ombudsman. The latter three were resolved as matters of “maladministration” and were not criminal in nature. None of these matters concerned disclosures of bribery.

34. Representatives of public and private trade unions expressed concern about lengthy procedures under the PDA, although they recognised that there have been few cases. Awareness of the legislation also appears to be low in some cases. The overall view was that whistleblowers prefer to go to the media rather than go through the formal process of making disclosures under the PDA. The New Zealand authorities indicated that the PDA provides for review of the Act itself in order to address possible difficulties which may arise in its application. A first review has taken place which did not result in any major amendments, but rather recommended continued monitoring of the PDA notably to evaluate how the Act operates in practice, and whether it would be necessary or desirable to further amend it.

⁹ Section 3 of the Protected Disclosures Act 2000.

¹⁰ Section 7 *ibid.*

¹¹ Sections 8 and 9 *ibid.*

¹² Section 19 *ibid.*

¹³ Section 18 *ibid.*

¹⁴ Under section 3 of the PDA, an organisation includes “a body of persons, whether corporate or unincorporate, and whether in the public sector or in the private sector.”

Commentary:

The lead examiners recognise the significant efforts of the New Zealand authorities to encourage whistleblowing in appropriate cases, and espouse their on-going efforts to improve the effectiveness of the legislation. They recommend that New Zealand pursue its reflection on measures to protect whistleblowing, and ensure that adequate protection is afforded to employees reporting suspicions of foreign bribery, both internally and to law enforcement authorities, in good faith.

3. Detecting and Reporting by the Public Sector of Suspicions of Foreign Bribery

a. General reporting procedures in the public service

35. New Zealand indicates that the New Zealand Public Service Code of Conduct, which applies to all New Zealand public sector employees, only requires public officials to disclose conflicts of interest, or offers of gifts or other inducements made to them. The Code does not lay out a whistleblowing procedure for public sector employees, although it does refer to possibilities of disclosure under the PDA. There is no legal, regulatory or contractual obligation to report suspicions of offences for civil servants, including foreign bribery offences, for public officials and staff of public or para-public agencies providing support to New Zealand enterprises operating abroad. The New Zealand authorities indicate that, to date, there have been no reports of instances of foreign bribery by public officials.

Commentary:

The lead examiners recommend that New Zealand establish procedures to be followed by public sector employees, especially those employed by government bodies or public and para-public agencies who come into contact with companies involved in international business, for reporting to the law enforcement authorities credible information about foreign bribery offences that they uncover in the course of performing their duties, and encourage and facilitate such reporting.

b. Foreign diplomatic representations

(i) Awareness-raising efforts

36. As previously mentioned (see section 1(a) above on government initiatives to raise awareness), MFAT has not carried out any awareness raising activities for its staff, either in New Zealand or abroad. Nor have diplomatic missions approached New Zealand companies operating in their country of posting to inform them on the foreign bribery offence and offer assistance should they be confronted with such situations. Following the on-site visit, New Zealand informed the examiners that MFAT had liaised with the Ministry of Justice on the preparation of a standard briefing package for all diplomatic staff departing New Zealand. It is expected that at least 10 briefings per year will be provided to those staff on the foreign bribery offence and corruption issues in general with particular emphasis on diplomats departing to “high risk” jurisdictions.

(ii) Detection of foreign bribery and duty to report

37. As indicated above, there is no obligation on New Zealand public sector employees to report, either hierarchically or to law enforcement authorities, suspicions of offences by New Zealand individuals or corporations. A specific code of conduct for overseas officials exists and contains provisions relating to the receiving of gifts by diplomatic staff, but no rule on reporting suspected bribes by New Zealand individuals or corporations to foreign public officials. Nevertheless, representatives of MFAT were confident that overseas staff that become aware of credible information of foreign bribery in relation to a

New Zealand company or individual would relay this to the Ministry. In addition, Ministry representatives indicated they would consider including recommendations on reporting in the Guidelines for overseas posts due to be issued in 2006. Following the on-site visit, MFAT indicated that it had issued its Guidelines which had been distributed to overseas posts and included in consular instructions. These Guidelines include instructions concerning the steps that should be taken where credible allegations of foreign bribery arise and the reporting of these allegations to law enforcement authorities.

38. If no awareness raising on what constitutes a foreign bribery offence is carried out for overseas posts, and no training provided on how to detect and report it, the lead examiners have some doubt as to whether there would, in effect, be any chance of such detection and reporting. In fact, representatives of MFAT indicated that, given the absence of formal reporting procedures, if a New Zealand company operating abroad was to approach a New Zealand diplomatic representation abroad regarding an issue of foreign bribery, it would be likely that the New Zealand company would be advised to contact their lawyers. In this regard, it is of concern that the MOJ brochure on the foreign bribery offence instructs readers to report foreign bribery allegations to, inter alia, embassies and high commissions abroad. If embassies and high commissions do not have clear guidelines on procedures they should follow when receiving such reports, these may not be duly passed on to appropriate authorities.

Commentary:

Given the important role that foreign diplomatic representations may play in interacting with New Zealand companies operating abroad, both in terms of awareness raising as well as reporting of suspicions of foreign bribery, the lead examiners recommend that New Zealand:

- ***continue to carry out awareness raising activities, for instance through circulars, newsletters, seminars and training, for staff in overseas posts, notably those posted in sensitive geographic areas, on all important aspect of the foreign bribery offence under New Zealand law;***
- ***ensure that foreign diplomatic representations, in their contacts with New Zealand businesses operating overseas, (i) disseminate information on the corruption risks in their country of operation and the legal consequences of a foreign bribery offence under New Zealand law, and (ii) encourage New Zealand businesses and individuals to report suspected instances of foreign bribery to appropriate authorities;***
- ***issue regular reminders to foreign representations of procedures in place for reporting of suspected foreign bribery, including the prohibition of consideration of the factors identified in Article 5 of the Convention, and pursue efforts to encourage and facilitate such reporting to law enforcement authorities.***

c. Export credit organisations

(i) Awareness raising

39. New Zealand's export credit programme and the New Zealand Export Credit Office ("ECO") were launched relatively recently, in July 2001. It has dealt with few transactions to date and deals mainly with banks. Export Kredit Namnden (EKN), the Swedish governmental export credit agency, acts as ECO's agent. EKN is responsible for processing applications, portfolio management, collections and recommendations on risk management and pricing. Using an agent allows ECO to benefit from EKN's export credit expertise and avoid many of the costs associated with setting up and running an export credit agency.

40. ECO has a policy manual containing a section on bribery which is distributed to all employees. There has not been any specific training for employees regarding the foreign bribery offence. ECO requires applicants to declare that they have not and will not engage in bribery. But it has not provided advice to companies on how to cope with foreign bribery risks. Generally, it relies heavily on the Swedish agency with regard to the underwriting function.

(ii) *Detection and reporting of evidence of foreign bribery*

41. ECO has no experience with any allegations of bribery. There is no mandatory reporting requirement of foreign bribery suspicions applicable at ECO although the issue is under review by the legal department. Its representatives indicated that in the few transactions it has been involved in, it reviews agents' commissions generally. However, it does not have any specific policy, list of risk factors or maximum limits for such commissions.

d. Development aid agencies

(i) *Awareness raising efforts*

42. The key agency charged with development aid in New Zealand is the New Zealand Agency for International Development (NZ Aid). NZ Aid has not engaged in any specific training regarding foreign bribery for its employees or for its clients. However, it includes a standard and broadly-worded anti-corruption clause in its grant funding arrangements. Bribery constitutes grounds for immediate termination of the funding arrangement, or the taking of such corrective action as NZ Aid deems appropriate. NZ Aid representatives indicated at the on-site visit that grant recipients are required to report any corrupt practices to NZ Aid. However, the grant funding documents supplied by New Zealand since the on-site visit do not appear to include this obligation.

(ii) *Detection and reporting of evidence of foreign bribery*

43. There is no obligation for NZ Aid to report suspicions of bribery to the law enforcement authorities; it is up to the discretion of the relevant NZ Aid personnel. NZ Aid does not have any specific internal policy on the reporting of bribery suspicions. NZ Aid is not aware of any instance of cases concerning bribery of foreign public officials with regard to public procurement. In the last four years there has been only one reported case of fraud where an employee of a small in-country non-government organisation embezzled funds. The NGO took the appropriate action (reported to the police).

Commentary:

The lead examiners recommend that, in conjunction with its Swedish agency, ECO expand its efforts to prevent foreign bribery and to raise awareness, both internally and with regard to potential clients, including by developing policies with regard to agents' commissions.

The lead examiners welcome the inclusion of anti-corruption clauses in NZ Aid's grants and they encourage it to take further action to improve awareness of the foreign bribery offence. They recommend in particular that NZ Aid develop policies with regard to the reporting by grant recipients of suspicions of foreign bribery to NZ Aid.

The lead examiners also recommend that the New Zealand authorities establish procedures to be followed by staff of ECO and NZ Aid for reporting to the law enforcement authorities credible information about foreign bribery offences that they uncover in the course of performing their duties, and encourage and facilitate such reporting.

4. The Tax Administration

a. Legislation prohibiting tax deductibility of bribe payments

44. At the time of its Phase 1 evaluation in 2002, New Zealand allowed the tax deduction of a bribe to the extent it was an expenditure: (1) incurred by the taxpayer in deriving the taxpayer's gross income, or (2) necessarily incurred by the taxpayer in the course of carrying on a business for the purpose of deriving the taxpayer's gross income. The Working Group on Bribery had found that the New Zealand tax law did not fully implement the 1997 Revised Recommendation and urged New Zealand to proceed promptly with adoption of adequate legislation.

45. In 2002, New Zealand passed legislation disallowing the tax deduction of bribes where that bribe is paid in order to obtain or retain business or obtain any improper advantage in the conduct of business. The prohibition in the Taxation Act 2002 – now section DB36 of the Income Tax Act 2004 – applies to bribes paid to New Zealand public officials and foreign public officials, if it is an offence under the laws of the foreign jurisdiction.

(i) General provisions

46. While the adoption of legislation expressly denying tax deductibility of bribe payments is a noteworthy improvement in terms of implementation of the 1997 Revised Recommendation and the 1996 Recommendation on the Tax Deductibility of Bribes, the new section DB36 on non tax deductibility of bribe payments raises a number of issues.

47. The issues raised in Part C, section 2(b) concerning the foreign bribery offence as defined in the Crimes Act 1961 (CA or "Crimes Act"), such as, for instance, the intent requirement (including the uncertainty of the "corruptly" requirement), generally also apply to the offence as transcribed in the tax law.

48. In addition, from the point of view of tax deductibility, concerns about the criminal offence raise additional issues for the tax administration, such as the absence of interpretive guidelines, the highly technical nature of the offence and the ensuing difficulty to effectively assess the availability of the deduction.

49. The new provisions in section DB36 of the Income Tax Act 2004 also raise issues specific to the tax legislation:

- The bribe must be paid by person "A" for the purpose of obtaining an advantage for person "A".¹⁵ Consequently, bribes paid to obtain an advantage for third party beneficiaries would be deductible under this provision. This could also mean that bribes paid through agents could be tax deductible. New Zealand authorities argue that the agent/principal relationship under New Zealand law would mean that acts carried out by an agent would be deemed to be carried out by the principal (i.e. person "A" could represent both the agent and the principal). Lead examiners note that this agent/principal concept of civil law is not generally applicable in the context of criminal law, and are uncertain whether it would be applicable to tax law. In any case, they remain concerned that this would make the tax provision dependent on other legal principles, and may add an unnecessary burden of proof on tax auditors.

¹⁵ Section DB36(1)(b)(i) and (ii) of the Income Tax Act 2004.

- Bribes to foreign public officials for acts outside of their competence are not clearly covered because the payment must be made to a foreign official to obtain an act or omission “in their official capacity”.¹⁶ New Zealand authorities argue that paragraph 1(c) of section DB36 would cover situations where the bribe was paid in order for officials to act outside their scope of competence. However, conditions in section DB36 are cumulative, and, under the current wording, the condition set out in paragraph 1(c) would always be met. Consequently, to refuse the deductibility of a bribe payment, it would remain to be demonstrated that the act or omission was performed by the foreign public official “in [his/her] official capacity”.
- Section DB36 states that deduction is denied where the bribe was given to “another person [...] intending to influence a foreign public official”. There appeared to be some confusion about whether, in fact, the provision disallows a deduction when bribes are paid through an intermediary. In the context of the on-site visit, representatives of Inland Revenue stated that, in their view, the provision would allow a deduction where the bribe was paid through an intermediary or agent. The opposing view was expressed during Parliamentary debates surrounding the adoption of the Taxation Act 2002, where a Member of Parliament questioned whether the wording “another person” could in fact be interpreted to imply that bribes given directly to the foreign public official are deductible. Thus, it would appear that the current wording lacks clarity with regard to whether and when deduction of bribe payments should be denied, which raises serious doubts with regard to the application of the non deductibility in practice. Representatives of Inland Revenue however pointed out that, in their report to Ministers on whether New Zealand complies with the United Nations Convention Against Corruption in relation to the tax deductibility of bribes, they would recommend changes so that a deduction will be explicitly denied when a bribe is paid through an intermediary as well as directly to a public official.
- Only bribes that are “given” are non-deductible. Thus bribes “promised” or “offered” could potentially be deductible. Tax officials at the on-site visit indicated that, while this would be very difficult, it would be potentially possible to claim deductions for definitive commitments to expenditure (i.e. a definitive commitment to pay a bribe to a foreign public official could theoretically be claimed as a deduction for the fiscal year prior to the actual payment of the bribe).

50. Many of the difficulties appear to result from an attempt to replicate the lengthy and complex criminal law provisions in shorter fashion in the tax law.

51. Inland Revenue informed the examining team that section DB36 was in the process of being revised, with a Bill pending before Parliament.¹⁷ As of September 2006, the Bill had received first reading and had been reported to Parliament by the Finance and Expenditure Committee. However, the issues raised in this report on potential loopholes in the current section DB36 were still present in the draft legislation that was presented to the examining team. Inland Revenue further indicated that they are due to report to Ministers on whether New Zealand complies with the United Nations Convention on Corruption in relation to the tax deductibility of bribes. They assured the team that they would notably recommend changes so that a deduction would be denied when a bribe is paid through an intermediary, as well as to

¹⁶ Compare section DB36(1)(b) with section 105C(2) CA (applying to payments for acts in the person’s official capacity “whether or not the act or omission is within the scope of the official’s authority”).

¹⁷ This revision is part of a general process whereby the New Zealand tax legislation is being progressively rewritten to improve its clarity.

review the use of the term “corruptly”, and consider reviewing or clarify certain issues regarding deduction of small facilitation payments (see below for specific discussion of small facilitation payments).

(ii) Treatment of small facilitation payments

52. Pursuant to subsection DB36(4), a deduction is available if the bribe was paid “wholly or mainly to ensure or expedite the performance by a foreign public official of a routine government action when the value of the benefit is small.” The availability of a deduction for facilitation payments raises issues which may pose particular difficulty in the practical application of this provision in the context of the tax legislation (for discussion of the potential difficulties in the exclusion of small facilitation payments, see Part C, section 2(b)).

53. The highly technical nature of this exception may notably create confusion on the part of the private sector, as well as tax auditors, as regards differentiating between legal and illegal payments, particularly given the absence of interpretive guidelines in this respect. Furthermore, the deduction is not limited to small payments but extends to any small benefit, making the assessment of what constitutes a small benefit in monetary terms subject to interpretation. Thus, the potential to identify payments as facilitation payments in order to claim an expense for tax purposes may provide scope for abuse. The tax auditors, at the very least, would need to be provided with internal technical interpretation to enable them to interpret this provision. To date, the tax authorities confirm that such guidelines or interpretative advice has not been provided.

54. Furthermore, there may be some uncertainty about the definition of “benefit”. In the Parliamentary debates during adoption of the legislation, there was disagreement on whether the “benefit” refers to the bribe or the advantage obtained in return. Representatives of Inland Revenue expressed the view that the “benefit” would refer to the bribe, based on definitions under sections 99 and 105C CA, although they did acknowledge that the legislation as it is written is somewhat unclear. Representatives of Inland Revenue pointed out that clarification of issues regarding deduction of small facilitation payments would be included in their recommendations, as part of their report to Ministers on whether New Zealand complies with UNCAC.

(iii) The double criminality requirement

55. The tax provision allows deductibility unless there is double criminality with regard to foreign bribery. [See section DB36(3)(c)]. For the reasons set forth below in the section on the elements of the offence, a similar provision in the criminal law appears to be inconsistent with the Convention. The lead examiners consider that the double criminality provision should be deleted from the tax law as well.

b. Detecting and reporting by the tax administration

(i) Detection

56. The New Zealand authorities indicate in their Phase 2 responses that Inland Revenue are not aware of any circumstance in which section DB36 has been applied. Furthermore, representatives of Inland Revenue indicated during the on-site visit that a risk analysis had been carried out by Inland Revenue, which showed that New Zealand was at the low risk end for claims for tax deductibility of bribes. This may explain why, to date, few efforts have been made to provide training to tax auditors on how to detect bribe payments. At the time of the on-site visit, the OECD Bribery Awareness Handbook for Tax Examiners had not been circulated to tax auditors. New Zealand Inland Revenue subsequently informed the examining team that the Handbook has been distributed among auditors.

(ii) *Reporting*

57. As indicated already at the time of the Phase 1 evaluation of New Zealand, tax authorities in New Zealand are bound by a duty of confidentiality, under section 81 et seq. of the Tax Administration Act 1994. Consequently, Inland Revenue is prohibited, by law, from sharing information about suspicious bribery transactions with criminal law enforcement authorities in New Zealand. Both the NZP and the SFO expressed their regret that no information could be obtained through this channel, and indicated it could be useful if information could be divulged by Inland Revenue for the purpose of criminal investigations.

58. Similarly, Inland Revenue, while it may exchange tax information under its double tax agreements as per section 88 of the Tax Administration Act 1994, can only provide information to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of taxes covered in the agreement. Such information can only be used for the purposes specified in the agreement (i.e. the investigation and prosecution of tax offences).

59. The Working Group had considered this in Phase 1 to be a significant obstacle in the detection of bribery in New Zealand and the provision of mutual legal assistance where tax information is requested regarding suspected bribe transactions. New Zealand reiterated the argument that sharing tax information on bribes with law enforcement authorities would undermine the New Zealand tax system which is largely dependent upon voluntary compliance and requires that taxpayers be assured that the information they provide cannot be used for other purposes. Following the on-site visit, New Zealand informed the examining team that a revised set of principles allowing exceptions to taxpayer secrecy is being considered.

60. The lead examiners are concerned that the current prohibition on sharing of information by tax authorities deprives law enforcement authorities of an important investigative tool, and may generally hinder the effective enforcement of the foreign bribery offence. Disclosure by New Zealand Inland Revenue of restricted tax information in relation to foreign bribery would enable a more effective whole of government approach to dealing with the activity. The lead examiners note that the new proposed proceeds of crime legislation recommends, under certain conditions, provision of tax information by Inland Revenue to law enforcement authorities when applying confiscation measures (see also Part C, section 4(a)(ii) on confiscation).

c. Awareness and training

61. Some awareness-raising initiatives have been taken to inform staff at Inland Revenue, as well as corporations. Within Inland Revenue, the legislation has been circulated several times to tax auditors, along with explanations on the terms used and references to sections 99 and 105C CA, although no in-depth training has been provided on the detection of bribe payments to foreign public officials. For the private sector, Inland Revenue made several presentations to New Zealand corporations, and published information on the non deductibility of bribes in “Corporate Contact”, Inland Revenue’s newsletter distributed to companies. Inland Revenue’s awareness raising activities notably targeted corporations identified as having important trading activities in “at risk” countries, as identified in the Transparency International CPI. In this respect, Inland Revenue carried out a high level tax risk review of 20 major New Zealand corporations, and sent a questionnaire to 21 corporations enquiring into the importance of their transactions in sensitive countries, and whether bribe payments had been involved. Answers to this questionnaire – which remain confidential – were still underway at the time of the on-site visit, but 75% of

corporations had already replied.¹⁸ Following this survey, an article was published by Inland Revenue on good corporate governance in the Chartered Accountants Journal of August 2006.

Commentary:

The lead examiners welcome the significant step taken by New Zealand in adopting legislation expressly prohibiting the tax deductibility of bribe payments. Nevertheless, they are not satisfied that the current provisions are fully compliant with the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials. They therefore recommend that New Zealand amend its legislation to ensure that no foreign bribe payments covered under criminal law are tax deductible. Notably, the New Zealand tax legislation should prohibit the tax deductibility of bribes (i) paid through intermediaries; (ii) paid for the purpose of obtaining an advantage for a third party; (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties, and (iv) “promised” or “offered” as well as paid. More generally, recommendations concerning the foreign bribery offence in the Crimes Act, including with regard to the double criminality requirement and small facilitation payments, should also be reflected in the provisions on the non tax deductibility of bribe payments. However, regardless of the outcome of the consideration of elimination of the word “corruptly” from the Crimes Act offence, the lead examiners consider that the word should be replaced in the tax law in order to make that law more understandable to business and to tax inspectors and thus more effective. In addition, they recommend that the Working Group follow-up on the application of the deduction for a facilitation payment.

Furthermore, the lead examiners acknowledge recent steps by Inland Revenue to draw attention to and circulate the OECD Bribery Awareness Handbook for Tax Examiners. They recommend that New Zealand pursue its efforts to provide guidelines, instructions and training to tax examiners for the effective non tax deductibility of bribes, determining whether a particular payment to a foreign public official comes under the facilitation payment exception, and detection of foreign bribery during tax audits.

Finally, the lead examiners welcome the ongoing reflection in Inland Revenue to envisage possibilities for information sharing with law enforcement authorities. They recommend that New Zealand amend its tax legislation to require, where appropriate, Inland Revenue to provide information on request from law enforcement authorities in the context of foreign bribery investigations and to report information regarding suspected foreign bribery uncovered in the course of their work to law enforcement authorities.

