



NEW ZEALAND: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 13 March, 2009.

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SUMMARY AND CONCLUSIONS BY WORKING GROUP ON BRIBERY

Introduction

1. In December 2008, the Working Group on Bribery reviewed the Phase 2 Written Follow-Up Report supplied by New Zealand (the "Follow-Up Report"), which reports on actions taken by New Zealand in response to the recommendations in the Working Group's October 2006 Phase 2 report (the "Phase 2 Report"). The Follow-Up Report and the summary and conclusions of the Working Group on the report have been consolidated for publication.

2. New Zealand representatives explained that due to a very recent change of government in New Zealand (November 2008), they could provide only limited information about the new government's intentions with regard to foreign bribery issues, including proposed reforms pending under the previous government.

Review of Implementation of the Phase 2 Recommendations

3. New Zealand has satisfactorily implemented a number of the Working Group's recommendations in the Phase 2 Report. With regard to awareness-raising in the public sector, New Zealand reported on substantial awareness work carried out by the Ministry of Justice with a variety of public sector agencies, including New Zealand Trade and Enterprise (NZTE) and the Ministry of Foreign Affairs and Trade (MFAT).

4. New Zealand provided case law demonstrating that it can provide mutual legal assistance to foreign authorities regardless of whether New Zealand law enforcement agencies would have territorial jurisdiction to open their own investigation. New Zealand also adequately considered whether to change, for foreign bribery cases, its general rule precluding the imposition of both imprisonment and a fine for the same offence.

5. The Working Group further identified certain areas where Phase 2 recommendations have been partially implemented, calling for New Zealand to make further progress. With regard to efforts to improve awareness of foreign bribery legislation among companies, and in particular small and medium sized enterprises, the Working Group noted that there are numerous planned initiatives that would assist in raising awareness, but few have been carried out to date.

6. With regard to efforts to work proactively with the accounting and auditing profession and financial institutions to develop training for and awareness of the foreign bribery offence, almost all of the information supplied by New Zealand related to public sector accounting. While important, the Working Group noted that the core focus of the recommendation is on accounting and auditing in private companies. In this regard, New Zealand clarified that an expected article by the Ministry of Justice on New Zealand's anti-bribery legislation in the journal of the New Zealand Institute of Chartered Accountants had not yet been published. New Zealand indicated that it is actively engaged in constructive discussions with this sector and is confident that this sector is taking adequate steps to carry out its own training programmes.

7. With regard to the reporting by public sector employees to law enforcement authorities of suspicions of foreign bribery that they may uncover in the course of their work, New Zealand has made significant efforts to develop and publicise reporting procedures in several agencies. Work is also ongoing on whistleblowing. However, NZECO (New Zealand's export credit agency) should reflect the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits in its anti-bribery policies. In addition, the full reporting chain from the employee discovering the evidence to the report to the law enforcement authorities is not clear in all instances.

8. With regard to the reporting by external auditors of suspicions of foreign bribery, New Zealand has not taken action with regard to auditors of private sector companies. However, the Working Group considered that the recommendation was partially implemented because public sector auditors are subject to a reporting obligation.

9. With regard to the recommendations about the investigation and prosecution of foreign bribery generally (taking necessary measures to ensure that all credible foreign bribery allegations are properly investigated; ensuring that the Serious Fraud Office (SFO) receives all allegations; and making effective investigative means and training available to relevant law enforcement authorities in foreign bribery investigations), the Working Group noted continuing uncertainty about the institutions that are or will be charged with investigating foreign bribery cases. A new specialised agency of the New Zealand Police, the Organised and Financial Crime Agency New Zealand (OFCANZ), was established by the previous government on 1 July 2008. That government had intended to disband the SFO, but the necessary legislation has not been adopted. During the plenary meeting, New Zealand informed the Working Group that the new government elected in November 2008 had stated that it does not intend to disband the SFO. The division of jurisdiction between the SFO and OFCANZ with regard to foreign bribery cases remains uncertain. A Memorandum of Understanding exists between the Police and the SFO, but it does not specifically address foreign bribery cases. New Zealand indicated that the Police refer all serious cases to the SFO.

10. Despite the institutional uncertainty, New Zealand indicated that the SFO has been active in practice on foreign bribery related cases. New Zealand reported that one case had recently been closed for lack of evidence after active investigative efforts by the SFO. The Working Group noted some uncertainty about the treatment of the bribery aspects of a now-closed case relating to the UN Oil for Food investigation. With regard to investigative means, New Zealand indicated that significant proposed reforms were pending under the previous government following a major law reform commission report on the law of search and seizure.

11. With regard to extradition, the Phase 2 report contained a three-pronged recommendation that New Zealand 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; pursue efforts to facilitate where appropriate the procedures for extradition; and reconsider the requirement of Ministerial approval of certain requests for extradition under the Convention. The Working Group noted only limited action in this area. New Zealand is currently reviewing its approach to extraditing its citizens in the context of ongoing treaty negotiations with the United States. A change in policy, if any, would apply in respect of requests from all jurisdictions. There was no evidence of government reconsideration of the Ministerial approval requirement.

12. The Working Group considered that a number of recommendations had not been implemented. The Phase 2 report specifically noted that New Zealand law on the liability of legal persons for foreign bribery is inconsistent with Article 2 of the Convention. The Working Group is seriously concerned that New Zealand has not rectified this deficiency. New Zealand has also not addressed the issue of sanctions

against legal persons for foreign bribery (other than in a proposed bill applying generally to confiscation - see below). Criminal sanctions remain of little impact in the absence of an effective regime of criminal liability.

13. With regard to Article 5 of the Convention, New Zealand has not amended the Solicitor-General's Guidelines to require that the factors identified in Article 5 of the Convention be excluded from consideration with regard to the investigation and prosecution of foreign bribery cases. Nor has it removed the requirement of Attorney-General consent for prosecution of foreign bribery.

14. The Working Group recommended (in both its Phase 1 and Phase 2 reports) that New Zealand take steps to allow the exchange of information between the tax authorities and prosecutors in foreign bribery cases. The Working Group is again seriously concerned that Inland Revenue has not implemented the recommendation. New Zealand noted that a review of its policy in this area was in progress.

15. The Working Group noted that New Zealand had made some progress with regard to certain other recommendations to adopt or amend legislation. The proposed amendments include repeal of the double criminality requirement in section 105E of the Crimes Act 1961 and amendments to the Income Tax Act to ensure that no foreign bribe payments covered under criminal law are tax deductible. Under the previous government, a Crimes (Anti-Corruption) Amendment Bill was being drafted for introduction in 2009. Work has also been ongoing with regard to legislation to amend the law on routine government action (facilitation payments) exception in section 105C(3) of the Crimes Act 1961 and reforms in this area could be included in the same bill. New Zealand has indicated more generally that it will further examine whether to 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 bribe occurred.

16. Another bill in progress under the previous government would strengthen powers of confiscation, notably by introducing civil processes that would enable authorities to recover profits received from business deals secured by payments of bribes even if a conviction has not been secured. If adopted, this bill would allow for civil recovery from legal persons.

17. While the Working Group noted the efforts made so far by New Zealand in these areas, the Working Group decided, as a general matter and after discussion, that recommendations to member states to adopt or amend legislation should be considered to be not implemented (rather than partially implemented) until the relevant legislation is adopted or amended. The Group noted that it had repeatedly adopted this approach in the past, albeit not on all occasions, and agreed to apply a consistent standard for the future. The Group noted that it could distinguish in its summary between areas where legislation was expected and where more fundamental issues existed. New Zealand indicated that it accepted a single standard provided it had applied equally to all countries in the past or was going to be consistently used in the future.

Conclusion

18. Based on the findings of the Working Group with respect to New Zealand's implementation of its Phase 2 recommendations, the Working Group determines that

- Recommendations 1(a), 3(d) and 6(b) have been satisfactorily implemented;
- Recommendations 1(b)-(c), 2(a), 2(c), 3(a)-(c) and 3(e) have been partially implemented; and

- Recommendations 2(b), 3(f), 4(a), 4(b)¹, 4(c)¹, 5(a)¹, 5(b)¹, 6(a)¹, 6(b) and 6(c)¹ have not been implemented.

