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WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

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**NEW ZEALAND: FINAL REPORT**

**FINAL REPORT ON THE IMPLEMENTATION AND APPLICATION OF THE CONVENTION ON  
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN  
INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 RECOMMENDATION OF THE  
COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN  
INTERNATIONAL TRANSACTIONS**

*The Working Group on Bribery adopted this report on 10 October 2013.*

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## EXECUTIVE SUMMARY

The Phase 3 report on New Zealand by the OECD Working Group on Bribery evaluates and makes recommendations on New Zealand's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in New Zealand's legislative and institutional framework, as well as progress made since New Zealand's Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

While the Working Group welcomes New Zealand's recent efforts to implement the Convention, it has serious concerns about the lack of enforcement of the foreign bribery offence. Since becoming a Party to the Convention in 2001, New Zealand has not prosecuted any foreign bribery cases. Only four foreign bribery allegations have surfaced. New Zealand opened its first investigations into two of these allegations in July 2013. The Working Group recommends that New Zealand significantly increase its efforts to investigate and prosecute foreign bribery, including by providing practical training to law enforcement authorities on the foreign bribery offence. It further recommends that New Zealand continue to routinely and promptly coordinate with foreign law enforcement authorities and make efforts to obtain evidence from abroad. The Working Group is also very concerned that a number of key recommendations from Phase 2 remain unimplemented. In particular, it reiterates its earlier recommendation that New Zealand broaden its criteria for the liability of legal persons to allow for the effective prosecution of such entities for foreign bribery.

The report identifies additional areas for improvement. With regard to the foreign bribery offence, New Zealand should remove or amend the dual criminality exception and clarify the routine government action (facilitation payments) exception. The low number of foreign bribery allegations raises concerns on the levels of awareness, reporting and detection. There are further concerns that outdated perceptions that New Zealand individuals and companies do not engage in bribery may undermine detection efforts. However, as the Serious Fraud Office (SFO) agrees, the low number of allegations is not a reflection that New Zealand is immune from foreign bribery. The Working Group therefore recommends that New Zealand enhance its awareness-raising efforts and ensure that suspicions of foreign bribery are reported to competent authorities, including by auditors and tax examiners. Effective enforcement also goes hand in hand with effective, proportionate and dissuasive sanctions; in this regard, the range of sanctions available for foreign bribery in New Zealand may be insufficient. In addition, New Zealand should promptly ensure that under no circumstances are foreign bribe payments tax deductible.

The report also notes positive developments. The Working Group commends New Zealand's progress on confiscation and welcomes the establishment of a new civil-based asset confiscation scheme, as well as the creation of the Police Asset Recovery Unit. It also commends New Zealand for adopting a comprehensive whistleblower protection law and for efforts made to encourage and facilitate whistleblowing. The Working Group welcomes the entry into force of the new AML/CFT regime, and the recent steps taken by New Zealand to review its mutual legal assistance (MLA) framework to ensure incoming requests are effectively addressed. It is also encouraged by the planned legislative steps to address some of the above-mentioned loopholes in its foreign bribery offence.

The report and its recommendations reflect findings of experts from Israel and Korea, and were adopted by the Working Group on 10 October 2013. It is based on legislation and other materials provided by New Zealand and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its three-day on-site visit to Auckland and Wellington on 22-24 April 2013, during which the team met representatives of New Zealand's public and private sectors, and civil society. The Working Group invited New Zealand to submit a written report in six months on progress made in establishing the liability of legal persons for foreign bribery and every six months thereafter, if needed. As well, as part of its regular Phase 3 evaluation process, the Working Group invited New Zealand to report orally on its implementation of recommendations 2, 4a, 4b, 4c, 11a, 11b and 11c in one year (i.e., by October 2014). It will further submit a written report on the implementation of all recommendations within two years. New Zealand is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these two reports.

## A. INTRODUCTION

### 1. The On-site Visit

1. On 22 – 24 April 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions ('WGB' or 'Working Group') visited Auckland and Wellington as part of the Phase 3 evaluation of New Zealand's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Israel and Korea as well as members of the OECD Secretariat.<sup>1</sup> Before the on-site visit, New Zealand responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of New Zealand's public and private sectors, civil society, and media.<sup>2</sup> The evaluation team expresses its appreciation to the participants for their openness during the discussions and to New Zealand for its co-operation throughout the evaluation and organisation of a well-attended on-site visit.

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<sup>1</sup> Israel was represented by: Ms. Yael Keinan-Markovits, Deputy Legal Adviser, Tax Revenue Administration, Ministry of Finance; and Mr. Aryeh Peter, Deputy, Department of Criminal Law, State Attorney's Office. Korea was represented by Ms. Yoojin Choi, Deputy Director, International Cooperation Division, Anti-Corruption and Civil Rights Commission; and Mr. Changjin Kim, Prosecutor, International Affairs Division, Ministry of Justice. The OECD Secretariat was represented by Ms. Sandrine Hannedouche-Leric, Senior Legal Analyst and Coordinator of New Zealand's Phase 3 evaluation, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; and Ms. Melissa Khemani, Legal Expert, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

<sup>2</sup> See Annex 2 for a list of participants.

## **2. Summary of the Monitoring Steps Leading to Phase 3**

3. The Working Group has previously evaluated New Zealand in Phase 1 (May 2002), Phase 2 (October 2006) and in the Phase 2 written follow-up report (December 2008). As of December 2008, New Zealand had fully implemented 3 out of 20 Phase 2 recommendations, and partially implemented a further 7 recommendations.<sup>3</sup> The outstanding recommendations covered a range of issues such as liability of legal persons, awareness-raising, reporting obligations, tax, accounting and auditing, investigation and prosecution, extradition, and sanctions.

## **3. Outline of the Report**

4. This report is structured as follows. Part B examines New Zealand's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

## **4. Economic Background**

5. New Zealand is one of the smallest economies in the Working Group. In 2011, it ranked 32<sup>nd</sup> in terms of GDP and 35<sup>th</sup> in terms of exports of goods and services among the 40 Working Group members.<sup>4</sup> New Zealand's economy has transitioned from being primarily agrarian to increasingly industrialised. Service industries now make up a large proportion of the economy, accounting for 70 per cent of GDP. Energy, resources, manufacturing, engineering, and financial services have also contributed to an increase in New Zealand's GDP between 2007 and 2012.<sup>5</sup>

6. New Zealand's main trading partners are Australia, China, the United States and Japan. In 2011, its main exports comprised of food and beverage products; forestry products; crude oil; mechanical machinery and other equipment; aluminium and aluminium products; education services; government services and insurance; transportation; and commercial services.<sup>6</sup> In 2012, total outward foreign direct investment (FDI) amounted to NZD 24 254m (EUR 14.8bn)<sup>7</sup> the majority of which was directed in Australia. NZD 2 295m (EUR 1.4bn) was directed in the EU and NZD 2 231m (EUR 1.36bn) in the ASEAN region.

## **5. Cases Involving the Bribery of Foreign Public Officials**

7. New Zealand has not prosecuted any foreign bribery cases. Since New Zealand became a Party to the Convention in 2001, four allegations of New Zealand individuals and/or companies involved in bribery of foreign public officials have surfaced. New Zealand shell companies have also been implicated in an ongoing foreign bribery case in another State Party to the Convention. (Recent steps taken by New Zealand to address foreign bribery risks posed by shell companies will be addressed under section B.2. on Liability of Legal Persons). In July 2013, three months after the Phase 3 on-site visit, New Zealand opened investigations into two of the allegations. Further details on the cases are set out below.

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<sup>3</sup> See Annex 1 for previous WGB recommendations and assessment of their implementation.

<sup>4</sup> 2011 UNCTAD Statistics, New Zealand, nominal and real GDP; export flows.

<sup>5</sup> See: [Statistics New Zealand 2013](#).

<sup>6</sup> New Zealand Ministry of Business, Innovation and Employment.

<sup>7</sup> 3 June 2013 Conversion rate: 1 NZD = 0.61 EUR.

*Case #1 - Asia Case:* In 2012, the SFO evaluated an allegation of foreign bribery made by an individual following a public presentation on doing business in Asia. The allegation referred to a New Zealand citizen who allegedly paid bribes to public officials of an Asian country in order to gain business. The SFO states that a formal investigation was not opened because the allegation was based on hearsay, and “could not be supported by evidence, nor were potential avenues of evidence identified.”

*Case #2 - April 2013 Case:* In April 2013, on the last day of the on-site visit, the SFO informed the evaluation team that it had just received a complaint of alleged foreign bribery committed by a New Zealand citizen or company. The allegation involves a New Zealand citizen, primarily domiciled in another State Party to the Convention, having paid bribes to officials in an African country. The SFO opened a formal investigation in July 2013. The case remains at the investigation stage.

*Case #3 – Import/Export Company Case:* In July 2013, the SFO opened its second investigation into possible foreign bribery related to a fraud investigation involving a New Zealand company. The allegation relates to the payment of bribes over a number of years by the company to officials in an Asian country in order to secure access to markets. The investigation was opened on the basis of a newspaper report. The SFO states that the case remains at the investigation stage.

*Case #4 - Technology Company Case:* This case alleges that senior management of a (non-New Zealand) company routed foreign bribe payments to public officials of another State Party to the Convention through a network of shell companies, including in New Zealand. The SFO states that it has not investigated the allegations because there is no information available as to who may be behind the shell company. Information on this case is publicly available and has been reported in the press; however, according to the SFO, the information available is insufficient to make a MLA request. New Zealand has also not received any MLA requests on this case. During the on-site visit, the SFO indicated that it has not made informal contact with law enforcement authorities in the two Convention parties involved to obtain more information. In October 2013, the SFO provided an update that they have approached one of the parties to the Convention, though outside of the MLA process.

8. During the on-site visit, a number of participants from both the public and private sectors, including one senior FIU official, commented on how bribery and corruption are not part of New Zealand’s culture. However, recent allegations of major fraud potentially involving up to NZD 240m (EUR 147.3m)<sup>8</sup> connected with the post-earthquake rebuilding of Christchurch have called into question whether New Zealand’s “culture” is truly corruption-free. The former Director of the SFO has also stated publicly: “We do have a problem [with financial crime], it's endemic in every sector of business, it exists in the public sector, it's a transnational problem and it's not getting any smaller.”<sup>9</sup> One participant from the legal community commented that it would be naive to believe that New Zealand companies are not engaging in foreign bribery. Indeed, the low number of cases and allegations are not necessarily a reflection that New Zealand citizens or companies do not engage in foreign bribery. Rather, it may be linked to a lack of awareness of the offence or effective means of detection. The SFO acknowledges this; a senior SFO official recently stated publicly that “[we] must be paying bribes... New Zealanders were doing business in the same jurisdictions as US and British organisations where people were “pinged” for bribery. How can

<sup>8</sup> See: [“SFO probes two Christchurch rebuild fraud cases”](#), *3News*, 21 March 2013.

<sup>9</sup> See: [“SFO chief: Be afraid, be very afraid”](#), *The New Zealand Herald*, 28 September 2012.

we, organisations and individuals, operate in the same jurisdictions and not be paying bribes... it doesn't make any sense."<sup>10</sup>

**(a) Oil-for-Food Cases**

9. Two New Zealand companies were named by the Independent Inquiry Committee (IIC) into the U.N.'s Oil-for-Food programme. At the time of Phase 2, the Working Group expressed concerns over the absence of any investigation into the allegations and the lack of proactive response on the part of law enforcement authorities, despite the very well-publicized release of the IIC Report.<sup>11</sup> In its follow-up to Phase 2, the Working Group noted some uncertainty about the treatment of bribery aspects in one of the cases.<sup>12</sup> No further steps have been taken by New Zealand to consider the bribery aspects of this case, which is now closed.

*Commentary*

*While the lead examiners are encouraged by recent developments in New Zealand to implement the Convention, they are still seriously concerned that the level of foreign bribery enforcement actions remains low. They are also very concerned that outdated perceptions held by some individuals, including in the public sector, that New Zealand individuals and companies do not engage in bribery may undermine detection efforts. The lead examiners recommend that New Zealand significantly step up efforts to detect, investigate and prosecute foreign bribery. As is also explained in this report, the lead examiners are seriously concerned that enforcement may be hampered by the continued absence of an effective regime holding legal persons liable for foreign bribery.*

**B. IMPLEMENTATION AND APPLICATION BY NEW ZEALAND OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

10. This part of the report considers the approach of New Zealand in respect of key Group-wide (horizontal) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to country-specific (vertical) issues arising from progress made by New Zealand on weaknesses identified in Phase 2, or from changes in the domestic legislation or institutional framework of New Zealand. With regard to weaknesses identified in Phase 2, the Phase 2 recommendations and issues for follow-up are set out as Annex 1 to this report.

**1. Foreign Bribery Offence**

11. Two Phase 2 recommendations concerning the foreign bribery offence were considered not implemented by the Working Group at the time of New Zealand's written follow-up, in December 2008: recommendations 4b to amend the dual criminality exception; and recommendation 4c to clarify the routine government action (facilitation payments) exception. The intent requirements were also noted by

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<sup>10</sup> See: "[SFO receives complaint of NZ offshore bribe](#)", *The New Zealand Herald*, 13 May 2013.

<sup>11</sup> See also: New Zealand Phase 2 Report, at pp. 36 – 39.

<sup>12</sup> New Zealand Phase 2 Written Follow-up Report, at para. 10.

the Working Group as requiring further monitoring (follow-up issue 7d). The basic foreign bribery offence is provided under section 105C in Part 6 of the Crimes Act (hereinafter CA). No legislative changes have been made to the offence since Phase 2.

**(a) The “Corruptly” Intent Requirement**

12. The foreign bribery offence 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.” In Phase 2, the Working Group raised concerns about the inclusion of the term “corruptly” in the offence and its interpretation. It viewed this term as redundant because of the “intent to influence” requirement, and that it could also be perceived as inviting a particularly open-ended inquiry about intent, especially in the absence of guidelines or case law. The examiners invited New Zealand to consider replacing the uncertain “corruptly” requirement with language more specifically focused on the intent to obtain an undue advantage.

13. Different and sometimes contradictory explanations have been advanced on the meaning of the term “corruptly”. The Phase 2 report refers to domestic bribery cases, which have interpreted the term “corruptly” as requiring that the accused acted with the requisite intent to influence the public official, and that the terms “corruptly” and “intent to influence” under section 105C are accordingly in effect redundant. These cases are of less relevance in light of the more recent Supreme Court decision in *Field*. However, in Phase 3, New Zealand reiterated the argument advanced in Phase 2<sup>13</sup> that under the CA, the term “bribe” is defined in neutral terms to keep the definition as broad as possible which in turn necessitates the use of “corruptly” in section 105C to require a dishonest intention.<sup>14</sup> Hence, according to New Zealand, if the term “corruptly” was omitted from section 105C(2), the neutrally-defined “bribe” would apply to the payment of an advantage (due or undue) to an official with intent to procure a contract. This reasoning draws from the fact that the term “bribe” is not applied under New Zealand law according to its ordinary meaning. Accordingly, some “bribes” do not fall within the scope of the offence. This raises further concerns with regard to the issue of small facilitation payments, which will be addressed under sub-section 1(b)(ii) below.

14. Since Phase 2, there have been no legislative changes or guidelines issued on the “corruptly” intent requirement. While New Zealand admits that the concerns raised regarding the complexity of the term are valid, they nevertheless argue that the use of the term “corruptly” is consistent with the domestic bribery and private sector bribery offences, and has not caused any interpretive difficulties in this regard. This is without taking into consideration the evidentiary hurdles in foreign bribery cases arising from difficulties to gather evidence of facts which will, in many instances, have taken place outside of New Zealand’s territory.

15. In Phase 3, New Zealand refers to a recent Supreme Court decision which discussed the meaning of “corruptly” in the domestic passive bribery offence. In *Field v R*,<sup>15</sup> the Supreme Court held that the term “corruptly” requires a defendant to have “acted knowingly”. The Court went on to say that in the *Field* case, “this requirement required the Crown to establish that the appellant [a Member of Parliament] knew that the services he received were provided in connection with the immigration assistance he gave, meaning that he knowingly engaged in conduct which the legislature regards as corrupt”. The Court also considered the receipt of gifts of token value, which are part of the usual courtesies of life, would not be

<sup>13</sup> New Zealand Phase 2 Report, para. 159.

<sup>14</sup> Section 99 of the Crimes Act defines “bribe” as: “[...] any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect”.

<sup>15</sup> *Field v R* [2011] NZSC 129 [66].

criminally culpable (*de minimis* defence), but the knowing receipt of more than such token gifts for official actions or the performance of official duties would be culpable. The Court expressly noted that its interpretation would apply within section 103 (a domestic bribery offence) “and like provisions” which also used the word “corruptly”.

16. If this interpretation is transposed to the foreign bribery offence, it still remains unclear whether *Field* has resolved the uncertainties with regard to “corruptly”. The interpretation in *Field* may at best be limited to reaffirming the need to prove the intent to influence, as also advanced by a number of panellists during the on-site visit. It would thus only confirm the Phase 2 conclusions that the term “corruptly” is redundant.