5. Accounting and Auditing

a. Awareness raising efforts

62. Representatives of the accounting and auditing profession indicated that they have not engaged in any specific awareness raising with regard to the issue of foreign bribery and the role of accountants and auditors in the fight against foreign bribery. For example, the profession has not produced any training materials or other documents that specifically address foreign bribery. New Zealand has noted that it has sought to harmonise its accounting rules with international standards, which do not specifically refer to bribery. The absence of specific references to bribery in the standards, however, makes awareness-raising and training about the application of general standards to bribery especially important.

¹⁸ Following the on-site visit, New Zealand informed the examining team that they had received replies from all the corporations.

b. Accounting and auditing standards

63. The New Zealand Institute of Chartered Accountants (NZICA) establishes accounting standards pursuant to section 25 of the Financial Reporting Act 1993 (FRA). NZICA submits the standards to the Accounting Standards Review Board (ASRB), an independent Crown entity, for approval. The FRA gives legal force to accounting standards approved by the ASRB and prescribes requirements for financial reporting by companies and other 'reporting entities'. Financial reporting requirements are also established by the Companies Act 1993. Internal controls (e.g. audit and assurances) are dealt with within NZICA as a self-regulatory function.

64. In terms of coverage of accounting requirements, New Zealand has a three tiered system. All issuers and some other large companies are required to comply with full New Zealand generally accepted accounting practice. New Zealand is adopting International Financial Reporting Standards (IFRS) for annual accounting periods beginning on or after 1 January 2007; some companies have been using them since 2005. All companies are statutorily required to present financial statements that comply with the FRA and Companies Act 1993. In order to comply with these legislative requirements, companies must prepare consolidated financial statements that include investments in companies they control; control is generally presumed to exist where the parent owns more than half of the voting power of the subsidiary or where it has the power to govern the financial and operating policies of an entity under a statute or an agreement. Material contingent liabilities must be disclosed.¹⁹ A second tier of entities – non-issuers where all of the owners are members of the governing body or where the entity is not large -- are exempted from some IFRS requirements.²⁰ A third group, companies with total assets of less than NZD 450 000 (EUR 215 167; USD 273 686)²¹ and total income of less than NZD 1 000 000, and which are neither subsidiaries of other companies nor the owners of subsidiaries, are able to prepare financial statements with a simplified fill-in-the-box system.

65. Section 194 of the Companies Act provides for requirements to keep accounting records that correctly record and explain the transactions of the company; enable the financial position of the company to be determined with reasonable accuracy, and allow the financial statements of the company to be readily and properly audited. Directors held in breach of the obligation under this section are liable to a fine not exceeding NZD 10 000 (EUR 4 782; USD 6 082). Failure to complete financial statements within prescribed time periods can lead to fines for directors not exceeding NZD 100 000 (EUR 47 820; USD 60 820).

66. With regard to audit requirements, all issuers (and other publicly accountable entities) are required to have their financial statements audited pursuant to the FRA and Companies Act 1993; other statutes impose audit requirements on additional entities. Only chartered accountants who meet statutory standards and belong to NZICA or an equivalent foreign entity may be auditors. However, if all shareholders agree, privately-held companies, including very large companies, are not required to have an external auditor.²² Pursuant to Audit Standard (AS) 206, which adopts International Standard of Auditing (ISA) 240, auditors are required to design and perform audit procedures responsive to the identified risks of material misstatement due to fraud, including procedures to address the risk of management override of controls. Audit standards for public entities have more focused requirements. The "Auditor-General's Auditing Standard 3: The Auditor's Approach to Issues of Performance, Waste and Probity" (AG-3) has a

¹⁹ See New Zealand Equivalent to International Accounting Standard 37 §§ 27, 86.

²⁰ An entity is large if it exceeds two of the following: (a) total income of NZD 20 000 000; (b) total assets of NZD 10 000 000; and (c) 50 full time equivalent employees.

²¹ As of 1 July 2006, 1 NZD (New Zealand Dollar) = 0.48 EUR = 0.61 USD.

²² See section 196(20), Companies Act 1993.

specific directive for auditors to consider spending by public entities in “sensitive areas” and makes specific reference to “payments to and from other countries, particularly those with a history of different ethical standards”.

67. Members of NZICA must adhere to the Institute’s Code of Ethics and Professional Standards covering, amongst other things, independence. Members who offer accounting services to the public, including audit, must hold a certificate of public practice. This requires, inter alia, compliance with standards of independence and review by the Institute’s practice review unit. New Zealand has supplied recent examples of the NZICA taking action to enforce independence standards with proceedings leading to disbarment or censure, publicity and costs orders.

c. Reporting obligations

68. The professional rules governing the reporting by auditors of suspicious behaviour are contained in AS-206; they refer to fraud but not specifically to bribery. AS-206 requires auditors to report suspected fraud to company management; suspected fraud by management or certain key employees must be reported to those charged with governance of the company. (See AS-206 paras 97-99). It may not be clear, however, that foreign bribery always constitutes fraud for this purpose, particularly since bribery may not involve personal enrichment of any company personnel. In addition, the materiality requirement is unclear: while section 97 requires reports of even minor fraud to management, the Standard elsewhere (para. 10) states that for purposes of the Standard the auditor is concerned with fraud that causes a material misstatement in the financial reports.

69. ISA 240 (and thus AS-206) does not require any reporting by auditors to regulatory and enforcement authorities unless national law so provides.²³ The Responses (question 16.2) indicate that “[w]hile untested, it is [NZICA’s] preliminary view that its members undertaking audit would be required to report to the relevant government authority were those members to detect incidences of bribery of foreign officials”. However, the legal basis for that view remains unclear. NZICA’s Code of Ethics makes clear that there is a general duty of confidentiality with regard to information acquired in the course of professional work, which can only be lifted where there is right or a duty of disclosure. There does not appear to be any legal obligation on an accountant or auditor in New Zealand to disclose suspected foreign bribery to government authorities other than an obligation, applicable only to accountants who receive funds in the course of business for deposit or investment, to disclose suspicions of money laundering.

Commentary:

The examiners recommend that the New Zealand authorities take steps to improve the detection of foreign bribery by accountants and auditors, including encouraging the profession to include specific training on foreign bribery in the framework of their professional education and training, and to address foreign bribery in efforts relating to the implementation of AS-206.

The lead examiners found that accounting and auditing standards in New Zealand could, if properly enforced, help effectively combat bribery. The lead examiners recommend that New Zealand reconsider the exemption from audit requirements applicable to large privately-held companies.

²³ See ISA 240 – The Auditor’s Responsibility to Consider Fraud and Error in an Audit of Financial Statements ¶ 68 (stating that an auditor’s professional duty of confidentiality “ordinarily precludes reporting fraud and error to a party outside the client entity”, but that the duty may be overridden by national law); see also AS-206 para 106.

The lead examiners recommend that the New Zealand authorities (1) take all necessary measures to require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether the suspected bribery would have a material impact on the financial statements; and (2) consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities.

6. Money Laundering

70. As underlined in a joint Report by FATF and the Asia Pacific Group on Money Laundering (APG), New Zealand is not a major international financial centre, with the majority of financial activities being domestic.²⁴ The Report also acknowledges that “the foundations of an effective preventive system are in place”, although it recommends some improvements, notably in areas of customer due diligence, as well as guidelines and surveillance of reporting entities.

a. Suspicious transaction reporting

71. The Financial Transactions Reporting Act 1996 (FTRA) imposes obligations on financial institutions, including (i) verification of customer identity, for example, when new accounts are opened, occasional transactions and certain other transactions conducted, or where money laundering is suspected,²⁵ (ii) retention of transaction records and customer verification details;²⁶ and (iii) reporting of suspicious transactions.²⁷ The FTRA also provides for protection of the identity of people making suspicious transaction reports (STRs) and immunity from liability for any breach of secrecy or customer confidentiality.²⁸

72. Financial institutions, as defined in section 3 of the FTRA, include banks, life insurance companies, building societies, credit unions, casinos, share brokers, real estate agents, trustees and managers of superannuation schemes, the New Zealand Racing Board, as well as any other person whose business consists providing financial services.²⁹ Lawyers and accountants are also considered financial institutions for the purpose of the Act, but only insofar as they receive funds in the course of their business.³⁰

73. The FTRA does not specify what may constitute a suspicious transaction, but provides that the Commissioner of Police shall issue guidelines in this respect. The “Best Practice Guidelines for Financial Institutions” set out “Suspicious Transaction Guidelines”,³¹ which, notably define the terms used in the FTRA provisions (“suspicion”, “knows or believes”, etc.), explain how money laundering may take place and its different stages (placement, layering and integration), and provide indications on recognising

²⁴ The publication “New Zealand: Report on Observations of Standards and Codes, FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism” is available from the New Zealand Ministry of Justice website at <http://justice.govt.nz/fatf/nz-report.html>.

²⁵ Part 2 (sections 6 et seq.) of the FTRA.

²⁶ Part 4 (sections 29 et seq.), *ibid.*

²⁷ Part 3 (sections 15 et seq.), *ibid.*

²⁸ Sections 17 and 18, *ibid.*

²⁹ See section 3(k), *ibid.* for criteria set out for this last category.

³⁰ See sections 3(l) and 3(m), *ibid.*

³¹ See the “Best Practice Guidelines for Financial Institutions” at www.police.govt.nz/service/financial/guidelines-for-financial-institutions.pdf

suspicious transactions. These indications are not exhaustive but rather attempt, for each category of financial institutions, to provide examples of factors which should alert the financial institution to the suspicious nature of the transaction (e.g. numerous accounts, complex and unusually large transactions, certain types of off-shore activities, etc.). The Guidelines also provide a “suspicion checklist” which may be used by financial institutions as a guide in identifying potentially suspicious transactions. Finally, the Guidelines explain the form that any suspicious transaction report (STR) should take, and the information it should contain.

74. During the on-site visit, representatives of financial and non-financial institutions subject to reporting obligations indicated that, although regular training on money laundering takes place for the reporting entities, no training or information has been made available in the Guidelines, seminars or other media on the foreign bribery offence as a predicate offence to money laundering. Nor has guidance or training been provided to reporting entities on identifying suspicious transactions that may be linked to foreign bribery offences.

75. In addition, the FATF/APG Report pointed out several areas where suspicious transaction reporting could usefully be improved to meet the standards in the 1996 FATF 40 Recommendations. Additional requirements regarding customer identification have been recommended, notably to cover wire transfers as well as cash transactions, to identify owners or controllers of legal persons, as well as persons believed to be acting on behalf of other persons. Enhanced customer due diligence in respect of politically exposed persons is also not provided for under New Zealand current anti money laundering regime.

76. The New Zealand authorities acknowledge these compliance gaps, and are in the process of reviewing their money laundering reporting legislation to ensure that it is consistent with the 2003 FATF 40 Recommendations and 9 Special Recommendations. In this regard, the government has already decided to implement rules relating to the wire transfer of funds. Furthermore, discussions and consultations are ongoing with reporting entities covered by the FTRA on possible amendments to the Act. The Ministry of Justice aims to complete the review and consultation process by 2007, with the aim of bringing the New Zealand anti money laundering legislation fully in line with FATF standards by the next FATF/APG evaluation scheduled for 2008.³²

b. Exchange of information

77. The New Zealand Financial Intelligence Unit (FIU) is established within the NZP. It receives, analyses, and disseminates STRs and other relevant information, and generally coordinates the flow of information between reporting entities and law enforcement authorities. It also has access to a wide range of other financial, administrative and law enforcement information, including law enforcement and customs databases, credit histories, real estate registers, etc. It does not, however, have access to Inland Revenue information.

78. The FIU has eight permanent staff and one temporary. According to information provided by New Zealand to the APG, the number of STRs have dramatically increased over the past years, with nearly 7 000 reports processed by the FIU in 2004, and 6 200 in 2005, a significant increase compared to the 2003 figure of 3 152. It appears, however, that most of these STRs come from the banking sector (up to 90% in 2002), with very few reports filed from the securities or insurance sectors, or by lawyers and accountants. Representatives of the FIU interviewed at the on-site visit indicated notably that there had been no STRs by lawyers until 2003/2004, but that an important prosecution of a lawyer for failure to report under the FTRA had considerably raised awareness of the legal profession about their reporting obligations under the

³² See information on Review of the FTRA available from the Ministry of Justice website at <http://justice.govt.nz/fatf/chapter-9.html>.

FTRA, with important contributions of the Law Society in this regard. The FIU reported that STRs from auditors are still in relatively low numbers.

79. Overall, based on discussions with representatives of the financial institutions and the FIU, there appeared to be good coordination between the reporting entities, notably the banks, and the FIU. The FIU expressed the view that the banks exercise due diligence and respect their money laundering reporting obligations, both in terms of the number of STRs made, and the quality of the information provided. The banks indicated that they feel they receive adequate feedback from the FIU on follow-up to STRs made, and stated that regular dialogue takes place with the FIU, notably through the New Zealand Bankers Association. The banks nevertheless expressed the wish that more feedback could usefully be provided on the value of the information provided to the FIU, and on to other law enforcement authorities and Inland Revenue. The lead examiners believe that there is merit in providing feedback to the banks and other providers of STRs.

80. The examining team is concerned by the manual treatment of STRs by the FIU. As of June 2006, reports received by the FIU still have to be keyed in manually on the FIU database. According to FIU representatives, this represents a full-time job for four persons (out of the eight person staff available in the FIU). Representatives of the FIU pointed out that, while this is time consuming, it also entails more scrutiny of each STR received. Nevertheless, this raised doubts among the examining team concerning the efficiency of the functioning of the FIU and accessibility of the database. Following the on-site visit, the New Zealand authorities indicated that initiatives are underway to implement an updated electronic database for the FIU, with first steps in place as of September 2006. In the view of the New Zealand authorities, this should dramatically reduce the amount of time necessary for the input of STRs and allow more time for analysis of the financial information contained therein. The examining team also had some concern that the FIU is not authorised by law to request financial institutions to send electronic wire transfer information, as such transfer reports could provide important intelligence of international financial activities that may indicate fraudulent activity, tax evasion or instances of foreign bribery. Projects to improve the technological infrastructure and enable electronic receipt of STRs would constitute a major improvement.

c. Sanctions for failure to report

81. Under section 22 of the FTRA, an offence is committed where any suspicious transaction is conducted or is attempted to be conducted through a financial institution, and the financial institution fails to report the transaction as soon as practicable after forming the suspicion. Fines for such failure to report range from a maximum of NZD 20 000 for an individual (approx. EUR 9 563; USD 12 164), to NZD 100 000 for a legal person (EUR 47 815; USD 60 819). Sanctions for providing misleading information are in the amount of NZD 10 000 (EUR 4 782; USD 6 082). Tipping-off is also considered an offence (breach of section 20 of the FTRA) and carries a penalty of up to six months imprisonment, as well as a NZD 5 000 fine for individuals (EUR 2 390; USD 3 040) and NZD 20 000 fine for legal persons.

82. The FIU reported that several prosecutions have taken place for breach of the FTRA, for charges ranging from failure to keep records to failure to identify customer and submit STRs. Out of seven prosecutions, six prosecutions have resulted in convictions. According to representatives of the FIU, the one prosecution which did not result in a conviction is still being pursued through other avenues. Following the on-site visit, the Ministry of Justice pointed out that it was necessary to provide for a wider variety of sanctions and to increase the penalties for failure to report and for other breaches of law in this regard. To address this, the review of the anti-money laundering legislation will also include a review of sanctions and penalties.

Commentary:

The lead examiners encourage the New Zealand authorities to pursue efforts to draw the attention of financial institutions to the foreign bribery offence as a predicate offence to money laundering, and provide them with guidance on identifying suspicious transactions that may be linked to foreign bribery offences.

The lead examiners further recommend that New Zealand provide training on the foreign bribery offence, as well sufficient technological and human resources to the FIU to enable it to carry out its role efficiently, notably with regard to the detection of foreign bribery as a predicate offence to money laundering. The lead examiners welcome New Zealand's expressed intent to continue to implement electronic collection of data, so as to enable potentially important intelligence to be collected which, on analysis, could indicate instances of foreign bribery and related offences.

C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY

1. Investigation and Prosecution

a. Law enforcement bodies

83. Under the New Zealand system, two authorities are principally responsible for detecting and investigating foreign bribery offence: the SFO and the Police. While both bodies are competent under the law for the investigation of alleged foreign bribery offences, discussions at the on-site visit pointed to the SFO as the investigative authority most likely to deal with foreign bribery cases.

(i) The Serious Fraud Office

84. The SFO was established by the Serious Fraud Office Act 1990 (SFO Act). It is a government department established for the purpose of combating serious or complex fraud. The SFO has wide powers to investigate such fraud and to take criminal proceedings against those suspected of committing it, and is specifically exempted from responsibility to the Attorney-General for decisions to investigate or prosecute.³³

85. As of May 2006, the total staff of the SFO consisted of 35 persons. The SFO is divided into two branches, one dealing with Investigations and the other with Prosecutions (see section (ii) below on the role of the SFO in prosecuting cases). The pool of investigative staff consists of eleven investigators, seven forensic accountants, and a document management unit. SFO investigators and forensic accountants undertake investigations where serious fraud is suspected. An in-house prosecutor is assigned to each investigation, with the role of providing advice on any legal issues arising in the course of the investigation and to provide a report to the Director. A separate report is also prepared for the Director by the investigators and accountants. Representatives of the SFO at the on-site visit explained that, on average, each investigator has responsibility for four to six cases, notably because the purpose of the SFO Act is to

³³ Section 30(1) of the SFO Act. Consent of the Attorney General is nonetheless required for SFO decisions to prosecute offences subject to an Attorney General consent requirement, including foreign bribery. See the discussion on the Attorney General's consent under section c(ii) below.

“enable proceedings relating to such fraud to be taken expeditiously”, possibly within a year. Thus, to conform to this standard, the SFO does not take on more cases than it can prosecute. While there seems to be a good motivation on the part of the SFO to take on future foreign bribery cases, there is some concern regarding the capacity of the SFO, in terms human resources, to take on additional cases of foreign bribery when these arise.

86. The SFO Act does not detail a specific list of offences which fall under the SFO’s responsibility. Thus, foreign bribery is not specifically mentioned as an area of exclusive competence of the SFO. Rather, the SFO Act states that the SFO is empowered to deal with cases that its Director believes on reasonable grounds to involve “serious and complex fraud”. For the purpose of determining whether an offence involves serious and/or complex fraud, the SFO Act 1990 provides that the Director may, among other things, have regard to factors such as the suspected nature and consequences of the fraud, the suspected scale of the fraud, the legal, factual and evidential complexity of the matter, and any other relevant public interest consideration.³⁴ Other criteria not included in the SFO Act but which are generally considered in SFO decisions to take on cases include fraud involving over NZD 500 000 (EUR 239 074; USD 304 095), fraud perpetrated by complex means, as well as any fraud likely to be of major public interest and concern.³⁵ In any case, it is the Director of the SFO who retains full discretion in the selection of cases.

87. Although the law is not explicit on the issue, there was broad agreement during discussions at the on-site visit that major foreign bribery cases would most likely fall under the responsibility of the SFO, not only because such cases are likely to involve complex corporate structures and sums above the NZD 500 000 threshold, but also because panellists considered that a foreign bribery offence would clearly constitute a major public concern. In addition, judges also expressed the view that the SFO should take over any foreign bribery case because of the expertise available within the SFO, which may not be available within the NZP, given the priority given to crimes against the person as opposed to financial and economic crime (see also section (ii) below). The SFO itself considers that it would be well placed to deal with foreign bribery cases, notably given its experience acquired with the Secret Commissions Act, mutual legal assistance requests and more generally with cases with an overseas component, as well as its specific investigative powers (see section b(ii) below). In this regard, it should be noted that the SFO has already dealt with several domestic corruption cases, which did not necessarily meet the NZD 500 000 threshold but were considered to be of major public interest or concern.³⁶

88. As regards training, the SFO conducts both in-house training and public education campaigns where necessary (for senior civil servants, local communities, etc.). As of July 2006, these training programmes had focused on fraud detection and investigation in general, with no specific attention paid to the foreign bribery offence. Following the on-site visit, New Zealand informed the examining team that internal seminars had been held for new recruits to the SFO, including on the specific foreign bribery offence, and that information distributed at these seminars was also available on the SFO’s intranet site.

89. In addition, the role of the SFO is to be expanded, possibly during the 2006/2007 financial year, to include the investigation and where appropriate forfeiture of assets or profits derived from criminal activity, whether or not there has been a conviction in relation to the criminal activity in question. This new role of the SFO is dependent upon the passing of the Criminal Proceeds (Recovery) Bill (see also section

³⁴ Section 8 of the SFO Act.

³⁵ See notably the SFO Annual Report 2005 (www.sfo.govt.nz/Annual%20Report%202005.pdf) and the SFO Statement of Intent for the year ending 30 June 2007 (www.sfo.govt.nz/SOI%20for%20June%202007.pdf).

³⁶ See for instance the SFO Annual Report 2005 p.28, which discusses an SFO case under the Secret Commissions Act involving bribe payments in the amount of NZD 263 000.

4.b.(ii) below on Confiscation).³⁷ This new role of the SFO is due to be accompanied by the creation of a unit in the SFO to deal specifically with proceeds of crime, as well as additional resources in the form of approximately 20 new staff members.

(ii) *The Police*

90. The NZP is a unified national police force, composed of twelve districts administered from the Office of the Police Commissioner in Wellington. The staff consists in total of 2 300 support staff and 7 500 police officers, of which 1 000 are investigative personnel. The NZP also has seven liaison officers in overseas posts to aid international co-operation on all matters, including corruption.