19. The Working Group invited New Zealand to report orally to the Working Group within one year on the implementation of the recommendations not fully implemented at this time. The Working Group will continue to monitor the follow-up issues identified in the Phase 2 Report as practice develops.

¹ The Working Group notes that New Zealand has indicated that legislation is in progress in the areas addressed by these recommendations.

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: New Zealand

Date of approval of Phase 2 Report: 27 October 2006

Date of information: 27 October 2008

Part I. Recommendations for Action

Text of recommendation 1(a):

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and Revised Recommendations, the Working Group on Bribery 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Ministry of Justice has initiated a wide-ranging strategy aimed at raising awareness of bribery and corruption related issues, including awareness of the foreign bribery offence. The Ministry has:

- Initiated discussion with public sector agencies on development of a National Anti-Corruption strategy – this strategy encompasses a range of awareness-raising initiatives from the development of a dedicated anti-corruption web-site, publication of articles in media and industry journals, seminars;
- Conducted a seminar with public officials on challenges facing New Zealand in promoting compliance with the OECD Convention;
- Consulted with the New Zealand Export Credit Office (NZECO) over OECD requirements regarding foreign bribery and export credits and provided comment on NZECO policy;
- Provided advice to New Zealand Trade and Enterprise (NZTE).

All Ministry of Foreign Affairs and Trade (MFAT) posts overseas have been advised of the offence and its extraterritorial application. MFAT Consular instructions have been amended to include information on bribery procedures. The MFAT Audit division has included information on bribery and corruption issues in pre-posting briefings. All Foreign Affairs and Agency staff going overseas are alerted to the

regulations. Where it is particularly relevant (due to the location, or the position they will fill), the Audit division will provide the staff member with a copy of the regulations. MFAT and the New Zealand Aid and International Development Agency have also circulated copies of the Ministry of Justice brochures on bribery and corruption to overseas Posts.

NZTE has also conducted in-house workshops and seminars on compliance with the OECD Convention. The provisions of the Crimes Act relating to the foreign bribery offence and general information on the Convention have been included in NZTE's staff training programme and in its legislative compliance system (that tests staff awareness of legislation and requests information as to compliance). Training for client-facing staff includes a direction that New Zealand companies need to be educated on their responsibilities for compliance with the Convention.

The Serious Fraud Office (SFO) has conducted training sessions at NZTE offices on its role in combating fraud including external fraud and bribery. The training included material on what constituted 'bribery' under New Zealand's Crimes Act and the procedures to deal with such issues. This training will continue to be delivered if the Serious Fraud Office becomes part of a new agency, the Organised and Financial Crime Agency New Zealand (OFCANZ).

A significant amount of effort has gone into strengthening integrity systems within the public sector. The State Services Commission issued a new Code of Conduct on Integrity and Ethics in April 2007. The code has been applied to 130 State agencies, which must also give effect to the State Services Development Goals.

A development goal for the New Zealand State Services, which creates obligations for all its agencies, is to strengthen trust and reinforce the spirit of service. The objective is to build on New Zealand's international reputation for having one of the most honest and transparent public sectors in the world.

Standards of Integrity and Conduct seeks to reinforce this reputation by fostering a spirit of service and establishing common standards of behaviour required from the diverse range of people and roles across the State Services. The emphasis in the Code is on matters relating to integrity and conduct. Integrity is the inclusive and all-embracing description of these ethical requirements. The headings under which the standards have been grouped - Fair, Impartial, Responsible and Trustworthy - are indicative of integrity.

The Code provides the framework within which to make informed judgements when faced with competing interests and conflicting values - when the 'right answer' is not readily apparent. It does not provide detailed explanations of appropriate behaviour in every situation but reflect values that, with judgement, have universal application in all State Services organisations. However, all agencies must have policies and procedures which build and expand on, but are consistent with, the code.

The State Services Commissioner, who has a statutory mandate to set integrity standards, will monitor the way in which the behaviour of State servants complies with the standards. Milestones set in November 2007 relating to the trust development goal, require agencies to give effect to the "6 elements" essentially for maintaining trustworthiness. These are:

- Agencies of the State Services have standards of integrity and conduct that meet the State Services Commissioner's minimum standards;
- Agencies of the State Services promote their standards of integrity and conduct;
- Standards of integrity and conduct are integrated into the behaviour of State servants;
- Managers model the standards of integrity and conduct in their behaviour;

- Consequences for behaviour that breaches the standards of integrity and conduct are known by State servants;
- Agencies act decisively when breaches occur.

The State Services Commission contracted the Washington based Ethics Resource Centre to conduct an integrity and conduct survey of the State Services in April 2007, using the US National Business Ethics Survey model.

One of the findings of the survey was that many State Servants were unfamiliar with the provisions of the Protected Disclosures Act and the process for reporting serious misconduct. This matter has been drawn to the attention of agencies.

The survey will be repeated in September 2009 enabling a comparison with the 2007 benchmark and identification of the success across agencies in raising awareness of reporting processes.

Text of recommendation 1(b):

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

(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 sized enterprises, and advise and assist companies with regard to the prevention and reporting of foreign bribery (Revised Recommendation, Paragraph I).

Actions taken as of the date of the follow-up report to implement this recommendation:

In the process of developing a public-awareness raising strategy, the Ministry has initiated contact with a wide-range of individuals, agencies, institutions, and organisations for the purpose of improving the level of awareness of the foreign bribery offence amongst New Zealand businesses, but particularly small and medium sized entities (SME). This is a long term strategy with new initiatives being rolled out over the next 3 to 5 years. It is anticipated that the strategy be reviewed both for content and implementation. The strategy will be reviewed with the support of an ad hoc advisory group consisting of representatives from the private sector, civil society groups and the public sector. A range of initiatives are currently underway, including:

- The construction of a standalone anti-bribery web-site that will cater for the interests of the public and private sectors and provide a range of practical tools for SMEs to use. This web-site is still under construction with a target date for completion of May 09.
- Working with University Business schools to undertake a comprehensive research project that will provide policy-makers and others with information about the practices of New Zealand businesses when operating in countries with high levels of corruption.
- Being a strategic partner of Transparency International New Zealand in the organisation and planning of a two day symposium on bribery and corruption.
- Completion of a scoping study into the economic benefits of being seen as 'corruption-free'.

- The publication of articles in industry and professional association magazines. Articles by the Inland Revenue Department and the Ministry of Justice on New Zealand’s anti-bribery legislation have been published in the NZICA journal (**copies attached**)
- Reviewing and updating anti-bribery information on web-sites from relevant public sector organisations (e.g. NZTE and Export Credit Office – see below).
- Establishing links with the Small Enterprise Directorate, Business New Zealand and Regional Chambers of Commerce to find the most effective means of providing information/advice to SMEs.

Major private sector accountancy firms undertake a number of initiatives such as training programmes to promote awareness within the business community of bribery offences. They also provide clients with advice and guidance on meeting obligations under anti-bribery legislation in different parts of the world (for example, although there is no record-keeping requirement under domestic legislation, there may be requirements under other legislation such as the FCPA).

KPMG has recently (July 16 2008) released a media statement drawing attention to the corruption risks faced by New Zealand businesses. The article drew attention to the provisions in the 1961 Crimes Act covering the bribery of foreign public officials and pointed out that under the United States Foreign and Corrupt Practices Act (FCPA), New Zealand countries which have a “footprint” in the United States, are potentially subject to the substantial penalties associated with breaches of the FCPA.

The Export Credit Office (ECO) has also revised the advice it provides to exporting businesses on bribery and ECO’s anti-bribery policy. It has published this information on its web-site www.nzeco.govt.nz/antibribery. The web-site emphasises ECO’s commitment to combating bribery and expressly states that it “has a legal, corporate and ethical responsibility to ensure it is not knowingly providing support in a transaction involving the offer or the giving of a bribe.”

The Export Credit Office is also strongly supportive of initiatives that encourage the combat of bribery in international business transactions such as the OECD Action Statement on Bribery and Officially Supported Export Credits. Consequently ECO makes it clear that it operates in a manner consistent with OECD guidelines relating to officially supported export credits, including any guidelines developed by OECD from time to time in relation to bribery.