17. The *Field* case also requires that the offender “knowingly engaged in conduct which the legislature regards as corrupt”. This may raise concerns when applied to a foreign bribery case where prosecutors may have to prove that the offender had knowledge that the conduct was considered corrupt by the foreign legislature. This could be an added evidentiary burden for the prosecution and should be followed up as case law develops.

18. Private sector lawyers met on-site generally perceived the interpretation of the term “corruptly” as broad and open to argument. The view was also expressed that not much would be lost in terms of protection of the accused if the text were to be clarified and the term “corruptly” removed. More generally, while the term was clarified in *Field*, the decision also gave rise to additional criteria of the “corruptly” intent requirement that could give rise to concerns when applied to a foreign bribery case. The establishment of the intent requirement will therefore have to be closely monitored as case law develops.

### *Commentary*

***The lead examiners are concerned by the persisting uncertainty as to the exact meaning of “corruptly”, particularly since this term might be interpreted more narrowly in the context of foreign bribery. The Working Group should follow up the application of the “corruptly” intent requirement as case law develops.***

#### **(b) Exclusions and Defences**

##### **(i) The Dual Criminality Exclusion**

19. Under section 105E CA, dual criminality operates as an “exclusion” to the application of the foreign bribery offence.<sup>16</sup> In Phase 2, the Working Group considered that this provision is inconsistent with Article 1 of the Convention which requires an autonomous foreign bribery offence, as well as Commentary 8 of the Convention.<sup>17</sup> The Working Group also found that it contravened Article 4(2) of the Convention and the exercise of nationality jurisdiction (see section 5(c) on Jurisdiction). The Working Group therefore recommended that New Zealand remove or amend the dual criminality exception in section 105E CA. At the time of the Phase 2 written follow-up, this recommendation was considered unimplemented, though some progress was noted with the drafting of a Crimes (Anti-Corruption) Amendment Bill for introduction in 2009. The proposed amendments in this Bill included a repeal of the dual criminality requirement under section 105E CA.

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<sup>16</sup> The large scope of this exception (on both the offence itself and the nationality jurisdiction) is discussed into detail under para. 166 of the Phase 2 Report.

<sup>17</sup> Article 1 of the Convention defines the foreign bribery offence and Commentary 8 of the Convention provides that: “it is not an offence...if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”

20. However, almost 5 years after the announcement of these planned amendments, the removal of the dual criminality exclusion “has yet to be progressed”, according to New Zealand. The issue remains on the Government’s work programme and is expected to be included in a legislative package focused on preventing and detecting organised and financial crime to be introduced to Parliament in 2013. In accordance with the usual Parliamentary process, the amendments will then be considered by a Select Committee which will invite submissions from the public. The Working Group will continue monitoring the legislative developments regarding the removal of the dual criminality requirement in section 105E CA.

(ii) *The Routine Government Action (Facilitation Payments) Exclusion*

21. In Phase 2, although the Working Group recognised that the Convention permits a narrow facilitation payments exception, the scope of the New Zealand exclusion for routine government action (facilitation payments) raised a number of concerns. The report considered 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, thereby significantly lessening the likelihood of both enforcement of the offence and its dissuasive effect.<sup>18</sup> The Working Group therefore recommended that New Zealand clarify the routine government action exception in section 105C(3) CA (recommendation 4c). At the time of its Phase 2 written follow-up, recommendation 4c was considered not implemented. New Zealand indicated that work had nonetheless been on-going and that reform in this area could be conducted in the same Bill as the one that included repeal of the dual criminality requirement in section 105E CA, as discussed above.

22. However, once again, almost 5 years after announcing proposed amendments on small facilitations payments, these “have yet to be progressed” according to New Zealand. When asked whether they have alternatively considered further clarifying the scope of the offence through other means (e.g. issuing guidelines), New Zealand authorities stated that in general in New Zealand, the Government does not issue guidance on the criminal law. They also said that they have not done so because they do not want to attract the attention of the public to the small facilitation exclusion. They further stated that issuing guidance may give the false impression that the Government condones the act. These considerations do not persuasively outweigh the benefits of clarifying the scope of the exclusion through some form of guidance to counter the risk that bribe payments fall through the cracks. Moreover, the approach taken by New Zealand has been, until very recently, in the opposite direction to the 2009 Recommendation which provides that, in view of the corrosive effect of small facilitation payments, Member countries should encourage companies to prohibit or discourage the use of small facilitation payments.<sup>19</sup> In late September 2013, New Zealand indicated that the SFO recently started discouraging small facilitation payments in its awareness raising efforts, including through training that has been made available to businesses.

23. Nonetheless New Zealand states that amendments on small facilitation payments remain on the Government’s work programme and are to be included in the above-mentioned legislative package focusing on preventing and detecting organised and financial crime. In contrast with the dual criminality exclusion, the small facilitation exclusion is not planned to be repealed. New Zealand indicated that the Cabinet has agreed that the definition of a “routine government action” in section 105C(3) CA will be clarified so that the facilitation payment exclusion will not cover instances where the payment provides either an undue material benefit to the person making the payment, or an undue material disadvantage to any other person. New Zealand specified that the purpose of this change is to clarify that the payment of small sums of money in return for the performance of a function or service are legitimate, provided the

<sup>18</sup> See: New Zealand Phase 2 Report, para. 172 *at al.*

<sup>19</sup> New Zealand has not taken steps in its awareness-raising efforts to fulfil this obligation (see also section B.7).

payment does not otherwise influence the person or company's entitlement to that service. These provisions clarifying such payments will be introduced into Parliament by the end of 2013.

24. New Zealand further specified that the amended facilitation payments exclusion will not cover instances where informal payments are illegal in a country. This could in theory narrow the scope of the exclusion as such payments are generally illegal in the countries where they are made but raises additional concerns on the burden of proof that would fall on the prosecution. The status of small facilitation payments as an exclusion rather than a defence will remain unchanged, which implies that the prosecution will have to demonstrate beyond any reasonable doubt that the payment under scrutiny is not a "routine government action" (and hence is not excluded from the scope of the offence).<sup>20</sup> This requires a very clear definition of the scope of the exclusion, which the above-mentioned planned amendments are unlikely to fully achieve.

25. A definition of what should be considered as "small" is not contemplated in the currently planned amendments. Lawyers met on-site held the view that the determination of what may be considered as "small" will, in each case, be examined contextually and could refer to the relative size of the bribe in comparison to the benefit received. They also stressed that these "small" amounts may be accumulated over a period of time and that this exclusion should not be confused with the "*de minimis*" exception set in the *Field* case.<sup>21</sup>

#### **Commentary**

*The lead examiners are seriously concerned that 7 years after the adoption of New Zealand's Phase 2 report, none of the significant weaknesses identified in New Zealand's foreign bribery offence have been addressed. They regret the low level of priority given by New Zealand to proceeding with the amendments on both the removal of the dual criminality exclusion and the clarification of the routine government actions (small facilitation payments). They note that these legislative changes are expected to be introduced into Parliament this year. The lead examiners urge New Zealand to proceed, as a matter of priority with the planned amendments to remove the dual criminality exception in section 105E of the Crimes Act.*

*They also urge New Zealand to proceed with the implementation of Phase 2 recommendation 4c to clarify the routine government action (facilitation payments) exception in section 105C(3) of the Crimes Act, 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. They further recommend that New Zealand, in its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, consider the views of the private sector and civil society.*

## **2. Responsibility of Legal Persons**

26. In Phase 2, the Working Group considered that the regime of liability of legal persons for foreign bribery in New Zealand is inconsistent with Article 2 of the Convention and recommended that New Zealand broaden the criteria for the criminal liability of legal persons for foreign bribery (recommendation 4a). At the time of New Zealand's written follow-up, the Working Group found the recommendation unimplemented. The Group expressed its serious concern that New Zealand had not rectified this

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<sup>20</sup> See: New Zealand Phase 2 Report, para. 177.

<sup>21</sup> *Ibid.*

deficiency and noted the continued absence of an effective regime of criminal liability. New Zealand states that there have been no changes to its liability of legal persons regime since Phase 2.

27. During the on-site visit, the Ministry of Justice (MOJ) announced that the regime of liability of legal persons (across the entire criminal law) would be considered by the Law Commission, an independent consultative body, which would submit an issues paper to the Government, including proposals to review legislation, if needed. The whole process was expected to take about two years before the parliamentary stage of the legislative process would start. At the time of the on-site visit, the terms of reference for the consultation had not yet been drafted. While this report was about to be finalised, the MOJ indicated that a revision focusing on the narrower issue of the liability of legal persons for foreign bribery specifically would be considered by the MOJ within a shorter time frame, i.e. by the end of 2013.

**(a) Standard of Corporate Liability and Level of Requirement of Natural Person's Liability**

**(i) Continued Application of the Identification Theory**

28. Since Phase 1, New Zealand has consistently asserted that legal persons can be held liable for certain criminal offences, including foreign bribery. The liability of legal persons in New Zealand derives in part from section 2 CA which defines "person" and like terms to include both incorporated and unincorporated bodies of persons. In turn, the foreign bribery offence refers to "everyone" or to "persons" and thus applies to legal persons. In addition, section 105D CA (which provides for extraterritorial effect of the foreign bribery offence) explicitly applies to bodies corporate and corporations sole. While those provisions allow legal persons to be held liable for economic offences, neither a general provision nor the foreign bribery statute addresses the criteria for corporate liability. In Phase 2, the Working Group found that this contrasted with the statutory regimes of corporate liability for a number of regulatory offences otherwise adopted by New Zealand, which had given rise to prosecutions and convictions.<sup>22</sup>

29. In its responses to Phase 3 questionnaires, New Zealand reiterated the information provided in Phase 2 - that the principles of attribution of liability are grounded in the *Tesco Supermarkets Ltd. v Natrass* decision.<sup>23</sup> The *Tesco* decision establishes a regime for the liability of legal persons that is based on the identification theory, which implies that only the acts of natural person(s) constituting the company's directing mind can trigger the liability of the legal person. These natural persons are exclusively the persons with the highest level managerial authority, i.e. the board of directors, the managing director and perhaps other senior officers of a company who speak and act as the company. Under the *Tesco* test, lower level employees are unlikely to qualify, regardless of whether the company failed to take any measure to attempt to prevent such activity. This does not allow for the identification of an aggregated *mens rea*. 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.

30. During the on-site visit, however, a lawyer from the private sector stated that *Tesco* was no longer the leading authority under New Zealand law, and that the establishment of corporate liability is now based on the Privy Council case of *Meridian Global Funds Management Asia v Securities Commission*.<sup>24</sup> Subsequently, representatives from the MOJ confirmed this approach. The potential alternative theoretically offered by this case was discussed in Phase 2. The Working Group concluded that

<sup>22</sup> See examples in New Zealand Phase 2 Report, para. 185 (e.g. reference to the Fair Trading Act 1986 and the Commerce Act 1986).

<sup>23</sup> The UK House of Lords decision in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

<sup>24</sup> *Meridian Global Funds Management Asia v Securities Commission* [1995] UKPC 5.

it has not given rise to any significant evolution of the common law standard for intentional offences.<sup>25</sup> The Working Group had reached the same conclusion in the United Kingdom Phase 2 evaluation.<sup>26</sup> The test for attribution under the *Meridian* case depends on the purpose of the provisions creating the relevant offence rather than on the search for a directing mind. It suggests that a somewhat broader test than the *Tesco* test could be appropriate. However, *Meridian* involved a statutory regulatory offence relating to a securities law disclosure, not a conventional crime. Moreover, a significant problem with the application of the *Meridian* test to bribery offences is the difficulty of identifying the purpose of the offence and how this purpose would allow identification of the relevant group of individuals in a legal person. During the on-site visit, discussions with the SFO, lawyers, academics and representatives from the private sector did not help clarify this issue. Panellists rather consistently expressed the view that the persons likely to trigger the liability of legal persons are those with the highest level managerial authority, some even expressly referring to the “directing mind” which corresponds to the *Tesco* theory. This reflects persistent uncertainty with regard to the level of authority of the person likely to trigger the liability of a legal person and further demonstrates a need for clarification.

31. Since Phase 2, Parties to the Convention committed to depart from the identification theory with the adoption of the 2009 recommendation Annex 1, which provides guidance on effective approaches to corporate liability. During the on-site visit, discussions with prosecutors and representatives of the legal professions confirmed that the failure to supervise a lower level person and the failure to implement adequate internal controls, ethics and compliance measures would not trigger the liability of a legal person under current regime of corporate liability. New Zealand’s approach to the liability of legal persons (whether through the *Tesco* or the *Meridian* test) is therefore not in line with either of the two approaches recommended under Annex 1 B) of the 2009 Recommendation with regard to the natural person whose conduct triggers the liability of legal persons.

(ii) *Liability of Shell Companies*

32. Cases have emerged where shell companies were being established in New Zealand as a conduit for illegal activity.<sup>27</sup> Recently, New Zealand shell companies have been reported as being fronts for international laundering of drug money, fraud and terrorism.<sup>28</sup> As mentioned above, one on-going foreign bribery case in another State Party to the Convention involves foreign bribe payments allegedly made through New Zealand shell companies.

33. Given the ease with which shell companies may be created in New Zealand and the role these companies may potentially play – and have played – in transnational crime,<sup>29</sup> the availability of an effective corporate liability regime in New Zealand is particularly crucial (see also discussion under sections A.4 and A.5). The serious deficiencies of the current corporate liability regime and/or of the possibility for New Zealand to exercise jurisdiction over these companies creates a serious loophole in the joint effort of the Parties to the Convention to fight transnational bribery. This issue has become of particular relevance to foreign bribery with the *Technology Company Case*, currently on-going in another State Party to the Convention, and which allegedly involves foreign bribe payments made through New Zealand shell companies.

<sup>25</sup> See: New Zealand Phase 2 Report, para. 184.

<sup>26</sup> See: UK Phase 2 Report, paras. 197-200.

<sup>27</sup> See, for example: “Global Shell Games: Testing Money Launderers’ and Terrorist Financiers’ Access to Shell Companies” (Sharman, J. et al.), Griffith University, 2012.

<sup>28</sup> [“NZ Shell Companies Further Exposed”](#), *Business Day*, 26 November 2012.

<sup>29</sup> See, for example: “[http://www.readymadeshelfcompany.com/nominee\\_director.html](http://www.readymadeshelfcompany.com/nominee_director.html) or <http://www.lowtaxcompany.com/en/our-offshore-tax-services/nominee-services>

34. Discussions with the SFO and representatives of the legal profession during the on-site visit highlighted the impact of the identification theory where it comes to establishing the liability of shell companies. Under the current regime of corporate liability, in the absence of a resident director in New Zealand, no legal action is in practice undertaken against the shell company itself. This is the reason why, in the above mentioned *Technology Company Case*, the SFO stated that it has not investigated the allegations, as no information is available as to who may be behind the shell company.

35. Awareness of this issue has recently increased in New Zealand and has attracted significant media attention.<sup>30</sup> New Zealand indicated that the Minister of Business Innovation and Employment (MBIE) introduced to Parliament in October 2011 the Companies and Limited Partnerships Amendment Bill. The Bill, which is now in the final stages of Parliamentary discussion, amends the Companies Act 1993 and the Limited Partnerships Act 2008. If passed into law, all companies will be required to have at least one director resident in New Zealand, or in a country where New Zealand has reciprocal arrangements for the enforcement of low-level criminal fines (e.g. Australia). This will provide an identifiable individual with a substantive connection to the company who can be questioned about activities of the company and who can, in certain circumstances, be held to account. While the Bill addresses the issue of the nominee directors, it does not directly address the issue of the liability of the shell companies themselves and the liability of their corporate beneficial owners.

**(b) *Absence of Prosecution of Legal Persons for Foreign Bribery***

36. No legal persons have been charged or sanctioned for either domestic or foreign bribery in New Zealand. During the on-site visit, the SFO explained that in a domestic bribery case, an investigation was not opened because the SFO did not obtain the required evidence. New Zealand however stressed that had the allegation been supported by evidence, then charging the legal person may have been appropriate, given the nature of the case “which potentially involved management throughout an organisation allegedly involved in paying backhanders”.

37. There is only one case of corporate liability for other intentional economic offences under the CA. This is a case of money laundering mentioned by New Zealand after the on-site visit for which the defendant company pleaded guilty (therefore a full judgement as to the liability is not available). New Zealand was asked to clarify the reasons why legal persons were not charged or sanctioned in seven listed large domestic cases concerning intentional economic offences. In five out of the seven cases, the reason given was that the cost of proceeding with cases against these companies would have outweighed the value of financial or other assets recovered. Information provided by New Zealand after the on-site visit shows that companies have been held liable for other crimes under the CA, although in a limited number of instances.<sup>31</sup> The figures provided by New Zealand indicate that while a number of legal persons have been

<sup>30</sup> For instance, in 2012, the [Guardian published a list of 28 nominee directors](#), including 15 who were on a combined 113 New Zealand companies. The Guardian also published this [data table](#), which shows [a group of 28 nominee directors controlling no fewer than 21,500 companies](#) in three continents.