91. Discussions at the on-site visit focused notably on concerns about the availability of resources within the NZP to deal with economic crime, and notably foreign bribery. As explained by representatives of the Police, four dedicated fraud units have been set up within the NZP in the districts of Auckland, Christchurch, Hamilton and Wellington. There is also a Company Fraud Unit in Auckland. Where there is no fraud unit, the Police Criminal Investigations Branch plays a role in investigating fraud. These entities would be the Police units most likely to deal with foreign bribery investigations. There is no formal case prioritisation model in New Zealand. Representatives of the NZP acknowledged that crimes against the person generally take across the board priority over fraud cases. This may be the cause or the consequence of the insufficiency of resources available within the fraud units: NZP representatives recognised that fraud units are lightly staffed and have been reduced over recent years, and that the staff assigned to fraud cases is likely to be taken off them when a higher priority arises. A Companies Office representative also noted that practically his entire team of investigators formerly worked for fraud units within the NZP and that few people with the requisite expertise are still with the Police. Consequently, while fraud cases, including foreign bribery cases, above the NZD 500 000 threshold would normally be automatically reported to the SFO (see section (iii) below on coordination between the two bodies), there is a likelihood that cases under the NZD 500 000 threshold would get little attention within the NZP. It should be noted that the only two foreign bribery cases the Police have been involved in to date have (as mentioned in section on the Oil-for-Food cases below) been given high level attention within the Police. However, the lead examiners remain concerned that high level attention may not be systematically available to overcome the limits of anti-fraud resources and expertise available within the NZP.

92. With respect to training, investigative personnel within the NZP receive two to three years of training. This includes training on offences under the Crimes Act, and corruption is generally dealt with in that context. The fraud units also undergo training together with the Australian Federal Police. Discussions with police representatives revealed that, at the time of the on-site visit, there had not been specific training on the foreign bribery offence.

93. This raised some concern regarding the ability of the NZP to properly identify foreign bribery instances which they may come across. Indeed, although the SFO will probably take on responsibility for the investigation of most foreign bribery cases (see section (i) above), the NZP are the ones most likely to initially uncover bribe payments to foreign public officials. Furthermore, there may be instances where the NZP will be in charge of foreign bribery investigations. Thus, it is essential to ensure that police forces are properly aware of the importance of investigating and prosecuting foreign bribery offences, are trained to detect them, and have the necessary resources to do so. Following the on-site visit, the New Zealand authorities indicated that the Police plans to include coverage of the foreign bribery offence in upcoming Criminal Investigations Branch induction courses.

³⁷ See the SFO Statement of Intent for the year ending 30 June 2007.

(iii) *Coordination and cooperation*

94. There is no formal mechanism between the Police, SFO and/or other regulatory bodies for reporting foreign bribery offences, and thus bringing such matters to the attention of the SFO. Formal operating protocols for general issues of cooperation exist between the SFO and a number of key agencies such as the Police, the Inland Revenue Department, the Customs Service and the Securities Commission. A Memorandum of Understanding between the Police and the SFO specifies that the SFO is to be notified of complaints with an actual or potential loss in excess of NZD 500 000, where the facts, law or evidence is of great complexity, or is of great public interest or concern. While the NZD 500 000 threshold is an objective and fairly easily verifiable reference point, it may be more difficult to establish a threshold beyond which the facts are greatly complex, or the matter of sufficient public interest to be referred to the SFO.

95. Where the Director of the SFO becomes aware of a potential SFO case, the Director of the SFO may, under section 11 of the SFO Act, assume the responsibility for investigating any case which the Director believes on reasonable grounds to involve serious or complex fraud, and to require from the Police any information held in Police records. Section 11(2) provides for the possibility of referral to the Solicitor-General where there is disagreement between the Police Commissioner and the Director of the SFO on the attribution of a case, but participants at the on-site visit indicated that such a referral has never been necessary. The SFO and Police further explained that there is a strong interplay between the two authorities, and that they are confident that any foreign bribery case would get picked up. Following the on-site visit, New Zealand informed the examining team that the Memorandum of Understanding between the NZP and the SFO was in the process of being redrafted, and that consideration could be given therein to clarifying the SFO's role with regard to foreign bribery cases.

Commentary:

The lead examiners consider that the current investigation system raises concerns about whether cases that fall under the SFO's threshold will be adequately investigated. They encourage the New Zealand authorities to clarify the SFO's competence over foreign bribery offences and establish it as the agency responsible for initially assessing all foreign bribery allegations. This could help ensure that such cases are given due attention by allowing the SFO to review whether it should exercise its jurisdiction over the case, to consider the appropriate agency for referral in the event it declines to take jurisdiction, and to generally keep track of the status of investigations of foreign bribery allegations. In this regard, the SFO should clarify that investigation of foreign bribery allegations is in the public interest and that its informal monetary threshold is not a determining factor. In addition, the lead examiners note that the specific investigative powers of the SFO, as well as its planned new role as the recovery agency charged with seizure and confiscation of the proceeds of crime would also make it well suited to act as the initial assessor of all foreign bribery allegations. In this regard, the lead examiners recommend that the NZP establish a formal mechanism for reporting all foreign bribery allegations in a timely manner to the SFO.

The lead examiners welcome the motivation and willingness of the SFO to investigate foreign bribery offences. However, they are concerned that the existing resources dedicated to foreign bribery investigations and the level of training, both within the SFO and the NZP, may not be sufficient for adequate detection and investigation of foreign bribery offences. Thus, they recommend that the New Zealand authorities ensure that sufficient resources are made available and that training continue to be provided to the SFO and the NZP for the effective detection and investigation of foreign bribery offences.

b. The conduct of investigations

(i) Commencement of proceedings

96. To date, the only investigation initiated in New Zealand into possible foreign bribery offences in international business transactions arises from the unusual context of the Independent Inquiry Committee into the UN Oil-for-Food Programme (see below the section on Oil-for-Food allegations for concerns raised in that context). It does not appear that there have been other media reports of possible foreign bribery by New Zealand companies or individuals and no other allegations were referred to during the on-site visit. There have also not been any preliminary investigations closed for lack of evidence or other reasons. Consequently, this section reviews the rules and procedures relied on for other comparable offences, with regard to decisions to open or close investigations.

97. SFO and NZP cases concerning economic and financial crime generally originate from complaints and referral of cases by government departments, corporate staff or liquidators, as well as the general public. Where the SFO receives complaints which are considered inappropriate for the SFO, these are referred to the relevant enforcement or regulatory bodies. The SFO and NZP also have the possibility of proactively undertaking inquiries, although participants at the on-site indicated that this is less frequent. The Phase 2 responses to the questionnaire also explained that, to date, all proactive investigations have invariably been supported by later formal complaints. The lead examiners stressed the need to give more consideration to proactive investigations in the context of alleged foreign bribery. Indeed, there is less likelihood of formal complaints by victims given the difficulty to identify the victim of a foreign bribery offence in the context of an international business transaction, and given also the strong overseas component of such an offence.

98. As concerns the SFO, where the Director of the SFO considers that a complaint or referral falls within the SFO's competence, a first step is often a further consideration of all the documentary material (referred to as "the detection stage"). At the completion of the detection stage the Director, after consultation with senior management, will then decide on further steps: some cases will be closed at this stage, others upgraded to a full investigation where the available evidence supports that step. Where the evidence supplied with a complaint is convincing the matter will proceed immediately to the investigation stage. Once investigations are opened, as previously indicated, investigators and forensic accountants work together on investigations. Typically, potential witnesses and suspects are interviewed, documents obtained and analysed, and financial transactions researched. Investigation teams regularly exchange information and share experiences and expertise in order to maintain consistency. Prosecutors are assigned to each investigation. They advise on legal issues, including the exercise of SFO powers (see section (ii) below on investigative techniques). Appraisal meetings are held regularly (usually monthly) to ensure that, for each investigation and prosecution, an appropriate level of resources is being applied, professional standards and disciplines are being adhered to, and proper progress and direction is being maintained.

Commentary:

The lead examiners recommend that the Working Group on Bribery follow up with regard to actions taken by law enforcement authorities, including decisions to open or to discontinue investigations in respect of foreign bribery allegations.

(ii) *Investigative techniques*

General investigative tools

99. Overall, the New Zealand legislation allows for a wide range of investigative methods. The Crimes Act 1961, the Summary Proceedings Act 1957 and the Evidence Act 1908 notably provide for the use of investigative tools such as interception of communications,³⁸ search and seizure³⁹, and undercover police officers.⁴⁰ With regard to interception of communications, part 11A (sections 312A to 312Q) of the Crimes Act, which provides for obtaining of evidence by the Police by interception devices, appears to indicate that such measures can only be used in the context of an “organised criminal enterprise”,⁴¹ or in respect of “serious violent offences”⁴² or terrorist offences.⁴³ The foreign bribery offence may not always match the criteria for an organised criminal enterprise which notably implies “the continuing association of 3 or more persons”, nor that for serious violent offences which would involve attempts or risks of attempts on the physical safety of a person.⁴⁴ Given the potential importance of being able to use wiretapping and other methods of interception of communications in the context of foreign bribery investigations, it is a matter of concern if such tools are not available to investigative authorities in that context.

100. Witness protection programmes are also available, although the New Zealand authorities explain that these do not rely on specific statutory provisions. Nevertheless, sections 13B to J of the Crimes Act deal with pre-trial witness anonymity, as well as witness anonymity during High Court trials. Conditions for providing witness anonymity include considerations of safety of the witness, risks of serious damage to property, the seriousness of the offence, and the importance of the witness’s evidence to the case. More generally, decisions to make a witness anonymity order should take into account the right of the defendant to a fair trial. Given that the foreign bribery offence under section 105C CA is an indictable offence tried before the High Court, witness anonymity could therefore potentially be available in foreign bribery cases.

101. As regards access to financial information held by banks, the NZP can obtain bank records for the purpose of conducting criminal investigations, including for the purpose of financial analysis in support of asset confiscation investigations. The provision of financial information usually requires the execution of a search warrant served upon the relevant bank or finance company. While the Privacy Act 1993 applies to personal information collected by any agency,⁴⁵ and generally limits the possibilities to disclose such information, Principle 11 of the Act expressly allows for information to be disclosed where it is done to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences. The NZP confirmed that they do not generally encounter problems in obtaining information from banks and financial institutions in the context of criminal investigations.

³⁸ Sections 312A to 312Q CA.

³⁹ Section 198 of the Summary Proceedings Act 1957 (and special search and seizure provisions in the SFO Act for the SFO).

⁴⁰ Section 13A of the Evidence Act 1908.

⁴¹ Section 312B CA.

⁴² Section 312CA *ibid.*

⁴³ Section 312CC *ibid.*

⁴⁴ See the definitions under section 312A CA.

⁴⁵ Under section 2 of the Privacy Act, an agency “means any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector.”

102. Finally, it should be pointed out that, under New Zealand legislation, law enforcement authorities can not access information held by Inland Revenue, unless the investigation concerns tax offences. The NZP and the SFO shared the view that it would be highly useful if Inland Revenue were allowed to share information for the purpose of criminal investigations (for further discussion, see above Part B. section 4(b)(ii) on sharing of information by tax authorities).

Specific investigative powers of the SFO

103. In addition to ordinary and special investigative tools available to the Police, the SFO has been granted specific powers under the SFO Act not only for formal investigations, but even where there are suspicions of offences. In the view of the lead examiners, this would also make the SFO well suited to act as the responsible body for foreign bribery cases (see section (a) and corresponding commentary above). Notably, where it is suspected that an investigation into the affairs of any person may disclose serious or complex fraud, the SFO may require any person to produce documents and answer questions about the whereabouts or existence of further documents.⁴⁶ Furthermore, where there are reasonable grounds to believe that an offence involving serious or complex fraud may have been committed, the SFO may require any person to produce documents, supply any information, and attend and answer questions.⁴⁷ The SFO may apply for search warrants if persons do not comply with requests to produce documents, supply information, or answer questions, or if service of a notice to produce might seriously prejudice an investigation e.g. by giving a suspect the opportunity to destroy evidence.⁴⁸ As pointed out by the SFO during the on-site visit, this gives much more effective investigative powers to the SFO, partly because SFO search warrants are granted on a different basis from those available to the Police: it is the Director of the SFO who decides if there are reasonable grounds to believe that an offence of serious or complex fraud has been committed,⁴⁹ with the judge only having to decide the other jurisdictional elements, including whether or not evidence is likely to be found at the place to be searched and - where this is the basis for the application - whether or not service of a notice might seriously prejudice the investigation. Failure or refusal to respond positively to request to produce documents, supply information, and attend and answer questions constitute an offence under the SFO Act.⁵⁰

104. It should be noted that where a person is required to attend and answer questions, that person is not excused from answering any questions on the grounds that to do so might incriminate him/herself,⁵¹ although statements made in the course of a compulsory interview are not admissible in criminal proceedings against that person (except for the purposes of impeachment if the person later gives evidence inconsistent with the statement); or the proceedings relate to specific offences committed under the SFO Act.⁵²

105. Furthermore, the SFO Act entitles the SFO to require information otherwise covered by duties of confidentiality, except for legal professional privilege.⁵³ These provisions would notably require banks to

⁴⁶ Section 5 of the SFO Act.

⁴⁷ Section 9 *ibid.*

⁴⁸ Section 10 *ibid.*

⁴⁹ The New Zealand Law Commission is preparing a paper in which it recommends that a standardised search warrant apply to all law enforcement agencies. The proposal will remove the power of deciding whether there are reasonable grounds to believe that an offence has been committed from the Director to a judge.

⁵⁰ Section 45 *ibid.*

⁵¹ Section 27 *ibid.*

⁵² Section 28 *ibid.*

⁵³ Sections 23 *et seq.* *ibid.*

produce information pertaining to their clients, legal practitioners to supply unprivileged financial and other information concerning their clients, and accountants to produce books of account and audit files. With respect to access to financial information, SFO representatives interviewed during the on-site visit reported that they interact daily with banks in the context of serious fraud investigations and that cooperation is generally of a high standard. The SFO however pointed out that this would not include obligations on Inland Revenue to disclose information on any offence other than inland revenue offences (for further discussion on sharing of information by tax authorities, see above Part B, section 4(b)).⁵⁴

106. The SFO voiced their concern regarding the making of blanket claims of privilege by legal professionals and corporations, especially with respect to access to computer information, and how such claims are received by the courts. SFO representatives referred to a recent case pending on appeal before the courts, concerning requests for access to information contained in a computer, where the firm of solicitors handling the financial transactions under investigation refused such access on the grounds that the computers also contained privileged information. The SFO expressed concern that the courts may not have a full understanding of the nature of computer evidence, and of the necessity to have access to the computer in order to collect the specific evidence. The SFO is especially apprehensive that such blanket claims of privilege will become an increasingly effective defence to investigations carried out by the SFO and the Police, where information is sought from a computer, which may also contain legally privileged material. On the other hand, defence lawyers interviewed at the on-site visit stressed the necessity to avoid abuse of SFO powers, and the general use of fishing expeditions to gather evidence. While it is clear that the rights of the defence should be respected under all circumstances, the specific nature of digital evidence may require further reflection from the legislative authorities to put in place an adequate framework.

Commentary:

The lead examiners recommend that the New Zealand authorities ensure that all necessary investigative techniques, including interception of communication, and search and seizure powers, are available, where appropriate, for the effective detection and investigation of foreign bribery. Furthermore, the lead examiners encourage the New Zealand authorities to consider looking into the applicable framework for access to computer information by investigative authorities in the context of criminal investigations.

(iii) *The Oil-for-Food allegations*

107. Two relatively small New Zealand companies were named in the IIC Oil-for-Food report that was released on 27 October 2005. The alleged illicit fund transfers are relatively modest in comparison to other Oil-for-Food allegations (less than USD 40 000). During the on-site visit in May 2006, police officials indicated that the cases were receiving high-level attention and that materials received from the IIC were being reviewed. They considered that the facts could generally fit within the New Zealand foreign bribery offence, although they refrained from discussing the possible application of the offence in detail. The examiners take note of the current investigative activity concerning these matters and commitment of senior staff. However, there are a number of troubling aspects about the earlier treatment of the allegations by the New Zealand authorities as well as the lack of investigation of certain other allegations.

108. The examiners are concerned about the initial lack of law enforcement activity with regard to the allegations of the two named companies. Neither the police nor the SFO took any spontaneous action with regard to the allegations even though they were very well-publicised after the release of the IIC report on 27 October 2005. The only inquiry initially conducted was a review by MFAT of its own files, which gave rise to a MFAT background memorandum dated 4 November 2005 (the “MFAT Report”). It was MFAT

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Sections 25 and 37 *ibid.*

that contacted the IIC between 16-21 November 2005; it was only after the IIC told MFAT that it would only deal with law enforcement authorities and after MFAT contacted the police that the police became involved. Although the NZP reviews press articles for possible allegations, articles about the Oil-for-Food program were considered to involve issues of international relations rather than possible criminal behaviour, and therefore were not of interest. The examiners acknowledge MFAT's attention to following up the allegations with the IIC and its cooperation with law enforcement authorities, but they consider that the law enforcement authorities could have addressed such highly-publicised allegations more pro-actively.

109. In this regard, it is noteworthy that the MFAT Report's discussion of the kickback issue with regard to the two companies appears at best to be inconclusive. It states (para 20) that the issue only "arises on MFAT's files" with regard to one of the two companies because only one company raised the issue with the Ministry. The fact that only one company spontaneously raised the issue of how to deal with being solicited is not conclusive about whether the other company was solicited and how it responded. Moreover, with regard to the solicited company, the report appears to state only that a 10% "after sales tax" payment was no longer solicited because a 10% payment had been made in another form by the company's agent. [See MFAT Report para 23 ("MFAT's records show that [the NZ company] subsequently received advice from an agent in Jordan that it would no longer need to pay the 'after sales tax' as the '10% is the value of the letter of guarantee [the agent] delivered to the State Company for Agricultural Supplies on [the NZ company's] behalf" and there was 'therefore no need to pay the 10%'").] It is also noteworthy that the IIC report itself states that the amount of ASSF (kickback) reportedly levied and paid in relation to the New Zealand company's contract was based "entirely on actual data".⁵⁵

110. A second and related concern arises out of language in the MFAT Report suggesting that a very high standard would be applied to decisions to open an investigation. The MFAT Report states that "before even considering whether a foreign bribery offence may have been committed under New Zealand's anti-bribery laws we would need reliable and admissible evidence of knowledge and intention on the part of the two companies." During the on-site visit, senior MFAT and law enforcement officials explained that the memorandum was hurriedly prepared and did not carefully analyze the test for opening an investigation, in part because that is not the role of MFAT. The examiners accept the explanation and do not attribute undue importance to the precise language used in the MFAT Report in this regard.

111. Third, the examiners have some concerns about certain broad MFAT statements about the lack of evidence relating to allegations relating to specific companies prior to any meaningful outside investigation. On 4 November 2005, well before there was any activity by any law enforcement agency with regard to the allegations or contact with the IIC, a press release was issued by the Minister for Foreign Affairs entitled "Oil-for-Food: No Evidence of NZ Corporate Wrongdoing" which stated that "an extensive file search by MFAT officials has found that the two New Zealand companies referred to in the Volcker report ... acted in accordance with UN and New Zealand rules".⁵⁶ The press release does reflect that the IIC had not yet been contacted, noting that "significant further information would be needed from the Independent Inquiry to establish whether there were any grounds to pursue a prosecution against either of these two companies under New Zealand's anti bribery laws". Questioned at the on-site visit, MFAT

⁵⁵ Appendix E of the IIC Report (at 617) defines ASSF as the term used to "disguise the humanitarian contract kickback paid on Programme Contracts as required by the Iraqi regime".

⁵⁶ Available at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=24306 (as of 6 July 2006). The release attracted international attention. See, e.g., Agence France Presse, "No evidence NZ companies involved in Iraq food-for-oil bribes: minister", 4 November 2005); Indo-Asian News Service, "New Zealand trashes Volcker report, South African firm goes to court" (4 November 2005); BBC Monitoring International Reports, "Minister Says No Evidence New Zealand Companies Involved In Iraq Graft", (4 November 2005); Xinhua General News Service, "FM refuses NZ companies' UN corruption reports" (4 November 2005).

officials confirmed that, as the press release itself suggests, no investigation was carried out prior to the press release other than an MFAT review of its internal files. While such a review could perhaps justify assertions about a lack of Ministry involvement in the allegations, it is hard to see how it provides the basis for meaningful statements about company behaviour with regard to bribery. As noted by a law professor commenting on the November 2005 press release, “These firms have been found innocent. But you’ve got to ask yourself, do you really expect to find evidence of bribery and corruption in the official MFAT records?”⁵⁷

112. As noted, the alleged payments at issue are relatively modest, particularly in comparison with other Oil-for-Food contracts. As discussed above in this report, the examiners consider that the initial lack of investigative activity by law enforcement agencies in these two cases results, not from the consideration of any prohibited Article 5 factors⁵⁸, but from their failure to satisfy the SFO’s NZD 500 000 case-value threshold and from the relatively low priority and limited resources generally attributed to fraud type cases by the police. (As discussed above, the examiners consider that the SFO should take a more active role with regard to foreign bribery allegations.) But they appear to reveal a certain number of apparent reflexes – including initial MFAT rather than law enforcement agency involvement in addressing foreign bribery allegations – that if present in other cases would lead to a high risk of consideration of Article 5 factors.⁵⁹

113. A third significant Oil-for-Food related matter involves much greater amounts of trade with Iraq. It involves a major New Zealand company not specifically named in the IIC Report and has apparently not been the subject of any investigation other than the initial MFAT internal document review and public statements. The MFAT Report noted that a “[Vietnamese company] is identified in the Volcker report as having supplied products under contracts that allegedly involved illicit funds transfers to the Iraqi regime. [A major New Zealand company] sold [the Vietnamese company] a substantial proportion of the product ... that was repackaged by that company in Vietnam and sold to Iraq.” The Vietnamese company is listed in the IIC report as having made over USD 360 000 000 in contracts.

114. The MFAT Report is again at best inconclusive. It appears that at some stage MFAT learned of the reselling practice and sought confirmation from the New Zealand company, which is a major exporter. After the company confirmed the practice, the company obtained an exemption under New Zealand law from the relevant Minister in order to cover the indirect sales to Iraq.⁶⁰ The company’s actions suggest that it at least acquiesced in the Ministry’s view that the company could be considered to be selling product to Iraq indirectly. The MFAT report notes that the company gave “assurances [to the Ministry] that the exports to Iraq by their customers were in compliance with the Oil-for-Food Program.” The Ministerial approval for the possible indirect exports may have addressed concerns about unauthorised exports, but it

⁵⁷ See D. Eaton, “Govt Clears NZ Firms”, The Press (Christchurch NZ) 5 November 2005 (quoting Professor David Capie).