ECO informs potential and existing clients about the foreign bribery offence and advises them that it takes appropriate measures to deter the offer or giving of a bribe, including:

- Informing applicants and/or exporters about the legal consequences of bribery in international business transactions;
- Requiring applicants and/or exporters to provide to the NZECO an undertaking or declaration that neither they, nor anyone acting on their behalf, have been engaged, or will engage, in any corrupt conduct including bribery while conducting that transaction;
- Refusing to approve credit, cover or other support where, in the NZECO’s opinion, there is sufficient evidence or reason to believe that bribery was involved in connection with the export transaction to which the application relates.

Text of recommendation 1(c):

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and Revised Recommendations, the Working Group on Bribery

recommends that New Zealand:

(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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Auditor-General's Auditing Standard AG-3: "The Auditor's Approach to Issues of Performance, Waste and Probity" has been amended to require auditors of public entities acting on behalf of the Auditor-General to review overall levels of expenditure in sensitive areas, and the Standard specifically notes that sensitive areas may include "payments to or from other countries, particularly those with a history of different ethical standards or where bribery is more prevalent".

In February 2007 the Auditor-General released a Good Practice Guide called "Controlling Sensitive Expenditure: Guidelines for public entities". This Guide, which is separate from AG-3 referred to above, represents the Auditor-General's view of good practice that public entities should use to control sensitive expenditure. The Guide outlines expectations and guidance that will be used by auditors acting on behalf of the Auditor-General when carrying out performance audits or inquiries under section 16 or section 18 respectively of the Public Audit Act 2001, or in annual financial audits of public entities.

"Sensitive expenditure" is defined in the Guide as that category of expenditure by a public entity that could be seen as giving some private benefit to an individual staff member that is additional to the business benefit to the entity of the expenditure. Travel, accommodation and hospitality spending are examples of delicate areas where problems often arise. The Guide also includes expenditure by a public entity that could be considered unusual for the entity's purpose and/or functions.

The purpose of the Guide is to help public entities improve, where necessary, their organisational approach to, and control of, sensitive expenditure. The Guide aims to assist senior managers and leaders of public entities and any others who are responsible for sensitive expenditure policies, procedures and other controls. The Guide also provides advice on specific types of sensitive expenditures, which all entities and individuals making sensitive expenditure decisions should consider.

The Guide is intended to assist public entities and individuals in exercising good judgement when sensitive expenditure decisions are involved. To that end the Guide and the amended Auditing Standard AG-3 will complement and strengthen the SSC Code of Conduct *Standards of Integrity and Conduct*.

The Ministry of Justice has also been working in close collaboration with members of the New Zealand Institute of Chartered Accountants (NZICA) over provision of training sessions and other awareness raising opportunities. It is intended to develop these private sector-government relationships as part of the awareness-raising strategy.

Text of recommendation 2 (a):

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

a) establish procedures to be followed by public sector employees, including employees of the Ministry of Foreign Affairs and Trade, and of export credit, trade promotion and development aid agencies, to report to law enforcement authorities credible information about foreign bribery that they may uncover in the course of their work, and encourage and facilitate such reporting (Revised Recommendation, Paragraph I).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Protected Disclosures Act was subject to an independent review of its effectiveness and a number of amendments to the Act were recommended. The Protected Disclosures Act Amendment Bill was reported back in April 2008 and is currently awaiting its second reading. The amendments contained in the Bill will, amongst other things, enhance the role of the Ombudsman in providing guidance and assistance to people seeking to report serious misconduct. They will also provide improved protection for whistleblowers, including provisions for the protection of the identity of whistleblowers in certain circumstances. The relevant parts are found in clause 10 of the Bill, which provides:

10 Confidentiality

- (1) Section 19(2) is amended by inserting “or under the Local 15 Government Official Information and Meetings Act 1987” after “Official Information Act 1982”.
- (2) Section 19 is amended by adding the following subsection:
- (3) An Ombudsman may-
 - “(a) provide information and guidance to organisations and employees concerning the circumstances in which anonymous disclosures of information may be made under this Act; and
 - (b) otherwise provide advice and assistance to organisations and other persons in relation to the duty specified in subsection (1).”

The amended legislation will authorise the Ombudsmen at any time, to provide information and guidance to public and private sector employees on using the Act, advise on what is serious wrongdoing, who to complain to, and when anonymous disclosures can be made. This should provide a filter for misguided disclosures as well as encouraging whistle blowers to throw light on serious wrongdoing.

The provisions on how whistleblowers can get help will be given more prominence, as will the advice to organisations and employees on protecting the identity of a whistle blower.

The Ombudsmen's involvement should also encourage more organisations to have published internal procedures. They will have new powers to review and guide public sector organisations' investigations of whistle blowing. These provisions come with information requiring powers, although private sector organisations will not be required to comply with an Ombudsman's request for information in exercising the new powers, but will be encouraged to do so.

The Ombudsmen will be able to take over a public sector organisation's investigation of serious wrongdoing alleged against it if the Ombudsman considers that the insufficient progress had been made by the organisation, and the whistle blower consents to the take-over. In addition, the Ombudsmen will co-ordinate protected disclosures that have already been made to another person or body. This again applies only with the whistle blower's consent. The Ombudsmen may refer the disclosure on to another body or to a Minister to investigate, or may investigate when the matter relates to a public sector organisation.

When enacted, the State Services Commission intends promoting awareness of the legislation and the

importance of all agency employees being familiar with the process for "safely" reporting misconduct.

The Serious Fraud Office has conducted training sessions at New Zealand Trade and Enterprise (NZTE) offices on its role in combating fraud including external fraud and bribery. The training included material on what constituted 'bribery' under New Zealand's Crimes Act and the procedures to deal with such issues. This training will continue to be delivered if the SFO becomes part of a new agency, the Organised and Financial Crime Agency New Zealand (OFCANZ).

In October 2006 the Ministry of Foreign Affairs and Trade (MFAT) sent a cable to all its Posts setting out the procedures that must be followed in the event that the Post receives information about New Zealanders or New Zealand companies who may be engaged in bribery. These instructions were re-circulated in 2007 along with copies of the Ministry of Justice brochures on bribery and corruption (**copy attached**).

NZTE also provided similar information to all NZTE staff including staff in its offshore offices. The information sent to the MFAT Posts and NZTE's offshore offices includes the required procedures for reporting the information to the Legal Division of MFAT and NZTE respectively and the type of information that is required, information that might be provided to the informant, and the appropriate role of the Posts and offshore offices in responding to the complaint. The instructions make it clear that the responsibility for investigating the complaint or information rests with the New Zealand Police or Serious Fraud Office.

NZTE's Prevention of Fraud Policy includes information about foreign bribery and the associated legislation. It requires staff to report any instances or awareness of such fraud to NZTE's corporate counsel.

The MFAT audit division includes information on bribery and corruption issues in its pre-posting meetings. MFAT consular instructions have been amended to provide detailed information on how a staff member should deal with bribery and corruption matters.

The New Zealand International Aid and Development Agency (NZAID) 2007 Procurement Policy requires any staff member becoming aware of or suspecting any instance of either fraud or corruption will immediately advise their manager, NZAID's Internal Auditor, and MFAT's Audit division for investigation and action.

The New Zealand Export Credit Office (NZECO) does not guarantee transactions where bribery is involved. The guarantee-holder could find that the guarantee ceases to be valid if it later emerges that the export transaction involved bribery.

The NZECO requires everyone who applies for a guarantee to verify that no bribes have been paid in connection with the transaction in question. The NZECO's guarantee will cease to be valid should it later emerge that bribes have been paid.

The NZECO requires the exporter to certify this when the exporter applies for the guarantee. In addition the NZECO informs the parties involved about the consequences of breaking the law against bribery.