<sup>31</sup> During the on-site visit, no panellist was able to identify a case where a legal person had been sanctioned for an intentional offence (including for non-economic offences) under the Crimes Act. However, after the on-site visit, New Zealand authorities provided information on four cases where legal persons had been convicted between 1932 and 1996 under this Act, but not for economic intentional offences. It is not clear which of these four cases genuinely required proof of *mens rea* (at least two cases involved automatic liability with a possible defence of absence of *mens rea*: a completely different situation in terms of burden of proof) and the others here again illustrate the identification theory. After the visit, New Zealand also indicated that the Ministry of Justice records show that, between 1 January 2008 and 31 December 2012, 29 legal persons were prosecuted for offences under the Crimes Act. Of those, seven were convicted (for multiple offences) for offences under sections 145 (criminal nuisance), 228 (dishonestly taking or using a document), 243 (money laundering), and section 66 (aiding and abetting).<sup>31</sup> Neither the Court decisions nor

prosecuted since 2008, only a small proportion of these were in the end convicted (7 out of 29 between 1 January 2008 and 31 December 2012).

### *Commentary*

*In the absence of legislative or case law developments since Phase 2, the lead examiners reiterate the Working Group's Phase 2 finding that the restrictive rules under which bribery is attributed to legal persons in New Zealand does not allow for effective prosecutions of such entities.*

*After 12 years since the entry into force of the Convention in New Zealand, the lead examiners are alarmed by the continued absence of an effective regime of liability of legal persons for foreign bribery, and by the continued breach of Article 2 of the Convention. They further note the lack of steps taken to address this major loophole and to implement the Phase 2 recommendation to broaden the criteria for liability of legal persons for foreign bribery.*

*Against this background, they strongly urge New Zealand to review its system of liability for legal persons for foreign bribery as a matter of priority, to ensure that the criteria for such liability are broadened and that the system takes one of the approaches described in Annex 1 to the 2009 Recommendation. In this regard, they encourage New Zealand to accelerate the re-evaluation process.*

## **3. Sanctions for Foreign Bribery and Related Offences**

### **(a) Sanctions for Natural Persons**

#### **(i) Alternative Imprisonment or Pecuniary Sentence**

38. Under section 105C CA, the penalty for natural persons for foreign bribery is a term of imprisonment not exceeding seven years. Alternatively, instead of being sentenced to imprisonment, the offender may be sentenced to pay a fine (section 39(1) of the Sentencing Act 2002).<sup>32</sup> It is not possible to impose both an imprisonment and a pecuniary sentence for foreign bribery. This is also the case for domestic bribery. However, the possibility does exist for other offences.<sup>33</sup> There is no maximum fine for the foreign bribery offence under the law.<sup>34</sup>

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the names of the companies could be provided by New Zealand. Subsequently, the New Zealand government agreed to amend the law to include a presumption that final written judgments of all courts will be published online, unless there is good reason not to do so. This should provide greater transparency and accessibility to information about convictions of both legal and natural persons for foreign bribery (and other offences).

<sup>32</sup> 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].

<sup>33</sup> 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.

<sup>34</sup> 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.

39. In Phase 2, the Working Group recommended that New Zealand consider permitting the imposition of both fines and imprisonment for foreign bribery offences (recommendation 6b). At the time of New Zealand's written follow-up, the Working Group found that New Zealand had adequately considered the issue, and found the recommendation satisfactorily implemented, even though it led to a decision to leave the penalty system unchanged. The Working Group decided that it should continue to monitor the level of sanctions, including confiscation, applied in foreign bribery cases (follow-up issue 7b).

40. The fact that fines against natural persons are available only as an alternative to jail sentences continues to raise concerns, and the lead examiners in Phase 3 decided to re-visit the issue. In recent country evaluations, the Working Group has also concluded that similar provisions in other countries raise two issues. First, fines alone may not be sufficiently effective, proportionate and dissuasive.<sup>35</sup> Second, monetary sanctions are a fundamental deterrent for economic offences such as foreign bribery.<sup>36</sup> The limited availability of such penalties may affect the effective, proportionate and dissuasive character of New Zealand's sanctions for foreign bribery.

(ii) *Conversion into Home Detention*

41. Prison sentences can no longer be suspended in New Zealand, although a third of the sentences may be served on parole under certain conditions (as provided under sections 20-32 of the Parole Act 2002). Prison sentences of two years or less may be converted to home detention. However, according to New Zealand, given the maximum term of imprisonment for foreign bribery is seven years, home detention is "unlikely to be imposed in many, if any, cases."

(iii) *Sentences Imposed in Practice*

42. New Zealand has not sanctioned natural persons for foreign bribery in practice but information on sanctions for domestic corruption may offer some guidance. In Phase 2, the figures provided for domestic bribery indicate that in over 50% of cases, the sentence resulted in the discharge of the natural person (24 out of 44 sentences pronounced); and where penalties were imposed, the very large majority were in the form of prison sentences (only 1 case out of 44 resulted in the imposition of a fine).<sup>37</sup> After the on-site visit, New Zealand stated that between 2006 and 2012, there have been 17 convictions (out of 32 prosecutions) for domestic bribery offences under the CA. Of these, nine resulted in imprisonment, and no cases were discharged. No monetary sanctions were imposed.

43. During the on-site visit, SFO prosecutors as well as of the legal profession generally held the view that the level of sanctions available against natural persons for foreign bribery is theoretically sufficiently deterrent. A SFO representative also explained that imposing an imprisonment penalty is always the starting point and that it is only in the presence of mitigating factors that imposition of a fine will instead be considered. Given that there is no maximum fine for the foreign bribery offence under the law, he anticipated that "massive fines" would be imposed for this offence. This remains to be seen as case law develops.

<sup>35</sup> See: Phase 3 Reports of Spain (para. 68); Greece (para. 47) and Portugal (para. 55).

<sup>36</sup> See: Phase 3 Report of Italy, (paras. 54-60), and recommendation 3a.

<sup>37</sup> The statistics for fraud showed 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.

*Commentary*

*As no sanctions have been imposed in relation to the foreign bribery offence to date, the lead examiners consider that it is not possible to fully assess whether New Zealand's sanctions regime is in practice effective, proportionate and dissuasive. The lead examiners are concerned that monetary penalties can only be applied against natural persons for foreign bribery as an alternative to imprisonment. They therefore recommend that New Zealand make both imprisonment and fines available as sanctions against natural persons for foreign bribery.*

*The lead examiners also recommend that the Working Group continue to follow up whether the sanctions imposed against natural persons for foreign bribery are effective, proportionate and dissuasive.*

**(b) Sanctions for Legal Persons**

44. In Phase 2, the Working Group recommended that New Zealand ensure that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions (recommendation 6a). At the time of New Zealand's written follow-up, this recommendation had not been implemented. The Working Group noted that criminal sanctions remain of little impact in the absence of an effective regime of criminal liability.

45. 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. Aggravating and mitigating factors are set out under the Sentencing Act and apply to both natural and legal persons. In Phase 2, the examiners were concerned about the discretionary nature and uncertainty of the sanctions on legal persons for foreign bribery. The calculation of fines should therefore be followed up as practice develops.

46. The Phase 2 report noted that, based on data provided at the time, it appeared that convicted legal persons may frequently escape sanction.<sup>38</sup> Figures provided by New Zealand after the Phase 3 on-site visit, confirm this analysis; while more legal persons appear to have been prosecuted since 2008, only a small proportion of these were ultimately convicted (7 out of 29 between 1 January 2008 and 31 December 2012). Of the seven legal persons convicted, three were discharged, and the remaining four received fines. The highest fine imposed among the four was NZD 102 400 (EUR 62 000) for a money laundering offence.

47. During the Phase 3 on-site visit, an SFO representative stated that the level of sanctions imposed in practice for other offences may not be sufficiently deterrent for large companies, although he was confident that confiscation measures now available under the new Criminal Proceeds (Recovery) Act 2009 (CPRA) offer the possibility to confiscate large sums of money (see discussion below on confiscation). This view was also shared by other panellists. However, at the time of the drafting of this report, a legal person has yet to have the profits obtained from a bribe confiscated, even in the domestic arena.

**(c) Additional Civil and Administrative Sanctions**

48. As indicated in Phase 2, 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, including foreign bribery. 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

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<sup>38</sup> See Phase 2 report, para. 198.

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 or allowing participation in contract opportunity (see discussion under section B.11 on Public Advantages).

### *Commentary*

*The lead examiners recommend that, in connection with the revision of its system of corporate criminal liability for foreign bribery, recommended under section B.2 above, New Zealand (i) ensure that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions as recommended by the Working Group in Phase 2 (recommendation 6a); and (ii) revisit the possibility to make available additional sanctions for legal persons to ensure effective deterrence.*

*The lead examiners further recommend that New Zealand maintain statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive.*

## **4. Confiscation of the Bribe and the Proceeds of Bribery**

49. In Phase 2, the Working Group recommended that New Zealand 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 (recommendation 6c). A problem identified in Phase 2 was that confiscation was available on a discretionary basis, and only provided when a conviction has been pronounced. At the time of New Zealand's written follow-up, recommendation 6c had not been implemented, although the Working Group noted that a Bill was in progress.

### **(a) New Civil-based Asset Confiscation Regime**

50. In 2009, New Zealand enacted the CPRA which establishes a civil-based asset-confiscation regime. Under the CPRA, assets can now be restrained or forfeited regardless of the existence or outcome of criminal proceedings where it can be shown that they were derived from "significant criminal activity", which covers the foreign bribery offence.<sup>39</sup> The test to determine whether assets should be forfeited is the lower civil test requiring proof on the balance of probabilities rather than the higher criminal test requiring proof beyond reasonable doubt.

51. The 2009 CPRA also led to the creation of the Police Asset Recovery Unit (ARU) in October 2009. The ARU is located within the New Zealand Police (NZP) (rather than within the SFO as initially contemplated) in four separate regional offices (Auckland, Hamilton, Wellington and Christchurch), all under the authority and coordination of the ARU National Manager and his team. There are currently 38 staff members within the ARU, including investigators, forensic accountants, and financial analysts in each regional office. New Zealand authorities stress that the SFO and the ARU collaborate on cases to ensure that all sanctions are considered and applied where appropriate, and that both the SFO and the ARU work closely with Inland Revenue.

52. The CPRA can be used in conjunction with a mutual legal assistance request to restrain or forfeit assets that are located in New Zealand, but are derived from a crime committed in a foreign state. The

<sup>39</sup> A "significant criminal activity" is defined as (i) activity punishable by five years' imprisonment; or (ii) activity from which assets with a value of NZD 30 000 have been derived. Foreign bribery being punishable by seven years' imprisonment this definition encompasses the foreign bribery offence.

availability of conservatory measures to seize both the bribe and the proceeds of the bribe was confirmed on-site. ARU representatives also confirmed the possibility to confiscate the monetary equivalent of the bribe if the bribe is no longer in New Zealand.

53. However, a problem identified in Phase 2 was that guidelines did not exist on how to quantify the proceeds or benefits of an offence. While this concern should to an extent be alleviated by the expertise available under the ARU and the increase in the amounts confiscated since its creation (see below), such guidelines still did not exist at the time of the on-site visit. The absence of such guidelines could also raise specific issues in the context of foreign bribery, where the proceeds of a bribe would usually derive from a contract obtained through unlawful payments and may therefore be difficult to evaluate.

**(b) Confiscation in Practice**

54. At the time of Phase 2, forfeiture orders appeared to have been rarely imposed in respect of corruption or other economic crime cases. Between 1995 and July 2003, only NZD 8.84m (EUR 5.4m) in assets had been confiscated through 57 forfeiture orders. Since the CPRA came into effect, NZP (through ARU) have obtained forfeiture orders over assets worth an estimated NZD 28.8m (EUR 17.6m) (i.e. over three times more).<sup>40</sup>

55. New Zealand states that the SFO has prosecuted a case where a private individual paid a bribe of NZD 160 000 (EUR 98 000) to a public official (*R v Mason*)<sup>41</sup>. NZD 160 000 (EUR 98 000) was recovered from the recipient, and a further NZD 205 000 was recovered from the payer. Furthermore, the profits from the payer's transaction were assessed differently for tax purposes and a further NZD 100 000 (EUR 61 000) was recovered. The tracing was done by forensic accountants using information provided under compulsion from financial institutions in New Zealand. While the CPRA also allows for civil recovery from legal persons, this possibility had never been used to confiscate the profits obtained from a bribe, even in the domestic arena, at the time this report was drafted.

**Commentary**

***The lead examiners welcome the establishment of a new civil-based asset confiscation regime as well as the creation of the Police Asset Recovery Unit (ARU) with the entry into force of the Criminal Proceeds (Recovery) Act 2009 (CPRA). They commend New Zealand for progress achieved in this area since Phase 2. However, the lead examiners note with concern that, to date, the profits obtained from a bribe have never been confiscated from a legal person, even for domestic bribery. They encourage New Zealand to make full use of the large range of asset confiscation tools offered under the CPRA, and to consider issuing guidelines on how to quantify the proceeds or benefits of a foreign bribery offence.***

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<sup>40</sup> Data provided by New Zealand as of 13 May 2013.

<sup>41</sup> [“Public servant admits accepting \\$160k bribe”](#), *The National*, 16 February 2011.

See also: *R v Hutt* [2012] NZHC 593 below for further details on the facts of the case. This case has suppression orders and a copy of the sentencing notes was not made available.

## 5. Investigation and Prosecution of the Foreign Bribery Offence

### (a) Principles of Investigation and Prosecution

#### (i) Enforcement Agencies and Co-ordination

56. The SFO is responsible for the investigation and prosecution of foreign bribery. It is a statutory body separate from the NZP. The SFO is primarily an investigative agency and draws on an external panel of prosecutors, which includes Queens Counsel and Crown Solicitors.<sup>42</sup>

57. At the time of New Zealand's Phase 2, there was discussion that a Serious Fraud Taskforce within the Organised and Financial Crime Agency of New Zealand (OFCANZ) would subsume the work of the SFO. However, it was ultimately decided that the SFO be retained as a stand-alone agency with primary responsibility for corruption offences. New Zealand states that the retention of the SFO as a stand-alone agency highlights the Government's intention to take corruption seriously.

58. In Phase 2, the WGB recommended that New Zealand ensure that the SFO receives all allegations of foreign bribery. Since Phase 2, a Memorandum of Understanding (MOU) between the SFO and the NZP was renewed in September 2011. The MOU outlines the processes for reporting and enforcing bribery and corruption offences. It expressly states that all allegations of bribery and corruption offences should be referred to the SFO. Where NZP receive notifications of bribery or corruption, the information will be referred to the SFO to initiate a joint assessment process. All reports are considered by the SFO and within ten working days of receiving the referral, the SFO will contact the NZP to jointly assess the report and determine whether an investigation is warranted. The SFO would take the lead on foreign bribery investigations, but the investigation could draw on resources from the NZP, OFCANZ and/or other agencies.

#### (ii) Initiating and Terminating Cases

59. The SFO's priority of cases expressly includes "matters of bribery and corruption."<sup>43</sup> The SFO states that the primary criterion in deciding whether to take on a case is the public interest. While the monetary value of the offence is taken into account in fraud cases, the SFO confirmed at the on-site visit that financial criteria would not apply to cases of corruption, including foreign bribery.

60. The Evaluation and Intelligence team within the SFO conducts preliminary evaluations of complaints received. The team assesses each case and determines whether to recommend the formal opening of an investigation or to refer the matter to other agencies. To open a formal investigation, the team must also establish sufficient evidence to give the Director of the SFO "reason to suspect that an investigation may disclose a serious or complex fraud."<sup>44</sup> The SFO states that this is not a high threshold, and that an investigation may be opened on the basis of media reports, as was done in the *Export/Import Company Case*. The decision to open an investigation can only be taken by the Director in consultation with senior management and general counsel. In foreign bribery investigations, such consultations would also include the NZP. Decisions to discontinue foreign bribery investigations would be conducted in the same, consultative manner.

<sup>42</sup> Crown Solicitors are legal practitioners in private practice responsible for the prosecution of jury trials in the High and District Courts.

<sup>43</sup> Other priority cases include multi-victim investment fraud; fraud involving those in important positions of trust; and any other case that could significantly damage New Zealand's reputation for a fair and free financial market. See: <http://www.sfo.govt.nz/about>

<sup>44</sup> Section 4, SFO Act.

61. As highlighted throughout this Report, there have been no foreign bribery prosecutions to date in New Zealand. The two cases currently under investigation were only recently opened in July 2013. Detection levels of foreign bribery are also very low. However, as the SFO itself acknowledges, this is not likely to be due to the fact that New Zealand companies are not engaging in foreign bribery.<sup>45</sup> In efforts to increase detection levels, the SFO has engaged in a number of foreign bribery awareness-raising events (see also discussion under section B.10). The SFO states that it has also been actively working with overseas agencies to solicit foreign bribery referrals where relevant, and has developed close working relationships with the UK Serious Fraud Office and Australian Federal Police (AFP) in this regard. In August 2013, the SFO indicated that it also planned to formally approach the other State Party to the Convention involved in the *Technology Company Case*.