⁵⁸ Article 5 of the Convention provides that investigation and prosecution of foreign bribery “shall not be influenced by considerations of national economic interest, the potential effect on relations with another State or the identity of the natural or legal persons involved”.

⁵⁹ MFAT officials explained that MFAT’s involvement was due to its role in administering the sanctions regime. However, as the press release and MFAT Report make clear, its actions extended to consideration and public statements about the foreign bribery aspects of the allegations as well.

⁶⁰ See MFAT Report at 2 (“Once [the NZ company] confirmed that some of its product was being repackaged and re-exported to Iraq, MFAT sought and obtained an exemption from the Minister for indirect exports of [the product] to Iraq (to be absolutely sure that they complied with New Zealand regulations)”; see also Supp. Responses question 37.

does not address the issue of illicit payments or bribery, which (other than for MFAT's files) remains uninvestigated.⁶¹

115. The MFAT report does note that the search of MFAT files did not reveal any evidence that the New Zealand company participated in or knew about any illicit payments. As in the case of the two named companies, however, such evidence or other evidence of bribery would not likely be found in MFAT's files. In response to questions at the on-site visit and subsequently, the law enforcement authorities indicated that they had not taken any steps to investigate this matter. The lead examiners have concerns about the possible influence of Article 5 factors in the decision by law enforcement authorities not to engage even in relatively preliminary steps such as contacting the IIC. In October 2006, the NZP indicated that it was currently seeking the IIC files in relation to the Vietnamese company and, in consultation with the SFO, would consider the further steps to be taken.

Commentary:

The lead examiners have concerns about the absence of any law enforcement investigation of the allegations concerning large amounts of possible indirect exports to Iraq by a major New Zealand exporter. They consider that the presence of an intervening purchaser is not sufficient, without more, to exclude the appropriateness of consideration of an investigation of alleged kickbacks with regard to millions of dollars of possible indirect sales, given the broad coverage of payments through intermediaries under the Convention. The lead examiners take note with interest that the NZP has recently made a request for information from the IIC with regard to this matter. In addition, they have concerns about the lack of pro-active law enforcement agency response with regard to the allegations concerning the two companies named in the IIC Report. The lead examiners recommend that New Zealand take necessary measures to ensure that all credible foreign bribery allegations are properly investigated.

c. Principles of prosecution

(i) Public prosecution in New Zealand

116. In New Zealand, the primary prosecutorial agency is the NZP's National Prosecution Service. The decision to charge and the initial selection of charges is part of the investigation process and therefore remains a decision for the investigating Police Officer. However, the National Prosecution Service reviews charges before proceeding to prosecution and may change withdraw or otherwise modify charges in the light of their expertise. Where charges are laid indictably or once a person is committed for trial in the High Court at a preliminary hearing, the Police Prosecution Service refers the case to a Crown Solicitor for the laying of an indictment, which would be the case for a foreign bribery offence. The Crown Solicitor (who is independent and appointed by warrant from the Governor-General) may also modify charges. With specific regard to foreign bribery offences, and more generally in serious or complex fraud cases, prosecution will in fact be the responsibility of the Prosecutions Branch of the SFO and the Serious Fraud Prosecutors Panel. Finally, for offences pertaining to their area, prosecutions may also be carried out by departmental prosecutors, appearing on behalf of Government Departments or agencies such as the Inland Revenue, Work and Income New Zealand, or local councils.

117. Because the foreign bribery offence is a High Court only indictable offence which cannot be tried in the District Court (see also section 4(a) below on the Courts), the Police National Prosecution Service

⁶¹ Certain domestic and international press reports have referred broadly to an "investigation". See, e.g., Forbes.com, "NZ's largest company investigated over Iraq Oil-for-Food scandal" (31 October 2005); New Zealand Herald (1 November 2005). However, the only inquiry to date is the MFAT internal file review.

will only have competence up to and including a preliminary hearing in the District Court to determine sufficiency of evidence, and will be required to refer the charges to a Crown Solicitor for laying of an indictment and subsequent trial in the High Court. Thus, the Crown prosecutors or the SFO would be the competent authorities for the prosecution of foreign bribery cases.

The Serious Fraud Office

118. The Director of the SFO, assisted by the head of the Investigations branch and the head of the Prosecutions branch, reviews the reports by SFO investigators and the prosecutor assigned to the investigation, and determines whether or not a prosecution will be taken, and if so the charges to be laid for the purposes of the preliminary hearing. The Director of the SFO does not have the power to file an indictment. Any indictment to further an SFO prosecution must be filed either on behalf and in the name of the Solicitor-General, or by a Crown Solicitor. For this purpose, the SFO Act 1990 provides for a panel of experienced barristers to conduct prosecutions at both the preliminary hearing and trial stages.⁶² These barristers are members of the Serious Fraud Prosecutors' Panel, and no one other than a member of this Panel may act in any SFO prosecution. Prosecutors on the Serious Fraud Prosecutors' Panel are present in six cities of New Zealand, although the majority are based in Auckland, Christchurch and Wellington. Some of the prosecutors on the Serious Fraud Prosecutors' Panel may also be Crown Prosecutors (see below).

Crown Solicitors

119. Crown Solicitors are legal practitioners in private practice whose main responsibility is to prosecute jury trials in the High and District Courts. Their role is to prosecute an accused on the basis of evidence collected by the Police and other investigative authorities. There are 16 Crown Solicitors, appointed by the Governor-General on the recommendation of the Attorney-General. Each Crown Solicitor is responsible for a particular region of New Zealand, and oversees the Crown prosecution work within that region. Crown Solicitors in turn delegate work to individual Crown prosecutors, i.e. lawyers working for or on behalf of a Crown Solicitor.

120. With respect to potential prosecutions of foreign bribery offences, the Crown prosecutors would prosecute cases which have been investigated by the Police and not taken up by the SFO. There was some concern, however, during the on-site visit, that Crown prosecutors are not very informed on the foreign bribery offence and its inherent complexities. Notably, no training has been provided on the issue. This may be explained by the general feeling among representatives of the Crown prosecution that any foreign bribery prosecution would be the responsibility of the SFO. While the competence of the SFO over foreign bribery offences is very much welcomed and encouraged by the Working Group on Bribery, to date, this competence is not exclusive under the law, but is merely an option which the SFO may choose to exercise. Consequently, it is essential that Crown prosecutors be duly informed and trained on the foreign bribery offence.

Commentary:

The lead examiners recommend that the New Zealand authorities continue to provide awareness-raising and training focused on the foreign bribery offence to the prosecution authorities, including the SFO and Crown Solicitors. As previously mentioned, they also recommend that New Zealand formalise the SFO's role as the initial assessor of all foreign bribery allegations.

⁶² Section 48 *ibid.*

(ii) *Discretion to prosecute*

121. As explained in the Phase 1 review of New Zealand, the Crown Solicitors and the Director of the SFO exercise discretion to initiate, suspend and terminate criminal proceedings. The Solicitor-General's Prosecution Guidelines establish a two-limb test which should be considered by prosecutors when deciding whether or not to prosecute, based on an evidentiary test and a public interest test.⁶³ The evidentiary test involves looking at whether there is admissible and reliable evidence, and whether such evidence is sufficiently strong to establish a prima facie case. This test is very similar to evidentiary tests in place in other jurisdictions with a discretionary principle to prosecute.

122. The public interest test is also not unusual in many jurisdictions worldwide. The concern for the Working Group on Bribery is whether the public interest elements considered under the New Zealand system would contravene Article 5 of the Anti-Bribery Convention which prohibits that considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved be taken into account. In this respect, the Solicitor-General's Prosecution Guidelines list a number of factors which can be taken into account to determine whether there is a "public interest" to prosecute. Such factors notably include the effect of a decision not to prosecute on public opinion, whether the prosecution might be counter-productive (for example by enabling an accused to be seen as a martyr), the availability of proper alternatives to prosecution, and the likely length and expense of the trial.⁶⁴ The examining team questioned whether certain of these public interest considerations could potentially involve conflicts of interest and contravene Article 5 provisions, but the New Zealand authorities assured that these would not be interpreted contrary to the meaning of Article 5. Furthermore, section 3.3.4 of the Solicitor-General's Prosecution Guidelines clearly states that a decision not to prosecute must clearly not be influenced by "possible political advantage or disadvantage to the Government or any political organisation", which would potentially rule out the possibility of taking into account considerations of relations with another State.

(iii) *Attorney-General's consent*

123. Section 106(1) CA requires the consent of the Attorney-General before a prosecution for the offence of bribery of a foreign public official. This was identified in the Phase 1 Report on New Zealand as an issue for follow-up in Phase 2.

124. The Attorney-General is entitled to conduct an inquiry into the allegations and consider the factors outlined in the Solicitor-General's Prosecution Guidelines (see above), as well as any other factor the Attorney-General may deem relevant.⁶⁵ Although, in constitutional terms, the ultimate responsibility for Crown prosecution in New Zealand lies with the Attorney-General, in practice, the Attorney-General takes no active role in particular criminal prosecutions. Instead, as allowed under section 9A of the Constitution Act 1986, he/she generally delegates his/her functions to the Solicitor-General, an independent and non-political figure.

125. It appears that there have been very few (three) instances where the Attorney-General's exercise of consent power was criticised because of its appearance of political decision-making in relation to public

⁶³ The Solicitor-General's Prosecution Guidelines are published as Appendix C of the Law Commission's Report No. 66 on "Criminal Prosecution", available at www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_150_R66.pdf

⁶⁴ See section 3.3.2 of the Solicitor-General's Prosecution Guidelines.

⁶⁵ See section 106(1) CA, which allows the Attorney-General to make "such inquiries as he sees fit" prior to deciding on granting consent.

prosecutions. According to participants at the on-site visit and academic literature, the last instance of an intervention by the Attorney-General in decisions to prosecute dates back to the mid-1980s. However, as noted by a law professor at the on-site visit, the Attorney-General does retain the power to call up the file and has done so, albeit rarely, in the past. Moreover, in one exceptional case, an intervention by the Attorney-General in granting a stay of prosecution in a specific case was apparently prompted by consideration of the national economic interest (as well as issues relating to extradition); there was no criticism of that action or suggestion that it was constitutionally or otherwise improper.

126. The reasons given at the time of the Phase 1 for the existence of such a consent requirement were reiterated in the context of the Phase 2 responses and at the on-site visit. Essentially, the New Zealand authorities indicated that the requirement of the Attorney-General's consent is intended to prevent the "frivolous, vexatious or political" use of criminal provisions in prosecution. The consent is required not only for prosecution of foreign bribery, but also in respect of offences of judicial corruption, bribery and corruption of law enforcement officers and officials.

127. The New Zealand authorities also explain that, as a matter of principle, the prosecution consent of the Attorney-General is required where an offence has extra-territorial effect, notably to take into account the existence of proceedings in another jurisdiction. The lead examiners underlined that while the double jeopardy (*non bis in idem*) principle should certainly always be borne in mind in prosecutorial decisions, it should not serve as a reason for lack of proactivity. Indeed, in foreign bribery cases, it may be the case that it is the so-called passive party, i.e. the foreign public official receiving the bribe, who is prosecuted and tried, but not necessarily the New Zealand natural and/or legal person(s) involved in the active bribery. Such situations should not trigger decisions not to prosecute, but, on the contrary, give reason and potentially admissible and reliable evidence to start proceedings in New Zealand. Furthermore, if proceedings are indeed underway in another jurisdiction against the New Zealand individual involved in foreign bribery, it could be left to the discretion and professionalism of New Zealand investigators and prosecutors to decide to commence, suspend or discontinue proceedings.

128. To date the New Zealand authorities indicate that, in practice, they do not recall instances where consent has been refused. Statistics were provided on requests for consent in the context of domestic corruption offences under the Secret Commissions Act or the Crimes Act: for the four requests presented between 2001 and March 2006, consent was always granted.⁶⁶ The New Zealand authorities also stress that they are confident that due regard would be taken of considerations prohibited under Article 5 of the Anti-Bribery Convention.

129. It should further be noted that decisions by the Attorney-General may be subject to judicial review. The New Zealand authorities however point out that an application for judicial review of a consent decision is rare and has never been successful in New Zealand, as the Courts do not lightly interfere in decisions relating to prosecutorial discretion.

Commentary:

The lead examiners welcome the practice of delegating prosecutorial decisions regarding individual cases from the Attorney-General to the Solicitor-General. Nevertheless, they note that the delegation is not reflected in the foreign bribery law, which refers specifically to the need for the Attorney-General's consent. They consider that the requirement for the Attorney-General's consent should be removed for foreign bribery.

⁶⁶ Note: in one case, the request for consent was withdrawn (due to lack of evidence) before the Solicitor-General had time to give consent.

The lead examiners also recommend that appropriate measures be taken to ensure that in prosecuting the bribery of foreign public officials, and in issuing any consent, decisions should not be influenced by considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved. Notably, the lead examiners recommend that the Solicitor-General's Prosecution Guidelines be amended and clarified in this respect.

d. Mutual legal assistance (MLA) and extradition

(i) Mutual legal assistance

130. MLA in New Zealand is principally governed by the Mutual Assistance in Criminal Matters Act 1992 (MACMA). New Zealand has only two MLA treaties (with Hong Kong and Korea) and generally enters into them only where they are required by the other State.

131. While MACMA allows for cooperation with all States even where no treaty exists, its mechanisms appear at times to be somewhat cumbersome and formalistic. Other than for very few countries (Canada, United Kingdom, United States), requests must come from the requesting state's central authority. Because MACMA requires issuance by a central authority, Interpol-transmitted requests that originate from other authorities must be recommenced through the formal channels. There are no guidelines available for foreign authorities who wish to use the system, but the Crown Law Office (CLO) can make sample requests available and can answer questions. New Zealand has no experience with MLA regarding legal persons. MACMA applies only to MLA requests relating to criminal proceedings and accordingly MLA would generally be unavailable for foreign countries conducting administrative proceedings against legal persons.

132. MLA relating to seizure and confiscation includes the possibility of registering foreign confiscation orders or foreign restraining orders. [See MACMA ss 54-55]. However, at present, foreign countries may only request assistance with enforcement in cases of foreign orders made in respect of a "foreign serious offence", which is defined as a offence under the law of a foreign country punishable by imprisonment for a term of 5 years or more. [See MACMA section 2(1)] Thus, under current law, assistance with seizure and confiscation of assets would not be available to Working Group members conducting criminal proceedings for foreign bribery infractions carrying less than a five year maximum, or for members with administrative liability regimes for legal persons.⁶⁷

133. A Criminal Proceeds (Recovery) Bill (which was in preparation at the time of the on-site visit) could improve MLA somewhat with regard to seizure and confiscation. The proposed new provisions will be applicable to allow restraint and confiscation of property in connection with foreign criminal proceedings for bribery involving foreign offences where, had there been a criminal case, the behaviour would have amounted to an offence that carries a maximum penalty of at least 5 years imprisonment. Failing that, the provisions will also apply to behaviour of a criminal nature where the respondent has received at least NZD 30 000 (EUR 14 400), regardless of what the appropriate maximum criminal penalty would have been, had a conviction been sought. The Bill would eliminate the requirement for a criminal investigation, proceeding or conviction in the foreign country, but would still require possible criminal liability. Countries that have a civil forfeiture order for specific property (derived directly or indirectly

⁶⁷ Similarly, under certain conditions, foreign countries can ask the Attorney-General to obtain the issue of a restraining order regarding property in New Zealand even in the absence of a foreign restraining order. (See MACMA section 60.) Again, however, the foreign country must have commenced criminal proceedings in respect of a foreign serious offence.

from criminal activity) or who have such an order in contemplation would be potentially able to restrain and confiscate property in New Zealand.

134. Under the bill, assistance with seizure and confiscation of assets would apparently still not be available to Working Group members conducting criminal proceedings for foreign bribery infractions carrying less than a five year maximum unless they can satisfy the NZD 30 000 threshold. It is unclear if the NZD 30 000 threshold applies to assets in New Zealand or in total. Assistance would also still not be available for Working Group members with administrative liability regimes for legal persons because underlying criminal behaviour is still required. The new Bill is currently being finalised and its introduction is expected in September 2006. As discussed below in the section on confiscation, the SFO is expected to be given a leading role in confiscation proceedings under the Bill.

135. MACMA and POCA also impose foreign law requirements for other coercive measures. For instance, if the request is to obtain an article, etc. by search and seizure, the foreign offence must be punishable by imprisonment for a term of 2 years or more. (See MACMA section 43.)

136. In the context of the Winebox Affair, an audit firm and employees of corporations relied on, inter alia, Cook Islands secrecy legislation and a Cook Islands court-issued injunction in refusing to provide documents and evidence to the New Zealand judicial inquiry that was reviewing New Zealand law enforcement treatment of international tax fraud allegations; a 1996 Privy Council decision, upholding a lengthy New Zealand Court of Appeals decision, determined that the documents and evidence in question should be supplied to the inquiry in that case notwithstanding the legislation and injunction.⁶⁸ Although the uncertain availability of evidence relating to the Cook Islands has thus been at issue in relatively recent and high-profile court decisions concerning alleged white collar crime, MLA experts interviewed at the on-site visit were not familiar with the legal regime governing MLA between New Zealand and territories such as the Cook Islands and Niue. New Zealand has stressed that MLA with these jurisdictions is akin to that with other sovereign states and would involve the law of those jurisdictions. However, the examiners are concerned that MLA specialists in New Zealand were not familiar with the basic structure of MLA with jurisdictions with a significant financial sector and with which New Zealand has very close economic relations. The Supp. Responses (§ 25) suggest that MLA with the Cook Islands might require that the SFO seek an agreement to cooperate on a case-by-case basis rather than being able to rely on a pre-existing legal regime.

137. There are no statistics concerning the time taken to fulfil MLA requests. The system deals with relatively limited number of requests of all types: it has dealt with approximately 200 requests since 2001, of which about two-thirds are incoming requests from other countries. Five staff members work at times on MLA matters at the CLO, with the total time spent amounting to approximately one full-time position. At the on-site visit, CLO representatives indicated that responding to requests generally take between two to six months, but that delays vary greatly depending on the circumstances.

138. In a pending High Court proceeding, the SFO's power to locally investigate a matter (not involving bribery) on behalf of a foreign authority has been challenged on the grounds that it exceeds the Director's power where no fraud has been committed in New Zealand. The SFO has argued that it has the power to assist the foreign authority on the basis, inter alia, that it has territorial jurisdiction over the matter. A decision is not expected for some time. The examiners consider that the SFO's powers to provide MLA in foreign bribery cases should not be limited to matters where it would have territorial jurisdiction.

⁶⁸ *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140, 143 (P.C. 1996), affirming [1996] 2 NZLR 278 (Ct. App. 1996).

Commentary:

The examiners welcome the current legislative attention to the international aspects of seizure and confiscation, and the proposed new role of the SFO in this regard. The lead examiners encourage New Zealand to take appropriate action to ensure that effective mutual legal assistance, including with regard to seizure and confiscation, is not excluded by the level of applicable sanctions in any foreign bribery case. The examiners also encourage New Zealand to take all necessary measures to ensure that the SFO is able to provide MLA to foreign authorities in foreign bribery cases regardless of whether it would have territorial jurisdiction to open its own investigation.

The lead examiners note that MLA specialists were not aware of the basic structure governing MLA from close economic partners of New Zealand such as the Cook Islands and Niue. Given the potential importance of the availability of information from such jurisdictions, the lead examiners encourage the New Zealand authorities to take all appropriate measures to seek to ensure that the rules are effective and well understood. As a general matter, they invite the New Zealand authorities to consider ways to simplify and accelerate the provision of MLA in foreign bribery cases.

(ii) *Extradition*

139. Under the Extradition Act 1999 (EA), extradition offences are those punishable by a maximum of at least one year imprisonment under the law of the requesting country provided that the conduct constituting the offence would have constituted an offence attracting at least such one year maximum penalty under New Zealand law. All bribery offences under the Crimes Act, including the foreign bribery offence, are thus extraditable offences. New Zealand has not to date received or made any requests for extradition regarding foreign bribery. The Extradition Act does not provide for any time limits for granting or denying requests for extradition and no statistics are available in this regard.

140. The Responses (§ 14.1) state that extradition of New Zealand citizens is permitted subject to the terms of any extradition treaty. But section 103 EA provides that new extradition treaties “must state whether or not New Zealand citizens may be surrendered” and that “if [the treaty] states that New Zealand citizens may be surrendered, [it must] provide that the surrender of a person may be refused in a particular case on the grounds that the person is a New Zealand citizen”. Thus, it appears that all post-1999 extradition treaties must either exclude the extradition of nationals or provide for the power to refuse to extradite nationals on a case-by-case basis. The Extradition Act does not appear to require any consideration of the domestic prosecution of the national where extradition is refused by New Zealand on the basis of nationality.

141. The only post-1999 extradition treaty is with the Republic of Korea. It provides that extradition may be refused if the person sought is a national of the requested party, but, if extradition is refused solely on the basis of nationality, it requires the requested state to submit the case to its competent authorities if the requesting state so requests. The examiners consider that, in light of section 103 EA, such clauses requiring submission of the case to competent authorities should be systematically provided for in a suitable manner, whether by treaty or legislation, in order to comply fully with Article 10(3) of the Convention. The examiners note that New Zealand has indicated that it has not for many years refused to extradite New Zealand citizens where all other conditions for extradition are met..

142. New Zealand’s extradition procedures fall into three broad categories. First, for a small group of designated countries (“Part 4 jurisdictions”, at present only Australia, the United Kingdom and the UK overseas territory of the Pitcairn, Henderson, Ducie and Oeno Islands), an “endorsed warrant” procedure applies under Part 4 EA. Under this procedure, a New Zealand judge can endorse the arrest warrant issued

by the requesting country to authorise its execution in New Zealand. Second, for countries that satisfy the requirements of Part 3 EA -- Commonwealth countries, certain countries with which New Zealand has a treaty and certain other designated countries (collectively, "Part 3 countries") -- Part 3 EA sets out the relevant procedures. Third, for all countries, extradition is available under Part 5 EA on an ad hoc basis including in the absence of a treaty.