When an exporter applies for a guarantee they have to certify that:

- the applicant has not paid and will not pay bribes or other unacceptable rewards to foreign ministers, members of parliament or public officials in connection with the export transaction to which the application relates;
- no other person who is acting on behalf of the applicant has paid or will pay bribes or other

unacceptable rewards to foreign ministers, members of parliament or public officials in connection with the export transaction to which the application relates;

- they are aware that the NZECO's obligation to honour the NZECO guarantee may cease and that any indemnification already paid may have to be refunded if the export transaction turns out to have involved bribery;
- The NZECO's policy and procedures against corruption have been harmonised with those of other export credit agencies within the OECD.

The NZECO supports initiatives that encourage the combating of bribery in international business transactions such as the OECD Action Statement on Bribery and Officially Supported Export Credits. Furthermore, the NZECO must operate in a manner consistent with OECD guidelines relating to officially supported export credits, including any guidelines developed by OECD from time to time in relation to bribery and corruption. In supporting any export credit transaction, the NZECO will take measures and adopt policies and procedures that deter bribery. These measures will include the following:

- The applicant for an export credit guarantee and/or the relevant exporter will be required to provide to NZECO an undertaking or declaration that neither they, nor anyone acting on their behalf, have been engaged, or will engage, in any corrupt conduct including bribery while conducting that transaction.
- The applicant and other parties receiving or benefiting from the support of NZECO will be primarily responsible on an on-going basis for the proper description of the international business transaction and the transparency of all relevant payments.
- The applicant will at all times be responsible for compliance with all applicable laws and regulations, including national provisions for combating bribery of foreign public officials in international business transactions.
- If there is sufficient evidence of bribery in the award of the export contract, the NZECO will refuse to approve credit, cover or other support.
- If after credit, cover or other support has been approved and an involvement in bribery by the applicant or other beneficiary is proved, the NZECO will take whatever action it deems appropriate including the denial of payment or indemnification, seeking repayment of sums paid out and/or referral of evidence of such bribery to the appropriate authorities both in New Zealand and in any other relevant jurisdiction.

The NZECO supports initiatives by New Zealand exporters to have and apply internal policies to combat bribery and corruption. New Zealand exporters are encouraged to:

1. Develop and implement appropriate internal control systems that combat bribery and corruption.
2. Familiarise appropriate employees and agents with relevant New Zealand legislation.
3. Educate appropriate employees and agents about:
 - their responsibilities regarding combating bribery and corruption,
 - how to identify bribery and corruption, and
 - the actions to take if they encounter bribery and corruption.
4. Identify the export markets that present a significant risk of bribery and corruption.
5. Establish a reporting system for suspicious behaviour.
6. Monitor the actions of agents representing their company.

Text of recommendation 2 (b):

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

(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).

Actions taken as of the date of the follow-up report to implement this recommendation:

Inland Revenue is currently reviewing the information sharing principles with a view to considering what appropriate measures could be taken to authorise Inland Revenue to share information with law enforcement agencies investigating foreign bribery offences. Inland Revenue have also been working with the Working Party 8 (WP8) of the OECD Committee on Fiscal Affairs on the revision of a 1996 Council Resolution relating to the treatment of bribes under tax law – and more specifically the issue of whether tax authorities should be encouraged or required to report suspicions of bribes to domestic law enforcement authorities.

Text of recommendation 2 (c):

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

(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 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

There are currently no legislatively mandated reporting requirements for auditors in respect of any offences. However, the auditors of public entities appointed by the Auditor-General are still obliged to follow Auditing Standards (such as AG3) and, if any suspicious payments are identified, these need to be reported to the Office of the Auditor-General. The OAG will also alert appropriate authorities of suspicions of fraud if a public entity that was subject to an audit does not.

The NZICA now bases its New Zealand Auditing Standards on International Standards on Auditing (ISAs). To the extent that ISAs are amended in the future to require auditors to report any instances of suspected bribery NZICA will be obliged to pick up such a requirement in New Zealand. In our view, the most appropriate body to address this requirement is the OECD in discussions with the International Auditing and Assurance Standards Board of the International Federation of Accountants. Our understanding is that many countries around the world are adopting ISAs.

Text of recommendation 3(a):

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

a) take necessary measures to ensure that all credible foreign bribery allegations are properly investigated (Convention, Article 5; Revised Recommendation, Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

In September 2007, the Government announced the establishment of an organised crime agency to increase cooperation between New Zealand government agencies in the targeting of serious and organised crime, and serious and complex fraud. The new agency, the Organised and Financial Crime Agency New Zealand (OFCANZ), was established on 1 July 2008.

The Government intends to abolish the Serious Fraud Office and merge its functions into OFCANZ. Taking this step requires legislation, and the House has now risen in advance of the 8 November general election. An incoming government may maintain this policy, or may decide to leave the Serious Fraud Office as a separate organisation. Until new legislation is enacted, the Serious Fraud Office will continue to receive and investigate complaints.

OFCANZ is a new agency hosted by New Zealand Police. OFCANZ takes a whole-of-government approach, working with information and resources from a range of agencies. Staff and systems from New Zealand's key law enforcement, border and regulatory agencies, financial authorities and government departments (such as Inland Revenue, Ministry of Fisheries, and Customs) are an integral part of OFCANZ. The same may be true of the Serious Fraud Office.

OFCANZ is intended to optimise Government investment in the investigation and disruption of serious and organised crime and serious and complex fraud by centralising and enhancing cross-agency information sharing and carrying out joint operations under OFCANZ leadership. Within a small jurisdiction such as New Zealand, it makes sense to consolidate expert resources such as financial investigation capability in order to have a critical mass form in a centre of excellence.

Until any legislative developments, the Serious Fraud Office continues to have primary responsibility for investigating allegations involving the foreign bribery offence. The Serious Fraud Office will exercise its discretion to investigate such offences as it deems appropriate. However, once the Serious Fraud Office is merged into OFCANZ, there will be an enhanced resources and capacity to carry out such investigations. If the Serious Fraud Office (Abolition and Transitional Provisions) Bill is not passed, the Serious Fraud Office's powers may be amended by the Search and Surveillance Powers Bill (See section 3c below).

Text of recommendation 3(b):

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

(b)ensure that the Serious Fraud Office (SFO) receives all allegations of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

All allegations will continue to be referred to the Police as the principal enforcement agency and referred to the Serious Fraud Office as per the Memorandum Of Understanding that exists between the agencies. Should the Serious Fraud Office be abolished, such allegations will generally be referred to OFCANZ for investigation.

Text of recommendation 3(c):

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

(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 SFO, New Zealand Police and Crown solicitors, for the effective investigation and prosecution of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

The New Zealand Law Commission has recently conducted a comprehensive review of existing search and surveillance powers that are available to law enforcement agencies. As part of this review the Commission consulted extensively with enforcement agencies, policy agencies and others interested agencies. The Commission released its report in November 2007. The report covered a wide spectrum of issues from civil liberties considerations to the impact of new and emerging technology. The Commission made over 300 individual recommendations most of which have been adopted by the Government. A Search and Surveillance Powers Bill was introduced into the House in September 2008. The Bill is targeted for enactment in 2009.

In its report the Commission sought to address problems caused by:

- inconsistencies in the range of investigative powers that were able to be used under different statutes
- a lack of consistency in terms of the thresholds that needed to be met before the powers could be exercised
- not all search powers being codified
- a lack of certainty as to the scope of certain powers
- developments in technology are such that to a large extent the law had not been able to keep pace
- the law on interception technologies had been developed on a piecemeal basis and was not consistent

- Bill of Rights jurisprudence on search powers had developed to extent that many of the existing statutory powers needed to be reconsidered in light of statements by the courts.

The new legislation when enacted will enhance investigative powers and be of great assistance when it comes to the investigation and prosecution of bribery offences. In particular the legislation will see:

- the extension of the use of surveillance and interception devices to the investigation of a broader range of offences, including foreign bribery;
- the ability to apply for, production and monitoring orders, and ‘residual’ warrants which enable the search of any electronic data storage device. The residual warrant regime will authorise the use of a device, procedure or technique for purposes other than those permitted by a surveillance device. For example, a warrant may be sought by enforcement agencies for installation and use of “key-stroke loggers” (hardware or software that electronically captures passwords to computers or entry codes to buildings as the user inputs that information) under this regime.
- specific legislative provisions authorising the searching of computer records, cross-border searches of computers in limited cases, accessing and copying intangible material, and removal of computers
- clarification of laws governing treatment of legally privileged material.