#### *Commentary*

***The lead examiners strongly recommend that New Zealand continue to take all necessary measures to ensure that it assesses all credible allegations of foreign bribery and seriously investigates complaints of this crime. They also encourage New Zealand to continue to pursue its efforts to increase detection levels by strengthening and expanding the SFO's working relationships with foreign law enforcement authorities.***

#### *(iii) Investigative Techniques*

62. In Phase 2, the Working Group recommended that New Zealand make effective investigative means available in foreign bribery investigations, and provide a framework for access to information stored on computers (recommendation 3c). As noted in Phase 2, the SFO has been granted specific investigative powers under the SFO Act. In 2012, New Zealand also enacted the Search and Surveillance Act (SSA) which allows law enforcement authorities to avail themselves of special investigative techniques in foreign bribery cases. These include: (i) visual surveillance involving entry onto private property; (ii) audio surveillance and interception devices; (iii) visual surveillance not involving trespass; and (iv) use of tracking devices. The SFO confirms that powers under both the SSA and the SFO Act allow for access to information stored on computers, including banking and financial information.<sup>46</sup> While the SFO cannot invoke the powers under the SSA on its own, it can indirectly obtain such information when conducting an investigation jointly with NZP or OFCANZ. Training on the provisions of the SSA has been provided to investigators, prosecutors and judges. According to New Zealand, the SSA is expected to strengthen the detection and investigation of foreign bribery.

#### *Commentary*

***The lead examiners welcome the adoption of SSA and the availability of special investigative techniques for foreign bribery cases. They encourage New Zealand to make full use of these powers in conducting its foreign bribery investigations.***

#### *(iv) Prosecutorial Discretion and Article 5*

63. Prosecutions are conducted in accordance with the Solicitor-General's Prosecution Guidelines ("SG Guidelines"). The Guidelines, which are mandatory, state that prosecutions are to be initiated or continued only where: (i) the evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction (evidential test); and (ii) prosecution is required in the public interest (public interest

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<sup>45</sup> See: ["SFO receives complaint of NZ offshore bribe"](#), *The New Zealand Herald*, 13 May 2013.

<sup>46</sup> Sections 110(h) and 130, SSA.

test). The evidential test must be satisfied before the public interest test is considered. There is no statute of limitations for the foreign bribery offence.

64. In Phase 2, the WGB was concerned that some of the public interest elements listed in the SG Guidelines could contravene Article 5 of the Convention.<sup>47</sup> These factors included: “the effect of a decision not to prosecute on public opinion, whether the prosecution might be counter-productive, the availability of proper alternatives to prosecution, and the likely length and expense of the trial.” New Zealand authorities stated that these factors would not be interpreted contrary to the meaning of Article 5, and highlighted section 3.3.4 of the Guidelines which stated that a decision not to prosecute must clearly not be influenced by “possible political advantage or disadvantage to the Government or any political organisation.” According to New Zealand, this would rule out the possibility of taking into account considerations of relations with another State. The Working Group nevertheless recommended that New Zealand ensure that Article 5 considerations do not influence the investigation and prosecution of foreign bribery cases, and “in this respect, amend the Solicitor General’s Prosecution Guidelines” (recommendation 3f).

65. New Zealand updated the SG Guidelines in 2010 and 2013, and removed the public interest factors of concern to the WGB in Phase 2. The SG Guidelines also now list as one of the public interest considerations for prosecution “where there is any element of corruption.”<sup>48</sup> However, the updated Guidelines also list new public interest considerations against prosecution which may contravene Article 5 of the Convention. For example, section 5.9.12 lists as a factor tending against prosecution “where information may be made public that could disproportionately harm sources of information, international relations or national security.” The updated Guidelines have also removed former section 3.3.4., which could have helped clarify that considerations of relations with another State are not to be taken into account. New Zealand states that section 3.3.4. was replaced with more general provisions on prosecutorial independence, including express reference to the UN Guidelines on the Role of the Prosecutor and International Association of Prosecutors’ Standards.<sup>49</sup> However, these provisions do not clearly address all of the considerations prohibited by Article 5 of the Convention. At the on-site visit, prosecutors stated that section 5.9.12 would never outweigh the public interest considerations to prosecute in foreign bribery cases. Nevertheless, for legal certainty, the SG Guidelines would benefit from further clarification to ensure that its provisions cannot be construed in a way that may contravene Article 5 of the Convention.

### *Commentary*

***The lead examiners remain concerned that the SG Guidelines list as factors tending against prosecution considerations that are prohibited under Article 5 of the Convention. They recommend that New Zealand take steps to clearly ensure that the SG Guidelines cannot be interpreted contrary to Article 5 of the Convention. They also recommend that New Zealand raise awareness of the considerations prohibited by Article 5 of the Convention to prosecutors.***

#### (v) *Attorney General’s Consent*

66. Section 106(1) CA requires the consent of the Attorney General for foreign bribery prosecutions. This was an issue of concern to the WGB in both New Zealand’s Phase 1 and 2 Reports. In Phase 2, the

<sup>47</sup> Article 5 of the Convention states that the investigation and prosecution of foreign bribery “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

<sup>48</sup> Prosecution Guidelines (2010), section 6.8.13.

<sup>49</sup> See: Sections 4.1 and 4.2 of the SG Guidelines, and the UN Guidelines on the Role of the Prosecutor and International Association of Prosecutors’ Standards.

Working Group recommended that New Zealand remove the requirement for the Attorney General's consent for foreign bribery (recommendation 2f).

67. New Zealand has not removed the requirement that the Attorney General consent to foreign bribery prosecutions. New Zealand reiterates the reasons advanced in prior evaluations for this requirement; namely, the general principle under New Zealand law that extraterritorial offences require the Attorney General's consent, and that the requirement prevents frivolous, vengeful or political use of criminal provisions in prosecutions.<sup>50</sup> New Zealand further explains that the latter is particularly relevant in its jurisdiction, where private prosecutions are possible, and that the rationale was confirmed in *Burgess v Field* (2007), which concerned corruption charges against a member of Parliament.<sup>51</sup> The Court accepted that members of the Executive and Parliament are likely to be more susceptible to ill-founded, vexatious or politically-motivated allegations of corruption than public officials or members of the judiciary. However, the relevance of this rationale remains doubtful when applied to foreign bribery cases, where companies or private individuals would be the more likely focus of prosecutions. In addition New Zealand highlights procedural safeguards that were also in place in Phase 2: namely, the practice that the consent function is delegated to the Solicitor-General or Deputy Solicitors-General who are senior public servants and act independently of the political process.

68. New Zealand states that the consent requirement applies to over 110 offences across 41 Acts. It also states that the SFO has commenced a number of domestic corruption prosecutions in which consent has never been refused. New Zealand further highlights that all decisions made by the Attorney General, including a decision not to prosecute, may be subject to judicial review. New Zealand is unaware of any application for judicial review of a consent decision ever having been brought, but states that the courts would be reluctant to interfere with the exercise of the Attorney General's discretion to consent, as they are typically reluctant to interfere in decisions to prosecute.<sup>52</sup>

### *Commentary*

*The lead examiners note the procedural safeguards in place whereby the Attorney General's consent function is delegated in practice to the Solicitor-General or Deputy Solicitors-General, who are non-political appointees. However, to avoid any potential risk of political interference, the lead examiners reiterate Phase 2 recommendation 3f that New Zealand remove the requirement of the Attorney General's consent for the prosecution of foreign bribery cases.*<sup>53</sup>

### *(b) Resources and Training*

69. The SFO is comprised of 53 officers. In July 2010, the SFO appointed a General Manager for Fraud and Corruption, who is responsible for foreign bribery cases. The General Manager oversees a team of approximately 20 investigators, forensic accountants and investigating lawyers, all of whom are dedicated to the investigation and prosecution of bribery, corruption and fraud. The SFO's current total annual budget is approximately NZD 10m (EUR 5.9m). The SFO states that its current level of financial

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<sup>50</sup> New Zealand Phase 2 report, at pp. 41-42.

<sup>51</sup> *Burgess v Field* [2007] NZCA 547.

<sup>52</sup> New Zealand cites as an example the case of: *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [62].

<sup>53</sup> The Working Group has made a similar recommendation to at least one other Party to the Convention (see UK Phase 2bis Report (2008), in which the Working Group recommended that the "UK eliminate statutory requirements for Attorney General consent for prosecutions of foreign bribery" (recommendation 5a).

and human resources is sufficient for the investigation of foreign bribery. It may also re-direct resources, as well as draw from experienced investigators within the NZP, if required.

70. In Phase 2, the WGB recommended that New Zealand ensure that sufficient training and resources are made available to law enforcement authorities, including the SFO, NZP and Crown Solicitors, for the effective investigation and prosecution of foreign bribery offences (recommendation 3c). The SFO states that law enforcement training on corruption offences, including foreign bribery, is provided twice a year. However, more practical training may be required, as the SFO has only recently opened its first ever foreign bribery investigations, which are still in preliminary stages. In this regard, the SFO states that it is liaising with the Australian Federal Police (AFP) for additional support, if required, on how to proceed with such investigations. No specific training on the prosecution of the foreign bribery offence has been provided.

### *Commentary*

*The lead examiners note that New Zealand has no experience enforcing the foreign bribery offence. This may soon change, as the SFO has opened two investigations in July 2013. At this critical juncture, the lead examiners recommend that New Zealand provide regular, practical training to law enforcement officials on investigating and prosecuting the foreign bribery offence.*

#### **(c) Jurisdiction**

##### *(i) Territorial and Nationality Jurisdiction*

71. The WGB made no recommendations to New Zealand in Phase 2 concerning its ability to exercise jurisdiction in foreign bribery cases. Under section 7 CA, an offence is deemed to be committed in New Zealand where the following occurs in New Zealand: (i) an act or omission forming part of any offence, or (ii) an event necessary to the completion of the offence. Section 7 requires that only part of the offence be committed in New Zealand in order for jurisdiction to be exercised.

72. Section 105D(2) CA provides for nationality jurisdiction over the foreign bribery offence. The provision covers individuals who are New Zealand citizens or are ordinarily residents of New Zealand. However, as provided under section 105E CA, New Zealand may not exercise nationality jurisdiction for foreign bribery where there is no dual criminality. The Working Group found that this requirement contravenes Article 4(2) of the Convention, which requires that where a State 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 the respect of foreign public officials, *according to the same principles*” (emphasis added). New Zealand has adopted nationality jurisdiction for a series of offences, including domestic bribery and corruption offences, which are not subject to dual criminality. By imposing this for nationality jurisdiction over foreign bribery, New Zealand is not applying the same principles of jurisdiction, and is thus contravening Article 4(2).

##### *(ii) Jurisdiction over Legal Persons*

73. In Phase 2, the WGB identified the exercise of jurisdiction over legal persons as an issue to follow-up. The criteria applied in determining the “nationality” of a legal person in New Zealand is the place of incorporation. New Zealand also 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 through a foreign subsidiary could be subject to prosecution in New Zealand. For the purposes of applying territoriality jurisdiction over legal persons, it remains unclear whose actions must occur in New Zealand.

The absence of corporate prosecutions for foreign bribery renders it difficult to assess how New Zealand would apply jurisdiction over legal persons, and should be followed-up as practice develops.

### *Commentary*

*The lead examiners recommend that New Zealand remove or amend the dual criminality exception in section 105E of the Crimes Act in order to achieve full compliance with the Convention, including Article 4(2).*

*The lead examiners also note that, in the absence of case law, principles applicable to the exercise of jurisdiction over legal persons for foreign bribery remain uncertain in New Zealand. They therefore recommend that the Working Group continue to follow-up this issue as practice develops.*

## **6. Money Laundering**

### **(a) The Money Laundering Offence**

74. In Phase 2, the Working Group recommended that New Zealand amend the dual criminality exception for the money laundering offence in section 245 CA in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred (Phase 2 recommendation 5b). At the time of New Zealand's written follow-up, the Working Group found this recommendation unimplemented but noted that New Zealand intended to further examine whether to amend the dual criminality exception for the money laundering offence.

75. Since Phase 2, no changes have been made to the money laundering offence as it relates to foreign bribery.<sup>54</sup> Section 243 CA establishes the offence of money laundering, covering the money laundering process as well as the possession of criminal property. Section 245 CA lists the acts committed outside New Zealand to which section 243 CA does not apply. Hence, under section 245 CA, section 243 CA 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.

76. As mentioned earlier, New Zealand has indicated that it intends to introduce a Bill into Parliament in 2013 that will remove the dual criminality exception for foreign bribery. New Zealand states that in the context of money laundering, this will mean that foreign bribery will be treated as a domestic offence and thus remove any uncertainty as to whether the offence can serve as a predicate offence for money laundering.

77. The Bill will also address the serious gap identified by the FATF of the additional requirement of an intent to conceal (developed by case law as an interpretation of the term "conceal" under section 243CA). This is another illustration of a general legal context which has proven particularly demanding in New Zealand in terms of the level of proof required to demonstrate the intent of economic offences (see discussion under section B.1).<sup>55</sup> However, according to New Zealand, the proposed amendments will

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<sup>54</sup> See Phase 2 report, para. 218 and 219

<sup>55</sup> The 2009 FATF Mutual Evaluation of New Zealand identified it as a gap in New Zealand's money laundering offence's compliance with the FATF Recommendations, and the UNTOC and Vienna Conventions.

ensure that there is no longer a requirement that the prosecution prove that the accused had an intent to conceal.

**(b) Anti-Money Laundering Measures**

*(i) Changes in the AML Mechanisms*

78. Since New Zealand Phase 2 evaluation, the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act, 2009 and the AML/CFT Regulations, 2011 were enacted with a view to address some of the deficiencies that were identified by the FATF in its 2009 mutual evaluation report (MER). The AML/CFT Act, 2009 reforms New Zealand's ageing AML/CFT framework, as set out in the Financial Transactions Reporting Act 1996. In terms of preventive measures, including in relation to PEPs, a package of regulations which supplements the AML/CFT Act came into force on 30 June 2013 and reporting entities in New Zealand were given until that date to prepare for the substantial changes that will be required to fully implement the provisions of the AML/CFT Act and its associated regulations. The Act aims at implementing the FATF standard adopted in 2003, in particular on preventive measures.

*(ii) Monitoring of the New Regime under the AML/CFT Act 2009*

79. New Zealand's Financial Intelligence Unit (FIU) is part of the Financial Crime Group, an Intelligence Unit within the Police. The FIU staff has increased over the past 5 years from 11 to 19 experts to carry out its expanded duties. New Zealand has established a comprehensive regime of statutory supervisors to monitor and enforce compliance with the AML/CFT Act (the Department of Internal Affairs (DIA), the Reserve Bank of New Zealand (RBNZ), and the Financial Market Authority (FMA)). A National Coordination Committee has also been established to ensure the consistent, effective and efficient operation of the AML/CFT regulatory system. Its members include all three statutory supervisors (the DIA, the FMA and the RBNZ), the MOJ, and the FIU of the NZP. New Zealand Customs Service and the Inland Revenue Department also participate in and provide advice to the Committee.

80. The joint supervisors have produced guidance to support the reporting entities prepare for their obligations under the AML/CFT regime. This includes information to aid in detecting the ways their businesses may be used for money laundering and terrorist financing. New Zealand authorities stressed that although the guidance documents do not address the detection of crimes, including foreign bribery offences or corruption in general, they do work towards creating a business environment that is resistant to criminal behaviour.<sup>56</sup>

*(iii) Preventive Measures*

81. Under the AML/CFT Act, reporting entities are required to identify their customers, beneficial owners of their customers and anyone who acts on behalf of their customers.<sup>57</sup> Reporting entities must obtain information about beneficial owners and according to the level of risk involved, take reasonable steps to verify the beneficial owner's identity. In addition, as mentioned above, the Government has introduced to Parliament the Companies and Limited Partnerships Amendment Bill. The Bill will enable

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<sup>56</sup> The guidance documents are available on the following websites: <http://www.rbnz.govt.nz/aml/4315132.html>; [http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Anti-Money-Laundering-Codes-of-Practice-and-Guidelines](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Anti-Money-Laundering-Codes-of-Practice-and-Guidelines); <http://www.fma.govt.nz/help-me-comply/anti-money-laundering-and-countering-financing-of-terrorism-reporting-entities/guidelines-and-codes-of-practice/>

<sup>57</sup> A beneficial owner is any individual that effectively controls a customer, owns more than 25% of a customer, or is a person on whose behalf a transaction is conducted.

the Registrar of Companies and Limited Partnerships to make direct enquiries to directors and general partners about beneficial owners and ultimate controllers of companies and limited partnerships respectively. This is particularly relevant with regard to the issues raised by shell companies in New Zealand (as discussed under section B.2 above).