143. Except for Part 4 jurisdictions, a requesting country must generally satisfy a New Zealand court that there would be sufficient evidence to justify the person's trial in New Zealand if the alleged offence had occurred in New Zealand, or, in other words, that a prima facie case exists against that person. Establishment of a prima facie case can be very difficult, particularly for countries unfamiliar with common law evidentiary requirements. Section 25 EA thus allows Part 3 countries to be further designated as "exempt" countries; as such, they are permitted to produce a "record of the case" in order to establish the existence of a prima facie case without meeting all of the evidentiary requirements applicable under New Zealand law. At the on-site visit, panellists indicated that this procedure is designed in particular for civil law countries. In 2003, New Zealand declared that the Czech Republic is a Part 3 country and that it is exempt pursuant to section 25 EA; the other countries exempt pursuant to section 25 EA are Canada, the Kingdom of Tonga and the United States.

144. MFAT has prepared guidelines to the Extradition Act, which recognise that New Zealand's complex extradition law is strictly applied by New Zealand judges. The guidelines make clear that assistance is available and encourage requesting countries to informally contact the New Zealand authorities before making a formal request. The guidelines were not available on MFAT's website at the time of the on-site visit, but since the visit, New Zealand has indicated that the Ministry has begun to review the assistance it provides to foreign countries in complying with the formal requirements of the Extradition Act. The Ministry will place on its website guidelines to the Extradition Act, model extradition documents and contact details for officials who can provide pre-request assistance. Other possible assistance may include more pro-active assistance for foreign extradition officials, including locally-provided technical assistance. The examiners welcome these measures.

145. The guidelines indicate that Part 5 is used to apply the EA where both the requesting country and New Zealand are parties to a multilateral treaty that establishes an extradition relationship for offences covered by that convention, e.g. corruption and bribery. However, the guidelines also note that extradition under part 5 requires the approval of the Minister of Justice. Approval of the Minister is thus required for requests by a Working Group member for extradition of a person suspected of foreign bribery. New Zealand has explained that the Minister's approval is required to establish the extradition relationship, but a simplified decision making process is used where both countries are also party to a multilateral treaty.

146. As a general matter, the examiners found that the New Zealand extradition system appears to be at times characterised by a relatively high level of formality. Even the accelerated endorsed warrant procedure continues to impose a large number of technical requirements before extradition can be granted. Similarly, at the on-site visit, panellists informed the examiners that the NZP cannot arrest a suspect based on an Interpol Red Notice and that a formal written request is required. However, New Zealand does have a provisional arrest procedure which allows a judge to issue a provisional arrest warrant in urgent cases before the formal request for surrender is received. The examiners recognise the need to ensure that individual rights are respected, but they consider that the New Zealand authorities could usefully review the extradition system to eliminate extraneous or outdated formal requirements. In this regard, the examiners note that New Zealand has to date made relatively limited use of its capacity to facilitate

extradition procedures by permitting use of the endorsed warrant system or section 25 EA, which it explains as reflecting a limited number of requests seeking such treatment.⁶⁹

Commentary:

The lead examiners recommend that New Zealand (i) take all necessary action to ensure that it can extradite its nationals or that it can prosecute its nationals for the foreign bribery offence including in cases under all relevant extradition treaties; and (ii) ensure that, where pursuant to an applicable treaty a request for extradition of a national is prohibited or is refused solely on the ground that the person is a New Zealand national, the case is submitted to the competent New Zealand authorities for the purpose of prosecution.

The lead examiners welcome the on-going efforts to make the extradition system easier to use by requesting states, including making extradition guidelines and other useful information available on the Internet. They encourage New Zealand to actively pursue its efforts to facilitate where appropriate the procedures for extradition, in particular to countries with different legal systems, through measures such as a pro-active approach to expansion of the number of exempt countries under section 25 EA. The examiners also recommend that New Zealand reconsider its requirement of Ministerial approval of requests for extradition under the Convention for Working Group members subject to part 5 of the Extradition Act.

e. Jurisdiction

(i) Territorial jurisdiction

147. By statute (s 7 CA), an offence is deemed to be committed in New Zealand where the following occurs in New Zealand: (1) an act or omission forming part of any offence, or (2) an event necessary to the completion of the offence. The New Zealand Court of Appeal has noted that the statutory basis of territorial jurisdiction has given the courts less leeway than in the United Kingdom to extend the concept of territorial jurisdiction to include cases where the effects of the crime are felt in New Zealand. Nonetheless, the court has made clear that section 7 requires only that part of the offence be committed in New Zealand.⁷⁰

(ii) Nationality jurisdiction

148. As noted by the Court of Appeal in its 1984 decision in *Sanders*, the traditional basis for criminal jurisdiction in New Zealand is territorial.⁷¹ Importantly, however, section 105D CA also provides for nationality jurisdiction over the foreign bribery offence. The rarity of nationality jurisdiction and its inclusion for foreign bribery in the specific offence rather than with the more general jurisdictional provisions of the CA raises issues about whether relevant constituencies are aware of the broad scope of jurisdiction over foreign bribery. The recently-prepared pamphlet describing the foreign bribery offence notes that extraterritorial jurisdiction applies to someone from New Zealand who bribes abroad. But during the on-site visit, awareness about the availability of nationality jurisdiction over foreign bribery offences appeared to be limited. For example, a representative of a trade promotion organisation stated that the SFO

⁶⁹ A request from Germany to be designated as a Part 4 country was being considered at the time of the on-site visit.

⁷⁰ See, e.g., *R. v. Sanders*, [1984] 1 NZLR 636.

⁷¹ See, e.g., *R. v. Sanders*, [1984] 1 NZLR 636 (“The jurisdiction of the New Zealand Courts in criminal matters is territorial. This accords with the principle that ‘all crime is local’ and that jurisdiction over a crime belongs to the country where it is committed.”)

would only investigate crimes committed in New Zealand and not foreign bribery committed by New Zealand companies abroad. Despite the exceptional nature of nationality jurisdiction, no training has been provided to relevant law enforcement officials.

149. Section 105D(2) CA provides that nationality jurisdiction applies to persons who are “New Zealand citizens [or] ordinarily resident in New Zealand”. Citizens of the territory of Tokelau and those of the Cook Islands and Niue (which are former New Zealand territories) are New Zealand citizens and section 105D(2) thus applies. While officials from the Ministry of Justice indicated that extension of the New Zealand offence to citizens of the Cook Islands and Niue (which are self-governing States) was perhaps inadvertent, they indicated that prosecution of those citizens under New Zealand law would be a matter for prosecutorial discretion in light of the specific facts of each case. For instance, Cook Islands and Niue citizens would not be prosecuted for this offence in New Zealand unless they satisfied the requirements for territorial jurisdiction.

(iii) *Jurisdiction over legal persons*

150. With regard to nationality jurisdiction over legal persons, the criteria applied in determining the “nationality” of a legal person in New Zealand is the place of incorporation. Section 105D CA explicitly extends nationality jurisdiction to corporations incorporated in New Zealand. In this context, however, “New Zealand” does not include the self-governing states of the Cook Islands or Niue, the territory of Tokelau or the Ross Dependency. (See section 29, Interpretation Act).

151. Importantly, New Zealand has jurisdiction over aiders and abettors that aid, incite, counsel or procure bribery abroad. Thus, a New Zealand company or individual who aids and abets bribery abroad by a foreign subsidiary could be subject to prosecution in New Zealand. (See section 69(3) CA). The lack of criminal cases against legal persons in general and the exceptional nature of nationality jurisdiction make it difficult to predict the outcomes in a number of other important scenarios. Thus, it is not clear whether New Zealand would have nationality jurisdiction over a New Zealand company where a foreign national employee of the company bribes a foreign public official abroad. For purposes of territoriality jurisdiction over legal persons, it is not clear whose actions must occur in New Zealand, but it would seem at least arguable that only the actions of the directing mind would suffice.

Commentary:

The lead examiners consider that the nationality jurisdiction provisions are an important element in the enforcement provisions in New Zealand. They welcome the attention to those provisions in the MOJ brochure and recommend that the New Zealand authorities take further action to improve awareness about nationality jurisdiction among law enforcement officials, companies and other relevant constituencies. The lead examiners recommend that the Working Group follow up with regard to the effect of any possible changes to the law to exclude nationality jurisdiction over citizens of the associated territories.

The lead examiners welcome the specific reference to jurisdiction over legal persons in the foreign bribery law. However, they note that the principles applicable to such jurisdiction in practice appear to remain uncertain, particularly for intentional offences. They recommend that the Working Group follow up with regard to jurisdiction over legal persons.

f. Statute of limitations and other time limits

152. As noted in the Phase 1 report, there is no statute of limitations in New Zealand for serious crime such as foreign bribery. There are also no fixed limits on the length of investigations.

2. The Foreign Bribery Offence

a. Overview of the bribery provisions

153. The basic foreign bribery offence is set forth in section 105C in Part 6 of the Crimes Act. Section 105C(2) CA sets out the offence, section 105C(3) sets out a routine government action (facilitation payments) exclusion, section 105D provides for the application of nationality jurisdiction to the offence, and section 105E sets forth an exception which in effect requires double criminality in certain cases. The foreign bribery offence has its own set of defined terms in section 105C(1) which generally closely track the terms of the Convention. However, some terms used in the foreign bribery offence and in particular the term “bribe” are defined in section 99. The domestic bribery provisions are also set forth in Part 6 of the Crimes Act in sections 99-105B.

b. Elements of the offence

154. Generally, the examiners found the New Zealand foreign bribery statute to be clear, comprehensive and on the whole well understood by key constituencies. Considerable attention has evidently been paid to many of the specific requirements of the Convention. However, the examiners have concerns in certain areas, particular with regard to the intent requirement, the double criminality exclusion and the routine government action (facilitation payments) exclusion.

155. It appears that the difficulty of proving intent can be a major hurdle to the successful prosecution of crime and in particular complex white collar crime in New Zealand. In this connection, it is noteworthy that a number of on-site panellists referred to the extraordinary series of proceedings arising out of the so-called Winebox Inquiry relating to allegations of tax fraud. While a detailed description of that case is beyond the scope of this report, the examiners note that despite multiple court decisions appearing to leave little doubt about the illegality of some of the actions at issue and despite the existence of an opinion from a Crown Solicitor advising that there was sufficient credible and admissible evidence which, if accepted (and lacking any evidence to the contrary), would support the prosecution of a number of persons on tax fraud charges, the SFO determined that prosecution was not appropriate because of an insufficient likelihood of success on the issue of intent.⁷²

⁷²

In *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140, 143 (P.C. 1996), one of the many judicial review decisions arising out the public inquiry in the case, the statement of claim with regard to one of the key transactions at issue was described by Lord Nicholls of Birkenhead in simplified terms as follows: “This involved the payment of withholding tax (in very round figures, NZD 2 million) by European Pacific to the Cook Islands Government in respect of interest paid by one European Pacific company to another, the purchase by the Cook Islands Government of a promissory note from a European Pacific company, and the sale of the same note by the government to another company in the group at a substantial loss (NZD 1.95m). All these dealings were part of a single, prearranged scheme. Their economic effect was to pay back almost all the tax paid. The withholding tax certificate was then presented to the New Zealand tax authorities by a company in the European Pacific group, and used to reduce the amount of New Zealand tax otherwise payable. The amount of the reduction corresponded to the amount of tax shown as paid on the certificate. Thus European Pacific was better off by NZD 1.95m, the Cook Islands Government was better off by NZD 50 000, and the New Zealand Government was worse off by NZD 2m.”

As noted in a subsequent New Zealand Court of Appeals decision in the case, *Peters v. Davison*, [1999] NZLR 164 (1998), “the additional feature is that when claiming those tax credits the European Pacific company did not disclose the promissory note arrangements to the Inland Revenue Department and by the time they became known to the department the particular European Pacific company had been struck off the company register in New Zealand and there was no successor company which the Inland Revenue Department could look to.” The last judicial decision concerning the inquiry found that “[a] tax credit was ... not due and was unlawfully received and retained. If in [the particular European Pacific company’s]

156. In this context, the lead examiners have carefully examined the intent requirements of the foreign bribery offence. Section 105C(2) is an offence requiring specific intent. It applies to a person who “corruptly gives ... a bribe to a person with intent to influence a foreign public official in order to obtain or retain business or to obtain an improper advantage in international business.” From the perspective of intent, three terms are of particular interest: “corruptly”, “bribe”, and “intent to influence” the official for particular ends.

157. According to MOJ officials, recent cases have supported an approach under which the word “corruptly” merely requires that the accused have acted with the requisite intent to influence the public official and that it is accordingly in effect redundant. The Supp. Responses cite a case under the Secret Commissions Act 1910 (applicable to private sector bribery) which defined corruptly “... to mean that there is no additional element of the offence beyond the deliberate performance of the prohibited conduct, which itself is labelled by the statute as corrupt”. See Supp. Responses question 3 (citing *R. v. Child & Courtney* T000708 (High Ct. 2002)). A number of panellists at the on-site visit suggested that the word corruptly is redundant and should be deleted.

158. Those who suggested that “corruptly” be eliminated may have been assuming that the word “bribe” would be interpreted in accordance with its usual meaning as an undue pecuniary or other advantage, thus importing an element of knowledge of the undue nature of the advantage for the public official. One legal specialist specifically pointed to the word bribe in noting the superfluousness of the word corruptly. If bribe were defined in accordance with its ordinary meaning, the word corruptly would become either redundant or, if the word imposed any additional requirements, arguably inconsistent with the Convention. Its deletion could accordingly be appropriate.

159. However, the bribery statute explicitly defines the term “bribe” in neutral terms without any connotation of impropriety. Thus, both “bribe” and “benefit” are defined identically as “any money, valuable consideration, office or employment, or any benefit, whether direct or indirect” [See sections 99 and 105C CA (defining “bribe” and “benefit” in identical terms)] Accordingly, if “corruptly” were deleted and the present definition of “bribe” were maintained, the only remaining specific intent requirement would appear to be the “intent to influence”. This latter element, however, applies, inter alia, to the intent to obtain or retain business. In the absence of the corruptly requirement, the offence would thus appear to apply to payment of an advantage (due or undue) to an official with intent to procure a contract. This could cover many legitimate situations.

160. As a number of panellists recognised, the word “corruptly” is in any event evidently difficult to interpret. In contrast to the Convention, which focuses specifically on the intent to give the “undue ... advantage” with the requisite intent to influence the public official, the adverb “corruptly” invites a particularly open-ended inquiry about intent. As noted by a law professor, continued inclusion of the word risks making extensive and complicated case law on the meaning of the word corruptly in other jurisdictions of continued relevance for the New Zealand foreign bribery statute. The examiners note the apparently positive trend of case law regarding the term, but share the difficulty in understanding its meaning.⁷³

claiming and retaining the benefit of the credit when disclosure had not been made certain other features were present, there would be fraud.” See *Peters v. Davison*, [1999] 3 NZLR 744 (High Ct. Auckland 1999). The SFO’s decision not to prosecute for fraud because of the difficulty of proving intent was taken or reiterated after the 1999 decision. See Ombudsman, Annual Report 2003 at 21-22; SFO Press Release of 27 July 2000.

⁷³ See also below the section on liability of legal persons for the application of the intent requirement to legal persons.

161. It is not clear whether the intent requirement can be satisfied by recklessness. Generally, when a statute does not expressly provide for the requisite mental element recklessness will be a sufficient but minimum degree of fault for liability. However, the courts determine the requisite intent in light of the wording of each offence. Because the wording of 105C requires a specific “intent to influence”, the courts could find that it is not satisfied by recklessness.

Commentary:

The lead examiners invite the New Zealand authorities to consider replacing the uncertain “corruptly” requirement with language more specifically focused on the intent to provide an undue advantage. They recommend that the Working Group follow up with regard to the intent requirements in the foreign bribery statute.

c. Defences and exclusions

(i) The double criminality exclusion

162. The section 105E CA double criminality requirement in New Zealand law – which takes the form of an exclusion to application of the foreign bribery law -- is complicated. In order to analyze it properly, it is helpful first to review the provisions of the Convention and Working Group practice with regard to double criminality requirements.

163. Double criminality requirements for the foreign bribery offence itself are inconsistent with the Convention. Indeed, one of the fundamental principles of the Convention is that the foreign bribery offence should be autonomous, i.e. that it should not require proof of foreign law for its application.⁷⁴ Double criminality requirements by their very nature compel the consideration of foreign law and its application to the facts of the case. There are two exceptions to the exclusion of double criminality requirements that are of relevance to the situation in New Zealand: (1) the well-recognised and narrow exception set forth in Commentary 8 of the Convention; and (2) the uncertain status of double criminality requirements applicable, not to the foreign bribery offence as such, but to the exercise of nationality jurisdiction with regard to the offence.

164. Commentary 8 to the Convention describes a narrow exclusion to the application of the Article 1 foreign bribery offence. It notes that Article 1 does not apply where the advantage provided to the foreign public official was “permitted or required by the written law or regulation of the foreign public official’s country, including case law”. The requirement that the advantage be permitted or required by the written law of the foreign jurisdiction appears to have three main purposes. First, the reference to “permi[tting] or requiring” by written law requires that the foreign law-maker must have adverted with some specificity to the practice at issue. The words “permit” and “require”, particularly when associated with a requirement of a writing, connote a conscious act in which the act in question is identified and then accepted or mandated. Second, by requiring that the act be permitted or required by “written law or regulation” – and not merely by administrative practice that may be relatively opaque – Commentary 8 requires that a law-making authority in the foreign jurisdiction must have publicly endorsed the practice in question. Conduct that would fall within the scope of Art. 1 of the Convention is unlikely to constitute publicly acceptable

⁷⁴ See Commentary 3 (underlining that Article 1 mandates introduction of an offence that “does not require proof of elements beyond those which would be required to be proved if the offence were as defined as in this paragraph” and noting the need for autonomous definitions of elements “not requiring proof of the law of the particular official’s country”).

behaviour in many jurisdictions.⁷⁵ Third, as New Zealand has noted, Commentary 8 creates an exception to the autonomy of the foreign bribery offence by contemplating the consideration of foreign law. In this context, the requirement of written and relatively specific foreign law permitting or requiring the practice facilitates issues of proof because it is comparatively easy to determine whether the strict conditions for application of the Commentary are satisfied.

165. A second and much less certain exception to the prohibition on double criminality requirements may exist with regard to the exercise of nationality jurisdiction. The lead examiners consider that, insofar as they apply to nationality jurisdiction cases, double criminality requirements continue to sharply undercut the basic Convention principle that the offence should be autonomous. In this regard, the examiners note that given the now practically universal acceptance of the legitimacy and indeed fundamental importance of the foreign bribery offence – the offence is included in UNCAC – the exercise of nationality jurisdiction over the Article 1 offence by Working Group members should be possible without the need to consider foreign law. However, the lead examiners recognise that horizontal issues exist with regard to a number of Working Group members in this area.⁷⁶ They consider that this issue merits prompt attention on a horizontal basis.

166. As noted above, the scope of the section 105E CA double criminality exclusion is complicated. On the one hand, it expressly applies both to the basic offence in section 105C and to the special nationality jurisdiction provision in section 105D CA. [See section 105E CA (expressly stating that both “sections 105C and 105D” do not apply unless the double criminality requirement is satisfied)] On the other hand, the double criminality requirement applies only where the “act that is alleged to constitute an offence under either of those sections was done outside New Zealand.” The provision thus contemplates territorial jurisdiction – i.e. application of the normal foreign bribery offence in section 105C CA -- in cases in which the “act constituting the offence took place abroad”. Presumably, this reflects the possibility that one of constituent elements took place abroad while sufficient other acts or elements took place in New Zealand to allow proceedings under section 105C.⁷⁷ (Given the nature of foreign bribery, this is a frequent scenario for territorial jurisdiction.) Under section 105E, the double criminality requirement would apply to such a case. In requiring double criminality for application of the basic offence in section 105C, section 105E is inconsistent with Article 1 and Commentary 8.⁷⁸

167. New Zealand has noted that under Section 105E(2), the law establishes a presumption of double criminality. However, the presumption is rebutted if the defendant “puts the matter at issue”; this generally requires that the defendant ensure that there is some evidence of an issue of foreign law which could result in a reasonable court or jury determining that double criminality does not exist. Once that evidence is produced, the burden shifts back to the prosecution to prove that the double criminality requirement is satisfied beyond a reasonable doubt. Given the numerous complex issues raised by bribery statutes – as illustrated by the numerous Phase 1 and Phase 2 recommendations by the Working Group to its members

⁷⁵ Under section 105E, conviction of a New Zealand company for an admitted Article 1 bribe of a public official in such a country could be impossible if the local law does not adequately cover bribery paid through intermediaries or paid to a third party beneficiary. At a minimum, the defendant could raise defences on those grounds and the case would turn on the interpretation of foreign law. In contrast, the test established by Commentary 8 – that written local law permit or require bribery through intermediaries or bribes paid to third party beneficiaries – will rarely if ever be satisfied.

⁷⁶ See Mid-Term Study of Phase 2 Reports paras. 232 -234, 590.

⁷⁷ See also section 105E(2) CA (making clear that the exclusion can be invoked in cases where a person is “charged with an offence under section 105C”).

⁷⁸ Concerns are raised for largely similar reasons by a double criminality requirement applicable to the money laundering offence, as discussed below in the section on the money laundering offence.

to modify their laws to achieve full compliance with the Convention – the examiners consider that defendants may be able to raise possible uncertainties in the bribery law of non-Working Group member states and that the prosecution may face significant hurdles in proving the existence of double criminality beyond a reasonable doubt. The additional burden on prosecutors may discourage prosecution and/or result in acquittals with regard to behaviour falling within the scope of Article 1.

168. As indicated, in addition to its application to section 105C, section 105E also imposes a double criminality requirement on nationality jurisdiction cases under section 105D and this issue raises horizontal concerns for a number of Working Group members.