A full copy of the Commission’s recommendations can be found at www.lawcom.govt.nz/publications

Text of recommendation 3(d):

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

(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);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Criminal Proceeds (Recovery) Bill (awaiting its second reading in the House) contains provisions amending the 1992 Mutual Assistance in Criminal Matters Act (MACMA) and introduces civil processes for providing assistance to overseas jurisdictions seeking to recover profits received from business deals secured by payments of bribes even if a conviction has not been secured. It enables New Zealand to assist foreign jurisdictions in enforcing civil and criminal restraining and forfeiture orders in New Zealand. The changes are intended to make the procedural requirements relating to the registration of foreign restraining and forfeiture orders more workable, and to minimise the risk of people re-litigating in New Zealand matters on which they have already been heard in a foreign country. The Bill amends the MACMA so that New Zealand can accept requests to enforce foreign civil as well as criminal orders. The Bill also contains provisions for the operation of foreign restraining orders and foreign forfeiture orders, which will be located in the Criminal Proceeds (Recovery) Act. The Bill seeks to clarify that in general, the right of respondents or third parties to appear on applications to register foreign restraining or forfeiture orders, or on applications for related further orders, only arises where;

- the person has not had the opportunity to be heard in a court in the foreign country that

made the order; or

- a New Zealand court grants special leave.

The Bill also clarifies that, in general, the right of respondents or third parties to seek relief from foreign restraining or forfeiture orders, only arises where;

- the person has not had the opportunity to be heard in a court in the foreign country that made the order; or
- a New Zealand court grants special leave.

In certain circumstances, people who are subject to restraining or forfeiture orders, or third parties who have an interest in property that is or is proposed to be restrained or forfeited, can apply to the Court to have their interest excluded from the order. For domestic orders, the Court has discretion to grant relief on hardship grounds even if the person has unlawfully benefited from significant criminal activity. The Bill will give the High Court discretion to grant relief in relation to foreign restraining and forfeiture orders where a person has unlawfully benefited from significant foreign criminal activity.

Text of recommendation 3(e):

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

(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);

Actions taken as of the date of the follow-up report to implement this recommendation:

A review of the ability to decline an extradition request on the grounds that the person subject to the extradition order is a New Zealand citizen is currently underway in context of US extradition treaty negotiations. It should be noted that NZ has not exercised its discretion to refuse a request under the grounds that the person who is the subject of the request is a New Zealand national for at least 15 years.

There are already a number of existing mechanisms to facilitate procedures for extradition under New Zealand law. For example, New Zealand does not require a treaty in order to extradite. Thus, a country that has no formal extradition arrangement with New Zealand may make a request for extradition and such a request would have to be considered. Furthermore, there is an ability under the Extradition Act to accelerate extradition requests from countries that have been designated under the appropriate provisions of the Extradition Act. Currently New Zealand has granted dispensation from certain requirements to the Czech Republic and consideration is being given to a request from another civil law jurisdiction. Compatibility between legal systems is required before any dispensation is provided and this is considered on a case-by-case basis.

The OECD concern regarding the requirement for Ministerial approval is limited to requests where the requesting party is also a member of the OECD. Such requests are made under Part 5 of the Act, and any formal requirements under that Part are waived for countries that are members of multilateral treaties that New Zealand is also party to if the offence is a treaty offence. However, extradition under Part 5 requires the approval of the Minister of Justice.

The requirement for Ministerial approval recognises that a decision to surrender a person involves an arrangement between states and is not under New Zealand constitutional arrangements a matter to be resolved by the judiciary. A decision to surrender a person also involves weighing a number of considerations, not just legal matters, which may fall outside the expertise of the courts.

Text of recommendation 3(f):

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

(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 Attorney-General's consent for foreign bribery (Convention, Article 5; Revised Recommendation, Paragraph I).

Actions taken as of the date of the follow-up report to implement this recommendation:

The respective roles of the Solicitor-General and Attorney-General in New Zealand have developed over time to reflect New Zealand's constitutional arrangements. The approach taken by New Zealand in creating specific roles for the Law Officers provides an essential balance by recognising the legitimacy of governmental power in a democratic system, and providing constitutional controls to prevent the abuse of political power. This system should be seen as unique to this country's needs. The role of the Attorney-General has evolved from, and should be seen as having departed from the role of the Attorney-General in the United Kingdom.

The statutory pattern is to place responsibility for the government's role in the administration of criminal justice on the Attorney-General. This includes responsibility for prosecution of serious crime, the power to terminate any prosecution, and the power to give any witness at trial immunity from prosecution. However, the Solicitor-General, who is a politically neutral public servant as well as being the junior law officer, exercises these functions pursuant to constitutional convention and s 7 of the Constitution Act 1986. By convention, and in order to make it plain that criminal justice is, in New Zealand, administered free from political direction or influence, successive Attorneys-General have increasingly left this area to the Solicitor-General.

The consent of the Attorney-General to prosecution is required for a range of offences. In some cases it is to ensure that offences of wide application are brought for proper motives. Increasingly, where offences touch on matters of security or involve foreign relations or international treaty obligations consent is required to ensure that the circumstances of the prosecution accord with the statutory purpose of the Act.

The prosecution consent of the Attorney-General is required where an offence has extra-territorial effect in order to ensure, among other things, that proceedings in New Zealand are not commenced when they

may already have been commenced in another jurisdiction. In addition, an offence of foreign bribery would inevitably involve issues surrounding mutual legal assistance. Such issues would need to be carefully and fully considered before any prosecution was commenced domestically.

The Crown Law Office points out that the public interest considerations may be influential in determining whether or not a prosecution is brought. Although s 106(1) provides that it is the Attorney-General's consent that is required, in reality the Attorney-General makes the decision on the advice of the Solicitor-General. Paragraph 3.3.4 of the Solicitor-General's Guidelines states that,

“A decision whether or not to prosecute must clearly not be influenced by: [*inter alia*] ...possible political advantage or disadvantage to the Government or any other political organisation.”

While it is the Attorney-General's duty to ensure that the criminal law is enforced in a just and fair manner, in New Zealand the practice has emerged of the Solicitor-General rather than the Attorney-General having charge of the prosecution of serious crime after committal for trial. The practice has become a convention, built on the perception that it is undesirable for there to be even an appearance of political decision-making in relation to public prosecutions. It is therefore highly unlikely that the Attorney-General would adopt a different view to the Solicitor-General.

Text of recommendation 4(a):

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

(a) broaden the criteria for the criminal liability of legal persons for foreign bribery (Convention Article 2);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Ministry of Justice has undertaken a review of the approach taken in other jurisdictions to establish the liability of legal persons in relation to foreign bribery. Although the Australian approach has some appeal, New Zealand authorities also note that there have been no prosecutions of legal persons under the Australian model. New Zealand will continue to monitor developments in this area.

Any amendments to criminal liability of legal persons must take into consideration the impact that any change may have on the wider criminal law; amendments should be holistic and not piecemeal. At this stage there is no evidence to indicate that the common law is seriously deficient in New Zealand.

Text of recommendation 4(b):

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

(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);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Government has recently agreed to legislative amendments to the foreign bribery provisions in the Crimes Act and Income Tax Act 2007. The proposed amendments include repeal of the double criminality requirement. A Crimes (Anti-Corruption) Amendment Bill is being drafted for introduction in 2009. The legislation will also include provisions that implement New Zealand's obligations under the United Nations Convention Against Corruption (UNCAC) domestically, thereby enabling New Zealand to ratify UNCAC.

Text of recommendation 4(c):

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

(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 improper advantage, including advantages such as tax breaks that may be unrelated to the specific terms of business (Convention, Article 1).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Cabinet considered a proposal to clarify the facilitation payments exception under the Crimes Act to remove the uncertainties surrounding what constitutes a facilitation payment. It was proposed that this would be achieved by the introduction of a set of standards based on the Australian Criminal Code and United States Foreign Corrupt Practices Act. The Cabinet did not approve the proposal and instead directed officials to consider options for developing a foreign bribery offence which did not provide for a facilitation payments exception. Officials are required to report back by mid-February 2009 with options for the drafting the offence of bribery of a foreign public official so that:

- payments made for the purposes of encouraging a public official to perform the functions that they would carry out as a matter of course and do not result in an improper or undue advantage are not an offence, and;
- the offence is consistent with the approach taken under United Nations Convention against Corruption and OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Consideration will be given to legislative models from other jurisdictions, like the United Kingdom, who have dispensed with the facilitation payments exception in developing these options. Any legislative amendments will be included in the proposed Crimes (Anti-Corruption) Amendment Bill.