82. The new AML/CFT Act requires that foreign politically exposed persons (PEPs) are subject to enhanced scrutiny by financial institutions (section 22(2)). Financial institutions will be required to (i) have appropriate risk management systems to identify if a customer is a PEP; (ii) obtain senior management approval for establishing business relationships with a PEP; (iii) take reasonable measures to establish the source of wealth and source of funds; (iv) undertake enhanced due diligence (e.g., taking additional steps to verify the identity of the customer) when establishing a business relationship, and (v) undertake enhanced account monitoring during the course of the relationship. New Zealand authorities stress that these provisions mean that where a prominent foreign public official is profiting from bribery, the financial institution is more likely to recognise this, and report it.

*(iv) Transaction Reporting Obligations*

83. The new AML/CFT regime places obligations on financial institutions, casinos, trust and company service providers, and certain financial advisors (“reporting entities”) to undertake more robust customer identification, transaction monitoring, record keeping, and suspicious transaction reporting (STRs). As of May 2013, there were approximately 1 534 reporting entities that were subject to the AML/CFT Act. The new AML/CFT regime also establishes a new civil and criminal penalties regime for failing to meet these obligations and confer on supervisors and law enforcement agencies (including the FIU) new powers to enable them to carry out their AML/CFT functions.

84. Further action is underway on the second phase of the reform in order to extend coverage of the AML/CFT Act to a range of Designated Non-Financial Businesses and Professions (DNFBPs). As part of the All-Government Response to Organised Crime, the MOJ is developing a policy on transaction reporting obligations. If progressed, industry will be required to report details about international wire transfers and domestic large cash transactions directly to the FIU to enable it to track and trace along high risk money trails. These proposals went to Cabinet in June 2013 with legislation intended to be introduced to Parliament by the end of the year.

85. The FIU indicated that variations in reporting techniques mean that there is no consistent data collated for the number of STRs but that this will change with the new IT system (‘goAML’) which will be used by the FIU for all its STR processing as of June 2013. The FIU referred 428 reports (“intelligence products”) to law enforcement authorities during the 2012 calendar year. New Zealand was unable to provide information on how many of these “intelligence products” relate to foreign bribery but states that it will be able to do so in the future under the new ‘goAML’ system.

***Commentary***

***The lead examiners note that, seven years after the Phase 2 report, New Zealand has only now taken steps to address Phase 2 recommendation 5b. They urge New Zealand to pursue its efforts to amend the dual criminality exception for the money laundering offence under section 245 CA, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred.***

***The lead examiners welcome the entry into force in June 2013 of the new AML/CFT regime and encourage New Zealand to continue to raise awareness and make a full use of the new tools at its disposal to increase the enforcement of its money laundering offence in cases where***

*foreign bribery is the predicate offence. They also recommend that New Zealand maintain clearer statistics on investigations, prosecutions and sanctions related to money laundering in cases where foreign bribery is the predicate offence.*

## **7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes**

### **(a) Accounting Requirements and False Accounting**

#### *(i) Key Accounting Standards*

86. New Zealand has adopted equivalent standards to the International Financial Reporting Standards (IFRS). Section 194 of the Companies Act sets out the books and records-keeping requirements. Accounting records are to be accurately recorded; 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. Breaches of these obligations can lead to fines for Directors of up to NZD 100 000 (EUR 61 400). All companies that are reporting entities are statutorily required to present financial statements in compliance with the Financial Reporting Act 1993. New Zealand changed its accounting standards framework in April 2012 to a multi-standards, multi-tier system of reporting; however, under the new framework, for-profit companies will continue to report under the IFRS-based standards. The new tier structure uses “public accountability” and/or “size” to determine the accounting standards to be applied by a particular entity.<sup>58</sup>

#### *(ii) The False Accounting Offence*

87. New Zealand’s false accounting offences are set out under section 260 CA and sections 194(4), 373(4), 374(2), 377(1) and 379(1) of the Companies Act. The former is enforced by the SFO and the latter by the Financial Markets Authority and the Registrar of Companies. Under section 260 CA, the offence is punishable by up to ten years imprisonment. Accounting violations under the Companies Act may result in specific criminal or civil charges.<sup>59</sup>

88. There were no issues raised in Phase 2 with regard to the false accounting offence or the level of sanctions. However, the enforcement of accounting fraud offences was identified by the Working Group as a follow-up issue. Since Phase 2, there have been no enforcement actions involving the concealment of foreign bribery. New Zealand states that the SFO regularly investigates and prosecutes false accounting offences. The SFO provides a recent example of a successful investigation and prosecution of an individual who ran a Ponzi-like scheme domestically, and was also charged with accounting fraud offences of NZD 38m (EUR 23.3m).

#### *(iii) Treatment of Small Facilitation Payments*

89. New Zealand allows for a routine government action (facilitation payments) exclusion under section 105C(3) CA (see section B.1(c) for further details). The 2009 Recommendation requires that such payments are adequately recorded in company accounts. The disclosure of the nature and amount of material items are required under New Zealand accounting standards. According to New Zealand, small facilitation payments could be considered material due to their nature, even if the amount is small. The preparer and auditor of the financial statements must exercise their judgment to determine whether or not

<sup>58</sup> External Reporting Board, Current Standards, available at: [http://www.xrb.govt.nz/Site/Accounting\\_Standards/Current\\_Standards/default.aspx](http://www.xrb.govt.nz/Site/Accounting_Standards/Current_Standards/default.aspx)

<sup>59</sup> See Phase 1 report, at pp. 26-27 and Phase 2 report, at pp. 65 – 66, for specific legal provisions.

the facilitation payment should be disclosed. Accounting and auditing professionals participating in the on-site visit stated that they were not aware of a requirement to record facilitation payments in company accounts, nor have they ever seen such recordings in practice. As discussed in earlier sections of this report, amendments to the law will be introduced to Parliament in 2013 to require companies to record small facilitation payments in company accounts and maintain the records for seven years.

**(b) *Detection of Foreign Bribery by External Auditors***

90. The Companies Act 1993 sets out which companies are required to be audited. However, these requirements will be amended by the Financial Reporting Bill, which is expected to enter into force on 1 April 2014. Currently, under section 196 of the Companies Act, all companies are audited unless shareholders unanimously decide otherwise. This exception does not apply to issuers, overseas companies, large companies in which 25 per cent of voting rights are held by a foreign company or person, subsidiaries of foreign companies, or public entities. Under the new Financial Reporting Bill, clause 106 requires that financial statements must be audited for all large companies (except subsidiaries where group statements are prepared and audited), large overseas companies, companies with ten or more shareholders, unless the company has opted out (a large company cannot opt out), and companies with fewer than ten shareholders, if the company has opted in to compliance. Large companies are defined as companies with assets exceeding NZD 60m (EUR 36m) (including subsidiary assets), or companies with revenue exceeding NZD 30m (EUR 18m).

91. New Zealand has implemented equivalent standards to the International Standards on Auditing (ISA).<sup>60</sup> Auditors thus apply ISA(NZ) 240 to detect material misstatements in financial statements due to fraud. During the on-site visit, auditors stated that foreign bribery could also involve fraud. ISA(NZ) 240 requires auditors to analyse and assess fraud risk factors, and plan an appropriate response. Foreign bribery risks may be identified by the auditor when considering fraud risk factors, but it is unclear what steps an auditor may take if he or she may identify traces of bribery but not necessarily fraud. Auditors also stated that foreign bribery could result in material misstatements in financial statements due to non-compliance with laws and regulations under ISA(NZ) 250. However, the ability of New Zealand auditors to detect foreign bribery through material misstatements in financial statements due to fraud or non-compliance with laws and regulations in practice remains weak due to a low level of awareness of the foreign bribery offence and risk indicators. One auditor stated that foreign bribery issues are “barely on a company’s radar, let alone an auditor’s radar.” Another auditor stated that New Zealand auditors are very inexperienced in dealing with bribery and corruption, and that fraud and economic crime generally are “seldom” detected by external auditors.

92. New Zealand has not taken steps to fully implement Phase 2 recommendation 1c, which suggested efforts be made to work proactively with the accounting and auditing profession to develop training for and awareness of the foreign bribery offence. The accounting and auditing professionals at the on-site visit stated that the government has not provided any awareness-raising materials or guidance on the detection of foreign bribery for the profession. The training that has been provided on bribery and corruption generally for the accounting and auditing profession has been private sector-led.

**(c) *Reporting of Foreign Bribery by External Auditors***

93. Phase 2 recommendation 2c asked New Zealand 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 consider requiring external auditors, in the face of inaction

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<sup>60</sup> These include ISAs 240, 250, 315 and 330.

after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities. In its follow-up to Phase 2, the Working Group found that this recommendation had only been partially implemented because the new reporting obligations established only applied to public sector auditors.

(i) *Internal Reporting to the Audited Company and External Reporting to Competent Authorities*

94. New Zealand auditors are subject to the internal reporting obligations under ISA(NZ) 240 and 250. The ISAs impose additional requirements on an external auditor to report illegality to the audited company. ISA(NZ) 240(40)-(42) require fraud or suspicion of fraud that results in material misstatements of financial statements to be reported to those charged with the company's governance on a timely basis. ISA(NZ) 250(22)-(24) require material misstatements resulting from non-compliance with laws to be communicated to those charged with governance unless the matters are "clearly inconsequential". If the non-compliance is intentional and material, the auditor shall report the matter "as soon as practicable".

95. Since Phase 2, New Zealand has not adopted measures requiring auditors to report to competent authorities, including law enforcement, suspicions of foreign bribery; however, it has given consideration to the issue. In September 2012, the International Ethical Standards Board for Accountants (IESBA) released an exposure draft proposing the adoption of an ethical standard on circumstances in which an assurance practitioner should override the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate authority. In response, the New Zealand Auditing and Assurance Standards Board (NZAuASB) simultaneously released an exposure draft for comment by its constituents.

96. The NZAuASB noted in its submission to the IESBA that it generally supports the principle that assurance practitioners act in the public interest. However, on the basis of the comments received from its constituents, the NZAuASB considers that such requirements are better placed in the context of the legal or regulatory environment, and not in a code of ethics, because of the liability that could flow from any action taken by assurance practitioners in this area. It was also felt that the issue is addressed to a significant extent under New Zealand's Protected Disclosures Act (PDA), and thus, according to the NZAuASB, it is "not altogether clear that it is necessary in [New Zealand's] situation to impose an additional legal requirement on assurance practitioners to breach the fundamental principle of confidentiality and to disclose a suspected illegal act to an appropriate authority." However, it should be noted that the PDA does not require auditors to report suspicions of illegal conduct to competent authorities, but is rather aimed at providing protection from retaliation for those who choose to report serious wrongdoing. During the on-site visit, one auditor stated that the opposition from the profession mainly related the duty of confidentiality, which the profession "takes very seriously", and that requiring auditors to report externally would render their role and expectations of work unclear.

97. The NZAuASB has issued a revised "Professional and Ethical Standard 1: Ethical Standards for Assurance Providers" ('Revised Ethical Standard 1'). The revised standard states that where an auditor discovers fraudulent or illegal activities, he or she must "raise the matter with those charged with governance of the client" and "do all that can be done to persuade those charged with governance of the client to fulfil any legal obligations". If those charged with governance decline to fulfil their legal obligations, the auditor must consider resigning. Given the little impact such acts may have on the company's decision, the auditor is left with rather ineffective means of persuasion or action. The NZAuASB states that it will await the outcome of the IESBA's decision on the reporting of suspected illegal acts and will consider whether to adopt or amend the international standard for use in New Zealand, once it is finalised.

### *Commentary*

*The lead examiners emphasise the important role of auditors in the detection of foreign bribery, especially in New Zealand, where detection has thus far been very weak. The lead examiners are disappointed that New Zealand has not taken any steps since Phase 2 to raise awareness of foreign bribery among the accounting and auditing profession. They therefore strongly reiterate Phase 2 recommendation 2c that New Zealand take concrete and meaningful steps to raise awareness of foreign bribery among accountants and auditors, including by providing guidance and training on detecting red flags for foreign bribery in company accounts.*

*The lead examiners also recommend that New Zealand require auditors to report suspicions of foreign bribery to a competent corporate monitoring body, in particular where management of the company fails to act on internal reports by the auditor. To further help increase detection, they also recommend that New Zealand re-consider requiring auditors to report suspicions of foreign bribery to law enforcement authorities. New Zealand should also ensure that auditors making such reports in good faith are protected from legal or retaliatory action.*

*Finally, the lead examiners recommend that New Zealand take steps to ensure that companies are required to accurately account small facilitation payments in their books and financial records, and that they are aware of the requirement.*

#### **(d) Internal Controls, Ethics and Compliance Measures**

98. In 2009, Standards New Zealand published a Compliance Programmes Standard ('Standard'), which is a voluntary guide aimed at providing public and private sector organisations with guidance for developing and implementing compliance measures. New Zealand states that the Standard is based on principles of Annex II of the 2009 Recommendation ('Good Practice Guidance on Internal Controls, Ethics, and Compliance'); however, no explicit reference is made therein to compliance measures for foreign (or domestic) bribery. While New Zealand allows for a small facilitation payments exclusion under its foreign bribery offence, it has taken no specific steps to encourage companies to prohibit or discourage their use in internal company controls, ethics and compliance programmes or measures, as required by the 2009 Recommendation.

99. Representatives from the private sector, and legal and auditing professions expressed divergent views on the existence of anti-corruption compliance systems within New Zealand companies. One representative stated that large New Zealand companies with overseas operations would "generally" have anti-corruption compliance systems in place. However, other private sector and civil society representatives stated that even large New Zealand companies have a "striking" lack of awareness of foreign bribery and that anti-bribery compliance measures would be weak or absent. A Transparency International New Zealand (TINZ) review of the approach to bribery and corruption by New Zealand business indicated that 44% of companies listed on the NZX50 have policies prohibiting bribery, of which only 16% have a code of ethics system that would encourage a culture of compliance with anti-corruption policies.<sup>61</sup> The nine companies participating in the on-site visit had anti-corruption compliance in place. Additional research on publicly available information on 22 major New Zealand companies with exposure to foreign bribery risks also showed that 9 make reference on their website of some form of policy on corruption; however, none of these make any specific reference to foreign bribery. On-site visit

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<sup>61</sup> See: "As Good as we are Perceived?", Transparency International New Zealand (2009), available at: <http://www.transparencynz.org.nz/index.php/indices-reports/new-zealand/report-qas-good-as-we-are-perceivedq>

participants were also of the view that New Zealand small and medium-sized enterprises (SMEs) are not sufficiently aware of their risks of committing foreign bribery, and that SMEs generally do not have adequate compliance measures to prevent foreign bribery.

### *Commentary*

*The lead examiners recommend that New Zealand raise awareness of internal controls, ethics and compliance measures to prevent foreign bribery. This should include promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Anti-Bribery Recommendation. Particular efforts should be made to raise awareness among SMEs, which is a horizontal issue among Parties to the Convention.*

*The lead examiners also recommend that New Zealand take steps to encourage companies to prohibit or discourage the use of small facilitation payments in their internal controls, ethics and compliance programmes or measures, as required by the 2009 Recommendation.*

## **8. Tax measures for combating bribery**

### **(a) Non-deductibility of Bribes**

100. New Zealand adopted legislation expressly denying the tax deductibility of bribe payments in 2002. In Phase 2, the Working Group identified certain weaknesses in the legislation, and recommended that New Zealand 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 (Phase 2 recommendation 5a). At the time of New Zealand’s written follow-up, this recommendation was considered unimplemented, but the Working Group noted that progress had been made with the introduction of proposed amendments to the Income Tax Act to ensure that no foreign bribe payments covered under criminal law are tax deductible.

101. The express denial of the deductibility of bribes has now been placed under section DB 45 of the Income Tax Act 2007. New Zealand indicated that the planned amendments to the Act mentioned in its written follow-up have not progressed but remain on the Government work programme. The relevant legislation is expected to be introduced to Parliament in 2013. During the on-site, representatives of Inland Revenue indicated that they are first waiting for the pending changes to the CA, from which changes to the Income Tax Act would derive.

102. The Phase 2 report also noted that concerns about the foreign bribery offence (see also section B.1) raised 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. The use of the term “bribe” under the Income Tax Act 2007 to designate any type of payment whether corrupt or not was perceived as an issue in Phase 3 as well as in Phase 2. Panellists from Inland Revenue unanimously admitted that the use of this terminology may in some instances lack logic and consistency, and that it should be reviewed. However, at present, no formal steps have been taken to review the use of this term.

103. At the time of New Zealand’s written follow-up, the Working Group also decided that it should continue to monitor the tax deduction of facilitation payments (follow-up issue 7e). As discussed earlier, New Zealand indicates that the matter of small facilitation payments is still to be clarified by legislation. Discussions during the on-site with representatives of the private sector, accounting and auditing and Inland Revenue highlighted that, at present, the scope of this exclusion remains unclear (see also section

B.1). This, coupled with the current lack of obligation in New Zealand that these payments be accurately accounted for in companies' books and financial records, raises serious concerns as it may limit in practice the effective implementation of the non-tax deductibility of bribes.