169. A further consideration, however, applies to New Zealand with regard to its double criminality requirement in nationality jurisdiction cases. Article 4(2) of the Convention requires that where a Party has nationality jurisdiction for offences committed abroad, it “shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of foreign public official, according to the same principles”. (emphasis added). In section 7A CA, New Zealand has adopted nationality jurisdiction for a series of offences including the domestic bribery and corruption offences in sections 100-104 and 105(2) CA (covering, inter alia, bribery of judges, MPs and officials), the money laundering offence in section 243, and the offences of causing disease or sickness in animals (section 298A) and contaminating food, crop, waters or other products (section 298B). With the exception of the money laundering offence, there does not appear to be any double criminality requirement applicable to the exercise of nationality jurisdiction over these offences. In imposing a double criminality requirement on nationality jurisdiction over foreign bribery but not on its nationality jurisdiction over certain other offences, New Zealand thus does not apply nationality jurisdiction to the foreign bribery offence according to the same principles as to other offences. This appears to be inconsistent with Article 4(2) of the Convention.

170. In sum, New Zealand’s double criminality requirement is inconsistent with Art. 1 and Commentary 8 of the Convention insofar as it applies to the section 105C foreign bribery offence generally and appears to be inconsistent with Art. 4(2) of the Convention to the extent it applies to section 105D cases brought using nationality jurisdiction.⁷⁹

171. The examiners note that elimination of the section 105E double criminality requirement for foreign bribery could allow nationality jurisdiction for foreign bribery to be more easily included in the general section 7A nationality jurisdiction provision (located with other general jurisdiction provisions in Part 1 of the CA). Together with appropriate training as discussed above in the section on nationality jurisdiction, this could improve awareness about nationality jurisdiction over the offence.

Commentary:

The lead examiners recommend that New Zealand remove or amend the double criminality exclusion in section 105E CA in order to achieve full compliance with the Convention, including Article 4(2) and Commentary 8.

(ii) *The facilitation payments exclusion*

172. Section 105C(3) CA contains a “routine government action” exclusion to liability for foreign bribery. The exclusion applies if the act allegedly constituting the offence was committed for the sole or

⁷⁹ As noted in the Phase 1 report at pp. 16-18, 35, New Zealand’s double criminality requirement mandates consideration of the (foreign) law of the place where the foreign public official’s “principal office” is situated rather than the more usual (foreign) law of the place where the unlawful act occurred. The distinction does not affect the analysis here.

primary purpose of ensuring or expediting the performance by a foreign public official of a “routine government action” and the “value of the benefit is small”. Although the lead examiners recognise that the Convention permits a narrow facilitation payments exception, they note that a number of panellists during the on-site visit expressed surprise and dismay at the existence of a facilitation payments (routine government action) exclusion under New Zealand law.

173. Section 105(3) raises a number of interpretive questions. First, New Zealand has not limited the exclusion by reference to the discretionary nature or the legality of the reciprocal act of the foreign public official. Thus, in theory, the exclusion could apply to bribes for an illegal act or for one requiring the official to make a discretionary decision. Second, with regard to the nature of the official action at issue, the statute uses the concepts of (1) decisions about the granting of (or about the terms of) business; and (2) decisions outside of the scope of ordinary duties of the official. Both of these types of decision are expressly excluded from the notion of routine government action (which is not otherwise defined).⁸⁰ This approach raises the possibility that actions that do not directly relate to the awarding or terms of business -- such as undue tax breaks or a favourable foreign exchange rate -- could potentially be considered a “routine government action”. The only possible way to exclude such actions from the notion of routine government action under New Zealand law would appear to be to argue that they constitute actions outside the scope of ordinary duties of the official.

174. In Phase 1, New Zealand offered this interpretation, suggesting that official action such as granting undue tax breaks could be regarded as routine government action because it would be outside the scope of the ordinary duties of the official. However, the domestic bribery offences apply only to payments to an official with intent to influence him/her “in respect of any act or omission by [him/her] in [his/her] official capacity”.⁸¹ Assuming the domestic offence would apply to a bribe to obtain an unfair tax break from a tax official, such action must be considered to fall within the official capacity of the official. If approving an unfair tax break is considered to be an act “in [his/her] official capacity” for purposes of the domestic offence, it would seem more than likely that such an approval by a foreign tax official would be considered to be “in the ordinary scope of the official’s duties” for purposes of the routine government action defence to the foreign bribery offence. Under this approach, the exception would not be in accordance with the Convention.

175. Two other interpretive issues are raised by the reference to the requirement that the value of the “benefit” must be “small”. First, the law does not clarify whether the “benefit” is the bribe or the advantage supplied by the public official in return; given the use of the specifically defined term “bribe” in the offence itself, it is arguable that Parliament, in using the term benefit rather than bribe in the exclusion, intended to refer to the benefit received in return. As discussed above in the section on tax deductibility, Parliamentary debates in connection with the adoption of tax legislation containing an analogous exclusion reflected this uncertainty about the meaning of benefit. Under this approach, large bribes could thus be excluded from the offence provided the benefit in return was “small”. This scenario is hardly limited to “stupid” bribers who pay too much for a small benefit; it could arguably apply to significant bribes where no benefit was provided by the official, say because he or she reneged or because the scheme was discovered before the benefit could be supplied.

176. The term “small” is also vague. In New Zealand’s view, “small” benefits are benefits for a foreign public official that are insignificant and offer little real value to the official concerned in light of

⁸⁰ Specifically, the statute excludes from the definition of routine government action (1) decisions about the awarding or continuation of business or variation in the terms of business; and (2) acts outside of the scope of the ordinary duties of the official. See section 105C(1) (defining “routine government action” only by exclusion)

⁸¹ See, e.g., section 105(2) CA.

the context in which the act of bribery is made and the value of the money in the relevant jurisdiction (i.e. the country of the foreign public official's principal office). However, while this may be a reasonable interpretation, other interpretations may also be reasonable and there are no criteria under the law for determining whether a benefit is "small". Participants at the on-site visit offered a variety of views about what might constitute a small benefit, a number of which raise concern. For example, it was suggested that small referred to the relative size of the bribe in comparison to the benefit received. New Zealand notes that Commentary 9 also uses the word small in referring to facilitation payments, but in that case the exclusion is further qualified by language making clear that bribes to obtain illegal or discretionary acts cannot constitute facilitation payments; as noted above, there is no similar language in the New Zealand statute.

177. Concerns about the vagueness of the exclusion are compounded by two additional related factors: its status as an exclusion rather than a defence and the consequent difficulty of proving intent. The provision was expressly changed from a defence to an exclusion in the bill by the relevant legislative committee in order to "retain the burden of proof on the prosecution to prove that the payment in question is not excluded from the scope of the offence".⁸² The same committee recommended that a specific monetary limit provision setting a maximum of NZD 200 (EUR 96; USD 122) be deleted in favour of the general reference to "small". Again, this was to "plac[e] the onus of proof on the prosecution to determine whether or not the value of the payment is large enough to be included in the scope of the offence". Given the general difficulties in proving intent, companies and individuals may have little difficulty in raising insuperable hurdles to any prosecutorial action with regard to facilitation payments.

Commentary:

The lead examiners consider that the combination of vague or ambiguous statutory language and an express prosecutorial burden of proof is likely to lead to little if any case law and continuing ambiguity, thereby significantly lessening both enforcement of the offence and its dissuasive effect. In order to achieve compliance with the Convention, they recommend that New Zealand clarify the routine government action exclusion to ensure that the foreign bribery offence can apply to any bribes in order to obtain (1) discretionary or illegal acts by a foreign public official; or (2) the granting of any improper advantage in the conduct of international business, including advantages such as tax breaks that may be unrelated to the specific terms of business. In addition, the examiners recommend that New Zealand clarify the requirement that the "benefit" be "small".

3. Liability of Legal Persons

178. As a general matter, section 2 CA defines "person" to include companies. Legal persons can thus in theory be liable for criminal offences applicable to persons, including offences requiring intent or mens rea, except for certain offences such as murder or offences that provide only for sanctions of imprisonment. The section 2 definition of person is very broad and covers both incorporated and unincorporated bodies of persons. The foreign bribery offence refers to "every one" or to "persons" and thus applies to legal persons, but it does not define any criteria for its application to such persons.⁸³ Panellists at the on-site visit indicated that a conviction of a legal person does not require the conviction of an individual although no authority has been supplied for this proposition. Both types of persons can be prosecuted in the same proceeding.

⁸² See Crimes (Bribery of Foreign Public Officials) Amendment Bill, as reported from the Law and Order Committee, Commentary at 7.

⁸³ The section 2 definition of person also expressly applies to "other words and expressions of the like kind", which would appear to encompass without difficulty the expression "every one".

179. The lead examiners consider that the regime for liability for legal persons in New Zealand does not allow for effective prosecutions of legal persons that engage in and profit from foreign bribery. The principal difficulty arises from the restrictive rules under which bribery is attributed to the legal person, but a number of additional issues are also raised.

a. Attribution of bribery to the legal person

180. Unlike the case of certain other common law and civil law jurisdictions, there has been no general legislation in New Zealand modifying the common law approach to corporate liability. There have been a number of statutes that have adopted explicit corporate liability regimes for specific offences (see below), but none applies to bribery.

181. Accordingly, neither a general provision nor the foreign bribery statute address the criteria for corporate liability. There are also no cases on corporate liability for bribery in New Zealand. In the absence of any statutory or case law guidance, a significant number of panellists questioned about corporate liability spontaneously referred to the well-known UK House of Lords decision in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, as the basis of the approach in New Zealand to corporate liability for intentional offences such as foreign bribery.

182. *Tesco* adopted an approach known as the identification theory. Under the identification theory, the corporation is liable only for the acts and intent of one or more of the natural persons who constituted the company's "directing mind". As noted in the Supp. Responses, "[w]here the offence committed requires proof of a specific intent, a corporate defendant cannot be found guilty unless the requisite intent was a state of mind of one or more of the natural persons who constituted the company's 'directing mind and will'".⁸⁴ *Tesco* is often considered to restrict the directing mind to the board of directors, the managing director and perhaps other superior officers of a company who speak and act as the company. The application of the *Tesco* principles to deliberate acts by a regional manager or even relatively senior management would be unlikely at best; deliberate acts by a salesperson or agent would not qualify, regardless of whether the activity was undertaken to benefit the company and regardless of whether the company failed to take any measures to attempt to prevent such activity. While the *Tesco* test could conceivably apply to small companies where top management are the actors, it appears unlikely ever to apply to a large company with decentralised operations, or operations away from the corporate head office.⁸⁵

183. The principles in *Tesco* were expressly applied to bribery in the UK case of *R. v. Andrews-Weatherfoil Ltd.*⁸⁶ Both *Tesco* and *Andrews-Weatherfoil* have been referred to by New Zealand courts as the applicable test for corporate liability in the absence of a specific statutory test. [See, e.g., *Autocrat Sanyo Ltd. v. Collector of Customs*, [1985] 2 NZLR 707 (High Ct. 1984).]

184. In discussing the *Tesco* approach, one panellist referred to the Privy Council case of *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 2 AC 500 (P.C. 1995), which offers

⁸⁴ See Supp. Responses § 7 (citing *Wings v. Ellis*, [1984] 1 All ER 1046, 1053 (Eng. Q.B. 1983) (applying *Tesco*). As noted above, the foreign bribery offence is a specific intent offence that requires that the culprit have acted both "corruptly" and with "intent to influence" a foreign public official.

⁸⁵ See A. Hainsworth, The Case for Establishing Independent Schemes of Corporate and Individual Fault in the Criminal Law, J. Crim. L. 65 (420) (October 2001) ("In the case of more diffuse business and corporate structures, where the directing mind and will of the company are not involved in decisions taken at 'ground level' within the company, a requirement of *mens rea* within an offence can leave it with very little bite.").

⁸⁶ *R. v. Andrews-Weatherfoil Ltd.* [1972] 1 WLR 118, 1 All ER 65 (C.A.) (applying *Tesco* and overturning conviction of a company for bribery).

at least in theory a potential alternative. *Meridian* held that the test for attribution of liability to the company should depend on the purpose of the provisions creating the relevant offence.⁸⁷ *Meridian*, however, involved a statutory regulatory offence relating to securities law disclosure, not a conventional crime. In the eleven years since it was decided, *Meridian* has not given rise to any significant evolution of the common law standard for intentional offences in New Zealand or in the UK, perhaps because of the difficulty of deriving a liability regime for companies from an analysis of the purpose of the underlying infraction (which, like the foreign bribery statute, generally makes no explicit reference to companies).

185. While as noted above the foreign bribery statute does not address the criteria for corporate liability, New Zealand has expressly adopted vicarious liability or other alternative corporate liability regimes for other offences or infractions. Thus, the Fair Trading Act 1986 (s 45) as well as the Commerce Act 1986 (s 90) attribute both the acts and the mental states of employees or agents (as well as directors) to the company, providing the person was acting within the scope of his/her actual or apparent authority. In applying to employees and agents, these tests are obviously far broader than the *Tesco* standard requiring acts and intent of the “directing mind”. They have been applied by the courts in finding corporations liable for acts of their employees and agents. [See, e.g., *Giltrap City Ltd v. Commerce Commission*, [2004] 1 NZLR 608 (Ct. App. 2003) (applying Commerce Act section 90).] In another alternative approach, the Human Rights Act (s 68) attributes liability automatically to corporate employers for the acts of their employees or agents unless the corporation “takes such steps as were reasonably practicable to prevent the employee from doing that act”. This appears to be a form of vicarious liability with a possible defence based on “corporate culture” and would have the salutary effect of providing corporations with an incentive to engage in meaningful preventive efforts. However, Parliament did not include these tests when it adopted the foreign bribery statute in 2002.

186. There is no reference in the legislative history to any intent to broaden the rules of liability beyond those in *Tesco*. During the on-site visit, an expert on the legislative history of the foreign bribery statute explained that the *Tesco* approach was generally understood to be the underlying law for intentional offences at the time Parliament adopted the foreign bribery statute in 2002. Given *Tesco* and the UK *Andrews-Weatherfoil* precedent applying *Tesco* to the specific offence of bribery (together with New Zealand cases applying *Tesco* and *Andrews-Weatherfoil*), there would appear to be little likelihood that a New Zealand court would depart significantly from the identification theory in the absence of specific legislative intent. Certainly, there is no evidence that such a departure has occurred to date.⁸⁸

187. A senior CLO official recognised during the on-site visit that the *Tesco* approach would be the starting point, but offered a number of general arguments for potential rejection of the *Tesco* approach by the New Zealand courts in a bribery case, such as the possibility of a relatively autonomous interpretation of the Crimes Act or the possibility of declining influence of UK precedent in New Zealand in the wake of New Zealand’s elimination of appeals to the Privy Council in 2003. He also noted that different rules apply

⁸⁷ See *Meridian* (“the rule of attribution is a matter of interpretation or construction of the relevant substantive rule ...”).]

⁸⁸ Although as noted above the Responses recognise that the *Tesco* standard would apply to infractions requiring specific intent, they also refer at times to the potential application of vicarious liability. However, there appears to be little authority for the application of vicarious liability to bribery under present law in New Zealand. The Responses cite *Giltrap*, but that case involved the application of a statutory provision expressly establishing vicarious liability for a specific and different offence; in the absence of a similar statutory provision for foreign bribery, the case offers limited if any support for the application of vicarious liability to foreign bribery.

in the area of occupational health and safety.⁸⁹ The lead examiners recognise the eloquence of the arguments put forward, but they consider that, as a law professor noted, such general arguments would likely be unpersuasive for an intentional offence like bribery given the existing case law, statutory language and legislative history.

b. Rejection of aggregated intent

188. Although there does not appear to be any law directly on the point, New Zealand law does not appear to allow the creation of a corporate *mens rea* by aggregating the knowledge/states of mind of different people.⁹⁰ The criminal responsibility of a legal person thus would depend on proving a culpable act and intent by a single representative of the company (although an actual conviction of the individual is not required). The necessity of identifying a single individual with the appropriate *mens rea* does not address modern complex decision-making structures in large corporations where it is often difficult to identify one individual decision-maker within a management chain.

c. Absence of prosecutions of companies

189. The lead examiners are very concerned that the criteria for liability make successful prosecutions effectively impossible and thus will dissuade prosecutions. There have not been any prosecutions or convictions of legal persons for domestic or foreign bribery despite the longstanding existence of domestic bribery offences in New Zealand. SFO prosecutors indicated that the SFO has never brought a prosecution against a company for any economic crime offence.⁹¹ An SFO prosecutor explained that in some cases – such as a closely-held company where the shareholders are active participants in the management and the misconduct -- it may not make sense to separately charge the company. But the complete absence of cases against companies is of serious concern. Defence lawyers underlined that in a recent major economic crime case, defence lawyers representing individual defendants unsuccessfully attempted to convince the SFO to add the company as a defendant. The lawyers claimed that their individual clients had been acting for the benefit of the company rather than in an attempt to enrich themselves at the expense of the company. Even under these circumstances, the SFO declined to prosecute any of the companies involved. The lead examiners consider that a broader regime of corporate liability for bribery, together with appropriate training about the importance of corporate liability under the Convention, could greatly assist in increasing the likelihood of prosecution and conviction of legal persons for foreign bribery in appropriate cases.⁹²

⁸⁹ *Meridian* was applied in an occupational health and safety case where the corporation was charged under a strict liability offence involving a statutory duty to ensure that a safety standard is achieved. See *Linework Ltd v. Dept of Labour*, [2001] 2 NZLR 639.

⁹⁰ See Supp. Responses question 7; see also C. Wells, *Corporations and Criminal Responsibility* (2d ed. 2001) (stating in book focusing on England and Wales that “*It does seem clear, however, that the aggregation argument is unlikely to take root in the common law and that statutory intervention would be necessary for it to become a part of the English law of corporate liability.*”).]

⁹¹ The Ministry of Justice has referred to a database suggesting that twelve corporations were convicted of fraud between 2001-2004, but no information is available about the identity or nature of these cases, which are unreported.

⁹² An SFO prosecutor at the on-site visit initially explained the general lack of prosecutions as a result of the view that, until the advent of new offences such as foreign bribery, the individual was considered to be the truly blameworthy party and that it was inappropriate to prosecute companies. Other explanations for the absence of prosecutions of legal persons include the small size of most New Zealand companies.

d. Foreign subsidiaries

190. New Zealand generally does not provide for liability of a parent corporation as such for bribery by its subsidiaries. If the offender is a wholly-owned foreign subsidiary of a New Zealand company, the New Zealand parent company would not generally be liable. In order successfully to prosecute the parent company, it would be necessary to show complicity, such as direction or authorisation, by a directing mind of the parent. The “directing mind” requirement would raise the same practically insurmountable evidentiary hurdles discussed above. There could be a prosecution against the responsible individuals if they are New Zealand nationals.

Commentary:

The lead examiners consider that the current regime of liability of legal persons for foreign bribery in New Zealand is inconsistent with Article 2 of the Convention. The lead examiners note that New Zealand has adopted statutory regimes of corporate liability for a number of intentional offences and that such regimes have given rise to prosecutions and convictions. They recommend that New Zealand broaden the criteria for the liability of legal persons for foreign bribery in order to make prosecution of legal persons more likely and more effective.

4. Adjudication and Sanction of the Foreign Bribery Offence

a. Sanctions imposed by the courts

(i) Criminal sanctions

Sanctions on natural persons

191. For natural persons, under section 105C CA, the penalty for bribery of a foreign public official is a term of imprisonment not exceeding seven years. The Court may also, at its discretion, sentence the offender to pay a fine instead of sentencing the offender to imprisonment, as provided in section 39(1) of the Sentencing Act 2004.⁹³ It is not possible, for a foreign bribery offence, to impose both a prison and a pecuniary sentence, although that possibility exists for other offences.⁹⁴ There is however no maximum fine for the foreign bribery offence under New Zealand law. Indeed, where the sentencing court is the High Court, there is no ceiling on the amount of the fine which may be pronounced. Foreign bribery being a High Court only indictable offence, it will always be tried before a High Court.

192. Out-of-court settlement similar to plea-bargaining and negotiations with the prosecution do not exist as such under the New Zealand system. However, the Solicitor-General Prosecution Guidelines provide that “arrangements between the prosecutor and the accused person as to the laying or proceeding with charges to which the accused is prepared to enter a plea of guilty can be consistent with the requirements of justice”, subject to certain constraints.⁹⁵ Such constraints notably impose that this arrangement can only be initiated by the defendant, as well as other conditions having to do with evidentiary issues, admission of guilt by the defendant on the charges presented, etc. Additionally, for

⁹³ Under section 39(1) of the Sentencing Act 2004:
“If an enactment provides that a court may sentence an offender to imprisonment but does not prescribe a fine, the court may sentence the offender to pay a fine instead of sentencing the offender to imprisonment” [underlining added].

⁹⁴ Offences which carry fines and imprisonment are those under the Misuse of Drugs Act, the Immigration Act, the Biosecurity Amendment Act and the Marine Reserves Act.

⁹⁵ See sections 7.4 et seq. of the Solicitor-General’s Prosecution Guidelines.

indictable offences, the New Zealand authorities indicate that the Solicitor-General would have to approve any decision to plea for a lesser offence. In practice, prosecutors and judges interviewed during the on-site visit indicated that an early plea would usually result in a 25 to 30% reduction on applicable penalties.

193. The statistics in the Phase 2 responses provide only aggregate figures on the type and number of penalties imposed by the courts. Given that no convictions for foreign bribery have been entered to date, these statistics focus on domestic bribery and fraud by natural persons, between 2001 and 2005. The figures provided regarding domestic bribery offences indicate that, in over 50% of cases, the sentence resulted in the discharge of the natural person (24 out of 44 sentences pronounced). Where penalties were imposed, the very large majority were in the form of prison sentences, and only 1 case out of 44 resulted in the imposition of a fine. The statistics for fraud show a somewhat more balanced picture, with only approximately one third of cases resulting in discharges, and greater repartition of sentences between imprisonment and monetary penalties. Overall, for bribery, there appears to be a fairly low conviction rate. However, no breakdown is available regarding the level and severity of sentences (imprisonment and fines) imposed, nor is detailed information provided on the specifics of the case, which makes it difficult to adequately assess whether sentences imposed in New Zealand for bribery and related offences are actually effective, proportionate and dissuasive, as prescribed under Article 3 of the Convention.