Text of recommendation 5:

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

a) amend its legislation to ensure that no foreign bribe payments covered under criminal law are tax deductible, including in particular bribes (i) paid through intermediaries; (ii) paid for the purpose of obtaining an advantage for a third party; (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties, and (iv) “promised” or “offered” as well as paid (Revised Recommendation, Paragraph IV);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Government has agreed that the Crimes (Anti-Corruption) Amendment Bill will also include amendments to the Income Tax Act 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.

Text of recommendation 5(b):

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

(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 bribe occurred (Convention, Article 7).

Actions taken as of the date of the follow-up report to implement this recommendation:

It is proposed to further examine section 245 of the Crimes Act 1961 as part of the legislative reforms initiated by the Crimes (Anti-Corruption) Amendment Bill.

Text of recommendation 6(a):

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

a) ensures that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions (Convention, Article 3);

Actions taken as of the date of the follow-up report to implement this recommendation:

New Zealand considers that the penalties currently available for the foreign bribery offence meet the required threshold. The maximum specified penalty of a term of imprisonment of 7 years is comparable

to other types of related offending. Furthermore, the Courts have the discretion to impose financial penalties in place of imprisonment. This enables the Court to impose appropriate penalties which it considers to be dissuasive on a case by case basis. Section 9 of the Sentencing Act 2002 specifies a set of non-exhaustive aggravating factors that the Court must take into account in imposing a sentence. These factors include the extent of any loss, damage, or harm resulting from the offence.

A range of other “sanctions” are also available, such as powers to disgorge profits resulting from the payments of bribes under proceeds of crime legislation.

The Criminal Proceeds (Recovery) Bill – as discussed below - introduces civil processes that will enable authorities to recover profits received from business deals secured by payments of bribes even if a conviction has not been secured.

The Government also agreed to a proposal to extend the definition in the Crimes Act of offence involving dishonesty. This expanded definition will ensure that those convicted of the foreign bribery offence will automatically be disqualified from being appointed as a Director or Manager of a company for five years, and give the court the discretion to increase the length of the ban to ten years.

NZAID are to consider what the requirements are for individuals and officers of organisations tendering for work to disclose the existence of past convictions. The NZAID work plan over the next 12 months includes a review and refresh of its Procurement Policy & Procurement Procedures.

Text of recommendation 6(b):

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

(b) consider permitting the imposition of both fines and imprisonment for foreign bribery offences (Convention, Article 3);

Actions taken as of the date of the follow-up report to implement this recommendation:

New Zealand’s legislation does not specify fines for serious offending of this sort but under section 39 of the Sentencing Act 2002 the Court does have the ability to impose monetary penalties. To introduce a financial penalty as an additional or alternative penalty would be inconsistent with current New Zealand framework and there is no justification for a departure in this case. The Sentencing Council Act 2007 establishes a council to issue guidelines on sentencing levels. The council has yet to be appointed, however once appointed this issue will be referred to them to consider in developing guidance for these offences.

Text of recommendation 6(c):

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

(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)).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Criminal Proceeds (Recovery) Bill has been reported back from Select Committee and is waiting its second reading. This Bill will allow for the enforcement of foreign restraining and forfeiture orders regardless of whether the orders are civil or based on a criminal conviction. The Bill provides for two types of applications to register foreign restraining orders: applications made on notice and applications made without notice. Applications can be made without notice when a foreign country seeks New Zealand's assistance in urgently restraining criminal assets or proceeds that are at risk of being disseminated, concealed or otherwise disposed of. Interim foreign restraining orders, which target foreign property, are also available on application without notice and last for up to 28 days.

Part II. Issues for Follow-up by the Working Group

Text of issue for follow-up 7(a):

7. The Working Group will follow up the issues below as cases and practice develop in New Zealand:

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.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

One case is under active investigation. No further cases have been reported.

Text of issue for follow-up 7(b):

7. The Working Group will follow up the issues below as cases and practice develop in New Zealand:

(b) the level of sanctions, including confiscation, applied in foreign bribery cases and in particular with regard to legal persons;

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

There have been no convictions for the foreign bribery offence to date.

Text of issue for follow-up 7(c):

7. The Working Group will follow up the issues below as cases and practice develop in New Zealand:

c) jurisdiction over legal persons;

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Enforcement agencies continue to successfully pursue enforcement action against legal persons in a variety of regulatory contexts, including for breaches of environmental and consumer law standards, commercial and competition laws, and occupational health and safety laws.

Text of issue for follow-up 7(d):

7. The Working Group will follow up the issues below as cases and practice develop in New Zealand:

- d) the intent requirements in the foreign bribery statute;

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As part of the legislative reform proposals, the Government has also agreed to review the use of the term “corruptly” under s105C(2) of the Crimes Act. It is proposed that consideration be given to defining the term in legislation so that it more closely focuses on the intent to provide undue advantage. The use of the term corruptly will also need to be reviewed in light of the decision to consider options that would allow for the repeal of the facilitation payments exception.

Text of issue for follow-up 7(e):

7. The Working Group will follow up the issues below as cases and practice develop in New Zealand:

- e) the application of the tax deduction for facilitation payments;

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As part of the legislative reform proposals, Cabinet has agreed to amend the Income Tax Act to ensure that the tax deductibility of bribes is made more consistent with criminal legislation, including removal of the double criminality exception and clarification of the facilitation payments exception and in particular, to clarify that bribes are not tax deductible if they are: paid through intermediaries; paid for the purpose of obtaining an advantage for a third party; paid to foreign officials for acts or omissions in relation to the performance of official duties; “promised” or “offered” as well as paid.

Text of issue for follow-up 7(f):

7. The Working Group will follow up the issues below as cases and practice develop in New Zealand:

- f) enforcement of the accounting fraud offences.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Although New Zealand does not have a specific standalone accounting fraud offence, the mischief captured by the “offence” can be found in a number of legislative provisions, including s228 of the Crimes Act, s41 of the Finance Reporting Act 1993, the Securities Act, Companies Act and so on. These provisions are enforced on a regular basis. There are currently a significant number of investigations being carried out by the Securities Commission and Serious Fraud Office into the collapse of a number of companies over the past 18 months. Charges have been laid, some of them indictably. It would not be possible to clearly identify how many convictions there have been for the “accounting fraud offence” as there is no one specific offence. The statistics for convictions of related accounting fraud type offences are also not able to accurately identify the numbers of offences as these offences cover a broad spectrum of offending and not just accounting fraud.

ANNEX 1 – MINISTRY OF FOREIGN AFFAIRS AND TRADE CONSULAR INSTRUCTIONS

CHAPTER # - SAYING NO TO BRIBERY AND CORRUPTION

Overview

Bribery and Corruption

Introduction

This chapter contains procedures for handling the receipt of information regarding allegations of New Zealanders or New Zealand Companies involved in acts of bribery or corruption and reporting it to Wellington.

Posts should familiarise themselves with the Bribery and Corruption website (www.justice.govt.nz/bribery-corruption/index.html) and maintain a stock of pamphlets which are available from the Ministry of Justice.

Summary

New Zealand is a party to the OECD anti-bribery convention, and a signatory to the United Nations Convention against Corruption. Under those treaties New Zealand is obliged to tackle corruption and bribery of foreign officials by New Zealanders or New Zealand companies. Bribery of a foreign public official is an extra-territorial offence under New Zealand law, ie. a New Zealander committing this offence overseas can be prosecuted under New Zealand law. New Zealanders or New Zealand companies who bribe foreign officials are liable to imprisonment for up to 7 years.