*Commentary*

*The lead examiners are seriously concerned that, 7 years after its Phase 2 evaluation, New Zealand has not addressed any of the weaknesses identified in its regime of non-deductibility of bribes. The lead examiners urge New Zealand to implement Phase 2 recommendation 5a and promptly proceed with plans to 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; and (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties.*

*Additionally, regardless of the outcome of the consideration of elimination of the word "corruptly" from the Crimes Act offence, the lead examiners recommend that the use of the terms "bribe" and "corruptly" in the Tax Act be monitored to ensure that it is sufficiently clear that bribe payments are non-tax deductible.*

**(b) Detection of foreign bribery**

104. New Zealand indicates that with regard to the provision of guidance, the OECD Bribery Awareness Handbook for Tax Examiners ('Handbook') has been widely distributed to investigations staff, and is also available on Inland Revenue's intranet site. In August 2013, Inland Revenue also circulated a "corporate update" which includes a section on bribery awareness. The lead examiners note, however, that the update was only distributed to large enterprises and not to SMEs. With regard to detection, a risk-based approach is taken. This is built on intelligence, based on the review of suspicious transaction reports relating to at-risk offshore transfers received quarterly from the Police, the FIU, and anonymous information. In addition, a special focus is placed on New Zealand-owned or controlled companies with foreign exports or activities abroad.

105. Inland Revenue continues to have very wide powers to require financial institutions to provide information.<sup>62</sup> It may also obtain information by requiring any person to attend and give evidence under oath before the Commissioner or an authorised officer (section 19). Inland Revenue may also apply to the District Court for an inquiry (including examination of witnesses under oath) to be held before a District Court Judge (section 18).<sup>63</sup>

*Commentary*

*The lead examiners recommend that in parallel with the planned amendments to its tax legislation, New Zealand should supplement awareness-raising efforts by providing guidelines, instructions and training to tax examiners on (i) the non-tax deductibility of bribes; (ii) determining whether a particular payment to a foreign public official comes under the facilitation payment exception; and (iii) detection of foreign bribery during tax audits. They*

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<sup>62</sup> The two key provisions are sections 16 (access to premises) and section 17 (access to information) of the Tax Administration Act 1994. Both sections confer powers on Inland Revenue to obtain information for a number of express purposes and also more generally "for the purpose of carrying out any function lawfully conferred on the Commissioner".

<sup>63</sup> According to NZ authorities, New Zealand's judicial system has produced multiple cases that support Inland Revenue's information gathering powers.

*also recommend that Inland Revenue target a wider range of recipients in its anti-bribery awareness-raising measures, in particular SMEs.*

**(c) *Sharing of Tax Information***

**(i) *With Law Enforcement Authorities***

106. 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 of bribery transactions with criminal law enforcement authorities in New Zealand.<sup>64</sup> In Phase 2, the Working Group therefore recommended 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 (Phase 2 recommendation 2b). At the time of New Zealand's written follow-up, the Working Group was seriously concerned that Inland Revenue had not implemented this recommendation, though it noted that a review of its policy in this area was underway.<sup>65</sup>

107. The review was completed in May 2013 and is now in the process of being implemented. New Zealand indicated that Inland Revenue, together with the MOJ and the NZP, prepared a discussion document regarding a proposal to allow Inland Revenue to share information with law enforcement agencies in relation to "serious crime" (those punishable by 4 years or more imprisonment). The proposed definition of "serious crime" would include the offence of foreign bribery, therefore allowing information-sharing in respect of this offence. The proposal is to allow initiation of information sharing by either the enforcement agency by request to Inland Revenue, or by Inland Revenue passing information of a suspected serious crime to the relevant enforcement agency. Public consultation on this issue began in April 2013. The closing date for submissions was 21 May 2013. According to Inland Revenue, the results of the consultation have been generally positive and it is now endeavouring to take the proposal forward with the introduction of legislation in 2013.

**(ii) *With Other Countries***

108. Inland Revenue may exchange tax information under its double tax agreements and tax information exchange agreements (TIEAs). Under section 88 of the Tax Administration Act, 1994, it 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. for civil and criminal tax purposes). In Phase 2, the Working Group considered this to be a significant obstacle in the detection of bribery in New Zealand and for the provision of mutual legal assistance where tax information is requested regarding suspected bribe transactions.

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<sup>64</sup> Inland Revenue can only make referrals to the SFO on tax matters. A Memorandum of Understanding with the SFO provides a framework for these exchanges. Whether these cases will be prosecuted by Inland Revenue or by the SFO is decided on a case by case basis.

<sup>65</sup> The 1996 Tax Recommendation has since been reviewed and the 2009 Tax Recommendation includes provisions for countries to establish, in accordance with their legal systems, an effective legal and administrative framework, and provide guidance to facilitate reporting by tax authorities of suspicious foreign bribery arising out of the performance of their duties, to appropriate domestic authorities (Recommendation II of the 2009 Tax Recommendation).

109. Since Phase 2, the situation has evolved in this area. The 2009 Tax Recommendation includes, *inter alia*, considerations for adding optional language (of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention) in bilateral tax treaties. The optional language allows the sharing of certain tax information with other law enforcement agencies and judicial authorities on certain high priority matters, including corruption and allows that information received be used for other, permitted purposes. Article 26 of the OECD Model Tax Convention was revised in July 2012, with the optional language now provided under paragraph 2.<sup>66</sup> If a treaty includes this language, the revised commentary now expressly states that when the receiving State wishes to use the information for any non-tax purpose (such as foreign bribery investigations), it should (i) specify to the supplying State the non-tax purpose (such as foreign bribery investigations) for which it wishes to use the information and (ii) confirm that the receiving State can use the information for such non-tax purpose under its own laws.

110. New Zealand indicates that none of its comprehensive tax treaties (apart from its tax treaty with Australia) contain the new Article 26 language. However, they further indicate that they are progressively updating their tax treaties as when they are negotiated with the new Article 26 language.<sup>67</sup> In addition, a number of their comprehensive tax treaty exchange of information provisions have recently been updated to the required international standard. All 20 of New Zealand's concluded Tax Information Exchange Agreements (TIEAs) (with the exception of Dominica) permit or will permit on entry into force, a Contracting Party to request that previously exchanged information be passed to another person or agency with the express written consent of the sending State. Many of these TIEAs also contemplate that the information could also be passed to a third jurisdiction, again with the express written consent of the original providing Contracting Party.

111. Furthermore, on 26 October 2012, New Zealand signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("the Multilateral Convention"). It has not yet been ratified but, when in force, Article 22(4) will permit New Zealand to achieve the same aim as that contemplated by the revised wording of Article 26 of the OECD Model Tax Convention. Over 50 countries have signed this Convention and many are new treaty partners for New Zealand.<sup>68</sup> The Multilateral Convention is unlikely to enter into force in New Zealand before the end of 2013. Once the Multilateral Convention is in force, New Zealand tax authorities will follow the same exchange of information and reporting procedures that are currently in place, but with the additional feature that the information could be used by the other Party for non-tax purposes provided the information to be exchanged could also be used in the same way in New Zealand.

### *Commentary*

***The lead examiners welcome New Zealand's proposal to allow Inland Revenue to share information with law enforcement agencies in relation to "serious crime". They note the importance of the changes initiated, including on the implementation of the possibilities***

<sup>66</sup> See Update to Article 26 of the OECD Model Tax Convention and its Commentary, Approved by the OECD Council on 17 July 2012, available at: [http://www.oecd.org/ctp/exchangeofinformation/120718\\_Article%2026-ENG\\_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf) ("Update to Article 26").

<sup>67</sup> New Zealand's tax treaty with its main trading partner, Australia, has been fully updated.

<sup>68</sup> The amended Convention facilitates international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. The amended Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims. The updated list of signatories and parties is available at: [www.oecd.org/ctp/eoi/mutual](http://www.oecd.org/ctp/eoi/mutual)

*offered by both the “modernised” bilateral tax treaties and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. They recommend that New Zealand proceed with this proposal as a matter of priority with a view to implement Phase 2 recommendation 2b 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.*

## **9. International Co-operation**

### **(a) Mutual Legal Assistance**

112. Formal requests for mutual legal assistance (MLA) are received under the Mutual Assistance in Criminal Matters Act (MACMA). New Zealand’s Central Authority for sending and receiving MLA requests is the New Zealand Crown Law Office (CLO). MACMA allows for cooperation with all States, including where no treaty or convention relationship exists. Dual criminality is specifically provided for under the MACMA for requests made under the Anti-Bribery Convention. Reciprocity is not expressly required for requests made under the Anti-Bribery Convention. The CLO has experience in granting MLA requests for financial and company information. The latter can be provided more promptly as it is often publicly available, whereas information from financial institutions requires a search warrant. The CLO also has experience processing requests for the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery.

113. In 2011, the New Zealand Government released an “All-Government Response to Organised Crime” (‘All-Government Response’) in which it was proposed that the MACMA be reviewed in order to increase efficiency and reduce complexity. In this regard, it proposes to: (i) improve interchange with overseas law enforcement agencies to gather information on techniques, methodologies, resources and enforcement approach for dealing with criminal groups or types of offending; (ii) expand the scope of cross-border information sharing and; (iii) review domestic MLA systems (including legislative provisions and operations) to ensure efficiency and effectiveness.”<sup>69</sup> In July 2013, the Minister of Justice requested the Law Commission to undertake a full review of the MACMA and Extradition Act. The Commission will then submit a report to the Government, including recommendations. The review process<sup>70</sup> may therefore address the comments raised by the WGB in Phase 2 that the MACMA procedures “appear to be somewhat cumbersome and formalistic.”<sup>71</sup>

114. Since 2010, the CLO has sent an average of 17 MLA requests and received an average 31 requests per annum. No outgoing requests have been made in relation to New Zealand’s on-going foreign bribery investigations. Since 2006, the CLO has received four foreign bribery-related MLA requests, including one from a party to the Convention. Three requests were made from non-Convention parties, and related to company information, investigations into bank accounts and the identification and freezing of assets. New Zealand states that assistance was provided under the MACMA to the Convention party, and in two of the three requests from non-Convention parties. Assistance could not be provided in the third non-Convention party case because the information could not be obtained in New Zealand. The response

<sup>69</sup> New Zealand Ministry of Justice, “All-Government Response to Organised Crime”, at p. 23.

<sup>70</sup> The Minister of Justice is required to table the Law Commission’s report to Parliament. The Government must formally respond to the report within six months. The consideration process is expected to take up to two years.

<sup>71</sup> New Zealand Phase 2 report, at p. 43.

time has varied in respect of these MLA requests. According to New Zealand, the shortest execution timeframe was one month, whereas the request from the Convention party took one year to complete.

115. New Zealand states that none of the foreign bribery-related MLA requests received involved alleged bribery carried out by a New Zealand company or individual, and thus did not trigger the opening of any investigation in New Zealand. In “some” of the requests, bribery was allegedly committed by a foreign company (outside of the requesting State), which may have been associated with a New Zealand company but the criminal conduct allegedly emanated entirely from the foreign company. MLA requests have not been made or received in relation to the *Technology Company Case*, which involves another State Party to the Convention (see also section A.5). In October 2013, New Zealand provided an update that they have formally approached the other State Party to the Convention in this case, though outside of the MLA framework.

**(b) Extradition**

116. In Phase 2, the WGB issued a three-pronged recommendation that New Zealand (i) 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; (ii) pursue efforts to facilitate, where appropriate, the procedures for extradition; and (iii) reconsider the requirement of Ministerial approval of certain requests for extradition under the Convention (Phase 2 recommendation 3e). In its 2009 follow-up report, the WGB noted only limited action in this area and found the recommendation partially implemented. New Zealand states that it receives relatively few extradition requests, averaging at approximately six per year. No foreign bribery-related extradition requests have been made or received.

**(i) The Nationality Exception**

117. Under section 101 of the Extradition Act, extradition treaties concluded after 1999 must include a provision that the surrender of a New Zealand citizen may be refused on the grounds of nationality. New Zealand asserts that it is very unlikely the clause will be widely utilized. According to New Zealand, as a treaty is not required to process an extradition request, a compelling reason will be needed for it to consider entering into an extradition treaty (e.g. if required by the foreign state’s law to make or receive an extradition request). The only extradition treaty that has been concluded since 1999 is with Korea, which expressly provides that any case refused on the basis of nationality must be submitted to domestic authorities if requested by the requesting state.

118. Where there is no extradition treaty between the parties, New Zealand citizens can be surrendered subject to the general restrictions that apply to all individuals; there is no specific ground permitting refusal of extradition on the basis of nationality. Where an extradition request is made by a party to the Anti-Bribery Convention for a Convention-related offence, the request will be processed in accordance with the terms of the Convention, the Extradition Act, any relevant treaty, and the law of the requesting country. However, New Zealand again states that in light of Article 10(3) of the Convention, it is highly unlikely that it would exercise its discretion to refuse the request on the basis of nationality even if permitted under an existing extradition treaty with the Convention party. New Zealand further confirms that it has no record of ever having refused a request on the basis of nationality.<sup>72</sup> New Zealand reaffirmed that where a request would be refused on the basis of nationality, “it is anticipated” that the case would be submitted to domestic authorities whether or not requested by the requesting state.

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<sup>72</sup> New Zealand’s records date back 19 years.

119. In 2008, the New Zealand Law Commission reviewed the law relating to nationality provisions in extradition treaties. The Commission concluded that retaining a compulsory nationality exception in treaties was not necessary, and cited section 101 as “something of a historical anomaly.” New Zealand asserts that given that the provision has little effect and has not caused any practical challenges, it was decided that a legislative amendment targeting “this minor, inconsequential change” was unnecessary. However, under the above-mentioned All-Government Response, the MOJ is now considering undertaking a full review of the Extradition Act. New Zealand states that this would provide a means to reconsider the repeal of section 101.

(ii) *Facilitated Process*

120. Since Phase 2, New Zealand has adopted measures to facilitate extradition. The Ministry of Foreign Affairs and Trade (MFAT) and the CLO provide assistance to requesting states by addressing draft MLA requests and advising on requisite documentation. The websites of both agencies provide contact information for extradition officers, and encourage requesting countries to seek advice from New Zealand officials. MFAT’s website also provides a guide for requesting states on New Zealand’s extradition framework. The MOJ, CLO, NZP and MFAT are also in the process of developing an inter-agency protocol to clarify the extradition process and the roles of the respective agencies, which is intended to improve the efficiency and effectiveness of the extradition system.

121. New Zealand also cites Part 4 and section 25 of the Extradition Act as means of facilitating the extradition process. Under Part 4, foreign countries with similar legal systems, and with whom New Zealand engages frequently on extradition requests, permits extradition on the basis of a backed warrant process.<sup>73</sup> A New Zealand judge can endorse the requesting country’s arrest warrant. The decision on extradition is then made by the Court with no Ministerial involvement. Section 25 of the Act allows for countries to request exemption from meeting all of the evidentiary requirements under New Zealand’s law.<sup>74</sup>

(iii) *Ministerial Approval*

122. Part 5 of the Extradition Act governs extradition requests 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. MFAT guidelines on the Extradition Act state 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. In Phase 2, New Zealand explained that the Minister’s approval is required to establish the extradition relationship, and that a simplified decision-making process, where fewer factors need to be considered, is used where both countries are also parties to a multilateral treaty. However, as noted above, the Working Group recommended that New Zealand re-consider this requirement.

123. Since Phase 2, New Zealand has considered the issue of Ministerial approval for extradition requests of persons suspected of foreign bribery, and states that it is unlikely that changes will be made to the requirement. However, New Zealand states that the above-mentioned Law Commission review of the Extradition Act will again review this requirement. As is the case in a number of Working Group countries, the requirement is also intended to be a safeguard to protect individual human rights and prevent abuses of the extradition process. New Zealand states that the Minister of Justice must consider a variety of factors

<sup>73</sup> These countries include Australia, the United Kingdom and the Pitcairn Islands.

<sup>74</sup> Such countries are permitted to produce a ‘record of the case’, which allows them to establish a *prima facie* case for extradition. At present, this process has been made available to Canada, the Czech Republic, Tonga and the United States.

before deciding to surrender the given individual, including whether the requesting country is likely to use torture or apply the death penalty; the prison conditions of the country; and whether the extradition is of a political nature. New Zealand is not aware of the Minister ever having refused surrender. The Minister's decision to refuse extradition can be subject to judicial review, and thus there are safeguards in place to ensure that the Minister's discretionary powers are not abused.

### ***Commentary***

***The lead examiners welcome the recent steps New Zealand has taken to review the MACMA and ensure that MLA requests are effectively addressed in foreign bribery cases. They recommend that New Zealand continue to routinely and promptly co-ordinate with foreign law enforcement authorities, and make greater efforts to obtain evidence from these authorities, including through formal MLA, where appropriate.***

***With regard to extradition, the lead examiners welcome the development of an inter-agency protocol to improve the efficiency and effectiveness of New Zealand's extradition system. They recommend that New Zealand promptly pursue this initiative.***

***The lead examiners note New Zealand's position that in the unlikely event an extradition request for foreign bribery is refused solely on the grounds of nationality, the case would be submitted to competent authorities in New Zealand for the purposes of investigation and prosecution. The lead examiners nevertheless recommend that New Zealand pursue the channels that have been made available under the All-Government Response to Organised Crime and the Law Commission review to re-consider repealing the "historical anomaly" of section 101 of the Extradition Act.***

***With regard to the requirement of Ministerial approval for extradition requests, the lead examiners acknowledge New Zealand's position for retaining this requirement, and note that similar provisions exist in a number of WGB members. As the Minister's decision to refuse an extradition request can be subject to judicial review, the lead examiners are satisfied that sufficient safeguards are in place to ensure that the discretion cannot be abused.***

## **10. Public Awareness and the Reporting of Foreign Bribery**

124. This section addresses awareness-raising efforts, reporting of foreign bribery, and whistleblowing. The reporting obligations of officials involved in tax and the disbursement of public advantages are respectively addressed under sections B.8 and B.11.