194. Some unease was voiced by the SFO regarding the leniency with which certain white collar crime offenders are treated by the courts in some cases. The Director of the SFO, in his 2004 Chief Executive's Overview, expressed his concern with illustrations of the sentencing decisions by the courts in two major domestic corruption cases, while acknowledging that this kind of approach was not taken in every case.⁹⁶ In both cases, the defendants had pleaded not guilty throughout the investigation and prosecution, and had exhausted all legal avenues to avoid the case going to trial, before admitting guilt in the days leading up to the trial, or, for some, just shortly before sentencing. At the sentencing, in both cases, the judges underlined the seriousness of the offending and the need for a deterrent sentence. However, in both trials, the courts expressed the feeling that the defendants were entitled to significant credit for their otherwise good conduct and their position in the community. The court handed down sentences in the two cases as follows:

- In the first case, involving private sector bribery, with benefits for the offender reaching nearly NZD 2 million (approx. EUR 956 000; USD 1 216 000),⁹⁷ the briber was sentenced to six months imprisonment, carried out as home detention. The defendant repaid NZD 1.9 million – the amount of the benefit obtained from the bribery – which the judge saw as “a significant loss to you [the defendant]”.⁹⁸ The same businessman was convicted again less than a year later for another fraudulent activity, for which he received another six months imprisonment sentence, carried out as well as home detention.⁹⁹
- The second case, involving payment of bribes in the amount of NZD 600 000 (approx. EUR 290 000; USD 365 000) over several years to gain access to lucrative property transactions, is described by the Director of the SFO as “by far the largest case of bribery of a public servant in the history of the New Zealand Public Service.”¹⁰⁰ The judge noted that the bribers had made significant financial gains, between NZD 400 000 and NZD 500 000 (EUR 191 000 to EUR

⁹⁶ The 2004 Chief Executive's Overview is available from the SFO website at www.sfo.govt.nz/.

⁹⁷ As of 1 July 2006, 1 NZD = 0.48 EUR = 0.61 USD.

⁹⁸ R. v. Bansal, Sep. 2001.

⁹⁹ R. v. Bansal, Aug. 2002.

¹⁰⁰ R. v. Griffiths & Giles, Dec. 2003.

239 000; USD 243 000 to USD 304 000), with no risk attached. Despite these large sums, the judge took a lesser starting point for the sentencing on the basis that a third party had not suffered any loss. This consideration as a mitigating circumstance would pose potentially problem if it were transposed to a foreign bribery case, where it is unlikely that a victim would be represented in court, and where it is in general difficult to identify a direct victim of the foreign bribery offence. The defendants (briber and recipient of the bribe) received a 25% reduction in their prison term – a reduction usually granted for early pleas of guilty where the costs of a full trial are avoided –, and received a three year imprisonment sentence. Based on the description of the case, there is no indication of whether the bribes, their proceeds or any financial equivalent were confiscated.

195. Representatives of the SFO present at the on-site visit concurred with the views expressed by the Director of the SFO. In their view, there is a tendency of the courts to take crimes of violence more seriously than economic crime.

Sanctions on legal persons

196. In Phase 1, the Working Group recommended that the issue of sanctions for legal persons be followed up in Phase 2 to determine whether sanctions are “effective, proportionate and dissuasive” as required by the Convention. As set forth above, the prior issue of liability under the identification test makes the prospect of criminal liability and sanctioning of a legal person for foreign bribery practically impossible under current law.

197. Section 105C CA does not specify fines for legal persons, but section 39(1) of the Sentencing Act 2004 allows the imposition of a fine. As in the case of natural persons, fines are discretionary sanctions and there is no maximum fine. There are no statutory sentencing guidelines, but there are guidelines in case law regarding the imposition of fines generally. The examiners are concerned about the discretionary nature and uncertainty of the sanctions on legal persons for foreign bribery.

198. However, as noted above, the MOJ has referred to a database suggesting that twelve corporations were convicted of fraud between 2001-2004, but no information is available about the identity or nature of these cases, which are unreported. However, from the perspective of sanctions, it is noteworthy that 8 of the 12 cases apparently resulted in sanctions of “discharge” and another in community work. While it is not possible to judge in absence of further information about the cases, it appears that convicted legal persons may frequently escape sanction.

(ii) Confiscation

199. The Proceeds of Crime Act 1991 (POCA) allows for confiscation in respect of “serious offences”, i.e. offences which carry a maximum imprisonment term of five years or more. Given that the foreign bribery offence carried a maximum imprisonment sentence of seven years, it is considered a serious offence, and thus may give rise to application for confiscation measures.

200. Confiscation may be requested on a discretionary basis, and only provided that a conviction has been pronounced. It is the role of the Solicitor-General to decide to apply for confiscation measures within six months following the conviction for a serious offence.¹⁰¹ Law enforcement authorities indicate that it is also possible to place a request for confiscation together with the rest of the sentencing process, although that would rarely be the case, given the requirement of a conviction prior to the consideration of confiscation. The appropriate court to receive such confiscation requests is the court before which the

¹⁰¹ Section 8(1) of the Proceeds of Crime Act 1991.

person was sentenced.¹⁰² Thus, for the foreign bribery offence, confiscation requests would be made before the High Court.

201. Section 15 of POCA allows for the confiscation by the courts of “tainted property”. As defined in section 2, “tainted property” includes “property used to commit or to facilitate the commission of the offence”. As confirmed by the New Zealand authorities during the on-site visit, this would cover confiscation of the bribe itself, if it can still be confiscated (i.e. if it is still in the possession of the briber or a third party in New Zealand), but it would not be possible to confiscate the monetary equivalent of the bribe if the bribe is no longer in New Zealand. This may be rendered possible in the new Criminal Proceeds (Recovery) Bill (see below on reforms underway to revise the POCA).

202. Section 15 also covers confiscation of the proceeds of bribery, since “tainted property” also includes “proceeds of the offence”. Under section 2 of the POCA, proceeds are defined as “any property that is derived or realised, directly or indirectly, by any person from the commission of the offence”. This would cover direct proceeds of the offence, or, as would be more likely in foreign bribery cases where the proceeds of the bribe are often in the form of a contract, a permit, or other form of advantage, their monetary equivalent. The Solicitor-General may also rely on section 25 of the POCA to apply for a pecuniary penalty order, which amounts to the value of benefits derived by a person from the commission of a serious offence. The New Zealand authorities indicate that this provision would notably be relied on where the proceeds can not be confiscated because the offender has converted these proceeds to some other form. To date, guidelines do not exist on how to quantify the proceeds or benefits of an offence, which could pose some issues for benefits and proceeds derived from a foreign bribery offence or other type of fraud, where the direct proceeds are likely to have been transformed, and may therefore be difficult to evaluate.

203. As previously mentioned, the current POCA legislation limits any confiscation to those assets or profits which can be linked to a conviction for a criminal offending. This would notably not allow for confiscation to be pronounced against persons involved with, or benefiting from criminal activity but who succeed in distancing themselves from the actual commission of any specific offence. As pointed out by the SFO in its 2005 Annual Report, the POCA was aimed largely at drug dealers: it enables property to be restrained upon an arrest, or where an arrest was imminent, but does not, however, allow for any restraining action to be taken where an investigation could take many months, thereby effectively negating the legislation in relation to most white collar offending. Nor does it allow for any action to be taken to recover benefits clearly obtained from crime where charges failed for technical rather than substantive reasons.¹⁰³ This, together with the absence of guidelines on the use of confiscation measures, may explain why such forfeiture orders appear to have been rarely imposed in respect of corruption or other economic crime cases. The New Zealand Minister of Justice himself acknowledged that the existing POCA has been only moderately successful compared with overseas models. Between 1995 and July 2003, only NZD 8.84 million in assets had been confiscated through 57 forfeiture orders.

204. In this context, the envisaged changes to the Proceeds of Crime legislation are very much welcomed. The Criminal Proceeds (Recovery) Bill was introduced before Parliament in June 2005, with a foreseen entry into force date of 1 January 2007. The new legislation will notably introduce two major changes:

- The Bill aims to broaden the possibilities for confiscation on a pre-conviction basis. The proposal is that where it can be established to the civil standard of proof (the balance of probabilities), as

¹⁰² Section 8(2)(a) *ibid.*

¹⁰³ The 2005 Annual Report of the SFO is available from the SFO website at www.sfo.govt.nz/.

opposed to the criminal standard (beyond reasonable doubt), that assets are the proceeds of any major criminal offending, such proceeds may be confiscated. It would no longer be necessary to link the confiscation to an actual prosecution or conviction.¹⁰⁴ Confiscation of the instruments of crime would remain conviction-based.

- The Bill proposes to locate the recovery body within the SFO. This proposal reflects the requirements of the new role, the skills available within the SFO, and notably the importance of the role of the forensic accountant in determining the extent of the tainted assets. In view of this new role, the SFO anticipates a gradual increase in its staff: current planning is for seven additional staff in the first year rising to approximately 20 additional staff after three years.

205. The New Zealand authorities, including the SFO and the NZP, expect the new legislation to be much more effective in confiscating property from persons engaged in or benefiting from criminal activity, reducing the rewards from and the attraction of crime, and reducing the resources that could potentially be used for further criminal activity. According to the Minister of Justice, “it is estimated that up to NZD 14 million per year will be recovered under the new legislation. This is based on the average amount per forfeiture order over the last two years under existing law, and an expectation that about 70 confiscation cases will be taken each year under the new process.”¹⁰⁵ SFO representatives present at the on-site visit indicated that they strongly support the proposed Bill, and are hopeful that the new legislation will yield 40 to 50 forfeiture based orders a year.

(iii) *Additional civil or administrative sanctions*

206. As indicated in Phase 1, New Zealand’s legal system does not permit the courts to impose any additional non-criminal (administrative or civil) sanctions in connection with a criminal offence such as bribery of a foreign public official. Notably, the use of exclusion or suspension from access to procurement as a sanction for bribery and corruption offences does not exist. However, there are some possibilities for independent bodies in charge of administering public funds to take into account convictions and/or suspicions of involvement in foreign bribery in deciding to grant support (see section (b) below on “Other sanctions”).

Commentary:

The lead examiners are concerned that potential tendency to leniency of the courts in certain economic crime cases, the potential difficulties under the current confiscation regime and the impossibility to impose both imprisonment and a fine for foreign bribery may affect the effective, proportionate and dissuasive character of criminal sanctions in New Zealand for the foreign bribery offence.

Given that monetary sanctions are a fundamental deterrent for economic offences such as foreign bribery, the lead examiners encourage the New Zealand authorities to consider permitting the imposition of both fines and imprisonment in such cases, and recommend that the New Zealand authorities draw the attention of investigating, prosecutorial and judicial authorities to the importance of requesting and imposing confiscation on bribers.

¹⁰⁴ This would apply for offences punishable by at least five years imprisonment, thus covering the foreign bribery offence, which carries a sentence of seven years imprisonment.

¹⁰⁵ See the press release: “New Bill will reap millions from gangs” on the official website of the New Zealand Government at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=23431.

In this regard, the lead examiners welcome the on-going preparation of the Criminal Proceeds (Recovery) Bill and recommend that New Zealand proceed diligently with its adoption. In this respect, they support both appropriate measures aimed at broadening possibilities for bribery-related confiscation on a pre-conviction basis, and the proposed new role of the SFO, provided sufficient resources are made available. The lead examiners recommend that the Working Group follow up in this area, including the use in practice of confiscation measures once the expected legislation has been implemented.

The examiners consider that New Zealand does not apply effective, proportionate and dissuasive sanctions on legal persons for foreign bribery as required by the Convention principally because of the considerations set forth above relating to the regime for the liability of legal persons. In addition to the recommendation above concerning the broadening of the grounds for liability, the examiners invite the New Zealand authorities to review the apparently high number of cases in which companies convicted of crimes are granted discharges. They also recommend that New Zealand consider measures to ensure that meaningful and effective efforts by companies to prevent foreign bribery can be taken into account in assessing the appropriate sanctions and/or in assessing the liability of the company when bribery does occur.

Finally, given the absence of any foreign bribery conviction to date, the lead examiners recommend that the Working Group monitor the level of sanctions and application of confiscation measures when there has been sufficient practice, in order to ensure that the sanctions handed down by the courts are effective, proportionate and dissuasive.

b. Non-criminal sanctions and sanctions imposed by agencies other than courts

207. New Zealand criminal law does not provide for the imposition by the courts of additional non-criminal sanctions on companies in connection with a criminal offence (such as bribery of a foreign public official). (See Supp. Responses question 13) This section reviews the policies with regard to the treatment of prior convictions for foreign bribery at the level of the key administrative agencies, such as agencies charged with providing export credit support or development aid, or with carrying out public procurement.

(i) Export credit agencies

208. ECO does not have any mandatory measure with regard to convictions for foreign bribery. If after credit, cover or other support has been approved, an involvement in bribery by the applicant or other beneficiary is proved, ECO will take whatever action it deems appropriate including the denial of payment or indemnification, seeking repayment of sums paid out and/or referral of evidence of such bribery to the appropriate authorities both in New Zealand and in any other relevant jurisdiction. It does not yet have any specific policy regarding the effect of prior convictions with regard to unrelated transactions.

(ii) Development aid

209. NZAID has an Approved Contractor Scheme (ACS) under which companies can be in effect pre-qualified for certain NZAID contracts on agreed terms. Approximately 600 companies are included in the list with 200 expected to be added shortly. Applicants for inclusion in the scheme are required to declare previous convictions. However, declarations are made based on an honour system and police checks are not carried out. NZAID has indicated that it assesses whether to let the contract/tender based on the nature of the conviction. If it was for corruption, including bribery, they would not proceed with the contract. If, for instance, it was for driving offences, it would not usually stand in the way. At the on-site visit, a NZAID representative indicated that one conviction for fraud had been declared to date and the company was not permitted to join the ACS. For contracts whose value exceeds the limits of the ACS (NZD

100 000, EUR 48 000), applicants are not asked about convictions and no police checks are carried out. A NZAID representative recognised at the on-site visit that this policy should be reviewed.

(iii) *Public procurement*

210. As outlined in the Introduction, New Zealand has a highly decentralised administrative structure. Government agencies, authorities and bodies are individually responsible for public procurement relating to their work. However, the Ministry of Economic Development sets public procurement guidelines to which agencies should adhere. In addition, agencies should be guided by the Procurement: Statement of Good Practice Guidelines, issued by the Office of the Auditor General. No specific law provides for any consequences for convictions for foreign bribery. Representatives of the MED affirmed that tendering procedures are generally rigorous, that convictions for bribery would be noted and the relevant company excluded. However, no actual practice of this nature has been described. New Zealand has also noted that review and audit of agency procurement practice against procurement guidelines can also raise the profile of bribery issues.

Commentary:

The lead examiners recommend that New Zealand consider providing for the imposition of additional civil or administrative sanctions on legal and natural persons convicted of foreign bribery. The lead examiners note that certain agencies indicated prior bribery convictions would lead to exclusion of applicants for government contracts, but the policy basis of this approach has not been identified. They recommend that efforts be made, including by the ECO, NZAID and procurement bodies, to clarify (1) whether the bar is in the nature of an additional sanction for the prior conviction or a matter of contractual policy; and (2) the conditions under which prior convictions for bribery in unrelated transactions are or should be a bar to obtaining contracts, including the length of time.

The examiners welcome New Zealand's planned efforts to provide specific guidance concerning the review of the existence of foreign bribery convictions in New Zealand or elsewhere as part of the procurement process so that appropriate measures can be taken. If the honesty of applicants is relied on with regard to the disclosure of past convictions, appropriate sanctions should apply for the failure to disclose relevant convictions. With regard to development aid, the lead examiners recommend that questions regarding bribery convictions be asked of all potential contractants, including those seeking higher-value contracts such as those attributed outside of the Approved Contractor Scheme.

5. The False Accounting Offence

a. The offence

211. Companies are generally self-regulating within statutory guidelines under the Companies Act and the FRA, in relation to which they, or their officers, may face specified criminal charges or civil action in relation to specified obligations. In terms of supervision and enforcement, the Securities Commission monitors financial statements of issuers for compliance with IFRS. The Registrar of Companies also has an enforcement role.

212. In addition to the accounting offences under the Companies Act 1993 and FRA as described in the Phase 1 report (at 26-27), section 260 CA establishes a crime of false accounting. Punishable by imprisonment of up to ten years, it applies to, inter alia, false entries or omissions in accounting documents with the intent to obtain advantages by deception or to deceive or cause loss to any other person.

b. Sanctions

213. New Zealand has supplied limited information about the enforcement of the false accounting offences. The Responses (Annex 2 at 67-68) indicate that the SFO has dealt with a few accounting fraud cases. However, no statistics have been supplied with regard to the enforcement of accounting fraud offences by the SFO or the police. The Companies Office has supplied statistics indicating that it brought three charges against three defendants in 2004-2005 (July to June) and five charges against four defendants in 2005-2006 under the Crimes Act accounting provisions. The relatively few cases of enforcement of accounting fraud offences is of concern because, as recognised by a Companies Office representative, enforcement is a key factor in achieving high rates of compliance with regard to accounting obligations. He noted that his department had engaged in a programme to raise low compliance levels with a requirement for directors to file certain financial records. After several sets of notices to directors and companies had failed to achieve results, the Companies Office began prosecuting violations. Although the representative noted that it took time for judges to sanction violations with any significant penalties, they have now begun doing so. Compliance rates for the filing obligation have risen from approximately 35% to over 70%.

214. There is no particular division of responsibility between the Companies Office, the Police and the SFO with regard to the enforcement of accounting fraud offences. The agency who has responsibility for the legislation creating an offence (and therefore having the requisite specialist expertise) is generally responsible for enforcing those offences. The SFO does not concern itself with any accounting offences under the Companies Act, and in practical terms deals only with the offence of “false accounting” under section 260 CA. The Companies Office does not generally conduct cases requiring proof of fraudulent intent. The concerns expressed above about the low priority given to economic crime by the police are equally present with regard to accounting offences.

Commentary:

In light of the apparently limited degree of enforcement of the accounting fraud offences, the lead examiners consider that the Working Group should follow up on the enforcement of these provisions as practice develops.

6. The Money Laundering Offence

a. The offence

215. Since the Phase 1 evaluation of New Zealand, the money laundering offences at sections 257 et seq. CA have been replaced with sections 243 et seq (see Annex 3 for excerpts of money laundering legislation). Section 243 CA establishes the offence of money laundering, covering the money laundering process as well as the possession of criminal property.¹⁰⁶

216. Under section 243, an offence is constituted by a person who engages in a money laundering transaction in respect of any property that is the “proceeds of a serious offence”, or obtains property which is the proceeds of an offence.

217. Proceeds are defined in section 243(1) as “any property that is derived or realised, directly or indirectly, by any person from the commission of [a serious] offence”. A “serious offence” includes all offences punishable by a term of five years or more, as well as acts which, if committed in New Zealand,

¹⁰⁶ The Misuse of Drugs Act 1975 also has a separate money laundering offence, which pertains only to drug offences.

would constitute an offence punishable by a term of five years or more.¹⁰⁷ Given that a foreign bribery offence is punishable by a term of seven years imprisonment, money laundering where the predicate offence is the bribery of a foreign public official would thus be covered by the money laundering offence at section 243 CA. Under section 243(5), the prosecution is not required to prove the predicate offence, but only that the property is the proceeds of a serious offence. Consequently, although the Attorney-General's consent is required for prosecution of the foreign bribery offence, it would not be required for prosecution of money laundering with foreign bribery as the predicate offence.

218. With regard to the offence of money laundering, section 243(2) provides that a person is guilty of a money laundering offence if that person (i) knows or believes that the property is the proceeds of a serious offence, or (ii) is reckless as to whether or not the property is the proceeds of a serious offence. In addition, section 243(3) criminalises the possession of property which is the proceeds of a serious offence (i) where the person intends to engage in money laundering, or (ii) where the person know, believes or is reckless as to whether or not the property is the proceeds of a serious offence. The New Zealand authorities confirm that the money laundering legislation also covers successive layers of money laundering. Under the New Zealand system, each conversion event would constitute a distinct money laundering offence. Self-laundering also constitutes an offence under section 344AA CA.

219. The Crimes Act sets out a dual criminality exception to the money laundering offence, which applies, *inter alia*, where foreign bribery is the predicate offence.¹⁰⁸ Under section 245, section 243 does not apply if the act constituting the serious offence “was not, at the time of its commission, an offence under the law of the place where the act was done”. This would imply that if a company from New Zealand paid a bribe to a foreign public official from country B, but the act was accomplished in country C, where the foreign bribery offence does not exist, then the predicate offence would not exist. Consequently, there would be no money laundering offence generated by the foreign bribery. The dual criminality requirement is deemed to be met unless the defendant puts the matter at issue.¹⁰⁹

b. Sanctions

220. The sanction for money laundering under section 243(2) is an imprisonment penalty of up to seven years. The sanction for possession of property constituting the proceeds of a serious offence, under section 243(3), is an imprisonment penalty of up to five years. The Crimes Act does not provide for a monetary penalty for the offence of money laundering. Thus, as for the foreign bribery offence, the courts may also discretionarily decide to impose a fine instead of sentencing the offender to imprisonment.¹¹⁰

221. In addition, anyone who aids, abets, incites, counsels or procures any person to commit an offence in New Zealand is guilty of being a party to the offence,¹¹¹ including aiding, abetting, etc. those to commit offences in other jurisdictions.¹¹² Consequently, any employee or officer of a financial institution who is a party to the main offence of money laundering by assisting or co-operating in such a way as to facilitate the commission of the offence would be guilty of money laundering. Failure by financial institutions to make adequate STRs would, on the other hand, constitute offences under the Financial

¹⁰⁷ Section 243(1) CA.

¹⁰⁸ As discussed in Part 2(c) above on defences and exclusions to the foreign bribery offence, double criminality requirements for the foreign bribery offence itself are inconsistent with the Convention.