Procedures

If the post receives information that a New Zealander or a New Zealand company may have been or is planning to engage in bribery posts should immediately report the information to the Legal Division. Legal Division will pass the information to the Police or Serious Fraud Office to seek advice, and will revert with instructions for the post.

In bringing the matter to the attention of Wellington, posts should convey the substance of the information received, as well as details on the nature of the post's contacts with the individual and/or company.

Any additional details that are known that may help the Police or Serious Fraud Office to assess the allegations should also be reported. Examples of such details include:

- the nature of the project, industry or business for which the company is involved and which any alleged bribe or corrupt practice relates;
- the value of any contracts or projects; the number and identity of competitors;

- the sensitivity or political profile of the project;
- any information that may be known on which individuals, or which agency or level of government will make relevant decisions in awarding any contract;
- the current stage in the host-country's decision making process;
- whether the contract involves any funds provided by NZAID or through an international organisation such as a United Nations development agency or the World Bank;
- any information that is known to the post about the company or individuals involved, such as whether they are incorporated in New Zealand or are New Zealand citizens or residents.

Protection of Informants

If the information has been obtained from an employee of the company concerned, that employee may be protected from dismissal, harassment or legal proceedings by the Protected Disclosures Act 2000. Posts may, if appropriate, bring this to the attention of the person by providing them with a copy of the "Saying no to Bribery" pamphlet or directing them to the Ministry of Justice Website. The post should not, however, provide that person with legal advice.

Dealing with the individual or company

Given the serious criminal nature of the bribery and corruption offences, posts should exercise discretion in their dealings with the individual or company until instructions have been received. Posts should not make active investigations themselves without instructions.

If approached for advice

Posts should not offer advice or opinions on the legality of conduct by New Zealand companies. Posts should recommend that the enquirer seek legal advice from a New Zealand lawyer.

If posts have reason to believe that the enquiry relates to a bribe that has already been offered or paid, posts should report the enquiry to Wellington, including information on the factors identified above.

Credibility of information received

In reporting allegations of bribery to Wellington, posts should include any factors that may be relevant to assessing the credibility of the information.

Should posts suspect that allegations are not credible because they are, for example, maliciously motivated by competitors, those suspicions should be included in their report to Wellington. But given the serious nature of the offences, posts should err on the side of reporting information, with caveats on credibility if necessary.

Responsibility for investigations and prosecution

It is ultimately the responsibility of the Police or Serious Fraud Office to make determinations on the credibility of information, and whether a formal investigation should be opened and subsequently prosecuted. The Ministry of Foreign Affairs and Trade does not have a role in such decisions, and must refer all relevant information to the Serious Fraud Office or Police for their assessment.

Posts should also bear in mind Article 5 of the Convention, which says that decisions on investigation and prosecution of 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.

Do Not Report via iCONZ

Reporting allegations of bribery is not a consular function and should not be reported via, or recorded in iCONZ.

SAYING NO TO BRIBERY AND CORRUPTION: POST PROCEDURES FOR HANDLING ALLEGATIONS OF BRIBERY BY NZ COMPANIES OVERSEAS

1. New Zealand is a party to the OECD anti-bribery convention, and a signatory to the United Nations Convention against Corruption. Under those treaties New Zealand is obliged to tackle corruption and bribery of foreign officials by New Zealanders or New Zealand companies. Bribery is an extra-territorial offence under New Zealand law and New Zealanders or New Zealand companies who bribe foreign officials are liable to imprisonment for up to 7 years.

2. As part of New Zealand's efforts to tackle bribery, the Ministry of Justice has launched a campaign called "Saying no to Corruption and Bribery". Its awareness raising material encourages people overseas, who have information on New Zealanders or New Zealand companies who may engage in bribery, to contact their local New Zealand Embassy or High Commission.

3. This message contains procedures for handling the receipt of such information and reporting it to Wellington.

Introduction

4. New Zealand is currently ranked by Transparency International, an anti-corruption NGO as being the second least corrupt country in the world (equal with Finland and just behind Iceland). Nonetheless, it is important that the Government remain vigilant to keep New Zealand commerce transparent. New Zealand is a party to the OECD's anti bribery Convention (The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) and the United Nations Convention against Corruption. Those conventions oblige the Government to undertake awareness raising efforts to educate New Zealand business about the corruption and bribery offences, to ensure that bribery and corruption are not tolerated.

5. As part of those awareness raising efforts the Ministry of Justice has launched a campaign called "Saying no to Bribery and Corruption". The campaign comprises a "Bribery and Corruption" website (www.justice.govt.nz/bribery-corruption/index.html) and pamphlet that has been distributed to New Zealand business and government departments. We will send supplies of the pamphlet to posts shortly.

6. The pamphlet and the website set out New Zealand's international commitments to tackle corruption and bribery, and detail the corruption and bribery offences in the Crimes Act. Importantly, those crimes are extra-territorial, and it is a crime under New Zealand law for New Zealand citizens, residents and companies to bribe an official in another country. Bribery of foreign officials carries a penalty of imprisonment for up to 7 years.

7. The pamphlet and website encourage persons who suspect a New Zealand resident or company of being involved in bribery or corrupt to contact the New Zealand Police or Serious Fraud Office, or New Zealand Embassy or High Commission.

8. The Ministry has, therefore, developed procedures for posts to follow, should they receive any information that indicates New Zealanders or New Zealand companies are engaging in bribery in their countries of accreditation. Those procedures are set out in this cable.

Procedures for reporting information relating to corruption or bribery by New Zealanders or New Zealand companies

9. Corruption and bribery are serious offences under New Zealand law, and information received by posts that may implicate New Zealanders or New Zealand companies must be treated seriously and promptly.

If the post receives information that a New Zealander or New Zealand company may have been, or is planning to engage in bribery:

10. Posts should immediately report the information to the Legal Division. The Legal Division will pass the information to the Police or Serious Fraud Office to seek advice, and will revert with instructions for the post.

11. In bringing the matter to the attention of Wellington, posts should convey the substance of the information received, as well as details on the nature of the post's contacts with the individual and/or company.

12. Any additional details that are known that may help the Police or Serious Fraud Office to assess the allegations should also be reported. Examples of such details include:

- the nature of the project, industry or business for which the company is involved and which any alleged bribe or corrupt practice relates;
- the value of any contracts or projects; the number and identity of competitors;
- the sensitivity or political profile of the project;
- any information that may be known on which individuals, or which agency or level of government will make relevant decisions in awarding any contract;
- the current stage in the host-country's decision making process;
- whether the contract involves any funds provided by NZAID or through an international organisation such as a United Nations development agency or the World Bank;
- any information that is known to the post about the company or individuals involved, such as whether they are incorporated in New Zealand or are New Zealand citizens or residents.

13. If the information has been obtained from an employee of the company concerned, that employee may be protected from dismissal, harassment or legal proceedings by the Protected Disclosures Act 2000. Posts may, if appropriate, bring this to the attention of the person by providing them with a copy of the "Saying no to Bribery" pamphlet or directing them to the Ministry of Justice Website. The post should not, however, provide that person with legal advice.

14. Given the serious criminal nature of the bribery and corruption offences, posts should exercise discretion in their dealings with the individual or company until instructions have been received. Posts should not make active investigations themselves without instructions.

If the post is approached for advice as to whether certain conduct would constitute a criminal offence in New Zealand:

15. Posts should not offer advice or opinions on the legality of conduct by New Zealanders or New Zealand companies. Posts should recommend that the enquirer seek legal advice from a New Zealand lawyer.

16. If posts have reason to believe that the enquiry relates to a bribe that has already been offered or paid, Posts should report the enquiry to Wellington, including information on the factors identified above.

Credibility of information received

17. In reporting allegations of bribery to Wellington, posts should include any factors that may be relevant to assessing the credibility of the information.

18. Should posts suspect that allegations are not credible because they are, for example, maliciously motivated by competitors, those suspicions should be included in their report to Wellington. But given the serious nature of the offences, posts should err on the side of reporting information, with caveats on credibility if necessary.

Responsibility for investigations and prosecution

19. It is ultimately the responsibility of the Police or Serious Fraud to make determinations on the credibility of information, and whether a formal investigation should be opened and subsequently prosecuted. The Ministry of Foreign Affairs and Trade does not have a role in such decisions, and must refer all relevant information to the Serious Fraud Office or Police for their assessment.