### ***(a) Awareness of the Convention and the Offence of Foreign Bribery***

125. Since Phase 2, New Zealand has taken steps to raise awareness of foreign bribery in both the public and private sectors. Information on the foreign bribery offence, and on the reporting, investigation and prosecution of corruption, more generally, is available on the SFO and MOJ websites. The MOJ has also posted an information sheet titled "Saying No to Bribery and Corruption" on its website, which makes reference to the foreign bribery offence, the Anti-Bribery Convention, the Good Practice Guidance, public reporting channels, as well as general guidance to companies on how to minimize corruption risks. In mid-2013 the SFO updated their website to include a more extensive section on bribery and corruption.

126. To encourage detection and reporting, the SFO states that it has been active in speaking on the foreign bribery offence in various awareness-raising events. This includes presentations made to accounting and auditing firms, financial institutions, lawyers, and various private sector organisations, including the Institute of Directors, regional chambers of commerce and rotary clubs – the last of which the

SFO states has been useful in reaching out to SMEs. In February 2013, the SFO hosted an Economic Crime Seminar in Auckland, which included presentations on foreign bribery. A number of government agencies, including the MOJ, Office of the Auditor General (OAG), the SFO and the State Services Commission (SSC) are also contributing to TINZ's National Integrity System Study, which will address foreign bribery issues. The Study is expected to be completed in October 2013. The SFO has also worked with TINZ on a training package on bribery and corruption offences under both domestic and international laws and best practices for preventing bribery.

127. Information on bribery and corruption risks for exporters and businesses operating overseas is also provided on MFAT's website. The website refers to New Zealand's foreign bribery offence, as well as implications for New Zealand companies of the UK Bribery Act. The site also provides some general guidelines to companies on how to reduce exposure to foreign bribery risks. MFAT states that it undertakes regular awareness-raising measures for its staff posted in embassies on bribery and corruption risks of New Zealand companies operating overseas, and circulates regular messages to all overseas missions that foreign bribery is an extra-territorial offence.

128. Staff employed by New Zealand Trade and Enterprise (NZTE), New Zealand's trade promotion agency, are also trained to provide guidance to businesses operating overseas on bribery and corruption risks. NZTE's website includes guidance materials on specific risks businesses may confront in certain geographic areas and countries, and provides a link to the MFAT guidelines. However, while NZTE's webpage on crime and fraud risks New Zealand companies may confront in overseas markets makes reference to theft, fraud, internet crime and money laundering, no reference is made to the foreign bribery offence.<sup>75</sup> A link to the OECD Good Practice Guidance is provided under a 16 September 2010 entry on NZTE's "news and media" webpage, and would benefit from being added to a more prominent webpage.<sup>76</sup>

129. Despite these efforts, representatives from a cross-section of civil society and the private sector at the on-site visit stated that most New Zealand companies remain unaware of the foreign bribery offence, and that the government needs to be more active in raising awareness. A number of private sector representatives commented that they have not seen any awareness-raising efforts on the part of the government, and that awareness of the offence is mainly the result of the enforcement of foreign bribery laws in the US and UK, and not efforts by New Zealand authorities. A number of non-governmental participants, including one from New Zealand's main business and industry association, further stated that more could be done to raise awareness of the offence among SMEs.

### *Commentary*

***The lead examiners find that the low levels of detection of foreign bribery in New Zealand may be linked to a lack of awareness of the offence. They therefore recommend that New Zealand continue to actively raise awareness of foreign bribery within the private sector, and in particular to SMEs. The lead examiners also note that engagement with SMEs is a horizontal issue that affects many other Parties to the Convention.***

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<sup>75</sup> See New Zealand Trade and Enterprise, Crime and Fraud: <http://www.nzte.govt.nz/en/export/starting-to-export/managing-risk/crime-and-fraud/#toc-minimise-the-risks>

<sup>76</sup> See New Zealand Trade and Enterprise, News and Media, 16 September 2010: <http://www.nzte.govt.nz/en/news-and-media/new-zealand-government-guidance-for-avoiding-bribery-and-corruption>

**(b) Reporting Suspected Acts of Foreign Bribery**

130. In Phase 2, the WGB recommended that New Zealand establish procedures to be followed by public sector employees, including employees of MFAT, 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 (recommendation 2a). At the time of New Zealand's written follow-up report in 2009, the WGB found this recommendation partially implemented because the full reporting chain to law enforcement authorities was not clear.

131. There are no general foreign bribery reporting obligations and procedures directed to all public servants in New Zealand. The SSC, which issues the Standards of Integrity & Conduct for public servants, explains that integrity policies are decentralised and that every government department would have its own fraud policy in place with reporting obligations. New Zealand stated on-site that government departments' policies would include foreign bribery reporting obligations to law enforcement authorities. However, this may not be consistently applied; a review of the MOJ's fraud policy, for example, makes no explicit reference to the reporting of suspicions of foreign bribery. New Zealand also refers to the Auditor-General's statement on ISA(NZ) 240 as an additional source of public sector reporting obligations. The statement recommends that all public sector agencies have fraud policies and reporting mechanisms in place. "Fraud" is defined in the statement as including bribery or corruption.

132. Procedures have been established for MFAT officials posted in embassies to report information of New Zealand companies' or individuals' possible involvement in foreign bribery. In such cases, reports are to be made immediately to the MFAT's Legal Division. All criminal suspicions of foreign bribery would be reported to the SFO. The reporting procedures are set out in MFAT's Consular Instructions. An oral and written briefing on these reporting obligations is also provided to all Heads of Mission prior to their appointment. Hotlines have been established to facilitate such reporting. NZTE has also implemented its own fraud and corruption prevention policy. NZTE staff are required to report credible information to NZTE's corporate counsel, who are then required to transmit the report to the SFO.

***Commentary***

***The lead examiners recommend that New Zealand take steps to ensure that all public servants are made aware of the obligation to report all credible suspicions of foreign bribery involving New Zealand individuals or companies detected in the course of their work to New Zealand law enforcement authorities.***

**(c) Whistleblowing and Whistleblower Protection**

133. New Zealand's Protected Disclosures Act (PDA) provides whistleblower protection for both public and private sector employees who report in good faith serious wrongdoing in or by an organisation. "Serious wrongdoing" includes "an act, omission, or course of conduct that constitutes an offence" and thus covers foreign bribery. The PDA requires public sector entities to establish processes for employees to report suspected serious wrongdoing and receive the benefit of the protections available under the Act. If the internal chain of reporting cannot be used (i.e. the wrongdoing may involve the head of the organisation in question), the Act provides that in certain circumstances, employees may report to specified designated authorities, which include the SFO. The PDA does not impose a similar requirement on private sector entities to establish reporting processes and protection to its employees. While a number of the companies participating in the on-site visit have established whistleblowing mechanisms, it is unclear whether this is the prevailing trend among most New Zealand companies.

134. New Zealand has undertaken significant efforts to raise awareness of the PDA and encourage whistleblowing. In November 2012, the SSC invited an international whistleblowing expert to speak at several events. A related workshop was also held on protected disclosures and the value of “internal witnesses” in identifying and reporting wrongdoing within organisations. The SSC is also planning to publish a model “internal policy” to provide a template for an effective system for employees to report concerns of wrongdoing within their organisation. The SSC has also been active in supporting funding applications to research whistleblowing policies of New Zealand and Australian companies.

135. The SFO states that it has received a total of 13 corruption-related whistleblower reports over the past three years. While this number is encouraging, several participants from both the governmental and non-governmental sector highlighted practical difficulties confronted by small countries, like New Zealand, in encouraging whistleblowing while ensuring confidentiality. The SFO also made reference to international statistics illustrating that another obstacle to whistleblowing may be the belief that no meaningful action will be taken in response to the report. The SFO states that it has been actively trying to dispel this concern in its awareness-raising efforts by making public assurances that it treats whistleblower reports seriously.

### ***Commentary***

*The lead examiners commend New Zealand for adopting a comprehensive whistleblower protection law, and for its commitment in promoting the PDA and encouraging whistleblowing. The lead examiners are hopeful that such efforts will help increase the detection of foreign bribery in New Zealand. They recommend that New Zealand continue its efforts to encourage and facilitate the reporting of suspected acts of foreign bribery in good faith and on reasonable grounds to law enforcement authorities, in particular among private sector employees.*

## **11. Public Advantages**

### **(a) Official Development Assistance**

136. MFAT’s International Development Group administers New Zealand’s official development assistance (ODA) through the New Zealand Aid Programme (NZAP). For the 2011-2012 financial year, ODA disbursements amounted to NZD 587.1m (EUR 360m). The main recipient countries were the Solomon Islands (6%), Papua New Guinea (5%), Tonga (4%), Tokelau (4%), Kiribati (4%) and Samoa (3%). 10 % of ODA was channelled to or through multilateral development banks.

137. MFAT’s standard ODA grant funding arrangements include an anti-corruption clause requiring parties to declare that they shall not make or offer any “gift, payment, consideration, inducement, reward or benefit of any kind which would or could be construed as an illegal, unethical or fraudulent practice.” Such conduct may be grounds for immediate termination under the clause. “Right to audit” clauses also allow MFAT to investigate any alleged fraudulent, collusive or coercive practices related to its funding, MFAT’s supplier bidder documents may exclude from the tendering process individuals or organisations that are included on the NZP list of “Designated Individuals and Organisations”, the World Bank’s debarment list or where the applicant has been convicted of bribery or corruption.

138. Internal controls, ethics and compliance measures of companies are generally considered through MFAT’s accreditation process. Entities bidding on ODA-funded contracts must complete an accreditation form in which they must identify whether they are subject to corruption risks; describe the potential impact of these risks; and the likelihood of the risks occurring. MFAT staff are provided training on identifying red flags and potential risks or corruption. In addition, MFAT has established a Fraud Control Programme

for NZAID. Fraud is defined therein as the “deliberate deceit by an employee, contractor or consultant in order to obtain a benefit for themselves or someone else, or cause a loss to the Ministry.”<sup>77</sup> Foreign bribery would be considered as a type of fraud under this policy. To prevent and respond to suspicions of fraud, a reporting hotline and whistleblower policy has been established. MFAT’s Code of Conduct also requires all allegations of fraud to be investigated. Fraud policy briefings are also provided to all MFAT staff departing for overseas postings.<sup>78</sup>

139. In Phase 2, the WGB recommended that New Zealand establish procedures for those working with ODA to report to law enforcement authorities credible information of foreign bribery that they may uncover in the course of their work (recommendation 2a). At the time of New Zealand’s written follow-up report in 2009, the WGB found this recommendation partially implemented because the full reporting chain to law enforcement authorities was not clear in all cases. MFAT states that it has since clarified its reporting procedures. Suspicions of foreign bribery involved in ODA-funded contracts must be reported to MFAT’s Audit and Risk, as well as Legal Divisions, who would conduct a preliminary internal investigation. Where there is a criminal suspicion that a New Zealand company or individual was involved in foreign bribery in relation to an ODA-funded contract, MFAT would report the suspicion to the SFO.

### *Commentary*

*The lead examiners welcome MFAT’s efforts to address the Phase 2 recommendation on reporting obligations and procedures. As detection levels of foreign bribery are particularly low in New Zealand, they recommend that MFAT continue to raise awareness among staff working with NZAID of their obligation to report credible suspicions of foreign bribery to the SFO.*

### **(b) Public Procurement**

140. Public procurement is de-centralised in New Zealand. Government agencies, authorities and bodies are individually responsible for executing their respective public procurement procedures. The MBIE is responsible for setting the overall government procurement rules, which must be applied by all public service departments.<sup>79</sup> In 2013, the MBIE adopted revised Government Rules of Sourcing (‘Rules of Sourcing’) to reflect the WTO Agreement on Government Procurement, including the Agreement’s requirements on transparency.

141. The Rules of Sourcing state that an agency may exclude a supplier from participating in a contract opportunity if there is “good reason” for exclusion. This includes making a false declaration; a conviction for a serious crime or offence; or professional misconduct, and would thus include foreign bribery.<sup>80</sup> However, the application of these exclusion rules may be completely ineffective in practice, as there is no requirement under the Rules of Sourcing for tenderers to make a declaration that they have not been convicted of a serious crime or offence, including foreign bribery. Also, the Rules do not require government agencies to conduct due diligence on a tenderer, including by verifying whether it is listed on the debarment lists of the multilateral development banks or the NZP list of Designated Individuals and Organisations. New Zealand additionally refers to the Auditor General’s Procurement Guidance and the

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<sup>77</sup> NZAID Fraud Control for the Aid Programme, available at: <http://www.aid.govt.nz/funding-and-contracts/fraud-control-aid-programme>

<sup>78</sup> *Ibid.*

<sup>79</sup> This includes the New Zealand Police and the New Zealand Defence Force under Rule 6 of 2013 the Government Rules of Sourcing.

<sup>80</sup> Government Rules of Sourcing (2013), Rule 41.

Government's "Guide to Mastering Procurement", both of which generally refer to due diligence, but do not require or recommend verification against domestic or international debarment lists. The MBIE does not conduct reviews on how government agencies exclude tenderers due to corruption. Statistics on exclusions are not maintained.

### *Commentary*

***The lead examiners recommend that New Zealand issue guidance to its contracting authorities to ensure that rules on exclusion from public procurement due to foreign bribery is effectively implemented in practice.***

#### ***(c) Officially Supported Export Credits***

142. The New Zealand Export Credit Office (NZECO) is New Zealand's officially supported export credit and insurance agency. NZECO's website contains links to its anti-bribery policy, the 2006 Export Credits Recommendation, the Anti-Bribery Convention, NZECO's Anti-Bribery Policy, as well as a link to the bribery and corruption website of the MOJ. All new NZECO staff are required to undertake training on identifying and combating bribery, as well as on legislative awareness and compliance.

143. NZECO informs its clients of the legal consequences of bribery within its application forms and through information posted on its website. The text refers to New Zealand's foreign bribery offence. Applicants for support must also declare in the application form that neither they, nor anyone acting on their behalf in connection with the transaction, have engaged or will engage in bribery. Before NZECO provides support for agent commission fees, it always requires details of the commissions associated with the transaction, as well as the amount and the purpose of the commissions. NZECO applies ceilings on agents' commissions on a case by case basis, and would take into account whether the level of the commission is consistent with standard business practice. However, no written guidance is provided on factors to be taken into account in applying ceilings on agents' commissions. To date, New Zealand has never provided official export credit support for agent commission fees.

144. NZECO conducts enhanced due diligence if it has credible evidence that bribery was involved in the award of a contract before or after support has been approved. Steps have also been taken to address Phase 2 recommendation 2a to establish reporting procedures to law enforcement authorities. NZECO's Anti-Bribery Policy provides written guidance on the reporting procedure, which requires staff to first report to NZECO Management and Treasury Legal Department. The Treasury Legal Department will then notify the SFO of the credible evidence.<sup>81</sup> The approval of the application is suspended pending the outcome of the review. If the SFO confirms that there is credible evidence of bribery, NZECO will refuse to support the application.

145. NZECO does not have a policy of mandatory debarment of exporters that are listed on the debarment lists of the multilateral development banks. Where exporters are named on such lists, NZECO would conduct enhanced due diligence before deciding to grant support. If it is proven that the applicant or other beneficiary has been involved in foreign bribery after support has been approved, NZECO may interrupt loan disbursements, invalidate cover, or deny indemnification. However, there are no written guidelines setting out the factors to be taken into account in making this decision.

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<sup>81</sup> "Credible evidence" is defined under NZECO's Anti-Bribery Policy as "evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted."

### *Commentary*

*The lead examiners welcome NZECO's adoption of an Anti-Bribery Policy and reporting procedures to law enforcement authorities. They recommend that NZECO continue its efforts to provide staff training on the Policy. They further recommend that NZECO consider adopting written guidance on factors to be considered when determining (a) ceilings on agents' commissions, and (b) whether to interrupt loan disbursements, invalidate cover or deny indemnification, if bribery is proven after support has been approved.*

## **C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP**

146. The Working Group on Bribery is seriously concerned with New Zealand's lack of enforcement of its foreign bribery offence. 12 years after its entry into force, only 2 investigations were opened in July 2013. New Zealand must step up efforts to proactively investigate allegations of foreign bribery. The low level of foreign bribery allegations also raises concerns on the levels of awareness, reporting and detection. This is of particular concern in a context where some individuals, including in the public sector, hold the view that New Zealand individuals and companies do not engage in bribery. The Working Group is also seriously concerned by the low level of priority given by New Zealand to implement the Working Group's Phase 2 recommendations, including on major loopholes such as the absence of an effective regime of liability of legal persons for foreign bribery and significant weaknesses identified in the foreign bribery offence. Seven years after its Phase 2 evaluation, New Zealand has also not addressed any of the weaknesses identified in its regime of non-tax deductibility of bribes.