¹⁰⁹ Section 245(2) CA.

¹¹⁰ Section 39(1) of the Sentencing Act 2004.

¹¹¹ Section 66 CA.

¹¹² Section 69(2) *ibid*.

Transactions Reporting Act 1996 (see above Part B section 6 on reporting under the money laundering regime and corresponding sanctions).

222. The New Zealand authorities indicate that, to date, no charges of bribery of a foreign public official have been investigated or prosecuted in New Zealand, nor any money laundering charges where foreign bribery was the predicate offence.

223. Statistics on prosecuted cases involving money laundering offences are provided in New Zealand's 2005 Report to the APG.¹¹³ These statistics show an important increase in the number of money laundering offences prosecuted under section 243(2) (old section 257A(2)) between 1996, where there were three prosecutions, and 2003 and 2004 which saw respectively 43 and 25 prosecutions, bringing the total of prosecutions to 202 between 1995 and 2004. The number of prosecutions for possession of the proceeds of a serious offence was somewhat less important, with only 35 prosecutions over the same time period. Statistics on the number of money laundering cases resulting in convictions show a total of 91 convictions (87 for the money laundering offence and 4 for the possession of property with intent to launder) between 1995 and 2004. No breakdown is available on the type and level of sanctions imposed. Statistics are not available either on the types of offences which constituted the predicate offences to the money laundering.

224. As pointed out by the SFO in respect of fraud cases, the confiscation regime under the Proceeds of Crime Act (POCA) provides for a somewhat cumbersome procedure for seeking restraint orders on proceeds of criminal offences. The 2003 FATF/APG Report on New Zealand confirmed the SFO's appreciation that most of the cases where confiscation measures were pronounced were drug related, and encouraged New Zealand to envisage the passing of more efficient legislation for confiscation.¹¹⁴ The Criminal Proceeds (Recovery) Bill introduced before Parliament in June 2005 should constitute major improvement in this respect (see discussion of the Bill under section 4.a.(ii) above).

Commentary:

The lead examiners recommend that the New Zealand authorities revise their money laundering offence under the Crimes Act 1961 to eliminate the exclusion under section 245 CA, so that foreign bribery is always a predicate offence to money laundering.

The lead examiners encourage New Zealand to continue to compile statistical information on the application of the offence of money laundering, including the level of sanctions and confiscation of proceeds of crime.

¹¹³ The "2005 New Zealand Report to the Asia/Pacific Group on Money Laundering" is available from the New Zealand Ministry of Justice website at <http://justice.govt.nz/fatf/jurisdiction-report.html>.

¹¹⁴ The publication "New Zealand: Report on Observations of Standards and Codes, FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism" is available from the New Zealand Ministry of Justice website at <http://justice.govt.nz/fatf/nz-report.html>.

D. RECOMMENDATIONS

225. Based on its findings regarding New Zealand's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to New Zealand under Part 1; and (2) will follow up the issues in Part II when there is sufficient relevant practice.

Part 1. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and Revised Recommendation, the Working Group recommends that New Zealand:

- a. increase efforts to raise awareness of the foreign bribery offence, and in particular its extraterritorial application, among public sector employees and agencies involved with New Zealand enterprises operating abroad, including foreign diplomatic representations and trade promotion, export credit, and development aid agencies (Revised Recommendation, Paragraph I);
- b. take necessary action, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery legislation among companies, and in particular small and medium size enterprises, and advise and assist companies with regard to the prevention and reporting of foreign bribery (Revised Recommendation, Paragraph I);
- c. work proactively with the accounting and auditing profession and financial institutions to develop training for and awareness of the foreign bribery offence and its status as a predicate offence for money laundering (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that New Zealand:

- a. establish procedures to be followed by public sector employees, including employees of the Ministry of Foreign Affairs and Trade, and of export credit, trade promotion and development aid agencies, to report to law enforcement authorities credible information about foreign bribery that they may uncover in the course of their work, and encourage and facilitate such reporting (Revised Recommendation, Paragraph I);
- b. amend the New Zealand tax legislation to require, where appropriate, Inland Revenue to provide information on request from law enforcement authorities in the context of foreign bribery investigations, and to report information regarding suspected foreign bribery uncovered in the course of their work to law enforcement authorities (Revised Recommendation, Paragraph I); and
- c. require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies regardless of whether the suspected bribery would have a material impact on the financial statements; and consider requiring external auditors, in the face of inaction after appropriate disclosure

within the company, to report such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

3. With respect to the investigation and prosecution of foreign bribery offences, the Working Group recommends that New Zealand:

- a. take necessary measures to ensure that all credible foreign bribery allegations are properly investigated (Convention, Article 5; Revised Recommendation, Paragraph I);
- b. ensure that the Serious Fraud Office (SFO) receives all allegations of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);
- c. make effective investigative means available in foreign bribery investigations; provide a framework for access to information stored on computers; and ensure that sufficient training and resources are made available to law enforcement authorities, including the SFO, New Zealand Police and Crown solicitors, for the effective investigation and prosecution of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);
- d. take appropriate action to ensure, in foreign bribery cases, that New Zealand is able to provide mutual legal assistance to foreign authorities regardless of whether law enforcement agencies would have territorial jurisdiction to open their own investigations (Convention Article 9(1); Revised Recommendation, Paragraph I);
- e. ensure that, where a request for extradition of a person for suspected foreign bribery is prohibited or is refused solely on the ground that the person is a New Zealand national, the case is submitted to the competent New Zealand authorities for purposes of prosecution; actively pursue its efforts to facilitate where appropriate the procedures for extradition, in particular to countries with different legal systems; and reconsider the requirement, currently applicable to certain Working Group Member States, of Ministerial approval of requests for extradition under the Convention (Convention Articles 10(2) and 10(3); Revised Recommendation, Paragraph I); and
- f. take all necessary measures to ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved do not influence the investigation or prosecution of foreign bribery cases, and, in this respect, amend the Solicitor-General's Prosecution Guidelines and remove the requirement for the Attorney-General's consent for foreign bribery (Convention, Article 5; Revised Recommendation, Paragraph I).

4. With respect to the offence of foreign bribery and the liability of legal persons for foreign bribery, the Working Group recommends that New Zealand:

- a. broaden the criteria for the criminal liability of legal persons for foreign bribery (Convention, Article 2);
- b. remove or amend the double criminality exception in section 105E of the Crimes Act 1961 in order to achieve full compliance with the Convention (Convention, Article 1); and

- c. clarify the routine government action (facilitation payments) exception in section 105C(3) of the Crimes Act 1961 to ensure that the foreign bribery offence can apply to any bribery of a foreign public official in the conduct of international business in order to obtain (1) discretionary or illegal acts by the official; or (2) the granting of any improper advantage, including advantages such as tax breaks that may be unrelated to the specific terms of business (Convention, Article 1).

5. With respect to related tax and money laundering offences, the Working Group recommends that New Zealand:

- a. amend its legislation to ensure that no foreign bribe payments covered under criminal law are tax deductible, including in particular bribes (i) paid through intermediaries; (ii) paid for the purpose of obtaining an advantage for a third party; (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties, and (iv) “promised” or “offered” as well as paid (Revised Recommendation, Paragraph IV); and
- b. amend the double criminality exception for the money laundering offence in section 245 of the Crimes Act 1961, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred (Convention, Article 7).

6. With respect to sanctions for foreign bribery offences, the Working Group recommends that New Zealand:

- a. ensure that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions (Convention, Article 3);
- b. consider permitting the imposition of both fines and imprisonment for foreign bribery offences (Convention, Article 3); and
- c. proceed with the adoption of proposed proceeds of crime legislation aimed at facilitating confiscation where appropriate, including in foreign bribery cases, and draw the attention of investigating, prosecutorial and judicial authorities to the importance of confiscation as a sanction for foreign bribery (Convention, Article 3(3)).

Part 2. Follow-Up by the Working Group

7. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

- a. the performance of law enforcement authorities with regard to foreign bribery allegations, including in particular with regard to decisions not to open or to discontinue investigations;
- b. the level of sanctions, including confiscation, applied in foreign bribery cases and in particular with regard to legal persons;
- c. jurisdiction over legal persons;
- d. the intent requirements in the foreign bribery statute;
- e. the application of the tax deduction for facilitation payments; and
- f. enforcement of the accounting fraud offences.

Annex 1 – List of Participants in the On-Site Visit

MINISTRIES AND OTHER STATE ORGANS

- *Audit New Zealand, Office of the Auditor General*
- *Inland Revenue Department*
- *New Zealand Agency for International Development*
- *New Zealand Export Credit Office*
- *New Zealand Trade and Enterprise*
- *Members of Parliament*
- *Ministry of Economic Development*
- *Ministry of Foreign Affairs and Trade*
- *Ministry of Justice*
- *Parliamentary Counsel Office*
- *Reserve Bank of New Zealand*
- *Securities Commission*
- *State Services Commission*
- *Treasury*

LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

- *Crown Law Office*
- *Crown Solicitors*
- *New Zealand Police*
- *Judges*
- *Police Complaints Authority*
- *Serious Fraud Office*

PRIVATE SECTOR AND CIVIL SOCIETY

Accounting and Auditing:

- *Accounting Standards Review Board*
- *Major New Zealand accounting and auditing firms*
- *New Zealand Institute of Chartered Accountants*

Civil Society:

- *Academics*
- *New Zealand Council of Trade Unions*
- *Transparency International, New Zealand Chapter*

Private Sector:

- *Business New Zealand*
- *Financial Services Federation*
- *Major New Zealand banks*
- *New Zealand Law society*
- *New Zealand multinational company – construction industry*
- *New Zealand multinational company – dairy industry*
- *New Zealand multinational company – telecommunications industry*
- *New Zealand multinational company – transport industry*
- *Private sector barristers and solicitors*

Annex 2 – Principal Abbreviations

Abbreviation	Name
ACS	Approved Contractor Scheme
ADB	Asia Development Bank
APEC	Asia Pacific Economic Co-operation
APG	Asia/Pacific Group on Money Laundering
ASRB	Accounting Standards Review Board
CA	Crimes Act 1961
CLO	Crown Law Office
CPI	Transparency International Corruption Perception Index
EA	Extradition Act 1999
ECG	OECD Working Party on Export Credits and Credit Guarantees
ECO	New Zealand Export Credit Office
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
FRA	Financial Reporting Act 1993
FTRA	Financial Transactions Reporting Act 1996
IAS	International Accounting Standard
IAWG	Inter-Agency Working Group
IFRS	International Financial reporting Standards
IIC Report	Report of the Independent Inquiry Committee into the UN Oil-for-Food Programme (released on 27 October 2005)
ISA	International Standards of Auditing
MACMA	Mutual Assistance in Criminal Matters Act 1992
MED	Ministry of Economic Development
MFAT	Ministry of Foreign Affairs and Trade
MLA	Mutual legal assistance
MOJ	Ministry of Justice
NGO	Non governmental organisation
NZAID	New Zealand Agency for International Development
NZIAS	New Zealand International Accounting Standard
NZICA	New Zealand Institute of Chartered Accountants
NZP	New Zealand Police
ODA	Official development assistance
PC	Privy Council
PDA	Protected Disclosures Act 2000
POCA	Proceeds of Crime Act 1991
Responses	Responses to the Phase 2 General written questionnaire
SFO	Serious Fraud Office
SMEs	Small and medium size enterprises
STR	Suspicious transaction report
Supp. Responses	Responses to the Phase 2 supplementary written questionnaire
UNCAC	United Nations Convention Against Corruption

Annex 3 – Excerpts from Relevant Legislation

Crimes Act 1961

Part 1 – Jurisdiction

Section 6 – Persons not to be tried in respect of things done outside New Zealand

Subject to the provisions of section 7 of this Act, no act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

Section 7 – Place of commission of offence

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

Section 7A – Extraterritorial jurisdiction in respect of certain offences with transnational aspects

(1) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for any offence against this Act committed in the course of carrying out a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002) or an offence against section 98AA, section 98A, section 98C, section 98D, any of sections 100 to 104, section 105(2), section 116, section 117, section 243, section 298A, or section 298B—

- (a) if the person to be charged—
 - (i) is a New Zealand citizen; or
 - (ii) is ordinarily resident in New Zealand; or
 - (iii) has been found in New Zealand and has not been extradited; or
 - (iv) is a body corporate, or a corporation sole, incorporated under the law of New Zealand;

[...]

Part 6 – Crimes Affecting the Administration of Law and Justice Bribery and Corruption

Section 99 – Interpretation

In this part of this Act, unless the context otherwise requires,—

“**Bribe**” means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect:

“**Judicial officer**” means a Judge of any Court, or a District Court Judge, Coroner, Justice of the Peace, or Community Magistrate, or any other person holding any judicial office, or any person who is a member of any tribunal authorised by law to take evidence on oath:

“**Law enforcement officer**” means any constable, or any person employed in the detection or prosecution or punishment of offenders:

“**Official**” means any person in the service of Her Majesty in right of New Zealand (whether that service is honorary or not, and whether it is within or outside New Zealand), or any member or employee of any local authority or public body, or any person employed in the Education service within the meaning of the State Sector Act 1988.

Section 105C – Bribery of foreign public official

(1) In this section and in sections 105D and 105E,—

“**benefit**” means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect

“**foreign country**” includes—

- (a) territory for whose international relations the government of a foreign country is responsible; and
- (b) an organised foreign area or entity including an autonomous territory or a separate customs territory

“**foreign government**” includes all levels and subdivisions of government, such as local, regional, and national government

“**foreign public agency**” means any person or body, wherever situated, that carries out a public function under the laws of a foreign country

“**foreign public enterprise**” means—

- (a) a company, wherever incorporated, that—
 - (i) a foreign government is able to control or dominate (whether by reason of its ownership of shares in the company, its voting powers in the company, or its ability to appoint 1 or more directors (however described), or by reason that the directors (however described) are accustomed or under an obligation to act in accordance with the directions of that government, or otherwise); and
 - (ii) enjoys subsidies or other privileges that are enjoyed only by companies, persons, or bodies to which subparagraph (i) or paragraph (b)(i) apply; or
- (b) a person or body (other than a company), wherever situated, that—
 - (i) a foreign government is able to control or dominate (whether by reason of its ability to appoint the person or 1 or more members of the body, or by reason that the person or members of the body are accustomed or under an obligation to act in accordance with the directions of that government, or otherwise); and
 - (ii) enjoys subsidies or other privileges that are enjoyed only by companies, persons, or bodies to which subparagraph (i) or paragraph (a)(i) apply

“**foreign public official**” includes any of the following:

- (a) a member or officer of the executive, judiciary, or legislature of a foreign country;
- (b) a person who is employed by a foreign government, foreign public agency, foreign public enterprise, or public international organisation;
- (c) a person, while acting in the service of or purporting to act in the service of a foreign government, foreign public agency, foreign public enterprise, or public international organisation

“**public international organisation**” means any of the following organisations, wherever situated:

- (a) an organisation of which 2 or more countries or 2 or more governments are members, or represented on the organisation;
- (b) an organisation constituted by an organisation to which paragraph (a) applies or by persons representing 2 or more such organisations;
- (c) an organisation constituted by persons representing 2 or more countries or 2 or more governments;
- (d) an organisation that is part of an organisation referred to in any of paragraphs (a) to (c)

“**routine government action**”, in relation to the performance of any action by a foreign public official, does not include—

- (a) any decision about—
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with any particular person or body; or
 - (iii) the terms of new business or existing business; or
- (b) any action that is outside the scope of the ordinary duties of that official.

(2) Every one is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope of the official’s authority) in order to—

- (a) obtain or retain business; or
- (b) obtain any improper advantage in the conduct of business.

- (3) This section does not apply if—
 - (a) the act that is alleged to constitute the offence was committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action; and
 - (b) the value of the benefit is small.
- (4) This section is subject to section 105E.

Section 105D – Bribery outside New Zealand of foreign public official

- (1) Every one commits an offence who, being a person described in subsection (2), does, outside New Zealand, any act that would, if done in New Zealand, constitute an offence against section 105C.
 - (2) Subsection (1) applies to a person who is—
 - (a) a New Zealand citizen; or
 - (b) ordinarily resident in New Zealand; or
 - (c) a body corporate incorporated in New Zealand; or
 - (d) a corporation sole incorporated in New Zealand.
 - (3) Every one who commits an offence against this section is liable to the same penalty to which the person would have been liable if the person had been convicted of an offence against section 105C.
 - (4) This section is subject to section 105E.

Section 105E – Exception for acts lawful in country of foreign public official

- (1) Sections 105C and 105D do not apply if the act that is alleged to constitute an offence under either of those sections—
 - (a) was done outside New Zealand; and
 - (b) was not, at the time of its commission, an offence under the laws of the foreign country in which the principal office of the person, organisation, or other body for whom the foreign public official is employed or otherwise provides services, is situated.
- (2) If a person is charged with an offence under section 105C or section 105D, it is to be presumed, unless the person charged puts the matter at issue, that the act was an offence under the laws of the foreign country referred to in subsection (1)(b).

**Part 10 – Crimes against Rights of Property
Money Laundering**

Section 243 – Money laundering

- (1) For the purposes of this section and sections 244 and 245,—
 - “**conceal**”, in relation to property, means to conceal or disguise the property; and includes, without limitation,—
 - (a) to convert the property from one form to another;
 - (b) to conceal or disguise the nature, source, location, disposition, or ownership of the property or of any interest in the property
 - “**deal with**”, in relation to property, means to deal with the property in any manner and by any means; and includes, without limitation,—
 - (a) to dispose of the property, whether by way of sale, purchase, gift, or otherwise;
 - (b) to transfer possession of the property;
 - (c) to bring the property into New Zealand;
 - (d) to remove the property from New Zealand
 - “**interest**”, in relation to property, means—
 - (a) a legal or equitable estate or interest in the property; or

(b) a right, power, or privilege in connection with the property
“**proceeds**”, in relation to a serious offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence

“**property**” means real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible; and includes an interest in any such real or personal property

“**serious offence**” means an offence punishable by imprisonment for a term of 5 years or more; and includes any act, wherever committed, that, if committed in New Zealand, would constitute an offence punishable by imprisonment for a term of 5 years or more.

(2) Subject to sections 244 and 245, every one is liable to imprisonment for a term not exceeding 7 years who, in respect of any property that is the proceeds of a serious offence, engages in a money laundering transaction, knowing or believing that all or part of the property is the proceeds of a serious offence, or being reckless as to whether or not the property is the proceeds of a serious offence.

(3) Subject to sections 244 and 245, every one is liable to imprisonment for a term not exceeding 5 years who obtains or has in his or her possession any property (being property that is the proceeds of a serious offence committed by another person)—

(a) with intent to engage in a money laundering transaction in respect of that property; and

(b) knowing or believing that all or part of the property is the proceeds of a serious offence, or being reckless as to whether or not the property is the proceeds of a serious offence.

(4) For the purposes of this section, a person engages in a money laundering transaction if, for the purpose of concealing any property or enabling another person to conceal any property, that person—

(a) deals with that property; or

(b) assists any other person, whether directly or indirectly, to deal with that property.

(5) In any prosecution for an offence against subsection (2) or subsection (3),—

(a) it is not necessary for the prosecution to prove that the accused knew or believed that the property was the proceeds of a particular serious offence or a particular class of serious offence:

(b) it is no defence that the accused believed any property to be the proceeds of a particular serious offence when in fact the property was the proceeds of another serious offence.

(6) Nothing in this section or in sections 244 or 245 limits or restricts the operation of any other provision of this Act or any other enactment.

Section 245 – Section 243 not to apply to certain acts committed outside New Zealand

(1) Subject to subsection (2), section 243 does not apply if—

(a) any property is alleged to be the proceeds of a serious offence; and

(b) the act that is alleged to constitute that serious offence was committed outside New Zealand; and

(c) the act was not, at the time of its commission, an offence under the law of the place where the act was done.

(2) If a person is charged with an offence under this section and the act that is alleged to constitute the serious offence resulting in the proceeds was committed outside New Zealand, it is to be presumed, unless the person charged puts the matter at issue, that the act was an offence under the law of the place where the act was done.

**Part D – Deductions
Theft and Bribery**

Section DB 36 – Bribes paid to public officials

When subsection (2) applies: official in New Zealand

- (1) Subsection (2) applies when
- (a) person (“person A”) corruptly gives a bribe to another person; and
 - (b) person A gives the bribe intending to influence a New Zealand public official to act, or to fail to act, in their official capacity in order to
 - (i) obtain or retain business for person A; or
 - (ii) obtain an improper advantage for person A in the conduct of business; and
 - (c) the official either has or does not have the authority to act or to fail to act.

No deduction

- (2) Person A is denied a deduction for the amount of the bribe.

When subsection (4) applies: official overseas

- (3) Subsection (4) applies when
- (a) a person (“person A”) corruptly gives a bribe to another person; and
 - (b) person A gives the bribe intending to influence a foreign public official to act, or to fail to act, in their official capacity in order to—
 - (i) obtain or retain business for person A; or
 - (ii) obtain an improper advantage for person A in the conduct of business; and
 - (c) person A’s giving the bribe was, at the time the bribe was given, an offence under the laws of the foreign country that is the site of the main office of the person, organisation, or other body by whom the foreign public official is employed or for whom they provide services; and
 - (d) the official either has or does not have the authority to act or to fail to act.

No deduction (with exception)

- (4) Person A is denied a deduction for the amount of the bribe, unless it was paid wholly or mainly to ensure or expedite the performance by a foreign public official of a routine government action when the value of the benefit is small.

Some definitions

- (5) In this section,—
- “**benefit, foreign country, and foreign public official**” are defined in section 105C of the Crimes Act 1961
- “**bribe**” is defined in section 99 of the Crimes Act 1961
- “**public official**” means—
- (a) a member of Parliament or a Minister of the Crown; and
 - (b) a judicial officer, a law enforcement officer, or an official, as those terms are defined in section 99 of the Crimes Act 1961; and
 - (c) a foreign public official routine government action is defined in section 105C of the Crimes Act 1961.

Link with subpart DA

- (6) This section overrides the general permission.