20. Posts should also bear in mind Article 5 of the Convention, which says that decisions on investigation and prosecution of 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.

Amendment to consular instructions


21. Although reporting allegations of bribery is not a consular function, Consular Division will include appropriate instructions in an amendment to the Consular Instructions. This will ensure that they are readily accessible to all posts.


22. Would supervisory missions in **Berlin, Brasilia, Canberra, Hanoi, Ottawa, Riyadh, Rome, and Washington** please pass a copy of this message to the NZTE Consulates-General in Hamburg, Sao Paulo, Melbourne, Ho Chi Minh City, Vancouver, Dubai, Milan and New York. A copy of these guidelines, and the Ministry of Justice pamphlets, will also be sent to all New Zealand Trade and Enterprise offices offshore.

ANNEX 2 – MINISTRY OF JUSTICE PAMPHLET: SAYING NO TO BRIBERY AND CORRUPTION

Saying no
to bribery
and
corruption

This brochure explains what you need to know about bribery and corruption, its effects, the fundamental laws in New Zealand which prohibit or otherwise deal with corruption and what businesses can do to combat corruption.

 MINISTRY OF JUSTICE
Iudicium in Pace

 MINISTRY OF JUSTICE
Iudicium in Pace

What is bribery and corruption?

Bribery is a specific offence in New Zealand, while corruption is a more generic problem which may encompass a number of offences such as fraud, abuse of one's position of power and money laundering. They are problems not just at home in New Zealand but internationally and affect business, government and society in general.

New Zealand is strongly committed to fighting bribery and corruption both at home and abroad by establishing and maintaining a transparent and corrupt-free environment both for businesses to conduct their business in and outside New Zealand and for New Zealanders in general.

What are the effects of bribery and corruption?

With the increasing globalisation of trade, businesses are faced with complex trading environments which are further complicated by the potential exposure to corrupt practices.

Activities involving bribery and corruption have wide social costs, not just costs to the state. In general, bribery and corruption undermine business and strains democratic systems and values. In particular:

- it inhibits the free flow of goods and services across borders and in doing so distorts international trade processes;
- it adversely affects economic growth (particularly in vulnerable developing countries) and adds additional costs for business without necessarily increasing revenue; and
- it denies tax revenue to the benefit of the wider society.

International commitments

New Zealand, along with many other countries, has signed the OECD Convention Against Bribery of Foreign Public Officials in International Business Transactions as well as the UN Convention Against Corruption. Both Conventions require member countries to implement strong measures to combat bribery and corruption. New Zealand became a party to the OECD Convention in 2001 and signed the UN Convention in 2003.

New Zealand laws to combat bribery and corruption

The Crimes Act 1961 makes it an offence to corruptly accept or obtain a bribe for something done or not done in an official capacity. Bribes may involve

money, valuable consideration, employment, or any other benefit. It is an offence to bribe Judges, Government Ministers, Members of Parliament, police officers and other public officials including foreign public officials. It is also an offence to corruptly use official information. Penalties for bribery may include imprisonment for up to 14 years.

In a case where someone from New Zealand bribes an official in another country, that person may be prosecuted in New Zealand. This is because these offences are subject to extraterritorial jurisdiction. Bribery of foreign public officials in such cases carries a penalty of imprisonment for up to 7 years.

The Secret Commissions Act 1910 creates bribery offences in the private sector. The Act criminalises the bribing of an agent (such as a real estate agent, securities broker, lawyers etc) to act in a certain way in respect of their client's affairs or business. It also creates other offences relating to a client's business or affairs.

■ EXAMPLES

BRIBERY:

- offering a customs officer a payment for approving the import of a product produced by your company.
- a company in New Zealand paying a public official in another country a sum of money to fast-track an application to launch a product in another country.

CORRUPTION:

- a construction company (X Ltd) wants to bid on a contract for a building. A competing foreign company (Y Ltd) contacts X Ltd suggesting that the companies 'collaborate'. An agreement is made that X Ltd makes a bogus bid so that company Y Ltd is awarded the contract. Subsequently, Y Ltd pays X Ltd a percentage of the contract price awarded to Y Ltd.

New Zealand law contains many other offences which the public would consider corruption-style crimes. These include money laundering (under the Crimes Act), fraud (under the Serious Fraud Office Act 1990) as well as civil offences under the Securities Market Act 1978 relating to insider trading and market manipulation.

What are some of the warning signs of corruption?

Some of the warning signs that your business has been exposed to corrupt activity include:

- abnormally high profit margins;
- business arrangements which serve no apparent commercial purpose;
- unjustified requests for reimbursement for undefined costs relating to goods or services;
- unusually high and unjustified commission payments, and apparent 'special' treatment.

What can your business do to minimise the risk of corruption?

New Zealand businesses, both at home and abroad, should implement anti-corruption policies and practices, including anti-corruption guidelines, training, internal audit procedures and reporting requirements. The challenge for businesses is to maintain, review and develop these measures to respond to changing circumstances. A number of the major New Zealand businesses operating internationally have developed measures for fighting corruption.

Some specific measures your business could implement may include:

- establishing an anti-corruption policy;
- ensuring all employees are familiar with relevant bribery and corruption laws, their roles in the business, their responsibilities, and the appropriate response to any suspicion of corrupt activity;
- ensuring agents and partners who are representing or purporting to represent your business have adequate and valid credentials for the activities being undertaken;
- establishing monitoring and reporting requirements for agents and partners representing your business;
- establishing a clear and accessible system for the reporting of any suspicious behaviour.

What protections are there for people who suspect corruption and want to report it?

The law recognises the difficult position of a person who suspects that certain activities are corrupt but are concerned that as an employee they will suffer repercussions for disclosing information. The Protected Disclosures Act 2000 protects employees who make protected disclosures from dismissal and/or harassment as well as civil and criminal proceedings.

How to make a complaint

Any suspicion of a person or business being involved in bribery should be reported to either the New Zealand Police or the Serious Fraud Office.

All international complaints should be made to the New Zealand Police or Serious Fraud Office, or the local New Zealand Embassy or High Commission.

Contact details

NEW ZEALAND POLICE

Office of the Commissioner

PO Box 3017

Wellington, New Zealand

Tel: 00 64 4 474 9499

Fax: 00 64 4 498 7400

SERIOUS FRAUD OFFICE

The Director

Duthie Whyte Building

Cnr Mayoral & Wakefield Sts.

Auckland, New Zealand

Tel: 00 64 27 272 1395 or

0800 109 800 Ext. 863

Email: complaints_officer@sfo.govt.nz

Independent investigative bodies

THE OFFICE OF THE OMBUDSMEN IN NEW ZEALAND

Complaints: complaint@ombudsmen.govt.nz

General information/inquiries: office@ombudsmen.govt.nz

WELLINGTON

Level 14, 70 The Terrace, PO Box 10152 Tel: +64 4 473-9533

AUCKLAND

Level 10, 55-65 Shortland St, PO Box 1960 Tel: +64 9 379-6102

CHRISTCHURCH

Level 6, 764 Colombo Street, Cnr Colombo & Armagh Streets,
PO Box 13 482 Tel: +64 3 366-8556

Would you like to know more?

Please visit the Ministry of Justice website at www.justice.govt.nz and click on 'bribery and corruption' for further information about New Zealand's laws. This website also includes links to other government agencies involved in combating bribery and corruption.

OTHER NATIONAL AGENCIES

Ministry of Foreign Affairs & Trade

www.mfat.govt.nz

New Zealand Police

www.police.govt.nz

Serious Fraud Office

www.sfo.govt.nz

The Office of the Ombudsmen

www.ombudsmen.govt.nz

State Services Commission

www.ssc.govt.nz

Audit New Zealand

www.auditnz.govt.nz

The Office of the Controller &
Auditor-General

www.oag.govt.nz

INTERNATIONAL AGENCIES

The Organisation for Economic
Co-operation and Development

www.oecd.org

The United Nations

www.unodc.org

Transparency International

www.transparency.org