147. The Phase 2 evaluation report on New Zealand adopted in October 2006 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of New Zealand's December 2008 written follow-up report, the Working Group concludes that: Recommendation 3b, 3c and 6c have been implemented, Recommendations 1b, 1c, 2a, 2c, 3a and 3e remain partially implemented and Recommendations 3f, 4a, 4b, 4c, 5a, 5b and 6a remain not implemented. While recommendation 6b was deemed implemented in the Phase 2 written follow-up report, it was deemed necessary to re-assess it in Phase 3.

148. In conclusion, based on the findings in this report on New Zealand's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invited New Zealand to submit a written report in six months on progress made in establishing the liability of legal persons for foreign bribery and every six months thereafter, if needed. As well, as part of its regular Phase 3 evaluation process, the Working Group invites New Zealand to report orally on its implementation of recommendations 2, 4a, 4b, 4c, 11a, 11b and 11c in one year (i.e., by October 2014). It also invites New Zealand to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e., by October 2015). New Zealand is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these two reports.

## 1. Recommendations of the Working Group

### *Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery*

1. The Working Group recommends that New Zealand significantly step up efforts to detect, investigate and prosecute foreign bribery. [Convention Article 1, 2009 Recommendation, V]
2. Regarding the foreign bribery offence, the Working Group:
  - (a) Urges New Zealand to proceed, as a matter of priority with the planned amendments to remove the dual criminality exception in section 105E of the Crimes Act; [Convention Article 1, 2009 Recommendation, III (ii), V, VI and Annex I A]
  - (b) Urges New Zealand (i) to clarify the routine government action (facilitation payments) exception in section 105C(3) of the Crimes Act, 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 discretionary or illegal acts by the official; or the granting of any improper advantage; and (ii) in its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, to consider the views of the private sector and civil society. [Convention Article 1, 2009 Recommendation, III (ii), V, VI and Annex I A]
3. Regarding the responsibility of legal persons, the Working Group strongly urges New Zealand to review its system of liability for legal persons for foreign bribery as a matter of priority, to ensure that the criteria for such liability are broadened and that the system takes one of the approaches described in Annex 1 to the 2009 Recommendation; [Convention Article 2, 2009 Recommendation III ii), V, Annex I B]
4. Regarding sanctions, the Working Group recommends that:
  - (a) New Zealand consider making both imprisonment and fines available as sanctions against natural persons for foreign bribery; [Convention Article 3; 2009 Recommendation III (ii)]
  - (b) In connection with the revision of its system of corporate criminal liability for foreign bribery, New Zealand (i) ensure that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions; and (ii) re-visit the possibility to make available additional sanctions for legal persons to ensure effective deterrence; [Convention Article 3; 2009 Recommendation III (ii) and V]
  - (c) New Zealand maintain statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive; [Convention Article 3; 2009 Recommendation III ii) and V]
  - (d) New Zealand make full use of the large range of asset confiscation tools offered under the Criminal Proceeds Recovery Act (2009), and to consider issuing guidelines on how to quantify the proceeds or benefits of a foreign bribery offence. [Convention Article 3; 2009 Recommendation III (ii) and V]

5. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that:
- (a) The SFO (i) thoroughly investigate and prosecute foreign bribery allegations; (ii) proactively gather information from diverse sources to increase the number of allegations and to enhance investigations; and (iii) make full use of special investigative techniques in foreign bribery investigations, where appropriate; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
  - (b) New Zealand provide law enforcement authorities with regular, practical training on (i) the foreign bribery offence; (ii) investigative techniques adapted to this offence; and, more generally, (iii) ways to more proactively detect, investigate and prosecute the offence of bribery of foreign public officials; [Convention Article 5; 2009 Recommendation Annex I D]
  - (c) New Zealand take steps to ensure that the *Solicitor General's Guidelines* cannot be interpreted contrary to Article 5 of the Convention, and that prosecutors are made aware of Article 5 of the Convention to ensure that the factors enumerated in the Article do not influence foreign bribery investigations and prosecutions; [Convention Article 5; 2009 Recommendation Annex I D]
  - (d) New Zealand remove the requirement of the Attorney General's consent for the prosecution of foreign bribery cases. [Convention Article 5]
6. Regarding jurisdiction, the Working Group recommends that New Zealand remove or amend the dual criminality exception under section 105E of the Crimes Act in order to ensure that nationality jurisdiction for foreign bribery is applied according to the same principles applied with regard to jurisdiction for other offences committed abroad. [Convention Article 4]
7. With regard to mutual legal assistance, the Working Group recommends that New Zealand continue to routinely and promptly co-ordinate with foreign law enforcement authorities, and make greater efforts to obtain evidence from these authorities, including through formal treaty-based MLA, where appropriate, in foreign bribery cases. [Convention Article 9]
8. With regard to extradition, the Working Group recommends that New Zealand (i) ensure that when an extradition request for foreign bribery is refused solely on the grounds of nationality, the cases would be submitted to competent authorities in New Zealand for the purposes of investigation and prosecution; and (ii) consider repealing section 101 of the Extradition Act on the refusal of extradition on the basis of nationality, in the context of its All-Government Response to Organised Crime and planned review of its Extradition Act. [Convention Article 10]

***Recommendations for ensuring effective prevention, detection and reporting of foreign bribery***

9. Regarding money laundering, the Working Group recommends that:
- (a) New Zealand pursue its efforts to amend the dual criminality exception for the money laundering offence under section 245 CA, 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 and 2009 Recommendation, III (i)]

- (b) New Zealand continue to raise awareness and make a full use of the new tools at its disposal to increase the enforcement of its money laundering offence in cases where foreign bribery is the predicate offence. [Convention Article 7 and 2009 Recommendation, III (i)]
- (c) New Zealand maintain clearer statistics on investigations, prosecutions and sanctions related to money laundering in cases where foreign bribery is the predicate offence. [Convention Article 7 and 2009 Recommendation, III (i)]

10. Regarding accounting and auditing, corporate compliance, internal controls and ethics, the Working Group recommends that:

- (a) New Zealand raise awareness among accountants and external auditors, including by providing guidance and training on detecting red flags for foreign bribery in company accounts; [Convention Article 8; 2009 Recommendation III.i]
- (b) New Zealand (i) require external auditors who discover indications of a suspected act of foreign bribery to report the discovery to corporate monitoring bodies as appropriate; and (ii) consider requiring auditors to report to external competent authorities, including law enforcement authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure auditors making such reports reasonably and in good faith are protected from legal action as appropriate. [2009 Recommendation III(iv), (v), X.B(iii), (v)]

11. Regarding tax measures to combat bribery of foreign public officials, the Working Group:

- (a) Urges New Zealand to proceed with plans to 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; and (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties; [2009 Tax Recommendation]
- (b) Recommends that in parallel with the planned amendments to its tax legislation, New Zealand pursue its efforts to provide guidelines, instructions and training to tax examiners on (i) the non-tax deductibility of bribes; (ii) determining whether a particular payment to a foreign public official comes under the facilitation payment exception; and (iii) detection of foreign bribery during tax audits; [2009 Tax Recommendation]
- (c) Recommends that New Zealand proceed as a matter of priority with its proposal to allow Inland Revenue to share information with law enforcement agencies in relation to “serious crime” with a view to amending 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; [2009 Tax Recommendation]

- (d) Recommends that Inland Revenue target a wider range of recipients in its anti-bribery awareness-raising measures, in particular SMEs. [2009 Recommendation, III(iii) and 2009 Tax Recommendation]

12. Regarding awareness-raising, the Working Group recommends that: New Zealand (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in co-operation with business associations; and (ii) encourage companies, especially SMEs, to develop and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance. [2009 Recommendation III (i), X C (i) and (ii), and Annex II]

13. With respect to the reporting of foreign bribery, the Working Group recommends that New Zealand:

- (a) Ensure that all public servants, including within NZAID, are made aware of the obligation to report all credible suspicions of foreign bribery involving New Zealand individuals or companies detected in the course of their work to New Zealand law enforcement authorities; [2009 Recommendation IX (i) and (ii)]
- (b) Continue efforts to raise awareness of the Protected Disclosures Act in order to encourage and facilitate the reporting of suspected acts of foreign bribery in good faith and on reasonable grounds to New Zealand law enforcement authorities, in particular among private sector employees. [2009 Recommendation IX (iii)]

14. Regarding public advantages, the Working Group recommends that:

- (a) New Zealand issue guidance to its contracting authorities to ensure that exclusion from public procurement due to foreign bribery is effectively implemented in practice; [2009 Recommendation XI (i)]
- (b) NZECO (i) continue to raise awareness among its employees on its Anti-Bribery Policy and reporting obligations; and (ii) consider adopting written guidance on factors to be considered when determining ceilings on agents' commissions, and whether to interrupt support if bribery is proven after support has been approved. [2009 Recommendation XI (i); 2006 Export Credit Recommendation]

## **2. Follow-up by the Working Group**

15. The Working Group will follow up the issues below as case law and practice develops:

- (a) The application of the “corruptly” intent requirement;
- (b) Whether the sanctions imposed against natural persons for foreign bribery are effective, proportionate and dissuasive;
- (c) The exercise of jurisdiction over legal persons;

- (d) The use of the terms “bribe” and “corruptly” in the Tax Act to ensure that it is sufficiently clear that bribe payments are non-tax deductible.

**ANNEX 1 PREVIOUS WORKING GROUP RECOMMENDATIONS TO NEW ZEALAND  
AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION**

<i>Phase 2 Recommendation (2006)</i>	<i>2009 Working Group Evaluation</i>
<b><i>Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials</i></b>	
1. With respect to <u>awareness raising and prevention-related activities</u> 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);	<i>Satisfactorily Implemented</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);	<i>Partially Implemented</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).	<i>Partially Implemented</i>
2. With respect to the <u>detection and reporting</u> 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);	<i>Partially Implemented</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	<i>Not Implemented</i>
(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).	<i>Partially Implemented</i>
<b><i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences</i></b>	

3. With respect to the <u>investigation and prosecution</u> 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);	<i>Partially Implemented</i>
(b) ensure that the Serious Fraud Office (SFO) receives all allegations of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);	<i>Partially Implemented</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);	<i>Partially Implemented</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);	<i>Satisfactorily Implemented</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	<i>Partially Implemented</i>
(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).	<i>Not Implemented</i>
4. With respect to the <u>offence of foreign bribery</u> and the <u>liability of legal persons</u> 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);	<i>Not Implemented</i>
(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	<i>Not Implemented</i>
(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).	<i>Not Implemented</i>
5. With respect to <u>related tax and money laundering offences</u> , 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	<i>Not Implemented</i>

(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).	<i>Not Implemented</i>
6. With respect to <u>sanctions</u> 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);	<i>Not Implemented</i>
(b) consider permitting the imposition of both fines and imprisonment for foreign bribery offences (Convention, Article 3); and	<i>Satisfactorily Implemented</i>
(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)).	<i>Not Implemented</i>
<b><i>Follow-Up by the Working Group</i></b>	
(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;	<i>Continue to follow up</i>
(b) the level of sanctions, including confiscation, applied in foreign bribery cases and in particular with regard to legal persons;	<i>Continue to follow up</i>
(c) jurisdiction over legal persons;	<i>Continue to follow up</i>
(d) the intent requirements in the foreign bribery statute;	<i>Continue to follow up</i>
(e) the application of the tax deduction for facilitation payments; and	<i>Continue to follow up</i>
(f) enforcement of the accounting fraud offences.	<i>Continue to follow up</i>

## ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

### Public Sector

- Crown Law Office
- Crown Solicitors
- Department of Internal Affairs
- Financial Markets Authority
- Inland Revenue
- Ministry of Business, Innovation and Employment
- Ministry of Foreign Affairs and Trade
- Ministry of Justice
- New Zealand Export Credit Office
- New Zealand Police
- New Zealand Trade and Enterprise
- Office of the Auditor General
- Reserve Bank of New Zealand
- Serious Fraud Office
- State Services Commission

### Private Sector

#### *Private enterprises*

- Douglas Pharmaceuticals
- Fonterra
- Mainfreight
- New Zealand Oil and Gas
- PGG Wrightson Ltd.
- Sealord
- Telecom
- Todd Energy
- Zespri International

#### *Business associations*

- Business New Zealand
- Federated Farmers of New Zealand

#### *Legal profession and academics*

- Chapman Tripp
- New Zealand Law Society
- Russell McVeigh
- Simpson Grierson

#### *Accounting and auditing profession*

- Deloitte
- Ernst & Yong
- KPMG
- New Zealand External Reporting Board
- New Zealand Institute of Chartered Accountants
- PWC

### Civil Society and Media

- Business Desk
- Fairfax News
- New Zealand Council of Trade Unions
- Transparency International New Zealand

**ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS**

<b>AFP</b>	Australian Federal Police	<b>SFO</b>	Serious Fraud Office
<b>ARU</b>	Asset Recovery Unit	<b>SME</b>	Small and Medium-sized Enterprise
<b>CA</b>	Crimes Act	<b>SSC</b>	State Services Commission
<b>CLO</b>	Crown Law Office	<b>SSA</b>	Search and Surveillance Act
<b>CPRA</b>	Criminal Proceeds Recovery Act (2009)	<b>STR</b>	Suspicious Transaction Report
<b>DIA</b>	Department for Internal Affairs	<b>TIEA</b>	Tax Information Exchange Agreement
<b>DNFBP</b>	Designated Non-Financial Businesses and Professions	<b>TINZ</b>	Transparency International New Zealand
<b>EUR</b>	Euro	<b>USD</b>	United States Dollar
<b>FATF</b>	Financial Action Task Force	<b>WGB</b>	Working Group on Bribery
<b>FIU</b>	Financial Intelligence Unit	<b>WTO</b>	World Trade Organisation
<b>FMA</b>	Financial Markets Authority		
<b>IESBA</b>	International Ethical Standards Board for Accountants		
<b>IFRS</b>	International Financial Reporting Standards		
<b>IIC</b>	Independent Inquiry Committee		
<b>ISA</b>	International Standards on Auditing		
<b>MACMA</b>	Mutual Assistance in Criminal Matters Act		
<b>MBIE</b>	Ministry of Business, Innovation and Employment		
<b>MFAT</b>	Ministry of Foreign Affairs and Trade		
<b>MLA</b>	Mutual Legal Assistance		
<b>MOJ</b>	Ministry of Justice		
<b>MOU</b>	Memorandum of Understanding		
<b>NZAID</b>	New Zealand Aid Programme		
<b>NZAuSB</b>	New Zealand Auditing and Assurance Standards Board		
<b>NZD</b>	New Zealand Dollar		
<b>NZECO</b>	New Zealand Export Credit Office		
<b>NZP</b>	New Zealand Police		
<b>NZTE</b>	New Zealand Trade and Enterprise		
<b>NZX50</b>	New Zealand Exchange Index 50		
<b>OAG</b>	Office of the Auditor General		
<b>ODA</b>	Official Development Assistance		
<b>OECD</b>	Organisation for Economic Cooperation and Development		

<b>OFCANZ</b>	Organised and Financial Crime Agency of New Zealand
<b>PEPs</b>	Politically Exposed Persons
<b>PDA</b>	Protected Disclosures Act
<b>RBNZ</b>	Reserve Bank of New Zealand

## ANNEX 4 EXCERPTS OF RELEVANT LEGISLATION

### Crimes Act 1961

#### Section 2 - Interpretation

[...]

**person, owner**, and other words and expressions of the like kind, include the Crown and any public body or local authority, and any board, society, or company, and any other body of persons, whether incorporated or not, and the inhabitants of the district of any local authority, in relation to such acts and things as it or they are capable of doing or owning

[...]

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#### 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;

[...]

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#### 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) Everyone 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) Everyone 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).

**Section 106 - Restrictions on prosecution**

(1) No one shall be prosecuted for an offence against any of the provisions of sections 100, 101, 104, 105, 105A, 105B, 105C, and 105D without the leave of the Attorney-General, who before giving leave may make such inquiries as he thinks fit.

[...]

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**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, everyone 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, everyone 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.

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**Income Tax Act 2012 (as at 31 December 2012)**

**DB 45 Bribes paid to public officials**

*When this section applies*

- (1) This section 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 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.

*Exclusions*

- (3) This section does not apply if—

- (a) person A gives the bribe outside New Zealand and, at the time, the bribe is not an offence under the laws of the foreign country where the principal office of the person, organisation, or other body that employs the foreign public official or for whom the official provides services is situated:

- (b) the bribe is given 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*

- (4) 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*

- (5) This section overrides the general permission.

Defined in this Act: amount, benefit, bribe, business, deduction, foreign country, foreign public official, general permission, New Zealand, pay, public official, routine government action,

Compare: 2004 No 35 s DB 36